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GOD-LIKE POWERS: THE CHARACTER TEST AND UNFETTERED MINISTERIAL DISCRETION

ABSTRACT

The ability to deport or cancel the visas of non-citizens, regardless of the length of their residency in Australia, remains a controversial topic. Whilst it reflects long-standing Australian policy, the widening scope of s 501 of the *Migration Act 1958* (Cth) should provoke reflection and criticism. The legislative provision empowers the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs with a non-delegable, non-reviewable and non-compellable discretion to expel from Australia those deemed not to be of good character. I explore the history of the character test in Australia, highlighting the relevant international and domestic legal frameworks with a particular focus on visa holders to whom Australia owes non-refoulement obligations, followed by key issues arising from the current regime: the potential inconsistency of domestic legislation with international law; the inherent irrationality of assessing future risk; and the consequences of mandatory detention. I will then explore the current review process and its legal and practical barriers, before concluding with select solutions.

* LLM (Hons I) (Melb); BA (Classics) / LLB (Hons) (UQ). This article finds its origins whilst the author was Associate to the Hon Justice JA Logan RFD of the Federal Court of Australia in 2018 and was finalised in a subsequent paper submitted as part of coursework undertaken for a Master of Laws at Melbourne Law School, the University of Melbourne. The development of administrative law occurs at such an exponential rate, arising from the plethora of immigration cases, that the cases cited herein were current at the time of writing, but may have been overruled subsequently. One example of this is the recent decision in *BAL19 v Minister for Home Affairs* [2019] FCA 2189 (Rares J) who decided that, inter alia, the Minister failed to apply the correct character test in that the Public Interest Criterion ('PIC') in PIC 4001 did not apply to individuals seeking a temporary protection visa, as the criteria are inconsistent with the *Migration Act 1958* (Cth) s 36 provisions. Given the volume of visa applicants and appellants whom this decision would affect, it is likely to be appealed.

I INTRODUCTION

The notion of expelling an individual deemed to be a risk to the state is neither novel nor unique. The Achaemenid Empire, held by some as the original model for state governance,¹ regularly utilised mass exile to maintain community safety.² The very word deportation — from the Latin *deportatio* — denoted a practice of banishing an individual to an outlying province of the Empire.³ Exile was a continued practice throughout the Middle Ages and Victorian Era, evolving into the transportation of a ‘criminal class’ that was fundamental to the British settlement of Australia.⁴ Even within colonial Australia, individuals viewed as risky to the fledgling Sydney community were exiled to secondary penal colonies in Van Dieman’s Land and Moreton Bay,⁵ and, if necessary, to Norfolk Island.⁶ Australia’s current policies relating to immigration are thus somewhat unsurprising, continuing the tradition of rejecting those considered ‘stained’ by bad character from residing here.⁷

I specifically explore s 501 of the *Migration Act 1958* (Cth) (*‘Migration Act’*), which provides the Minister for Immigration, Citizenship, Migrant Services and Multi-cultural Affairs (as the position is currently) (*‘the Minister’*) with both mandatory and discretionary refusal and cancellation powers of a visa on character grounds. The use of character tests as a part of administrative decision-making raises multiple concerns on the breadth of discretion given to the Minister,⁸ as well as the lack of

¹ Philip L Groisser, *Mastering World History* (Keystone Education Press, rev ed, 1960) 16.

² Diodorus Siculus, *The Library of History*, tr Charles H Oldfather (Loeb Classical Library, 1921) bk 12, [46].

³ William Walter, ‘Deportation, Expulsion, and the International Police of Aliens’ (2002) 6(3) *Citizenship Studies* 265, 269.

⁴ John Braithwaite, ‘The Criminal Class and the Making and Breaking of Australia’ (1991) 24(2) *Australian and New Zealand Journal of Criminology* 99, 103. Over 160,000 convicts were transported over an 80-year period: National Library of Australia, *Convicts* (Web Page, 25 November 2018) <<https://www.nla.gov.au/research-guides/convicts>>.

⁵ See especially Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868* (Collins Harvill, 1987) for an unparalleled history of the transportation system.

⁶ See generally Margaret Anderson, ‘A Mill to Grind Rogues Honest’ (2007) 38 *Australian Historical Studies* 154.

⁷ Michael Grewcock, ‘Reinventing “The Stain”: Bad Character and Criminal Deportation in Contemporary Australia’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2017) 121.

⁸ A topic which, by academic and judicial commentary, remains relevant. As at the time of writing, the Minister is granted the most ‘personal discretion of any Minister by an overwhelming margin’: see Liberty Victoria, *Playing God: The Immigration Minister’s Unrestrained Power* (Report, 2017) 3.

robust accountability mechanisms.⁹ The empowerment of the Minister with such discretion has, from early discussions, revolved around concerns that such power may be obscure, arbitrary and politically charged.¹⁰ It is submitted that the powers granted under s 501 are undesirable from a policy perspective and are possibly in breach of international obligations.

II HISTORY OF THE CHARACTER TEST

In 1992, the *Migration Reform Act 1992* (Cth) overhauled the system by which a non-citizen could enter and reside within Australia. The legislation introduced a power for the Minister to cancel or refuse a visa to a non-citizen who was not of good character.¹¹ The original rationale for this power was to exclude undesirable characters from entering or residing in Australia.¹² The main targets for the legislative amendments were unauthorised maritime arrivals; much less attention was given to the implications of the character test on other sectors.¹³

In 1998, the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) was passed, with some criticism on its effect on civil liberties¹⁴ and for putting the ‘ease of administration and economic factors ahead of equity and due process’.¹⁵ The amendments strengthened Ministerial powers and expanded provisions by which non-citizens could fail the character test,¹⁶ as well as shifting the onus of proof onto the applicant.¹⁷ The amendments were justified as a means of preventing the entry into Australia of ‘undesirable political activists or known criminals’.¹⁸ This was on the basis of three important cases which

⁹ Conditions in detention centres are harsh and prison-like: Australian Human Rights Commission, *2008 Immigration Detention Report: Summary of Observations Following the Inspection of Mainland Immigration Detention Facilities* (Report, December 2008).

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1229 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

¹¹ *Migration Act 1958* (Cth) (*‘Migration Act’*) s 180A. This evolved into s 501.

¹² Michelle Foster, ‘An “Alien” by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33(2) *Melbourne University Law Review* 483.

¹³ Grewcock (n 7) 125.

¹⁴ Susan Rimmer, *The Dangers of the Character Tests: Dr Haneef and Other Cautionary Tales* (Discussion Paper No 101, October 2008) 8.

¹⁵ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997* (Parliamentary Paper No 399, 23 March 1998) 47.

¹⁶ Khanh Hoang and Sudrishti Reich, ‘Managing Crime Through Migration Law in Australia and the United States: A Comparative Analysis’ (2017) 5(1) *Comparative Migration Studies* 1, 13.

¹⁷ Senate Standing Committees on Legal and Constitutional Affairs (n 15) 5–6.

¹⁸ Grewcock (n 7) 126.

generated significant media attention: the refusal to grant a visa to Mr David Irving (a Holocaust-denying academic);¹⁹ the refusal to grant a visa to Mr Gerry Adams (leader of left-wing Irish political party Sinn Fein);²⁰ and the initial cancellation of the visa of Mr Lorenzo Ervin (a member of the Black Panther party).²¹

Section 501 of the *Migration Act* was expanded on 11 December 2014 by the passage of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (*‘2014 Character Amendment Act’*). The legislation was premised on two foundations: that the character provisions and general visa cancellation provisions had changed little since their implementation; and that ‘the environment in relation to entry and stay in Australia of non-citizens [had] changed dramatically, with higher numbers of temporary visa holders entering Australia’.²² The Explanatory Memorandum to the *2014 Character Amendment Act* noted that while the system fundamentally worked, ‘it was clear there remained a small number of non-citizens who were not effectively and objectively being captured for consideration’.²³

III RELEVANT LEGAL FRAMEWORK

A International Framework

The *Convention Relating to the Status of Refugees* (*‘Refugee Convention’*),²⁴ as modified by the *1967 Protocol Relating to the Status of Refugees* (*‘Refugee Protocol’*),²⁵ represents a compromise between humanitarian ideals and concerns over host state community safety.²⁶

¹⁹ *Irving v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 68 FCR 422.

²⁰ *Adams v Minister for Immigration and Multicultural Affairs* (1997) 70 FCR 591.

²¹ See Transcript of Proceedings, *Re The Minister for Immigration and Multicultural Affairs; Ex parte Ervin* (High Court of Australia, B29/1997, Brennan CJ, 10 July 1997).

²² Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 1 (*‘Explanatory Memorandum 2014’*).

²³ *Ibid* Attachment A, 1.

²⁴ Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (*‘Refugee Convention’*).

²⁵ Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (*‘Refugee Protocol’*). This removed the geographic and temporal limits of the *Refugee Convention*.

²⁶ For Australian case law, see *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 583 [213] (Crennan J). See also Canadian jurisprudence in *Febles v Canada (Minister of Citizenship and Immigration)* [2014] 3 SCR 431, [29]–[30].

The *Refugee Convention* is both a status- and rights-based instrument, underpinned by certain principles, none of which are more important than non-refoulement.²⁷ While providing the definition of a refugee, it further provides for instances where recognition of refugee status may be refused²⁸ and for the revocation of protection afforded to a person found to be a refugee.²⁹ Pertinently, art 33(2) of the *Refugee Convention* allows for refoulement of

a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.³⁰

In ratifying and implementing the *Refugee Convention*, an increasing global acceptance for a ‘culture of exclusion’³¹ has caused tension between international obligations and state domestic legislation and procedures. Australia is one such example. Although affecting only certain visa holders — those visa holders to whom Australia owes protection obligations — the following critique of the interaction between s 501 of the *Migration Act* and the *Refugee Convention* is important in questioning its legality.

B *Domestic Framework*

The *Constitution* grants the Commonwealth broad powers to manage immigration with respect to ‘aliens’.³² The *Migration Act* provides for the sole right for a non-citizen to enter Australia³³ and aims ‘to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.³⁴ The overarching aim of the legislation is advanced through the implementation of visas which permit non-citizens the right to enter or remain within Australia. The notion of citizen and non-citizen under the *Migration Act* is statutorily binary,³⁵ although a recent decision of the High Court has introduced a special status for non-citizens who are of recognised Indigenous or

²⁷ United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees* (Report, December 2010) 4. Non-refoulement is the obligation not to return a refugee to where they have a well-founded fear of persecution: *Refugee Convention* (n 24) art 33(1).

²⁸ Article 1F of the *Refugee Convention* materially excludes an individual from being granted refugee status, even if they were to meet the definition in art 1A(2).

²⁹ *Refugee Convention* (n 24) art 33.

³⁰ *Ibid* art 33(2).

³¹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 244.

³² *Constitution* s 51(xix).

³³ *Migration Act* (n 11) s 4(2).

³⁴ *Ibid* s 4(1).

³⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

Torres Strait Islander descent.³⁶ Whether or not a non-citizen is lawfully or unlawfully residing in Australia remains binary under the *Migration Act*.³⁷

The *Migration Act* provides the mechanism to deal with protection claims under the *Refugee Convention*, importing the obligations and the exceptions,³⁸ subject to modifications.³⁹ Regardless of the type of visa, the Minister must be satisfied that the person applying for a visa does not fail the character test.⁴⁰

501 Refusal or cancellation of visa on character grounds

...

(6) For the purposes of this section, a person does not pass the *character test* if:

(a) the person has a substantial criminal record (as defined by subsection (7)); **or**

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

...

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

...

³⁶ *Love v Commonwealth* [2020] HCA 3.

³⁷ *Migration Act* (n 11) ss 13(1), 14(1).

³⁸ *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 62 [123] (Gummow J).

³⁹ Peter Billings, 'Refugee Protection and State Security in Australia: Piecing Together Protective Regimes' (2017) 24(4) *Australian Journal of Administrative Law* 222, 224.

⁴⁰ If not satisfied, the Minister must refuse to grant the visa: *Migration Act* (n 11) s 65(1)(b).

- (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;the person is not of good character; or
- (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia; or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way ...

There are obvious overlaps between the *Refugee Convention* and the character test,⁴¹ yet the character test goes much further, capturing 'a broad range of non-citizens of character concern, including non-citizens who do not have criminal convictions, but are nevertheless determined to be a risk to the Australian community'.⁴²

1 *Discretionary Revocation*

The width of Ministerial discretion is substantial. The Minister or a delegate is empowered to refuse or cancel a visa if they reasonably suspect an individual does not pass the character test, or where the individual does not satisfy the Minister or delegate that they pass the character test.⁴³ In these circumstances, the principles of natural justice apply.⁴⁴

⁴¹ See *ibid* s 501(6)(d)(v).

⁴² Jason Donnelly, 'Tale of Two Characters: The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship' (2018) 25(2) *Australian Journal of Administrative Law* 104, 112.

⁴³ *Migration Act* (n 11) ss 501(1)–(2).

⁴⁴ *Ibid*.

The Minister may further personally refuse or cancel a visa without applying the principles of natural justice if, once reasonably suspecting an individual does not pass the character test, they determine it to be in the national interest.⁴⁵

Having regard to the legislative framework, the decision to cancel a visa on character grounds — or to revoke an automatic cancellation — is largely discretionary. The decision can be made in two ways: either by the Minister in their personal capacity, or through a delegated decision-maker.⁴⁶ When a delegate makes a decision, regard is required to be given to any Ministerial directions in force, which dictate mandatory and discretionary considerations.⁴⁷

Currently there are 17 Directions in force, which broadly can be classed as being procedural, guiding or prescriptive.⁴⁸ Of the third category, *Direction No 79*, which came into effect on 28 February 2019, provides a range of considerations when making a decision on whether to refuse or cancel a visa.⁴⁹ This Direction expanded on its predecessor — *Direction No 65*⁵⁰ — extending ‘[p]rotection of the Australian community from criminal or other serious conduct’ to include violence or offences of a sexual nature against women.

Table 1: Primary and Other Considerations⁵¹

Primary considerations	Other considerations
Protection of the Australian community from criminal or other serious conduct	International non-refoulement obligations
The best interests of minor children in Australia	Strength, nature and duration of ties
Expectations of the Australian community	Impact on Australian business interests
	Impact on victims
	Extent of impediments if removed

The effect of primary and other considerations is to mandate policy decisions when assessing visa applications. It is thus illustrative to note that consideration of non-refoulement obligations is secondary to the interest of the Australian community, and

⁴⁵ Ibid s 501(3).

⁴⁶ Delegation can occur by implication of *ibid* s 501B(1).

⁴⁷ *Ibid* s 499.

⁴⁸ See Christopher Chiam, ‘Characterising Migration Directions as Legislative Instruments: Implications for Judicial Review’ (2018) 24(4) *Australian Journal of Administrative Law* 234, 241–2.

⁴⁹ Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (28 February 2019) (*‘Direction No 79’*).

⁵⁰ Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 65: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (22 December 2014).

⁵¹ *Direction No 79* (n 49) cls 9(1), 10(1).

that the ‘existence of a non-refoulement obligation does not preclude cancellation of a non-citizen’s visa’.⁵² These directions do not bind the Minister.⁵³

2 *Mandatory Revocation*

The significance of the *2014 Character Amendment Act* was to introduce a regime of mandatory cancellations under specified circumstances. These circumstances were in reference to certain elements of the character test. The legislation provides:

501 Refusal or cancellation of visa on character grounds

...

(3A) The Minister must cancel a visa that has been granted to a person if:

- (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
 - (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
 - (ii) paragraph (6)(e) (sexually based offences involving a child); and
- (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

What a substantial criminal record⁵⁴ means is discussed in later paragraphs. The mandatory nature was justified under the premise that

a decision to cancel a person’s visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued ...⁵⁵

IV ISSUES WITH THE SYSTEM

This power of cancellation in s 501(3A) of the *Migration Act* is not subject to natural justice.⁵⁶ Since the amendment, the number of visa cancellations has increased by

⁵² Ibid cl 10.1(2).

⁵³ *Dunn v Minister for Immigration and Border Protection* [2016] FCA 489, [15] (North ACJ).

⁵⁴ *Migration Act* (n 11) s 501(3A)(a)(i).

⁵⁵ Explanatory Memorandum 2014 (n 22) 8 [34].

⁵⁶ *Migration Act* (n 11) s 501(5).

over 1,100%.⁵⁷ The character test therefore captures a wide class of non-citizens, and accordingly has a wide range of legal implications and issues.

A Particularly Serious Crime

As outlined above, the intention of art 33(2) of the *Refugee Convention* is to protect the host state. Different domestic ratifications have resulted in differing interpretations. The Canadian view on art 33(2) is that there is an implied high bar to its proper use.⁵⁸ Whilst persuasive, such an observation is not binding in Australia. Locally, it has been stated in the High Court that ‘ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]’.⁵⁹

This sentiment is codified under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which provides that legislation must be compatible with various human rights instruments.⁶⁰ These instruments, however, cannot be relied upon in litigation to ground an expectation of compliance or as a source of rights. Relevantly, this captures the *Refugee Convention*, the *International Covenant on Civil and Political Rights* (‘ICCPR’)⁶¹ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’).⁶²

Article 33(2) of the *Refugee Convention*, as outlined above, provides the foundation by which Australia has justified its deportation of criminals. Section 501(7) of the *Migration Act* aims to domestically interpret Australia’s rights of exclusion, as provided by art 33(2) of the *Refugee Convention*. Of interest is the definition in the *Migration Act* of ‘serious criminal conduct’ (which triggers the Minister’s mandatory visa cancellation):

501 Refusal or cancellation of visa on character grounds

...

- (7) For the purposes of the character test, a person has a substantial criminal record if:

⁵⁷ Department of Home Affairs, *Key Visa Cancellation Statistics* (Web Page, 14 October 2019) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

⁵⁸ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

⁵⁹ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

⁶⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3.

⁶¹ Opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

⁶² Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’).

- (a) the person has been sentenced to death; or
- (b) the person has been sentenced to imprisonment for life; or
- (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
- (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or
- (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution ...

Section 501(7) of the *Migration Act* expands beyond art 33(2) the scope for an individual to be deemed a serious criminal threat. An initial issue therefore is whether Australia's interpretation of art 33(2) is consistent with the terms in the *Refugee Convention*.

The notion of a particularly serious crime is not defined within the *Refugee Convention*. As an oft-quoted observation of Lord Steyn illustrates:

In principle therefore there can only be one true interpretation of a treaty... In practice it is left to national courts, faced with a material disagreement on the issues of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.⁶³

Conveniently, the search for this one true meaning was undertaken in 2003.⁶⁴ Pertinently, the opinion held that 'particularly serious crime' — subject to the double qualification of 'particular' and 'serious' — emphasised that only crimes such as 'murder, rape, armed robbery, arson, etc'⁶⁵ would come within the purview. Article 33(2) is thus to be read in a restrictive manner and attempts to proportionately balance the risk to the community with the gravity of the crime. Accordingly, '[t]he application of this exception must be the *ultima ratio* ... to deal with a case reasonably'.⁶⁶

⁶³ *R v Secretary of State for the Home Department; Ex Parte Adan* [2001] 2 AC 477, 516–17 (Lord Steyn).

⁶⁴ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 121.

⁶⁵ *Ibid* 139. See also Paul Weis, *The Refugee Convention, 1951* (Cambridge University Press, 1995) 342.

⁶⁶ *Kenya National Commission on Human Rights v A-G (Kenya)* (High Court of Kenya, Judge Matrio, 9 February 2017).

This view would appear to be endorsed by the United Nations High Commissioner for Refugees, whose recommendation is that refolement should only be considered

when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community ...⁶⁷

There does not appear to be any geographic limitation to where the crime was committed.⁶⁸

The effect of the *2014 Character Amendment Act* was to reduce the threshold of a serious criminal offence from 24 to 12 months.⁶⁹ This was understood to reflect the concerns ‘as to the person’s character, including that there may be a history and high risk of recidivism and a clear disregard for the law’.⁷⁰ This rhetoric is important when juxtaposed with the actual offences that have triggered the character test, as disclosed by the Minister.

**Table 2: Offence Type Justifying *Migration Act* s 501 Visa Cancellations
1 January 2014–29 February 2016⁷¹**

Offence Type	No. of Cancellations
Other Violent Offence	214
Assault	210
Drug Offences	148
Other Non-Violent Offence	111
Armed Robbery	105
Theft, Robbery, Break Enter	93
Child Sex Offences	88
Rape, Sexual Offences	59
GBH, Reckless Injury	55
Fraud, Deception, White Collar	45

⁶⁷ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement* (November 1997) pt F.

⁶⁸ Lauterpacht and Bethlehem (n 64).

⁶⁹ *Migration Act* (n 11) s 5C(2)(d) as amended by the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth). This 12-month test includes where the sentence was wholly suspended: see *BNNN v Minister for Home Affairs* [2019] AATA 27.

⁷⁰ Explanatory Memorandum 2014 (n 22) 12.

⁷¹ Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958* (Report No 8, December 2016) 7 (*The Administration of Section 501 of the Migration Act 1958*).

Offence Type	No. of Cancellations
Murder	18
Child Pornography	17
(Not Recorded)	15
Use Threat Intent Weapon	12
Manslaughter	13
Kidnapping	<10
Nation Security/Organised Crime	<10
People Smuggling	<10
TOTAL	1,219

There are some significant and obvious issues with the format and collation of the data. The manner by which the Minister publishes the above data, which subsequent sources draw upon, groups offences too broadly. This in turn creates a barrier to conducting proper analysis of the crimes so as to ascertain whether or not they are particularly serious. For example, the term ‘assault’ can include non-aggravated assault and even the threat of assault, and the term ‘drug offences’ covers instances from possession of cannabis to importation and supply of methamphetamines.⁷²

Regardless, the statistics show that, between 1 January 2014 and 29 February 2016, only 23.5% of visa cancellations under the character test were based on crimes found by the 2003 opinion⁷³ to be capable of triggering the exclusion powers of the *Refugee Convention*. Australia’s implementation thus seeks to import the power without adopting the relevant limitations.

A leading reason for this is the 12-month imprisonment threshold for mandatory visa cancellations. Section 501(7A) requires that concurrent sentences be aggregated for the purpose of assessing time spent in prison. Case law has highlighted how this specific section can ‘operate in a way which is inconsistent with an application of the totality principle in the sentencing of the person concerned’.⁷⁴ This is so where the ultimate legal consequence may be the deportation of an individual from Australia, despite failing to reach the threshold of a year’s imprisonment. Whether deportation may be considered in sentencing is currently piecemeal and varies across states.⁷⁵

⁷² Ibid.

⁷³ Lauterpacht and Bethlehem (n 64).

⁷⁴ *Ogawa v Minister for Immigration and Border Protection* [2018] FCA 62, [21] (‘Ogawa’).

⁷⁵ In New South Wales and Western Australia, it is irrelevant: *R v Latumetan* [2003] NSWCCA 70, [19]; *Dauphin v The Queen* [2002] WASCA 104, [22]. In Victoria and Queensland, it is relevant to the extent that deportation would cause hardship: *Guden v The Queen* (2010) 28 VR 288, 295 [29]; *R v Schelvis* (2016) 263 A Crim R 1.

B *Assessing Future Risk*

It is important to note that it is not simply the crime itself that triggers the refolement, but the prospective future harm to the community. The character test is said to reflect community values and Australian standards⁷⁶ and to reflect Commonwealth policy that ‘there is an expectation that non-citizens will be law-abiding, respect important Australian institutions and not pose a risk of harm to individuals or the Australian community’.⁷⁷

Predicting an individual’s risk of future offending has long been a central question in Australian law, notably in sentencing.⁷⁸ As part of the *2014 Character Amendment Act*, s 501(6)(d) was modified to omit the word ‘significant’ when assessing future risk.

This has raised the controversy of whether, through its scope and purpose, s 501 has an implied requirement that the Minister must consider the future risk of someone who does not pass the character test as a relevant consideration in the *Peko-Wallsend* sense.⁷⁹ There have been differing views by the Full Court of the Federal Court of Australia as to the nature of Ministerial discretion when assessing risk. The ‘unresolved tension’ between the decisions of *Moana v Minister for Immigration and Border Protection* (‘*Moana*’)⁸⁰ and *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (‘*Huynh*’)⁸¹ was noted by the Full Court in *Minister for Home Affairs v Ogawa*, but the majority found the point unnecessary to consider.⁸²

I argue that the tension between *Moana* and *Huynh* is an important area that requires clarification for a number of reasons. If future risk was to be a mandatory consideration, consequential questions are what level of risk and what standard of proof is required. Although not binding, it has been suggested in the United Kingdom that

[t]here must be material on which proportionately and reasonably [the Secretary of State] can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a ‘high civil degree of probability’.⁸³

⁷⁶ *Direction No 79* (n 49) cl 6.2(1).

⁷⁷ Donnelly (n 42) 109 (citations omitted).

⁷⁸ *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Kable v DPP (NSW)* (1996) 189 CLR 51; *Sentencing Act 1991* (Vic) s 5(1).

⁷⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).
⁸⁰ (2015) 230 FCR 367.

⁸¹ (2004) 139 FCR 505.

⁸² *Minister for Home Affairs v Ogawa* (2019) 369 ALR 553, 571 [86] (Davies, Rangiah and Steward JJ). There is an argument that there is indeed no tension: *Le v Minister for Immigration and Border Protection* (2015) 237 FCR 516, 529 [51].

⁸³ *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 184 [22] (Lord Slynn). It is important to note that the decision was delivered one month after the 9/11 attacks in the United States.

Within Australia, assessing risk has been held to call for a broad, evaluative judgment.⁸⁴ The question remains, however, how either the Minister or the judiciary can assess accurately whether someone is a future risk. A recent decision by the Federal Court looked at whether risk to the Australian community should or could distinguish ‘hands on’ child sex abuse (which can be prevented by removing an individual from Australia) and possessing child pornography downloaded from the internet (which would occur anywhere regardless).⁸⁵ The matter highlights the multifaceted considerations that must be taken into account by an individual decision-maker.

1 *Past and Present Criminal Conduct*

As it stands, when assessing future risk, regard is often given to past and present criminal conduct. For the purpose of the *Migration Act*, criminal conduct requires conduct that is both punishable by law, and has actually been punished by a conviction for an offence.⁸⁶ It is interesting to note that deportation of non-citizens with criminal convictions is not viewed as a double punishment, but as a ‘public affirmation by the state that certain types of deviance, constructed through arbitrary intersections of criminal offending and immigration status, cannot be accommodated within the community’.⁸⁷

The Federal Court has also drawn distinctions according to the nature of the crime, French J noting that ‘[t]he want of good character in persons convicted of offences against the person or dealing in addictive drugs may be very different in kind from that of persons who have lied in order to get into the country’.⁸⁸ While it is insufficient to merely refer to the offence as being determinative of future risk,⁸⁹ as it stands the Minister may form the view that the *nature* of an offence is such that *any* risk to the Australian community is intolerable.⁹⁰ The Minister’s assessment must occur with regard to the personal and proper circumstances of the crime committed.⁹¹

⁸⁴ *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, 426 [44] (Bromberg J).

⁸⁵ *FPU18 v Minister for Immigration and Border Protection* [2018] FCA 1606, [52] (Moshinsky J).

⁸⁶ *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [23] (Chappell DP).

⁸⁷ Grewcock (n 7) 124.

⁸⁸ *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1, 15 (French J).

⁸⁹ *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 447–8 [109] (Mortimer J) (*‘Tanielu’*).

⁹⁰ *Te Puke v Minister for Immigration and Border Protection* (2015) 230 FCR 499.

⁹¹ *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513, 527 [44] (Flick, Griffiths and Perry JJ) (citations omitted).

An alternative often taken is for the Minister to make a judgement call. This tends to ignore the fact that no individual is ‘no risk’.⁹² On this topic, the Supreme Court of Victoria reflected that

[t]he making of a prediction requires expertise which judges do not have. It calls for observation and assessment of those who commit the particular type of offence and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending. The necessary expertise combines the ability to make a qualitative assessment of the individual and the ability to utilise the available quantitative risk assessment instruments. A risk assessment report would ordinarily be at the centre of any court evaluation of the level of risk.⁹³

The observation that unstructured individual judgement is not indicative of future risk might equally extend to Ministerial decisions. The Federal Court has agreed, noting the risk of re-offending is ‘pre-eminently a matter for expert opinion’.⁹⁴ In a 2016 study, Ian Coyle and Patrick Keyzer suggested that risk models have poor success rates when applied to individuals.⁹⁵ Despite this, as it stands, the Minister is not required to undertake ‘any particular form of risk assessment or evaluation’.⁹⁶ When any assessment is made, the weight ascribed to any factors, and the balance to be struck, is one for Ministerial discretion.⁹⁷

2 Past and Present General Conduct

Acts that are not criminal may still be used to indicate general bad conduct.⁹⁸ The compendious concept of ‘past and present general conduct’ is one that requires assessment of an individual over time.⁹⁹ *Direction No 79* dictates that evidence of character through general conduct can be reflected in:

⁹² A reality recognised within the prison system: see Adult Parole Board Victoria, *Parole Manual: Adult Parole Board of Victoria* (5th ed, 2018) 7.

⁹³ *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 392–3 [124].

⁹⁴ *Applicant in WAD 230/2014 v Minister for Immigration and Border Protection [No 2]* [2015] FCA 705, [60] (Gilmour J).

⁹⁵ Ian Coyle and Patrick Keyzer, ‘The Removal of Convicted Noncitizens from Australia: Is There Only a ‘Minimal and Remote’ Chance of Getting it Right?’ (2016) 41(2) *Alternative Law Journal* 86, 87.

⁹⁶ *Tanioria v Minister for Immigration and Border Protection* [2015] FCA 965, [55] (Nicholas J).

⁹⁷ *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412, [64] (McKerracher J).

⁹⁸ Such as ‘brothel keeping, usury, exploitation of child labour and defaulting on child maintenance’: *Baker v Minister for Immigration and Multicultural Affairs* (1996) 69 FCR 494, 500.

⁹⁹ *Mujedenovski v Minister for Immigration and Citizenship* [2009] FCAFC 149, [47] (Ryan, Mansfield and Tracey JJ).

- where an individual has been involved in activities indicating contempt or disregard for the law or human rights more generally;
- past deportations or removal from Australia or other countries, and the relevant circumstances that led to that action; and
- whether an individual has been dishonourably discharged from the Armed Forces of another country.¹⁰⁰

Case law has suggested a balancing approach which gives increasing weight to actions — good or bad — closer to the date of assessment. The Full Court in *Minister for Immigration and Ethnic Affairs v Baker* (*'Baker'*)¹⁰¹ considered in what way a person's general conduct was reflective of whether they were of good character. Justices Burchett, Branson and Tamberlin found that '[j]ust as a person's criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, as we understand the term, displayed but once or twice, may lay character bare very tellingly'.¹⁰²

Their Honours went on to hold that, as it then stood, the legislative and administrative framework surrounding the execution of s 501 was 'both inhumane and irrational'.¹⁰³ *Baker* holds that it is neither just nor equitable for a court or tribunal to find evidence of character on allegations, but requires prosecution and conviction.¹⁰⁴ This concept of general bad conduct is highlighted in the decision in *Nguyen v Minister for Immigration and Border Protection* (*'Nguyen'*),¹⁰⁵ where the pattern of behaviour was such that, through a series of driving offences, the Tribunal found that the individual 'has a singular disregard for the safety of himself and others on the road'.¹⁰⁶ While demonstrative of failing to adhere to Australian standards, the applicant equally posed a future risk to society. Ironically, although failing the character test for the purpose of the *Australian Citizenship Act 2007* (Cth), Mr Nguyen retained his visa due to the different thresholds in the separate legislation.¹⁰⁷

Thus, there are friction points between the purpose and enactment of the principle of the character test, that being the protection of the community. The scope for which general conduct can be used to reflect an individual is perverse and without any clear limitation. Although values required to be afforded citizenship are not necessarily

¹⁰⁰ *Direction No 79* (n 49) Annexure A s 2 cl 5.2(2).

¹⁰¹ (1997) 73 FCR 187.

¹⁰² *Ibid* 195.

¹⁰³ *Ibid* 192.

¹⁰⁴ *Ibid* 192–3. See also Bernard Robertson, 'Criminal Allegations in Civil Cases' (1991) 107 (April) *Law Quarterly Review* 194.

¹⁰⁵ [2017] AATA 1157.

¹⁰⁶ *Ibid* [32].

¹⁰⁷ *Fenn v Minister for Immigration and Multicultural Affairs* [2000] AATA 931, [8]; *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [60].

synonymous with residing in Australia — such as loyalty and a belief in democratic government¹⁰⁸ — it appears at odds with the purpose of the legislative sections.

C *Offences in Immigration Detention*

Consequential to disturbances within Villawood Immigration Detention Centre (‘VIDC’) and Christmas Island in 2011, the character test was expanded.¹⁰⁹ The effect of the amendments is such that any conviction of any offence while in immigration detention will result in that person failing the character test,¹¹⁰ regardless of the ‘gravity of the crime, the sentence imposed, or danger they present to the community’.¹¹¹ Accordingly, any criminal law infraction is sufficient¹¹² — for example, possessing a weapon,¹¹³ spitting on an official,¹¹⁴ or even theoretically breaking a toilet seat.¹¹⁵

The lowering of the level of criminality when compared to that required outside immigration detention centres would appear inconsistent with the primary premise of the *Migration Act*: protecting the Australian community. While not attempting to defend destruction of property, or assaults against the person, the short and long-term effect of detention and its alteration of patterns of general behaviour — either in exacerbating underlying problems or by making new ones — must be acknowledged.¹¹⁶

Detention for an indeterminate length of time has increased the ‘propensity for people to act out of character or engage in anti-social and criminal conduct as a result of the length and circumstances of their detention’.¹¹⁷ To justify the revocation of a visa on character grounds, as evidenced by disturbances within immigration detention, is irrational and illogical — the character of an individual and their risk to the community cannot be assessed through their actions while indefinitely detained.

¹⁰⁸ Donnelly (n 42) 109.

¹⁰⁹ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth) 1 (‘Explanatory Memorandum 2011’).

¹¹⁰ *Migration Act* (n 11) s 501(6)(ab).

¹¹¹ Billings (n 39) 230.

¹¹² *WASB v Minister for Immigration and Citizenship* (2013) 217 FCR 292, 301–2 [38]–[43] (Barker J).

¹¹³ *Migration Act* (n 11) s 197B.

¹¹⁴ *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44, 51.

¹¹⁵ *Criminal Code Act 1995* (Cth) s 132.8A.

¹¹⁶ *MZYVO v Minister for Immigration and Citizenship* (2013) 214 FCR 68, 70 [9]–[12]. See *R v Chenarjaafarizad* [2013] NSWSC 388, [58]; Billings (n 39) 231.

¹¹⁷ Billings (n 39) 231. There equally is a large body of research on this topic in Melissa Bull et al, ‘Sickness in the System of Long-Term Immigration Detention’ (2013) 26(1) *Journal of Refugee Studies* 47.

D *Membership and Association with a Criminal Group, Organisation or Person*

Section 501(6)(b) provides two alternative limbs for failing the character test which may be summarised as the ‘membership limb’ and the ‘association limb’.¹¹⁸ The former relates to actual membership of a group or organisation suspected of involvement in criminal conduct; the latter is suspicion of mere association.

The nature and scope of association was considered by Spender J, who found that ‘association’

has the connotation that there is an alliance or link or combination between the visa holder with the persons engaged in criminal activity. That alliance, link, or combination reflects adversely on the character of the visa holder. Such a meaning would exclude professional relationships, or those which are merely social or familial. It would exclude the victim of domestic violence.¹¹⁹

Notwithstanding this, in establishing association, *Direction No 79* notes that a delegate must have a reasonable suspicion that

the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation — mere knowledge of criminality of the associate is not, in itself, sufficient to establish association ... the association must have some negative bearing upon the person’s character.¹²⁰

Some case law has held the notion of association to extend to persons who did not know about the criminal links, and even to those whose link to criminality was mere family connection.¹²¹ As such, it would appear there is no requirement for actual conviction; the test authorises the detention of a person based on a suspicion in relation to the person’s lawful association with others.¹²² Evidently, the scope of the power is such that it may impact on the right and freedom of association, which can be limited or derogated under international law,¹²³ and has been historically limited

¹¹⁸ *Roach v Minister for Immigration and Border Protection* [2016] FCA 750, [23] (Perry J) (*Roach*).

¹¹⁹ *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 81 [230].

¹²⁰ *Direction No 79* (n 49) Annexure A s 2 cl 3(5).

¹²¹ *Mrishaj v Minister for Immigration and Border Protection* (2016) 247 FCR 224, 232–3 [37] (Besanko J), cited with approval in *Roach* (n 119) [147] (Perry J).

¹²² See generally Billings (n 39) 229.

¹²³ Freedom of thought, conscience and religion cannot be derogated, but it can be limited: *ICCPR* (n 61) arts 4(2), 18(3). The right of peaceful assembly and the right to freedom of association can be derogated: *ICCPR* (n 61) arts 4, 21, 22. However, contrary legislation is still valid: *Tajjour v New South Wales* (2014) 254 CLR 508, 554 [48] (French CJ), 567 [98] (Hayne J), 576 [136] (Gageler J).

in British¹²⁴ and Australian law.¹²⁵ However, such limitations on freedom of association are not without controversy. The broadening of the limbs in 2014 was justified as to show that

[t]he intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.¹²⁶

The association limb bears many similarities with consorting laws, except without the relevant checks and balances. Consorting laws, even when used judiciously, have long been noted to be ‘used against some of the most vulnerable members of community’¹²⁷ to the point of being subject to a New South Wales Ombudsman report even as recently as 2016.¹²⁸ Criminalising and punishing association is antithetical to the traditional purpose of the criminal justice system, which aims to investigate and punish criminal conspiracies and acts, as they occur.¹²⁹ For the purpose of the *Migration Act*, there must be reasonable suspicion of association; that is, suspicion which is ‘less than a certainty or a belief, but more than a speculation or idle wondering’.¹³⁰ Other legislative instances that aim to curtail the freedom of association, such as restrictions of people on bail¹³¹ or as an element of a sentence,¹³² require submissions by prosecution and the state with specific reference to the risk posed by an individual.¹³³ The association limb of the character test has none of these checks and balances.

Furthermore, regardless of membership or association, there remain issues with defining criminal activity. The notion has yet to be judicially considered, although the Explanatory Memorandum 2014 provides that the section aims to regulate ‘[a] person who is a member of a criminal group or organisation, such as a criminal

¹²⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 34 [2.19].

¹²⁵ *Crimes Act 1900* (NSW) s 93X.

¹²⁶ Explanatory Memorandum 2014 (n 22) 9 [41].

¹²⁷ Jane Sanders, ‘Consorting Laws in New South Wales’ (2013) 38(2) *Alternative Law Journal* 130, 130.

¹²⁸ New South Wales Ombudsman, *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016).

¹²⁹ David Brown et al, *Criminal Law: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 101.

¹³⁰ *Direction No 79* (n 49) Annexure A s 2 cl 3(2).

¹³¹ *Bail Act 2013* (NSW) s 25.

¹³² *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A.

¹³³ New South Wales Ombudsman (n 128) 23.

motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking'.¹³⁴

The obvious issue with the provisions is the lack of clarity: there is no express limitation on the kinds of criminal activities about which Parliament is concerned, or their seriousness.¹³⁵ Thus, groups that regularly engage in criminal activity could be found to include: members of religious orders that engage in child sex abuse to an extent of more than 40%;¹³⁶ environmental groups breaking anti-protest laws;¹³⁷ or even Teachers for Refugees who breach the *Australian Border Force Act 2015* (Cth).¹³⁸ As it stands, of the 184 visa cancellations under s 501(6)(b) to date, 139 (76%) involved suspected members or associates.¹³⁹

E *Risk of Arbitrary Detention*

It is evident that there are varied and wide grounds on which a non-citizen may not pass the character test. As outlined above, in circumstances where a visa is cancelled under character grounds, the consequentially illegal non-citizen shall be taken into immigration detention until they are granted a new visa or removed from Australia. Visa cancellation under a character ground precludes any further application for a visa, as well as the automatic refusal of any visa currently applied for, except for a protection visa.¹⁴⁰ Importantly, if the cancelled visa was a protection visa, the non-citizen is precluded from applying for any further protection visa unless the Minister decides to exercise their personal discretion in lifting the bar to application.¹⁴¹

While art 33(2) of the *Refugee Convention* might suggest it can be used to avoid Australia's non-refoulement obligations, other binding international obligations prevent

¹³⁴ Explanatory Memorandum 2014 (n 22) 9.

¹³⁵ *Roach* (n 118) [79].

¹³⁶ Phillipa McDonald and Riley Stuart, 'Royal Commission into Child Sex Abuse: 1800 Alleged Perpetrators Identified in Catholic Church', *ABC News* (online, 7 February 2017) <<https://www.abc.net.au/news/2017-02-06/royal-commission-into-child-sexual-abuse-begins-in-sydney/8242600>>.

¹³⁷ See Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA).

¹³⁸ Paul Farrell and Josh Wall, 'Nauru Teachers Speak out for Children: "We Don't Have to Torture Them"', *The Guardian Australia* (online, 11 August 2016) <<https://www.theguardian.com/news/2016/aug/11/nauru-teachers-speak-out-for-children-we-dont-have-to-torture-them>>.

¹³⁹ Justice John Griffiths, 'Review of Visa Cancellation or Refusal Decisions on Character Grounds: A Comparative Analysis' (Speech, Public Law Weekend, Australian National University, 2–3 November 2018) 10.

¹⁴⁰ *Migration Act* (n 11) ss 501E, 501F.

¹⁴¹ *Ibid* s 48B.

this — specifically, the *ICCPR*¹⁴² and the *CAT*.¹⁴³ *Direction No 41* acknowledges Australia’s obligations under international law as absolute:

There is no balancing of other factors if the removal of a person from Australia, including if that removal followed as a consequence of the refusal or cancellation of a visa, would amount to refoulement under the *ICCPR* or the *CAT*.¹⁴⁴

At its widest, a ‘legal limbo’ can occur when a non-citizen, residing in Australia under a protection visa, does not pass the character grounds (thus being liable to mandatory, indefinite detention) and the Minister fails to make specific allowances for their return.¹⁴⁵ Figure 1 outlines the countries of origin for character revocations in 2017; it is obvious that certain countries raise first instance concerns with non-refoulement.¹⁴⁶

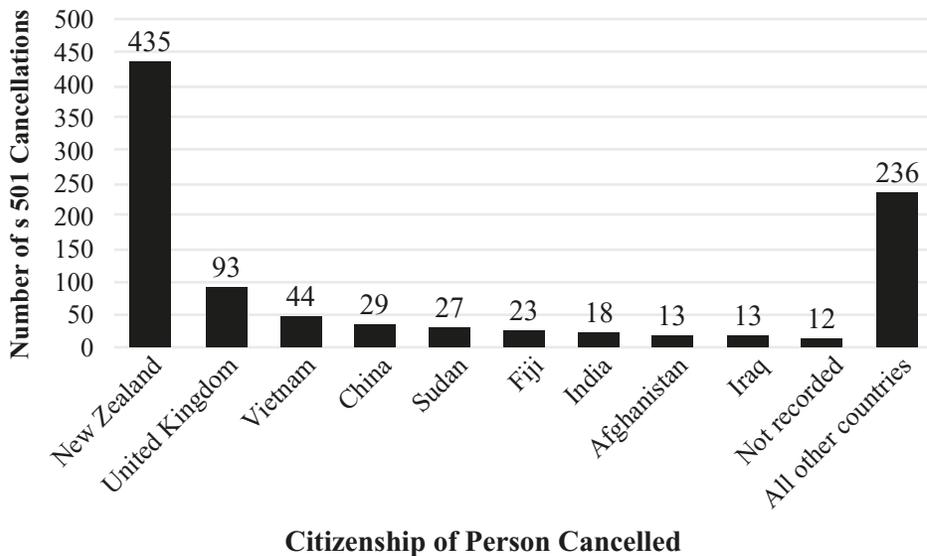


Figure 1: Top 10 Nationalities Featured in Character Cancellations from 1 July 2018–30 June 2019¹⁴⁷

¹⁴² *ICCPR* (n 61) arts 6(1), 7, which give the right to life and the right to not be subject to torture.

¹⁴³ *CAT* (n 62) art 3(1)

¹⁴⁴ Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 41: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (15 June 2009) cl 10.4.3(1)(c).

¹⁴⁵ A good example of this limbo can be found in *Greene v Assistant Minister for Home Affairs* [2018] FCA 919.

¹⁴⁶ Such as Sudan, Iraq, Iran and China, whose human rights records are wanting.

¹⁴⁷ Department of Home Affairs (n 57).

The case of Mr NK illustrates this very real risk.¹⁴⁸ Mr NK legally entered Australia in 1989 from the People's Republic of China on a student visa. After being found guilty of two counts of murder, his visa was cancelled. After serving a 20-year sentence, he was transferred to VIDC. He was unable to be returned to China under the principles of non-refoulement and spent four years in VIDC. The Government has commented specifically on the matter:

In circumstances where it is not possible to remove refugees, or other persons who engage these obligations, whose permanent visa has been refused or cancelled on character grounds ... such persons will also not be detained indefinitely. The Government ... will consider the grant of existing temporary visas under the [*Migration Act*] to manage persons who are owed non-refoulement [obligations], but whose permanent visa has been refused or cancelled on character grounds. In such cases, the Minister may consider the exercise of his personal power under section 195A of the Act to grant a visa placing these persons in the community with appropriate support arrangements until such time that their removal from Australia is possible. Other obligations relating to the presence of refugees in Australia will also continue to be met.¹⁴⁹

Mr NK was found by an Australian Human Rights Commission report to have been arbitrarily detained.¹⁵⁰ Despite the reassurance of the government, a 2006 Commonwealth Ombudsman report into the legislation more generally found that it was not uncommon for persons subject to a character cancellation to spend more time in immigration detention than in prison.¹⁵¹ This is unsurprising when recalling the effect of calculating concurrent sentencing in aggregate. The effect of this legal limbo is a violation of an individual's right to be free from arbitrary detention.¹⁵² It should be noted the requirement that detention be not arbitrary is distinct from that which requires detention to be lawful.¹⁵³

¹⁴⁸ Australian Human Rights Commission, *Mr NK v Commonwealth of Australia Department of Immigration and Citizenship* (Report No 43, February 2011).

¹⁴⁹ Department of Immigration and Citizenship, Submission No 16 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (May 2011) 8.

¹⁵⁰ Australian Human Rights Commission (n 148) 101.

¹⁵¹ Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents* (Report No 1, February 2006) ('*Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*').

¹⁵² Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*').

¹⁵³ Human Rights Committee, *Views: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Hugo van Alphen v the Netherlands*').

Article 9(1) of the *ICCPR* provides that

[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Even when not caught in a legal limbo, the risk of arbitrary detention is, under the current regime, of issue. The Full Court of the Federal Court has interpreted art 9(1) as a right that must be interpreted broadly, looking case-by-case at whether the detention is disproportionate or unjust.¹⁵⁴ International case law relating to Australia has held that detention should not continue beyond a period which is justifiable by the state¹⁵⁵ and where there are less invasive means available which would achieve the same end.¹⁵⁶ I agree with Chris Sidoti that the current mandatory detention regime is inherently arbitrary.¹⁵⁷

The length of detention in immigration detention can be attributed to the current administration of s 501, which is coordinated through the National Character Consideration Centre ('NCCC').¹⁵⁸ The role of the NCCC is, inter alia, to identify individuals subject to visa cancellations under the character test and to prepare their Notification of Intention to Consider Cancellation.¹⁵⁹ This requires the compilation of documents outlining criminal histories, court transcripts and family information.¹⁶⁰ For non-citizens who arrived in Australia prior to 1980, the files may not be digitised and can therefore require access to paper files.¹⁶¹

The methodology employed by the NCCC is piecemeal, relying upon referrals from community 'dob ins' and various state and territory correction services.¹⁶² One 2018

¹⁵⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92.

¹⁵⁵ UN Human Rights Committee, *Views: Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) ('*Kwok Yin Fong v Australia*'); UN Human Rights Committee, *Views: Communication No 625/1995*, 68th sess, UN Doc CCPR/C/68/D/625/1995 (28 April 2000) ('*Freemantle v Jamaica*').

¹⁵⁶ International Organization for Migration, *Immigration Detention and Alternatives to Detention* (Global Compact Thematic Paper, 2016).

¹⁵⁷ Chris Sidoti, 'Immigration Detention: A Question of Human Rights' (1999) 75 (Spring) *Australian Law Reform Commission Reform Journal* 36.

¹⁵⁸ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (n 71) 12.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid* 13.

¹⁶¹ *Ibid.*

¹⁶² *Ibid* 12.

report noted over 30,000 calls a year were received,¹⁶³ processed by only 92 staff.¹⁶⁴ There is no current departmental standard or direction for the timeframe in which a revocation is to be processed. The arbitrary nature of the regime is highlighted by the fact that, in select instances, Australian citizens have been detained and deported for not passing the character test.¹⁶⁵ After the arrests of the citizens, a report by the former Inspector General of Intelligence and Security found the NCCC lacked basic quality control over its decisions, and that ‘officers do not consistently demonstrate the requisite knowledge, understanding and skills to fairly and lawfully exercise the power to detain’.¹⁶⁶

In these instances, compensation was paid to the Australian citizens.¹⁶⁷ Of issue, however, is compensation for non-citizens. The question was raised in the primary judgement of *Fernando v Commonwealth [No 5]*¹⁶⁸ where nominal damages of \$1.00 were awarded for 1,203 days of false imprisonment.¹⁶⁹ The quantum of damages was based on jurisprudence from the United Kingdom which adopted a ‘but for’ test that found the individual did not suffer any loss because he would have suffered the loss anyway.¹⁷⁰ As a result, Mr Fernando was denied substantial or aggravated damages but was granted \$25,000 in exemplary damages by the primary judge.¹⁷¹ On appeal, the Full Court set aside the exemplary damages.¹⁷²

The result of this line of case law and the application of the ‘but for’ test is that the Commonwealth of Australia is immunised against paying damages to a non-citizen who is a victim of false imprisonment under the *Migration Act*.¹⁷³

¹⁶³ ‘Call Centre Hotline to Report Illegal Citizens’ (Web Page, 20 April 2016) <<https://cxcentral.com.au/industry-news/call-centre-report-illegal-citizens/>>.

¹⁶⁴ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (n 71) 12.

¹⁶⁵ Ben Doherty, ‘Australian Citizens Wrongly Detained because of Immigration Failures’, *The Guardian Australia* (online, 2 February 2018) <<https://www.theguardian.com/australia-news/2018/feb/02/australian-citizens-wrongfully-detained-because-of-immigration-failures-report-finds>>.

¹⁶⁶ Vivienne Thom, *Independent Review for the Department of Immigration and Border Protection into the Circumstances of the Detention of Two Australian Citizens* (Final Report, June 2017) 25.

¹⁶⁷ Rory Callinan, ‘Secret Payout for Wrongfully Deported Woman’, *Sydney Morning Herald* (online, 1 December 2006) <<https://www.smh.com.au/national/secret-payout-for-wrongfully-deported-woman-20061201-gdoy55.html>>.

¹⁶⁸ [2013] FCA 901.

¹⁶⁹ *Ibid* [99].

¹⁷⁰ *Ibid* [93].

¹⁷¹ *Ibid* [158].

¹⁷² *Fernando v Commonwealth* (2014) 231 FCR 251.

¹⁷³ Michael Douglas, ‘What is the Value of Freedom? Nominal Damages for False Imprisonment: *Fernando v Commonwealth of Australia [No 5]*’ (2013) 21(3) *Tort Law Review* 117.

V DIFFICULTY WITH REVIEW

Thus, it is clear that in addition to the wide grounds on which an individual may not pass the character test, the consequence — mandatory, indefinite detention — is severe, and accordingly it is important to have a robust system of review. However, layers of legal and practical barriers significantly impede effective review of migration decisions.

The relevant decision-maker denotes the relevant avenue by which an applicant, or appellant, may attempt to seek review: if the decision was made by a delegate of the Minister, a merits review by the Administrative Appeals Tribunal ('AAT') is available; if the decision is made by the Minister or Assistant Minister, it is subject only to judicial review in the Federal Court. A particularly notable feature of Australia's deportation system is that the only instance when an individual may provide live evidence to a Court or Tribunal is on the day of hearing.¹⁷⁴ Unfortunately, there does not appear to be any explicit, compiled data on the percentage of visa cancellation decisions made by each type of decision-maker, be it the Minister, Assistant Minister or a delegate of the Minister.

A Merits Review

A decision by a delegate of the Minister is liable to merits review by the AAT. The AAT is the by-product of an identified need for a 'comprehensive, coherent, accessible and integrated system of administrative review'¹⁷⁵ aimed to counter-balance 'the traditional reticence of the administrative decision-maker ... The citizen is thus enabled to challenge, and to challenge effectively, administrative action which affects his interests'.¹⁷⁶

Ministerial Directions bind not only the Minister's delegates, but also the AAT since it stands in the shoes of a primary decision-maker.¹⁷⁷ This is important, as any failure to abide by a Direction results in jurisdictional error.¹⁷⁸ While the AAT thus attempts to 'afford procedural fairness, there is little discretion, if any, in the application of

¹⁷⁴ See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 332 [16] (Kiefel, Bell and Keane JJ) where it was held that there is no universal rule that procedural fairness requires oral hearings.

¹⁷⁵ Justice Duncan Kerr, 'Reviewing the Reviewer: The Administrative Appeals Tribunal, Administrative Review Council and the Road Ahead' (Speech, Annual Jack Richardson Oration, 15 September 2015) 1.

¹⁷⁶ Justice Gerard Brennan, *Administrative Review Council Annual Report 1976–1977* (Report, 1977) foreword.

¹⁷⁷ Chantal Bostock, 'The Effects of Ministerial Directions on Tribunal Independence' (2011) 66 *Australian Institute of Administrative Law Forum* 33; *Singh (Migration)* [2017] AATA 850 ('Singh').

¹⁷⁸ *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 504.

the rules'.¹⁷⁹ Any attempt to seek merits review of a decision of the delegate of the Minister is thus, from the outset, fraught with political overtones.

A first barrier to effective merits review is the procedural formalities that surround visa cancellation reviews. Individuals whose visas have been cancelled are subject to immediate mandatory detention and have difficulty accessing legal help. Detainees may make free local calls, but must pay for international or interstate calls.¹⁸⁰ In larger detention centres, 'mail can sometimes take up to three or five days to get from administration to the correct detainee'.¹⁸¹ Detention thus practically affects the ability for individuals to obtain evidence.¹⁸² Many litigants do not have a strong grasp of the English language¹⁸³ and have limited understanding of the immigration process.¹⁸⁴ These limitations must be viewed in light of the model the AAT has adopted from its inception, which is

[i]n part the strength of legal culture, in part, the unwillingness to move from the known and well-established rules of evidence and in part, the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion.¹⁸⁵

Detention equally affects the ability of litigants to access legal representation, which is necessary in a quasi-adversarial system. The inhibiting effect of failing to secure legal representation is best highlighted by a review of the Australian Law Reform Commission; applicants who gained legal representation succeeded in the AAT 53.5% of the time, compared to a 16.7% success rate if self-represented.¹⁸⁶ Taking into account that legal aid may have been more readily available to applicants with more meritorious claims, such a divide is still indicative of practical barriers to justice created by implementing a quasi-adversarial merits review system that has its roots in traditional legal fora.

The limited scope for effective review of a visa cancellation is put into perspective when, as noted above, only 13% of all visa cancellations on character grounds are

¹⁷⁹ Bostock (n 177) 38.

¹⁸⁰ Australian Human Rights Commission, *2011 Immigration Detention at Villawood* (Report No 12, 2011) [10.8].

¹⁸¹ *Ibid.*

¹⁸² For a good example, see *Rountree v Minister for Immigration and Citizenship* (2008) 100 ALD 251.

¹⁸³ According to one review by Bostock (n 177), 19% of applicants used interpreters.

¹⁸⁴ Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents* (n 151) 30.

¹⁸⁵ Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (AIJA Inc, 2006) 66.

¹⁸⁶ Australian Law Reform Commission, *Part One: Empirical Information about the Administrative Appeals Tribunal* (Report, 1999) [7.5].

eligible for merits review and 39% of these were overturned by the AAT in 2016.¹⁸⁷ That such a high rate of decisions are overturned is positive, but it is further reflective of the likelihood that a decision of the Minister, if subject to the same merits review as a delegate, would be overturned.

Despite the limited number of decisions subject to merits review, the Minister has the unique power to overturn AAT decisions¹⁸⁸ if found to be in the public interest.¹⁸⁹ The development of the power in 2014 was justified because

the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.¹⁹⁰

This reform has attracted considerable criticism, primarily that it is antithetical to the purpose of administrative law¹⁹¹ and that it has had a negative impact on the independence of the AAT.¹⁹² The power has only been used in 30 instances involving non-cancellation, and in eight instances to overrule the AAT's refusal to grant a visa.¹⁹³

B *Judicial Review*

The state of judicial review with regards to s 501 has been the subject of recent scrutiny.¹⁹⁴ However, it is not a new topic; it has been remarked that 'in every age' the role of the judiciary in public law is subject to debate.¹⁹⁵

Challenges from most AAT visa reviews on the merits will eventually fall to the Federal Court by way of judicial review.¹⁹⁶ Only approximately 12% of applicants from the AAT are successful in establishing jurisdictional error.¹⁹⁷ Equally, when

¹⁸⁷ Keith Moor, 'Tribunal Lets Fake Iranian Refugees Stay', *Herald Sun* (online, 22 November 2018) <<https://www.heraldsun.com.au/news/tribunal-lets-fake-iranian-refugees-stay-in-australia/news-story/7f22e001f22c30ac94a12fb028c85126>>.

¹⁸⁸ *Migration Act* (n 11) ss 133A, 133C.

¹⁸⁹ *Ibid* s 133A(1).

¹⁹⁰ Explanatory Memorandum 2014 (n 22) sch 2, 27.

¹⁹¹ *Singh* (n 177).

¹⁹² *Bostock* (n 177).

¹⁹³ *Griffiths* (n 139) 9.

¹⁹⁴ *Griffiths* (n 139).

¹⁹⁵ John McMillian, 'Judicial Restraint and Activism in Administrative Law' (2002) 30(2) *Federal Law Review* 335, 370.

¹⁹⁶ *Migration Act* (n 11) s 477(1); *Judiciary Act 1901* (Cth) s 39B.

¹⁹⁷ Administrative Appeals Tribunal, *Migration Review Tribunal and Refugee Review Tribunal Annual Report 2014–15* (Report, 2015).

decisions are made by either the Minister or Assistant Minister, they are subject only to judicial review in the Federal Court, assuming the Minister has been validly appointed.¹⁹⁸ Table 3 illustrates the volume of litigation with respect to judicial review.

Table 3: Judicial Review Lodgements for Delegate and Minister s 501 Decisions¹⁹⁹

Financial Year	Delegate Decisions	Minister Decisions	Total
2009/2010	5	0	5
2010/2011	20	<5	22
2011/2012	33	10	43
2012/2013	37	5	42
2013/2014	34	17	51
2014/2015	18	33	51
2015/2016	17	65	82
2016/2017	44	125	169
2017/2018 (to 31 May 2018)	93	106	199
Total	301	363	664

Specific to the cancellation powers, the judiciary has expressed disquiet about the way in which the power is used.²⁰⁰ The overall difficulty with judicial review of cancellation decisions is perhaps best summarised by the former Minister for Immigration and Citizenship, Christopher Evans:

In a general sense I have formed the view that I have too much power. The [*Migration Act*] is unlike any Act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought

¹⁹⁸ The legal issue of the possible invalidity of Peter Dutton's appointment was considered in *FQMI8 v Minister for Home Affairs* [2019] FCA 1263, [28]–[32]. See also Janina Boughey, 'The Constitutional Crisis that Keeps on Giving: Could an Invalidly Appointed Minister's Decision be Challenged via Judicial Review?', *AUSPUBLAW* (Web Page, 31 August 2018) <<https://auspublaw.org/2018/08/the-constitutional-crisis-that-keeps-on-giving/>>.

¹⁹⁹ Griffiths (n 139) 8.

²⁰⁰ *Tanielu* (n 89) 427–9 [7]–[19] (Mortimer J); *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29, 53 [135] (Kenny and Perry JJ). See *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 ('*Eden*'), where despite overturning the decision of Logan J at first instance, the Court held that the decision was not one 'that everyone would necessarily agree with': at 179 [99] (Griffiths J).

was to be a power that was to be used in rare cases has become very much the norm.²⁰¹

In 2017, Liberty Victoria found the Minister’s discretion had expanded to 47 personal, national, or public interest powers.²⁰² This is compared to the Prime Minister’s three, or the Minister for Defence’s two.²⁰³ As noted by the Senate Select Committee on Ministerial Discretion in Migration Matters, it is concerning ‘that vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption’.²⁰⁴

This position has been made more complicated since the implementation of mandatory visa cancellations in 2014. The ‘mechanical’ nature of mandatory decision-making combined with strict Ministerial Directions results in cancellations that are made ‘without the checks and balances usually associated with administrative decisions’.²⁰⁵ Of the 3,432 mandatory cancellations made between 2014 and 2018, over 77% resulted in an application for revocation, 31% of which were approved and the cancellation overturned.²⁰⁶ This is demonstrative not only of the need for case-by-case merits review, but also of the extra workload placed on administrative decision-makers.

Traditionally, Australian courts have deferred to the executive when making administrative decisions, believing Ministers to be accountable to Parliament.²⁰⁷ In 2001, Parliament attempted to exclude completely judicial review through the introduction of a privative clause in the *Migration Act*.²⁰⁸ The High Court found that while the privative clause was constitutionally valid, it could not apply to instances of jurisdictional error. Accordingly, migration litigation has progressively widened the concept

²⁰¹ Commonwealth, *Parliamentary Debates*, Senate Standing Committee on Legal and Constitutional Affairs, 19 February 2008, 31 (Christopher Evans, Minister for Immigration and Citizenship).

²⁰² Liberty Victoria (n 8) 9.

²⁰³ *Ibid.*

²⁰⁴ Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (Report, 2004).

²⁰⁵ Amy Nethery, ‘Partialism, Executive Control and the Deportation of Permanent Residents from Australia’ (2012) 18(6) *Population, Space and Place* 722, 735.

²⁰⁶ Griffiths (n 139).

²⁰⁷ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 503 [334] (Kirby J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCA 1, 23 [70] (Griffiths J) (‘*Stretton*’). See generally Joel Townsend, ‘Adequacy of Risk Assessment in the Exercise of the Character Cancellation Power under the Migration Act 1958’ (2017) 28(2) *Public Law Review* 158.

²⁰⁸ Introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). This is after having removed migration decisions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in 1994 through the *Migration Reform Act 1992* (Cth).

of jurisdictional error, for ‘as each new decision pushes the boundaries further, [it] gives rise to a spate of litigation seeking to confine or extend its precedential worth’.²⁰⁹ The High Court’s decision has been hailed as neutralising ‘the potentially devastating prohibition to access to judicial review’.²¹⁰

Table 4: Judicial Review Outcomes for Minister Decisions²¹¹

Financial Year	Applicant Withdrawal	Department Loss	Department Win	Department Withdrawal
2009/2010	0	0	0	0
2010/2011	0	0	0	0
2011/2012	<5	<5	6	0
2012/2013	<5	<5	<5	<5
2013/2014	0	5	<5	<5
2014/2015	<5	4	18	<5
2015/2016	11	7	21	8
2016/2017	12	10	43	11
2017/2018 (to 31 May 2018)	15	13	19	13
Sub Total	45	41	113	36
Total	235			

Evidently, approximately one third of the review applications were successful.²¹² This is ‘higher than the outcome of judicial review challenges in the Federal Court in relation to other Commonwealth administrative action’.²¹³ The increased scrutiny by the judiciary has been noted by observers and may ‘also partly result from a concern that decision-makers are simply rubber stamping draft statements of reasons’.²¹⁴

In order to achieve a positive result for a person subject to visa cancellation, applicants for judicial review must demonstrate that the decision falls under one of the grounds of review. Practically, in the context of Ministerial decisions, applications for judicial review will aim to demonstrate that the decision of the Minister, or delegate, was unreasonable (thereby demonstrating that there has been some form of jurisdictional error).

²⁰⁹ Victor Kline, ‘The Road Back from Kafka’s Castle: Towards a Better System of Visa Application and Review in Australia’ (2018) 43(3) *Alternative Law Journal* 216.

²¹⁰ Nicholas Poynder, LexisNexis, *Australian Immigration Law* (online at 6 April 2019) [120,005].

²¹¹ Griffiths (n 139) 8.

²¹² Of the 235 total review applications made between 1 July 2009 and 31 May 2018, 77 were either lost or withdrawn by the Department.

²¹³ Griffiths (n 139) 10.

²¹⁴ Ibid 13.

Findings of legal unreasonableness are rare,²¹⁵ particularly where reasons are provided that demonstrate a justification for the exercise of power.²¹⁶ Where reasons for a decision are provided, they will provide the focal point for consideration of whether the decision is unreasonable.²¹⁷ Legal unreasonableness thus does not depend on a ‘definitional formulae or one verbal description rather than another’,²¹⁸ but requires demonstration of some flaw in the reasoning process, or that the decision was outcome-focused.

There are two different contexts in which the concept of unreasonableness can be employed: first, a conclusion after the identification of jurisdictional error for a recognised species of error;²¹⁹ and second, an ‘outcome-focused’ conclusion.²²⁰ It would serve no purpose to outline a list of decisions which denote what has and has not amounted to jurisdictional error; suffice it to say only the most egregious of decisions by the Minister would be liable to be overturned.²²¹ One Federal Court judge noted:

At some stage, courts may have to confront more squarely the increasing disparity of resources and capacities attending the way judicial review proceedings in the migration jurisdiction are conducted. They may have to confront what needs to be done to ensure that what occurs in Ch III courts does not appear to be but a veneer of fairness.²²²

The value of procedural fairness cannot be understated; it is the means through which the state may legitimise its administration by fostering the belief that ‘government may not act against the governed in a clandestine or arbitrary manner’.²²³ When arising from a mandatory cancellation, the principles of natural justice do not apply.²²⁴ The civic and legal use and concept of the phrase ‘natural justice’ has developed over a long and disparate history.²²⁵ As noted by Ormrod LJ,

²¹⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377 [113] (Gageler J); *Stretton* (n 207) 3 [4]–[5], 19 [61] (Griffith J).

²¹⁶ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [84].

²¹⁷ *Ibid.*

²¹⁸ *Ibid* 567 [59]; *Stretton* (n 207) 3 [2].

²¹⁹ See, eg, *Johnson v Minister for Home Affairs* [2018] FCA 1940.

²²⁰ *Eden* (n 200) 171 [60].

²²¹ *Ogawa* (n 74). Administrative inconsistency as a basis for unreasonableness was raised: at [105] (Logan J).

²²² *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 186 [124] (Mortimer J).

²²³ Laurence Tribe, ‘Developments in the Law: Zoning’ (1977–8) 91(7) *Harvard Law Review* 1427, 1507–8.

²²⁴ *Migration Act* (n 11) s 501(5).

²²⁵ *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676, 681.

the phrase ‘the requirements of natural justice’ seems to be mesmerising people at the moment. This must, I think, be due to the apposition of the words ‘natural’ and ‘justice’. It has been pointed out many times that the word ‘natural’ adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen.²²⁶

The removal of the principles of natural justice in mandatory visa cancellation decisions was justified on the basis that ‘natural justice will have already been provided to the non-citizen through the revocation process’.²²⁷ A fundamental flaw in this reasoning is the observation that affording natural justice is not a simple common law right subject to legislative amendment, but a ‘condition governing the exercise of statutory power’.²²⁸ The position is best summarised by the former Chief Justice of the High Court, Robert French:

A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error.²²⁹

In *Roach*,²³⁰ Perry J, while finding s 501(6)(b) of the *Migration Act* to be a deeming provision,²³¹ overturned the Minister’s decision on the basis that, inter alia, he denied the applicant natural justice.²³² This implied requirement is a contestable step in the decision, considering the express revocation in the legislation of the entitlement to natural justice. Subsequently, Charlesworth J has held a contrary view to Perry J, arguing that ‘[t]he s 501(3) discretion would, in my view, be validly exercised if the Minister gave no thought to what realistic opportunity would arise for the particular visa-holder under s 501C(4)’.²³³

I agree with those stakeholders that submitted that due to the mandatory nature of detention in Australia the seriousness of a visa cancellation necessitates the need for procedural fairness.²³⁴ Considering the drastic consequences of removal, the system

²²⁶ *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201, 226.

²²⁷ Explanatory Memorandum 2014 (n 22) 15.

²²⁸ *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).

²²⁹ Chief Justice Robert French, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed), *Modern Administrative Law: Concepts and Context* (Cambridge University Press, 2014) 24, 47.

²³⁰ *Roach* (n 118).

²³¹ *Ibid* [142] (Perry J).

²³² *Ibid* [115] (Perry J).

²³³ *Stevens v Minister for Immigration and Border Protection* [2016] FCA 1280, [79].

²³⁴ Australian National University, Submission No 59 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014* (2017) 22.

as it stands would seem to provide little relief for those caught in limbo.²³⁵ Indeed, the cumulative effect is immunisation of visa cancellations against effective review.

VI SOLUTIONS

Multiple solutions over three decades have been offered with respect to the character test; it has been the subject of two Commonwealth Ombudsman reports²³⁶ and a Senate Select Committee in 2004²³⁷ and 2019.²³⁸ In 2004, the Senate Select Committee found that there was ‘a pressing need for reform’.²³⁹ To date, the Minister has been reluctant to implement any recommendations.

With the high volume of litigation in the past two years, and the number of judicial review applications being listed currently for 2021,²⁴⁰ there have been calls for either more judicial officers²⁴¹ or the establishment of a new Migration Court of Australia.²⁴² I argue that although possible, the establishment of a new court is reactive and superficial. Such a court would not address the underlying issues that impact on the review of Ministerial decisions made pursuant to the *Migration Act*. I therefore suggest six reforms that strike closer to the heart of the problem.

A Repeal Mandatory Cancellation Powers

Of primary concern is the current mandatory visa cancellation power. Mandatory cancellations suffer innate weaknesses and can lead to unfair consequences. This is highlighted perhaps best in instances where Australian citizens were mistaken for being non-citizens and detained. Equally, there have been reported instances of at

²³⁵ Which provided the basis for allowing an appeal in *MSS v Belgium & Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

²³⁶ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (n 71); Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents* (n 151).

²³⁷ Senate Select Committee on Ministerial Discretion in Migration Matters (n 204).

²³⁸ Joint Standing Committee on Migration, Parliament of Australia, *The Report of the Inquiry into Review Processes Associated with Cancellations Made on Criminal Grounds* (Report, February 2019).

²³⁹ Senate Select Committee on Ministerial Discretion in Migration Matters (n 204) 165.

²⁴⁰ Nicola Berkovic, ‘Blow out in Court Cases for Migrants’, *The Australian* (online, 25 October 2018) <https://myaccount.news.com.au/sites/theaustralian/subscribe.html?sourceCode=TAWEB_WRE170_a_GGL&mode=premium&dest=https://www.theaustralian.com.au/business/legal-affairs/blowout-in-court-cases-for-migrants/news-story/41ebb3b8c176fcd23bd6c3e334025fd3&mementype=anonymous>.

²⁴¹ Aaron Patrick, ‘Justice Delayed: Federal Court Judgments Can Take Years to Write’, *Financial Review* (online, 26 October 2018) <<https://www.afr.com/business/legal/justice-delayed-federal-court-judgments-can-take-years-to-write-20181026-h174tj>>.

²⁴² Kline (n 209).

least one Australian citizen being deported.²⁴³ In 2013, a mandatory cancellation provision with respect to student visas was repealed after the government acknowledged the amendment would allow the Minister ‘the discretion to consider the circumstances of the student and to decide if cancellation is warranted based on the merits of the case put forward’.²⁴⁴

An obvious amendment is to remove the mandatory cancellation power entirely. Given the current threshold of 12 months’ imprisonment, a majority of cases that are directly concerned with community safety could adequately be dealt with under the remaining cancellation powers.²⁴⁵

B *Redefine Serious Criminal Offences*

A second important amendment to the current legislation is to modify the criteria on which an individual is found to be a serious criminal. One modification could be to reflect the nature of the offence, not the time imprisoned. This would see the exclusion clause become aligned with the one true autonomous meaning of art 33(2) of the *Refugee Convention*. Such a model is not without precedent — the United Kingdom has adopted a ‘nature of the offence’ approach since 2002.²⁴⁶ Equally, if an offence-based model is adopted, it should not be geographically linked to Australia. To do so would be inconsistent with a policy of community safety.²⁴⁷

Further, the 12-month imprisonment threshold on which the Minister is mandated to revoke a visa could be raised to 24 months, reflecting the previous definition of serious criminal offence in 2014. For an individual who has been sentenced to 12 months’ imprisonment to be effectively banished from Australia is disproportionate to the potential level of criminality, inconsistent with the principles of the criminal justice system in being purely punitive, and amounts to a secondary punishment for an individual by virtue of failing to hold citizenship. Calculating sentencing time as aggregate would also appear to be unfounded. I recommend that s 501(7A) be repealed.

C *Immigration Detention Centre Offences*

The current provisions relating to offences in an immigration detention centre are illogical and inconsistent with both the purpose of the *Migration Act* and the level of criminality required to trigger it. While safety in immigration detention centres

²⁴³ Doherty (n 165).

²⁴⁴ Explanatory Statement, *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) 21 (‘Explanatory Statement’).

²⁴⁵ *Migration Act* (n 11) ss 501(2)–501(3).

²⁴⁶ *Nationality Immigration and Asylum Act 2002* (UK) s 72.

²⁴⁷ This notion of geographic disconnect to a level of criminality is being promoted by the proposed Migration Amendment (Strengthening the Character Test) Bill 2019.

is a laudable policy objective, it can be achieved by imposing the same criminality threshold for offences that occur in civil society.²⁴⁸

D *Specify the Meaning of Association*

Finally, a short-term solution is clarification of ‘association’.²⁴⁹ This can either be through legislative amendment, Ministerial Directions, or the common law. As it stands, the notion of association goes above and beyond the concept of consorting and fails to have any of the checks and balances. While the desire to cancel individual visas on the basis of a dangerous criminal organisation is understandable, the breadth and scope of the power is unreasonable and is compounded by the inability to have an effective review mechanism.

E *Memorandum between NCCC and Government*

As promoted by the 2016 Commonwealth Ombudsman report, the Minister and Department can reduce the time spent by individuals in immigration detention centres through the adoption of a standard national operation procedure aimed at identifying convicted individuals liable for mandatory visa cancellation.²⁵⁰ The solution could develop on the current, sporadic practice which includes limited access to internal data including sentencing remarks, the conviction, family information and migration history.²⁵¹

Ensuring a streamlined process would help to reduce the time non-citizens spend in immigration detention, and further serve as a check and balance against the possible deportation of Australian citizens. Considering the current 12-month threshold, if the NCCC began the process from the moment of incarceration, it is possible that upon release the individual could be returned to their country of origin. This in turn would reduce the economic and administrative strain on immigration detention centres. It is noted, however, that this approach allows those detained limited opportunity to participate in programs whilst detained as part of demonstrating rehabilitation.

F *Removing Ministerial Override Power of the AAT*

The unique power of the Minister to overturn a merits review decision is antithetical to the purpose of independence in administrative decision-making and review. This is especially so where the Minister will inevitably be involved in cases that are political.²⁵²

²⁴⁸ That being the nature of the offence, 12 months or 24 months.

²⁴⁹ *Migration Act* (n 11) s 501(6)(b)(i).

²⁵⁰ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (n 71) Part 6.

²⁵¹ *Ibid.*

²⁵² *Anaki v Minister for Immigration and Border Protection* [2018] FCAFC 195.

Since at least 1985, there have been submissions that decisions by the Minister should be subject to some form of external review.²⁵³ That is, in effect, to open Ministerial decisions with respect to visa decisions to merits review. It is telling that as of current merits review statistics, 30% of migration cases subject to merits review are overturned.²⁵⁴ Considering the difference between the individual making a decision is purely titular (in that the Minister does not require special qualifications nor expertise to make visa cancellation decisions) it is an easy process to imagine these statistics would be the same, if not higher, if Ministerial decisions were also subject to merits review.

Currently, the Minister is neither personally nor politically accountable when overturning a merits review decision. The provision should be amended so that the Minister must advise Parliament at every instance of exercising personal power, as they are required to do under other provisions of the *Migration Act*.²⁵⁵

VII CONCLUSION

The tension between national and community security and the humanitarian principles underlying the *Refugee Convention* would appear global and persistent.²⁵⁶ States will, and should, retain the power to determine who enters, and resides, within their borders.²⁵⁷ In Australia, this tension has been the subject of continuous public debate for at least the past 25 years. Despite criticisms, the favouring of security over humanitarian principles has been the result of conscious, explicit policy choices by successive Australian governments — both Labor and Liberal — as supported by the Australian public.

This is not to accept, however, that the model the Australian government has adopted currently, with respect to visa holders, should be sacrosanct and above commentary. There are obvious, fundamental flaws in the God-like powers granted to the Minister. This position is best summarised by the UN Special Rapporteur on the Human Rights

²⁵³ Australian Human Rights Commission, *Human Rights and the Migration Act 1958* (Report No 13, April 1985).

²⁵⁴ Administrative Appeals Tribunal, *Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 March 2020* (Report, April 2020) 4.

²⁵⁵ *Migration Act* (n 11) ss 351, 417.

²⁵⁶ An example is the United States' response to the migrant caravan: Jonathan Blitzer, 'Donald Trump, The Migrant Caravan, and a Manufactured Crisis at the US Border', *The New Yorker* (online, 14 November 2018) <<https://www.newyorker.com/news/news-desk/donald-trump-the-migrant-caravan-and-a-manufactured-crisis-at-the-us-border>>.

²⁵⁷ As was accepted by the majority in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 where the Minister's ability to hold an individual in detention was not deemed a punishment, but rather a part of the Minister's prerogative powers to control who can, and cannot, enter or exit Australia.

of Migrants, François Crépeau, who noted with respect to s 501 of the *Migration Act* that ‘the lack of clarity of the provisions could also risk a politicized and biased use of controls, and be in violation of the principles of legality’ as the Minister’s powers are not matched with ‘the appropriate level of oversight to the country’s judiciary’.²⁵⁸

As the *Migration Act* currently stands, the ability to cancel visas would appear disproportionate and arbitrary: there is no clear limitation on who is liable to be affected by the association limb; the aggregate sentencing requirements distort the notion of a ‘serious crime’; and the consequences of visa cancellations are not matched with a robust system of effective review.

While the aforementioned solutions are all viable, some are more urgently required than others. The mandatory cancellation powers should be repealed for the same reason that other mandatory cancellations under the *Migration Act* have historically been: to allow the Minister to assess the merit of each case.²⁵⁹ Legislative reform should abolish the AAT override power of the Minister on the basis that such a power is antithetical to the principles of administrative law and has no foundation for its existence. Finally, the time individuals spend in detention is aggravated by improper and ineffective administration that can be reduced through the adoption of standardised communications between the NCCC and various state and territory facilities.

On 4 July 2019, the Migration Amendment (Strengthening the Character Test) Bill 2019 was re-introduced to Parliament, after its initial lapse at the dissolution of the 45th Commonwealth Parliament. The Bill seeks to add additional grounds by which an individual will fail the character test. Primarily, the Bill aims to introduce an additional criterion where an individual is convicted of a ‘designated offence’²⁶⁰ regardless of geographic location or whether certain ancillary offences have been committed. The Bill is particularly concerned with capturing

not only those non-citizens that commit designated offences, as specified ... [but also those] who, without committing the physical elements ... have a level of involvement in the commission of a designated offence that gives rise to an offence in and of itself.²⁶¹

Accordingly, the character test will begin to capture a wider sector of non-citizens, exacerbating the issues outlined above without providing any remedies. As it stands, it would appear that the God-like powers of the Minister are only expanding.

²⁵⁸ François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/2/Add.3 (24 April 2017) 10.

²⁵⁹ Explanatory Statement (n 244) 21.

²⁶⁰ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) 4.

²⁶¹ *Ibid* 7.

JUSTICE AT THE EDGE: HEARING THE SOUND OF SILENCE

ABSTRACT

This article examines a novel emerging trend in the access to justice movement. This latest trend is best seen as a counter-wave — or rip current — that seeks to incorporate knowledge and experience found at the periphery of the legal system in order to advance the theory and practice that underpins access to justice. Drawing on recent legal developments pioneered in Aotearoa/New Zealand that grant personhood status to natural objects, we report on the Māori world view that treats natural objects in much the same way as respected family members. This new perspective is indicative of the counter-wave in action and illustrates how legal principles derived from the periphery — in this case rooted in the First Law of the Māori people — are being recognised and incorporated into the mainstream legal system, holding the potential to advance access to justice for First Nations peoples whilst also bringing other benefits to the wider society. Focusing primarily on Australia, Brazil and Canada,

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our aim is to highlight common signs of receptivity for granting natural objects personhood status, and to show how this converging trend could enrich both the quality and accessibility of justice in these and other jurisdictions.

I INTRODUCTION

The access to justice movement has been described as evolving in cumulative ‘waves’.¹ The wave metaphor is apt as it captures what Mauro Cappelletti referred to as ‘converging trends’ in civil procedure and constitutionalism common to Western society.² Cappelletti’s three waves represent not only the basic idea that legal systems must stay within reach of communities having poor access to justice, but also that we accept ongoing responsibility to identify new approaches and forces that can translate legal ideals connected with equality before the law into reality. However, communities denied access to general legal systems frequently have created their own norms, customs and traditions for resolving disputes, which in some instances predate modern legal systems by centuries. Moreover, these local forms of social organisation and dispute resolution produced by First Nation peoples³

¹ For an account of the Florence Access to Justice Project and its component ‘waves’ see Mauro Cappelletti and Bryant Garth, ‘Access to Justice and the Welfare State: An Introduction’ in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff, 1981) 1. For a summary of subsequent and latest developments see: ‘Access to Justice – A New Global Survey’, *Global Access to Justice Project* (Web Page) <<http://globalaccesstojustice.com>>.

² Mauro Cappelletti, ‘The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis Symposium: Conference on Comparative Constitutional Law’ (1979) 53(2) *Southern California Law Review* 409, 412; Sabino Cassese, ‘In Praise of Mauro Cappelletti’ (2016) 14(2) *International Journal of Constitutional Law* 443, 446. But see Philip SC Lewis, ‘Comparison and Change in the Study of Legal Professions’ in Richard L Abel and Philip SC Lewis (eds), *Lawyers in Society: Comparative Theories* (University of California Press, 1989). Lewis criticises the metaphor, stating ‘Discussion of “waves” or “tendencies” is unsatisfactory not just because comparative lawyers assume changes fulfil similar needs but also because they assume that we have given a satisfactory account merely by showing the existence of apparently similar developments in different countries, whereas this only begins the inquiry into the circumstances underlying those similarities’: at 71.

³ It is problematic to refer to these culturally, spiritually and linguistically diverse peoples by a collective noun or acronym. First Nation peoples’ experiences, cultures and attitudes to many issues, including First Law, will vary between ‘individuals, communities, gender and age groups, and are influenced by a range of social factors such as the degree of urbanization’, however, a degree of commonality does exist between First Nations peoples in Australia, Brazil and Canada, which we draw upon when using the term ‘First Nations peoples’: see National Alternative Dispute Resolution Advisory Council, ‘Indigenous Dispute Resolution and Conflict Management’, (Research Paper, January 2006) 6 <<https://webarchive.nla.gov.au/awa/20191107002237/https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>>. See also Bruce Debelle,

are often displaced through the imposition of the general legal system, particularly in colonial settings. Our aim in this article is to redress this imbalance by highlighting important and original contributions that indigenous perspectives have to offer in challenging dominant definitions and understandings of access to justice.

We have chosen to focus on Australia, Brazil and Canada due to their similar physical geography (each is a very large country where distance alone constitutes a physical barrier to the justice system) and the fact that their First Nations peoples share a common history of colonialism. These jurisdictions were also selected to highlight contrasting differences in how First Nations peoples' legal traditions, hereinafter 'First Law', are protected and recognised. The variations between these States that share a common struggle to recognise First Law strengthens our claim that the counter-wave can promote access to justice, even where legally pluralist roots may initially be denied. For eventually, and through different means, we see that suppressed voices begin to be heard and new perspectives start to influence and challenge legal orthodoxy.

In Part II, we examine the content and context of this counter-wave more closely. We also report on recent efforts to meet legal service needs through itinerant courts, community legal clinics ('CLCs') and the use of technology. While these efforts may

'Aboriginal Customary Law and the Common Law' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 85, 85, 86; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31, December 1986) [32], [37] <<http://www.alrc.gov.au/publications/report-31>>; Australian Law Reform Commission, 'Traditional Aboriginal Society and Its Law' in WH Edwards (ed), *Traditional Aboriginal Society* (Macmillan Education Australia, 2nd ed, 1998) 213, 213; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 20, 34; Miguel A Bartolomé, 'La Diversidad de Las Diversidades: Reflexiones Sobre El Pluralismo Cultural En América Latina' (2008) 28 *Cuadernos de antropología social* 33; Kim Economides, 'On Liberating Law from the Tyranny of the City' in Leslie S Ferraz (ed), *Repensando o Acesso à Justiça: Estudos Internacionais* (Evocati, 2016) 151, 158 <ppg.unit.br/ppgd/wp-content/uploads/sites/5/2016/12/Repensando-a-Justiça_Volume-2-correto-1.pdf>. See also John Borrows, 'Indigenous Legal Traditions in Canada' (2005) 19(167) *Journal of Law and Policy* 58, 174–5, 193; Ministério da Educação, 'Índios no Brasil 1', *Livrosgratis* (2016) <<http://livros01.livrosgratis.com.br/me001985.pdf>>. On a shared worldview between many Indigenous cultures, see David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017) 132 <<http://ebookcentral.proquest.com/lib/usq/detail.action?docID=5180621>>; Reinaldo Matias Fleuri and Lilian Jurkevicz Fleuri, 'Learning from Brazilian Indigenous Peoples: Towards a Decolonial Education' (2017) 47(1) *The Australian Journal of Indigenous Education* 8, 14. Our use of the collective term, 'First Nations peoples', is not intended to diminish the unique personal, social and cultural qualities found amongst the First Nations peoples, wherever they reside: see David A Freedman, *The Ecological Fallacy* (Web Page, 2002) <<http://www.stat.berkeley.edu/~census/ecofall.txt>>; David Lubinski and Lloyd G Humphreys, 'Seeing the Forest from the Trees: When Predicting the Behavior or Status of Groups, Correlate Means' (1996) 2(2) *Psychology, Public Policy, and Law* 363.

improve physical access to justice, arguably, their true value as conduits through which the counter-wave may flow is yet to be fully realised. We also note the risk that these innovative delivery initiatives may have negative impacts. Part II introduces the unfamiliar perspective of First Nations communities as a novel and rich source of law at the legal periphery which is increasingly being formally recognised in Australia, Brazil and Canada.⁴ In particular, we highlight an emerging common viewpoint that nature should be seen as a person and respected accordingly.

Part III examines further the evolution of granting personhood status to natural objects in Aotearoa/New Zealand where explicit reference is made to principles of First Law in expanding the boundaries of the general legal system.⁵ Finally, Part IV examines how the counter-wave could benefit societies that embrace it. The counter-wave may improve access to justice by making the whole legal system more culturally accessible and inclusive. Granting natural objects personhood status could also improve access to justice by allowing relevant First Nations communities standing to represent interests of the natural object to which they hold a deep spiritual connection in court. In addition, the counter-wave (as it applies to First Law) will bring several jurisdictions, including Australia, Brazil and Canada, into greater alignment with their obligations under international law. Our counter-wave may also help identify solutions to long-term policy challenges, such as the unsustainable exploitation of natural resources and, significantly, could also open up new pathways for reconciliation between First Nations and non-First Nations peoples.

⁴ See Paul Babie, 'A New Narrative: Native Hawaiian Law Book Review' (2016) 39(1) *University of Hawai'i Law Review* 233, 235–6. Babie advances the First Nations' 'comeback' narrative, initially propounded by John Ralston Saul. According to Babie, this emerging narrative will be evident in three trends or phenomena: greater recognition of Aboriginal peoples in the legal order, the political order, and in the scholarship of Aboriginal experts on how the dominant legal and political structures can better recognise Aboriginal peoples contribution to these spheres. The present article contributes to Babie's 'new narrative' by arguing for greater incorporation of First Law principles within the legal order in order to improve access to justice.

⁵ This approach departs from earlier approaches pioneered in Ecuador and Bolivia by naming specific guardians and not granting nature itself positive rights, as in art 72 of the Constitution of Ecuador of 2008: see Georgetown University, 'Ecuador: 2008 Constitution in English', *Political Database of the Americas* (Web Page, 31 January 2011) ch 7 on 'Rights of Nature' <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>. As Mihnea Tanasescu explains, '[i]f the Whanganui had the right to flow in a certain way, for example, then any change to its course would be a violation of its rights. Absent this kind of right, the river is simply empowered to stand for itself in court; its legal guardians determine the positive content of its rights. It is thus theoretically conceivable that the river might one day argue for its course be changed because that change is necessary for its long-term survival (say, as an adaptation to climate change)': see further Mihnea Tanasescu, 'When a River Is a Person: From Ecuador to New Zealand, Nature Gets Its Day in Court', *The Conversation* (online, 19 June 2017) <<https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>>.

II THE NEXT (COUNTER) WAVE IN ACCESS TO JUSTICE

In the late 1970s, the international access to justice movement was launched with the publication of the *Florence Access to Justice Project* ('Florence Project'), now replicated by a new *Global Access to Justice Project*.⁶ Since its inception, the access to justice movement has been represented as evolving through a series of cumulative waves, the first three identified by Cappelletti and Bryant Garth.⁷

The 'wave' metaphor has been used to characterise a series of global converging trends in the access to justice movement that capture the idea of formal law flowing outwards to peripheral marginalised communities.⁸ The first wave represented reforms inspired by the welfare state designed to better address the legal needs of the underprivileged or socially excluded through legal aid (or *judicare*).⁹ Legal aid brought access to courts and lawyers within reach of poorer, underprivileged people living in the cities and to regional, rural and remote communities, provided they could physically access a lawyer. The second wave further extended legal representation by providing better protection for collective and diffuse interests, primarily through class actions and public interest litigation.¹⁰ Yet, 'justice' still remained defined by the legal norms and traditions of the prevalent legal system. The third wave turned towards alternative dispute resolution and a simplification, or even avoidance, of formal law in order to widen access to justice.¹¹ This outward expansion of the boundaries of the formal legal system has in several jurisdictions been matched by internal reviews that now incorporate more informal methods of dispute resolution, such as mandatory mediation and arbitration, as standard practice inside the general legal system, thus making it problematic to continue describing such methods as truly 'alternative'.

Other scholars have identified subsequent waves as the access to justice movement matured and evolved. Christine Parker, for example, claimed the existence of

⁶ Cappelletti and Garth (n 1) 2–3. See also Marc Galanter, 'Access to Justice in a World of Expanding Social Capability' (2010) 37(1) *Fordham Urban Law Journal* 115, 116.

⁷ Cappelletti and Garth (n 1).

⁸ *Ibid* 4; Kim Economides, 'Mauro Cappelletti's Legacy: Retrospect and Prospect' [2016] *Annuario Di Diritto Comparato E Di Studi Legislativi* 245. See also Galanter (n 6) 116; Mark Blacksell, Kim Economides and Charles Watkins, *Justice Outside the City: Access to Legal Services in Rural Britain* (Longman Scientific & Technical, 1991); Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge, 2010). For US developments: see Lisa R Pruitt et al, 'Legal Deserts: A Multi-State Perspective on Rural Access to Justice' (2018) 13(1) *Harvard Law and Policy Review* 15.

⁹ Cappelletti and Garth (n 1) 4, 7–8; Kim Economides, 'Reading the Waves of Access to Justice' (1999) 31(1) *Bracton Law Journal* 58, 66.

¹⁰ Cappelletti and Garth (n 1) 4; Economides, 'Reading the Waves of Access to Justice' (n 9) 66.

¹¹ Cappelletti and Garth (n 1) 4; Economides, 'Reading the Waves of Access to Justice' (n 9) 66.

a fourth wave of reform that advocated the use of competition policy in order to promote a more efficient distribution of resources leading towards greater access to justice.¹² Roderick A MacDonald categorised five waves in the access to justice movement — with proactive legal services being the latest.¹³ Kim Economides turned the inquiry inwards towards the ethical motivation of lawyers to pursue justice and found a fourth wave concerning lawyers' (and others involved in the legal services industry) access to justice.¹⁴ Economides' fourth wave 'seeks to expose the ethical and political dimensions to the administration of justice and, at the same time, establish new links between professional responsibility and legal education.'¹⁵ By improving lawyers' knowledge and understanding of professional responsibility and the challenges facing underprivileged and under-represented clients, it was hoped that lawyers would be inspired to better serve these sectors of the population.

Based on our latest observations of legal service delivery and the reach of the legal system, the next wave in the access to justice movement is best understood as a counter-wave or a rip current that draws legal knowledge and services *centripetally* from the periphery inwards towards the centre in order to improve access to justice. The resulting dual flow of legal knowledge is represented in Figure 1 below.

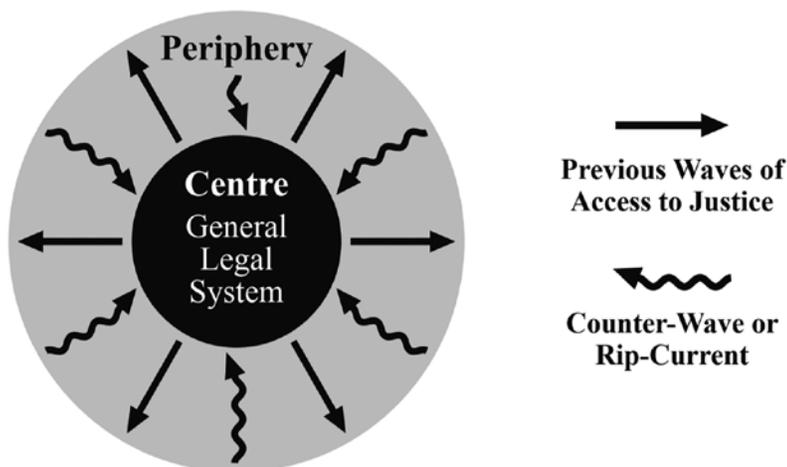


Figure 1: The Counter-Wave (Rip-Current)

¹² Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 35. See also Ronald Sackville, 'Some Thoughts on Access to Justice' [2003] *Federal Judicial Scholarship* 22.

¹³ Roderick A MacDonald, 'Access to Justice in Canada Today' in Julia Bass, WA Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada, 2005) 19, 19.

¹⁴ Economides, 'Reading the Waves of Access to Justice' (n 9) 67; Kim Economides, '2002: A Justice Odyssey' (2003) 34(1) *Victoria University of Wellington Law Review* 1, 12–13 ('2002: A Justice Odyssey').

¹⁵ Economides, '2002: A Justice Odyssey' (n 14) 12–13; Economides, 'Reading the Waves of Access to Justice' (n 9) 67.

Law at the ‘centre’ or *the* legal centre refers to the general law or ‘official’ legal system that operates in and is enforced by the State. The centre is where statutes are normally created and amended by democratically elected representatives (or their delegates) in parliament. Particularly within common law jurisdictions, formal law includes judicial decisions made in court. The legal epicentre, therefore, is not one place, but many. Although, geographically speaking, the legal centre is generally found in urban capitals and major metropolitan cities.

In contrast, the legal periphery (which can be defined both in terms of physical and social space) may also be found within, or on, the outskirts of large cities, such as those living in the favelas of Rio de Janeiro.¹⁶ However, the periphery is usually physically located outside major cities,¹⁷ somewhere in regional, rural and remote communities. For the purpose of this article, we focus on regional, rural and remote areas due to the high proportion of First Nations peoples that typically reside there.¹⁸

¹⁶ See Boaventura de Sousa Santos, ‘The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada’ (1977) 12(1) *Law and Society Review* 5 (*‘The Law of the Oppressed’*); Boaventura de Sousa Santos, ‘Law against Law: Legal Reasoning in Pasargada Law.’ (JSD Thesis, Yale, 1973) (*‘Law against Law’*). The validity of the term ‘favela’ has been questioned and frequently is replaced by ‘communities’. That said, some inhabitants argue in favour of retaining favelas. ‘Residents of favelas active in campaigns to integrate these communities into the city proudly use the term to represent a range of community qualities and to insist on the recognition of their historic role in building the city of Rio de Janeiro’: Catalytic Communities, ‘Why We Should Call Them Favelas’, *CatComm* (Web Page, 2020) <<https://catcomm.org/call-them-favelas/>>.

¹⁷ The periphery may also exist within major cities, where citizens are beyond the reach of the state. For example, in Rio de Janeiro, itinerant justice programs were only able to access urban communities with the assistance of the Pacifying Police Unit due to organized crime gangs and drug trafficking. See Instituto de Pesquisa Econômica Aplicada, *Democratização do Acesso à Justiça e Efetivação de Direitos: Justiça Itinerante no Brasil*, (Research Report, 2015) <http://www.ipea.gov.br/agencia/images/stories/PDFs/relatoriopesquisa/150928_relatorio_democratizacao_do_acesso.pdf>; Leslie S Ferraz, *Democratization of the Access to Justice in Brazil: The Itinerant Courts of Amapá and Rio de Janeiro* (forthcoming).

¹⁸ According to 2011 Australian census data, Indigenous people comprise one per cent of the population in major cities, four per cent in inner regional, seven per cent in outer regional, 16 per cent in remote and 45 per cent in very remote communities in Australia: ‘The Little Book of Rural Health Numbers: Demography’, *National Rural Health Alliance Ltd* (Web Page, 31 July 2017) <<https://ruralhealth.org.au/book/demography>>. See also Law Council of Australia, *The Justice Project: RRR Australians* (Final Report, 2017) 7 <https://www.lawcouncil.asn.au/files/web_pdf/Justice%20Project/Consultation%20Papers/RRR%20Australians.pdf>. In respect of Brazil, see Fleuri and Fleuri (n 3) 1, 3. In Canada, between eight to 43 per cent of people in the Northern census divisions have Aboriginal ancestry: see Jamie Baxter and Albert Yoon, ‘No Lawyer for a Hundred Miles? Mapping the New Geography of Access to Justice in Canada’ (2014) 52(9) *Osgoode Hall Law Journal* 50. By comparison, 19 per cent of non-Indigenous Canadian live in rural environments: see Government of Canada, ‘Population, Urban and Rural, by Province and Territory

Law, or forms of social organisation that exist at the periphery include:

- (i) First Law, as practiced by First Nations peoples;
- (ii) a limited and purpose-orientated incorporation or recognition of First Law within the general legal system. This is not the same as the counter-wave, which seeks to more broadly learn from the legal periphery; and
- (iii) other forms of social organisation that reflect the needs of the local community.

First Law refers to forms of social organisation that regulate relations among First Nation peoples, and between First Nation peoples and the natural environment.¹⁹ First Law has many names and variations among First Nations peoples.²⁰ It may also be referred to as ‘customary law’ or ‘Raw Law’ in the literature.²¹ This is a rich, complex and growing area of law in which we do not claim particular expertise. Our understanding of First Law is limited to secondary sources and we draw upon some truly inspirational scholarship that has informed our work.

Australia, Brazil and Canada all have large areas of their interior land mass that are regional, rural or remote and/or sparsely populated. Paradoxically, the interior (or geographical centre) of each State is remote while their peripheral borders, and

(Canada)’, *Statistics Canada* (Web Page, 4 February 2011) <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo62a-eng.htm>>; Canadian Forum on Civil Justice, *Rural and Remote Access to Justice: A Literature Review* (Rural and Remote Access to Justice Boldness Project, November 2015) 56.

¹⁹ On the use of ‘First Laws’: see Jacinta Ruru, ‘Why First Laws Must Be In’ in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians: Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 288, 290. See Marilyn Poitras and Norman Zlotkin, *An Overview of the Recognition of Customary Adoption in Canada* (Final Report, Saskatchewan First Nations Family and Community Institute, 15 February 2013) 7 <[http://www.sfnfci.ca/ckfinder/userfiles/files/Custom%20Adoption%20Final%20Report%202013\(2\).pdf](http://www.sfnfci.ca/ckfinder/userfiles/files/Custom%20Adoption%20Final%20Report%202013(2).pdf)>; Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 35. Mantziaris and Martin review the academic debate on whether customary law meets the definitional criteria of the ‘western’ conception of ‘law’: at 36. For the purposes of this article we leave this debate to other scholars and use the term ‘First Law’ to recognise the social ordering that existed prior to colonisation.

²⁰ See Watson (n 3) 22; Mantziaris and Martin (n 19) 39; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 219.

²¹ See Watson (n 3) 22, which uses ‘Raw Law’. On the use of ‘customary law’: see Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3); Debelle (n 3); Jeremy Webber, ‘The Grammar of Customary Law’ (2009) 54(4) *McGill Law Journal* 579; Mark Finnane, ‘“Payback”, Customary Law and Criminal Law in Colonised Australia’ (2001) 29(4) *International Journal of the Sociology of Law* 293; Tom Calma, ‘The Integration of Customary Law into the Australian Legal System’ (2007) 25(1) *Law in Context* 74.

their hinterlands, are where the centres of legal, social and economic activity exist. It is this remoteness that presents a continuing challenge for the access to justice movement in these States.

Much of Australia is classified as remote, as is evident in Figure 2.²² The vast distances between remote townships and communities, major cities and established infrastructure mean that it is difficult to provide adequate legal institutional support mechanisms, such as courts and lawyers, which are seen as a prerequisite to maintaining the rule of law.²³

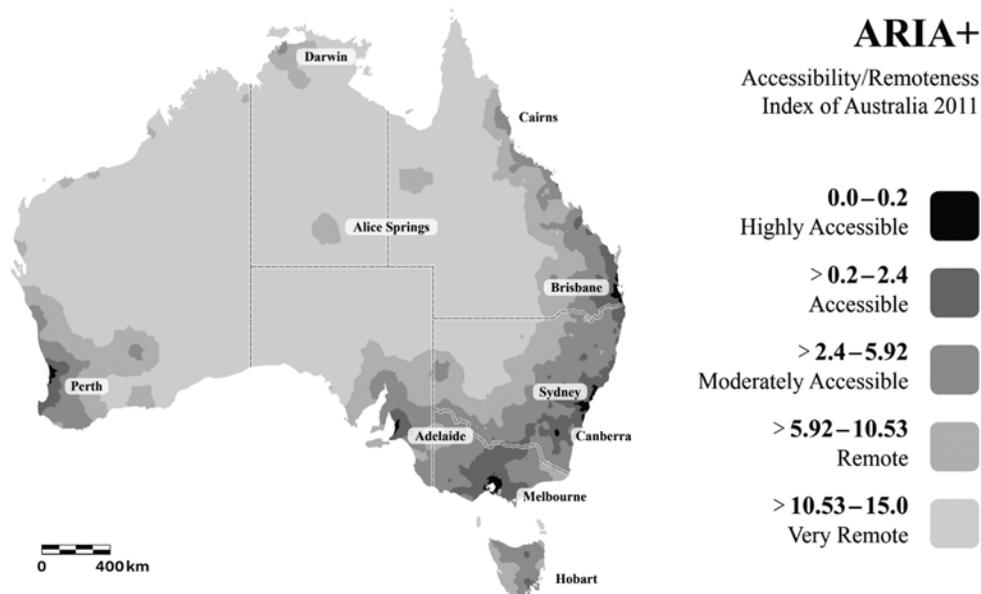


Figure 2: Accessibility and Remoteness Index of Australia²⁴

Brazil’s population is unevenly distributed over its territory, concentrated mainly around the coast and in the south-southeast regions (see Figure 3).²⁵ The northern region, where the Amazon basin is located, has the lowest demographic density in

²² University of Adelaide, ‘ARIA+ 2011’, *Hugo Centre for Population and Housing Research* (Web Page, April 2020) <<https://services.spatial.adelaide.edu.au/giscaportal/apps/webappviewer/index.html?id=cc785550a33a4651a72921c2a6cda8c1>>.

²³ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation, 2012) vol 8, 245; Law Council of Australia (n 18) 4.

²⁴ University of Adelaide (n 22).

²⁵ National Aeronautics and Space Administration, ‘Population Density (2000): Brazil’, *Socioeconomic Data and Applications Center* (Web Page, 5 March 2020) <<https://sedac.ciesin.columbia.edu/maps/gallery/search?facets=region%3Asouth+america&facets=theme%3Apopulation&facets=country%3Abrazil>>.

the country.²⁶ The huge distances to the main cities and the lack of airports, suitable roads and waterways, combined with the population's low income, make physical distance a significant barrier to the general legal system for most residents.²⁷

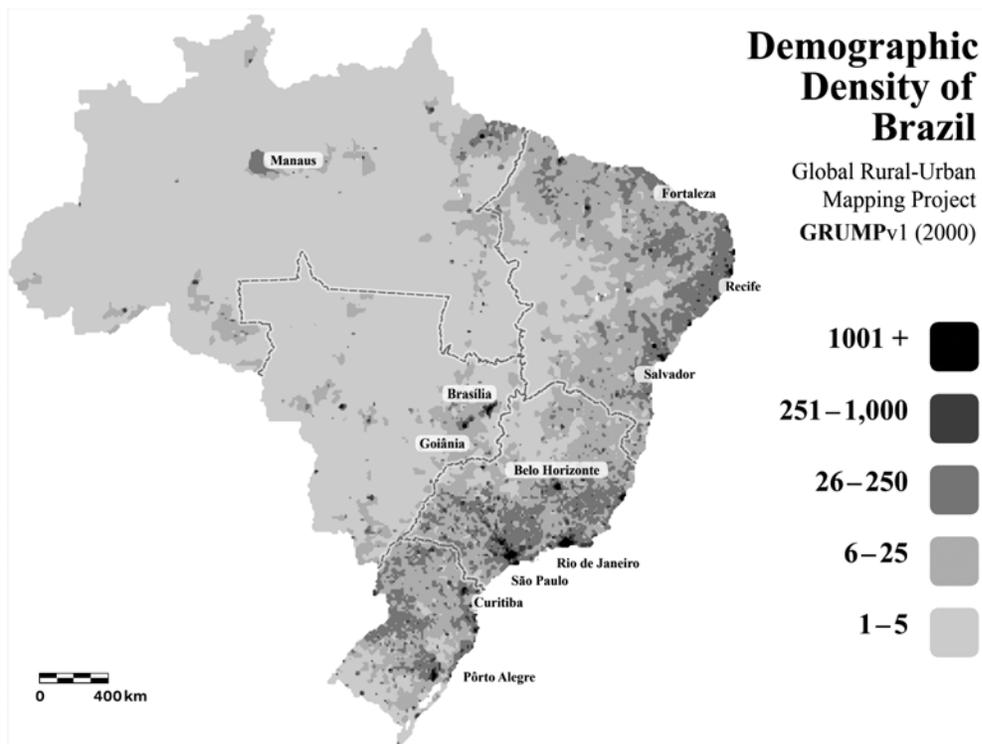


Figure 3: Demographic Density of Brazil (inhabitants/km²)²⁸

Vast areas of Canada are also classified as remote and have poor access to legal services. As a result, the ‘most significant obstacle’ that clients face in accessing general legal services in Canada is physical distance.²⁹ As seen in Figure 4, much

²⁶ Ibid.

²⁷ Lisa Valenta, ‘Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil’ (2003) 38(3) *Texas International Law Journal* 643, 653.

²⁸ National Aeronautics and Space Administration (n 25).

²⁹ Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (Web Page, 29 September 2014) 21 <<http://flsc.ca/wp-content/uploads/2014/10/services6.pdf>>; Canadian Forum on Civil Justice (n 18) 28. See also an earlier study by Laureen Snider, *Legal Services in Rural Areas* (Department of Justice (Canada), Evaluation Report, 1982).

of the interior has either low level access (as indicated by dark shades) or no direct access at all to legal services.³⁰

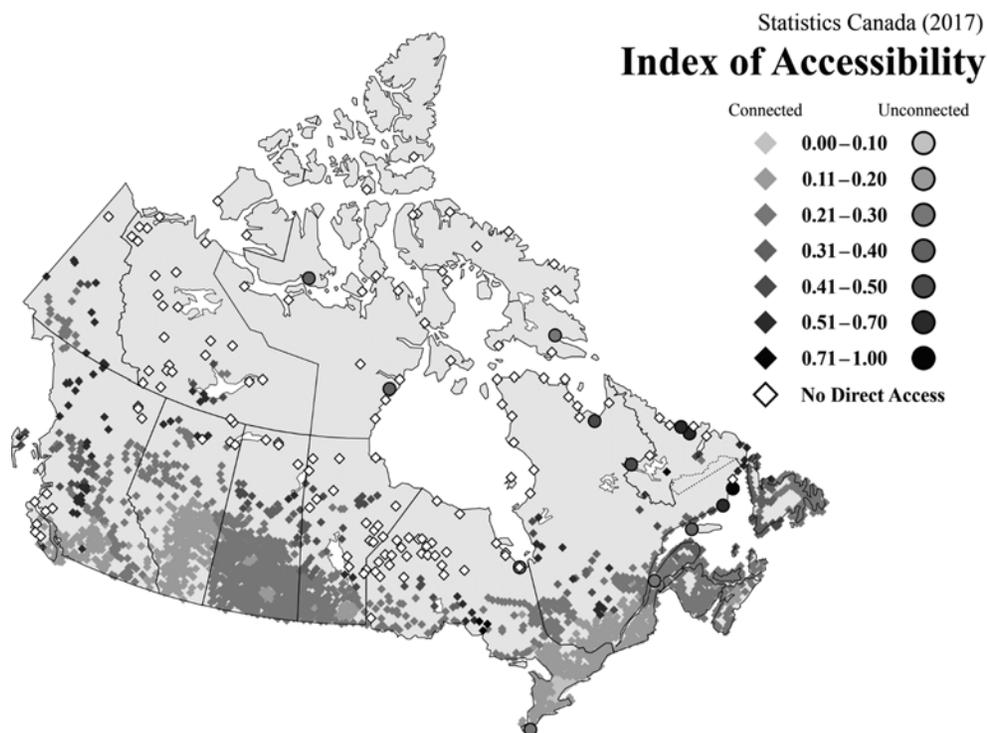


Figure 4: Accessibility Index to Legal Services in Canada³¹

Previous waves in the access to justice movement have attempted to address the challenges of poor or inadequate access in regional, rural and remote areas by pushing general law from the centre out towards the periphery. Despite decades of well-intentioned efforts, large gaps remain. In regional Australia there are less than three law firms for every 10,000 people over the age of 18.³² The situation in remote

³⁰ Alessandro Alasia et al, *Measuring Remoteness and Accessibility — A Set of Indices for Canadian Communities* (Report, 9 May 2017) 38, 43.

³¹ *Ibid* 39.

³² Albin Smrdel, 'Equitable Access to Justice' (Conference Paper, National Access to Justice and Pro Bono Conference, 14 November 2008) 3 <<http://www.nationalprobono.org.au/page.asp?from=3&id=199>>. See generally Pruitt et al (n 8) 31 on the utility of counting lawyers in a given area to measure access to justice. For an approximate comparison, in 2018, 41,203 solicitors were employed in city locations and the estimated resident population living in the capital cities was 17,160,368. This equates to 24 solicitors per 10,000 people. See Urbis, *2018 National Profile of Solicitors* (Final Report No ESA12418, 17 July 2019) 29 <<https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>>;

Australian communities is predictably even more severe, where people may have to travel several hours to the next town to find a lawyer that can represent them without a conflict of interest.³³ According to the Indigenous Legal Needs Project, remote areas of the Northern Territory, Western Australia, and Queensland have high levels of need across a broad range of civil legal work, much of which is likely to go unaddressed.³⁴ In Brazil, the majority of the indigenous population lives in rural areas.³⁵ Many of these communities can only be reached by boat or airplane.³⁶ The time and cost associated with travelling to the capital or major cities puts the general legal system beyond the reach of most Brazilians living in isolated and sparsely-populated communities.³⁷ In Canada, clients from rural areas have reported walking for more than an hour, or hitchhiking, in order to attend a legal appointment, or administrative or legal proceeding.³⁸ Like Australia and Brazil, poor physical access to justice disproportionately affects Canada's First Nations peoples, who are more likely to live in regional, rural and remote areas.³⁹

This centrifugal pushing out of general law to the legal periphery has been assisted through the use of itinerant courts, CLCs and, more recently, through the use of technology. Going forward, their role in the access to justice movement is relevant as conduits through which the counter-wave can flow.

Australian Bureau of Statistics, *Regional Population Growth, Australia, 2018–19* (Catalogue No 3218.0, 25 March 2020) <<https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>>.

³³ Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Report, 8 June 2004) 96–100 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents>; National Pro Bono Resource Centre, 'Regional, Rural and Remote Pro Bono: Models and Opportunities' (Research Paper, University of New South Wales, May 2006) 17 <http://www.nationalprobono.org.au/publications/documents/RRR_Paper.pdf>; Jeff Giddings, Barbara Hook and Jennifer Nielsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) *Alternative Law Journal* 57, 57, 61. See also Economides, 'On Liberating Law from the Tyranny of the City' (n 3) 158.

³⁴ Law Council of Australia (n 18) 8, 14.

³⁵ Fleuri and Fleuri (n 3) 3.

³⁶ Leslie S Ferraz, 'Brazilian Itinerant Justice: An Effective Model to Improve Access to Justice to Disadvantaged People?' in Leslie S Ferraz (ed), *Repensando o Acesso à Justiça: Estudos Internacionais* (Evocati, 2016) 65, 70 <ppg.unit.br/ppgd/wp-content/uploads/sites/5/2016/12/Repensando-a-Justiça_Volume-2-correto-1.pdf>. See Shawn Blore, 'Justice Aboard' (2006) 58(3) *Américas* 12.

³⁷ Blore (n 36) 14.

³⁸ Baxter and Yoon (n 18) 20.

³⁹ *Ibid* 14, 50; Canadian Forum on Civil Justice (n 18) 17–18.

A *Itinerant Courts*

The first itinerant experience in public legal service delivery is often credited as occurring at the University of Oslo, Norway, in 1971.⁴⁰ The *Jussbuss* was created with a dual purpose: to provide legal advice to the underprivileged in urban Oslo and to enhance the clinical legal skills of law students.⁴¹ Since then, itinerant justice programs have spread far and wide – although not directly connected to *Jussbuss*. In Africa, mobile justice programs were developed with the support of the United Nations in Sierra Leone, the Democratic Republic of the Congo, the Central African Republic and Somalia to provide support and legal advice to suit local needs. In Uganda, itinerancy has been creatively attempted through a program called UGANET.⁴² Local paralegals, trained on basic principles of law and conflict resolution, ride their bikes to solve general community problems and inform people living with HIV about their rights.⁴³ Still in Uganda, the United Nations Human Rights Committee, in conjunction with the Ugandan Government, created a mobile court to service victims of crime living in refugee areas.⁴⁴

In Pakistan and the Democratic Republic of Timor-Leste, ‘Justice on Wheels’ programs funded by the United Nations focus on the rural poor, remote populations or conflict-affected areas.⁴⁵ The Philippines also have an itinerancy program

⁴⁰ Jon T Johnsen, ‘Progressive Legal Services in Norway?’ (1999) 6(3) *International Journal of the Legal Profession* 261, 286. For a discussion of the itinerant model for legal service delivery, including courts, see Kim Economides, ‘Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience’ (2011) 16(1) *Deakin Law Review* 47, 50–52. For an analysis of the early operation of the English circuits and circuit judges, which Henry Bracton called ‘*itinerantes*’ and who were later known as ‘*justices in eyre*’ see J S Cockburn, *A History of the English Assizes 1558-1714* (Cambridge, 1972) 13–62.

⁴¹ Johnsen (n 40). See also, ‘Welcome to Jussbuss’, *Jussbuss* (Web Page, 12 March 2020) <<https://foreninger.uio.no/jussbuss/english/>>.

⁴² Uganet Network on Law Ethics and HIV/AIDS, ‘Access to Justice’, *UGANET* (Web Page, 2016) <<http://uganet.org/index.php/access-to-justice/>>.

⁴³ *Ibid.*

⁴⁴ United Nations High Commissioner for Refugees, ‘Mobile Court Scheme Launched in Uganda’s Nakivale Refugee Settlement’, *UNHCR* (Briefing Note, 16 April 2016) <<http://www.unhcr.org/news/briefing/2013/4/516d29359/mobile-court-scheme-launched-ugandas-nakivale-refugee-settlement.html>>; United Nations, ‘Uganda: UN Launches First of Its Kind Mobile Court Initiative in Refugee Settlement’, *UN News* (online, 16 April 2013) <<https://news.un.org/en/story/2013/04/437332-uganda-un-launches-first-of-its-kind-mobile-court-initiative-refugee-settlement>> (‘*Uganda Mobile Court Initiative*’).

⁴⁵ ‘Pakistan’s Justice on Wheels’, *United Nations Development Programme* (Web Page, 2020) <https://www.undp.org/content/undp/en/home/ourwork/ourstories/pakistan_s-justice-on-wheels-.html>. In relation to Timor-Leste see: United Nations Development Programme, *Global Programme on Strengthening the Rule of Law in Conflict and Post-Conflict Situations* (Annual Report, 2009) 51 <<http://www.undp.org/content/dam/undp/library/crisis%20prevention/undp-cpr-global-prog-strength-rule-law-conflict-post-ann-report-2009.pdf>>.

developed by the judiciary, called the ‘Enhanced Justice on Wheels’ program, which operates formal adjudication services.⁴⁶

For some remote communities in Australia, the only access to the judicial system is through the operation of so-called bush courts.⁴⁷ The term ‘bush court’ refers to the Magistrates ‘circuit court’ that services remote and isolated towns.⁴⁸ A Magistrate, two court orderlies and, possibly, a prosecutor, defence counsel and Community Liaison Officer, may arrive via road or air for court.⁴⁹ The frequency in which the bush court sits varies between monthly and quarterly, depending on weather and travel conditions.⁵⁰ The court room itself is generally housed within the local police station, although in the Daly River, Northern Territory, the court has been known to convene in the kindergarten library, or in Maningrida ‘around a plastic breakfast table in a hotel’.⁵¹

In Brazil, buses, vans and vessels were converted into mobile courts to deliver justice to communities living on the periphery. The first informal experiences of itinerancy began in 1992 on boats.⁵² This was the initiative of individual judges from the northern region of Brazil who were concerned about the isolation of riverside populations.⁵³ One such project was the *Tribuna: a Justiça vem a bordo* (trans: Tribune: Justice Comes on Board), which was a court boat converted to provide a range of

⁴⁶ ‘Enhanced Justice on Wheels’, *Office of the Court Administrator* (Web Page) <http://oca.judiciary.gov.ph/?page_id=507>; Philippine Information Agency, ‘Enhanced Justice on Wheels Goes to South Cotabato’, *PIA* (Web Page, 7 September 2017) <<http://pia.gov.ph/news/articles/1000110>>.

⁴⁷ Natalie Siegel, ‘Bush Courts of Remote Australia’ (2002) 76(10) *Australian Law Journal* 640, 640; cf Natalie Siegel, ‘The Reign of the Kangaroo Court?’ (2002) 1 (Spring) *Indigenous Law Journal* 113, 114. For example, the Northern Australian Aboriginal Justice Agency ‘travels to 36 Aboriginal communities and remote circuit “bush courts”’, with a substantial amount of travel by air to service these communities: Email from David Woodroffe, Principal Legal Officer, Northern Australian Aboriginal Justice Agency to Aaron Timoshanko, 15 August 2018.

⁴⁸ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 640.

⁴⁹ Ibid 640; Siegel, ‘The Reign of the Kangaroo Court?’ (n 47). Cf Peter O’Brien and RDT Woodroffe, ‘Bush Courts and the Katherine Regional Aboriginal Legal Aid Service’ (2003) 5(27) *Indigenous Law Bulletin* 20, 20. See also Anna Bulman and Emily Sims, ‘The Fight for Justice in Remote Indigenous Communities’ (2013) 35(7) *Bulletin* 24, 24.

⁵⁰ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 640; Siegel, ‘The Reign of the Kangaroo Court?’ (n 47) 122.

⁵¹ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 642. See also Siegel, ‘The Reign of the Kangaroo Court?’ (n 47) 123.

⁵² Ferraz (n 36) 69. See also Philippe Cunha Ferrari, *Justiça Itinerante: De Barco, de Ônibus e de Avião Em Busca Da Justiça* (Editora Multifoco, 2017).

⁵³ Ferraz (n 36) 69.

non-legal and legal services,⁵⁴ including adjudication, to the riverside communities in the archipelago of Bailique (see Figure 5). In 2012, the *Tribuna* decided over 291 cases in five separate journeys.⁵⁵ The matters most frequently dealt with by the *Tribuna* in 2012 were family law matters, civil disputes and criminal special court cases.⁵⁶ After the formalisation of these floating courtrooms by the Court of Justice of Amapá in 1996, several other state courts created their own programs inspired by the *Tribuna*'s success.⁵⁷ Nowadays, Brazilian Itinerant Justice programs are amongst the most comprehensive in the world.



Figure 5: The *Tribuna*

The program's success may be partially attributed to the procedural flexibility adopted by some judges, which allows, for example, service of a summons on the same day as the hearing.⁵⁸ This enables the majority of matters to be decided on the same day they were filed.⁵⁹ However, this flexibility has been compromised in recent years where, for example in Bailique, new and relatively inexperienced judges have been assigned to the court.⁶⁰

⁵⁴ The non-legal service provided by the *Tribuna* includes health and dental services, issuing of documents, culture, education and water treatment: *ibid* 82.

⁵⁵ *Ibid* 85.

⁵⁶ *Ibid* 85–6; Ferraz (n 17) 23.

⁵⁷ Instituto de Pesquisa Econômica Aplicada (n 17) 17–19.

⁵⁸ Ferraz (n 17) 22; Ferraz (n 36) 88.

⁵⁹ Ferraz (n 17) 22.

⁶⁰ *Ibid* 88.

Almost all Brazilian State Courts now have itinerant programs (Figure 6) of various modalities (vans, buses, boats and one plane) and specialisations (issuing documents, domestic violence, family law, special courts, rights of prisoners, traffic accidents, consumer cases, special events, etc).⁶¹ Some programs have been developed to address the specific needs of the indigenous people in Brazil. For example, the Justice Court of Amazon State and the State of Roraima have developed a program to issue birth certificates and other documents to the isolated group, *Waimiri Atroari*.⁶² Similarly, the Justice Court of Mato Grosso do Sul developed a program to reach 20 indigenous villages to officiate local marriages.⁶³ Itinerant justice is no longer an informal and isolated initiative of some judges in Brazil but has become enshrined in legislation and the *Federal Constitution* (Articles 107, § 20 [Federal Courts]; 115, § 30 [Labour Courts]; 125, § 20 [State Courts]).

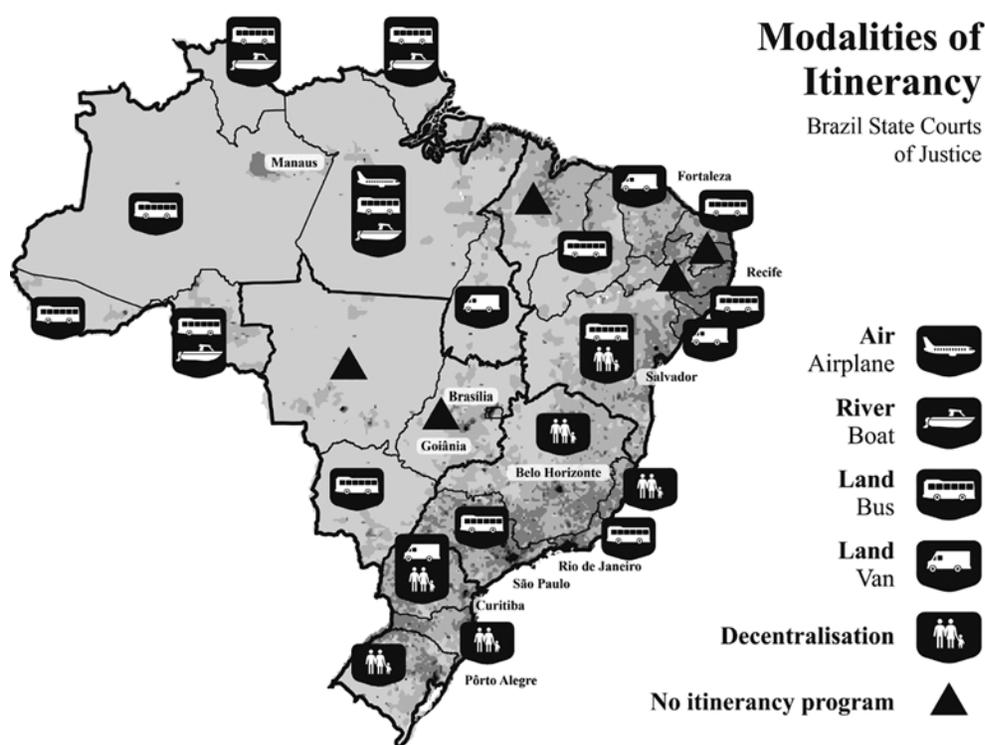


Figure 6: Modalities of Itinerant Courts in Brazil⁶⁴

⁶¹ Ferraz (n 36) 70–1.

⁶² ‘Judiciário Leva Cidadania a Índios Isolados do Norte do Brasil’, *Conselho Nacional De Justiça* (Web Page, 1 March 2018) <<http://www.cnj.jus.br/noticias/cnj/86261-judiciario-leva-cidadania-a-indios-isolados-do-norte-do-brasil>>.

⁶³ ‘Justiça Itinerante: Indígenas de 20 Aldeias são Atendidos no MS’, *Conselho Nacional De Justiça* (Web Page, 27 June 2018) <<http://www.cnj.jus.br/noticias/judiciario/87064-justica-itinerante-indigenas-de-20-aldeias-sao-atendidos-no-ms>>.

⁶⁴ Ferraz (n 36) 70–1; National Aeronautics and Space Administration (n 25).

In Canada, aircraft are commonly used to fly-in lawyers and a judge to service the remote communities in the country's northern provinces.⁶⁵ Among the proactive outreach services available in Canada are the circuit courts of the Provincial and Supreme Courts of British Columbia and the Nunavut Court of Justice. For the Nunavut Court of Justice, infrequent flights mean that counsel and the rest of the court may have to travel together, raising client concerns about perceived independence.⁶⁶ Reliance upon aircraft also affects the Court's frequency and duration of its circuit due to severe Arctic weather fronts.⁶⁷

As these courts are situated, albeit temporarily, in communities at the legal periphery, they nevertheless could become significant sites of receptivity and openness to local laws, customs and traditions. The itinerant courts thus have a potential and, if realised, valuable role in transmitting and legitimising legal knowledge from the periphery to the centre.

B *Community Legal Clinics*

In Australia and Canada, CLCs have been funded to deliver legal services to regional, rural and remote communities, among other under-served populations.⁶⁸ CLCs may provide general advice, and possible representation, to people living in their catchment area, or they may specialise in an area of law or client demographic.⁶⁹ Where CLCs are located in urban centres, many perform outreach services to regional, rural and remote areas using an itinerant model.⁷⁰

⁶⁵ Economides, 'Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience' (n 40) 51.

⁶⁶ 'Nunavut Legal Services Study', *Department of Justice (Canada)* (Web Page, 6 October 2004) <http://www.justice.gc.ca/eng/rp-pr/aj-ja/rr03_la14-rr03_aj14/pr3.html>.

⁶⁷ *Ibid.*

⁶⁸ Law centres have proven cost effective and efficient solutions to addressing the 'gap' in legal services for regional, rural and remote communities. As not everyone employed by the centre is a qualified lawyer, organisational costs are reduced. CLCs also employ salaried lawyers who, unlike lawyers in private practice, do not bill the client according to the time taken to complete a task. The use of salaried lawyers enables legal services to be provided to communities that may otherwise be too small, underdeveloped, or subject to seasonal fluctuations, to sustain a private practice. Another benefit of salaried lawyers in CLCs is their ability to specialise in uneconomic areas of legal work that may be in high demand in the population they serve. However, this ability to specialise means that CLCs are not a substitute for other forms of legal service delivery. Rather, CLCs must be seen as a complement to other modes of delivery, such as the use of legal aid to fund lawyers in private practice. CLCs also have an educational role that may help to address underlying structural problems in the community, ultimately reducing the number of disputes brought to the centre: see Economides, 'Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience' (n 40) 48–9.

⁶⁹ *Ibid.* 48.

⁷⁰ Smrdel (n 32) 5. Other potential models for delivery of legal services to remote and rural areas include: (a) the 'private model' (b) the 'secondment' model (c) the 'urban' model (d) the 'technological' model; and (e) the 'satellite' model: Kim Economides, 'Legal Services and Rural Deprivation' (1982) 15(1) *Bracton Law Journal* 41, 61–5.

In Australia, aircraft may be used to fly lawyers into remote communities.⁷¹ Normally, such visits are timed to coincide with the circuit court. The Northern Australian Aboriginal Justice Agency (which subsumed the Katherine Regional Aboriginal Legal Aid Service in 2005) also uses aircraft during the wet season to provide continuous legal assistance and representation to remote communities including Pine Creek in the north, Kalkaringi and Larramah in the south, Ngukurr in the east, and Timber Creek in the west.⁷²

In Canada, due to extreme Arctic weather, part-time satellite legal clinics have been established in rural and remote communities.⁷³ Interdisciplinary partnerships between CLCs and intermediary groups are also being explored. One such initiative is the Halton Community Legal Services Legal Health Check-Up Project, which helps staff within seven intermediary groups to ‘problem spot’ client legal issues and refer them to the CLC when appropriate.⁷⁴ According to one early evaluation of the project, the Halton Community Legal Service has increased its clientele by one-third through the use of the Check-Up tool, which indicates that this may be an effective strategy for targeting inaccessible populations.⁷⁵

The situation is different in Brazil, where CLCs almost exclusively exist in the southern states. CLCs are more appropriate in the smaller southern states as there is relatively good coverage of courts there.⁷⁶ However, in the northern states, where

⁷¹ For example, the Northern Australian Aboriginal Justice Agency ‘travels to 36 Aboriginal communities and remote circuit bush courts’, with a substantial amount of travel by air to service these communities: Email from David Woodroffe, Principal Legal Officer, Northern Australian Aboriginal Justice Agency to Aaron Timoshanko (n 47). See also, the Carnarvon Flying Duty Solicitors Service operated from August 2005 until 2011–12 to service the Carnarvon magistrates’ circuit: Legal Aid Western Australia, *Annual Report 2005–2006* (Report, 2006) <https://www.legalaid.wa.gov.au/sites/default/files/Annual_Report_2005-06.pdf> (*Annual Report 2005–2006*). A former Chief Justice of the High Court of Australia took part in a similar flying lawyer service in the 1970s operated by the Law Society of Western Australia: Robert French, ‘Law and Justice Outside the CBD’ (2011) 16(1) *Deakin Law Review* 1, 6; ‘Court Up North’, 7:30 *Northern Territory* (Australian Broadcasting Corporation, January 2013) 0:02:46 <<http://www.abc.net.au/news/2013-10-08/court-up-north/5009438>>. This circuit covered Paraburdoo, Tom Price, Onslow and Exmouth, all of which are classified as remote or very remote communities in Western Australia: Legal Aid Western Australia, (n 71) 15. The Flying Duty Solicitors Service was decommissioned with the establishment of a satellite office by Legal Aid Western Australia in 2011–12: Legal Aid Western Australia, *Annual Report 2011–2012* (Report, 27 August 2012) 26 <https://www.legalaid.wa.gov.au/sites/default/files/Annual_Report_2011-12.pdf> (*Annual Report 2011–2012*).

⁷² O’Brien and Woodroffe (n 49) 20.

⁷³ Five County Connecting Region Project, *Paths to Justice: Navigating with the Wandering Lost* (Report and Recommendations, March 2011) 1, 9.

⁷⁴ Canadian Forum on Civil Justice (n 18) 47.

⁷⁵ *Ibid* 47–8.

⁷⁶ Instituto de Pesquisa Econômica Aplicada (n 17) 22.

there are fewer permanent courts, efforts have mainly focussed on developing itinerant justice programs.⁷⁷

CLCs located at or frequenting communities at the legal periphery can play a similar role to itinerant courts in the next access to justice wave. One point of difference, however, is that CLCs can be more strategic and advocate for structural reform. CLCs are uniquely placed to agitate for reform as they understand the underlying issues faced by their clients and how local forms of social organisation may be adapted to overcome these challenges.

C Technology

In Australia, information technology may be used for ‘directions hearings, pre-trial conferences, chamber applications, and applications for special leave to appeal’, or as an alternative to circuit hearings.⁷⁸ Video-conferencing has also been used to deliver interpreter services.⁷⁹ Under the National Broadband Network (‘NBN’) Regional Legal Assistance Program, the Attorney-General’s Department provided grants to enable ‘legal assistance providers to trial NBN based initiatives that strengthened and increased legal assistance delivery in regional areas’.⁸⁰ For example, a program grant allowed the Welfare Rights Centre (South Australia) Inc to extend its Housing Legal Clinic to regional, rural and remote communities through a program grant and NBN enabled webcam communication.⁸¹ It is also anticipated that online access to alternative dispute resolution is likely to increase with the proliferation of information technology.⁸²

In Canada, technology is helping address the lack of legal service delivery in some areas.⁸³ The Ontario Government’s Justice Video Network has 200 videoconferencing sites and has been used for ‘everything from case conferencing and sign language interpretation, to solicitor-client hearings and training sessions’.⁸⁴ Videoconferencing has also been used by the Western Canada Society to Access Justice organization to operate several CLCs in remote areas of British Columbia.⁸⁵ It is hoped that these tele-legal initiatives will reduce the costs of legal service delivery or enable lawyers to expand their practice into a broader geographical area, or both,

⁷⁷ Ibid.

⁷⁸ Anne Wallace, “‘Virtual Justice in the Bush’: The Use of Court Technology in Remote and Regional Australia” (2008) 19(1) *Journal of Law, Information and Science* 1, 3.

⁷⁹ Ibid 4.

⁸⁰ National Association of Community Legal Centres, ‘Working Smarter: Community Legal Centres Using Innovation and Technology’ (Newsletter, 2015) 8 <http://www.naclc.org.au/resources/NACLCLC_TECH_WEB2.pdf>.

⁸¹ Ibid 9.

⁸² Giddings, Hook and Nielsen (n 33) 61.

⁸³ See Baxter and Yoon (n 18) 13, 26, 51.

⁸⁴ Canadian Forum on Civil Justice (n 18) 49.

⁸⁵ Ibid.

thereby helping to reduce some of the barriers to access to justice in regional, rural and remote communities.⁸⁶

The use of technology in the Brazilian judicial system has been growing recently, but remains in its infancy. The *Civil Procedural Code 2015* (Brazil) provides that ‘the practice of procedural acts through videoconference or other technological resource for transmitting sounds and images in real time is allowed’.⁸⁷ Similarly, the *Criminal Procedure Code 1941* (Brazil) – with the alterations given in 2009 by Law n 11.900 – also permits hearings via videoconference,⁸⁸ but only in exceptional cases (for example, highly dangerous criminals or inmates in federal prisons). Further, the National Council of Justice has now ruled that videoconferencing is not permitted for the first hearing of an arrested defendant (*audiência de custódia* or ‘custody hearing’).⁸⁹ This decision by Minister Toffoli (President of the Supreme Federal Court of Brazil and the National Council of Justice) suggests that, given the restrictive interpretation of the *Criminal Procedure Code*, use of videoconference technology will be more limited in criminal cases, at least for the foreseeable future.

Looking further ahead, the use and proliferation of technology in law and legal service delivery may also serve as a means through which law at the periphery can be communicated to the legal centre. Previously the tyranny of distance kept the two legal spheres separate and technology facilitated the extension of the general legal system to the periphery. The counter-wave could leverage the same technology to enable the dual flow of legal principles and knowledge between the centre and periphery.

D *Legal Pluralism and Current Recognition of First Law*

The counter-wave we identify asks, what may the general legal system learn from the legal customs and traditions at the periphery? The counter-wave, however, is not synonymous with legal pluralism as the latter envisions a co-existence of two or

⁸⁶ Baxter and Yoon (n 18) 13; Canadian Forum on Civil Justice (n 18) 49.

⁸⁷ *Código de Processo Civil* [Civil Procedure Code] 2015 (Brazil) art 236(3) [tr author]. See generally Katia Balbino de Carvalho Ferreira, ‘The Electronic Process in the Brazilian Judicial System: Much More Than an Option; It Is a Solution’ in Karim Benyekhief et al (eds), *EAccess to Justice* (University of Ottawa, 2016) 337.

⁸⁸ *Código de Processo Penal* [Criminal Procedure Code] 1941 (Brazil) art 185 [tr author].

⁸⁹ ‘Pauta de Julgamento da 58ª Sessão do Plenário Virtual: 05/12/2019 a 13/12/2019’ [Judgment of the 58th Session of the Virtual Plenary Session: 05/12/2019 to 13/12/2019], *Conselho Nacional de Justiça* [National Council of Justice] (Web Page, 29 November 2019) [34] <<https://www.cnj.jus.br/pauta-de-julgamento-da-58a-sessao-do-plenario-virtual-05-12-2019-a-13-12-2019/>> [tr author]. Prior to the COVID-19 pandemic videoconferencing was limited, though some states such as the State of Rio de Janeiro had a group of public defenders specially assigned for videoconferencing hearings. However, this has totally changed as a result of the pandemic and all ‘custody hearings’ in the State of Rio de Janeiro are now held by videoconference, as will be all criminal hearings after 15 May 2020: Email from Diogo Esteves (Public Defender in the State of Rio de Janeiro) to Kim Economides, 1 May 2020.

more normative orders, with neither being subservient nor dominant over the other, or even assuming that they are connected.⁹⁰ By contrast, the counter-wave is more limited in scope and focuses just on the recognition, if not integration, of specific legal principles and practices whose source originates from the periphery. Such legal principles and practices may improve, *inter alia*, mainstream access to justice by offering reformers an untapped resource for finding new ways to overcome barriers to justice, or even re-defining the justice problem itself by raising the question of what it is that citizens are able to access.

Legal pluralism may confront a number of other challenges, some quite serious, by reinforcing a perception of preferential or differential treatment which potentially undermines the notion of equality before the law, if not the rule of law itself. Non-First Nations peoples, for example, may consider some forms of traditional punishment as either too lenient or too extreme when evaluated against Western values. This was evident in the early Australian case law on *inter se* cases discussed below. There is also the temptation to romanticise legal pluralism as a form of ‘fireside equity’; specifically, the notion that pluralism is a progressive force for good.⁹¹ This is not always the case.⁹² First Law may seek to apply traditional values, which may be discriminatory, oppressive or offend basic human rights.⁹³ McRae et al cite a case where several Indigenous youths were banished for life from their community by the Aboriginal Community Council.⁹⁴ This is a very severe punishment in Aboriginal communities, which was handed down without a hearing, due process, or a lawyer being present.⁹⁵ The decision of the Aboriginal Community Council is also not subject to appeal or otherwise reviewable.⁹⁶ In Brazil, First Law in some groups expect mothers of ‘twins, sick children or children from unwed mothers’ to commit infanticide or face excommunication.⁹⁷ However, this particular concern is premised on First Law remaining frozen in time. In truth, First Law can be and is updated to reflect the changing needs of communities that use First Law and international human rights.⁹⁸

⁹⁰ See Borrows (n 3) 175.

⁹¹ Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 19 *Journal of Legal Pluralism* 1, 25; MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Thomson Reuters, 8th ed, 2008) 1095. See also Mitra Sharafi, ‘Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense’ (2008) 71(2) *Law and Contemporary Problems* 139, 139–40.

⁹² Freeman (n 91) 1095.

⁹³ David Pimentel, ‘Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law’ (2010) 32(2) *Harvard International Review* 32, 35.

⁹⁴ Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 111.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Vozes Indigenas, ‘Breaking the Silence 1/3’, (YouTube, 4 May 2010) 00:02:32 <<https://www.youtube.com/watch?v=IKFpcQB-qzo>>.

⁹⁸ Pimentel (n 93) 35; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 225; Webber (n 21) 586. See generally Jeremy Webber, ‘Legal Pluralism and Human Agency’ (2006) 44(1) *Osgoode Hall Law Journal* 167, 169.

This has occurred in the Brazilian example cited above, where in spite of the protests of the conservative *caciques* (Indigenous political leaders),⁹⁹ the groups that practise infanticide are calling for a change to First Law.¹⁰⁰

Another more serious challenge to legal pluralism comes from legal institutions denying or ignoring other legal orders that exist in their jurisdiction. For example, successive Australian Governments (State and Federal) have explicitly denied the proposition that Australia is a legally pluralist State.¹⁰¹ The Australian Governments' rejection of legal pluralism has attracted much criticism as it ignores the reality that Australia is, and has been, a legally pluralist State since colonisation in 1788.¹⁰²

This was not always the case. In the early 19th century, there was greater willingness to acknowledge First Law, as practiced by Aboriginal and Torres Strait Islander peoples. Early Australian case law saw some members of the judiciary unwilling to apply the general law for offences committed by one Indigenous person against another (referred to as '*inter se*').¹⁰³ Beginning in 1829, the Supreme Court of New

⁹⁹ Vozes Indigenas, 'Breaking the Silence 2/3', (YouTube, 3 May 2010) 00:03:13 <<https://www.youtube.com/watch?v=mPxHwbtloUs>>.

¹⁰⁰ Vozes Indigenas (n 97) 00:07:43; Vozes Indigenas (n 97) 00:04:44; Vozes Indigenas, 'Breaking the Silence 3/3', (YouTube, 3 May 2010) 00:02:22 <<https://www.youtube.com/watch?v=dEvps2xdw2E>>.

¹⁰¹ Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [166]–[168]; McRae et al (n 94) 111–12, 122, 124.

¹⁰² See, eg, Megan Davis and Hannah McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law* (Background Papers No 10, Law Reform Commission of Western Australia, January 2006) 381 <https://www.lrc.justice.wa.gov.au/_files/P94_Background_Papers.pdf>. See also McRae et al (n 94) 111–12.

¹⁰³ Justice Cooper of the Supreme Court of South Australia advised the Government in 1841 that it was not consistent with English law to apply the general law to people who have not had any contact with colonists and who have not submitted themselves to the dominion of the British Empire: Alex C Castles, *An Australian Legal History* (Law Book Co, 1982) 524–5. 'The Case of the Native Larry', *Law and Police Courts, The South Australian Register* (Adelaide, 28 November 1846) 383 reported that Cooper J discharged the accused, stating that legislative direction was required before crimes between Aboriginal people would be justiciable: Debelle (n 3) 94. By 1848, Cooper J had accepted that the Court had jurisdiction over Indigenous people; although prior to hearing another case he stated that he would stay any execution and refer the matter to the Governor if the accused were found guilty: Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [45]. However, attempts to relax the rules relating to the administration of oaths for Indigenous people, the admission of evidence, and enabling Magistrates to award summary punishment for some offences were defeated by hostile legislatures or disallowed by British law officers. The denial of these measures was justified under the rule of law and the concern it would foster prejudices: at [46]. Similarly, Willis J in *R v Bonjon* (Supreme Court of New South Wales, Willis J, 16 September 1841) ('*Bonjon*') noted that there was 'no express law ... that makes the Aborigines subject to our Colonial Code': Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous*

South Wales advised the Attorney-General that it would not apply English law to an Indigenous person accused of killing another Indigenous person because it would be unjust to do so.¹⁰⁴

The issue was considered settled in 1836 when the Full Court of the Supreme Court of New South Wales held in *R v Jack Congo Murrell* ('*Jack Congo*') that English law was to apply where one Indigenous person killed an Indigenous person from another group.¹⁰⁵ The judgment reflects their Honours' concerns about the rule of law and the perception that Indigenous people could otherwise murder with impunity.¹⁰⁶

The decision in *Jack Congo* remains valid law even today, and was reaffirmed 158 years later by the High Court of Australia in *Walker v New South Wales* ('*Walker*').¹⁰⁷ In *Walker*, the High Court of Australia refused to extend the rejection of terra nullius from *Mabo v Queensland [No 2]* ('*Mabo [No 2]*') to the criminal law.¹⁰⁸ The Court held that the criminal law must apply equally to everyone.¹⁰⁹ The official denial of more than one normative order in Australia is also reflected in the Australian Federal Government's refusal to provide wider recognition to First Law, as recommended by the Council for Aboriginal Reconciliation in 2000.¹¹⁰ The Australian Federal Government stated that it believed 'all Australians are equally subject to a common set of laws'.¹¹¹

Law Reporter 410, 425. The potential for causing injustice by applying the general law in *inter se* cases is evident in cases as recent as 1933: Philip Batty, 'Murder, Infanticide and the Moral Certainty of Ernest Kramer' (2013) 37(1) *Journal of the Anthropological Society of South Australia* 107, 123; see also 109, 116, 117–18. The hardship and injustice caused by the imposition of the general law on Indigenous people also led to an unofficial policy of not charging Indigenous offenders for *inter se* killings: Finnane (n 21) 303, 304.

¹⁰⁴ Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [39].

¹⁰⁵ (1836) 1 Legge 72 ('*Jack Congo*'); Castles (n 103) 526; DeBelle (n 3) 93; Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [40].

¹⁰⁶ *Jack Congo* (n 105) 73; Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [40].

¹⁰⁷ (1994) 182 CLR 45 ('*Walker*'). Despite the *Jack Congo* judgment, some members of the judiciary continued to express reservations in imposing the general law in *inter se* cases.

¹⁰⁸ (1992) 175 CLR 1 ('*Mabo [No 2]*'). For an analysis of the High Court of Australia's decision in *Mabo [No 2]*: see Watson (n 3) 42.

¹⁰⁹ *Walker* (n 107) 49–50. See also McRae et al (n 94) 117.

¹¹⁰ McRae et al (n 94) 115, 121, 124.

¹¹¹ *Ibid* 121.

This is problematic as it ignores incontrovertible evidence that First Law exists and still governs some traditionally orientated Indigenous people in Australia.¹¹² First Law provides rules of conduct that govern all aspects of Indigenous social interactions, backed by sanctions and dispute resolution mechanisms,¹¹³ and is therefore another functioning normative order.¹¹⁴ First Law, for Australian Indigenous peoples, is the understanding that ancestral beings gave legal instructions during the ‘Dreaming’ (the creation of country): a period of time that has many names.¹¹⁵ These legal instructions came in the form of ceremonial language and common symbols.¹¹⁶ First Law is a way of living conceived when the First Nation peoples walked across the land, now known as Australia, and sung it into creation.¹¹⁷ For the Aboriginal peoples of the Central Desert Region of Australia, First Law, or *Tnangkarra*, is represented in three layers of law: Traditional *Altjirra* law; Cultural *Tjurunga* Law; and Customary Kinship Law (see Figure 7).¹¹⁸

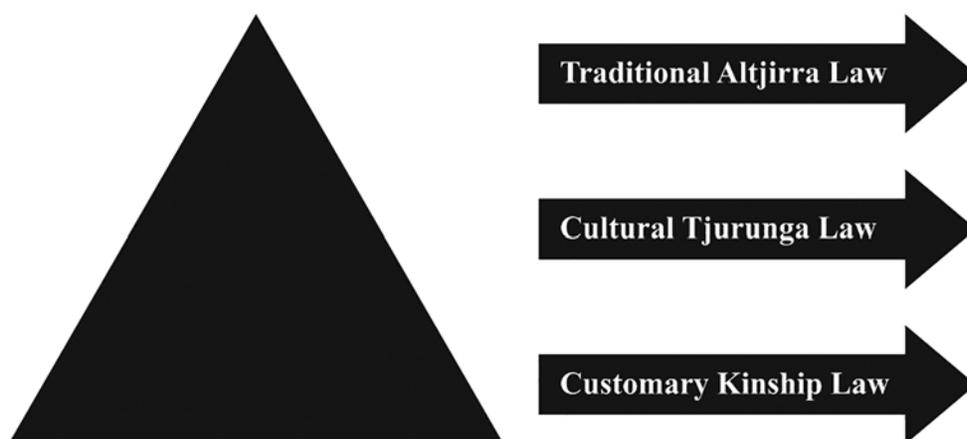


Figure 7: *Tnangkarra*/Dreaming Structural Law

¹¹² Mantziaris and Martin (n 19) 35. See generally Watson (n 3) 12. See also Babie (n 4) 236 who states that failing to recognise and understand the pluralistic legal order ‘is to misunderstand the nature of law itself’.

¹¹³ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [37], [98]; Calma (n 21) 75.

¹¹⁴ Borrows (n 3) 175.

¹¹⁵ Watson (n 3) 22; Mantziaris and Martin (n 19) 36, 40; Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Aboriginal Studies Press, 5th ed, 1988) 364; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 219.

¹¹⁶ Kenneth Lechleitner, ‘What Does Sanctioned Traditional Punishment Look Like?’ (2013) 8(7) *Indigenous Law Bulletin* 7, 8; Watson (n 3) 22.

¹¹⁷ Watson (n 3) 30.

¹¹⁸ Lechleitner (n 116) 7–8.

Vicki Grieves explains the creation of First Law:

The creation ancestors thus laid down not only the foundations of all life, but also what people had to do to maintain their part of this interdependence—the Law. The Law ensures that each person knows his or her connectedness and responsibilities for other people (their kin), for country (including watercourses, landforms, the species and the universe), and for their ongoing relationship with the ancestor spirits themselves.¹¹⁹

While the principles of First Law vary between Indigenous Australian nations, there are some common core concepts that are shared, such as the principle of connectedness.¹²⁰ This sense of interconnectedness means that ‘people, the plants and animals, landforms and celestial bodies are interrelated’.¹²¹ The land is considered a family member, as reflected in the following explanation by Knight:

We don’t own the land, the land owns us. The land is my mother, my mother is the land. Land is the starting point to where it all began. It’s like picking up a piece of dirt and saying this is where I started and this is where I’ll go. The land is our food, our culture, our spirit and identity.¹²²

Uncle Bob Randall, a Yankunytjatjara Elder of Uluru, explains how living an interconnected life means that all beings have a ‘vast family’ and that individuals must take responsibility ‘for this family and care for the land with unconditional love’.¹²³

This denial of legal pluralism in Australia has meant that, to date, First Law has very limited recognition in Australia’s general legal system.¹²⁴ In criminal law, First

¹¹⁹ Vicki Grieves, *Aboriginal Spirituality: Aboriginal Philosophy – The Basis of Aboriginal Social and Emotional Wellbeing* (Discussion Paper No 9, Cooperative Research Centre for Aboriginal Health, December 2009) 7.

¹²⁰ Bob Randall, *Songman: The Story of an Aboriginal Elder of Uluru* (ABC Books, 2003) 16, 17. See Debelle (n 3) 85, 86; Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [32], [37]; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 213; Watson (n 3) 20, 34. See also Jens Korff, ‘What Is Aboriginal Spirituality?’, *Creative Spirits* (Web Page, 8 February 2019) <<https://www.creativespirits.info/aboriginalculture/spirituality/what-is-aboriginal-spirituality>>.

¹²¹ Korff (n 120).

¹²² S Knight, ‘Our Land, Our Life (Poster)’ (Conference Paper, Office of Public Affairs, ATSIC, 1996) <<https://trove.nla.gov.au/version/41296663>>. See also Korff (n 120); Randall (n 120) 223.

¹²³ Global Oneness Project, ‘The Land Owns Us’ (Youtube, 26 February 2009) <https://www.youtube.com/watch?time_continue=281&v=w0sWIVR1hXw>. See also Korff (n 120).

¹²⁴ See Davis and McGlade (n 102) 382.

Law may be recognised in some courts when sentencing an offender,¹²⁵ or in the application of defences such as provocation, duress or a claim of right.¹²⁶ Some recognition of First Law in the general legal system can also be seen through the use of sentencing circles, for example those in Nowra and Dubbo in New South Wales and the Australian Capital Territory, and in Indigenous Courts, such as the Murri (Queensland), Koori (Victoria) and Nunga (South Australia) Courts.¹²⁷ Australian courts have also recognised First Law in accepting the loss of traditional status and privilege as a compensable injury in *Napaluma v Baker*¹²⁸ and *Dixon v Davies*.¹²⁹ Some statutory recognition of First Law is reflected in the legislation that confers land rights based on traditional claims.¹³⁰ Traditional marriage, based on First Law, has also been recognised in adoption legislation (although, not universally).¹³¹

By comparison, Canada is considered multi-juridical due to the constitutional recognition of the common law, civil law and Indigenous legal traditions as valid sources of law within the state.¹³² The acknowledgment of First Law within Canada comes from the constitutional recognition and affirmation of existing treaty rights and the rights for First Nations peoples to implement their unique laws.¹³³

¹²⁵ Calma (n 21) 83. But note, *Crimes Act 1914* (Cth) s 15AB(1)(b) was subsequently passed to prevent customary law and cultural practices from being taken into consideration when determining whether to grant bail and the conditions of any such bail. See Debelle (n 3) 110. See also *Northern Territory National Emergency Response Act 2007* (NT); Jonathon Hunyor, ‘Custom and Culture in Bail and Sentencing: Part of the Problem or Part of the Solution?’ (2007) 6(29) *Indigenous Law Bulletin* 8, 8.

¹²⁶ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [70], [72], [76]–[83]. On the relevance of an offender’s background of profound social deprivation, as it relates to Australian First Nations peoples, see generally: *Bugmy v The Queen* (2013) 302 ALR 192. See also *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

¹²⁷ Mark Harris, ‘From Australian Courts to Aboriginal Courts in Australia — Bridging the Gap?’ (2004) 16(1) *Current Issues in Criminal Justice* 26, 33, 38, 39; Calma (n 21) 84. See also John Borrows, ‘With or Without You: First Nations Law (in Canada)’ (1996) 41 *McGill Law Journal* 629, 655–6 on the Canadian use of sentencing circles as providing some recognition of First Law.

¹²⁸ (1982) 29 SASR 192.

¹²⁹ (1982) 17 NTR 31; Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [70], [73].

¹³⁰ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [76]–[83].

¹³¹ *Ibid* [74]–[75]. See also Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (Routledge, 2013) comparing child welfare delivery frameworks across Australia, Canada, New Zealand and the US.

¹³² Borrows (n 3) 174, 198; Borrows (n 127) 633, 641.

¹³³ Canada Act 1982 (UK) c 11, sch B (‘Constitution Act 1982’) s 35(1). See also Borrows (n 3) 206; Borrows (n 127) 636.

This act of recognition in the Canadian *Constitution* has entrenched the continuing existence of First Law within Canada's legal order.¹³⁴ Although this recognition has only existed since 1982, it is readily acknowledged that 'First Nations laws, legal perspectives and other indigenous frameworks have been present throughout the entire span of the treaty-making process in Canada'.¹³⁵ This formally recognises First Law that originated

in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. Their principles are enunciated in the rich stories, ceremonies and traditions of the First Nations.¹³⁶

One such principle recognised by the First Nations people of Canada is 'the idea of a living Earth, with a set of rights and responsibilities to govern relationships between humans and the natural world'.¹³⁷ Under Mi'kmaq law, for example, animals, plants, insects and rocks are considered persons, and therefore Mi'kmaq persons have legal obligations and duties to these beings.¹³⁸ Similarly, the Haudenosaunee of the Great Lakes have 'maintained a sophisticated treaty tradition about how to live in peace that involved all of their relations: the plants, fish, animals, members of their nations, and members of other nations'.¹³⁹ Many other First Nations in Canada developed similar laws through treaty and agreement, which regulated their interactions throughout their lands.¹⁴⁰ At present, however, the First Nations rights-based approach to natural objects has not been recognised in Canada's general legal system.¹⁴¹

As in Canada, First Law has achieved a measure of formal recognition in Brazil.¹⁴² Brazil's 1988 *Constitution* enshrines the right for indigenous people to live in an

¹³⁴ Borrows (n 3) 180.

¹³⁵ Ibid.

¹³⁶ Borrows (n 127) 646.

¹³⁷ Letter from Lisa Gue, 'Standing Committee on Environment and Sustainable Development', *David Suzuki Foundation* (Letter, 14 March 2017) 4. <<http://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR8834774/br-external/DavidSuzukiFoundation-e.pdf>>. See also Borrows (n 127) 632.

¹³⁸ Gue (n 137) 4.

¹³⁹ Borrows (n 3) 178.

¹⁴⁰ Ibid 178–9.

¹⁴¹ See *ibid* 174; Borrows (n 127) 637.

¹⁴² Although the current Brazilian President, Jair Bolsonaro, appears openly opposed to the interests of Indigenous nations, see 'What Brazil's President, Jair Bolsonaro, has said about Brazil's Indigenous Peoples' *Survival International* (Web Page) <<https://www.survivalinternational.org/articles/3540-Bolsonaro>>. On the existence of legal pluralism in Brazil generally: see Arnaldo Moraes Godoy, 'Globalization, State Law and Legal Pluralism in Brazil' (2004) 36(50) *The Journal of Legal Pluralism and Unofficial Law* 61, 66. For more information about peripatetic programs in Brazil: see Ferraz (n 36). See also Gláucia Falsarella Foley, 'Justiça Comunitária:

ecologically balanced environment,¹⁴³ to have communal standing in court, to allocate and use subsoil resources, rivers and lakes, and the ‘inalienable and indisposible’ right to their traditional lands.¹⁴⁴ Article 231 of the Brazilian Constitution states ‘Indians shall have their social organisation, customs, languages, creeds and traditions recognised, as well as their original rights to the land they traditionally occupy’.¹⁴⁵

Such constitutional protection, including the communal right of standing in court, could be used to protect or enforce principles of First Law within the Brazilian general legal system. However, this has been called into question by art 1 of the *Statute of the Indian 1973* (Brazil), which treats Brazil’s indigenous population as legally incapable of managing their affairs and has integration as its stated goal.¹⁴⁶ While other articles in this statute may have provided some limited recognition of First Law,¹⁴⁷ its overall effect has been to undermine self-determination and autonomy granted under the 1988 *Constitution*.¹⁴⁸

Today, the tutelary regime established under the *Statute of the Indian 1973* (Brazil) no longer has effect since it contravenes higher constitutional provisions. However, because the statute has not been repealed and technically remains in force, some judges have used it to restrict the legal capacity of so-called ‘Indians’ in court.

Uma Realidade’, Tribunal de Justiça do Distrito Federal e dos Territórios (Web Page) <https://www.tjdft.jus.br/informacoes/cidadania/justica-comunitaria/publicacoes/arquivos/uma_experiencia.pdf>.

¹⁴³ Moraes Godoy (n 142) 66.

¹⁴⁴ Valenta (n 27) 645.

¹⁴⁵ Ibid 651. But see, President Bolsonaro has refused to recognise more indigenous lands (as determined by the Constitution of Brazil): Survival International (n 142). See also, Bolsonaro’s speech to UN General Assembly: Ministry of Foreign Affairs, ‘Speech by Brazil’s President Jair Bolsonaro at the Opening of the 74th United Nations General Assembly’ (24 September 2019) <<http://www.itamaraty.gov.br/en/speeches-articles-and-interviews/president-of-the-federative-republic-of-brazil-speeches/20896-speech-by-brazil-s-president-jair-bolsonaro-at-the-opening-of-the-74th-united-nations-general-assembly-new-york-september-24-2019-photo-alan-santos-pr>>.

¹⁴⁶ Valenta (n 27) 647.

¹⁴⁷ Article 56 of the *Statute of the Indian* states that ‘in case of conviction of an Indian for criminal infraction, the sentence shall be attenuated and, in its application, the court must take into account the degree of integration of the Indian’: ibid 648. Article 57 of the *Statute of the Indian* also provides formal recognition to First Law by recognising the penalties handed down by the *cacique/paje* of the tribe, except where the punishment is death: see *Statute of the Indian 1973* (Brazil).

¹⁴⁸ Orlando Villas Bôas Filho, ‘Os Direitos Indígenas No Brasil Contemporâneo’ in Eduardo Bittar (ed), *História Do Direito Brasileiro: Leituras Da Ordem Jurídica Nacional* (Atlas, 2003) 282; Gabriel de Oliveira Silva, ‘O Estatuto Do Índio Frente à Constituição Federal de 1988’, *Jusbrasil* (online, 2016) <<https://gabriel2052.jusbrasil.com.br/artigos/237423120/o-estatuto-do-indio-frente-a-constituicao-federal-de-1988>>; Valenta (n 27) 647.

Therefore, this statutory regime has become, ‘one of the most significant roadblocks to enforcement of any of the ideals afforded to indigenous peoples in the 1988 Constitution’.¹⁴⁹

From a formal point of view, it may appear that there has been a significant shift in policy from an ‘integrationist’ (*Statute of the Indian*) to a ‘protectionist’ (1988 *Constitution*) approach. However, Valenta observes

the fact that the Congress has not been able to repeal ... the Statute of the Indian ... is a good indication of the political and social atmosphere in which the 1988 Constitution operates. [This statute is] representative of the discriminatory practices prevalent in Brazil toward the Indians. The discrepancies in the legal standing of Indians between the Constitution and the relevant statutes are essential to the discussion of indigenous lands, because without a basis for independent legal standing these indigenous peoples are without one of the fundamental purposes of the rule of law: legal redress for enforcement of the rules.¹⁵⁰

To sum up: ‘rule of law problems, political pressures on the executive as well as the judiciary, and societal attitudes have contributed to a hostile environment for indigenous peoples’ in Brazil.¹⁵¹

Despite this hostility, the First Nations peoples of Brazil would appear to share a similar worldview to that of other First Nations peoples, namely that humans and the environment should coexist in harmony.¹⁵² This is encapsulated in the concept of *buen vivir*, (*tekó porã* in Guarani), which means ‘good way of being and living and learning in coexistence with nature.’¹⁵³ *Buen vivir* ‘is sustained in a way of living reflected in daily practices of respect, harmony, and balance with existence. It understands that in life everything is interconnected, interdependent, and interrelated.’¹⁵⁴ For the Guarani people (Indians of Southern Brazil), their conception of *buen vivir* occurs when ‘there is harmony with nature and with members of the community, when there is sufficient food, health and tranquillity, when the ‘divine abundance’ allows reciprocal economy, *jopói*, which translates to, ‘open hands’ of one person to the other.’¹⁵⁵ According to Fleuri and Fleuri, this principle of living in balance and sustainably with the natural world is present in most Amerindian cultures.¹⁵⁶

In addition to highlighting the current levels of domestic recognition in Australia, Brazil and Canada, the above analysis evidences a strong First Nations legal tradition

¹⁴⁹ Valenta (n 27) 648.

¹⁵⁰ Ibid 648; Bôas Filho (n 148) 282; de Oliveira Silva (n 148).

¹⁵¹ Valenta (n 27) 644.

¹⁵² See Fleuri and Fleuri (n 3) 1, 7.

¹⁵³ Ibid 1, 6.

¹⁵⁴ Ibid 6.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

at the periphery from which learning by the legal centre can occur. While Brazil and Canada may provide greater levels of recognition and protection of First Law, these States have not adopted specific legal principles from First Law and adapted them for use within their general legal systems. As discussed, a common principle across Australian, Brazilian and Canadian First Nations is a rights-based approach towards natural objects, which has not been formally recognised in any of these States.

In contrast, the legal system in Aotearoa/New Zealand has demonstrated both alacrity and receptiveness to granting legal personhood to natural objects. This recognises and introduces (albeit imperfectly) an autochthonous worldview into the general legal system through legislation.¹⁵⁷ We focus on this legal principle (granting natural objects personhood status) as it presents a potential partial solution to the over-exploitation of natural resources. This is discussed in more detail in Part IV, along with general benefits associated with the counter-wave. Aotearoa/New Zealand is particularly instructive given the shared history of colonialism and the signing of the *Treaty of Waitangi* with the Māori peoples, which has some similarity to the Canadian experience.

In conclusion, this section has explored how previous ‘waves’ of the access to justice movement have pushed the general law out to the legal periphery through itinerant courts, CLCs and through the use of technology. While providing valuable historical context, the true relevance of these centrifugal forces is as conduits through which the next counter-wave in the access to justice movement can draw legal principles from the periphery into the general legal system. The new counter-wave has also been distinguished from traditional legal pluralism and existing forms of recognition of First Law in Australia, Brazil and Canada. In so doing, the aim has been to avoid known limitations of each approach in order to embrace lessons that can be learnt from First Law. Next, instances are identified where this learning process is already underway.

III EVIDENCE OF AN EMERGING COUNTER-WAVE

In support of our argument that a new access to justice counter-wave has already emerged, we show how the legal fiction of personhood is being applied to natural objects based explicitly on the principles of First Law. Other jurisdictions are also considered, although their reasons for granting natural objects personhood are not founded on First Law. The willingness to extend personhood to natural objects demonstrates the need and utility of this legal principle. Looking to the future, we evaluate the willingness of Australia, Brazil and Canada to grant personhood status to natural objects, and note that Australia appears the most open to change and comes closest to grounding such a development in First Law.

In 2014, the *Te Urewera*, designated as a national park in Aotearoa/New Zealand in 1954, was declared a ‘legal entity’ with ‘all the rights, powers, duties, and liabilities

¹⁵⁷ See Boyd (n 3) xxxii and heralded as ‘almost’ a celebration of First Law: at xxxv.

of a legal person' in an Act of the Aotearoa/New Zealand Parliament.¹⁵⁸ Significantly, the Board that is responsible for acting on behalf of, and in the name of, *Te Urewera* is statutorily required to give effect to First Law and values.¹⁵⁹ In the words of Aotearoa/New Zealand's former Attorney-General, Chris Finlayson, the Act encapsulates the Māori worldview: 'I am the river and the river is me.'¹⁶⁰ Not unlike other First Nations peoples, Māori 'see themselves as being part of nature, and their own welfare and health being reflected back by that of their environment.'¹⁶¹ In Māori culture, all the elements of nature are viewed as kin.¹⁶²

Then, in early 2017, the Whanganui river in Aotearoa/New Zealand was granted the same legal rights, duties and liabilities as a legal person through legislation.¹⁶³ This was the culmination of 140 years of work by the local Whanganui *iwi* (trans: tribe) to have Whanganui legally recognised as their living ancestor.¹⁶⁴ According to the chief negotiator for the Whanganui *iwi*, Gerrard Albert,

[w]e have fought to find an approximation in law so that all others can understand that from our perspective treating the river as a living entity is the correct way to approach it, as [an] indivisible whole, instead of the traditional model for the last 100 years of treating it from a perspective of ownership and management.¹⁶⁵

¹⁵⁸ *Te Urewera Act 2014* (NZ) s 11(1); Jacinta Ruru, 'Tūhoe-Crown Settlement – Te Urewera Act 2014', *Māori Law Review* (Web Page, October 2014) <<http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>>; Boyd (n 3) 134, 148, 150. See also Earth Law Centre, 'New Zealand', Earth Law Center (Web Page, 16 August 2016) <<https://www.earthlawcenter.org/international-law/2016/8/new-zealand>>. The Māori term Aotearoa refers to New Zealand, and usually translates as 'land of the long white cloud'.

¹⁵⁹ *Te Urewera Act 2014* (NZ) ss 17(a), 18(2); Ruru (n 158); Boyd (n 3) 153.

¹⁶⁰ Bryant Rousseau, 'In New Zealand, Lands and Rivers Can Be People (Legally Speaking)', *The New York Times* (online, 13 July 2016) <<https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html>>; Boyd (n 3) 131.

¹⁶¹ Thom Mitchell, 'In New Zealand, The Land Can Be A Person. Meanwhile, in Australia...?', *New Matilda* (online, 8 September 2016) <<https://newmatilda.com/2016/09/08/new-zealand-land-can-person-meanwhile-australia/>>.

¹⁶² Boyd (n 3) 133.

¹⁶³ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14; Eleanor Ainge Roy, 'New Zealand River Granted Same Legal Rights as Human Being', *The Guardian* (online, 16 March 2017) <<http://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>>; Boyd (n 3) 134, 138, 139.

¹⁶⁴ Roy, 'New Zealand River Granted Same Legal Rights as Human Beings' (n 163).

¹⁶⁵ *Ibid.*

Under the legislation, two guardians were appointed to represent the interests of the river; one guardian was appointed from the Crown and the other from the Whanganui *iwi*.¹⁶⁶

Most recently, the Aotearoa/New Zealand government agreed in a Record of Understanding to grant Mount Taranaki, on the west coast of the North Island, personhood status, giving eight Taranaki *iwi* shared guardianship over the mountain.¹⁶⁷ This recognition acknowledges the status of the mountain as an ancestor and *whanau* (trans: family member) for the Taranaki *iwi* within Aotearoa/New Zealand's general law.¹⁶⁸

Aotearoa/New Zealand is not the only State to have drawn upon First Law when granting natural objects rights. Ecuador has granted the natural environment, in general, the 'right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes'.¹⁶⁹ This gives all Ecuadorians the ability to demand the government take action to enforce the rights of nature, including the right to restoration.¹⁷⁰ According to the majority of actors involved in the granting of rights to nature in Ecuador, this development had its 'intellectual origin in indigenous tradition.'¹⁷¹ A similar approach was also subsequently adopted in Bolivia.¹⁷² In both States, the legal texts make specific reference to their First Nations peoples and clearly imply that they are the 'intended guardians of the nations' natural treasures.'¹⁷³

¹⁶⁶ Boyd (n 3) 141; Roy, 'New Zealand River Granted Same Legal Rights as Human Beings' (n 163).

¹⁶⁷ Ngā Iwi o Taranaki and The Crown, 'For Mount Taranaki, Pouākai and the Kaitake Ranges' (Record of Understanding, 20 December 2017) <<https://www.govt.nz/treaty-settlement-documents/taranaki-maunga/>>; Eleanor Ainge Roy, 'New Zealand Gives Mount Taranaki Same Legal Rights as a Person', *The Guardian* (online, 22 December 2017) <<http://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person>>; Derek Cheng, 'Mt Taranaki Will Be Granted Special Legal Status Similar to Te Urewera and the Whanganui River', *NZ Herald* (online, 21 December 2017) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11963982>.

¹⁶⁸ Boyd (n 3) 134; Roy 'New Zealand Gives Mount Taranaki Same Legal Rights as a Person' (n 167); Cheng (n 167).

¹⁶⁹ Georgetown University (n 5) Art 71; Mihnea Tanasescu, 'The Rights of Nature in Ecuador: The Making of an Idea' (2013) 70(6) *International Journal of Environmental Studies* 846, 855.

¹⁷⁰ Tanasescu (n 169) 12; Tanasescu (n 5); Georgetown University (n 5) art 72.

¹⁷¹ Tanasescu (n 169) 2.

¹⁷² 'Law of Mother Earth: The Rights of Our Planet. A Vision from Bolivia', *World Future Fund* (Web Page, 7 December 2010) <<http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html>>. See also Tanasescu (n 5).

¹⁷³ Tanasescu (n 5).

Other states have also granted natural objects personhood status, although in the following cases no reference was made to First Law. In the northern Indian State of Uttarakhand, the Ganges river and its main tributary, the Yamuna, were granted legal personhood in 2017.¹⁷⁴ This ruling is significant for Hindus, who consider the River Ganges sacred.¹⁷⁵ The ruling, designed to redress the lack of government cooperation and inaction, means that government representatives will act as the legal custodians of the river.¹⁷⁶ In Toledo, Ohio, United States of America, a lake's ecosystem was granted personhood status, which enables local residents to sue when the ecosystem's right to flourish has been contravened.¹⁷⁷ Numerous other counties in the USA have also granted natural objects rights.¹⁷⁸ In Colombia, part of the Amazon rainforest was granted rights, which allowed 25 residents to sue the government for failing to protect their right to a healthy environment due to the 44 percent increase in deforestation.¹⁷⁹ While these developments are not the result of centripetal forces drawing First Nations legal principles towards the centre, they nevertheless demonstrate the capacity and utility of legal personhood to provide greater protection to the environment, which is considered further in Part IV.

Australia, Brazil and Canada appear to be becoming more receptive to the granting of personhood status to natural objects. Although no natural object has been granted personhood status in these States yet, there are signs this could occur in the near future. In Australia, a 2017 report by the Australian Panel of Experts on Environmental Law recommended an in-depth exploration of granting natural objects

¹⁷⁴ Michael Safi, 'Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings', *The Guardian* (online, 21 March 2017) <<http://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>>; *Mohd Salim v State of Uttarakhand* (High Court of Uttarakhand, Rajiv Sharma J and Alok Singh J, 20 March 2017) 11 [19].

¹⁷⁵ See *Mohd Salim v State of Uttarakhand* (High Court of Uttarakhand, Rajiv Sharma J and Alok Singh J, 20 March 2017) 4 [11].

¹⁷⁶ *Ibid* 2 [3], [4]; Safi (n 174).

¹⁷⁷ Sigal Samuel, 'Lake Erie Just Won the Same Legal Rights as People', *Vox* (online, 26 February 2019) <<https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio>>.

¹⁷⁸ Kevin Stark, 'How Community-Led "Rights of Nature" Initiatives Are Protecting Ecosystems', *Shareable* (31 August 2017) <<https://www.shareable.net/blog/how-community-led-rights-of-nature-initiatives-are-protecting-ecosystems>> discusses the initiatives in Lincoln county in Oregon, Tamaqua Borough in Pennsylvania and Pittsburgh in Pennsylvania. See also Tanasescu (n 169) 9.

¹⁷⁹ Samuel (n 177); Anastasia Moloney, 'Colombia's Top Court Orders Government to Protect Amazon Forest in Landmark Case', *Reuters* (online, 7 April 2018) <<https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y>>. It is also worth noting the landmark decision of the Peruvian court that has ruled in the language of the Incas: BBC News, 'Peruvian Court Rules in Language of the Incas' (online, 19 July 2019) <<https://www.bbc.com/news/blogs-news-from-elsewhere-49046742>>.

legal personhood.¹⁸⁰ In the same year, the *Yarra River Protection (Wilip-Gin Birrarung murrn) Act 2017* (Vic) was passed, which grants the Wurundjeri people a ‘legislatively-enshrined voice in the formal custodianship of the Birrarung’, also known as the Yarra river.¹⁸¹ Although the Act does not grant the river personhood, the Act recognises the river as a ‘living and integrated natural entity’ and ‘set[s] out principles to which responsible public entities must have regard when performing functions or duties or exercising powers’ on or near the river.¹⁸² The Act also creates the Birrarung Council of which at least two (out of twelve) seats must be nominated by the Wurundjeri Tribe Land and Compensation Cultural Heritage Council (‘WTLCCHC’).¹⁸³ According to the Planning Minister, ‘this would give Wurundjeri elders a ‘central role’ in decisions around development within 500 metres of the river banks.’¹⁸⁴ Assuming the WTLCCHC is able to play a ‘central role’ in the governance and regulation of the river when their representatives may only constitute 16 per cent of the seats on the Birrarung Council, this is likely to improve outcomes for the river and river banks due to the statutory focus on the river as a living and integrated natural entity. This statutory focus aligns with the Wurundjeri’s personification of the river as a person with ‘a heart’ and a ‘spirit’.¹⁸⁵ A similar arrangement is being proposed for the Margaret River, south of Perth, Australia. One important distinction is that if the proposal discussed in the media is successful, the River will be granted personhood status.¹⁸⁶ More recently, a Bill was introduced by a member of the Greens party in the Western Australian Legislative Council that would grant enforceable rights to nature, including all ecosystems, ecological communities and native species.¹⁸⁷ The Bill proposes to grant nature the rights to: naturally exist, flourish, regenerate and evolve; recovery, rehabilitation and restoration; a healthy and stable climate system;

¹⁸⁰ Australian Panel of Experts on Environmental Law, ‘Democracy and the Environment’ (Technical Paper No 8, April 2017) 30–3 <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf>. See also Jane Gleeson-White, ‘It’s Only Natural: The Push to Give Rivers, Mountains and Forests Legal Rights’, *The Guardian* (online, 1 April 2018) <<http://www.theguardian.com/australia-news/2018/apr/01/its-only-natural-the-push-to-give-rivers-mountains-and-forests-legal-rights>>.

¹⁸¹ Calla Wahlquist, ‘“The Dream of Our Ancestors”: Victorian Bill Gives Indigenous Owners Custodianship of Yarra’, *The Guardian* (online, 22 June 2017) <<http://www.theguardian.com/australia-news/2017/jun/22/the-dream-of-our-ancestors-victorian-bill-gives-indigenous-owners-custodianship-of-yarra>>. See also Gleeson-White (n 180).

¹⁸² *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 1.

¹⁸³ *Ibid* s 49.

¹⁸⁴ Wahlquist (n 181).

¹⁸⁵ The preamble to the *Yarra River Protection (Wilip-Gin Birrarung murrn) Act 2017* (Vic). See also address by Wurundjeri Elders in Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2017 (Aunty Alice Kolasa).

¹⁸⁶ Gleeson-White (n 180); ‘Margaret River’, *Australian Centre for the Rights of Nature* (Web Page) <<https://rightsofnature.org.au/communities/margaret-river/>>.

¹⁸⁷ Rights of Nature and Future Generations Bill 2019 (WA).

and a vibrant and biodiverse community of life.¹⁸⁸ First Nations peoples are also given standing to join any proceeding commenced under the Act as custodians of the land.¹⁸⁹ At the time of writing, the Bill has not passed the Legislative Council. Given the Bill's ambitious scope, which could see individuals fined up to \$500,000 or imprisoned for five years, or both, and bodies corporates fined up to \$5,000,000 for violating the rights recognised by the Act,¹⁹⁰ it is unclear whether the Bill will ultimately be successful. In the Northern Territory, First Law and the personhood status of a natural object was recognised for the first time in a negotiated instrument between the Kimberley Traditional Owners in Australia in 2016.¹⁹¹ The Fitzroy River Declaration 'recognises the river as a living ancestral being with a right to life, and includes traditional owners' obligation to protect the river for current and future generations.'¹⁹²

In São Paulo, Brazil, a 2015 draft amendment to the *Lei Orgânica* [Organic Law] (Brazil) was introduced into Parliament that recognises that nature has an 'intrinsic right to life and maintenance of their ecosystem processes.'¹⁹³ Such an amendment, if successful, is not limited to one natural object, such as a river or mountain, but the whole of nature.

While no natural objects have been granted personhood status in Canada, over 140 municipal governments, representing over 15 million Canadians have passed environmental rights declarations.¹⁹⁴ The previously discussed developments in Aotearoa/New Zealand garnered some media attention in Canada,¹⁹⁵ with some questioning whether similar reforms are possible in Canada in the near future.¹⁹⁶

¹⁸⁸ Ibid cl 6(1).

¹⁸⁹ Ibid cls 3(1)(b), 13(2).

¹⁹⁰ Ibid cl 10(2).

¹⁹¹ Gleeson-White (n 180); Kimberley Land Council, 'Kimberley Traditional Owners Unite for the Fitzroy River', *Kimberley Land Council* (Web Page, 15 November 2016) <<https://www.klc.org.au/kimberley-traditional-owners-unite-for-the-fitzroy-river>>.

¹⁹² Gleeson-White (n 180).

¹⁹³ Projeto de Emenda à Lei Orgânica [Draft Amendment to the Organic Law] 04-00005/2015 do Vereador Eduardo Tuma (PSDB) (Brazil) 18 September 2015 [tr author]; Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(1) *Resources* 13, 5.

¹⁹⁴ Gue (n 137) 5.

¹⁹⁵ See, eg, Roshini Nair, 'Giving Legal Rights to Nature, Animals Would Help Protect the Environment, Says UBC Legal Expert', *CBC News* (online, 14 September 2017) <<http://www.cbc.ca/news/canada/british-columbia/giving-legal-rights-to-nature-animals-would-help-protect-the-environment-says-ubc-legal-expert-1.4289285>>; Supriya Tandan, 'How Extending Personhood to Canada's Rivers Could Help Reconciliation', *National Magazine* (online, 18 April 2017) <<http://nationalmagazine.ca/Articles/April-2017/How-extending-personhood-to-Canada-s-rivers-could.aspx>>.

¹⁹⁶ Tandan (n 195).

This section has examined the inclusion of First Law principles into Aotearoa/New Zealand's general legal system through granting personhood status to natural objects. Aotearoa/New Zealand is not the only State to have granted personhood to natural objects. However, it is one State where this legal development was made with explicit reference to First Law. Part III then evaluated whether Australia, Brazil or Canada would grant natural objects personhood status and found all three States open to the prospect. It is therefore possible that Australia, Brazil and Canada could soon enjoy the benefits associated with increased recognition of First Law in the general legal system.

IV BENEFITS OF EMBRACING THE COUNTER-WAVE

Greater recognition of First Law in general legal systems, through embracing the counter-wave, offers at least four main potential benefits for both the centre and periphery. The first benefit relates specifically to access to justice, while the remainder advance broader social and political goals.

First, the counter-wave can improve access to justice by making the legal system more inclusive and meaningful to First Nations people. Access to justice could also be improved by increasing the range of individuals able to represent the interests of natural objects in court.

To understand how the counter-wave could improve access to justice for First Nations peoples, one should first examine how previous waves failed to preserve the autonomy and integrity of First Law. In some cases, well-intentioned efforts to improve access to justice may have been counterproductive by undermining traditional authority structures that support First Law. This is highlighted in the independent report by the Honourable Frank Iacobucci, who found that 'First Nations people observe the Canadian justice system as devoid of any reflection of their principles or values, and view it as a foreign system that has been imposed upon them without their consent.'¹⁹⁷ This statement is made in relation to Canada, a multi-juridical State that constitutionally recognises First Law. It is not unlikely, therefore, that other First Nations people could feel the same or worse in Australia, Brazil or elsewhere. This feeling that the general legal system is 'foreign' makes the legal system less accessible to First Nations people.¹⁹⁸

¹⁹⁷ Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Final Report, Ministry of the Attorney-General, February 2013) [26] <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>. See also Trevor CW Farrow, 'What Is Access to Justice Special Issue: Symposium in Honour of John McCamus, Teaching and Scholarship' (2013) 51 *Osgoode Hall Law Journal* 957, 981.

¹⁹⁸ Human Rights Council, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with*

In contrast, Jacinta Ruru (New Zealand's first Māori law professor) writes in relation to the granting of legal personhood to *Te Urewera*, that the legislation granting personhood is a 'new bi-cultural way of articulating the importance of national park lands for multiple reasons ranging from science to *cultural*.'¹⁹⁹ The legislation recognises the importance of the national park and the First Law that protected it prior to colonisation. The David Suzuki Foundation, relying on the Supreme Court of Canada's acknowledgment 'that reconciliation efforts require integration of indigenous legal concepts into Canadian law', argues that '[a]dding environmental rights and responsibilities to federal statutes could have the powerful effect of weaving indigenous law with common and civil law within our legal system.'²⁰⁰ This weaving or flow between the two legal traditions would make the general legal system more accessible to First Nations peoples,²⁰¹ thereby improving access to justice.²⁰²

Increased recognition of First Law in the general legal system also has the potential to improve access to justice by granting some individuals, as representatives of a tribe or nation, standing to appear in court in order to represent a natural object's interests. The granting of personhood to corporations was a significant development in the regulation of business, which helped drive economic growth in the late 19th century.²⁰³ This gave an artificial non-human entity, a duly registered company, rights and obligations, including the right to sue and be sued in its own name. Companies, as separate legal entities from their owners and/or directors, could be represented in court to defend and represent their own interests. Nevertheless, while corporations have rights, human representatives are still required to enforce these rights. In practice, this means the rights of a company are protected only where the company's rights align with the interests of a human individual (for example, a director or shareholder) who also has standing to appear in court.

The same is true of natural objects granted legal personhood. From an access to justice perspective, it is not the legal entity's own rights that are of interest.²⁰⁴ Rather, it is the overlap between the interests of the legal entity (in this case, a river, mountain or some other natural object) and the interests of First Nations people to defend these interests,²⁰⁵ which improves access to justice. It is the overlapping interests and the

Disabilities (Agenda Item No A/HRC/27/65, United Nations General Assembly, 7 August 2014) 4 [8]. On alienation within the Australian criminal law and marginalisation: see Davis and McGlade (n 102) 382.

¹⁹⁹ Ruru (n 158) (emphasis added).

²⁰⁰ Gue (n 137) 4.

²⁰¹ Human Rights Council (n 198) 7 [20].

²⁰² *Ibid* 22 [6], 23 [17].

²⁰³ See Walter Lippmann, *The Good Society* (Routledge, 2017) 13, quoting Nicolas Murray Butler, President of Columbia University in 1911. See generally Christopher D Stone, 'Should Trees Have Standing — Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450, 452.

²⁰⁴ Cf, for example, Stone (n 203) 456, 458, 473–80.

²⁰⁵ See generally *ibid* 459, 475.

standing in court that the granting of personhood status facilitates, which improves access to justice.

This anthropocentric view is a point of departure from previous scholarship on the granting of personhood to the environment, which considers the intrinsic rights of natural objects.²⁰⁶ In 1972, Stone put forward what was, and still is, a radical proposition: should trees be granted legal standing?²⁰⁷ In that seminal article, Stone argued that departing from the enlightenment worldview that nature is a collection of senseless objects would result in ‘[a] new radical conception of man’s [sic] relationship to the rest of nature would not only be a step towards solving the material planetary problems; there are strong reasons for such a changed consciousness from the point of making us far better humans.’²⁰⁸

In contrast, we argue that by recognising First Nations’ personification of natural objects by granting such objects personhood status, a new legal avenue is created in the general legal system for *individuals with overlapping interest to enforce these rights*. This could improve access to justice by ‘enabl[ing] people to protect their environment, to resolve conflicts that impeded other rights, and to proactively secure rights, all of which contribute to strong natural resource governance.’²⁰⁹ It would also improve access to justice as ‘[i]ndividuals and communities must have the ability and a means through which they can effectively challenge the harmful effects of the dominionist perspective on nature and establish a new legal and moral ethos that protects the environment.’²¹⁰ Without personhood status, the requirement for standing is likely to preclude First Nations people from taking action to protect the environment.²¹¹

Second, the counter-wave could also assist Australia, Brazil, Canada, and other States with First Nations peoples, to comply with their relevant treaty obligations under the *International Covenant on Civil and Political Rights* (‘ICCPR’) and the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).²¹²

²⁰⁶ Ibid 473–80.

²⁰⁷ Stone (n 203).

²⁰⁸ Ibid 495. See also Gleeson-White (n 180).

²⁰⁹ Nigel Crawhall and Allison Silverman, ‘Access to Justice and the Right to Sustain Nature’ (Working Paper, International Union for Conservation of Nature: Commission on Environmental, Economic and Social Policy, December 2016) 33, 6.

²¹⁰ Ibid 7. See also Stone (n 203) 493.

²¹¹ See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc* (2006) 94 SASR 357. But see *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492.

²¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, 107th pen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007)

The ICCPR and UNDRIP provide some protection to First Law through provisions regarding the right to self-determination and minority rights.²¹³ Australia ratified the ICCPR in 1980, whereas Brazil and Canada accessioned in 1992 and 1976 respectively. Article 1 of the ICCPR contains the right to self-determination, stating:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²¹⁴

Article 27 of the ICCPR provides implicit protection for First Law, if one considers its practice of First Law to be an expression of culture or religion. The Article states:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.²¹⁵

The UNDRIP contains several provisions that grant First Nations peoples a right to live autonomously and according to their culture and traditions, which includes their legal institutions.²¹⁶ The most relevant provisions state:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.²¹⁷

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

(‘UNDRIP’). See generally Babie (n 4) 237 who states that the ‘new legal narrative emerging globally around Aboriginal law ... is part of supranational, sub-national, and trans-national legal relations’.

²¹³ See also Watson (n 3) 38; Human Rights Council (n 198) 5 [11] on UNDRIP affirming the ‘right of indigenous peoples to maintain and strengthen their own juridical systems’, citing arts 34, 5, 27 and 40.

²¹⁴ ICCPR (n 212).

²¹⁵ Ibid.

²¹⁶ Human Rights Council (n 198) 5 [11], 21 [2], [5].

²¹⁷ UNDRIP (n 212); Megan Davis, ‘Putting Meat on the Bones of the United Declaration of the Rights of Indigenous Peoples’ in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians: Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 265.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give *due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned* and international human rights.²¹⁸

Australia, Brazil and Canada have all approved the UNDRIP.²¹⁹ Therefore, all three States support the international framework that aspires to give greater expression and recognition to First Law. As noted above, all three States (to a lesser or greater extent) can improve the formal recognition and protection granted to First Law. Depending on how States implement the above obligations domestically, it is possible that greater compliance with the ICCPR and UNDRIP will improve access to justice. If the States' general legal system is open and receptive to the counter-wave, greater compliance with the relevant provisions of the ICCPR and UNDRIP will make the general legal system more accessible and increase standing for First Nations.

Third, one of the most significant existential questions facing humanity is the over-exploitation of resources in our biosphere. This is enabled by 'today's dominant culture and the legal system', which supports the pursuit of endless growth and the assertion of 'human superiority and universal ownership of all land and wildlife'.²²⁰

This worldview is leading to the sixth mass extinction in Earth's 4.5-billion-year history.²²¹ Every year, more species are declared extinct or in danger of extinction.²²² The Great Barrier Reef, for example, is deteriorating due to 'climate change, pollution from land- and marine-based human activities, shipping and excessive tourist traffic'.²²³ The deteriorating condition of the reef led the United Nations Educational, Scientific, and Cultural Organization ('UNESCO') in 2012 to threaten to downgrade the Reef's World Heritage status to 'at risk' if immediate steps were not taken.²²⁴ In Brazil, almost 20 per cent of the Amazon rainforest has been cleared due

²¹⁸ UNDRIP (n 212) (emphasis added).

²¹⁹ Initially, Australia and Canada voted against adopting the declaration in 2007 (along with New Zealand and the United States of America), but later reversed their position demonstrating their support for the declaration. See United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples', *UNDESA Divison for Inclusive Social Development — Indigenous Peoples* (2018) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

²²⁰ Boyd (n 3) xxxiv.

²²¹ *Ibid* xxi.

²²² *Ibid*.

²²³ *Ibid* 203.

²²⁴ *Ibid*.

to deforestation since 1970.²²⁵ Whereas in Canada, in 2006, threats to 488 species categorised as ‘extinct, extirpated, endangered, threatened, or of special concern’ were quantified by researchers.²²⁶ Habitat loss caused by human activities was the most significant threat (84 percent) to these species, however, overexploitation (32 percent) was a ‘particularly important’ threat.²²⁷

According to environmental lawyer and scholar David Boyd, ‘[h]umans are damaging, destroying, or eliminating entire ecosystems, including native forests, grasslands, coral reefs and wetlands. Ancient, complex, and vital planetary systems — the climate, water, and nitrogen cycles — are being disrupted by our actions.’²²⁸ Alarming, ‘humanity’s collective ecological footprint is estimated to be 1.6 Earths, meaning we are using natural goods and services 1.6 times faster than they are being replenished.’²²⁹ The current dominant worldview creates an insatiable drive for economic growth for governments and businesses alike, which ‘consistently trumps concerns about the environment.’²³⁰ Nature is viewed as a ‘thing’ to be ‘dominated, appropriated and commoditised.’²³¹ So-called ‘development’ and ‘modernisation’ are premised on the overexploitation of natural resources and unsustainable consumption,²³² creating an irreconcilable conflict between industry and environmental protection.²³³

What is required is a different ‘approach rooted in ecology and ethics’,²³⁴ which First Law offers. The autochthonous worldview is ‘the opposite of the dominant perspective in the capitalist mode of production, which seeks to exploit the land and turn it into property and its products, into merchandise.’²³⁵ In Guarani cosmology, the notion that land is an object to be owned and traded is inconceivable because the Earth has its own life because it ‘cannot move to anywhere and cannot be

²²⁵ As of 2019: Rhett Butler, ‘Calculating Deforestation in the Amazon’, *Mongabay* (Web Page, 14 September 2019) <http://rainforests.mongabay.com/amazon/deforestation_calculations.html>.

²²⁶ Oscar Venter et al, ‘Threats to Endangered Species in Canada’ (2006) 56(11) *BioScience* 903.

²²⁷ *Ibid.*

²²⁸ Boyd (n 3) xxi–xxii. See also Stone (n 203) 492.

²²⁹ Boyd (n 3) xxii.

²³⁰ *Ibid* xxiii.

²³¹ Fleuri and Fleuri (n 3) 6.

²³² *Ibid.*

²³³ See Boyd (n 3) xxxiv.

²³⁴ *Ibid* xxxiv. In a similar vein, Babie (n 4) 261 considers what can be learnt from Native Hawaiian law to help promote more productive relationships with land and resources. See also John Alder, ‘Fundamental Environmental Values and Public Law’ in Kim Economides et al (eds), *Fundamental Values* (Hart Publishing, 2000) ch 13 for a discussion of anthropocentric, ecocentric and individualistic non-anthropocentric ethical perspectives on the environment.

²³⁵ Fleuri and Fleuri (n 3) 5.

transported by humans.²³⁶ As the planet sustains human life, humans need to care for and respect nature to promote their survival.²³⁷ According to Eliel Benites, a former Kaiowá-Guaraní student and current Professor in the Federal University of Grande Dourados (UFGD), Brazil, ‘a very important dimension in the autochthonous way of life is the holistic ecological worldview: the world is a living being and the human being is a living part of this world.’²³⁸ The Earth is often seen as a mother in Brazilian indigenous cultures, which ‘protects and nurtures life through a practice of giving and reciprocity. Just as nature cares for and makes human life possible, human beings, by reciprocity, are invited to care for and protect nature.’²³⁹

As described earlier, for many First Nations people the relationship between humans and the environment (including animals and natural objects, such as rivers and mountains) is one characterised by reciprocal rights and responsibilities.²⁴⁰ The *Haida* people, whose territory spans between British Columbia, Canada, and Alaska, United States of America, conceptualise nature in familial terms. Terri-Lynn Williams-Davidson, a *Haida* lawyer and artist, stated that in the *Haida* worldview, a ‘cedar tree is known as ‘every woman’s sister,’ providing for and sustaining our existence.’²⁴¹ If non-First Nations societies were to adopt greater respect for nature this would result in dramatic changes in human attitudes towards natural objects, such as forests, rivers and lakes.²⁴² This would likely result in the environment being used in a more sustainable way,²⁴³ which would help address some of the challenges faced by the overexploitation of the natural environment. According to anthropologist, Eduardo Viveiros de Casto:

[w]e must learn from indigenous people ‘how to live in a country without destroying it, how to live in a world without demolishing [it] ... The original peoples have much to contribute to a more democratic and diverse country.’²⁴⁴

This approach is also advanced by conservationist and writer Aldo Leopold, who stated ‘[c]onservation is getting nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us.’²⁴⁵ Leopold offers, as a solution: ‘[w]hen we see land as a community to which

²³⁶ Ibid 6, citing Eliel Benites, *Fronteiras Etno-Culturais e Fronteiras da Exclusão: Desafio da Interculturalidade e da Equidade* (Unpublished Report, September 2002).

²³⁷ Ibid.

²³⁸ Ibid 5.

²³⁹ Ibid 6.

²⁴⁰ Boyd (n 3) xxx.

²⁴¹ Ibid.

²⁴² See *ibid* xxxi.

²⁴³ Ibid 143 on the Māori’s ‘special relationship with the natural world’, including the Māori’s guardianship of the Whanganui river. See also Babie (n 4) 261.

²⁴⁴ Quoted in Fleuri and Fleuri (n 3) 5.

²⁴⁵ Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (Oxford University Press, 1972) viii. See also Boyd (n 3) xxxv.

we belong, we may begin to use it with love and respect.’²⁴⁶ This is how First Nations people view the natural world, as enshrined in First Law. First Law offers a radically different and much-needed approach to conceptualising society’s relationship to the natural world. It is this worldview that we argue the legal centre may learn and benefit from through the counter-wave.

The fourth benefit of the counter-wave is that through greater recognition of First Law within the general legal system a new path to reconciliation may be possible.²⁴⁷ Greater receptivity of the legal centre to First Nations perspectives could be ‘used as a genuine move towards reconciliation.’²⁴⁸

To facilitate reconciliation, however, proper acknowledgment and restitution must be made for past wrongs.²⁴⁹ Previous attempts to address access to justice issues through proactive legal service delivery have also deepened the trauma caused by colonisation and dispossession experienced by First Nations peoples. This is especially true in States where inadequate legal protections exist for the continuation of First Law. According to the Expert Mechanism on the Rights of Indigenous Peoples, ‘[t]he traditional justice systems of indigenous peoples have largely been ignored, diminished or denied through colonial laws and policies and subordination to the formal justice systems of States.’²⁵⁰ In Australia’s First Nations communities, for example, traditional authority and First Law was ‘markedly affected by the process of settlement and dispossession’,²⁵¹ which included the reception of the general law from Britain through the defunct declaration of terra nullius. The imposition of the general law into traditionally orientated Aboriginal and Torres Strait Islander communities undermined (and continues to undermine) traditional authority structures, affecting long standing cultural norms.²⁵² This effect has been noted by the National Alternative Dispute Resolution Advisory Council in Australia, which states that although some customary forms of dispute resolution are still practiced in some communities, colonisation ‘has weakened many traditional ways of resolving disputes’.²⁵³ Similarly, in Canada, First Laws ‘have often been ignored or overruled by non-indigenous laws. [First Law’s] influence has thus been eroded within indigenous

²⁴⁶ Leopold (n 245) viii. See also Boyd (n 3) xxxv. See generally Bawaka Country et al, ‘Co-Becoming Bawaka: Towards a Relational Understanding of Place/Space’ (2016) 40(4) *Progress in Human Geography* 455.

²⁴⁷ Ruru (n 19) 290. See also Human Rights Council (n 198) 17 [74] on the use of restorative justice processes, informed by customary law, to facilitate greater indigenous self-determination.

²⁴⁸ Gleeson-White (n 180), quoting Erin O’Donnell, who was discussing the collaboration between First Nations representatives and other stakeholders of the Yarra river working together for the conservation and preservation of Birrarung (Yarra) river.

²⁴⁹ Ruru (n 19) 289, quoting Canadian indigenous Professor Taiaiake Alfred.

²⁵⁰ Human Rights Council (n 198) 4 [8].

²⁵¹ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [30].

²⁵² Watson (n 3) 5.

²⁵³ National Alternative Dispute Resolution Advisory Council (n 3) 3.

communities.²⁵⁴ One example of this is the application of Crown title, which has dispossessed First Nations people of their lands.²⁵⁵

In spite of this, First Law survives and is practised by some First Nations peoples. The Expert Mechanism on the Rights of Indigenous Peoples notes that ‘[d]espite the historical injustices that indigenous peoples have faced, the values and ideals of their legal systems have survived thanks to the resilience of the peoples themselves, and the close relationship between indigenous law and the land.’²⁵⁶ This is affirmed by Irene Watson, a Tanganekald, Meintangk-Bunganditj woman and scholar, who writes that ‘[o]ur Nunga law ways are still with us but they are suppressed by the Australian state.’²⁵⁷ The Australian Law Reform Commission also acknowledged that ‘Aboriginal customary law [has] demonstrated a capacity for survival and modification’,²⁵⁸ with behavioural norms changing in response to colonisation, rather than the laws. In Canada, ‘indigenous peoples stories, ceremonies, teachings, customs and norms often flow from very specific ecological relationships, and [therefore remain] interwoven with the world around them.’²⁵⁹

The capacity for the counter-wave to promote reconciliation is evident in the words of First Nations peoples when discussing the general legal system’s recognition of their relationship with the land. In relation to Aotearoa/New Zealand, Ruru states that ‘[i]f settler legal systems wish to realise aspirations for legal reconciliation with indigenous peoples, then an important component of this is to recognise indigenous peoples’ laws.’²⁶⁰ Similarly, Wurundjeri Elder, Aunty Alice Kolasa, acknowledged in her historic address to Parliament the ‘shared path of recognition, rights and repatriation and reconciliation’ that the passing of the *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) represented.²⁶¹ By recognising areas where the general legal system may learn from First Law and First Nations perspectives, colonising communities demonstrate their respect for the ancient legal traditions and help forge meaningful pathways for reconciliation.

The recognition of First Nations peoples’ personification of nature through the granting of personhood status in the general legal system is just one example of the centripetal action of the counter-wave. There are, no doubt, other principles in First

²⁵⁴ Borrows (n 3) 196.

²⁵⁵ Ibid.

²⁵⁶ Human Rights Council (n 198) 4 [6].

²⁵⁷ Watson (n 3) 16, 29. Some anthropologists claim that the songs (including law songs, which transfer customary law to new generations) have been lost, however, Watson states that the law continues to remain omnipresent in Indigenous communities and cannot be eradicated: at 32–3, 40.

²⁵⁸ Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 225–6.

²⁵⁹ Borrows (n 3) 196.

²⁶⁰ Ruru (n 19) 290.

²⁶¹ Victoria (n 185) 2018.

Law that may benefit both the centre and periphery if they were incorporated into the general law.²⁶² However, given the experience of many First Nations peoples in Australia, Brazil and Canada, it is understandable that there is a reluctance to share culturally sensitive information with non-First Nations peoples.²⁶³ Historic abuse by settlers in these States and their failure to acknowledge past wrongs has contributed to an environment of distrust.²⁶⁴ Reluctance to share principles from First Law may also be borne from a fear of losing control over one's own traditions and of cultural appropriation of their Law.²⁶⁵ This knowledge and wisdom, stripped of its cultural context, could be seen as another attempt at cultural assimilation.

In fact, the very expectation that the centre should have access to First Law in a form that is accessible and understandable to settler societies is itself an exercise of privilege. Even if concerns of cultural appropriation can be overcome, to properly understand First Law 'require[s] immersion in the ... environment, language, world view, deliberation, and practices of a society'.²⁶⁶ Some have expressed concern that the meaning of First Law may be distorted when it is interpreted outside of those communities.²⁶⁷ Furthermore, intimate knowledge of the culture required to properly understand First Law is unlikely to be acquired merely through academic study. Due to First Law's oral tradition, combined with concerns about cultural appropriation, First Law is both difficult and elusive to research.²⁶⁸ In many First Nations commu-

²⁶² On the potential for First Law to answer 'many of the contemporary challenges Canadian courts encounter', see generally Borrows (n 127) 653–5.

²⁶³ See, eg, Alastair Nicholson, 'Customary Law and Family Law' (1995) 42 (Spring/Summer) *Family Matters* 24.

²⁶⁴ See Farrow (n 197) 982; Nicholson (n 263).

²⁶⁵ See, eg, Australian Law Reform Commission, 'Traditional Aboriginal Society and Its Law' (n 3) 214; Human Rights Council (n 198) 9 [29]–[30].

²⁶⁶ Webber (n 21) 625 proposes a framework for understanding how legal orders are related to their various societies. The article builds upon the pragmatist conception of law developed by Lon Fuller and Gerald Postema, but it goes well beyond their accounts, arguing that their predominantly functionalist approaches are inadequate. Although law does serve to coordinate social interaction, it does so through specific conceptual languages, through particular grammars of customary law. Law can only be understood if one takes those grammars seriously. The article pursues this argument by drawing comparisons between indigenous and non-indigenous legal orders, both to expand the comparative range and to explore what indigenous legal orders can reveal about law generally. It explores the limitations of functionalist accounts (including law and economics).

²⁶⁷ Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37, 64. See also Pimentel (n 93) 35.

²⁶⁸ See generally Watson (n 3) 22, 32; Mantziaris and Martin (n 19) 41–2; Borrows (n 127) 648; Human Rights Council (n 198) 4 [7] acknowledges First Law's oral tradition but notes that it 'may also be legislated through existing traditional institutions'.

nities, certain knowledge and customs are only passed on to select individuals.²⁶⁹ Thus, attempts to codify First Law for the purposes of incorporation into the general legal system could threaten to undermine the authority structures that support it.²⁷⁰

The above risks are significant and understandable. Yet, the granting of personhood to a park, river and mountain in Aotearoa/New Zealand has shown that there is a path that can carefully navigate these risks, resulting in benefits for First Nations people, including improved access to justice. However, there are important historical and cultural differences between Aotearoa/New Zealand and Australia, Brazil and Canada. It is therefore naïve to assume that what has worked in Aotearoa/New Zealand will work, for example, in Australia, which still does not have a treaty with the Aboriginal and Torres Strait Islander peoples. As previously stated, preparatory work may be required to acknowledge past wrongs and create an environment of trust and mutual respect.

V CONCLUSION

This article has highlighted the potential and need for incorporating and recognising First Law within the general legal system in order to directly improve access to justice and indirectly promote other benefits. We describe this centripetal flow of legal knowledge from the periphery to the centre as a counter-wave. While our focus has been on the First Law principle that natural objects should be treated as persons, the counter-wave may also impact on other legal principles and practices found at the periphery.

The counter-wave demands greater receptivity and openness at both the legal epicentre and periphery. First Nations peoples forcibly dispossessed of their ancestral lands and pushed to the legal periphery due to colonisation are understandably reluctant and distrustful of the centre. If First Nations communities can become more open to dialogue (once trust and sufficient protections are in place to protect the ownership and integrity of First Law), increased recognition and reception of First Law into the general legal system could improve access to justice for First Nations people.

Other forms of social organisation at the periphery may also enhance access to justice, assuming that the centre and periphery remain both receptive and open. Further research is required, however, to determine what effect, if any, the imposition of the general law has had on other forms of social organisation existing at the periphery.

²⁶⁹ Watson (n 3) 43; Mantziaris and Martin (n 19) 42. See also Berndt and Berndt (n 115) 338–9; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 214.

²⁷⁰ Harris (n 127) 35. See Watson (n 3) 2, 14, 43; Mantziaris and Martin (n 19) 42–3; Paul Chantrill, ‘The Kowanyama Aboriginal Community Justice Group and the Struggle for Legal Pluralism in Australia’ (1998) 40 *Journal of Legal Pluralism and Unofficial Law* 23, 53.

If the proposed counter-wave is fully embraced, an important logical corollary to the two-way flow of legal knowledge engendered by the counter-wave is the gradual erosion and eventual disappearance of the centre-periphery distinction. Increased sharing of legal principles and practices via the counter-wave should eventually make the very distinction between the centre and the periphery redundant and ultimately strengthen the rule of law through making the legal system both more accessible and equal. This is not to suggest that First Law would be subsumed within the general legal system, or vice versa. First Law would continue to be practiced by the First Nations communities as it has been for thousands of years. But rather, the counter-wave would mean First Law is no longer seen as a separate entity entirely divorced from the general legal system. Common principles and practices shared by parallel legal systems could help forge a new vision that brings citizens and the environment closer together thus promoting greater sustainability, social cohesion and, ultimately, justice.

CAN PARLIAMENT DEPRIVE THE HIGH COURT OF JURISDICTION WITH RESPECT TO MATTERS ARISING UNDER THE *CONSTITUTION* OR INVOLVING ITS INTERPRETATION?

ABSTRACT

The original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation is not entrenched in the *Constitution*. It is conferred upon the High Court by s 30(a) of the *Judiciary Act 1903* (Cth). Parliament enacted s 30(a) pursuant to its power in s 76(i) of the *Constitution* to confer additional original jurisdiction on the High Court. This article examines whether the failure of the framers to entrench the original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation has left its access to those matters vulnerable. It considers one far-fetched possibility — that the interplay between ss 71, 73, 76 and 77 of the *Constitution* may confer upon Parliament the power to create a new federal court with exclusive jurisdiction over matters arising under the *Constitution* or involving its interpretation from which no appeal may be made to the High Court. Ultimately, it argues that, whilst Parliament could attempt to create such a court, it could not rely upon its power in s 73 to prescribe exceptions to the High Court's appellate jurisdiction to oust the High Court's access to constitutional questions, and suggests that s 76(i) should be moved into s 75.

I INTRODUCTION

Consider the following hypothetical series of events. The Australian people become gripped by some kind of fear. They elect to power in each state and the Commonwealth a party with an authoritarian bent. The newly elected Commonwealth Parliament enacts laws that make it an offence to criticise the government. The government issues preventative detention orders for the arrest of its most prominent opponents. These opponents seek relief in the original jurisdiction

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of the High Court. The High Court declares the legislation and arrests to be invalid. It holds that they violate the implied freedom of political communication and separation of powers doctrine. The government reacts by repealing s 30(a) of the *Judiciary Act 1903* (Cth) (*'Judiciary Act'*). Section 30(a) provides: 'In addition to the matters in which original jurisdiction is conferred on the High Court by the *Constitution*, the High Court shall have original jurisdiction ... in all matters arising under the *Constitution* or involving its interpretation'. The Prime Minister, a lawless fool who has never read the *Constitution*, believes that repealing s 30(a) will prevent the government's opponents from invoking the original jurisdiction of the High Court. The government introduces new legislation that in substance is the same as that held to be invalid. Its opponents again seek relief in the original jurisdiction of the High Court. This time they engage ss 75(iii) and (v) of the *Constitution* by suing the Commonwealth and several of its officers. The High Court declares the new legislation to be invalid.

The Prime Minister is enraged and considers stacking the High Court with an additional eight judges loyal to the government. But the Attorney-General advises against that course and presents a more legitimate solution to the problem. The state Parliaments could re-enact the legislation so that neither the Commonwealth nor its officers are party to any consequential litigation. The Commonwealth Parliament could use its power under s 71 of the *Constitution* to create a new federal court. It could confer jurisdiction on this new court with respect to matters arising under the *Constitution* or involving its interpretation, pursuant to its power in s 77(i) to define the jurisdiction of federal courts. It could make the jurisdiction of this new federal court exclusive to that of the courts of the states, pursuant to its power in s 77(ii) to confer exclusive jurisdiction on federal courts. And it could create an exception to the appellate jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation, pursuant to its power in s 73 to prescribe exceptions to the appellate jurisdiction of the High Court.

The effect of this scheme would be to prevent the High Court and state Supreme Courts from enforcing the implied freedom of political communication and the separation of powers doctrine. This unlikely path to oppression appears to be possible because the jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation is not entrenched in the *Constitution*. The jurisdiction of the High Court with respect to those matters is contingent upon s 30(a) of the *Judiciary Act*, set out above. Parliament enacted s 30(a) pursuant to the power conferred upon it by s 76(i) of the *Constitution*. Section 76(i) provides that '[t]he Parliament may make laws conferring original jurisdiction on the High Court in any matter ... arising under this *Constitution*, or involving its interpretation'.¹ Section 76(i) has been described as an 'odd fact of history'.² This is an apt description. It is odd that the original jurisdiction of the High Court over matters arising

¹ *Constitution* s 76(i) (emphasis added).

² Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, October 2001) 258 [12.16] (*'ALRC 2001'*).

under the *Constitution* or involving its interpretation is contingent upon an Act of Parliament.³

This article is about the High Court's jurisdiction with respect to constitutional matters — those 'arising under the *Constitution* or involving its interpretation'.⁴ It examines whether the Commonwealth Parliament really does have the power to bring about the events just described. It does so in seven parts. The first part explains the means by which the High Court accesses constitutional matters. The second provides an analysis of the jurisdiction invoked by constitutional cases heard in the 12 years between 2005 and 2016. The third to seventh parts answer five questions. Why did the framers make the original jurisdiction of the High Court with respect to constitutional matters contingent upon an Act of Parliament? Can Parliament repeal s 30(a) of the *Judiciary Act*? What would happen if Parliament did repeal s 30(a) of the *Judiciary Act*? Can Parliament create a constitutional matter exception to the appellate jurisdiction of the High Court? And can a federal constitutional court truly evade High Court scrutiny? The article concludes by recommending that the jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation be entrenched in s 75.

II THE JURISDICTION OF THE HIGH COURT WITH RESPECT TO CONSTITUTIONAL MATTERS

The High Court hears cases involving matters arising under the *Constitution* or involving its interpretation in both its original and appellate jurisdiction. Its original jurisdiction is contained in ss 75 and 76 of the *Constitution*.

Section 75 provides:

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

³ See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Discussion Paper No 64, December 2000) 46 [2.47] ('ALRC 2000').

⁴ *Judiciary Act* s 30(a).

Section 76 provides:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this *Constitution*, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

These two sections contain the only matters that can be brought at first instance to the High Court.⁵ But they operate in different ways. Section 75 contains the entrenched original jurisdiction of the High Court. The jurisdiction is said to be ‘entrenched’ because it is conferred upon the High Court by the *Constitution* itself. The fact that it is entrenched means that it is beyond the control of Parliament,⁶ and may only be altered or removed via referendum.⁷ Section 76 contains the additional original jurisdiction of the High Court. The jurisdiction is said to be ‘additional’ because the section heading uses that description. Unlike s 75, it does not confer original jurisdiction on the High Court; rather, it confers legislative power on the Parliament to confer original jurisdiction on the High Court.⁸ And it is the exclusive source of that legislative power. Parliament cannot confer original jurisdiction on the High Court in respect of any matter that is not included in s 76.⁹

Section 30 of the *Judiciary Act* confers original jurisdiction upon the High Court in respect of two of the four matters listed in s 76:

In addition to the matters in which original jurisdiction is conferred on the High Court by the *Constitution*, the High Court shall have original jurisdiction:

⁵ *R v The Licensing Court for the Licensing District of Maryborough* (1919) 27 CLR 249, 253 (Knox CJ); *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ), cited in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 542 (Gleeson CJ), 555 (McHugh J), 575 (Gummow and Hayne JJ).

⁶ Commonwealth Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 374 [6.48]; PH Lane, *Lane’s Commentary on the Australian Constitution* (Lawbook, 2nd ed, 1997) 554–5, 595, citing *Commonwealth v New South Wales* (1923) 32 CLR 200, 206–7, 216 (Knox CJ).

⁷ *Constitution* s 128.

⁸ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 595–6.

⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ).

- (a) in all matters arising under the *Constitution* or involving its interpretation; and
- (c) in trials of indictable offences against the laws of the Commonwealth.

By repeating exactly the words of the *Constitution*, s 30(a) fully implements the potential jurisdiction contained in s 76(i).¹⁰ The High Court has original jurisdiction over all matters that arise under the *Constitution* or involve its interpretation.¹¹ In contrast, s 30(c) implements only part of the potential jurisdiction contained in s 76(ii). Rather than conferring original jurisdiction over any matter ‘arising under any laws made by the Parliament’,¹² s 30(c) confers original jurisdiction only with respect to laws that create an indictable criminal offence.¹³

The jurisdiction conferred by s 30(a) of the *Judiciary Act* contains two separate limbs: (1) matters arising under the *Constitution*; and (2) matters involving interpretation of the *Constitution*. According to Lane, in practice there is no need to distinguish between the two, and a party may claim jurisdiction under s 30(a) on either ground in the alternative.¹⁴ But the two limbs of s 76(i) are different. As Latham CJ explained in *Ex parte Barrett*,¹⁵ a matter may arise under the *Constitution* without involving its interpretation, and a matter may involve interpretation of the *Constitution* without arising under it.¹⁶ Matters arising under the *Constitution* are those in which a right, title, privilege or immunity is claimed under the *Constitution*.¹⁷ Matters involving interpretation of the *Constitution* were originally held to be only those matters that presented ‘necessarily and directly, and not incidentally, an issue upon its interpretation’.¹⁸ The modern approach is that where a case may be resolved on several grounds, one of which involves interpretation of the *Constitution*,¹⁹ or where interpretation of

¹⁰ *ALRC 2001* (n 2) 258–9 [12.16]–[12.18]; Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 597.

¹¹ *A-G (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315, 322–3 (Mason, Wilson, Brennan, Deane and Dawson JJ) (‘*Commonwealth Savings Bank*’).

¹² *Constitution* s 76(ii).

¹³ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 602.

¹⁴ PH Lane, *A Manual of Australian Constitutional Law* (Lawbook, 6th ed, 1995) 278. See also W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 5th ed, 1976) 477–8.

¹⁵ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141.

¹⁶ *Ibid* 154 (Latham CJ), cited in Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598.

¹⁷ *James v South Australia* (1927) 40 CLR 1, 40 (Gavan Duffy, Rich and Starke JJ) (‘*James*’), quoted in Lane, *A Manual of Australian Constitutional Law* (n 14) 278.

¹⁸ *James* (n 17) 40 (Gavan Duffy, Rich and Starke JJ).

¹⁹ *Commonwealth Savings Bank* (n 11) 326 (Mason, Wilson, Brennan, Deane and Dawson JJ).

the *Constitution* is ‘essential or relevant’ to a question of statutory interpretation,²⁰ the matter falls within the second limb of s 76(i).²¹

In practice, the original jurisdiction of the High Court under s 30(a) of the *Judiciary Act* may be invoked in two ways. An action involving a constitutional matter may be commenced in the High Court itself; alternatively, a cause or part of a cause involving a constitutional matter pending in another court may be removed to the High Court pursuant to s 40(1) of the *Judiciary Act*. Section 40(1) provides that the High Court may order removal upon the application of a party that shows sufficient cause and shall order removal ‘as of course’ upon the application of the Commonwealth or a state Attorney-General.²² Where a cause or part of a cause involving a constitutional matter is not removed to the High Court, but is determined by the court in which it originated, the matter will fall for determination by the High Court only if one of the parties appeals to the High Court and the High Court grants special leave to appeal.

III EXERCISE OF CONSTITUTIONAL MATTER JURISDICTION IN PRACTICE

According to a compilation of the annual statistical analyses by Andrew Lynch and George Williams,²³ the High Court heard 110 cases involving constitutional matters

²⁰ Ibid 327 (Mason, Wilson, Brennan, Deane and Dawson JJ), citing *Nelungaloo Pty Ltd v Commonwealth* [No 4] (1953) 88 CLR 529, 540–2 (Dixon CJ).

²¹ PH Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598; PH Lane, *A Manual of Australian Constitutional Law* (n 14) 278–9.

²² See, eg, *Commonwealth Savings Bank* (n 11).

²³ Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2005 Statistics’ (2006) 29(2) *University of New South Wales Law Journal* 182; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2006 Statistics’ (2007) 30(1) *University of New South Wales Law Journal* 188; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2007 Statistics’ (2008) 31(1) *University of New South Wales Law Journal* 238; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2008 Statistics’ (2009) 32(1) *University of New South Wales Law Journal* 181; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2009 Statistics’ (2010) 33(2) *University of New South Wales Law Journal* 267; George Williams and Andrew Lynch, ‘The High Court on Constitutional Law: The 2010 Term’ (2011) 34(3) *University of New South Wales Law Journal* 1006; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2011 Statistics’ (2012) 35(3) *University of New South Wales Law Journal* 846; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2012 Statistics’ (2013) 36(2) *University of New South Wales Law Journal* 514; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2013 Statistics’ (2014) 37(2) *University of New South Wales Law Journal* 544; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2014 Statistics’ (2015) 38(3) *University of New South Wales Law Journal* 1078; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2015 Statistics’ (2016) 39(3) *University of*

between 2005 and 2016. Of those 110 cases, 96 were cases in which the Commonwealth or an officer of the Commonwealth was a party,²⁴ and six involved more than one state.²⁵ At first blush, these numbers seem to suggest that repealing s 30(a) of the *Judiciary Act* would be of little consequence — only eight of the 110 constitutional cases heard between 2005 and 2016 were outside the entrenched original jurisdiction of the High Court — and that s 76(i), whilst not a dead letter, is not living a full and prosperous life. However, this suggestion is misleading, as these numbers do not take into account Commonwealth and state intervention.

The Commonwealth and states have the power to intervene in proceedings before the High Court that relate to a matter arising under the *Constitution* or involving its interpretation under s 78A of the *Judiciary Act*. Section 78B provides that notice must be given to the Commonwealth and state Attorneys-General whenever such a case is pending in the High Court. But the case itself must have commenced before intervention is possible. This means that cases where the Commonwealth, an officer of the Commonwealth or more than one state are a party only by intervention are not cases that could have been commenced within the entrenched original jurisdiction.

If the numbers are adjusted to take into account intervention, the true scope of the additional original jurisdiction becomes clearer. Of the 110 cases involving a constitutional matter heard by the High Court between 2005 and 2016, 40 would not have involved the Commonwealth, an officer of the Commonwealth or more than one state if the Commonwealth or a state had not intervened.²⁶ Only two of those 40 cases involved a matter arising under a treaty or affecting consuls or other representatives of other countries.²⁷ This means that the 38 remaining cases could not have been heard in the High Court's entrenched original jurisdiction. The additional original and appellate jurisdictions — both of which are shaped by Parliament — were the High Court's sole source of jurisdiction.

New South Wales Law Journal 1161; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2016 and French Court Statistics' (2017) 40(4) *University of New South Wales Law Journal* 1468.

²⁴ See Appendix A for the list of cases.

²⁵ *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348; *The Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343; *Pollentine v Bleijie* (2014) 253 CLR 629; *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*'); *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232.

²⁶ See Appendix B for the list of cases.

²⁷ *Maloney v The Queen* (2013) 252 CLR 168; *Tajjour* (n 25).

IV WHY DID THE FRAMERS MAKE THE ORIGINAL JURISDICTION OF THE HIGH COURT WITH RESPECT TO CONSTITUTIONAL MATTERS CONTINGENT UPON AN ACT OF PARLIAMENT?

The decision of the framers not to entrench the original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation is often considered to be unusual. For example, the authors of the current edition of *Blackshield and Williams* say in relation to the original jurisdiction of the High Court that ‘[o]ddly, [the] areas of jurisdiction left to Parliament’s discretion include matters ‘arising under the *Constitution*, or involving its interpretation’.²⁸ Similarly, the Australian Law Reform Commission, in its inquiry into the *Judiciary Act*, described the inclusion within s 76 of original jurisdiction with respect to constitutional matters as an ‘odd fact of history’.²⁹ It is easy to understand why s 76(i) comes across as odd. The failure of the framers to entrench the High Court’s jurisdiction with respect to constitutional matters makes it seem as if the framers considered those matters to be less significant than those they did entrench. But this does not appear to be the case. The records of the convention debates contain numerous examples of members referring to the High Court as the ‘guardian’ and ‘interpreter’ of the *Constitution*.³⁰ For example, in the course of a passionate argument against giving the now defunct Inter-State Commission any role in interpreting the *Constitution*, Tasmanian barrister Henry Dobson said:

I have heard every honorable member who is a frequent speaker at this Convention ram home with all his force and weight the fact that the High Court is our guardian, is the interpreter of the *Constitution*, is the tribunal which is there to say whether a state on the one hand or the Commonwealth on the other infringes the principles of the *Constitution*.³¹

If, as Dobson said, the framers rammmed home with all their force and weight the fact that the High Court was to be the interpreter of the *Constitution*, why did they make its original jurisdiction over matters arising under the *Constitution* or involving its interpretation contingent upon an Act of Parliament?

The drafting history of Ch III provides no real answers to that question. The additional jurisdiction first appeared in the first official draft of the *Constitution* prepared by Sir Samuel Griffith for the National Australasian Convention in 1891. The relevant provisions of Griffith’s draft were cls 59, 61 and 63:

²⁸ George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 532 [13.35].

²⁹ *ALRC 2001* (n 2) 258 [12.16]. See also *ALRC 2000* (n 3) 46 [2.47].

³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 297 (Josiah Symon); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2471, 2477 (Edmund Barton).

³¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 February 1898, 1497 (Henry Dobson).

59. The Judicial power of the Commonwealth shall extend—
- (1) To all cases arising under this *Constitution*: ...
- ...
61. In all cases affecting Public Ministers, Consuls, or other Representatives of other Countries, and in all cases in which the Queen in Her capacity as Sovereign of any State or any person sued on behalf of the Queen in the capacity of Sovereign of any State is a party, or in which a Writ of Mandamus or Prohibition is sought against an Officer of the Commonwealth, the High Court shall have original jurisdiction, and in all other cases the High Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Federal Parliament shall authorize.
- ...
63. The Federal Parliament may confer original jurisdiction on the High Court in such other cases within the judicial power of the Commonwealth as it may think fit.³²

These provisions were amended in three relevant ways throughout the remaining conventions. First, the words ‘or involving its interpretation’ were inserted after ‘arising under this *Constitution*’ by the Adelaide Convention held in 1897.³³ This was a significant expansion, as the class of matters arising under the *Constitution* is narrower than the class of matters involving its interpretation.³⁴ Second, the clause setting out the extent of judicial power was removed by the Melbourne Convention held in 1898.³⁵ According to Quick and Garran, the clause was removed because it ‘involved the use of the phrase “judicial power” with exclusive reference to original jurisdiction, and therefore in a different sense than that which it bears in section 71’.³⁶ Third, the clause conferring power on Parliament to confer additional original jurisdiction was expanded to refer to specific matters. This was necessary because it had previously referred to other matters ‘within the judicial power’ — a phrase made redundant by the removal of the clause setting out the scope of judicial power.

None of these changes had any bearing upon the High Court’s original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation. The additional original jurisdiction extended to constitutional matters from the

³² John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 151.

³³ *Ibid* 491.

³⁴ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598.

³⁵ Williams (n 32) 1040–1.

³⁶ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 789.

moment of its invention by Sir Samuel Griffith. There is no evidence from the drafting that the framers ever considered moving constitutional matters into the entrenched original jurisdiction. Nor is there any evidence from the debates — the additional original jurisdiction was barely discussed.³⁷ The framers appear not to have turned their minds to the possibility that failing to entrench original jurisdiction with respect to constitutional matters could jeopardise the High Court's access to constitutional questions. They must have assumed that constitutional matters would arise in the entrenched original jurisdiction or come to the High Court on appeal.

The explanation of s 76 provided by Quick and Garran supports this proposition:

The cases mentioned in [s 76] are cases in which the Convention did not think it absolutely essential, at the outset, that the High Court should have original jurisdiction; but in which, on the other hand, such jurisdiction was appropriate and might prove to be highly desirable.³⁸

This statement provides more insight into ss 75 and 76 than the primary sources. The learned authors suggested that the framers did not think it 'absolutely essential' that the High Court have original jurisdiction over the matters included in s 76. The corollary of this is that the framers did consider it absolutely essential that the High Court have original jurisdiction over the matters contained in s 75. An examination of the text tends to confirm this proposition. The matters contained in s 75 — those arising under any treaty, those affecting consuls and other representatives of other countries, those in which the Commonwealth is a party, those that cross state borders, and those in which writs are sought against officers of the Commonwealth — would likely be beyond the jurisdiction of state courts. That is why it was 'absolutely essential' that they be placed within the entrenched original jurisdiction of the High Court. Failure to place them within the High Court's entrenched original jurisdiction could have led to a situation where there was no court in Australia with jurisdiction to determine disputes relating to those matters. Matters arising under the *Constitution* or involving its interpretation were not entrenched because, to the extent that they do not involve the Commonwealth or a dispute that crosses state boundaries, they may be determined by state courts. It was not absolutely essential to make provision for them in the entrenched original jurisdiction.

³⁷ At the National Australasian Convention in 1891, Henry Wrixon expressed concern that the additional original jurisdiction could be used to oust the states. Andrew Inglis Clark joined in his attempt to have the clause excised. Clark said that he had 'strenuously fought against [the] provision' during the meeting of the Judiciary and Constitutional Committees: see *Official Report of the National Australasian Convention Debates*, Sydney, 1 April 1891, 536 (Henry Wrixon), 547–8 (Andrew Inglis Clark). The retention of the provision suggests that their attempt to excise it failed. But evidence of at least partial success may be found in the Bill submitted by the Drafting Committee on 30 March 1891, in which the clause conferring additional original jurisdiction was visibly struck out: see Williams (n 32) 179, 200.

³⁸ Quick and Garran (n 36) 790.

V CAN PARLIAMENT REPEAL S 30(A) OF THE *JUDICIARY ACT*?

In its inquiry into the *Judiciary Act*, the Australian Law Reform Commission said ‘[t]he High Court’s constitutional role could presumably be diminished by amendment to s 30(a) [of the *Judiciary Act*] unless it could be said that the *Constitution* impliedly prohibits that course’.³⁹ It seems unlikely that the *Constitution* impliedly prohibits repeal of s 30(a) of the *Judiciary Act*. The text is clear. Section 75 contains the matters over which the High Court has original jurisdiction, and s 76 contains the matters in relation to which Parliament ‘may make laws conferring original jurisdiction’. Nevertheless, as the Australian Law Reform Commission has suggested the possibility, it warrants full investigation.

To suggest that Parliament cannot repeal s 30(a) of the *Judiciary Act* seems to suggest that the conferral of power to make laws in 76(i) does not carry with it the power to repeal those laws. In *Kartinyeri v Commonwealth*, Brennan CJ and McHugh J said: ‘[t]he power to make laws includes a power to unmake them’.⁴⁰ If it were otherwise, one Parliament would be able to deny or qualify the power of itself or of a later Parliament.⁴¹ But Brennan CJ and McHugh J also said:

To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question.⁴²

This is a hint that the *Constitution* might in some circumstances limit the power to repeal a law. The question is whether it applies to s 30(a) of the *Judiciary Act*. Is there some implied right, duty or principle in the *Constitution* so powerful that it outweighs the presumption that Parliament can repeal a law enacted under s 76(i)? Two possibilities spring to mind. Neither is convincing.

A Repeal of s 30(a) as a Violation of the Separation of Powers

The first possibility is that repeal of s 30(a) would amount to a violation of the separation of powers. To establish this argument, it would have to be shown that: (1) interpretation of the *Constitution* is an essential element of the judicial power; (2) revocation from the judiciary of an essential element of its powers is inconsistent with the separation of powers; (3) repeal of s 30(a) amounts to revocation of

³⁹ ALRC 2000 (n 3) 46 [2.48].

⁴⁰ (1998) 195 CLR 337, 355, approved in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 373–4 (Gaudron J), 399–400 (McHugh J), 444 (Kirby J), 450 (Callinan J) (*‘Re Pacific Coal’*).

⁴¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 356 (Brennan CJ and McHugh J) (*‘Kartinyeri’*), quoting William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1978) bk 1, 186.

⁴² *Kartinyeri* (n 41) 356 (Brennan CJ and McHugh J). See also *Re Pacific Coal* (n 40) (Gaudron J), 399–400 (McHugh J), 444 (Kirby J), 450 (Callinan J).

the power of the judiciary to interpret the *Constitution*; and, therefore (4) repeal of s 30(a) is inconsistent with the separation of powers.

Proposition (1) is not controversial. The fifth covering clause of the *Constitution* provides that the *Constitution* is ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State’. The *Constitution* is the highest law of the land and binds every part of Australia’s federal system. The judiciary is charged with ensuring compliance with its provisions. To this end, the judiciary has inherent power to review the constitutional validity of legislation. This principle draws from *Marbury v Madison*,⁴³ which has been accepted as ‘axiomatic’ in Australia.⁴⁴

In regard to proposition (2), it is a well-established principle that Parliament cannot confer judicial power on a non-judicial body, or non-judicial power on a judicial body.⁴⁵ This principle perhaps could be extended to prohibit Parliament from revoking judicial power from a judicial body. Consider, for example, the determination of criminal guilt, something that is undoubtedly within the judicial power.⁴⁶ In *Polyukhovich*, the High Court held that Parliament cannot validly enact a bill of attainder due to the separation of powers principle.⁴⁷ A bill of attainder is an Act of Parliament that ‘adjudg[es] the guilt of a specific individual or individuals and impos[es] a punishment upon them’.⁴⁸ By enacting a bill of attainder, Parliament does two things: first, it exercises a power that belongs exclusively to the judiciary; and second, it deprives the judiciary of the opportunity to exercise the power itself. Although the exercise of judicial power by Parliament is typically considered to account for the constitutional repugnancy of a bill of attainder, it may be that ousting the judiciary from the determination of criminal guilt is equally repugnant: if, for example, Parliament enacted legislation that prohibited judges from making determinations of criminal guilt, it would be hard to characterise the legislation as being compatible with the separation of powers.

⁴³ *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) (*‘Marbury v Madison’*).

⁴⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J) (*‘Communist Party Case’*).

⁴⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 270, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) v The Queen; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 540–1. See generally *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 367–73 (Kirby J).

⁴⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 536–9 (Mason CJ), 608–10, 613–14 (Deane J), 647–9 (Dawson J), 685–6 (Toohey J), 706–7 (Gaudron J), 721 (McHugh J) (*‘Polyukhovich’*).

⁴⁷ *Polyukhovich* (n 46) 536–9 (Mason CJ), 609, 612–14 (Deane J), 647–8 (Dawson J), 685–6 (Toohey J), 706–7 (Gaudron J), 721 (McHugh J).

⁴⁸ *Ibid* 536 (Mason CJ).

The same reasoning could be applied to interpreting the *Constitution*. If Parliament enacted legislation that prohibited judges from interpreting the *Constitution*, it would be hard to characterise the legislation as being compatible with the separation of powers. The problem for the present argument is that repeal of s 30(a) of the *Judiciary Act* would not strip the High Court of its *power* to interpret the *Constitution*; rather, it would strip the High Court of part of its *jurisdiction*. This would prevent the High Court from hearing some constitutional matters. But it would not deprive the High Court of the power to interpret the *Constitution* or to determine constitutional matters that arise under the entrenched original or appellate jurisdiction. Because the principle from *Marbury v Madison* is ‘axiomatic’ in Australia,⁴⁹ the High Court — with or without s 30(a) of the *Judiciary Act* — will always be able to interpret the *Constitution* when a question of interpretation arises, and will always have the inherent power to declare an Act of Parliament invalid. The argument therefore fails to satisfy proposition (3). Repeal of s 30(a) would not violate the separation of powers.

B *Extension of Intergovernmental Immunities Principle*

The other possible argument involves an extension of the intergovernmental immunities principle. In *City of Melbourne v Commonwealth*,⁵⁰ the High Court declared s 48 of the *Banking Act 1945* (Cth) to be invalid.⁵¹ Section 48 required banks to obtain permission from the Commonwealth Treasurer before conducting banking business for a state or any authority of a state. The reasoning of the five judges in the majority differed. Justice Dixon held that a law which was a valid exercise of Commonwealth legislative power would be invalid where it was also ‘a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers’.⁵²

Justice Dixon’s argument was that the *Constitution* impliedly limits an otherwise valid exercise of power where it discriminates against a state or places a particular disability or burden upon an operation or activity of a state. Over time it came to form the basis of what is known as the *Melbourne Corporation Case* principle.⁵³ In *Queensland Electricity Commission v Commonwealth*,⁵⁴ Mason J said that the principle consisted of two elements. One was a prohibition against discrimination that involved placing special burdens or disabilities on the states. The other was a prohibition against laws of general application that operated to destroy or curtail the

⁴⁹ *Marbury v Madison* (n 43), cited in *Communist Party Case* (n 44) 262 (Fullagar J).

⁵⁰ (1947) 74 CLR 31 (*‘Melbourne Corporation Case’*).

⁵¹ *Ibid* 64 (Latham CJ), 67 (Rich J), 76 (Starke J), 85 (Dixon J), 101 (Williams J).

⁵² *Ibid* 79. Cf *ibid* 61–2 (Latham CJ), 99–100 (Williams J).

⁵³ Cf *Victoria v Commonwealth* (1971) 122 CLR 353, 372–3 (Barwick CJ). See generally *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 208 (Gibbs CJ), 219 (Mason J), 233 (Brennan J), 248 (Deane J).

⁵⁴ (1985) 159 CLR 192.

continued existence of the states or their capacity to function.⁵⁵ In *Austin v Commonwealth*,⁵⁶ Gaudron, Gummow and Hayne JJ described it as a single implied limitation upon laws that impose a ‘sufficiently significant impairment of the exercise by the State of its freedom to select the manner and method for discharge of its constitutional functions’.⁵⁷

It could be argued by extension that the *Constitution* also impliedly prohibits legislation that impairs the High Court in the exercise of its constitutional functions. The *Melbourne Corporation Case* supports this argument, as all of the judges based their reasoning upon the existence of the federal system provided by the *Constitution*.⁵⁸ Justice Starke, for example, held that

[t]he federal character of the *Australian Constitution* carries implications of its own ... the government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the *Constitution* as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other.⁵⁹

Justice Dixon similarly held that ‘the federal system itself is the foundation of the restraint upon the use of the power to control the States’.⁶⁰ And Rich J emphasised that the *Constitution*

expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because [it is] inconsistent with the express provisions of the *Constitution* ...⁶¹

The High Court is just as much a feature of the federal system as the states. The existence of the states is entrenched by ss 106–8 of the *Constitution*. The existence of the High Court is entrenched by s 71. If the *Constitution* impliedly provides protection for the existence of the states, which in some ways are subordinate to the Commonwealth, then it must also provide protection for the existence of the High

⁵⁵ Ibid 217. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 139 (Mason J).

⁵⁶ (2003) 215 CLR 185.

⁵⁷ Ibid 264.

⁵⁸ *Melbourne Corporation Case* (n 50) 55 (Latham CJ), 65–6 (Rich J), 70 (Starke J), 81 (Dixon J), 99 (Williams J).

⁵⁹ Ibid 70, quoting *South Australia v Commonwealth* (1942) 65 CLR 373, 442 (Starke J) (*‘South Australia v Commonwealth’*); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488, 515 (Starke J).

⁶⁰ *Melbourne Corporation Case* (n 50) 81.

⁶¹ Ibid 66.

Court, which is the apex of the Australian judiciary, the highest court of appeal, and the only court guaranteed jurisdiction over the Commonwealth and its officers.⁶²

This argument is unlikely to be controversial. If the *Constitution* provides protection for one organ in the federal system, it should follow that it provides protection for other organs in the federal system. The hard part is establishing that this protection would extend to prohibiting repeal of s 30(a) of the *Judiciary Act*. That would involve establishing that the High Court needs original jurisdiction over matters arising under the *Constitution* or involving its interpretation in order to exercise its constitutional function. That proposition is doubtful. The *Constitution* provides that Parliament ‘*may* make laws conferring original jurisdiction on the High Court in any matter ... arising under this *Constitution*, or involving its interpretation’.⁶³ The word ‘*may*’ indicates that the *Constitution* contemplates the existence and functioning of the High Court without original jurisdiction over those matters. It therefore cannot be argued that the High Court requires original jurisdiction in respect of constitutional matters to exercise its constitutional function. Revocation of that jurisdiction is not an impairment of the High Court’s freedom to select the manner and method for discharge of its constitutional functions. It is the valid determination by Parliament of what those constitutional functions are. Repeal of s 30(a), therefore, would not violate the intergovernmental immunities principle.

VI WHAT WOULD HAPPEN IF PARLIAMENT REPEALED S 30(A) OF THE *JUDICIARY ACT*?

If Parliament repealed s 30(a) of the *Judiciary Act*, litigants would be unable to commence proceedings in the original jurisdiction of the High Court with respect to a constitutional matter, unless the proceedings were also with respect to one of the matters contained in the High Court’s entrenched original jurisdiction. That consequence follows from the plain text of Ch III of the *Constitution*. However, the reviewers of the original draft of this article suggested an alternative consequence — that repeal of s 30(a) may have no effect because the High Court has an *implied* entrenched original jurisdiction in respect of matters arising under the *Constitution* or involving its interpretation independent of s 76(i). The reviewers suggested that this jurisdiction could exist by virtue of the axiomatic status of *Marbury v Madison* in Australia, or by virtue of the ‘inherent jurisdiction’ of the High Court. After careful consideration, and with great respect to the reviewers, who far surpassed expectations in the level of analysis and care they put into reviewing the original article, neither suggestion appears to be convincing.

⁶² *Constitution* ss 71, 73, 75(iii), 75(v). See also James Stellios, *Zines’s the High Court and the Constitution* (Federation Press, 6th ed, 2015) 329.

⁶³ *Constitution* s 76(i) (emphasis added).

A *Axiomatic Status of Marbury v Madison*

The suggestion that the axiomatic status of *Marbury v Madison* in Australia could provide support for an implied entrenched original jurisdiction with respect to constitutional matters directly contradicts the actual decision in that case. The case is famous because Marshall CJ held that the Supreme Court of the United States had the power to declare an Act of Congress unconstitutional and therefore void.⁶⁴ But the very legislation that Marshall CJ declared void purported to confer original jurisdiction on the Supreme Court beyond the scope allowed by the *United States Constitution*. Article III of the *United States Constitution* provides that the Supreme Court has original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and in which a state is a party.⁶⁵ The legislation in question authorised the Supreme Court to issue ‘writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States’.⁶⁶ Chief Justice Marshall held that the legislation was unconstitutional because the *Constitution* did not make provision for Congress to confer additional original jurisdiction upon the Supreme Court.⁶⁷ Implicit in his Honour’s decision was the notion that the Supreme Court has no original jurisdiction beyond that conferred on it by the *United States Constitution*. Therefore, whilst the decision supports the proposition that a court established by a constitution has the power to declare legislation unconstitutional and therefore void, it opposes the proposition that such a court has original jurisdiction beyond that conferred upon it by the constitution. As Marshall CJ said:

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.⁶⁸

B *An Inherent Original Jurisdiction with respect to Constitutional Matters*

The suggestion that the inherent jurisdiction of the High Court may provide it with original jurisdiction with respect to constitutional matters misconstrues the meaning

⁶⁴ *Marbury v Madison* (n 43) 176–180.

⁶⁵ *United States Constitution* art III § 2.

⁶⁶ *Judiciary Act of 1789*, ch 20, § 13, 1 Stat 73, 81.

⁶⁷ *Marbury v Madison* (n 43) 174.

⁶⁸ *Ibid* 175.

of the phrase ‘inherent jurisdiction’. Sir Jack Jacob described the inherent jurisdiction as a

residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.⁶⁹

Jacob’s definition is regarded as seminal.⁷⁰ But it has also been persuasively criticised for conflating ‘jurisdiction’ with ‘power’.⁷¹ The jurisdiction of a court should be taken to refer to the territory or sphere of activity over which the authority of the court extends. The powers of a court should be taken to refer to what the court can do in the course of hearing and determining disputes within its jurisdiction. The phrase ‘inherent jurisdiction’ is an enduring misnomer for the phrase ‘inherent powers’.⁷² It refers to the array of powers possessed by superior courts that are ‘necessary to protect their capacity to administer justice and retain their very nature as superior courts’.⁷³ But those powers do not give courts the ability to determine matters outside their statutory and common law jurisdictions. For example, the ‘inherent jurisdiction’ of the Supreme Court of New South Wales could never enable it to determine a dispute wholly within the boundaries of Victoria. Nor could the ‘inherent jurisdiction’ of the Family Court of Australia enable it to determine a dispute involving an alleged patent infringement. In relation to the present issue, the High Court probably possesses inherent powers beyond those of other courts because of its position at the apex of the court hierarchy. But those powers could not enable it to determine matters beyond the scope of its jurisdiction under the *Constitution*.

VII CAN PARLIAMENT CREATE A CONSTITUTIONAL MATTER EXCEPTION TO THE APPELLATE JURISDICTION OF THE HIGH COURT?

Repealing s 30(a) of the *Judiciary Act* would prevent the High Court from hearing constitutional matters in its original jurisdiction unless the matters arose under the entrenched original jurisdiction contained in s 75. It follows that the appellate jurisdiction would become the sole means of access to constitutional matters that do

⁶⁹ IH Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23(1) *Current Legal Problems* 23.

⁷⁰ See, eg, Marcelo Rodriguez Ferrere, ‘The Inherent Jurisdiction and its Limits’ (2013) 13 *Otago Law Review* 107.

⁷¹ *Ibid* 111.

⁷² *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1. In the judgment, their Honours stated that ‘inherent jurisdiction can be used interchangeably with “inherent power.”’: at 17–18 [38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

⁷³ Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Ch III of the Constitution’ (2003) 31(1) *Federal Law Review* 57, 64, citing Jacob (n 69) 51.

not arise under the entrenched original jurisdiction. The appellate jurisdiction of the High Court is contained in s 73 of the *Constitution*:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

The first paragraph of s 73 stipulates that the appellate jurisdiction is subject to exceptions and regulations prescribed by Parliament. But the power of Parliament to prescribe exceptions and regulations is subject to two possible limitations. The existence and scope of the first is not contentious. It is contained in the second paragraph of s 73 and preserves the appellate jurisdiction of the High Court with respect to matters that could be heard by the Privy Council. The second limitation is contentious: implied limits on Parliament's ability to prescribe exceptions may be derived from the words 'with such exceptions and subject to such regulations as the Parliament prescribes'. These limitations could be used to prevent Parliament from creating a constitutional matter exception to the appellate jurisdiction of the High Court.

A Express Limitation in the Second Paragraph of s 73

The express limitation in the second paragraph of s 73 provides that

no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

In *Parkin v James*,⁷⁴ the High Court explored the circumstances in which, at the establishment of the Commonwealth, an appeal could be made to the Queen in Council. It concluded that ‘[i]n all cases ... an appeal lay to the Sovereign-in-Council, but in all cases leave to appeal had to be obtained, either from the Court appealed from or from the Privy Council’.⁷⁵ Pursuant to this authority, if the Supreme Court of a state determined a matter arising under the *Constitution* or involving its interpretation, an appeal of its decision may be made to the High Court, subject to the requirements relating to leave. No exception to the appellate jurisdiction of the High Court could be used to prevent the appeal.

However, this limitation relates only to appeals from the Supreme Courts of the states. It has no application to appeals from federal courts and other state courts. This qualification is important. It means that there is no express limitation on the creation of a constitutional matter exception to the appellate jurisdiction of the High Court with respect to decisions by courts other than state Supreme Courts. This opens up an alternative way for Parliament to prevent the High Court from hearing appeals on matters arising under the *Constitution* or involving its interpretation. This alternative way was canvassed in the introduction to this article. It relies upon s 77 of the *Constitution*:

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

Parliament could: (1) create a new federal court; (2) confer upon the new federal court original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation; (3) provide that the jurisdiction of the new federal court is exclusive of that which belongs to or is invested in the courts of the states; and (4) create an exception to the appellate jurisdiction of the High Court with respect to the decisions of the new federal court. The first two steps in this process are uncontroversial. Section 71 empowers Parliament to create new federal courts and s 77(i) empowers Parliament to confer jurisdiction upon any federal court with any of the matters listed in ss 75 and 76, which include matters arising under the *Constitution* or involving its interpretation.

The third step may appear controversial. But there is existing support for the notion that it is possible to make jurisdiction with respect to constitutional matters exclusive

⁷⁴ (1905) 2 CLR 315.

⁷⁵ *Ibid* 332. See also *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 208–17 (*‘Smith Kline & French Laboratories’*).

of the state courts. Quick and Garran suggested that Parliament could create a federal court with exclusive jurisdiction over constitutional matters to prevent litigants appealing to the Privy Council instead of the High Court upon questions as to the limits inter se of the constitutional powers of the Commonwealth and the states.⁷⁶ Furthermore, the High Court said in *Baxter v Commissioners of Taxation (NSW)*:

It is clear that by exercise of the power conferred by [s] 77 the Parliament of the Commonwealth could have withdrawn the cognizance of matters arising under the *Constitution* or involving its interpretation altogether from the Courts of the States, and so have drawn them within the sole cognizance of federal courts, with a consequential appeal to the High Court and prohibition of appeal to the Queen in Council except in the specified cases.⁷⁷

This means that, unless there is an implied limitation in the power to create exceptions to the appellate jurisdiction of the High Court, Parliament has the power to create a new constitutional court with sole jurisdiction over all constitutional matters that do not fall within the High Court's entrenched original jurisdiction under s 75.

B Alleged Implied Limitation to the Power to Prescribe Exceptions

The existence of any implied limitation on the power to prescribe exceptions had little support in the early days of the Commonwealth. According to Quick and Garran, '[e]xcept as regards appeals from the Supreme Courts of the states in the matters defined in the second paragraph of the section, the power to except and regulate is — as it is in the United States — absolute and unlimited'.⁷⁸ Justice Isaacs adopted that position in the *First Tramways Case*.⁷⁹ There it was argued that Parliament could not exclude from the appellate jurisdiction a whole class of some proceeding but could merely provide a check or restriction upon the appeal. Justice Isaacs said: 'I wholly dissent from that. 'Exception' means what it says'.⁸⁰

⁷⁶ Quick and Garran (n 36) 754–755. Parliament acted on this suggestion to an extent when it enacted the *Judiciary Act 1907* (Cth). That Act inserted s 38A into the *Judiciary Act 1903* (Cth). Section 38A deprived state Supreme Courts of jurisdiction over matters involving questions as to the limits inter se of the constitutional powers of the Commonwealth and the states. The intention of s 38A was to prevent appeals on inter se questions going to the Privy Council: Explanatory Memorandum, Judiciary Amendment Bill 1976 (Cth) [20]–[21]. It was repealed by s 7 of the *Judiciary Amendment Act 1976* (Cth).

⁷⁷ (1907) 4 CLR 1087, 1114 (Griffith CJ, Barton and O'Connor JJ) ('*Baxter*'). This possibility was also noted in *ALRC 2000* (n 3) 47 [2.51].

⁷⁸ Quick and Garran (n 36) 738.

⁷⁹ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 ('*First Tramways Case*').

⁸⁰ *Ibid* 76.

The first hint of a limitation on the power to create exceptions arose in *Collins v Charles Marshall Pty Ltd*.⁸¹ In that case, six of the seven judges said: ‘after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s 73’.⁸² If the Inter-State Commission were established, the Court said, the power to create exceptions ‘could hardly extend to excepting all judgments decrees orders and sentences of that body from the appellate jurisdiction of the [High] Court’.⁸³

Justice Taylor said in dissent that the language of s 73 was more appropriate to authorise the prescription of exceptions by reference to the ‘specified characteristics of judgments or orders’,⁸⁴ such as an exception that prevents appeals from interlocutory orders. In doing so his Honour rejected the contrary interpretation — that it is permissible to exclude appeals from specified judgments or orders. Such an interpretation, Taylor J said, would entertain the view that appeals in specified *matters* or classes of matters might be made the subject of an exception, something that was ‘clearly inconsistent with the substance of the section’.⁸⁵

Less than two years later, the extent of the power to prescribe exceptions arose again in *Cockle v Isaksen*.⁸⁶ In that case, Sir Garfield Barwick QC adopted the reasoning of Taylor J in *Collins*. He argued that, unless a restrictive approach was taken, the power to create exceptions could destroy ‘substantially the greater part of the appellate jurisdiction’.⁸⁷ It must have come as a surprise when the entire bench, including Taylor J, disagreed with him. Justice Taylor referred to his earlier views and said: ‘Upon further consideration I am satisfied that these observations express a view that is unduly restrictive of the power under s 73 to prescribe exceptions’.⁸⁸

Each of the six judges in *Cockle* held that s 113 of the *Conciliation and Arbitration Act 1904* (Cth) (*‘Conciliation and Arbitration Act’*) could validly prohibit any appeal that could be brought to the Commonwealth Industrial Court (except an appeal from a state Supreme Court) being brought instead to the High Court.⁸⁹ Chief Justice Dixon, McTiernan and Kitto JJ held that the judgments referred to in s 113 of the Act were really defined by reference to the *matters* involved in the appeal — that if a matter arising under the Act was involved in the appeal, it could not be brought to the High Court. It was difficult to see, their Honours said, ‘why that should be

⁸¹ (1955) 92 CLR 529 (*‘Collins’*).

⁸² *Ibid* 544 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

⁸³ *Ibid*.

⁸⁴ *Ibid* 558.

⁸⁵ *Ibid* (emphasis in original).

⁸⁶ (1957) 99 CLR 155 (*‘Cockle’*).

⁸⁷ *Ibid* 157 (during argument).

⁸⁸ *Ibid* 175.

⁸⁹ *Ibid* 166 (Dixon CJ, McTiernan and Kitto JJ), 172 (Williams J), 174 (Webb J), 176 (Taylor J).

an inadmissible ground of exception'.⁹⁰ They also noted that the exception did not 'eat up or destroy the general rule laid down by the *Constitution* that appeals shall lie to [the High Court]'.⁹¹ Similarly, Williams J said that Parliament 'is not thereby empowered to take away completely the whole of [the] jurisdiction to hear any appeal from these judgments, decrees, orders and sentences. The appeals that can be taken away are at most exceptions from such appeals'.⁹² And Webb J speculated as to what must have been the main purpose of the power to make exceptions: 'preventing this Court from being inundated with trivial appeals and thus to enable it to continue to discharge efficiently those important functions for which we may assume it was created'.⁹³

As for Sir Garfield Barwick QC, he never had an opportunity to revisit the matter. The scope of the power to create exceptions was not considered in detail again until *Smith Kline & French Laboratories*.⁹⁴ In that case, the Court held unanimously that the words 'exceptions' and 'exception' were used in the 'sense of jurisdiction or matters excluded or taken away from the general grant of appellate jurisdiction conferred by the first paragraph'.⁹⁵ The case itself involved a challenge to the constitutional validity of the special leave provisions of the *Judiciary Act*, predominantly on the basis of the second paragraph of s 73. The Court referred to but did not disturb *Cockle*.⁹⁶ As such, *Cockle* remains the authoritative case on the power of Parliament to prescribe exceptions to the appellate jurisdiction of the High Court.

As the law currently stands, that power is subject to few limitations.⁹⁷ However, as the six judges in *Collins* said, s 73 is 'only a power of making exceptions'.⁹⁸ Parliament could not enact a law creating an exception that covered every judgment of every lower court whatsoever. Such a law would be beyond the scope of its power under s 73. It would not be an exception to the appellate jurisdiction. It would be the abolition of that jurisdiction. The above authorities are unanimous on this point. However, if the inability to abolish the appellate jurisdiction is the only inherent restriction upon creating exceptions to it, the obvious problem is determining when a law crosses the threshold from being an exception to being an abolition. This problem may be exacerbated by the fact that one exception on its own may seem innocuous yet, when combined with a number of other seemingly innocuous exceptions, have a cumulative abolitionary effect. Under the position taken in *Cockle*, myriad exceptions

⁹⁰ Ibid 166.

⁹¹ Ibid.

⁹² Ibid 168.

⁹³ Ibid 173.

⁹⁴ *Smith Kline & French Laboratories* (n 75).

⁹⁵ Ibid 210.

⁹⁶ Ibid 216–17.

⁹⁷ The Commonwealth submitted during argument that it desired to keep the potential scope of the power open: *Cockle* (n 86) 159.

⁹⁸ *Collins* (n 81) 544.

could be validly made and much of the appellate jurisdiction eliminated.⁹⁹ For this reason, the judgment of Taylor J in *Collins* may merit reconsideration. It does go against the whole tenor of Ch III to suggest that within the power to define the appellate jurisdiction of the High Court there lurks the ability to abolish it.¹⁰⁰

Nevertheless, *Cockle* is authority for the proposition that appeals to the High Court in relation to certain matters may be prohibited using the power to create exceptions,¹⁰¹ and if matters arising under the *Conciliation and Arbitration Act* could be prohibited from appeal to the High Court, why not matters arising under the *Constitution* or involving its interpretation? The only reason would be the existence of some implied limitation upon the power to create exceptions that could be relied upon to argue that matters arising under the *Constitution* or involving its interpretation cannot be excluded from the appellate jurisdiction. There are grounds for suspecting the existence of such a limitation. But it cannot be conjured up simply to overcome undesirable consequences unforeseen by the framers. To have any chance at success, the limitation must ‘exist in the text and structure of the *Constitution*’.¹⁰² And to have a good chance at success, it must be compatible with previously established constitutional jurisprudence.

One approach could be to argue that a constitutional matter exception to the appellate jurisdiction would violate the separation of powers doctrine. This article argued earlier that repeal of s 30(a) of the *Judiciary Act* would not violate the separation of powers because it would affect the jurisdiction but not the powers of the High Court. The same could be said of the enactment of a constitutional matter exception to the appellate jurisdiction. But the denial of appellate jurisdiction would be more complete than the denial of original jurisdiction. In the years 2005–16, it could have prevented up to 38 out of 110 constitutional matters from being heard by the High Court. It could be argued that the power of the High Court to answer constitutional questions would be pointless if the questions themselves never arise. Perhaps the High Court would consider the abolition of its appellate jurisdiction over constitutional matters to amount in substance to the abolition of its power to interpret the *Constitution*.

Another approach could be to argue that the enactment of a constitutional matter exception to the appellate jurisdiction would violate the *Melbourne Corporation Case* principle. This article earlier concluded that the principle could not be extended to protecting the original jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation. That conclusion was grounded upon

⁹⁹ Unless the High Court was willing to find the various laws to be ‘schemes’: see *South Australia v Commonwealth* (n 59) 411 (Latham CJ), 448 (Starke J), 456 (McTiernan J), 462 (Williams J).

¹⁰⁰ Wynes (n 14) 506–7.

¹⁰¹ For other exceptions found to be valid: see Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 543–5.

¹⁰² *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), quoted in *Kruger v Commonwealth* (1997) 190 CLR 1, 152 (Gummow J).

the reality that the *Constitution* contemplated the existence of the High Court without that original jurisdiction. But it only contemplated the existence of the High Court without that original jurisdiction because it was assumed that constitutional matters would otherwise arise on appeal. The question is therefore whether the *Constitution* contemplates the existence of the High Court without access to a large proportion of constitutional matters. If it does not, then it could be said that determination of constitutional questions is one of the constitutional functions of the High Court, and a constitutional matter exception to the appellate jurisdiction could be an impairment of the discharge of one of its constitutional functions.

What evidence is there that determination of constitutional questions is one of the constitutional functions of the High Court? In *Baxter*, Higgins J said:

Those who have been accustomed to hear the phrases used as to the High Court — ‘the guardian of the *Constitution*’ — ‘the final authority on constitutional points’ — ‘the final arbiter of the *Constitution*’ — will be surprised to find how little there is in the *Constitution* to justify such language.¹⁰³

But perhaps his Honour was not looking hard enough. The High Court is the only court the existence of which is entrenched in the *Constitution*.¹⁰⁴ It is the only entrenched repository of the judicial power of the Commonwealth.¹⁰⁵ It has always been a final court of appeal on inter se questions.¹⁰⁶ It alone had the power to grant leave to appeal to the Privy Council on such questions.¹⁰⁷ And it has entrenched jurisdiction over other matters that in many cases also arise under the *Constitution* or involve its interpretation.¹⁰⁸

In addition to these factors, which are drawn from the text of the *Constitution* itself, there are also external indicators that determination of constitutional questions is one of the constitutional functions of the High Court. The extent to which they are relevant depends upon the approach taken to the task of interpretation. If the intentions of the framers are relevant, there is evidence that many of the framers intended the High Court to be a constitutional court.¹⁰⁹ Josiah Symon said that the High Court was to

¹⁰³ *Baxter* (n 77) 1166.

¹⁰⁴ *Constitution* s 71.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* s 74.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* s 75(iii)–(v).

¹⁰⁹ See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 129 (Josiah Symon), 26 March 1897, 201 (Henry Dobson), 14 April 1897, 593–4 (Josiah Symon), 19 April 1897, 937 (Henry Dobson); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 296 (Josiah Symon), 302 (Vaiben Solomon), 23 February 1898, 1367 (William Lyne), 1373 (Edmund Barton), 1 March 1898, 1718 (Frederick Holder).

be ‘above all things, the interpreter of the *Constitution*’.¹¹⁰ Edmund Barton called it ‘the very guardian of the *Constitution*’.¹¹¹ Furthermore, there is also evidence that a majority of the participants in the final convention in Melbourne intended the High Court to be the final interpreter of the *Constitution*. That evidence is s 74 of the draft Bill adopted on 16 March 1898:

No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this *Constitution* or of the Constitution of a State, unless the public interests of some part of Her Majesty’s Dominions, other than the Commonwealth or a State, are involved.¹¹²

It is well known that the intentions of the participants in the Melbourne Convention were never realised. They gave way to the intentions of the Colonial Secretary, Joseph Chamberlain. Chamberlain insisted that the Bill be amended to preserve appeals to the Privy Council. Section 74 in its final form was a compromise between his wishes and the wishes of the delegates who travelled to London.¹¹³ However, as appeals to the Privy Council have been abolished, that compromise is now defunct. This fact may have implications upon the interpretation of s 73. If events following Federation are relevant to constitutional interpretation, the abolition of appeals to the Privy Council may bolster the argument that interpretation of the *Constitution* is one of the constitutional functions of the High Court. That is because the only alternative expressly contemplated by the *Constitution* — interpretation on appeal by the Privy Council — no longer exists. The abolition of appeals to the Privy Council may have rejuvenated the relevance of the intentions of the participants in the Melbourne Convention. These are strong grounds to support the existence of an implied limitation on the power to prescribe a ‘constitutional matter exception’ to the appellate jurisdiction of the High Court.

VIII CAN A FEDERAL CONSTITUTIONAL COURT TRULY EVADE HIGH COURT SCRUTINY?

If, contrary to the argument just advanced, Parliament does have the power to create a new constitutional court of final appeal, the judges of that court would be officers of the Commonwealth within the meaning of s 75(v) of the *Constitution*.¹¹⁴ Therefore, if the constitutional court made a decision in which it did not apply the High Court’s interpretation of the *Constitution*, the losing party could seek a writ of prohibition

¹¹⁰ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1174.

¹¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 September 1897, 212.

¹¹² Williams (n 32) 1133.

¹¹³ JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 248–69.

¹¹⁴ *First Tramways Case* (n 79) 62 (Griffith CJ), 66–7 (Barton J), 79–80 (Isaacs J), 82–3 (Gavan Duffy and Rich JJ), 86 (Powers J).

or mandamus or an injunction from the High Court. But the grounds upon which such a writ might be sought would be contentious. The winning party could argue that the interpretation of the constitutional court should prevail on the ground that its decisions have been excluded from the appellate jurisdiction of the High Court. It is hard to imagine the High Court accepting that argument, which tends to demonstrate that Parliament cannot truly diminish the ability of the High Court to interpret the *Constitution*. Nevertheless, the very existence of the argument casts some doubt on the position. It at least proves that the position is not certain.

IX CONCLUSION

Not only does the *Constitution* contain few rights and freedoms, it may contain a means by which the ability of the High Court to safeguard those rights and freedoms may be thwarted. The means is the placement of original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation in s 76 rather than s 75. The consequence of that placement is that Parliament has the ability to (attempt to) prevent the High Court from hearing matters that arise under the *Constitution* or involve its interpretation. This article has chased up every loose end left by the existence of that ability. It has examined whether Parliament could create a new court with exclusive jurisdiction over constitutional matters beyond the entrenched original jurisdiction of the High Court. And it has argued that any attempt to exclude decisions of such a court from the appellate jurisdiction of the High Court would be invalid on the ground that it constitutes an impairment of the discharge of the High Court's constitutional functions. But the real point of the article was not to explore these fancy constitutional issues. It was to demonstrate the messiness of the High Court's means of access to constitutional questions. This messiness warrants amendment. If Australia ever undertakes to tidy up some of the more mechanical aspects of its *Constitution*, it should move s 76(i) into s 75. Although the High Court is not a constitutional court per se, it has become a constitutional court in practice, and steps should be taken to secure its position.

APPENDIX A

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame
(2005) 222 CLR 439

Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251

Chief Executive Officer of Customs v El Hajje (2005) 224 CLR 159

APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322

Combet v Commonwealth (2005) 224 CLR 494

Theophanous v Commonwealth (2006) 225 CLR 101

Sweedman v Transport Accident Commission (2006) 226 CLR 362

Koroitamana v Commonwealth (2006) 227 CLR 31

Dalton v NSW Crime Commission (2006) 227 CLR 490

XYZ v Commonwealth (2006) 227 CLR 532

Vasiljkovic v Commonwealth (2006) 227 CLR 614

Forge v ASIC (2006) 228 CLR 45

New South Wales v Commonwealth (2006) 229 CLR 1

Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR
651

A-G (Vic) v Minister for Employment and Workplace Relations (2007) 230 CLR 369

Bennett v Commonwealth (2007) 231 CLR 91

Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board
(2007) 231 CLR 350

Visnic v ASIC (2007) 231 CLR 381

A-G (NT) v Chaffey (2007) 231 CLR 651

ACCC v Baxter Healthcare Pty Ltd (2007) 232 CLR 1

Roach v Electoral Commissioner (2007) 233 CLR 162

South Australia v Totani (2010) 242 CLR 1

Rowe v Electoral Commissioner (2010) 243 CLR 1

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

Wainohu v New South Wales (2011) 243 CLR 181

Haskins v Commonwealth (2011) 244 CLR 22

Nicholas v Commonwealth (2011) 244 CLR 66

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation (2011) 244 CLR 97

Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508

Queanbeyan City Council v ACTEW Corporation Ltd (2011) 244 CLR 530

Momcilovic v The Queen (2011) 245 CLR 1

Wotton v Queensland (2012) 246 CLR 1

Australian Education Union v General Manager, Fair Work Australia (2012) 246 CLR 117

Phonographic Performance Company of Australia Ltd v Commonwealth (2012) 246 CLR 561

Crump v New South Wales (2012) 247 CLR 1

Stanford v Stanford (2012) 247 CLR 108

PT Garuda Indonesia Ltd v ACCC (2012) 247 CLR 240

Williams v Commonwealth (2012) 248 CLR 156

Betfair Pty Ltd v Racing New South Wales (2012) 249 CLR 217

Sportsbet Pty Ltd v New South Wales (2012) 249 CLR 298

Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398

JT International SA v Commonwealth (2012) 250 CLR 1

Plaintiff M47/2012 v Director-General of Security (2012) 251 CLR 1

North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569

McCloy v New South Wales (2015) 257 CLR 178

Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42

Alqudsi v The Queen (2016) 258 CLR 203

Cunningham v Commonwealth (2016) 259 CLR 536

Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500

Day v Australian Electoral Officer (SA) (2016) 261 CLR 1

Murphy v Electoral Commissioner (2016) 261 CLR 28

Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398

The Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment (2012) 250 CLR 343

A-G (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1

Assistant Commissioner Michael James Condon v Pompano Pty Ltd (2013) 252 CLR 38

New South Wales v Kable (2013) 252 CLR 118

Maloney v The Queen (2013) 252 CLR 168

Unions NSW v New South Wales (2013) 252 CLR 530

A-G (NT) v Emmerson (2014) 253 CLR 393

Pollentine v Bleijie (2014) 253 CLR 629

Kuczborski v Queensland (2014) 254 CLR 51

Tajjour v New South Wales (2014) 254 CLR 508

Duncan v New South Wales (2015) 255 CLR 388

Duncan v Independent Commission Against Corruption (2015) 256 CLR 83

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail (2015) 256 CLR 171

North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569

McCloy v New South Wales (2015) 257 CLR 178

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (2016) 260 CLR 232

Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500

DEMYSTIFYING CLS: A CRITICAL LEGAL STUDIES FAMILY TREE

ABSTRACT

From the first Conference on Critical Legal Studies in 1977, difficulties have arisen when trying to qualify what can be defined as critical legal studies. As either a jurisprudential banner or a specific reference, the term critical legal studies can lead to a variety of different meanings with little consistency. This article argues that due to the broad application of critical legal studies across different times and jurisdictions, it would benefit from a structured system of categorisation. By identifying various critical legal studies, this article briefly defines and categorises each major limb in relation to one another, in turn forming a critical legal studies family tree. Once this overview has been presented, this article focuses on the United States of America ('US')-based branch of Critical Legal Studies demonstrating how this method of categorisation provides clarity. Specifically, this demonstration addresses the roots and death of the US-based Critical Legal Studies and its effect on the continuation of critical legal studies works after this event.

I INTRODUCTION

More than 40 years after the first Conference on Critical Legal Studies in 1977,¹ the movement itself has ground to a halt, with 'Critical Legal Studies' (or 'CLS') remembered as a historical movement of 'left intelligentsia' against legal liberalism.² At the same time, critical legal studies, concerning fields of legal inquiry that are posed to critique law from a critical position, or through

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¹ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 204 ('*Legal Education and the Reproduction of Hierarchy*').

² Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1st ed, 1996) 185. See, eg, E Dana Neacsu, 'CLS Stands for Critical Legal Studies, If Anyone Remembers' (2000) 8(2) *Journal of Law and Policy* 415.

a critical lens, are flourishing.³ Such is the multifaceted nature of the term ‘critical legal studies’ that differentiations often rest with necessary further identification of specific themes, theorists, or scholars. However, this adds complication to an already difficult area to navigate. This article proposes that the non-doctrinal approach taken by scholars of the Critical Legal Studies movement ‘mystifies’ critical legal studies as a term. To combat this mystification, this article proposes a critical legal studies family tree as an act of demystification. Focusing on the US-based Critical Legal Studies movement, this article will demonstrate the clarity this framework brings via the proposal of two different US-based Critical Legal Studies. For ease of understanding and clarity, this article adopts two different expressions of the term ‘critical legal studies’: the term is capitalised (and at times abbreviated) when referring to the Critical Legal Studies movement; and is written in lower case when referring to the broader application of critical legal studies.

Broadly, the approach undertaken in this article is inspired by Duncan Kennedy’s critique of structures and the specific quote in ‘Legal Education as Training for Hierarchy’, that there is ‘endless attention to trees at the expense of forests’.⁴ In its original context, the quote relates to pedagogical structure in law schools, however Kennedy’s observation can also be levelled at existing works which attempt to clarify or demystify critical legal studies. While this article addresses the specifics and minutiae relating to CLS, its primary goal is a meta-analysis to categorise the often-singular grouping of critical legal studies. There is also an attempt at irony through this ‘forest type’ meta-approach and the designation of a family tree.

The foundation of this family tree draws from existing work in this area by Margaret Davies, Costas Douzinas and Adam Gearey. In their clarifications, Douzinas and Gearey categorise critical legal studies through national identities.⁵ The authors identify similarities between the national varieties but address their individuality based on geographic lines, specifically looking at different branches of Critical Legal Studies in the US,⁶ United Kingdom (‘UK’),⁷ Australia,⁸ and South Africa.⁹ Taking a different approach to the same problem, Davies designates a broad and narrow categorisation to critical legal studies, designating the US Critical Legal Studies

³ See especially Cassandra Sharp and Marett Leiboff (eds), *Cultural Legal Studies: Law’s Popular Cultures and the Metamorphosis of Law* (Routledge, 2015). See also Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge, 2012).

⁴ Duncan Kennedy, ‘Legal Education as Training for Hierarchy’ in David Kairys (ed), *The Politics of Law A Progressive Critique* (Pantheon Books, revised ed, 1990) 38, 38.

⁵ Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 229–58.

⁶ Ibid 229.

⁷ Ibid 239.

⁸ Ibid 247.

⁹ Ibid 253.

movement as narrow and critical race theory as broad.¹⁰ However, while Douzinas and Gearey, and Davies' approaches provide some clarity, they have limitations.

Notably, Douzinas and Gearey's categorisation becomes muddled with the (re)location of the critical legal scholars they assign to specific locations, a point which the authors themselves identify.¹¹ The authors' acknowledgement of this issue highlights the placeholder nature of these categories, rather than creating a definitive structure. Similarly, it can be inferred from Davies' approach that a dichotomy is imposed, and a designated critical legal studies is either broad or narrow. Whilst imperfect, both approaches are useful as a starting point to think about the categorisation of different critical legal studies. Building upon these ways of thinking about critical legal studies, this article's presentation of a critical legal studies family tree aims to reduce complication and assist in the exploration of critical legal studies' complexities.

The core of this article is a literal genealogy; however, given Michel Foucault's influence on critical legal studies it would be remiss not to mention his reading of genealogy.¹² Notably, Foucault applied his interpretation of genealogy in *The History of Sexuality*,¹³ however, he provided a concise overview of this method in the short essay, 'Nietzsche, Genealogy, History'.¹⁴ In this essay, Foucault outlines that his reading of genealogy draws on Friedrich Nietzsche's *On the Genealogy of Morals*,¹⁵ specifically highlighting Nietzsche's differentiation of the often synonymous origin, ancestry, and beginning.¹⁶ For Foucault, this is not an exercise in splitting hairs, but an interrogation of words and histories that are often overlooked — those in the most 'unpromising places, in what we tend to feel is without history'.¹⁷ Focusing on the different applications Nietzsche uses for words related to 'the start', Foucault argues that it is possible to travel past ideals of 'lofty origins' to 'lowly beginnings', and in turn, new historical perspectives.¹⁸

¹⁰ Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 191. Critical Race Theory is an American social theory which critiques institutions and race neutrality from a racialised perspective. Critical Race Theory drew from but distinguished itself from Critical Legal Studies and the Civil Rights Movement focusing on race, racism, and power: see especially Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 2001).

¹¹ Douzinas and Gearey (n 5) 239, n 26.

¹² See, eg, Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Studies Forum* 327.

¹³ Michel Foucault, *The History of Sexuality, Volume One an Introduction*, tr Robert Hurley (Pantheon Books, 1978).

¹⁴ Michel Foucault, 'Nietzsche, Genealogy, History' in John Richardson and Brian Leiter (eds), *Nietzsche* (Oxford, 1978) 139.

¹⁵ Friedrich Nietzsche, *On the Genealogy of Morals* (Penguin Classics, 2013).

¹⁶ Foucault, 'Nietzsche, Genealogy, History' (n 14) 140–1.

¹⁷ *Ibid* 139.

¹⁸ *Ibid* 142.

In a broad sense, the rationale Foucault provides through genealogy aids the justification to re-examine critical legal studies. As this article argues, the history of critical legal studies is, for the most part, settled; but this has led to a conflation between the variety of different critical legal studies. However, whilst the Foucauldian development is relevant in this general way, its specific methodology is not applicable to the very literal genealogy presented here through the critical legal studies family tree. Instead, this article proposes that through the creation of a family tree, different branches of critical legal studies can be clearly separated. To demonstrate the effectiveness of the critical legal studies family tree, this article first presents an overall understanding of the structure and its interrelated limbs. Having established the outline of the family tree, the focus shifts to a specific branch, undertaking a detailed assessment of the US-based Critical Legal Studies movement.

After addressing the roots of CLS, focus then turns to the proposed death of Critical Legal Studies in the mid-1990s. This article argues that this death adds to the mystification of critical legal studies, however the family tree may assist in counteracting this mystification and providing clarity. Specific attention is given to the death and its relation to three interconnected areas: the scholars who founded Critical Legal Studies; their location at Harvard Law School; and the rivalry between Critical Legal Studies and law and economics.

It must be noted, however, that the focus on these three areas should not be read as a rejection of internal issues in the US-based CLS, or conflicts between other left critiques of law, such as critical race and feminist legal theory; or similarly, issues with external parties, such as the Federalist Society at Harvard. Instead, through the interaction between key scholars, their location, and the rivalry of their approaches, this broad meta-analysis will demonstrate *a* cause of death and a way to understand the position of the Critical Legal Studies that continues posthumously.¹⁹

II THE CRITICAL LEGAL STUDIES FAMILY TREE

A discussion of critical legal studies requires the term to be unpacked, providing an understanding of its origins, impact, and legacy. However, when asking the seemingly simple question ‘what is critical legal studies?’ the answer given depends on a number of factors including the time, location, and associated theorists, with each combination providing a host of different answers. These different answers demonstrate the breadth of critical legal studies. Appreciating this breadth contextualises the existing work undertaken on differentiating the various forms of critical legal studies. Davies addresses this issue by offering a broad and narrow reading of critical legal studies.²⁰ Davies’ framework outlines a way to separate the narrow category of Critical Legal Studies as a title, and the broad category of critical legal studies as a description. For example, the narrow categorisation focuses on the Critical Legal

¹⁹ See generally, James Gilchrist Stewart, ‘CLS is Haunted! A Perspective on Contemporary Critical Legal Studies’ (2020) 32(1) *Law and Literature* 135.

²⁰ Davies (n 10) 191.

Studies movement,²¹ which Davies restricts to an existence within the US from the 1970s to early 1990s.²² Contrastingly, Davies applies the broad categorisation to areas of legal theory which take a critical approach to law, including critical race theory and feminist legal theory.²³

The division of critical legal studies into broad or narrow categories should be understood as a clarification of the term, rather than a separation of two distinct areas. Davies demonstrates that these two readings of critical legal studies can be identified, however the influence of the narrow category on the broad,²⁴ and to some extent vice versa,²⁵ is accepted within the literature.²⁶ This interwoven relationship between both broad and narrow critical legal studies means the distinction Davies draws is not always immediately clear. This lack of clarity demonstrates the nuanced relationship between a number of broad and narrow critical legal studies, although it should be noted that this link is not present in all Critical Legal Studies works.²⁷ The use of a broad–narrow distinction does, however, provide a blunt distinction, based on parameters of time, location, and author.²⁸

Similarly, Douzinas and Gearey categorise critical legal studies through a series of geographic locations.²⁹ This categorisation alleviates the dichotomous nature of Davies’ broad–narrow approach, but still presents some foundational issues. The primary issue is acknowledged by the authors in their discussion of Critical Legal Studies in the UK and the ‘Brit Crits’:

There is a problem with the ‘Brit’ Crit. Many of the scholars associated with this position are not British. Although some may have become British through long association with British bad habits, others are resolutely non-British, or even anti-British.³⁰

²¹ Roberto M Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983).

²² Davies (n 10) 191.

²³ Ibid.

²⁴ See Patricia J Williams, ‘Alchemical Notes: Reconstructing Ideals from Deconstructed Rights’ (1987) 22(1) *Harvard Civil Rights–Civil Liberties Law Review* 401; David M Trubek, ‘Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How to Get Along with a Little Help from Your Friends’ (2011) 43(5) *Connecticut Law Review* 1503; Kimberlé Williams Crenshaw, ‘Twenty Years of Critical Race Theory: Looking Back to Move Forward’ (2011) 43(5) *Connecticut Law Review* 1253.

²⁵ See, eg, Duncan Kennedy, *Sexy Dressing Etc* (Harvard University Press, 1993).

²⁶ See, eg, Trubek (n 24); Crenshaw (n 24); Mari J Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987) 22(2) *Harvard Civil Rights–Civil Liberties Law Review* 323.

²⁷ Trubek (n 24); Crenshaw (n 24).

²⁸ Davies (n 10) 191.

²⁹ Douzinas and Gearey (n 5) 229.

³⁰ Ibid 239.

Douzinas and Gearey recognise their framework’s limitations and do not impose it as a mode of firm categorisation. Instead, it is used to differentiate the historical locations of Critical Legal Studies in the authors’ larger project of ‘[c]ritical legal thought’, itself a conscious progression from Critical Legal Studies.³¹

The work that Davies, Douzinas and Gearey have done grounds this article’s presentation of the critical legal studies family tree. Using Davies’ broad–narrow approach as the starting point shapes the first two limbs of the family tree.

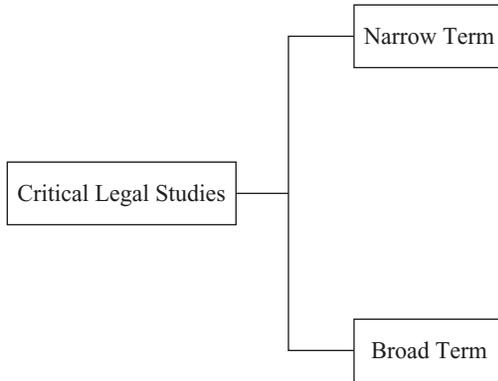


Figure 1: Family Tree: Broad–Narrow

This article is concerned with the US-based Critical Legal Studies movement, which falls under Davies’ narrow categorisation. As such, the discussion and refinements made under the family tree will reflect this. However, this does not mean that there is not a similar, plausible argument for refining the works under the broad category. Instead, it should be understood that substantial discussion of the broad category falls outside the scope of this article and its demonstration of the critical legal studies family tree. The broad category houses a non-exhaustive list of critical legal studies, including the aforementioned critical race theory and feminist legal theory,³² but also critical historical scholarship, psychoanalytical theory, postmodernism, law and literature, and queer legal theory, all of which Davies identifies under this heading.³³ In addition to Davies’ selection, there are emerging critical fields that should also be included, such as law and popular culture,³⁴ cultural legal studies,³⁵ and comics and law.³⁶

³¹ Ibid 258.

³² Davies (n 10) 191.

³³ Ibid.

³⁴ See, eg, William P MacNeil, *Lex Populi* (Stanford University Press, 2007).

³⁵ Sharp and Leiboff (n 3).

³⁶ Thomas Giddens (ed), *Graphic Justice: Intersections of Comics and Law* (Routledge, 2015); Thomas Giddens, *On Comics and Legal Aesthetics: Multimodality and the Haunted Mask of Knowing* (Routledge, 2018).

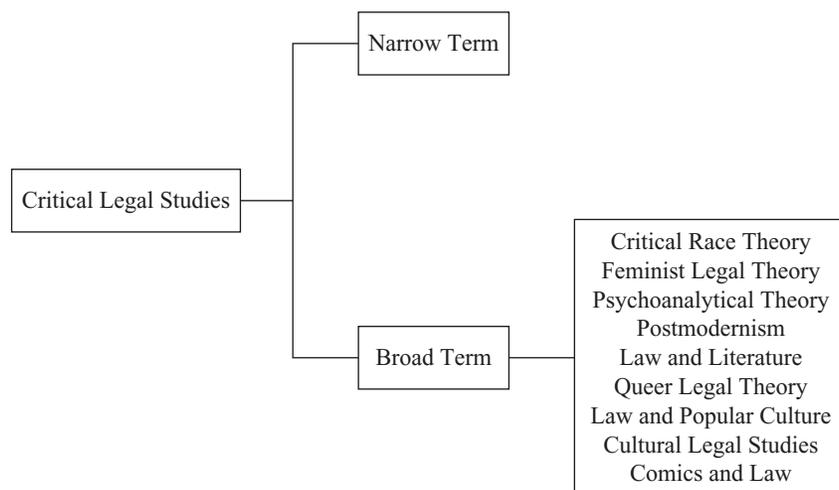


Figure 2: Family Tree: Broad complete

Having established and identified broad critical legal studies, the next step is to define what distinct areas can be identified under Davies' narrow categorisation. There are specific limitations in Davies' broad–narrow approach and its application to the narrow US-based Critical Legal Studies. Davies draws some distinctions between variants of the narrow Critical Legal Studies, however these are general and less important than the broad–narrow divide itself. For example, Davies provides a location and timeline for the US-based Critical Legal Studies,³⁷ but her introduction to the very different British Critical Legal Studies is mentioned in a footnote only.³⁸ This article contends that, following Douzinas and Gearey, this difference within the narrow category needs to be clearer. The two dominant narrow Critical Legal Studies are the British and the American approaches.³⁹ Unlike the broad category, narrow Critical Legal Studies are defined primarily by time and geographic location. Despite featuring a crossover of influences, topics, and authors, the Critical Legal Studies of the US and UK need to be recognised as different Critical Legal Studies. Instead of conflating similarities and presenting a unified narrow branch, these shared factors create two narrow limbs for the US and British Critical Legal Studies.

In the foundational years of Critical Legal Studies, this divide may not have been clear.⁴⁰ However, its origins are unquestioned, as Douzinas outlined in 2005: 'Critical legal thought ... started in America in the Seventies and was first introduced in Britain

³⁷ Davies (n 10) 191.

³⁸ Ibid 193 n 5.

³⁹ Although other countries had and continue to have critical legal scholarship, it is either less dominant than the US and UK branches or more generally housed within the broad category and falls outside the scope of this article.

⁴⁰ See, eg, Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' (2014) 25(2) *Law and Critique* 187, 189.

in the early Eighties'.⁴¹ For the family tree this positions the US-based Critical Legal Studies as the first limb. In an attempt to tackle the geographic issues presented by Douzinas and Gearey,⁴² this article presents the limbs numerically, rather than with associated nationalities. As such, the initial limb under the narrow heading is 'CLS1', representing the US-based Critical Legal Studies.

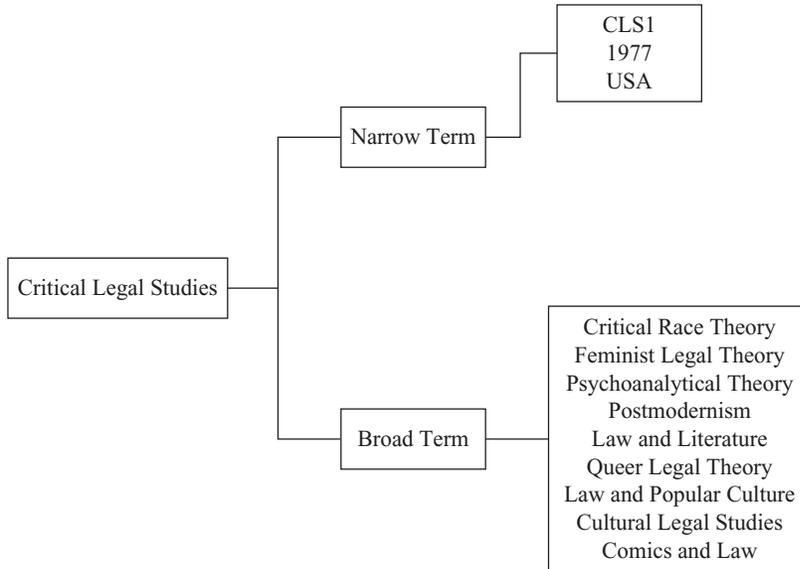


Figure 3: Family Tree: Narrow CLS1 1977

CLS1 is referred to as the Critical Legal Studies movement,⁴³ pertaining to the scholarship and meetings of this organisation, primarily in the US. This grew out of the 1977 inaugural Conference on Critical Legal Studies held in Madison, Wisconsin.⁴⁴ CLS1 was founded on the writing of notable legal scholars Duncan Kennedy, Morton Horwitz, and Roberto Unger, and is identifiable by specific terms and concepts, such as 'trashing'⁴⁵ and the 'indeterminacy' of law.⁴⁶ This article is primarily concerned with CLS1. It is, however, not the only narrow variant of Critical Legal Studies.

CLS1 originated in the US before being introduced, rather than transplanted, into the UK several years after its inception. Initially, a distinction between British and US Critical Legal Studies may not have been clear, with 'Brit Crit' authors Peter

⁴¹ Costas Douzinas, 'Oubliez Critique' (2005) 16(1) *Law and Critique* 47, 58.

⁴² Douzinas and Gearey (n 5) 229–58.

⁴³ Unger, *The Critical Legal Studies Movement* (n 21).

⁴⁴ Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

⁴⁵ Mark G Kelman, 'Trashing' (1984) 36(1) *Stanford Law Review* 293, 293.

⁴⁶ Mark Tushnet, 'Defending the Indeterminacy Thesis' (1996) 16(3) *Quinnipiac Law Review* 339, 341.

Fitzpatrick and Alan Hunt stating in 1987 that '[c]ritical legal scholarship has not formed clearly delineated "national" varieties'.⁴⁷ However, by 1993, fellow 'Brit Crit' Peter Goodrich presented an article on the distinctly US-based Critical Legal Studies movement.⁴⁸ Goodrich's article enforces the geographic distinction, tellingly titled 'Sleeping with the Enemy: On the Politics of Critical Legal Studies in America',⁴⁹ questioning the issues faced specifically by US-based Critical Legal Studies compared with legal critique in the UK.⁵⁰ By 2005, Douzinas was more confident still, stating that aside from the name, 'not much links the two sides'.⁵¹ In terms of categorisation, this article follows the clear division between these two branches of Critical Legal Studies,⁵² and presents British Critical Legal Studies as 'CLS2', under the narrow categorisation of the critical legal studies family tree.

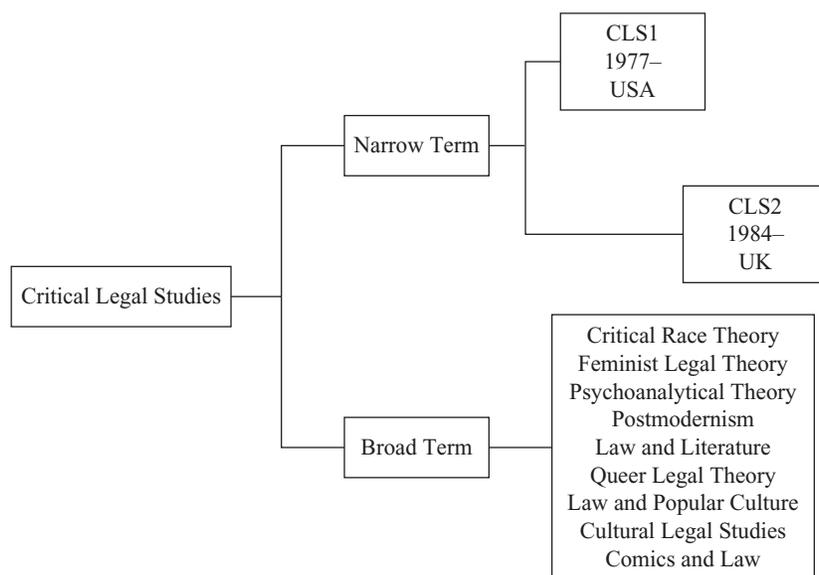


Figure 4: Family Tree: Narrow CLS2 1984

⁴⁷ Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Blackwell, 1987) 1.

⁴⁸ Peter Goodrich, 'Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America' (1993) 68(2) *New York University Law Review* 389.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 392 n 11.

⁵¹ Douzinas, 'Oubliez Critique' (n 41) 59.

⁵² A number of US-based sources on Critical Legal Studies do not address any variety of Critical Legal Studies outside of the US: see, eg, James Boyle (ed), *Critical Legal Studies* (New York University Press, 1992); Brian H Bix (ed), *Philosophy of Law: Critical Concepts in Philosophy* (Routledge, 2016). This is seen to a lesser extent in later works from the Brit Crits: see, eg, Costas Douzinas and Colin Perrin (eds), *Critical Legal Theory* (Routledge, 2011) which has no foundational CLS1 articles in the four-volume collection. Instead, Douzinas and Perrin include Pierre Schlag, 'US CLS' (1999) 10 *Law and Critique* 199 to historically address CLS1.

The creation of the family tree, which offers the neat categorisation of CLS1 and CLS2, comes with its own set of issues; relevant here is the issue of a clear starting point. For example, CLS2 can potentially be traced back further than 1984 and before the introduction of CLS1, with the seminal book *Images of Law* by Zenon Bankowski and Geoff Mungham in 1976.⁵³ A similar issue arises for CLS1 with *Law Against the People*, an edited collection on critically demystifying law, published in 1971.⁵⁴ Theoretically, both books offer earlier starting points for CLS1 and CLS2, however whilst influential, they should not be considered part of the Critical Legal Studies canon. The purpose of this family tree is not to encompass all critical works, but rather those that identified with and worked under the banner of Critical Legal Studies. Therefore, whilst *Images of Law* was influential on CLS2 specifically,⁵⁵ it should be viewed as a separate critical work, rather than Critical Legal Studies.

Instead, the date given to the start of the CLS2 limb relies on Fitzpatrick and Hunt's *Critical Legal Studies*,⁵⁶ which states that '[i]n Britain the Critical Legal Conference was formed in 1984'.⁵⁷ In keeping with Davies' initial distinction, the identification and categorisation of CLS2 is used to outline what CLS1 was not. Whilst certain CLS2 works will be relevant to the critique and contextualisation of CLS1, further analysis of this category falls outside the scope of this article.

At this stage, the narrow side of the critical legal studies family tree has two limbs, CLS1 and CLS2. Despite the existing similarities and differences in both the theory and practice of CLS1 and CLS2, there is a major distinction vital to the unpacking of the narrow Critical Legal Studies and the development of the family tree: the death of CLS1.

⁵³ Zenon Bankowski and Geoff Mungham, *Images of Law* (Routledge, 1976).

⁵⁴ Robert Lefcourt, *Law Against the People* (Random House, 1971).

⁵⁵ For CLS2, see especially Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999); Peter Goodrich, 'Screening Law' (2009) 21(1) *Law and Literature* 1.

⁵⁶ Fitzpatrick and Hunt (n 47).

⁵⁷ Fitzpatrick and Hunt (n 47) 1.

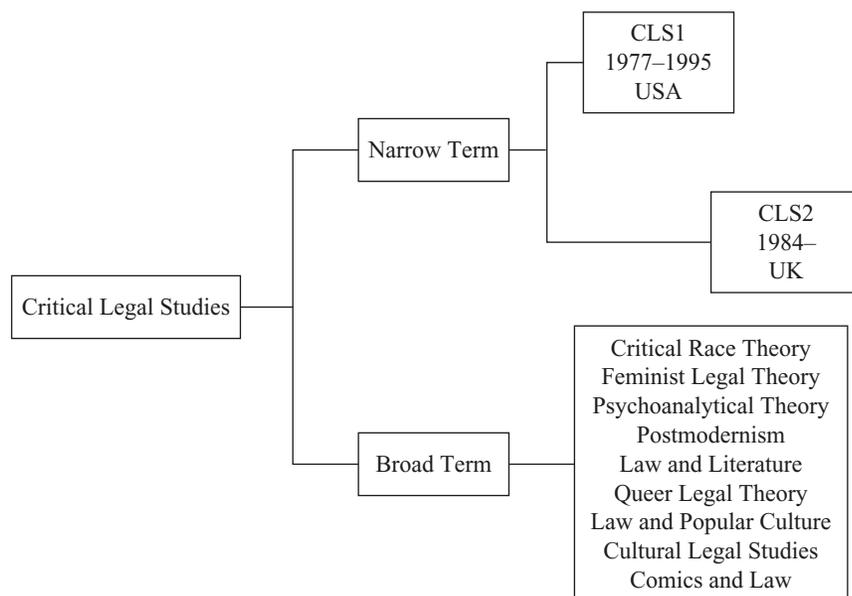


Figure 5: Family Tree: Narrow CLS1 1977–1995

Within the structure of this family tree, the death of CLS1 provides two important outcomes. First, it further differentiates itself from CLS2, which has not ‘died’. Second, the death of CLS1 provides a categorisation for US-based Critical Legal Studies post-1995. For CLS2, the CLC is still running and early CLS2 works like Hunt and Fitzpatrick’s *Critical Legal Studies*,⁵⁸ or Douzinas, Goodrich, and Yifat Hachamovitch’s *Politics, Postmodernity, and Critical Legal Studies*,⁵⁹ demonstrate modes of thinking that can still be seen in contemporary CLS2 works, sometimes by the same authors.⁶⁰ CLS1 has not followed this path, and instead transitioned to what has been called a death.⁶¹ The result of this death is a schism in US-based Critical Legal Studies, resulting in the creation of a new limb: CLS3.

⁵⁸ Fitzpatrick and Hunt (n 47).

⁵⁹ Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent* (Routledge, 1994).

⁶⁰ See, eg, Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (Routledge, 2009).

⁶¹ See below Part III.

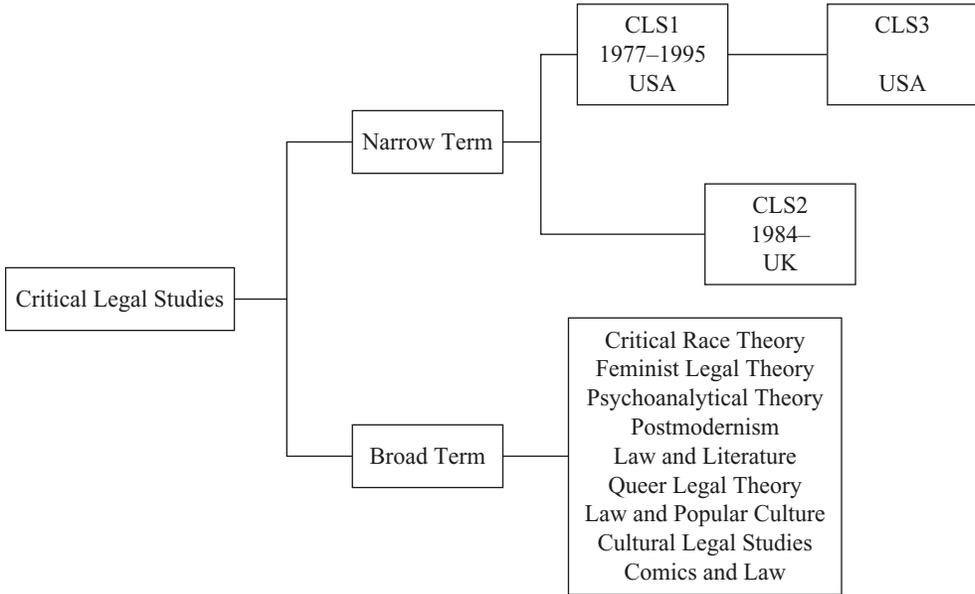


Figure 6: Family Tree: Narrow CLS3

Until this point, the divisions presented via the family tree should cause little to no debate.⁶² However, the CLS3 limb is not something already articulated within Critical Legal Studies;⁶³ instead, it is a creation of this article. CLS3 should be understood as a contemporary Critical Legal Studies — it follows the categorisation of the narrow US-based Critical Legal Studies, appearing after the death of CLS1. Unlike CLS1 or CLS2, CLS3 is resultant only on the death of CLS1, rather than a conference or a grouping of scholars. For clarity, CLS3 should also be understood as the US-based Critical Legal Studies that still continues to this day. By investigating how the CLS1 death occurred, this article will demonstrate a key factor in the mystification of critical legal studies.

III THE CLS1 EULOGY

In the 1 December 1995 edition of the *Harvard Law Record*, the student-run Harvard Law School paper, Hope Yen penned an article on CLS1. Under the title ‘As HLS Mulls its Mission, CLS Scholars Remain Quiet’, the article is a response to the lack of engagement by the once vocal Crits on development plans for Harvard Law School by the new Dean, Robert Clark.⁶⁴ The article begins on page two of the *Harvard*

⁶² See Davies (n 10) 191–221; Douzinas and Gearey (n 5) 229–58.

⁶³ But see Adam Gearey, “‘Change is Gonna Come’: Critical Legal Studies and the Legacies of the New Left” (2013) 24 *Law and Critique* 211, 224.

⁶⁴ Hope Yen, ‘As HLS Mulls Its Mission, CLS Scholars Remain Quiet’, *Harvard Law Record* (Cambridge, Massachusetts, 1 December 1995) 2.

Law Record, and continues on page four, with a secondary title ‘Crits at HLS a Dying Breed?’.⁶⁵ Although Harvard-centric, Yen’s article is an important piece of more general CLS1 history. The article’s focus on the silence of the Crits allows Yen to question Crits still on the Law School faculty, interviewing Kennedy and Horwitz. Within the quotes that Yen uses, both Professors of Law refer to CLS1 as ‘dead’.⁶⁶

Yen’s article offers a unique insight into the death of CLS1: first, by identifying from prominent Crits that a death has occurred; second, from the location in which this information was gathered and published; and third, with its relation to Dean Clark and his association with law and economics.⁶⁷ These three factors are linked throughout the history of CLS1, with its key actors, their location, and competing theories of jurisprudence shaping CLS1 and, inevitably, its end. When Yen captures both Kennedy and Horwitz saying that CLS1 is dead and Dean Clark stating that he did not ‘kill’ it,⁶⁸ the article can be read as a posthumous discussion of CLS1 itself, rather than Clark’s plans for the Law School. To best appreciate this reading, the history of CLS1, focusing on prominent Crits, Harvard Law School, and law and economics will be discussed, in the lead-up to Yen’s article and the declared death of CLS1.

The death of CLS1 will be discussed with reference to three categories: the CLS1 founders; their location; and the CLS1 rivals. Given the organic and loosely affiliated nature of CLS1, the many universities it had clusters at, as well as the early relationship between CLS1 and law and economics,⁶⁹ these titles are imperfect. However, given what each title denotes, it is possible to understand them as placeholders, representative of key issues, rather than unequivocal and definitive terms. The location in question is Harvard Law School, the founders are Kennedy, Horwitz and Unger, and the rival is law and economics. Categorised in this way, the specific rise and fall of CLS1 at Harvard Law School can be seen as endemic to CLS1 as a whole.

A *The CLS1 Founders*

Harvard Law School acted as a microcosm for CLS1. It was home to some of the most prominent names in CLS1, which given its prestige, went a long way in vetting the movement more broadly. The relationship between Harvard Law School and CLS1 can be traced back to the hiring of three legal theorists in 1971: Duncan Kennedy, Morton Horwitz, and Roberto Unger.⁷⁰ In accordance with the critical legal studies family tree, this act by the Law School predates the beginning of CLS1. However,

⁶⁵ Ibid 4.

⁶⁶ Ibid 2.

⁶⁷ See below Part III(C).

⁶⁸ Yen (n 64) 2.

⁶⁹ See James R Hackney, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, 2012) 22.

⁷⁰ Ibid 28.

the hiring of these theorists serves as a prelude to the movement proper, as Kennedy recounted in a 2012 interview:

When I got to Harvard Law School, I fell in with Morton Horwitz and Roberto Unger. We were all hired at the same time, and as it very often happens in law faculties, people that are hired in the same year form a kind of cohort. There's a kind of intimacy that comes from arriving at the same time, but it developed quickly way beyond that into a very deep intellectual alliance.⁷¹

The alliance Kennedy speaks of was manifested through the creation of CLS1. Kennedy, Horwitz, and Unger all contributed key texts to the Critical Legal Studies movement, with their work during the prelude to CLS1 establishing a grounding in areas further developed after the inaugural Conference on Critical Legal Studies in 1977.

In keeping with this structural meta-analysis approach, this article will assess the themes and structure of these theorists' works during this time. Through this demonstration, unity within the scholarship will be presented without the need for a detailed and extensive literature review. For example, during this pre-CLS1 phase, Kennedy published 'How the Law School Fails: A Polemic',⁷² and 'Form and Substance in Private Law Adjudication'.⁷³ Despite the length of these papers, especially 'Form and Substance',⁷⁴ these works can be considered fairly minor for Kennedy, with his more notable published CLS1 work coming after the first Conference on Critical Legal Studies.⁷⁵ Both articles hint, however, at the proceeding CLS1 with Kennedy's first polemic bearing traceable roots to his more famous polemic,⁷⁶ as well as themes of formal and ad hoc implications of law, seen in 'Form and Substance'.⁷⁷ These articles cover issues on structures of rhetoric and hierarchies within institutions, which feed into the dominant themes throughout Kennedy's later CLS1 work.⁷⁸ The foundational pre-CLS1 work for Kennedy was his 1975 unpublished manuscript *The Rise and Fall of Classical Legal Thought*, which remained in this form until being formally published in 2006.⁷⁹

⁷¹ Ibid.

⁷² Duncan Kennedy, 'How the Law School Fails: A Polemic' (1971) 1(1) *Yale Review of Law and Social Action* 77 ('How the Law School Fails').

⁷³ Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685 ('Form and Substance').

⁷⁴ Ibid. The article is 95 pages long.

⁷⁵ See Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28(2) *Buffalo Law Review* 205.

⁷⁶ Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

⁷⁷ Kennedy, 'Form and Substance' (n 73) 1685.

⁷⁸ Ibid.

⁷⁹ Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (BeardBooks, 2006) ('*Rise and Fall*').

Rise and Fall set the tone for a dominant branch of CLS1 with the use of structuralism and critical theory to assess what Kennedy calls ‘classical legal thought’ (from 1850–1940).⁸⁰ In the 2006 published version of *Rise and Fall*, Kennedy included a preface to the 1975 work, outlining that by discussing structuralism and critical theory with regard to law and legal history, he aimed to provide more techniques to a legal repertoire.⁸¹ Candidly, Kennedy also admitted that his hope was for this work to be included in the fields of critical theory and structuralism. Whilst the latter was not clearly achieved, the work’s thematic resonance with CLS1 can be seen through the issues Kennedy outlines. For example, *Rise and Fall* traces five issues through the period of classical legal thought which Kennedy identifies as ‘Legal Consciousness’,⁸² ‘The Phenomenological Approach to Legal Reasoning, by Analogy and by Deduction, to Produce a Conception of the “Mode of Integration of a Subsystem”’,⁸³ ‘The Notion of Nesting’,⁸⁴ ‘The Ontology of Rights and Powers’,⁸⁵ and ‘Reason Dies While Giving Birth to Liberalism’.⁸⁶ For Kennedy, *Rise and Fall*’s structure and subject matter is identifiably a form of critical legal studies, before the term was openly coined.

Choosing to publish through Harvard University Press, rather than following Kennedy’s self-publication method, Horwitz also released a book on legal history. Published in 1977, *The Transformation of American Law, 1780–1860* won the Bancroft Prize the following year.⁸⁷ *The Transformation of American Law* evidenced a different way in which legal history could be explored through a broad CLS1 approach. Although these are both historical works, Horwitz and Kennedy differ in both form and methodology. Horwitz also revisits history through a contemporary critical lens, but does not impose a framework in the way Kennedy approached *Rise and Fall*.⁸⁸ Instead, moving away from the dominant jurisprudential focus of constitutional law, Horwitz focused on the underrepresented analysis of private law.⁸⁹ *The Transformation of American Law* identified a tendency for previous historical work to look at public law as being in the public interest⁹⁰ and for private law to be ‘private’, despite its influence on the distribution of power and wealth in American society.⁹¹ Horwitz challenged this dominant approach, demonstrating a move from

80 Ibid vii.

81 Ibid xiv.

82 Ibid xiv.

83 Ibid xvii.

84 Ibid xx.

85 Ibid xxi.

86 Ibid xxii.

87 Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) (*The Transformation of American Law*).

88 Kennedy, *Rise and Fall* (n 78) x.

89 Horwitz (n 87) xii.

90 Ibid xiv.

91 Ibid xv.

the historical ideals of legal realism's critique of public law,⁹² to the foundational CLS1 stance which viewed all law as politics.⁹³

The difference in approach, demonstrated by Kennedy and Horwitz, shows a wide berth in the foundations of CLS1. It is important to note that these differences were also clear at the time, with Kennedy identifying that 'in 1975, Morty Horwitz and I were arguing about a series of different methodological issues that had a lot of influence on the first stages of Critical Legal Studies at the intellectual level'.⁹⁴ These discussions were in regard to the different approaches they took to their historical work, with Kennedy reiterating his structural and critical position, and Horwitz taking an approach relative to his Marxist allegiances.⁹⁵ Rather than fragmenting or dissolving CLS1 before it began, these differences paved the way for the diverse approaches taken to law under the banner of CLS1. This diversity is further exemplified by Unger's work, which moved away from the direct legal historical approach taken by both Kennedy and Horwitz, instead presenting a philosophical approach to law in the pre-CLS1 period.

Beginning with *Knowledge and Politics* in 1975,⁹⁶ and continuing with *Law in Modern Society* in 1976,⁹⁷ Unger set the tone for the philosophical side of CLS1. Whilst not strictly a series, Unger notes that *Law in Modern Society* builds upon *Knowledge and Politics*, and both books follow a similar style.⁹⁸ In comparison to both Kennedy and Horwitz, Unger's works begin more broadly. *Knowledge and Politics* opens with a statement from the author that the book's purpose is to 'help one understand the context of ideas and sentiments within which philosophy and politics must now be practiced'.⁹⁹ The book is not so much a call to arms as a map one might use to understand the current (1975) climate of philosophy and politics. As such, *Knowledge and Politics* covers a wide range of topics, but with liberalism at the heart of Unger's critique. This theme can be seen directly in the initial chapters on 'Liberal Psychology',¹⁰⁰ 'Liberal Political Theory',¹⁰¹ and 'The Unity of Liberal Thought'.¹⁰²

⁹² See Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, rev ed, 1991).

⁹³ Hackney (n 69) 26–7.

⁹⁴ Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 24.

⁹⁵ *Ibid.*

⁹⁶ Roberto M Unger, *Knowledge and Politics* (The Free Press, 1975).

⁹⁷ Roberto M Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (The Free Press, 1976) ('*Law in Modern Society*').

⁹⁸ *Ibid* v.

⁹⁹ Unger, *Knowledge and Politics* (n 96) v.

¹⁰⁰ *Ibid* 29.

¹⁰¹ *Ibid* 63.

¹⁰² *Ibid* 104.

In his follow-up text, *Law in Modern Society*, Unger further follows the thread of liberalism, this time addressing it with regard to social theory. The underlying aim of the book is to lead towards a critique of social theory.¹⁰³ Again, Unger addresses the topic at hand broadly, demonstrating and positioning law within the realm of modernity, primarily by addressing different cultures¹⁰⁴ and then assessing how liberalism has effected change internationally.¹⁰⁵ Whilst there is undoubtedly a marked difference between the three authors and their works, their own voices and styles evident and distinct in this pre-CLS1 time, the central theme of critiquing and questioning liberalism is unifying. In a post-CLS1 world there is a potential argument that the works themselves were at best tenuously connected, either broadly critical, or merely progressive. However, collectively their unified approach to demystifying liberal notions of law laid the groundwork for CLS1.

B *The CLS1 Location*

The groundwork for CLS1, completed by Kennedy, Horwitz, and Unger, was undertaken during their time at Harvard Law School. This location, as proposed above, acted as a microcosm for CLS1: what happened to CLS1 at Harvard Law School directly impacted CLS1 as a whole. The relationship between Harvard Law School and CLS1 therefore becomes a fundamental part of the CLS1 story. Importantly, the relationship between CLS1 and Harvard Law School was new.¹⁰⁶ The instigation of this relationship hinged on a changing socio-political climate¹⁰⁷ and changes in jurisprudence which led to universities hiring legal theorists like Kennedy, Horwitz, and Unger. Inadvertently, these factors helped to create and directly affect CLS1, specifically with its relationship to Harvard Law School. By addressing how this relationship began, it is possible to identify the pressures which led to the death of CLS1.

As was argued earlier in this article, the relationship between CLS1 and Harvard Law School can be traced back to the 1971 hiring of Kennedy, Horwitz, and Unger. However, the importance of this action is compounded by the fact that, historically, the broad type of critical work undertaken by these impending CLS1 scholars was not traditionally welcomed at Harvard Law School.¹⁰⁸ Instead, from the early part of the 20th Century this type of scholarship had been deliberately nurtured at Yale Law School.¹⁰⁹ As Laura Kalman identifies, the hiring of the early Critics by Harvard and not Yale demonstrated a deliberate transition in both institutions:

¹⁰³ Unger, *Law in Modern Society* (n 97).

¹⁰⁴ See, eg, *ibid* 47–133.

¹⁰⁵ See, eg, *ibid* 134–91.

¹⁰⁶ Hackney (n 69) 28.

¹⁰⁷ See below Part III(C).

¹⁰⁸ Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (The University of North Carolina Press, 2005) 7. See Hackney (n 69) 28.

¹⁰⁹ Kalman (n 108) 7.

Yale, which had embraced forward-looking legal realism in the 1930s, rejected realism's descendant, Critical Legal Studies [CLS1], at the same time that Harvard Law School, which had once turned its back on realism, made a home for realism's child and for scholarship that represented one logical extension of sixties activism.¹¹⁰

In her assessment, Kalman's identification leads to a series of issues which underpin the relationship between CLS1 and Harvard Law School. Kalman's insight contextualises CLS1 historically as a descendant of legal realism, and then contemporaneously as an extension of 1960s activism; by unpacking this statement, the significance of Harvard Law School as the location for CLS1 is made clear. The connection Kalman draws between legal realism and CLS1 further illuminates the relationship between CLS1 and Harvard Law School. The implication in Kalman's quote is that CLS1 would follow a similar path to legal realism and be rejected by Harvard Law School.¹¹¹ The hiring of Kennedy, Horwitz, and Unger demonstrated that Harvard was open to 'increasing [its] intellectual dynamism',¹¹² however its history with legal realism placed the emergence of CLS1 in a precarious position. To appreciate the importance of this position for CLS1, it is necessary to briefly look at the relationship between legal realism, CLS1, and Harvard Law School.

Kalman is not alone in her connection of CLS1 and legal realism, with Legal realism often heralded as a predecessor of CLS1,¹¹³ along with claims that CLS1 is a continuation of legal realism.¹¹⁴ Legal realism does differ from some CLS1 approaches,¹¹⁵ but its focus on judicial subjectivity under the guise of scientific formalism draws a strong correlation. Relative to the idea of a CLS1 location was legal realism's own relationship with Harvard Law School, notably through former student Oliver

¹¹⁰ Ibid.

¹¹¹ Ibid 7–8.

¹¹² Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008) 193.

¹¹³ Hackney (n 69) 27; Goodrich (n 2) 185–6.

¹¹⁴ Hackney (n 69) 27; Goodrich (n 2) 185–6; Debra A Livingston, "'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship' (1982) 95(7) *Harvard Law Review* 1669, 1682; Neil Duxbury, 'The Reinvention of American Legal Realism' (1992) 12(2) *Legal Studies* 137, 138; William W Fisher III, Morton J Horwitz and Thomas A Reed (eds), *American Legal Realism* (Oxford University Press, 1993) xi–xv; Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15(3) *Philosophy and Public Affairs* 205; John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45(1) *Duke Law Journal* 84; David Fraser, 'What a Long, Strange Trip It's Been: Deconstructing Law from Legal Realism to Critical Legal Studies' (1988) 5 *Australian Journal of Law and Society* 35, 38; Davies (n 10) 200.

¹¹⁵ See Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) 77–9.

Wendell Holmes Jr.¹¹⁶ The legal realists are often exemplified by Holmes and his work in both *The Common Law*,¹¹⁷ and ‘The Path of the Law’.¹¹⁸ Within these works, Holmes embodied the critical stance of the legal realists, demonstrating an application of broader philosophical theory and critique of law.¹¹⁹ This critical stance also included challenging the dominant formalist pedagogy, which was embodied by Harvard Law School’s Socratic Method.¹²⁰ Although legal realism ultimately failed in directly overthrowing formalism at Harvard Law School, its influence was felt throughout the 20th century, culminating in new jurisprudential approaches, including CLS1.

The legal realists’ decision to focus their challenge on Harvard Law School related to the creation of the Socratic casebook method by a former Dean of the Law School, Christopher Columbus Langdell.¹²¹ Langdell’s formalist pedagogical approach, which he instigated at Harvard Law School, transformed and dominated legal education from the early part of the 20th century.¹²² Sometimes referred to as ‘Langdellianism’,¹²³ the method was embraced heavily by a large number of law schools across the US at this time.¹²⁴ Critically, this method encouraged students to ‘believe law was separate from morality and preference’, in turn draining law of its ‘ideological political content’.¹²⁵ Despite its success,¹²⁶ the method’s vacuous nature made it a target for more inclusive modes of legal reasoning. However, this was not exclusive to the legal realists, with an early charge against Langdellianism being led unsuccessfully by Roscoe Pound, who called for the implementation of a sociological jurisprudence.¹²⁷ Although he was also unsuccessful, the movement spurred by Holmes was described as ‘the most concerted attempt to challenge Harvard’s control over legal education’.¹²⁸ As a result of this effort by the legal realists, their approach was seen as a valid alternative, and was desirable to other schools, most notably when it was taken up at Yale.¹²⁹

¹¹⁶ See Louis Menand, *The Metaphysical Club* (Farrar Straus and Giroux, 2001).

¹¹⁷ Holmes, *The Common Law* (n 92).

¹¹⁸ Oliver Wendell Holmes Jr ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457.

¹¹⁹ See, eg, Holmes, *The Common Law* (n 92) 188.

¹²⁰ Anthony Chase, ‘The Birth of the Modern Law School’ (1979) 23(4) *American Journal of Legal History* 329, 329–31.

¹²¹ *Ibid*; Kalman (n 108) 17.

¹²² Kalman (n 108) 17.

¹²³ Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995) 140–141.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

¹²⁶ Duxbury (n 123) 9–18.

¹²⁷ *Ibid* 54; Kalman (n 108) 18.

¹²⁸ Kalman (n 108) 18.

¹²⁹ *Ibid* 19.

Historically, with Harvard's rejection and Yale's acceptance of legal realism, it was not expected that Harvard Law School would hire young critical scholars like Kennedy, Horwitz, and Unger. Their unexpected appointment, paired with the lack of critical roots within Harvard Law School, presented an uncertain foundation for CLS1 at Harvard. More importantly to this current analysis, the level of uncertainty allows a challenge to be levelled at the terminology used by Kalman in the second part of her quote.¹³⁰ Kalman begins by stating that Harvard Law School made 'a home for realism's child' and identifies this child as a 'logical extension of sixties activism'.¹³¹ This article proposes that the concept of a home for CLS1, as an extension of 1960s activism, from an institution such as Harvard Law School is problematic. The connotation of the term 'home' implies certain values that were not evident in the existence of CLS1,¹³² which is why the use of 'location' has been employed in this article instead. The distinction between location and home moves beyond mere semantics and removes the inferred emotion with the designation of a home, which can include ownership, belonging, and safety. The idea of a location instead is one where CLS1 could be practiced, but where it would also be in competition with other modes of jurisprudence, specifically law and economics.

C *The Rivals: CLS1, Liberalism, and Law and Economics*

Following a similar path to the legal realists and their fight against formalism, CLS1 and the Crits also challenged the dominant structures of law. However, transitions made in American society during the 20th century shifted the dominant form of law from formalism to liberalism.¹³³ Given the breadth of the term, the 'liberalism' in question can be understood as 'the set of political ideas that had descended from the New Deal and that had shaped the steady post-war expansion of federal social and economic responsibilities'.¹³⁴ The shaping of these responsibilities were such that liberalism infiltrated all walks of American life, including law and the academe.¹³⁵ As historian Alan Brinkley continues, '[f]aith in both the value and the durability of liberalism shaped not only the politics, but also much of the scholarship of the post-war era'.¹³⁶ The Crits' focus, especially via Kennedy, was inside the law school,¹³⁷ and as Kennedy later affirmed, '[t]he mainstream of the law school world was not conservatism; the mainstream was liberalism'.¹³⁸ Collectively, the critique and criticism of liberalism was the primary target of the Crits.¹³⁹

¹³⁰ See above n 109 and accompanying text.

¹³¹ *Ibid* 7.

¹³² See below Part IV.

¹³³ Duxbury (n 123) 32–64.

¹³⁴ Alan Brinkley, *Liberalism and its Discontents* (Harvard University Press, 1998) ix.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ Kennedy, 'How the Law School Fails' (n 71); Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

¹³⁸ Hackney (n 69) 24.

¹³⁹ See above Part III(A).

In countering liberalism, the Crits and CLS1 were not alone. Notably, much earlier than CLS1,¹⁴⁰ law and economics had developed similar anti-liberal sentiments. Law and economics formed within the Chicago School of Economics, primarily offering alternatives to Keynesianism — the economic driving force behind liberalism¹⁴¹ — and applying these alternatives to law.¹⁴² At Chicago University, law and economics was spearheaded by Edward Levi and Aaron Director,¹⁴³ spawning a journal of the same name in 1958. In the third volume of the journal, Ronald Coase published an article, ‘The Problem of Social Cost’.¹⁴⁴ Presenting a mixture of real case law and theoretical economics, Coase’s seminal piece attacked existing economic arguments, specifically the imposition of taxes, fines, and restrictions on businesses that harm others. This article challenged the dominant concept of the Pigouvian Tax,¹⁴⁵ and instead looked at market-based alternatives that would be less economically damaging to businesses which caused harm.

‘The Problem of Social Cost’ transformed what would come to be known as law and economics, notably when Coase took over as editor of the journal and openly pushed the approach he had taken in this article.¹⁴⁶ Coase’s influence and the change in direction brought in interest from young scholars including Richard Posner who, as a prolific author, would further refine law and economics.¹⁴⁷ On its own, the journal, and even the academics at Chicago, were not enough to bring about an end to liberalism. However, the direction implemented by Coase helped to build a foundation against it. Within jurisprudence and the academe, these efforts, paired with the unlikely allies of the civil rights movement and the revolutionary 1960s,¹⁴⁸ helped to destabilise liberalism until ‘[b]y the end of the 1960s ... [the] secure liberal universe was already beginning to crumble’.¹⁴⁹

¹⁴⁰ Hackney (n 69) 22.

¹⁴¹ Michael Stewart, *Keynes and After* (Pelican Books, 2nd ed, 1968) 240.

¹⁴² Rob Van Horn and Philip Mirowski, ‘The Rise of the Chicago School of Economics and the Birth of Neoliberalism’ in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2009) 139.

¹⁴³ Ronald H Coase, ‘Law and Rconomics at Chicago’ (1993) 36(1) *The Journal of Law and Economics* 239, 247, 251.

¹⁴⁴ Ronald H Coase, ‘The Problem of Social Cost’ (1960) 3 *The Journal of Law and Economics* 1.

¹⁴⁵ *Ibid* 28. A Pigouvian tax, named after its founder, Arthur Pigou, argues for higher taxes on private companies to balance their self-interest with a broader social interest. A Pigouvian tax is a higher tax on businesses that have higher social costs: see generally Arthur C Pigou, *The Economics of Welfare* (Macmillan, 4th ed, 1932).

¹⁴⁶ Coase, ‘Law and Economics at Chicago’ (n 143) 253.

¹⁴⁷ *Ibid* 251. See, eg, Richard A Posner, *Economic Analysis of Law* (Little, Brown and Company, 1973). See also Richard A Posner, *The Economics of Justice* (Harvard University Press, 1983).

¹⁴⁸ Brinkley (n 134) ix.

¹⁴⁹ *Ibid* x.

Despite their shared target of liberalism, CLS1 and law and economics occupied different political positions, from which they led their attacks. Whilst the categorisation of CLS1 as politically left and law and economics as politically right is an oversimplification, it is one which aids the narrative. Ideologically, these directions broadly designate the politics aligned with both movements. They imply a binary opposition that was not always evident, as CLS1 and law and economics did interact.¹⁵⁰ However, as CLS1 developed it remained opposed to liberalism and distanced itself further from law and economics.¹⁵¹ This distance, however, merely clarified the nature of the relationship between both movements as liberalism continued to wane, moving to a relationship of direct competition. As Neil Duxbury identified, ‘[f]ew American academic lawyers seem to dissent from the proposition that ... law and economics and [CLS1] have been the “best-organized, most ambitious voices in the law schools”’.¹⁵²

Given the status and locations of CLS1 and law and economics, the competition occasionally left the law school and made for public consumption. Notably, this was seen when Mark Kelman’s *A Guide to Critical Legal Studies* singled out Posner’s approach to law and economics in a chapter titled ‘Legal Economists and Normative Social Theory’.¹⁵³ In the form of a book review for the *Wall Street Journal*, Posner, at this stage an appeals court judge, penned a response to Kelman’s claims.¹⁵⁴ Although he compliments Kelman as a critic of mainstream law,¹⁵⁵ Posner calls Kelman out as ‘too quick to find contradiction, too dismissive of efforts to reconcile apparent conflicts, [and] too contemptuous of practical reason’.¹⁵⁶ This bickering in the public eye can be seen as somewhat sporting and even healthy between two competing legal movements. However, the elephant in the room, the dying form of post-war American liberalism,¹⁵⁷ highlights the very real competition of a winner-takes-all situation.

¹⁵⁰ Krever, Lisberger and Utzschneider (n 94) 11. See also Richard Rorty, ‘The Banality of Pragmatism and the Poetry of Justice’ (1990) 63 *Southern California Law Review* 1811, 1812; Richard A Posner, *The Problematics of Moral and Legal Theory* (The Belknap Press, 1999). Posner unpacks the difference between postmodernism and pragmatism in law and asks himself: am I ‘a right-wing “Crit”?’: at 266.

¹⁵¹ Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1990) 114–85.

¹⁵² Duxbury (n 123) 304. Cf Schalg (n 52) 206.

¹⁵³ Kelman (n 151) 114.

¹⁵⁴ Richard A Posner, ‘Bookshelf: A Manifesto for Legal Renegades’, *The Wall Street Journal* (New York, 27 January 1988).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Brinkley (n 134) x.

IV THE SLOW DEATH OF CLS1

With a contextual framework made up from the founders, their location, and their rivals, the climate and pressures surrounding CLS1 have been presented. This article proposes that this climate and context provide an understanding of events that occurred over time eventually led to the death of CLS1. The likelihood of the CLS1 death became more apparent as the flaws in liberalism began to show more broadly, and interest in both CLS1 and law and economics as potential replacements for legal liberalism grew. However, as this interest grew, so did critiques and criticisms of both legal movements.¹⁵⁸ Aside from the aforementioned factors, the lack of a coherent CLS1 alternative to legal liberalism failed to instil confidence in those who might have been more politically supportive of other CLS1 aims.¹⁵⁹ In contrast, the election of Ronald Reagan in 1980 and the push towards supply-side economic policy thematically resonated with law and economics. Culturally, there was a push towards what would become coined as neo-liberalism, which affected politics and institutions alike.¹⁶⁰

Whilst the wider political climate was moving towards a conservatism that aligned with law and economics, the ‘extension of sixties activism’,¹⁶¹ CLS1 was faltering at Harvard Law School. As the notoriety of CLS1 had grown, so had tensions within the law faculty at Harvard. Broadly, this tension was between three identifiable groups: the Crits; traditional liberals; and those affiliated with law and economics.¹⁶² Such was the environment that at least one Professor left Harvard, after 20 years’ service, for Chicago Law School.¹⁶³ However, these tensions truly came to a peak in 1987, when Harvard Law School denied tenure to two CLS1 scholars. When David Trubek, a Visiting Professor, and Clare Dalton, an Assistant Professor, applied for tenure at Harvard Law School and were denied, the Crits and their sympathisers took this as a direct attack.¹⁶⁴ There was no clear evidence this was an attack, and no expectation that every application for tenure would be granted, as Trubek had found

¹⁵⁸ See, eg, Richard Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, 2000); Ronald M Dworkin, ‘Is Wealth a Value?’ (1980) 9(2) *The Journal of Legal Studies* 191.

¹⁵⁹ Bauman (n 158); Richard Michael Fischl, ‘The Question That Killed Critical Legal Studies’ (1992) 17(4) *Law and Social Inquiry* 779.

¹⁶⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 13; Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (ZoneBooks, 2015) 10, 122–31.

¹⁶¹ Kalman (n 108).

¹⁶² ‘Vorenberg, Former Law School Dean, Dies at 72’, *The Harvard Crimson* (online, 14 April 2000) <<https://www.thecrimson.com/article/2000/4/14/vorenberg-former-law-school-dean-dies/>>.

¹⁶³ Jennifer A Kingson, ‘Harvard Tenure Battle Puts “Critical Legal Studies” on Trial’, *The New York Times* (online, 30 August 1987) <<https://www.nytimes.com/1987/08/30/weekinreview/harvard-tenure-battle-puts-critical-legal-studies-on-trial.html>>.

¹⁶⁴ *Ibid.*

previously when he was denied tenure at Yale Law School.¹⁶⁵ However, the timing of the denial moved beyond the issue at hand and became representative of CLS1 at Harvard Law School. Whilst tensions had been running high between the different legal factions,¹⁶⁶ the denial of tenure was something institutionally instigated, rather than from an individual. In itself, this top-down rejection of CLS1 scholars represented an institutional decline in the approval or acceptance of CLS1 at Harvard Law School. Trubek did not request a review and returned to the University of Wisconsin Law School.¹⁶⁷ Dalton sought a review and her tenure denial was upheld.¹⁶⁸

The decision at Harvard Law School rippled through the legal academe and the broader community with the help of newspapers like the *New York Times*, which had covered the story.¹⁶⁹ Reading between the lines, those with an interest in the saga of CLS1 at Harvard would have seen that the movement was not going to wield the power it once had, however at this stage its actual death would not have been so easy to predict. In hindsight, the *New York Times* article did contain a quote from Crit Robert Gordon, of Stanford Law School, which was quite telling. Gordon gets to the heart of the seriousness of the competition between CLS1 and law and economics, stating that ‘[t]here’s a peculiar kind of vanity or megalomania at Harvard, that the place is the soul of the American ruling class ... Whoever wins in local institutional battles there thinks they will control America’s cultural and institutional destiny’.¹⁷⁰ A critical reading of Gordon’s observation gives a pre-emptive understanding that only one challenger of legal liberalism was likely to survive.

In 1989, two years after the denial of tenure to Trubek and Dalton, the Dean of Harvard Law School, Vorenburg — who had overseen the prominent CLS1 years — stepped down.¹⁷¹ Vorenburg was succeeded by Robert C Clark, a traditionalist with a background in corporate law,¹⁷² whose appointment was met with dissatisfaction from the Crits.¹⁷³ Gerald Frug, a Crit and part of the six-person faculty search committee that helped shortlist the potential Deans, believed the appointment of Clark was a mistake.¹⁷⁴ Harvard University President Derek Bok, however, gave

¹⁶⁵ Hackney (n 69) 28.

¹⁶⁶ Kingson (n 163).

¹⁶⁷ *Ibid.*

¹⁶⁸ Carol Kleiman, ‘Evidence Tenuous for Denied Tenure’, *Chicago Tribune* (online, 14 October 1993) <<https://www.chicagotribune.com/news/ct-xpm-1993-10-14-9310140190-story.html>>.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Allan Gold, ‘Traditionalist is Named as Harvard Law Dean’, *The New York Times* (online, 18 February 1989) <<https://www.nytimes.com/1989/02/18/us/traditionalist-is-named-as-harvard-law-dean.html>>.

¹⁷² See, eg, Robert Clark, *Corporate Law* (Little Brown Company, 1986).

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

his full support to Clark, overriding Frug and any other critics.¹⁷⁵ The appointment of Clark allowed a reshuffling of the faculty, separating the factions, and removing more of the power Crits held in the Law School,¹⁷⁶ a move that set the tone for the start of a new decade.

In 1991, law and economics' Ronald Coase won the Nobel Prize for Economic Science.¹⁷⁷ With this award, Coase joined Law and Economic influencers Friedrich von Hayek (winner in 1974) and Milton Friedman (1976).¹⁷⁸ The prestige of this award and the lineage behind it further legitimised the law and economics approach. Now facing a Nobel Prize-winning opponent, reflective of governments throughout the world,¹⁷⁹ CLS1 as the 'extension of sixties activism' was being framed as legal whimsy.¹⁸⁰ Given the reflective nature of law and economics to a certain political and business class, the final blow to CLS1 came in the form of corporate endowments, notably the endowments provided by John M Olin and the Olin Foundation.¹⁸¹ After giving money to the law and economics movement in the 1970s,¹⁸² the Olin Foundation pushed for a law and economics program at Harvard Law School, which was accepted by the University President, Derek Bok.¹⁸³ Similar to Gordon's earlier observation, Steven Teles identified Harvard Law School as a target for the Olin Foundation: 'Because of its size and prestige, Harvard Law School has an outsized impact on American legal culture and the character of the legal professoriate'.¹⁸⁴ The multiyear grant created The John M Olin Center for Law, Economics, and Business, which would go on to receive funding of more than \$18 million from the Olin Foundation.¹⁸⁵

V CONCLUSION: ENDING CLS1, BEGINNING CLS3

The ongoing competition between CLS1 and law and economics throughout the 1980s provides some context to the question asked in Yen's 1995 article for the *Harvard Law Record*. Broadly, in the face of a changing law school, where are the Crits? It can be argued that as the unsuccessful side in a jurisprudential overhaul, the Crits had stepped out of the limelight, no longer gracing the pages of mainstream newspapers

¹⁷⁵ Ibid.

¹⁷⁶ Yen (n 64) 2.

¹⁷⁷ 'All Prizes in Economic Sciences', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/uncategorized/all-prizes-in-economic-sciences/>>.

¹⁷⁸ Ibid.

¹⁷⁹ See, eg, Harvey (n 160) 37–8, 62–3.

¹⁸⁰ Kalman (n 108).

¹⁸¹ John J Miller and Karl Zinsmeister, *Agenda Setting: A Wise Giver's Guide to Influencing Public Policy* (The Philanthropy Roundtable, 2015) 38.

¹⁸² Ibid 39.

¹⁸³ Ibid 40.

¹⁸⁴ Teles (n 112) 192.

¹⁸⁵ Ibid.

and magazines.¹⁸⁶ However, in Yen's specific context, within Harvard Law School, the Crits also 'Remain Quiet'.¹⁸⁷ Turning to both Kennedy and Horwitz, as well as Clark, Yen receives unanimous confirmation that CLS1 is not as it once was. Whilst there is a heavy motif of death around CLS1 in the article, there is no unified understanding of what has actually died. Each interviewee, and Yen herself, draw different conclusions, reflecting the complexity of the situation.

Yen's article presents a short quote from Clark, who bluntly states: 'I didn't kill them'.¹⁸⁸ Given the animosity from the Crits to Clark's appointment,¹⁸⁹ this short statement is telling, first as to the assumption that the death could be Clark's fault by proxy, and that even outside of the immediate CLS1 community, people are aware that CLS1 is dead. Yen moves from Clark's protest-like statement to her own experience of CLS1 at Harvard Law School. Yen, herself citing Kennedy in the same article, states that CLS1 is as 'dead as a doornail'.¹⁹⁰ Once Yen has made her observation, she provides a longer quote from Clark, in which he refers to CLS1 as entering another phase in its lifecycle, having changed, or retired.¹⁹¹ Clark's choice of words, which this time made no mention of death, seems applicable only after any threat of CLS1 has long gone.

While thematically similar, Yen and Clark do present different ideas of what death means to CLS1. In questioning Kennedy, however, Yen achieves a more detailed understanding from one of the CLS1 founders:

You have to distinguish Critical Legal Studies the movement, from Critical Legal Studies the academic school ... There isn't at Harvard Law School or nationally any CLS[1] movement left. The movement completely collapsed several years ago. The school of thought, which is academic, is alive and well, but the school of thought doesn't have any activist component, period.¹⁹²

Kennedy's response provides an assessment of CLS1 as living a half-life, one that is no longer able to do what it used to. Kennedy's concession is that despite not wanting to create 'just another set of bibliographical headings' when CLS1 began, the current state of CLS1 is just that.¹⁹³ Horwitz follows a similar line about the state of the then contemporary CLS1, but optimistically argues for a resurgence once it

¹⁸⁶ See, eg, Kingson (n 163); Gold (n 171); Louis Menand, 'What is 'Critical Legal Studies': Radicalism for Yuppies' (17 March 1986) *The New Republic*; Marc Granetz, 'Duncan the Doughnut' (17 March 1986) *The New Republic*.

¹⁸⁷ Yen (n 64) 2.

¹⁸⁸ *Ibid.*

¹⁸⁹ Gold (n 171); Yen (n 64) 2.

¹⁹⁰ Yen (n 64) 2.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.* 4.

is safe to come out again.¹⁹⁴ Although not referencing them directly, the implication Horwitz makes is that the situation that befell Trubek and Dalton in 1986 was still a very real concern for the younger Crits, something which Kennedy agreed with, and had addressed a year earlier.¹⁹⁵

Both Kennedy and Horwitz, as representatives of the Crits at Harvard Law School, presented a dire view of CLS1, but with an overarching assumption that it will live on in one form or another. However, the hope for CLS1 to re-emerge in a decade, as per Horwitz,¹⁹⁶ or to continue as an area of academic interest, as per Kennedy,¹⁹⁷ seems to deny, or not fully appreciate, that in the same article there is a consensus that CLS1 is dead. Given that CLS1 never re-emerged and that its academic influence also waned, the optimism that Kennedy and Horwitz showed was ill-placed. Instead, what can be taken from Yen's article is that the death of CLS1 was not hyperbole and that in 1995 CLS1 was as 'dead as a doornail'.¹⁹⁸

Recognising CLS1 as dead, rather than on hiatus, clarifies two important areas. First, in relation to Yen's article, it frames the responses to the state of CLS1 as individual acts of mourning. For example, this can be seen with Clark's uncomfortable and jocular tone presenting a pre-emptive 'not guilty', backed up with pleasantries about a once real foe that is no longer a threat.¹⁹⁹ This act of mourning is also evident in Horwitz and Kennedy's demonstration of optimism that CLS1 will continue or be reborn. Even Yen's premise for the article, her line of questioning about 'what happened to the Crits?', becomes an act of discovery; that the once vibrant CLS1 at Harvard Law School is dead. The second clarification is more important to critical legal studies as a whole as it creates a way to understand and interpret the narrow US-based CLS work that continued post-1995. As was proposed earlier in this article, in accordance with the structure of the family tree, this Critical Legal Studies will be categorised as CLS3.

¹⁹⁴ Ibid.

¹⁹⁵ Gerard J Clark, 'A Conversation with Duncan Kennedy' (1994) 24(2) *The Suffolk University Law School Journal* 56, 58.

¹⁹⁶ Yen (n 64) 2.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

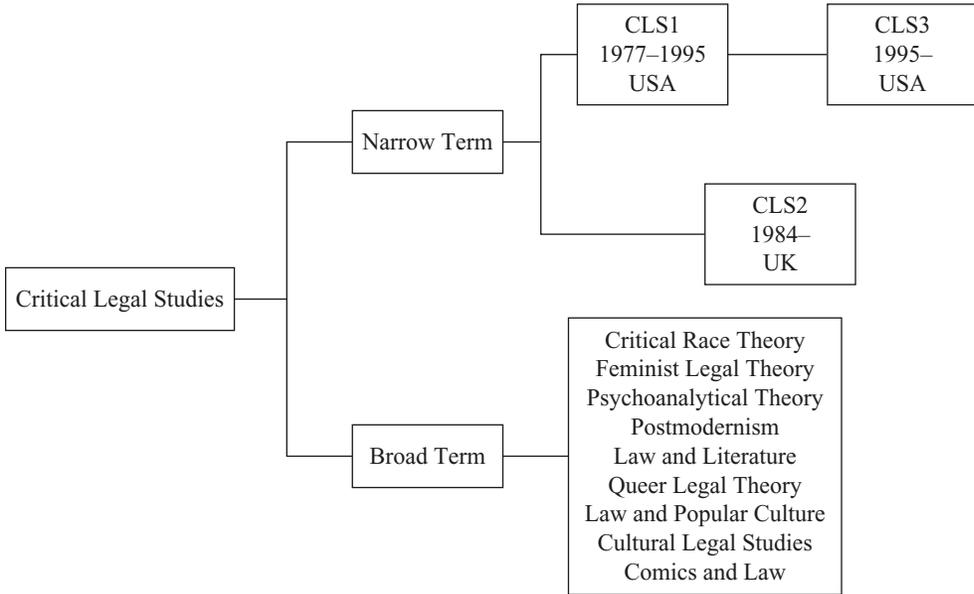


Figure 7: Family Tree: Complete

CLS3, beginning with the declaration of CLS1’s death in 1995²⁰⁰ and continuing thereafter, completes this demonstration of the critical legal studies family tree. The creation of this genealogy, a refinement on both Davies and Douzinas and Gearey’s original divisions, provides a framework that aids in the overall demystification of critical legal studies. The idea of the critical legal studies family tree provides a system to address the questions ‘what is critical legal studies?’ or ‘which critical legal studies?’. By using the family tree as a flowchart or map, these questions can be answered, albeit after further measures are accounted for. These measures include the need to identify a broad or narrow reading, whether it relates to US-based or another (most notably British) CLS2, and if it was before or after CLS1 was considered ‘dead as a doornail’.²⁰¹ Depending on the qualifiers chosen, the answers become evident by following the correlating limbs of the family tree, demystifying these questions. The ability to answer ‘which critical legal studies?’ is a step towards its demystification, but the clarity created by dividing critical legal studies into branches and limbs comes with its own set of related questions. Primarily, as this article is concerned with CLS1, it is now by proxy, also concerned with CLS3. Identifying these two closely related but distinctly different areas of Critical Legal Studies provides insight into how a description of the US-based Critical Legal Studies could differ so strongly between the late-1980s and the late-1990s; demonstrating the effectiveness of the critical legal studies family tree.

²⁰⁰ Ibid.

²⁰¹ Ibid.

**A CRITICAL ANALYSIS OF PRACTITIONERS
ISSUING ‘NOT APPROPRIATE FOR FAMILY
DISPUTE RESOLUTION’ CERTIFICATES UNDER
THE *FAMILY LAW ACT 1975* (CTH)**

ABSTRACT

Under the *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) (*‘2008 Regulations’*), family dispute resolution practitioners (*‘FDRPs’*) must conduct an intake assessment to decide whether family dispute resolution (*‘FDR’*) is appropriate and issue a certificate to the parties if it is not, allowing the parties to commence legal proceedings. Whether FDR is appropriate is determined according to the ability of the parties to negotiate freely, based on a series of factors listed in the *2008 Regulations*.¹ However, there is little in the literature which analyses how these provisions are to be applied. Existing research, while underdeveloped, suggests that FDRPs are taking a very wide interpretation of the Regulations and corresponding legislation,² and are confused as to what the Regulations require. This article therefore asks two questions: first, how are the Regulations to be interpreted? Secondly, how should FDRPs be applying these Regulations in practice? This article will argue that a purposive interpretation of the legislative scheme reveals the need for it to be interpreted narrowly and provide guidance as to how the factors listed in the Regulations should be applied in practice consistent with this narrow interpretation. It will contend that the current application of the Regulations does not always conform with best practice outlined in the literature and will make recommendations for amendments.

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¹ *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) reg 25(2) (*‘2008 Regulations’*).

² *Family Law Act 1975* (Cth) s 60I (*‘FLA’*).

I INTRODUCTION

In Australia, before parties can take parenting matters to court,³ they must either attempt FDR⁴ or apply for an exemption with the courts.⁵ FDR has the objective of moving parties away from litigation and towards cooperative parenting 'through the provision of useful information and advice, and effective dispute resolution services'.⁶ This pre-litigation step was introduced in 2006 as a tool to reduce the costs and delays of the family law system,⁷ as well as a way to improve satisfaction levels in agreements compared to the judicial system.⁸

In order to give effect to this pre-litigation step in family law, the *Family Law Act 1975* (Cth) ('FLA') was amended to include a provision which states that a court must not hear an application for parenting matters unless a certificate ('Inappropriate Certificate') has been issued by an FDRP.⁹ If they attempt FDR, parties must obtain an Inappropriate Certificate from an FDRP.¹⁰ There are five certificates which an FDRP may issue: a certificate which outlines that a party attempted FDR, but that the other party failed or refused to attend;¹¹ a certificate which outlines that the FDRP believes that FDR is not appropriate;¹² a certificate which outlines that FDR was attempted and that a genuine effort was made;¹³ a certificate which outlines that FDR

³ The requirement to attempt dispute resolution is currently only a requirement where parties are making an application to resolve parenting disputes: *ibid* pt VII. The same requirement does not currently extend to applications to resolve financial disputes in the event of separation and divorce: *ibid* pt VIII. However, there have been suggestions that similar mandatory pre-litigation steps may be extended to family financial disputes in the future: Australian Law Reform Commission, *Family Law for the Future: an Inquiry into the Family Law System* (Report No 135, March 2019) 257–8.

⁴ *FLA* (n 2) s 60I.

⁵ *Ibid* s 60I(9).

⁶ Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, December 2009) E1.

⁷ See generally Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, *A New Family Law System: Government Response to Every Picture Tells a Story* (Report, June 2005); House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, December 2003).

⁸ See Gay R Clarke and Iyla T Davies, 'ADR — Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7(1) *Queensland University of Technology Law Journal* 81, 87; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214, 216–17.

⁹ *FLA* (n 2) s 60I(7).

¹⁰ *Ibid* s 60I(8).

¹¹ *Ibid* s 60I(8)(a).

¹² *Ibid* s 60I(8)(aa).

¹³ *Ibid* s 60I(8)(b).

was attempted and that a genuine effort was not made;¹⁴ and a certificate which states that FDR commenced but became inappropriate after it started.¹⁵ The Inappropriate Certificate must then be filed with the court registry when making an application for parenting orders.¹⁶

FDR is defined broadly in the *FLA* as a non-judicial process in which an independent practitioner

helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; or helps persons who may apply for a parenting order ... to resolve some or all of their disputes with each other relating to the care of children ...¹⁷

This is a very broad definition and accounts for a number of dispute resolution frameworks, including assisted negotiation, mediation, conciliation, and neutral evaluation. In practice, the vast majority of FDRPs and service providers conduct FDR through mediation.¹⁸

On the one hand, FDR can represent the parties' best chance of resolving parenting issues, as court is often inaccessible for financial reasons or reasons of emotional capacity, and mediation has often been shown to provide better outcomes for parties.¹⁹ The legislature has also made clear that they desire parties to attempt FDR to assist with lowering the stresses on courts, and to lessen the adversarial nature of parenting disputes.²⁰

However, while FDR is often a beneficial process, it is not always appropriate, particularly in cases of family violence.²¹ There is significant literature that outlines the

¹⁴ Ibid s 60I(8)(c).

¹⁵ Ibid s 60I(8)(d).

¹⁶ Ibid s 60I(7).

¹⁷ Ibid ss 10F(a)(i)–(ii).

¹⁸ Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: an Analysis of the Role of the Independent Practitioner' (2008) 8(1) *Queensland University of Technology Law Review* 158, 159.

¹⁹ See, eg, Robert A Hahn and David M Kleist, 'Divorce Mediation: Research and Implications for Family and Couples Counseling' (2000) 8(2) *The Family Journal* 165, 165; Donald T Saposnek, 'Commentary: The Future of the History of Family Mediation Research' (2004) 22(1–2) *Conflict Resolution Quarterly* 37, 50; Joan B Kelly, 'Family Mediation Research: is there Empirical Support for the Field' (2004) 22(1–2) *Conflict Resolution Quarterly* 3, 28.

²⁰ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 1.

²¹ See, eg, Sarah Dobinson and Rebecca Gray, 'A Review of the Literature on Family Dispute Resolution and Family Violence: Identifying Best Practice and Research Objectives for the Next 10 Years' (2016) 30(3) *Australian Journal of Family Law* 180; Hilary Astor, 'Violence and Family Mediation: Policy' (1994) 8(1) *Australian Journal of Family Law* 3.

risk to parties who engage in FDR when it is not appropriate.²² The existing literature focuses heavily on when FDR (especially in the context of facilitative mediation) may not be appropriate for parties where there are issues of violence and coercion. Parties who engage in FDR where they cannot advocate for themselves may be coerced into a harmful or imperfect agreement, or have their interests overridden.²³ Rachael Field argues, for example, that FDR opens the possibility for perpetrators to continue to reinforce and exacerbate their control.²⁴ She further contends that the very process of FDR, and particularly mediation, can serve in practice to disadvantage the weaker party through hiding violence and allowing it to go unchecked.²⁵ This view is supported by Lundy Bancroft, Jay Silverman and Daniel Ritchie, who argue that perpetrators can use the FDR setting to continue to perpetuate domestic violence through actions and negotiating tactics, often reinforced by their lawyers.²⁶ Renata Alexander contends that FDR 'sanitises and decriminalises' domestic violence, keeping the abuse in the private arena.²⁷ There are also concerns that FDR can facilitate forced agreements, where power imbalances become so severe as to become coercive, invalidating the legitimacy of the agreements made. Christine Chinkin and Hilary Astor contend that '[t]he danger is that weaker parties will be unable to assert their position or needs and will accede to agreements which are not in their best interests'.²⁸ As Tony Bogdanoski and others point out, the neutrality requirements of mediators and dispute resolution professionals can have the effect of FDRPs allowing power imbalances to manifest in coercive ways, for fear of

²² See, eg, Rachael Field, 'Family Law Mediation: Process Imbalances Women Should Be Aware of Before They Take Part' (1998) 14(1) *Queensland University of Technology Law Journal* 23; Helen Cleak, Margot Schofield and Andrew Bickerdike, 'Efficacy of Family Mediation and the Role of Family Violence: Study Protocol' (2014) 14(1) *BMC Public Health* 57:1–12; Joan B Kelly and Michael P Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476; Helen Cleak et al, 'Screening for Partner Violence Among Family Mediation Clients: Differentiating Types of Abuse' (2018) 33(7) *Journal of Interpersonal Violence* 1118.

²³ See (n 22) and the sources cited therein.

²⁴ Rachael Field, 'Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(1) *Australian Journal of Family Law* 45, 74 ('Using the Feminist Critique of Mediation').

²⁵ Field, 'Family Law Mediation: Process Imbalances Women Should Be Aware of Before They Take Part' (n 22) 28.

²⁶ Lundy Bancroft, Jay G Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (SAGE Publications, 2nd ed, 2012) 157.

²⁷ Renata Alexander, 'Mediation, Violence and the Family' (1992) 17(6) *Alternative Law Journal* 271, 272.

²⁸ Christine Chinkin and Hilary Astor, 'Alternative Dispute Resolution: Panacea or Problem?' (1990) 1(2) *Polemic* 77, 79.

intervening to one party's benefit.²⁹ Given this, it is vitally important that FDRPs are able to screen parties out of the process when it is not appropriate to conduct an FDR session.

Beyond questions of safety and power dynamics, some commentators have also raised concerns that FDR may not be an appropriate process where the process cannot achieve a satisfactory outcome, such as where there are limited prospects of success due to the severity of the conflict,³⁰ or where one or both parties present as hostile to the dispute resolution process.³¹

The purpose of allowing FDRPs to issue Inappropriate Certificates saying that FDR is not appropriate is to ensure that parties are screened out of the process where it may be harmful. However, it is vitally important that FDRPs are issuing Inappropriate Certificates consistently and based on commonly understood criteria. Without consensus on how Inappropriate Certificates are to be determined, they are likely to be provided inconsistently, creating an unjust system. Tom Altobelli argues that where the issuing of Inappropriate Certificates is inconsistent and arbitrary, there is a risk of the public losing faith in the family law system.³² There is also a concern that where FDRPs make varying assessments on when to offer FDR, it makes 'forum shopping' more likely, where parties go between service providers until someone is willing to offer them the certificate they desire.³³

As such, the goal of any framework governing the Inappropriate Certificates is to strike the correct balance between engaging parties in FDR while protecting parents and children from its potentially adverse outcomes. The success of that goal is impacted by the decisions FDRPs are making on a day-to-day basis.

To this end, under the *2008 Regulations*, FDRPs must conduct a pre-conference meeting before offering FDR to assess its suitability in the matter;³⁴ this is often known as an intake session.³⁵ In this intake session, FDRPs must assess whether

²⁹ See Tony Bogdanoski, 'The "Neutral" Mediator's Perennial Dilemma: to Intervene or Not to Intervene?' (2009) 9(1) *Queensland University of Technology* 26, 27; Hilary Astor, 'Rethinking Neutrality: a Theory to Inform Practice — Part 1' (2000) 11(2) *Australasian Dispute Resolution Journal* 73, 79–80.

³⁰ Clarke and Davies (n 8) 93.

³¹ See John Wade, "Don't Waste My Time on Negotiation and Mediation. This Dispute Needs a Judge." Which Conflicts Need Judges? Which Conflicts Need Filing?' (2001) 1(1) *ALTA Law Research Series* 7:1–30, 11.

³² Tom Altobelli, 'A Generational Change in Family Dispute Resolution in Australia' (2006) 17(3) *Australian Dispute Resolution Journal* 140, 149.

³³ Note that in Hilary Astor, 'Genuine Effort in Family Dispute Resolution' (2010) 16(1) *Family Relationships Quarterly* 3, 3–4, Astor makes a similar argument in the context of the genuine effort certificate.

³⁴ *2008 Regulations* (n 1) reg 25.

³⁵ Linda Kochanski, 'The Importance of an Intake' (2011) 1(1) *Family Law Review* 164, 164.

FDR is appropriate and, if so, the best methods by which to conduct it.³⁶ FDRPs must not conduct an FDR session if it is not appropriate to do so.³⁷ If the FDRP deems that FDR is not appropriate under the *2008 Regulations*, they may issue an Inappropriate Certificate which, when filed at the registry with an application, allows parties to commence parenting proceedings in court.³⁸

However, while the literature provides a rich discussion of when FDR may be unsafe or coercive generally, and some other commentary outlines situations in which FDR generally may not be appropriate,³⁹ there is surprisingly little commentary on how the *2008 Regulations* are to be understood and interpreted. This helps to explain why recent research, while limited, suggests that FDRPs are often confused about how the Regulations should be interpreted in practice.⁴⁰

As such, this article will add to the literature with two key contributions. First, it will take a purposive approach to legislative interpretation to analyse how FDRPs should understand the Regulations. Part II will give a brief background and overview of the FDR framework. Part III will outline the existing research on how FDRPs are applying the Regulations in practice and will argue that FDRPs sometimes act outside of their legislative scope of authority in issuing Inappropriate Certificates. Part IV will explain and apply the purposive approach of legislative interpretation to the *2008 Regulations*. It will find that they are intended to be interpreted narrowly and should only apply to considerations where parties lack an ability to negotiate freely.

Secondly, this article will provide some guiding thoughts as to how the factors listed in the *2008 Regulations* might best be applied in practice and will undertake a comparative analysis as to how this framework applies to best practice guidelines supported by the literature. Part V will summarise the existing literature on how assessments for FDR should be conducted and apply this literature to the *2008 Regulations*. This serves both to support FDRPs in understanding how the literature may be applied in practice, as well as to argue that some of the suggested guides for best practice advocated in the literature sit outside the authority given to FDRPs in the *2008 Regulations*. Part VI will offer some concluding thoughts and argue that further discussion is required as to when FDR is and is not appropriate, and that the Regulations require amendment to better conform with best practice.

³⁶ Ibid.

³⁷ *2008 Regulations* (n 1) reg 25(1).

³⁸ *FLA* (n 2) s 60I(7).

³⁹ See, eg, Linda Fisher and Mieke Brandon, *Mediating with Families* (Thomson Reuters, 3rd ed, 2012); Clarke and Davies (n 8) 93; Laurence Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012).

⁴⁰ Bruce Smyth et al, ‘Certifying Mediation: A Study of Section 60I Certificates’ (Working Paper No 2/2017, Centre for Social Research and Methods, Australian National University, November 2017) 25.

II OVERVIEW OF THE FAMILY DISPUTE RESOLUTION FRAMEWORK

It is a cornerstone of the modern Australian family law framework that FDR must be attempted as a pre-litigation step unless an exemption is sought.⁴¹ FDR has the objective of moving parties away from litigation and towards cooperative parenting ‘through the provision of useful information and advice, and effective dispute resolution services’.⁴² This pre-litigation step was recommended by the House of Representatives Standing Committee on Family and Community Affairs (‘the House Standing Committee’) in a 2003 review of the family law system, as a tool to reduce costs and delays.⁴³ FDR was also seen as a way to improve satisfaction levels in agreements compared to the judicial system.⁴⁴ In order to effect this pre-litigation step in family law, Parliament introduced a provision in the *FLA* which states that a court must not hear an application for parenting matters unless a certificate has been issued by an FDRP.⁴⁵

Whilst Parliament accepted that FDR should be required before an application could be made, it also recognised that there were times where FDR would be inappropriate.⁴⁶ These concerns have been raised since at least the early 1990s. Field credits much of the awareness of the potential for power imbalances in mediation with Astor’s work in the early 1990s, including a 1991 position paper prepared for the National Committee on Violence Against Women.⁴⁷ In 1994, Astor explicitly advocated for mediation being considered inappropriate in cases of family violence, save for ‘a test based on the capacity of the parties to negotiate’.⁴⁸ This supported a test proposed by Susan Gribben.⁴⁹

This dominant language of identifying concerns with weaker parties engaging in ADR, predominately through a test of ‘power imbalances’, was ultimately codified in the 1995 amendments to the *FLA*.⁵⁰ These amendments explicitly encouraged

⁴¹ See House of Representatives Standing Committee on Family and Community Affairs (n 7); Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7).

⁴² Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6).

⁴³ See House of Representatives Standing Committee on Family and Community Affairs (n 7) 58.

⁴⁴ See Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 105; Wayne (n 8) 214.

⁴⁵ *FLA* (n 2) s 60I(7).

⁴⁶ See Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 9.

⁴⁷ Rachael Field, ‘Mediation and the Art of Power (Im)Balancing’ (1996) 12(1) *Queensland University of Technology Law Journal* 264, 264.

⁴⁸ Astor, ‘Violence and Family Mediation: Policy’ (n 21) 18.

⁴⁹ Susan Gribben, ‘Mediation of Family Disputes’ (1992) 6(2) *Australian Journal of Family Law* 126, 132.

⁵⁰ *Family Law Reform Act 1995* (Cth) (‘*Family Law Reform Act*’).

ADR (which it referred to as primary dispute resolution) without making mediation a requirement.⁵¹ Amendments to the Regulations obliged FDRPs to consider power imbalances in deciding whether to offer dispute resolution.⁵² Nevertheless, even with the introduction of this legislation, there was a concern that this process was inappropriate for women separating from abusive partners.⁵³ The Australian Law Reform Commission ('ALRC'), at the time, wrote that 'the legal system's tolerance of violence against women underwrites women's inequality before the law'.⁵⁴

With the 2003 recommendation from the House Standing Committee to make ADR a pre-litigation requirement, many saw ADR as an even greater risk to vulnerable parties who would have no choice but to attempt FDR. For example, Field argued that the suggested amendments were likely to manifest in post-separation injustices for women:

This is the challenge for the ... [mediation profession]: to seek to ensure that the good aspects of their professional practice are not compromised by the Government's inappropriate policy decision to mandate mediation in circumstances where it can be bad, or get ugly, for women.⁵⁵

To address these concerns, the House Standing Committee recommended that an exemption should be made 'when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal'.⁵⁶ The majority of the suggested exemptions were codified in s 60I(9) of the *FLA*, and allow parties to apply directly to court by submitting an affidavit explaining why they believe an exemption applies, bypassing FDR entirely.⁵⁷

However, it appears that these exemptions are being used less than anticipated: a 2009 review of the reforms found that lawyers are often unsure whether their clients will be accepted under an exemption, and therefore may send them to FDR to receive a certificate as an 'insurance policy'.⁵⁸ In practice, lawyers may also simply believe that the process of attending FDR and obtaining a certificate is easier, quicker, and

⁵¹ Ibid ss 14D–14E.

⁵² *Family Law Reform Act* (n 50) s 19P; *Family Law Regulations 1984* (Cth) reg 62 ('1984 Regulations'), as inserted by *Family Law Regulations (Amendment) 1996* (Cth) reg 20.

⁵³ See Helen Rhoades, Reg Graycare, and Margaret Harrison, *The Family Law Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community and Expectations* (Interim Report, Family Court of Australia, April 1999) 14.

⁵⁴ Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System* (Interim Report No 67, March 1994) 1.

⁵⁵ Field, 'Using the Feminist Critique of Mediation' (n 24) 78.

⁵⁶ House of Representatives Standing Committee on Family and Community Affairs (n 7) [3.72].

⁵⁷ *FLA* (n 2) s 60I(9).

⁵⁸ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 110.

cheaper than applying for an exemption and having to argue its merits in court. FDRPs have also expressed frustration with the number of parties presenting to FDR with advice from other lawyers to obtain a certificate at mediation, rather than rely on the exemptions in the *FLA*.⁵⁹ Helen Cleak and Andrew Bickerdike have found that ‘cases involving family violence were specifically exempt from the requirement to attend FDR prior to court, although in reality the majority of separating parents were encouraged to attempt FDR first’.⁶⁰

One further reason a party may not apply for an exemption, even where FDR is clearly unsuitable, is that there is little case law to assist parties in understanding whether their application for an exemption would be granted; the case law that does exist provides little clarity. There is little case law to support how such provisions are to be interpreted. Put simply, the court must be ‘satisfied that there are reasonable grounds to believe that’ one of the exemptions applies to allow parties to move directly to litigation.⁶¹ This determination is usually made by a registrar in an *ex parte*, interlocutory manner, and is subject to judicial appeal.⁶²

In *Carpenter v Carpenter*, it was considered that a delay of a couple of months for an FDR provider to facilitate FDR did not make it inappropriate on the grounds that parties were unable to participate.⁶³ Judge Harman went on to comment that the ‘effective operation of [the] Court’ is affected when FDR is not engaged in circumstances where it is appropriate,⁶⁴ and ‘[e]xemptions from attending FDR are not intended to be handed out like sweets at a children’s party or as a simple reward for having asked’.⁶⁵ In *Conlon v Conlon* it was found that some relocation cases may justify an exemption, but that the bare fact that a parent had unilaterally relocated was not sufficient to justify an exemption.⁶⁶ This may be somewhat contrasted with *Martin v Harding*, where the parties’ separation for a number of months was a significant factor in granting an exemption on the grounds of urgency.⁶⁷ A number of other factors, including the lack of access and time spent with the children being granted to the father, his professional football career which kept him geographically a long way from the family, and the escalated nature of the conflict, also contributed

⁵⁹ Smyth et al (n 40) 28.

⁶⁰ Helen Cleak and Andrew Bickerdike, ‘One Way or Many Ways: Screening for Family Violence in Family Mediation’ (2016) 98(1) *Family Matters* 16, 16.

⁶¹ *FLA* (n 2) s 60I(9)(b).

⁶² *Federal Circuit Court Rules 2001* (Cth) r 20.00A; *Carpenter v Carpenter* (2018) 337 FLR 95, 96 [9] (*‘Carpenter’*).

⁶³ *Carpenter* (n 62) 97 [18].

⁶⁴ *Ibid* 97 [19].

⁶⁵ *Ibid* 99 [27].

⁶⁶ *Conlon v Conlon* [2019] FCCA 2195, [37] (Judge Terry).

⁶⁷ *Martin v Harding* [2007] FamCA 1040, [6].

to the decision.⁶⁸ Justice Young also asserted that this decision had to be made in the best interests of the children.⁶⁹

In *Weaver v Cantrell*, it was established that there is no general exemption or catch-all provision listed in the exemptions.⁷⁰ Federal Magistrate Wilson also took what must be said to be an extremely generous interpretation of the definition of family violence, and asserted that he could apply the exemption on the basis of a single act of one parent raising their voice to their child.⁷¹ By this logic, any party who can point to an occasion where they slightly over-disciplined their child would have sufficient grounds for the exemption to apply. As such, while the judicial approach to the exceptions appears inconsistent, the exceptions seem to be constructed quite broadly. It will be shown below that this is inconsistent with how the legislative scheme should be understood. It becomes clear that the nature and application of the exemptions to FDR are ill-defined and may be contributing to their lack of use by parties.

The lack of utilisation of the exemptions by parties puts further pressure on FDRPs to ensure that they are screening parties out of FDR when it is not appropriate. In order to address concerns with mandating FDR as a pre-filing requirement, FDRPs are required to screen parties prior to offering FDR under s 60I(8)(aa) of the *FLA*, which states that an FDRP may issue a certificate

to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers ... that it would not be appropriate to conduct the proposed family dispute resolution ...⁷²

A certificate may also be issued if the FDR session has commenced, and the FDRP considers that it would not be appropriate to continue.⁷³ In issuing an Inappropriate Certificate, the FDRP is required to be satisfied that an assessment has been conducted of the parties to the dispute, and that FDR is not appropriate.⁷⁴ In determining whether FDR is appropriate, and before issuing a certificate, FDRPs *must* have regard to reg 25 of the *2008 Regulations*.⁷⁵

Regulation 25(2) of the *2008 Regulations* states:

- (2) In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been

⁶⁸ Ibid [12].

⁶⁹ Ibid.

⁷⁰ *Weaver v Cantrell* [2008] FMCAfam 961, [14].

⁷¹ Ibid [20]–[22].

⁷² *FLA* (n 2) s 60I(8)(aa).

⁷³ Ibid s 60I(8)(d).

⁷⁴ *2008 Regulations* (n 1) regs 25(1)–(2).

⁷⁵ Ibid reg 26(2).

given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

- (a) a history of family violence (if any) among the parties;
- (b) the likely safety of the parties;
- (c) the equality of bargaining power among the parties;
- (d) the risk that a child may suffer abuse;
- (e) the emotional, psychological and physical health of the parties;
- (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.⁷⁶

This regulation provides an overarching criterion that FDRPs must consider: whether the parties can negotiate freely. It also provides sub-factors that the practitioner may consider in forming their view of the overarching criterion. If, having considered these factors, the FDRP is not satisfied that FDR is appropriate, FDRPs *must not* offer FDR.⁷⁷ This provision has the effect of placing the onus on FDRPs to be satisfied that parties can freely negotiate, and not on the parties to prove that they cannot. Under the *2008 Regulations*, FDRPs must undergo training in family violence and supporting vulnerable parties.⁷⁸

Further reforms were also implemented through the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) ('*2012 Act*') to improve the family law system's response to family violence. This reform expanded the definitions of family violence and abuse, as well as clarifying that protection of children is to weigh greater than the right of the children to have a relationship with both parents.⁷⁹ In their review of the *2012 Act*, the Australian Institute of Family Studies found that FDRPs had improved in screening for violence, but that nearly three in ten parents were still not being asked about family violence and safety concerns when using a formal pathway such as FDR.⁸⁰ As such, it is clear that screening for violence in FDR still requires further development and understanding from FDRPs.

While there is significant literature which highlights the risks to parties engaging in FDR, and in the development of screening processes, there is little commentary which explains how this research interacts with the *2008 Regulations*, and what

⁷⁶ Ibid reg 25(2); *FLA* (n 2) s 60I.

⁷⁷ *FLA* (n 2) s 60I; *2008 Regulations* (n 1) reg 25(4).

⁷⁸ *2008 Regulations* (n 1) reg 3.

⁷⁹ Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) 2.

⁸⁰ Ibid 75.

they require of FDRPs. Before turning to this question, this article will outline the evidence available on how FDRPs are applying these provisions in practice.

III PRACTITIONERS’ CURRENT APPLICATION OF THE REGULATIONS

There has only been one major qualitative review which considered how FDRPs make determinations to issue Inappropriate Certificates. Conducted by Smyth et al this study was completed in 2017 and involved interviews with 27 FDRPs from the relationship services organisation Interrelate.⁸¹ The researchers conducted telephone interviews with the FDRPs asking semi-structured questions about their experiences in issuing Inappropriate Certificates under the *FLA*.⁸² While the study did find that many FDRPs made determinations to issue Inappropriate Certificates on the grounds that negotiating ability may be affected, it also concluded that

[s]ome factors outside the legislative instruments appear to be affecting decisions. The factors include, in particular, best interests of the children (variously perceived by FDRPs), organisational policy, fear of complaints, and perceptions about what will lie ahead for clients if a certificate (or particular category of certificate) is issued, particularly when the FDRP perceives that the client does not have the financial resources to go to court.⁸³

The FDRPs interviewed seemed to use a range of benchmark questions for making a determination of whether FDR was inappropriate: will FDR do the parties more good than harm? Are the parties safe? Is this the best process for them?⁸⁴ The only other qualitative studies to have examined assessments in FDR are the evaluations of the 2006 and 2012 law reforms, though they do not really discuss application of the assessment criteria under reg 25 outside of how assessments are made regarding violence.⁸⁵ In the evaluation of the 2006 reforms, it was noted that the question of what was next for the parties played a role in how FDRPs chose to assess matters.⁸⁶ The ALRC also found that FDRPs were inconsistent and arbitrary in their assessments, although this view was mostly within the context of screening assessments during intake regarding violence.⁸⁷ In submissions to the ALRC, some organisations outlined their view that the current certificate process is confusing and inconsistently

⁸¹ Smyth et al (n 40) xii.

⁸² Ibid 19.

⁸³ Ibid xii.

⁸⁴ Ibid 22–8.

⁸⁵ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6); Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments* (n 79).

⁸⁶ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 110.

⁸⁷ Australian Law Reform Commission, *Family Violence — A National Legal Response* (Report No 114, October 2010) 997.

applied.⁸⁸ CatholicCare Victoria and Tasmania stated that ‘sometimes FDRPs are confused about the extent of their discretion to issue a[n] [Inappropriate Certificate]’.⁸⁹ Partnerships Victoria further suggested that ‘too many cases either get an exemption or a section 60I certificate in parenting cases.’⁹⁰

Not only are FDRPs issuing Inappropriate Certificates on grounds which have little to do with safety, they also appear to have varying conceptions of what may constitute safety concerns or power imbalances. While some FDRPs were ‘all for giving [FDR] a go’,⁹¹ so long as the parties are confident in being able to have a discussion, for others ‘the presence of some of the factors set out in [reg] 25(2) result in an automatic determination that FDR is not appropriate’.⁹²

Is it clear that FDRPs have differing viewpoints as to how the Regulations are to be interpreted, and that many are confused about their scope of authority to issue Inappropriate Certificates. The obvious deduction from the literature is that some FDRPs are not making their assessments through the framework of assessing parties’ capacity to negotiate. Because of this, they may be issuing Inappropriate Certificates based on *any* factor which they feel is acting as a barrier to the process. This may be because they believe the *2008 Regulations* allow them unlimited discretion to make assessments based on their reading of the catch-all provision.⁹³ This view is also reinforced by the Attorney-General’s fact sheet on screening and assessment for FDRPs.⁹⁴ This fact sheet outlines that FDRPs should be considering each of the factors in reg 25(2), but makes no mention of the overarching criterion of the ability to negotiate freely.⁹⁵ FDRPs may well be seeing this as support for the view that they therefore have unlimited discretion about when to issue Inappropriate Certificates.

This is concerning, because it increases the probability that FDRPs are acting inconsistently and arbitrarily. The following section will therefore look specifically at the reg 25(2) factors to examine what considerations should be made when making a not appropriate for FDR assessment under the *2008 Regulations*.

⁸⁸ See CatholicCare Victoria & Tasmania, Submission No 115 to Australian Law Reform Commission, *Issues Paper 48* (May 2018) 6.

⁸⁹ *Ibid.*

⁹⁰ Partnerships Victoria, Submission No 307 to Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (October 2018) 18.

⁹¹ Smyth et al (n 40) 24.

⁹² *Ibid* 25.

⁹³ *2008 Regulations* (n 1) reg 25(2)(f).

⁹⁴ Commonwealth Attorney-General’s Department, *Screening and Assessment for Family Dispute Resolution* (Fact Sheet) <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Documents/Fact-sheet-on-screening-and-assessment.PDF>>.

⁹⁵ *Ibid.*

IV INTERPRETING THE REGULATIONS SURROUNDING ‘NOT APPROPRIATE’ ASSESSMENTS

A Methodology of Interpreting Legislation

In Australia, legislation is to be interpreted in a manner which ‘best achieve[s] the purpose or object of the Act’ (‘the purposive approach’).⁹⁶ In considering how to determine the purpose or object of an Act, courts have settled on a ‘contextual approach’.⁹⁷ Articulated by the High Court of Australia in *CIC Insurance Ltd v Bankstown Football Club Ltd*, this approach places the context of the legislation as a consideration in the first instance and gives a wide view of ‘context’ to include such things as the existing state of the law and the mischief the law was intended to rectify.⁹⁸

This approach is often conducted through a three-step test: first, interpret the statutory text; second, consider the broader context; third, consider the purpose of the legislation.⁹⁹ Justice Middleton refers to statutory interpretation as ‘mostly common sense’, stating that ‘[t]he starting point should always be to look at the words, their context, and the purpose of the legislation, then applying that to produce a result that is both fair and workable in the particular fact situation you have before you.’¹⁰⁰ This has also received support from the Hon Michael Kirby¹⁰¹ and Jeffrey Barnes, who have evidenced its acceptance and application in a number of High Court of Australia cases.¹⁰²

B Interpreting the Regulations

1 Text-Based Interpretation

The overarching criterion provided in the Regulations is that FDRPs must consider a party’s ability to negotiate freely. What does it mean to consider a party’s ability to

⁹⁶ *Act Interpretation Act 1901* (Cth) s 15AA (‘*Acts Interpretation Act*’).

⁹⁷ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

⁹⁸ *Ibid* 408.

⁹⁹ See *Comcare v Martin* (2016) 258 CLR 467; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1. See also Dennis Charles Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 63–5.

¹⁰⁰ Justice John Middleton, ‘Statutory Interpretation: Mostly Common Sense?’ (2017) 40(2) *Melbourne University Law Review* 626, 632.

¹⁰¹ Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35(1) *Melbourne University Law Review* 113, 131–2.

¹⁰² Jeffrey Barnes, ‘Contextualism: The Modern Approach to Statutory Interpretation’ (2018) *University of New South Wales Law Journal* 37, 45; *Mansfield v The Queen* (2012) 247 CLR 86.

do so? According to the Macquarie Dictionary, ability means ‘the power or capacity that is in a living thing which makes it possible for them to do something’.¹⁰³ This might be divided into two sub-questions: first, does the person have the *capacity* to negotiate; second, does the person have the *power* to negotiate? It is useful to think of the question of capacity as a reference to the internal factors of the individual, such as their skills, capacity to reason, or capacity to articulate the situation before them. On the other hand, power refers to a person’s capacity to *act* in a particular manner.¹⁰⁴ As such, power refers to external factors, such as whether one party feels safe or intimidated by the other party. As such, the overarching criterion of the Regulations is concerned with FDRPs forming a view on whether or not a party has the capacity to understand and interpret assertions being made by the FDRP and other parties during an FDR session, and whether they can act in their own interests on that understanding.

In order to assess this overarching question, FDRPs are provided several factors in the *2008 Regulations* to assess against, including a catch-all provision which allows them to consider any other matter they deem necessary.¹⁰⁵ An initial textual reading of the provision might suggest that the practitioner is able to decide to offer an Inappropriate Certificate on any ground they see fit, given the wording of the catch-all provision.

However, the principles of statutory interpretation would suggest otherwise. According to the principle of *noscitur a sociis*, words should not be determined alone, but rather according to the surrounding or accompanying words.¹⁰⁶ The *2008 Regulations* very clearly outline the overarching consideration FDRPs are making when considering this list: ‘whether the ability of any party to negotiate freely in the dispute is affected’.¹⁰⁷ As such, the Regulations limit ‘any other matter’ to be any other matter which may limit a party’s ability to negotiate freely.¹⁰⁸

Moreover, the principle of *eiusdem generis* states that where general words follow a list of particular factors, the general words are restricted to matters of the same class as those specifically listed.¹⁰⁹ The matters listed in regs 25(2)(a)–(e) are situated in the class of barriers to free negotiation. As such, these statutory interpretation principles support an interpretation of the catch-all provision which limits its operation to matters affecting a party’s ability to negotiate freely.

¹⁰³ *Macquarie Dictionary* (online at 24 April 2015) ‘ability’ (def 1).

¹⁰⁴ *Ibid* ‘power’ (def 1).

¹⁰⁵ *2008 Regulations* (n 1) reg 25(2)(f).

¹⁰⁶ *Encyclopaedic Australian Legal Dictionary* (online at 30 April 2020) ‘noscitur a sociis’.

¹⁰⁷ *2008 Regulations* (n 1) reg 25(2).

¹⁰⁸ *Ibid* reg 25(2)(f).

¹⁰⁹ *Macquarie Dictionary* (n 103) ‘eiusdem generis’.

2 *Context- and Purpose-Based Interpretation*

This provision must next be considered in line with the rest of the legislation to ensure such a construction is consistent.¹¹⁰ Section 60I(1) of the *FLA* states that

[t]he object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

This would seem to indicate that the legislature wished to narrow the circumstances in which parties were able not to engage in FDR, putting the onus on FDRPs only to issue Inappropriate Certificates when necessary. Further, s 63B of the *FLA* explicitly encourages parents to reach an agreement and use the legal system as a last resort.¹¹¹

The *Acts Interpretation Act 1901* (Cth) outlines a number of related materials which can be considered in interpreting legislation, including second reading speeches and explanatory memoranda.¹¹² The Minister’s second reading speech states simply that the requirement to mediate ‘does not apply where there is family violence or abuse’.¹¹³ In the Explanatory Memorandum, the government stated that

the mediator must consider whether the ability of any party to negotiate freely is affected ... It is envisaged that the regulation to be made for the purposes of paragraph 60I(8)(aa) will largely reproduce the factors currently set out in regulation 62.¹¹⁴

Here, the Explanatory Memorandum explains that the *2008 Regulations* sought to reproduce the language in the existing legislation. That legislation was the *Family Law Regulations 1984* (Cth) (*‘1984 Regulations’*). The *2008 Regulations* contain substantially similar wording as the *1984 Regulations*.¹¹⁵

The screening language reproduced from the *1984 Regulations* was introduced under the *Family Law Reform Act 1995* (Cth) (*‘1995 Act’*).¹¹⁶ The *1995 Act’s* Explanatory Memorandum states that

¹¹⁰ Pearce and Geddes (n 99) 63–5.

¹¹¹ *FLA* (n 2) s 63B.

¹¹² *Acts Interpretation Act* (n 96) s 15AB.

¹¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 10 (Philip Ruddock, Attorney-General).

¹¹⁴ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) 22.

¹¹⁵ *1984 Regulations* (n 52) reg 62.

¹¹⁶ *Family Law Reform Act* (n 50) s 25.

the regulations will make provision for instances where mediation is contraindicated such as a power imbalance between the parties where that power imbalance cannot be redressed, for example in cases of family violence.¹¹⁷

As such, the wording of the Regulations intended to focus on the criterion of whether the parties can negotiate freely. It is also clear that the legislature in the original drafting of the Regulations, and especially in the 2006 amendments, intended to place an onus on FDRPs to attempt to address these power imbalances before declining to offer dispute resolution.

There are two clear conclusions to draw from the textual and contextual reading of interpretations. First, there is little evidence to suggest that consideration should be given to broader questions of whether to offer FDR outside of considerations surrounding safety. This interpretation is also supported by case law. In *Madsen v Fancher*, Judge Harman stated that

[t]he intention of Parliament is clear being that litigants must, save in cases of urgency, family violence and abuse, endeavour to resolve parenting disputes between themselves without the need for intervention by the Court.¹¹⁸

In *Rastall v Ball*, Riethmuller FM referred to the Regulations as a ‘safety valve’ provision.¹¹⁹ His Honour dismissed the right of the practitioner to not offer a session just because they felt it would not be productive, arguing that this would render the provisions of the *FLA* providing for compulsory participation impotent.¹²⁰

Secondly, even questions of safety are constrained into a narrower question of whether there is an ability to negotiate freely. It is clear that the onus is on FDRPs to attempt to find workable solutions to offer FDR before issuing Inappropriate Certificates. This narrow interpretation will now be applied to the wording of the *2008 Regulations*.

V APPLYING THE REGULATIONS TO PRACTICE

In applying a narrow interpretation to the *2008 Regulations*, it is important to recognise that this interpretation only applies to FDRPs issuance of Inappropriate Certificates. Under the *2008 Regulations*, if satisfied that FDR is appropriate, the practitioner *may* offer family dispute resolution.¹²¹ This is to say that a practitioner is not obligated to offer a session; they may choose not to offer FDR. They may also choose to delay offering FDR until the parties have completed certain steps, such as seeking counselling or legal advice. However, in order to access the Inappropriate

¹¹⁷ Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) 18.

¹¹⁸ *Madsen v Fancher* [2016] FCCA 142, [16].

¹¹⁹ *Rastall v Ball* (2010) 44 Fam LR 256, 266–7 [40].

¹²⁰ *Ibid.*

¹²¹ *2008 Regulations* (n 1) reg 25(3).

Certificates to commence legal proceedings, the FDRP must be satisfied that parties do not have the ability to negotiate freely. In this section, I consider the factors FDRPs can (and cannot) consider in making that assessment.

A History of Violence & Equality of Negotiating Power

There is little doubt that FDRPs will routinely be required to assess parties that present with a history of violence, with recent research suggesting that up to 85% of respondents attempting FDR had experienced emotional or physical violence in their relationship.¹²² There are competing views in the literature as to how a history of violence should be considered by FDRPs in assessing the appropriateness of FDR. Alexander argues that mediation is unsuitable in *all* cases where there has been family violence, and that mediation is inappropriate in all family law matters due to the inability for FDRPs to screen properly for violence and the inherent inequalities in all violent relationships.¹²³ Astor argues that any allegation of substantial family violence deems mediation unsuitable, save for a narrow set of scenarios where the weaker party may make free and consenting decisions.¹²⁴ She argues that screening processes are not a sufficient barrier to protect the weaker party, and that agreements which may appear acceptable to the mediator can in fact be unfair or dangerous, as disempowered parties 'negotiate for what they think they can get, rather than an outcome which is just or equitable or which protects their safety'.¹²⁵ She further argues that there is an inability for a consensual agreement, even where parties are placed in separate rooms (known as a 'shuttle' session).¹²⁶ She notes that dispute resolution requires parties to be open to engaging with each other and desirable of settling the dispute through compromise, and that these actions are usually beyond the ambit of perpetrators.¹²⁷

While a history of family violence is the most obvious manifestation of a power imbalance in negotiation, there are many others. Control over decision-making can occur in relationships, even where violence (especially physical violence) never existed. According to Bernard Mayer, power can be habitual, informational, or formal.¹²⁸ It may be based on resources, on personal aptitudes, or the ability and willingness to cause discomfort to another.¹²⁹ One party may be significantly more

¹²² Lawrie Moloney et al, 'Mandatory Dispute Resolution and the 2006 Family Law Reforms: Use, Outcomes, Links to Other Pathways, and the Impact of Family Violence' (2010) 16(3) *Journal of Family Studies* 192, 195.

¹²³ Alexander (n 27) 271.

¹²⁴ Astor, 'Violence and Family Mediation: Policy' (n 21) 3.

¹²⁵ Ibid 5.

¹²⁶ Ibid 6.

¹²⁷ Ibid.

¹²⁸ Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16(1) *Mediation Quarterly* 75, 78.

¹²⁹ Ibid.

articulate or assertive.¹³⁰ Structurally, one party may have access to finances or access to the children.¹³¹ Imbalances may also be cultural¹³² or gendered.¹³³

On the other hand, victims of family violence may find the capacity to advocate for themselves empowering in FDR settings, and such benefits might apply to victims of domestic violence if the process can be conducted safely.¹³⁴ In considering the impact that family violence can have on vulnerable parties, Field notes the benefits that FDR can have on women generally. FDR empowers women to make their own decisions, rejects gendered norms of power and assumes an equality between the parties, and recognises women's autonomy and voice, giving them the opportunity to be heard and validated.¹³⁵ These assumed benefits to FDR must not blind an FDRP to the risks of vulnerable parties in the FDR process.

At the other end of the spectrum, Wade argues that 'inequality of bargaining power' is 'a shibboleth and catch-cry'.¹³⁶ He argues that

the phrase 'inequality of bargaining power' is repeated ad nauseam as a reason for alleging the ethical unsuitability of certain types of negotiations or mediations. An analysis of power suggests that this phrase should not be used blithely. Power imbalances are more complex than first meets the eye, are always present, and are not necessarily adjusted satisfactorily by switching to another procedure. Many lawyers involved in family litigation are well aware of various forms of power imbalance in the sometimes (ironically) idealised court process. The label of 'inequality of bargaining power' is fashionably epidemic; but the remedy may often (though not always) be worse than the disease.¹³⁷

He cautions that FDRPs should be careful not to 'overreact' to questions of bargaining inequality, and that understanding the complex dynamics of power can assist FDRPs to facilitate the FDR process. He supports Jay Folberg and Alison Taylor's test to define when power imbalances are significant enough to warrant termination of the session, being that '[m]ediators are not charged with the responsibility of balancing

¹³⁰ George Verghese Kurien, 'Critique of Myths of Mediation' (1995) 6(1) *Australasian Dispute Resolution Journal* 43, 54.

¹³¹ Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post Separation Financial Outcomes' (2000) 14(2) *Australian Family Law Journal* 102, 113, 115.

¹³² Dimitrios Eliades, 'Power in Mediation — Some Reflections' (1999) 2(1) *ADR Bulletin* 4, 5.

¹³³ Field, 'Mediation and the Art of Power (Im)Balancing' (n 47) 267–8.

¹³⁴ Rachael Field, 'A Call for a Safe Model of Family Mediation' (2016) 28(1) *Bond Law Review* 83, 84–5.

¹³⁵ Rachael Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21(3) *Australasian Dispute Resolution Journal* 185, 186–7.

¹³⁶ John Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 8(1) *Australian Journal of Family Law* 40, 57.

¹³⁷ *Ibid* 40.

all relationships. They must ensure, however, that participants are not railroaded into choices that are unconscionable’.¹³⁸

Significant research has been conducted to find a workable framework for FDRPs to assess a party’s power to negotiate. The current literature is overwhelmingly focussed on attempting to find tools to assist FDRPs to make better assessments. For example, Joan Kelly and Michael Johnson recognise that family violence history is complex and multifaceted, and advocate for a ‘nuanced’ approach to assessing parties within it.¹³⁹ However, there is no one defined assessment tool for FDRPs to use, and there is concern that some FDRPs are not using assessment tools in FDR sessions.¹⁴⁰

The Attorney-General’s fact sheet refers FDRPs to the Detection of Overall Risk assessment framework,¹⁴¹ though most organisations tend to construct their own screening processes. Sarah Dobinson and Rebecca Gray note that the literature agrees that safety measures are useful tools in FDR, and that screening processes are important, but that there is significant disagreement over the methods by which such screening practices are to occur.¹⁴² They also note the reality of non-disclosure for many victims of domestic violence, be it because they genuinely wish to engage in FDR, feelings of shame, not understanding that what occurred is family violence, or fear of not being believed.¹⁴³ However, again there is no formal or consistent guidance for FDRPs on how to approach these situations. KPMG have suggested the development of nationally consistent approaches and standards in this area, though this recommendation has not been implemented.¹⁴⁴

So how might FDRPs discharge their obligations under the legislative scheme to attempt to find a workable framework for FDR, while also ensuring that parties possess the ability to negotiate freely? In considering how equality of bargaining power affects parties’ capacity to negotiate, FDRPs should be aware that there is never perfect equality between the parties;¹⁴⁵ rather, mediators should instead be satisfied that imbalances in parties’ bargaining power are not so extreme as to inhibit a party’s ability to negotiate freely.

¹³⁸ Ibid 57.

¹³⁹ See Joan B Kelly and Michael P Johnson, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) 46(3) *Family Court Review* 476, 494; Peter G Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plan’ (2008) 46(3) *Family Court Review* 500; Cleak et al (n 22); Katherine A Fowler and Drew Westen, ‘Subtyping Male Perpetrators of Intimate Partner Violence’ (2011) 26(4) *Journal of Interpersonal Violence* 607.

¹⁴⁰ Cleak and Bickerdike (n 60) 23–4.

¹⁴¹ Commonwealth Attorney-General’s Department (n 94).

¹⁴² Dobinson and Gray (n 21) 203–4.

¹⁴³ Ibid 185–6.

¹⁴⁴ KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (Report, December 2008) 75.

¹⁴⁵ Mayer (n 128) 85.

Linda Kochanski suggests investigating with both parties how arguments between them tend to resolve, to get an understanding of whether parties can bargain with each other.¹⁴⁶ Field suggests that FDRPs start with caution in encouraging FDR for victims of family violence, and suggests that FDRPs must prepare parties thoroughly for participation in the process by providing both parties with clear understandings of their expectations and requirements of the process, including collaboration and assisting with option generation, as well as laying down very clear and understood ground rules.¹⁴⁷ Dobinson encourages FDRPs to recognise the relational context of the negotiations, asking the FDRP to consider if the relationship between the parties is a healthy, interdependent relationship or an unhealthy, oppressive one.¹⁴⁸ She claims that

the nature of a relationship cannot be garnered by focusing on a single act of violence suspended in time. Rather it requires looking at the relationship as a whole and considering the levels of trust, care and mutual responsibility that exist within it.¹⁴⁹

By investigating the broader relational context of the relationship, FDRPs become more attuned to the possibility of non-disclosure of family violence and the reasons for it, as well as understanding when a co-parenting relationship between the parties facilitated by FDR might be sustainable despite family violence.¹⁵⁰ This will also assist FDRPs to place adjustments and safety measures into the process to mitigate the risk of family violence disrupting the parties' ability to negotiate.¹⁵¹

B Safety of Parties & Risks That Children May Suffer Abuse

FDRPs must be aware of the safety of the parties engaging in FDR. The 'safety' of a party may refer to a broad range of concerns, such as physical safety, emotional safety or psychological safety, and stress levels.¹⁵² The Attorney-General's fact sheet outlines three risk domains which FDRPs should consider in making their assessment of safety: domestic and family violence and violence towards others; child abuse or abduction; and self-harm.¹⁵³ It recommends that FDRPs ask parties during intake

¹⁴⁶ Kochanski (n 35) 166.

¹⁴⁷ Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (n 135) 191.

¹⁴⁸ Sarah Dobinson, 'Relational Autonomy and Family Dispute Resolution: How a Feminist Approach Can Improve Service Delivery in the Context of Family Violence' (2016) *University of New South Wales Law Journal Student Series* 4: 1–24, 17.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* 18.

¹⁵¹ *Ibid.*

¹⁵² Donna Cooper and Mieke Brandon, 'Navigating the Complexities of the Family Law Dispute Resolution System in Parenting Cases' (2009) 23(1) *Australian Journal of Family Law* 30, 34.

¹⁵³ Commonwealth Attorney-General's Department (n 94).

questions whether they are concerned for their own safety, their children's safety, or the safety of anybody else.¹⁵⁴ However, these questions risk moving beyond the considerations offered to FDRPs by the legislative scheme. In the vast majority of instances, where a party's safety or their children's safety is at risk, this will necessarily affect a party's ability to negotiate. For example, fear of putting a child into a harmful environment may stop a responsible parent from putting forward suggestions for shared time in good faith. But it is not true to say that because a party feels unsafe for themselves or their children that they *necessarily* will lack an ability to negotiate; nor that because there is a risk that a child may suffer abuse that the parties will lack a capacity to negotiate. In other words, the wording of the *2008 Regulations* narrows how FDRPs can consider questions of party and child safety as to how such considerations affect their ability to negotiate.

For example, what of circumstances where parents are unconcerned about the risk to their child, regardless of the facts, or where a party believes that they can negotiate freely, despite their own safety concerns? For example, consider a situation where there is a state-based child protection investigation ongoing. During intake, the other parent discloses this, but informs the practitioner that they see the investigation as the government being 'overbearing'; that they do not believe the child is in any danger; and that they are prepared to discuss having the child stay with the other parent. An FDRP may assess that the issue of child abuse present in the family impacts on the negotiating capacity of the parent, despite what they might say. However, the existence of child abuse may not have any perceivable impacts on a party's ability to negotiate. Where this occurs, under a narrow interpretation of the legislative scheme, where parties are presenting as confident of their ability to negotiate freely, FDRPs lack the discretion to issue a certificate saying that FDR is not appropriate, regardless of any objective considerations of safety for children who may be at risk of abuse. As such, FDRPs are arguably obligated to conduct the session (or delay offering a session until the investigation is complete), and simply to advise parties to consider what is best for the children.

To take another example, consider a situation where a party states that they believe that if an FDR session is conducted, there is a chance that they will be attacked after the session, and that they may be followed home. Nevertheless, when asked whether they believe that this will affect their ability to engage in the FDR session, they advise that they shall not let their fear stop them from negotiating with the other party. Or, one party makes statements which are concerning to the practitioner, such as veiled threats, and the other party is unaware of these statements. Here again, the question of safety is distinct from the question of a party's ability to negotiate freely. The current Regulations, interpreted narrowly, do not allow the practitioner to consider the broader questions of safety outside of its impact on the negotiation dynamic of the FDR session itself. It would be beneficial if the *2008 Regulations* separated these considerations.

¹⁵⁴ Ibid.

Nor does the current wording of the *2008 Regulations* allow the FDRP to consider the safety of third parties, such as themselves or an identified third party who may be at risk (for example, a party's new partner). This is because the *2008 Regulations* say that FDRPs may consider 'the likely safety of the parties'.¹⁵⁵ This is a clear reference to the parties in the proceedings, not *all possible affected parties*.

These scenarios are all problematic. It is appropriate for FDRPs to consider the broad safety of parties in offering FDR sessions, as well as and especially the risks to the children, independent of whether the parties themselves identify that such considerations are likely to affect their ability to negotiate. It is also appropriate for FDRPs to consider how third parties may be affected by an FDR session going ahead, as well as other public policy concerns relating to safety, such as child abduction or fraudulent or criminal behaviour.¹⁵⁶ As such, the current criteria for determining whether FDR is not appropriate is overly narrow as it relates to safety. FDRPs may simply choose not to offer an FDR session. However, they may not issue an Inappropriate Certificate. This has the effect of leaving parties who require legal intervention unable to access the court system, which may have the effect of leaving children without safe, judicially considered arrangements.

C *Emotional, Psychological and Physical Health of the Parties*

Emotional, psychological and physical health might refer to a broad range of issues.¹⁵⁷ On the one hand, reg 25(2)(e) might list factors which consider a party's capacity to mediate. Capacity, for example, is considered quite closely in guardianship and medical law. Capacity in that framework relates closely to autonomy: it is the inherent freedom that a party has to make and accept responsibility for important decisions.¹⁵⁸ In common law, the criterion of capacity is the ability to comprehend and retain information; the ability to use and weigh the information as part of a decision-making process; and the ability to communicate a decision.¹⁵⁹ Factors which may affect a party's capacity include intellectual disabilities or being drug-affected. It is important to note that generally, legal jurisdictions which consider capacity presume that a party has capacity, and place the burden on the decision maker to prove otherwise.¹⁶⁰ Given the desires of the government to encourage participation in FDR and the concepts of self-determination that underpin the legislative scheme, this onus should also exist in making assessments to offer FDR.

¹⁵⁵ *2008 Regulations* (n 1) reg 25(2)(b).

¹⁵⁶ See Boulle and Alexander (n 39) 30.

¹⁵⁷ *2008 Regulations* (n 1) reg 25(2)(e).

¹⁵⁸ See Victorian Law Reform Commission, *Guardianship: Final Report* (Report No 24, April 2012) 99.

¹⁵⁹ *Re JS* [2014] NSWSC 302, [18]. This test is derived from *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, 553–4 (Butler-Sloss LJ).

¹⁶⁰ *PBU v Mental Health Tribunal* (2018) 56 VR 141, 185–6 [143]–[147] (Bell J).

It is also vitally important to recognise that simply having a mental illness, or a history of being drug-affected, does not necessarily affect a party's capacity to make decisions. In *PBU v Mental Health Tribunal*, for example, it was found that a person who had schizophrenia did not lack the capacity to make decisions for themselves, as the existence of the medical condition did not affect their capacity to understand, use or weigh the information given.¹⁶¹ As such, it is incumbent upon FDRPs to not just consider whether either party has a history of mental health illnesses, or if such illnesses exist at the time of intake. Rather, the FDRP should be satisfied that such an illness is actually inhibiting a party's capacity to understand, process, and convey information.

A number of commentators discuss emotional readiness to mediate.¹⁶² I have argued elsewhere that parties can present with deep and complex emotional needs, and that this may impact on their performance in an FDR session.¹⁶³ Parties may present to mediation at different stages of the grief cycle;¹⁶⁴ they may be highly attached to a particular emotional state;¹⁶⁵ or the effects of the separation may still be 'raw'.¹⁶⁶ However, while these factors may affect a party's ability to come to an agreement, FDRPs should think carefully about whether or not such factors affect their power to negotiate. In most of these situations, parties are still able to advocate for their own interests. Research from Anne Barlow et al in the United Kingdom context has found that an asymmetry between parties in readiness to engage in FDR is normal.¹⁶⁷ They suggest that in scenarios where parties are not emotionally prepared to mediate, they should be given a thorough explanation of the procedures and an understanding of the practical decisions to be discussed; that sometimes parties should be limited to discussing temporary arrangements; and that parties should be supported by other therapeutic interventions before and during the FDR process.¹⁶⁸ As such, FDRPs should tailor their processes where parties are in highly emotional states, but it would be rare that these emotional states are enough to warrant the issuance of an Inappropriate Certificate, or for the FDRP not to offer an FDR session at all.

¹⁶¹ Ibid 213 [233].

¹⁶² See Fisher and Brandon (n 39) 261; Andrew J Bickerdike and Lyn Littlefield, 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' (2001) 18(2) *Mediation Quarterly* 181, 182; Anne Barlow et al, *Creating Paths to Family Justice: Briefing Paper and Report on Key Findings* (Report, University of Exeter, July 2017) 6.

¹⁶³ Joshua Taylor, 'It's Time to Abolish the Genuine Effort and Non-Genuine Effort Certificates in Family Dispute Resolution' (2019) 33(1) *Australian Journal of Family Law* 29, 42.

¹⁶⁴ Robert E Emery, *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* (Guilford Press, 1st ed, 1994) 52.

¹⁶⁵ Bickerdike and Littlefield (n 162).

¹⁶⁶ Barlow et al (n 162) 6.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid 6–7.

D *Other Factors That the FDRP Deems Relevant (the 'Catch-All Provision')*

The catch-all provision is perhaps the most confusing provision to interpret. FDRPs have expressed confusion with their scope of authority to issue Inappropriate Certificates on a broad range of issues. This section will consider in detail four complex decision-making factors from the literature that FDRPs appear to give weight to in practice: administrative concerns; prospects of settlement, which include considerations of parties' history of entrenched conflict, the likelihood that parties are negotiating in bad faith, and the willingness or motivation of the parties to engage in FDR; the best interests of the children; and where parties do not seem to have the capacity to resolve the matter in another way.

1 *Administrative Concerns*

FDRPs have raised a number of administrative concerns which they claim to have impacted their capacity to offer FDR, and in doing so perhaps led to the issuing of improper Inappropriate Certificates. These include the inability of parties to pay costs;¹⁶⁹ lack of capacity to offer an appropriate FDR forum;¹⁷⁰ and pragmatic concerns such as waiting times, unavailability of a party for a time, or inability to agree on session times.¹⁷¹

Many of these factors appear to have little connection to the criterion of free negotiation and are instead commercial decisions. Where an appropriate forum cannot be offered in a reasonable timeframe, parties should be referred to another organisation. Where parties cannot agree on a session time, an organisation is well within its rights to refuse to offer a service. It may also be appropriate to offer a certificate stating that a party refused or failed to attend, if they offer a reasonable choice of times and advise that failure to attend may result in a certificate being issued.¹⁷² However, as these concerns are not related to a party's capacity to negotiate, Inappropriate Certificates should not be issued.

2 *Prospects of Settlement*

A number of recommendations in the literature may be considered as broadly suggesting that FDR is not appropriate where there is some likely barrier which would make settlement unlikely. Kochanski suggests that FDRPs should consider whether parties are truly motivated to settle, or if they are just there to get a certificate.¹⁷³ Linda Fisher and Mieke Brandon suggest that an FDRP should assess whether parties have 'the necessary skills and motivation', and list the following

¹⁶⁹ Centacare Australia, Submission No 125 to Australian Law Reform Commission, *Family Law for the Future: an Inquiry into the Family Law System* (May 2018) 3.

¹⁷⁰ *Ibid* 13.

¹⁷¹ CatholicCare Victoria & Tasmania (n 88) 79.

¹⁷² *2008 Regulations* (n 1) reg 26.

¹⁷³ Kochanski (n 35) 165–6.

factors which will affect the prospects of success as ‘indicators on which a decision can be made about the suitability of the parties and the dispute for mediation’:

- a clear statement by one party that he or she will not participate in dispute resolution, and wants their day in court;
- bad faith bargaining, or a clear likelihood of this;
- a matter which is primarily a dispute of fact;
- parties who have major, non-negotiable values differences;
- lack of commitment by one or more of the parties to resolve the dispute;
- likelihood that the costs of the dispute outweigh the benefits.¹⁷⁴

Gay Clarke and Iyla Davies suggest that FDR is not appropriate where parties are not trying to resolve the dispute genuinely and are seeking to gain a tactical advantage, and where ‘the parties are so conflict ridden they are incapable of considering the dispute between them apart from their own feelings ie., the “all or nothing” dispute’.¹⁷⁵ Laurence Boulle and Nadja Alexander have suggested that mediation should not be offered where ‘past experience suggests they will not respond to mediation’.¹⁷⁶ They further claim that mediation should not be offered where

it will make the situation worse, or where the parties are likely to use mediation for ulterior purposes, for example to indulge in destructive conflict or to fish for information.¹⁷⁷

These suggestions have the same underlying rationale: where there are reasons to suggest that FDR will not be successful, it ought not to be offered. There is some merit to this view. There are cost and time considerations in mandating FDR when it is likely to be ultimately unsuccessful. Tania Sourdin notes that by forcing parties to go through a mediation session where the issue is likely to go unresolved, parties are having to wait longer to seek a judicial determination. The waiting period could have the effect of making the situation worse,¹⁷⁸ and was a concern raised by parents in the Smyth et al study.¹⁷⁹ FDR is undoubtedly a stressful and emotionally draining process in which to participate; doing so unnecessarily should, of course, be avoided.

¹⁷⁴ Fisher and Brandon (n 39) 252–3.

¹⁷⁵ Clarke and Davies (n 8) 93.

¹⁷⁶ Boulle and Alexander (n 39) 33.

¹⁷⁷ Ibid.

¹⁷⁸ Tania Sourdin, ‘Making People Mediate, Mandatory Mediations in Court-Connected Programmes’ in David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 1st ed, 2005) 147, 148.

¹⁷⁹ Smyth et al (n 40) 84–5.

Providers also exist in a context of limited resources. It might be argued that provision of those services should instead be offered to those most likely to use the process genuinely and benefit from it.

However, there are a number of reasons to suggest that such determinations should not be made by the FDRP. First, there are many other benefits that FDR can offer outside of just making agreements. FDR can be an empowering and useful process, even if the parties are unwilling to move. Mayer argues that not all parties are necessarily seeking agreement as the primary goal of mediation; parties may instead be simply seeking a forum by which to better communicate their concerns.¹⁸⁰ Robert Emery argues that there is a benefit to parties being able to reach their underlying emotions in an FDR session, and that this moves them towards agreement in the future.¹⁸¹ FDR also gives the mediator the opportunity to test the parties' positions and bring the child into the conversation where they may otherwise have been missing. In this way, FDR is an educative experience for the parties. Further, FDR is an opportunity to model and encourage positive communication between parties; there is significant value in parties simply having a conversation with each other, especially where the conflict is high.¹⁸² As such, FDRPs who limit parties' participation in the process because agreement is unlikely are also removing them from other potential benefits. Secondly, FDRPs may be wrong in their initial impressions, and FDR may unexpectedly produce meaningful outcomes. The way parties present in intake sessions may not reflect how they will act in an FDR session. Statements about wanting to go to court may be masking a deeper sense of hurt or frustration.¹⁸³ FDRPs should be giving parties the benefit of the doubt when considering the prospect of resolution in offering FDR.

Even if the FDRP determines that they do not wish to offer an FDR session in the above scenarios, it is unlikely that it is in the scope of their authority to offer an Inappropriate Certificate to the parties. The Commonwealth Government specifically rejected making exceptions to FDR for cases of entrenched conflict and substance abuse, fearing that potentially successful mediations would be excluded.¹⁸⁴ More importantly, these considerations do not fit within the criterion of determining an ability to negotiate. A lack of *willingness* to negotiate does not mean that parties *cannot* negotiate. An unwilling party is not necessarily an incapable party, nor a powerless one. However, FDRPs should also be mindful that a general lack of willingness to engage with another party may be an indicator of undisclosed domestic violence or

¹⁸⁰ Bernard Mayer, 'Facilitative Mediation' in Jay Folberg, Ann L Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques, and Applications* (Guilford Press, 1st ed, 2004) 41.

¹⁸¹ Emery (n 164) 66.

¹⁸² See, eg, Elizabeth Clancy et al, *Family Dispute Resolution Evaluation: An Outcome Measurement Tool Development Project* (Report, Department of Social Services, November 2017).

¹⁸³ Emery (n 164) 27.

¹⁸⁴ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 9.

power balance concerns. In deferring to a narrow interpretation of the legislative scheme, a lack of prospects for success — be it because parties are unwilling; are entrenched in conflict; or because they are attending the session in perceived bad faith — is not sufficient to meet the criterion.

3 *Parties Not Acting in the Best Interests of Their Children*

During intake, some parents may appear to not be considering the best interests of their children. There is some justification for believing that this is a requirement in the legislation: under the *FLA*, the best interest of the children is the paramount consideration in parenting orders.¹⁸⁵ Advisers, such as FDRPs, are required under the *FLA* to inform the parties that they should regard the best interest of the child as the paramount consideration, and encourage them to act on the basis that these interests are best met (including having a meaningful relationship with both parents and being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence).¹⁸⁶ Moreover, the *FLA* explicitly encourages parents 'in reaching their agreement, to regard the best interests of the child as the paramount consideration'.¹⁸⁷

However, there is no provision in the legislative scheme that gives FDRPs the right to issue an Inappropriate Certificate if they are satisfied that parents are not acting in the child's best interests, unless it affects a party's ability to negotiate. One reason for this is noted by Bruce Smyth et al, who observe that FDRPs often have differing understandings of what is in the children's best interests.¹⁸⁸ Moreover, most community FDRPs use a facilitative mediation model.¹⁸⁹ The key philosophy of this model is that mediators do not evaluate parties' views, as parties maintain responsibility for content and outcomes and the parties are assumed to be best placed to make decisions regarding their children.¹⁹⁰ Arguably, neither the advisory nor facilitative models of FDR were developed to ensure the full and effective promotion of the rights of the child.¹⁹¹ The current legislative framework does not give FDRPs the authority to deem FDR inappropriate if they are of the view that parents are not sufficiently child-focussed or are acting against their child's best interest.

¹⁸⁵ *FLA* (n 2) s 60CA.

¹⁸⁶ *Ibid* s 60D.

¹⁸⁷ *Ibid* s 63B(e).

¹⁸⁸ Smyth et al (n 40) 4.

¹⁸⁹ Cooper and Field (n 18) 165.

¹⁹⁰ Mayer, 'Facilitative Mediation' (n 180) 29.

¹⁹¹ See Kirsikka Salminen, 'Mediation and the Best Interests of the Child from the Child Law Perspective' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer, 2018) 209, 219.

4 *No Other Avenues of Resolution*

Perhaps the most concerning conclusion to come from Smyth et al's study is that many FDRPs are influenced to offer FDR, when they would otherwise consider it not appropriate, if they feel that parties have no other place to go to resolve their dispute¹⁹² — for example, if parties say that they cannot afford or lack the emotional capacity to go to court. The natural inclination is to reassess the decision with a view to providing the parties with an option for resolution. However, this is not acceptable conduct. This article has argued that the *2008 Regulations* call for a narrow interpretation, with FDR being offered wherever possible. However, by facilitating an FDR session when an FDRP would otherwise issue an Inappropriate Certificate, FDRPs risk putting parties in a hostile situation, and having them agree to a settlement inconsistent with their interests. These agreements are often also formalised into parenting plans,¹⁹³ potentially leaving the party in a much worse position, because even though a parenting plan is not legally enforceable, a valid parenting plan may be considered by the courts in making parenting orders or in accusations of breaches of parenting orders.¹⁹⁴ A parent in this circumstance may request an FDR session, and this request may form part of an assessment as to the parent's capacity to negotiate freely. However, according to the Regulations, if the FDRP is of the view that the parent lacks capacity, they *must not* offer FDR, regardless of the alternatives available to the parties. By doing so, they are putting the parties at risk and are breaching their legal obligations.¹⁹⁵

VI CONCLUSION: REFORMING THE REGULATION 25(2) FACTORS

The above analysis draws two clear conclusions. First, FDRPs are often acting outside of their legal authority when they choose to issue Inappropriate Certificates. Second, the *2008 Regulations* as they currently are drafted are unduly narrow and if applied faithfully, limit FDRPs from being able to intervene and issue Inappropriate Certificates in circumstances where they are absolutely warranted. It is quite possible that these conclusions intersect and that FDRPs are choosing to apply best practice

¹⁹² Smyth et al (n 40) xii.

¹⁹³ Agreements in FDR sessions are sometimes, though not always, formalised into parenting plans. An agreement becomes a parenting plan if it is in writing and dated, made between and signed by the parents of the child, and deals with appropriate parenting matters: *FLA* (n 2) ss 63C(1)–(2). A parenting plan is not legally enforceable, however a valid parenting plan may be considered by the courts in making parenting orders or in accusations of breaches of parenting orders: at s 70NBB. Parenting plans may also be submitted to the courts to be made into consent orders. A consent order is a written agreement between parents which is then approved by the court and has the same legal effect as if it were an order of the court: 'If You Agree on Parenting Arrangements', *Family Court of Australia* (Web Page, 3 May 2016) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/if-you-agree-on-arrangements/>>.

¹⁹⁴ *FLA* (n 2) s 70NBB.

¹⁹⁵ *2008 Regulations* (n 1) reg 25(1).

as advocated for in the literature, even when it leads them to act outside of their legal authority. It is clear from the above evidence that FDRPs often misunderstand their obligations under the *2008 Regulations*, especially within the operation of the overarching criterion.

One solution is for the *2008 Regulations* to be reworded to provide greater guidance to FDRPs. It would be useful, as a starting point, for the *2008 Regulations* to separate the criterion of an ability to negotiate freely from questions of safety and risks to children. However, my analysis also raises a broader issue: while commentators largely agree on questions of safety and family violence, there is little discussion of when FDR may be inappropriate, as these concerns apply to the catch-all provision. This article has identified that the *2008 Regulations* do not adequately cover the range of questions FDRPs should be considering in making their decisions, due to the narrowly constructed wording of the overarching criterion. However, in considering how the Regulations should be reworded, the following questions arise: what factors *should* be considered by FDRPs in making their assessments? Should FDRPs be free to make any determination they see fit? Is there a better overarching criterion that should be used? Or, are there other factors which impact on FDR unrelated to a party's ability to negotiate, which warrant the issuance of Inappropriate Certificates? These are questions which still require addressing. It is hoped that this article has made some initial contributions to this broad and important discussion.

SPEECH ACTS: IS RACIAL VILIFICATION A FORM OF RACIAL DISCRIMINATION?

ABSTRACT

This article examines three issues concerning the relationship between racially offensive speech and laws prohibiting racial discrimination. First, it examines whether there is an overlap between the provisions of pt II of the *Racial Discrimination Act 1975* (Cth) (*RDA*) (which prohibits various forms of racial discrimination), and pt IIA (which prohibits racial vilification). It examines two decisions of the Federal Court of Australia, in which the Court held that racially offensive speech may, in certain circumstances, infringe pt II of the *RDA*. Second, it examines whether prohibitions on racial vilification are underpinned by the same values as laws prohibiting racial discrimination. The article determines that respect for individual autonomy and dignity underpins both sets of laws, and that racial vilification laws can be regarded as an aspect of the prohibition on racial discrimination. Third, the article argues that the distinction between conduct and speech is not tenable, and that racial vilification can simply be regarded as a form of harmful conduct. Therefore, courts should focus on the effects of such conduct, particularly on its targets, rather than the motives of respondents or the importance of disseminating ‘ideas’.

I INTRODUCTION

This article examines the relationship between pt IIA of the *Racial Discrimination Act 1975* (Cth) (*RDA*), which prohibits racial vilification, and pt II, which prohibits various forms of racial discrimination.¹ Specifically, it considers whether racial vilification can be considered a particular form of racial discrimination, and the implications of such a conclusion. The ongoing debate concerning

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¹ Racial discrimination and vilification are also prohibited by various state and territory legislation. However, the *RDA* is the only national law on these topics. In addition, the *RDA* contains the broadest prohibition on racial discrimination: *Racial Discrimination Act 1975* (Cth) s 9 (*RDA*).

pt IIA (and in particular s 18C)² generally frames these provisions as concerning *speech*, rather than discrimination. Further, these provisions are commonly regarded as limiting rights, rather than enhancing them.

This article seeks to challenge these assumptions in several ways. Part II of this article briefly outlines the key provisions of pt IIA, namely s 18C (which defines and prohibits racial vilification), and s 18D (which provides exemptions from liability). It also outlines the significance of the enactment of the *RDA*, and how pt II prohibits discrimination. It then examines two decisions of the Federal Court of Australia, in which the Court held that racially offensive speech may, in certain circumstances, infringe pt II.³ This means that such speech may result in liability under the *RDA*, completely apart from pt IIA. Further, the exemptions in s 18D are not relevant when liability is based on pt II. This part considers some implications of this overlap between pts II and IIA.

Part III of this article argues that pts II and IIA of the *RDA* are both underpinned by the values of protecting human dignity and individual autonomy. In Australia, a liberal democracy based on multiculturalism, these values are fundamental. Therefore, protection from racial vilification should be regarded as being as important as protection from racial discrimination. As a rights-protecting provision, s 18C therefore should be interpreted broadly and beneficially, rather than restrictively.⁴

Part IV of this article examines the distinction between conduct and speech, which underpins the assumption that vilification is different to discrimination. This distinction has been challenged on conceptual grounds, and it is implicitly rejected by the Federal Court in the decisions examined in this article. Viewing speech as a form of conduct moves the focus from the *ideas* it expresses to its *effects*, particularly its harmful effects on members of target groups.⁵ Scholars such as Katharine Gelber argue that racial vilification is discrimination in discursive form, as it seeks to subordinate members of minority racial and ethnic groups.⁶ Gelber also provides guidance on assessing the impacts of particular speech acts.

This article highlights two main implications of considering racial vilification within a discrimination law framework, rather than a free speech framework. First, this means that the provisions of s 18C should be interpreted broadly and beneficially,

² See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017).

³ *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ('*Gama*'); *Vata-Meyer v Commonwealth* [2015] FCAFC 139 ('*Vata-Meyer*').

⁴ See, eg, *Gama* (n 3) 576 [134] (Branson J).

⁵ In the words of Catharine MacKinnon, the focus is on what the conduct *does*, not merely what it *says*: Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993) 31.

⁶ See below Part IV(A). Part IV examines the concept of 'speech acts'.

consistently with their purpose of eliminating discrimination and upholding human dignity. Part IV of this article examines how courts have interpreted the requirement in s 18C that the respondent's conduct be done 'because of' the race of the target group. It argues that courts should focus on the objective nature of the relevant conduct, rather than (as some judges have done) focusing on the respondent's motive, intention and moral culpability.

Second, this article seeks to challenge the free speech paradigm in which racial vilification laws, such as pt IIA of the *RDA*, are commonly understood. This paradigm tends to frame these laws as primarily *limiting* rights (rather than enhancing them), and it understates the harms of vilification. This article argues for a discrimination law framework for understanding racial vilification laws, and particularly for understanding the types of harms these laws seek to target. This contributes to a richer debate concerning the legitimacy and importance of such laws in a multicultural liberal democracy such as Australia.

II DOES PT IIA OVERLAP WITH PT II OF THE *RDA*?

Part IIA was inserted in the *RDA* in 1995, following the recommendations of three government reports.⁷ Part IIA has two main provisions. First, s 18C makes it unlawful to 'do an act' that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people', if the act is done 'because of the race' of the person or group of persons.⁸ Second, s 18D establishes several exemptions from liability under s 18C. These exemptions provide defences for respondents, provided that they have acted 'reasonably and in good faith'. In broad terms, pt IIA proscribes 'racially offensive speech', or racial vilification.⁹

This part of the article examines whether racially offensive speech may also contravene pt II of the *RDA*.¹⁰ To determine whether there is overlap between the provisions of pts II and IIA, the provisions will be examined in detail. However, some background to the enactment of the *RDA* will be provided first.

⁷ *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991); Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *Report of the National Inquiry into Racist Violence in Australia* (Report, 1991); Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 14 April 1992). See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, University of Sydney Law School, 2002) for the background to the enactment of the *Racial Hatred Act 1995* (Cth).

⁸ Part IIA applies only to conduct having 'profound and serious effects': see *Eatoock v Bolt* (2011) 197 FCR 261, 330 [297] (Bromberg J) ('*Eatoock*').

⁹ *Toben v Jones* (2003) 129 FCR 515 ('*Toben*').

¹⁰ When pt IIA was enacted, it was unclear whether racial vilification was prohibited by the provisions of pt II: see Human Rights and Equal Opportunity Commission (Cth), *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Report, 27 March 1991) 298.

A The International and Constitutional Significance of the RDA

Two significant features of the *RDA* highlight its unique place in Australian law. First, its provisions are based on international human rights treaties to which Australia is a party. Second, the *RDA* has quasi-constitutional status. In relation to the first feature, key provisions of the *RDA*¹¹ are based on international human rights treaties, in particular the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*'),¹² to which Australia is a party. Australia is therefore obliged, under international law, to provide legislative protection from racial discrimination. Because key provisions in the *RDA* are based directly on the wording of the *ICERD*, this links the purposes of the treaty, particularly the aim of 'eliminating racial discrimination in all its forms and manifestations',¹³ with the purposes and the interpretation of the *RDA*.¹⁴ Therefore, the *RDA* should be interpreted consistently with the *ICERD*.¹⁵ Also, the constitutional validity of the *RDA* is based on Australia's ratification of the *ICERD*.¹⁶

Australia is also party to the *International Covenant on Civil and Political Rights* ('*ICCPR*'),¹⁷ which prohibits discrimination based on a person's 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁸ Further, the *ICCPR* provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.¹⁹ Freedom from racial discrimination is a central principle of international human rights law,²⁰ and eliminating racial discrimination is a central obligation of states

¹¹ See especially *RDA* (n 1) ss 8–10.

¹² Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

¹³ *Ibid* Preamble.

¹⁴ *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 280 [517], 282 [528] (Mortimer J) ('*Wotton*').

¹⁵ *Ibid* 281 [526].

¹⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'). In that case, Murphy J noted that the elimination of racial discrimination is also a matter of international concern: at 241–2. Therefore, it is within the external affairs power of Commonwealth Parliament, even in the absence of a treaty obligation. Similarly, the constitutional validity of s 18C was upheld by the Full Court of the Federal Court in *Toben* (n 9).

¹⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

¹⁸ *Ibid* art 2.

¹⁹ *Ibid* art 26. In *Mabo v Queensland [No 2]* (1992) 175 CLR 1, the High Court recognised Aboriginal native title in Australia and rejected the principle of terra nullius. One ground provided for this decision was the prohibition on racial discrimination contained in the *ICCPR*, which is binding on Australia: at 42 (Brennan J).

²⁰ Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 10–15. See also Sandra Fredman, *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001).

parties to these treaties.²¹ Pursuant to the *RDA*, certain forms of racial discrimination are unlawful, and victims may make a complaint and potentially obtain legal remedies for such conduct.²² Other liberal democracies, such as the United Kingdom and the United States of America ('US'), have also enacted laws prohibiting various forms of racial discrimination.²³

Second, and relatedly, protection from racial discrimination has a quasi-constitutional status in Australia, as s 10 of the *RDA* prohibits the federal government, as well as state and territory governments, from enacting racially discriminatory laws.²⁴ Therefore, the value and importance of eliminating racial discrimination is widely accepted in Australian society.²⁵ Also, the enactment of the *RDA* in 1975 closely coincided with Australia adopting a formal policy of multiculturalism.²⁶

B *The RDA Prohibits Racial Discrimination in Two Ways*

Part II of the *RDA* prohibits racial discrimination in two distinct ways. First, it prohibits particular types of discrimination in certain areas, such as employment, education and the provision of goods and services. These prohibitions are examined in the following section, with a particular focus on employment. Second, s 9 of the *RDA* contains a general prohibition on racial discrimination. This provision will be examined in Part II(B)(2), particularly in relation to its application to racially offensive remarks. In summary, this part concludes that racially offensive speech is unlikely to breach the activity-based prohibitions in the *RDA*, but it may breach the general prohibition in s 9.

1 *Activity-Based Prohibitions on Racial Discrimination in the RDA*

As mentioned above, ss 11–16 of the *RDA* contain several activity-based prohibitions on racial discrimination. The areas of activity in which racial discrimination is

²¹ Gaze and Smith (n 20). See also Fredman (n 20) 35–6.

²² Notably, these provisions apply to private actors, and also to conduct by the state: see, eg, *Koowarta* (n 16), which concerned racially discriminatory conduct by the State of Queensland.

²³ *Race Relations Act 1965* (UK); *Civil Rights Act 1964*, Pub L No 88–352, 78 Stat 241.

²⁴ This is not to say that racially discriminatory laws are not enacted in Australia, even by the federal Parliament: see, eg, *Northern Territory National Emergency Response Act 2007* (Cth), which was repealed and replaced by the *Stronger Futures in the Northern Territory Act 2012* (Cth).

²⁵ Tim Soutphommasane argues that the values established by the *RDA* are so well entrenched in the Australian legal and political system that repeal of the *RDA* is unlikely and suspension is usually highly controversial: Tim Soutphommasane, *I'm Not Racist But...: 40 Years of the Racial Discrimination Act* (NewSouth, 2015) ch 2. See also Parliamentary Joint Committee on Human Rights (n 2).

²⁶ The connection between eliminating racial discrimination and promoting multiculturalism is examined in Part III(B) of this article.

prohibited are the provision of goods and services,²⁷ employment,²⁸ access to land, housing and other accommodation,²⁹ and access to public places and facilities.³⁰ However, only certain conduct *within* these areas is prohibited. For example, s 15(1) makes unlawful certain conduct in the context of employment:

15 Employment

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer:
 - (a) to refuse or fail to employ a second person on work of any description which is available and for which that second person is qualified;
 - (b) to refuse or fail to offer or afford a second person the same terms of employment, conditions of work and opportunities for training and promotion as are made available for other persons having the same qualifications and employed in the same circumstances on work of the same description; or
 - (c) to dismiss a second person from his or her employment;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

Sections 11–16 are broad in that they cover both direct and indirect discrimination. *Direct* discrimination occurs when the discriminator treats the complainant ‘less favourably’, on the basis of the complainant’s race, than they would have treated someone who was otherwise in the same circumstances as the complainant but who was of a different race.³¹ Prohibiting such treatment, based on a person’s race, supports notions of *formal* equality — the concept that people who are similarly situated should be treated alike³² — as it requires consistent treatment of people, regardless of race.³³ *Indirect* racial discrimination, on the other hand, involves the

²⁷ RDA (n 1) s 13.

²⁸ Ibid s 15.

²⁹ Ibid s 12.

³⁰ Ibid s 11.

³¹ See *ibid* ss 11(a)–(b), 12(b)–(c), 13(b), 15(2). But see *ibid* ss 11(c), 12(1)(a), (d)–(e), (2)–(3), 13(a), 14, 15(1), (3)–(5), which are all absolute prohibitions. Alternatively, direct discrimination may require ‘unfavourable’ treatment, rather than ‘less favourable treatment’: see *Equal Opportunity Act 2010* (Vic).

³² Gaze and Smith (n 20) 16.

³³ Fredman (n 20) 16. According to this approach, a person’s race is considered normatively *irrelevant* to how they should be treated: see Gaze and Smith (n 20). Treating race as irrelevant adopts a ‘colour-blind’ approach to race, under which race is supposed to be ignored: Neil Gotanda, ‘A Critique of “Our Constitution is Color-Blind”’ (1991) 44(1) *Stanford Law Review* 1.

imposition of a term, condition or requirement which, although neutral on its face, disadvantages members of certain racial groups.³⁴ In particular, ss 11–16 recognise that a practice which appears neutral may in fact be discriminatory. Indeed, these provisions recognise that certain practices may discriminate against large groups of people simultaneously, including members of a particular racial group.³⁵ Whereas direct discrimination is based largely on notions of formal equality, indirect discrimination encompasses notions of substantive equality.³⁶ Substantive equality emphasises the actual circumstances of members of particular social groups, and particularly the disadvantaged and vulnerable circumstances of certain groups.³⁷ In particular, substantive equality acknowledges that discriminatory practices can cause or contribute to various forms of disadvantage.³⁸

Racially offensive speech is unlikely to breach the activity-based prohibitions in ss 11–16 of the *RDA*.³⁹ This is because such conduct is not likely to result in the specific forms of detriment required by these provisions, such as a person not being employed by reason of their race.⁴⁰ In this respect, Luke McNamara is correct in noting that the nature of the harms caused by racial vilification is different to those of racial discrimination.⁴¹ However, racially offensive speech may breach s 9 of the *RDA*, which applies to a broader range of conduct, and is examined in the next section of this article.

2 *The Scope and Nature of s 9 of the RDA*

Section 9 operates very differently from the activity-based provisions in ss 11–16. The section provides:

³⁴ See *RDA* (n 1) s 9(1A).

³⁵ In the United States, the terms ‘differential treatment’ and ‘differential impact’ are used in place of direct and indirect discrimination: see Gaze and Smith (n 20) 34.

³⁶ *Ibid* 20.

³⁷ *Ibid* 18–19.

³⁸ *Ibid* 18. See also Fredman (n 20) 24. This issue is examined further in Part III(B) of this article.

³⁹ McNamara (n 7) 56.

⁴⁰ *RDA* (n 1) s 15(1)(a). No reported Australian decisions could be located regarding racially offensive speech brought under ss 11–16 of the *RDA*.

⁴¹ McNamara (n 7) 269. McNamara does not, however, seem to acknowledge that acts of racial vilification may occur together with acts of discrimination, so that the difference in the nature of the harms becomes practically irrelevant. Indeed, he seems to assume that acts of *discrimination* commonly occur in the context of a pre-existing and ongoing relationship, such as employment, whereas *vilification* commonly occurs when the parties are ‘total strangers’: at 56–7. The former assumption may be correct; the latter assumption is not supported by the cases of *Gama* (n 3) and *Vata-Meyer* (n 3) which both involved racially offensive speech in the context of an employment relationship. These cases are examined in Part II(B)(4) of this article.

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

In *Wotton*,⁴² Mortimer J comprehensively examined the requirements of s 9. In particular, her Honour emphasised the section's origins in international law, and the implications of this for the proper interpretation of the section. Justice Mortimer described s 9 as having two 'limbs' — one 'conduct-based' and one 'outcome-based' — that must be satisfied for a claim to succeed.⁴³ The conduct-based limb requires 'an act involving a distinction, exclusion, restriction or preference that is based on race'.⁴⁴ Although the word 'discrimination' is not used in s 9, Mortimer J held that differential treatment of at least one person is required by the words 'distinction, exclusion, restriction or preference'.⁴⁵ In other words, this limb requires comparing the way one person or group is treated, with that of another person or group.⁴⁶

The outcome-based limb of s 9 focuses on the 'purpose or effect' of the relevant act on the human rights of the relevant person or group. In *Wotton*, Mortimer J emphasised that s 9 focuses on the 'actual outcome', or the practical consequences, of the act, rather than the motive or intent of the respondent.⁴⁷ In relation to the word 'effect', her Honour stated that a 'qualitative assessment of the impact of conduct' is required.⁴⁸ This necessarily involves examining the circumstances surrounding the relevant act, including its consequences for the complainant.⁴⁹ Her Honour emphasised that s 9 is concerned with achieving substantive, rather than merely formal, equality.⁵⁰

⁴² *Wotton* (n 14). This case did not itself involve racially offensive speech. However, it is examined in detail as it is the leading decision on the interpretation of s 9.

⁴³ *Ibid* 283 [530]–[531].

⁴⁴ This section will examine the 'distinction, exclusion, restriction or preference' aspect. The 'based on race' aspect, although related, is examined in Part IV(C)(2) of this article.

⁴⁵ *Wotton* (n 14) 283–4 [534]–[538].

⁴⁶ *Ibid* 285 [540].

⁴⁷ *Ibid* 283 [530]–[531]. Her Honour appeared to equate 'purpose' in s 9 with intent, which suggests that proving intent to discriminate may satisfy this requirement. However, her Honour's focus in this decision was on the alternative requirement of 'effect'.

⁴⁸ *Ibid* 283 [532].

⁴⁹ *Ibid* 289–91 [555]–[560].

⁵⁰ *Ibid* 283 [532]. Provisions in anti-discrimination law that focus on the *effect* of certain conduct, which is common in prohibitions on *indirect* discrimination, are more focused on achieving substantive equality, or equality in fact, rather than merely formal equality, or same treatment.

Justice Mortimer noted that the text of s 9 is drawn directly from art 1 of the *ICERD*.⁵¹ Section 9 should therefore be construed consistently with the *ICERD*, and it is ‘appropriate ... [and] necessary to have regard to international and comparative decisions concerning the content of those rights’.⁵² Her Honour noted that the provisions of the *RDA* must be interpreted consistently with their purpose.⁵³ As mentioned earlier, the purpose of the *RDA*, and of the *ICERD*, is ‘eliminating racial discrimination ... in all its forms and manifestations’.⁵⁴ This purpose, in turn, is underpinned by the principle of respect for human dignity.⁵⁵

In *Wotton*, Mortimer J did not merely cite the principle that s 9 must be interpreted purposively and in a way that contributes to the elimination of racial discrimination. Her Honour actually applied this principle to the circumstances of the case. First, her Honour focused on the consequences of the relevant act on the complainant, rather than the respondent’s motive or intent. Her Honour thus adopted a perspective that was sympathetic to the victim, which is more conducive to eliminating racial discrimination than a perpetrator-centred perspective.⁵⁶ Second, in determining whether the impugned act involved a ‘distinction, exclusion, restriction or preference’, Mortimer J examined the surrounding circumstances, and in particular, the impact of the respondent’s conduct on the complainant. Thus, her Honour determined the actual consequence of the act on the complainant, rather than taking a merely formal approach to whether the section had been breached.

Gaze and Smith have noted that s 9 is extremely broad in scope, particularly in comparison to the provisions of ss 11–16. First, s 9 does not impose a duty only on certain classes of persons.⁵⁷ Section 15, by contrast, applies only to actions by an ‘employer’, or a ‘person acting or purporting to act on behalf of an employer’. As illustrated by the decisions that will be examined below,⁵⁸ s 9 can apply to the conduct

⁵¹ Her Honour noted that ss 8 and 10 of the *RDA* are also based on the terms of the *ICERD*: *ibid* 282 [527].

⁵² *Ibid* 281 [526].

⁵³ *Ibid* 291 [561]. Gaze also emphasises the importance of interpreting anti-discrimination laws consistently with their purpose; she notes, however, that this is not done consistently by Australian judges: Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26(2) *Melbourne University Law Review* 325.

⁵⁴ *Wotton* (n 14) 282 [528], quoting *Maloney v R* (2013) 252 CLR 168, 271 [281] (Gageler J). This purpose is manifest in the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), and the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904 (XVIII), UN GAOR, UN Doc A/RES/18/1904 (20 November 193).

⁵⁵ *Wotton* (n 14) 282 [528], 285–6 [544].

⁵⁶ See Alan D Freeman, ‘Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine’ (1978) 62(6) *Minnesota Law Review* 1049.

⁵⁷ Gaze and Smith (n 20) 109.

⁵⁸ See below Part II(B)(4).

of a wider range of people, including the complainant's co-workers, rather than only their employer. Second, s 9 is not limited to discrimination that occurs in particular spheres of activity.⁵⁹ As mentioned earlier, ss 11–16 are limited to particular types of discrimination that occur in certain areas of life, such as the provision of education, goods and services, or employment. Section 9, by contrast, focuses on the effect of the relevant conduct on human rights and fundamental freedoms.⁶⁰ The relevant rights 'include any right[s] of a kind referred to in Article 5 of the ... [ICERD]'.⁶¹ This list is non-exhaustive, and it includes the rights listed in the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights*.⁶²

Also, s 9 is not qualified by a test of reasonableness.⁶³ Provisions in anti-discrimination legislation that focus on the *effect* of certain conduct are often subject to a reasonableness defence.⁶⁴ Typically, these are prohibitions on indirect discrimination. Section 9, however, applies to both direct and indirect discrimination.⁶⁵

3 'Based on Race' in s 9

As mentioned above, liability under s 9 depends on whether the relevant act was done 'based on race'.⁶⁶ As will be outlined below, courts have adopted a purposive approach to interpreting this requirement. In particular, courts have focused on the 'essential nature' of the respondent's conduct, rather than the motive or intention of the respondent,⁶⁷ as this approach assists in eliminating racial discrimination in all its forms and manifestations.⁶⁸ This is quite different to how courts have interpreted

⁵⁹ Gaze and Smith (n 20) 109.

⁶⁰ Ibid.

⁶¹ *RDA* (n 1) s 9(2).

⁶² Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See *Wotton* (n 14) 316 [672]. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 260–1. In *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 ('*Iliafi*'), the Court found that the right to worship publicly in native (Samoan) language is not a human right or fundamental freedom within the meaning of art 5 of the *ICERD*.

⁶³ Gaze and Smith (n 20) 121.

⁶⁴ See *RDA* (n 1) s 9(1A).

⁶⁵ Section 9(1A) was inserted by s 49 of the *Law and Justice Legislation Amendment Act 1990* (Cth). The purpose of the amendment was to clarify that s 9 applies to acts of indirect discrimination: see Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1990* (Cth) 48. This amendment appears to be for the avoidance of doubt, and s 9(1A) has been little used.

⁶⁶ This is different to the requirement in s 18C that the relevant act is done 'because of the race ... of the other person'.

⁶⁷ *Wotton* (n 14) 288–9 [551]–[553], quoting *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 33–4 (Weinberg J) ('*Macedonian Teachers' Association*').

⁶⁸ *Wotton* (n 14) 282 [528].

the wording ‘because of race’ in s 18C.⁶⁹ Courts have, on occasion, interpreted that requirement as focusing on the respondent’s motives or intention. Using s 9, rather than s 18C, may therefore be preferable for those seeking a remedy for racially offensive speech.⁷⁰

In *Macedonian Teachers’ Association*,⁷¹ Weinberg J distinguished the words ‘based on race’ (used in s 9) from ‘because of race’ (used in ss 11–16). His Honour held that the former (in contrast to the latter) does not imply any causal requirement but connotes that the act be done, or undertaken, by reference to race.⁷² In *Wotton*, Mortimer J adopted this reasoning, interpreting ‘based on race’ as focusing on the ‘essential nature’ of the relevant act.⁷³ Her Honour held that the character of the act must be determined by examining all the surrounding circumstances, including the consequences of the act.⁷⁴

Justice Mortimer referred to two examples of conduct that was ‘essentially discriminatory in nature’ provided in earlier decisions.⁷⁵ The first example was the internment by the US government, following the bombing of Pearl Harbour, of all American citizens of Japanese ancestry living on the west coast of the US.⁷⁶ At the time, the government said this action was necessary on the grounds of national security.⁷⁷ However, as this action singled out a single ethnic group for disadvantageous treatment, it was essentially discriminatory.⁷⁸ The second example relates to racially offensive speech, and it highlights the close connection between establishing a ‘distinction, exclusion, restriction or preference’, on the one hand, and establishing that this was done ‘based on race’, on the other. The example also highlights that the reference to race need not be explicit for s 9 to be infringed:

The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person’s race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person’s race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact

⁶⁹ See below Part IV(C)(2).

⁷⁰ However, if (as I argue in Part III of this article) racially offensive speech is considered a form of discrimination, then the respondent’s motive or intention is less relevant.

⁷¹ *Macedonian Teachers’ Association* (n 67).

⁷² *Ibid* 29–30.

⁷³ *Wotton* (n 14) 288–9 [551]–[553].

⁷⁴ *Ibid* 289–91 [555]–[560].

⁷⁵ *Ibid* 288 [551], quoting *Macedonian Teachers’ Association* (n 67) 33–4 (Weinberg J); *Wotton* (n 14) 290 [559], quoting *Gama* (n 3) 564 [76] (French and Jacobson JJ).

⁷⁶ This action was upheld by the United States Supreme Court in *Korematsu v United States*, 323 US 214 (1944) (*Korematsu*).

⁷⁷ *Wotton* (n 14) 288 [551], quoting *Macedonian Teachers’ Association* (n 67) 33–4 (Weinberg J).

⁷⁸ *Wotton* (n 14) 288 [551].

that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race.⁷⁹

As mentioned above, Mortimer J adopted an approach that focuses on the *essential nature* of the relevant act, rather than the respondent's motive or intention. In particular, her Honour noted that 'the basis of the impugned conduct must not be conflated with intention or subjective purpose [of the alleged discriminator]'.⁸⁰ This approach is consistent with the principle that a respondent's motive or intent is generally irrelevant to a claim based on direct discrimination.⁸¹ In anti-discrimination law, motive is the reason (or purpose) for which an act is done.⁸² Typically, as in *Korematsu v United States*,⁸³ the respondent will argue that there is a non-discriminatory reason for the conduct. However, it is well established in Australian anti-discrimination law that having a good motive is no defence to an otherwise established claim of direct discrimination.⁸⁴ To allow a good motive to prevent a claim of discrimination would severely undermine the effectiveness of anti-discrimination legislation, and would allow alleged discriminators easily to avoid their obligations under such laws.⁸⁵

Wotton involved a claim of racial discrimination made against members of the Queensland Police Service ('QPS') regarding their treatment of Aboriginal people during a period of heightened tension between the Aboriginal community and police in a remote community. Affirming the principles outlined above, Mortimer J stated that the existence of 'laudable motives, appreciable difficulties or understandable dilemmas [on the part of the QPS] will not prevent or preclude a contravention of s 9 where it can nevertheless be said that the impugned conduct ... was based on race'.⁸⁶

⁷⁹ Ibid 290 [559], quoting *Gama* (n 3) 564 [76] (French and Jacobson JJ).

⁸⁰ *Wotton* (n 14) 288 [551].

⁸¹ *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176 (Deane and Gaudron JJ) ('*Australian Iron*'). See also *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *Wotton* (n 14) 156–7 [551]–[553]; *Gaze and Smith* (n 20) 115. A respondent's motive may be relevant to a claim of indirect discrimination.

⁸² *Australian Iron* (n 81) 176–7 (Deane and Gaudron JJ).

⁸³ *Korematsu* (n 76).

⁸⁴ *Australian Iron* (n 81) 176–7 (Deane and Gaudron JJ).

⁸⁵ Ibid.

⁸⁶ *Wotton* (n 14) 289 [553]. Similarly, in *Macedonian Teachers Association* (n 67), the impugned conduct was a directive issued by the Victorian Premier that Ministers refer to the Macedonian language as 'Slav-Macedonian'. Justice Weinberg, without commenting on the merits of the instant matter, remarked that this conduct was 'essentially discriminatory', as it singled out all people of Macedonian ethnicity for differential treatment: at 34, 39–40. Also, it was irrelevant that the respondent stated that its motive was to promote peace and social harmony between two ethnic groups: at 39.

Similarly, a respondent's *intent* is generally considered irrelevant in anti-discrimination law.⁸⁷ Specifically, proof that the respondent had a desire to discriminate, for example, based on overt racial prejudice, is not required.⁸⁸ Among other reasons, proving an intention to discriminate would usually be extremely difficult for a complainant.

In summary, determining whether certain conduct is 'based on race' requires focusing on the essential nature of the relevant conduct, rather than on the alleged discriminator's stated intention or motive. This is consistent with a purposive approach to interpreting s 9, and an approach that assists in eliminating racial discrimination and protecting the inherent dignity and equal standing of each member of the Australian community.⁸⁹

4 *Racially Offensive Speech May Contravene s 9*

The preceding sections have examined the requirements for a successful claim under s 9. This section examines whether racially offensive speech may infringe s 9. Specifically, it examines two Australian Federal Court decisions, in which the Court determined that racially offensive remarks may contravene s 9. Notably, the Court neither relied on nor referred to pt IIA of the *RDA*, which specifically prohibits racial vilification.⁹⁰ These decisions are examined in detail to determine in what circumstances a claim involving racially offensive speech will be likely to succeed under s 9.

Gama involved racially discriminatory remarks made to an employee by his supervisor.⁹¹ The remarks, including that the complainant (who was Portuguese, and who experienced difficulty walking due to a workplace injury) walked 'like a monkey', and looked like a 'Bombay taxi driver',⁹² were made in the presence of his co-workers. The supervisor also stated to the complainant's co-workers that workers compensation

⁸⁷ As mentioned above, in *Wotton*, Mortimer J seemed to equate 'purpose' in s 9 with intent. Her Honour did not, however, elaborate further on this point.

⁸⁸ *Wotton* (n 14) 288–9 [551]–[553]. See also Gaze and Smith (n 20) 115.

⁸⁹ In *Wotton*, Mortimer J took an approach that was sympathetic to the effect of the relevant conduct on the victim. This is consistent with the view that s 9 seeks to achieve substantive, and not merely formal, equality. This approach is also consistent with a 'victim' perspective, rather than a 'perpetrator' perspective: see Freeman (n 56). Freeman argues that fault (or moral blameworthiness) is regarded by courts and legislators as an essential aspect of discrimination law: at 1054–6. See also Charles R Lawrence, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39(2) *Stanford Law Review* 317. Freeman and Lawrence focus on the harmful *effects* of discrimination on the victim.

⁹⁰ A number of Federal Court proceedings that were decided under s 18C also relied on s 9: see *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 ('*Creek*'); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 ('*Hagan*'). In these cases, the Court did not determine whether s 9 was infringed.

⁹¹ *Gama* (n 3).

⁹² *Ibid* 563 [74] (French and Jacobson JJ).

claims made by the complainant were not legitimate.⁹³ The Full Court of the Federal Court upheld the trial judge's decision that the supervisor's conduct infringed s 9 of the *RDA*, and that the employer was vicariously liable.⁹⁴ The Court stated that racially derogatory remarks made in a workplace could contravene s 9, and that the complainant did not need to bring his complaint under s 15.⁹⁵ The Court rejected an argument that 'systemic racial bullying or harassment' was necessary to prove infringement of s 9 in these circumstances.⁹⁶ Similarly, the Court held that proof that the supervisor's statements 'created any disadvantage in the workplace' was also unnecessary.⁹⁷

Significantly, the Court held that remarks made in the workplace could constitute an 'act' for the purposes of s 9.⁹⁸ In other words, the Court did not distinguish between discrimination by words (usually considered the province of pt IIA of the *RDA*) and discrimination by conduct (usually considered the province of pt II).

Justices French and Jacobson emphasised that derogatory racial remarks are capable of meeting the requirements for liability under s 9, and that these requirements will often overlap in cases involving remarks made in the workplace.⁹⁹ In relation to the impairment of the complainant's rights, their Honours stated that

remarks which are calculated to humiliate or demean an employee by reference to race ... are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work.¹⁰⁰

The Court thus found that each of the requirements for liability under s 9 had been met, and that the employer was vicariously liable for the supervisor's conduct.

More recently, in *Vata-Meyer*,¹⁰¹ an Aboriginal woman was repeatedly invited to eat 'black babies' and 'Coon cheese' by a male co-worker. The Full Court of the Federal Court affirmed the decision in *Gama* that racially offensive remarks made in the workplace could contravene s 9. In particular, the Court accepted that 'depending on the facts, racially-based remarks may affect a person's sense of self-worth and thereby

⁹³ Ibid 567 [91] (French and Jacobson JJ).

⁹⁴ *RDA* (n 1) s 18A.

⁹⁵ As outlined above, s 15 prohibits certain types of discrimination in relation to employment.

⁹⁶ *Gama* (n 3) 563–4 [73]–[76].

⁹⁷ Ibid.

⁹⁸ Ibid 564 [76] (French and Jacobson JJ, Branson J agreeing at 573 [122]).

⁹⁹ Ibid, quoted in *Wotton* (n 14) 290 [559] (Mortimer J).

¹⁰⁰ *Gama* (n 3) 564 [78].

¹⁰¹ *Vata-Meyer* (n 3).

appreciably disadvantage them in their conditions of work'.¹⁰² The Court also held that 'an unintentional racially offensive remark may impair a person's enjoyment of her right to work and to just and favourable conditions of work'.¹⁰³

In relation to the 'purpose' of the respondent's conduct, the Full Court rejected the respondent's 'innocent explanation' for the relevant remarks, and the trial judge's assessment of the respondent as simply 'obtuse' and 'unsophisticated'.¹⁰⁴ Thus, the Court determined that the remarks were made for the required purpose, as the respondent was aware (or should have been aware) of the offence caused by his conduct.¹⁰⁵

These two decisions confirm that racially offensive (or derogatory) remarks, particularly when made in the workplace by a co-worker or supervisor to an employee, may infringe s 9 of the *RDA*. This is not to say that all instances of racially offensive remarks in the workplace will infringe the section. As the cases emphasise, the nature of the conduct and the surrounding circumstances must be closely examined. However, the decisions in *Gama* and *Vata-Meyer* emphasise that subjecting a person to racially offensive or derogatory remarks in the workplace can often be humiliating and demeaning.¹⁰⁶ This conduct is likely to interfere with the right to work, and to just and favourable conditions of work, which is prohibited by s 9 of the *RDA*.¹⁰⁷

It is difficult to determine why the complainants in *Gama* and *Vata-Meyer* did not bring their complaints under s 18C, rather than s 9.¹⁰⁸ However, it is notable that the Court's judgment in *Vata-Meyer* determined that the respondent's conduct was 'likely to offend an Aboriginal person'.¹⁰⁹ This is similar to the language of s 18C, under which the respondent's conduct must be 'reasonably likely ... to offend, insult, humiliate or intimidate' a member of the relevant group. Also, both judgments emphasised that conduct that 'humiliate[d] [the complainant] ... by reference to

¹⁰² Ibid [93] (North, Collier and Katzmann JJ).

¹⁰³ Ibid.

¹⁰⁴ Ibid [72], [85]–[88].

¹⁰⁵ Ibid [85]–[88]. To support this conclusion, the Court referred to the fact that the complainant had 'dark skin', and that the respondent had recently undertaken training in Aboriginal cultural awareness: at [82]–[84]. Contrary to the trial judge, the Court found that the complainant's version of events was 'more probable than not': at [85].

¹⁰⁶ *Gama* (n 3) 564 [76]–[78], quoted in *Vata-Meyer* (n 3) [29].

¹⁰⁷ As mentioned above, s 9(4) provides that, to infringe s 9, the respondent's conduct must limit or restrict a human right or fundamental freedom within the meaning of art 5 of the *ICERD*.

¹⁰⁸ One possible reason may be that the complainant anticipated difficulty in satisfying the 'because of race' requirement under s 18C: see below Part IV(C).

¹⁰⁹ *Vata-Meyer* (n 3) [93]. More accurately, the respondent's repeated request for the complainant to eat 'black babies' was likely to offend an Aboriginal woman.

race' could incur liability under s 9.¹¹⁰ Therefore, it is possible that the respondent's conduct in these cases may also have infringed s 18C.¹¹¹

5 Implications of These Decisions

The decisions in *Gama* and *Vata-Meyer*, that racially offensive speech may infringe s 9 of the *RDA*, have significant implications for the operation of the *RDA*. The decisions mean that complaints relating to racially offensive speech may be made under s 9, rather than under pt IIA. Further, there are several reasons why proceeding under s 9 may be preferable for a complainant. First, unlike s 18C, there is no requirement in s 9 that the relevant act be done 'otherwise than in private'.¹¹² Therefore, it is possible that a complaint could be made under s 9 regarding racially offensive speech by one person to another in a private home, for example.

Second, unlike s 18C, there are no defences to a complaint made under s 9.¹¹³ In particular, reasonableness is not a defence under s 9. Therefore, the exemptions in pt IIA are not relevant to complaints made under s 9. These exemptions, and particularly the aspect of reasonableness, have sometimes resulted in complainants being denied a remedy.¹¹⁴ Therefore, a remedy may be available under s 9 in circumstances where no remedy would be available under pt IIA. Conversely, a person may be liable for racially offensive speech under s 9 even though the requirements of pt IIA would not be met, and an exemption under pt IIA may otherwise be available. Third, under s 9, the relevant conduct must be done 'based on race', which focuses on the essential nature of the conduct. However, under s 18C, the conduct must be done 'because of the race ... of the other person'. Courts have interpreted this requirement as focusing on the respondent's motives or intention, which has made it difficult for complainants to prove their claim.¹¹⁵

¹¹⁰ *Gama* (n 3) 564 [78], cited in *Vata-Meyer* (n 3) [29].

¹¹¹ The complainants may have elected not to use s 18C due to doubt that the relevant conduct took place 'otherwise than in private'.

¹¹² See, eg, *McLeod v Power* (2003) 173 FLR 31 ('*McLeod*'), in which it was determined that this requirement is not met where a racist remark is directed at a particular person, and where no other people are present. However, the decisions in *Gama* (n 3) and *Vata-Meyer* (n 3) strongly suggest that the presence of others (such as co-workers) is relevant to whether the conduct was likely to humiliate the complainant, and therefore whether it was likely to restrict or limit their human rights as required by s 9(4).

¹¹³ *Macedonian Teachers' Association* (n 67). The only defence to a complaint under s 9 is s 8, which concerns special measures for the 'advancement of certain racial or ethnic groups': see *ICERD* (n 12) art 1(4). This is unlikely to apply to racially offensive speech.

¹¹⁴ See, eg, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 ('*Bropho*'). This case involved a cartoon published in a major newspaper that was found to contravene s 18C. However, it was exempt as an 'artistic work' under s 18D.

¹¹⁵ See below Part IV(C).

The fact that some racially offensive speech may infringe pt II may suggest that separate laws prohibiting racial vilification are not necessary, or are undesirable. For example, retaining separate provisions relating to racial vilification may be regarded as undesirable because the same conduct could give rise to liability on two separate grounds, based on different criteria, with different defences being available. However, there are three reasons for maintaining laws specifically prohibiting racial vilification.

First, it is not unusual for an act to provide grounds for legal action on two or more bases. For example, a statement may be actionable both as defamation and as racial vilification.¹¹⁶ Additionally, one act may be both a breach of contract and also involve the commission of a tort. Therefore, the possibility of an overlap (or plurality) of legal claims, or the fact that a claim may succeed on one legal basis but fail on another, is not in itself grounds for arguing that one cause of action should be abolished. On the contrary, this would deprive complainants of their ability to choose the grounds upon which to proceed.¹¹⁷

Second, the overlap between ss 18C and 9 is far from complete. There are many circumstances where proceedings under one section or the other will not be available. For example, s 18C can be relied on only where the relevant conduct was done ‘otherwise than in private’.¹¹⁸ Also, there are several broad exemptions to liability under s 18C, which are contained in s 18D. These defences have been successfully relied on to exclude liability in several prominent cases.¹¹⁹ On the other hand, s 9 will not be available in relation to all racially derogatory remarks. As highlighted by *Gama* and *Vata-Meyer*, much will depend on the effect of the relevant conduct on the victim. Racially derogatory remarks are most likely to contravene s 9 when (as in those cases) they occur in the workplace and they otherwise deny or impair the enjoyment of a relevant human right. Thus, ss 18C and 9 should be seen as separate

¹¹⁶ For example, the respondents in *Eatoock* (n 8) argued that the complainant should have sued for defamation, rather than racial vilification: see Adrienne Stone, ‘The Ironic Aftermath of *Eatoock v Bolt*’ (2015) 38(3) *Melbourne University Law Review* 926. As the statements named specific individuals, they were most likely actionable as defamation.

¹¹⁷ For valid tactical reasons, complainants commonly allege both sexual harassment and sexual discrimination when both claims are available: see Rees, Rice and Allen (n 62) 651.

¹¹⁸ This requirement is not met, for example, where a racist remark is directed at a particular person, and where no other people are present: see *McLeod* (n 112). On the other hand, s 9 requires that the respondent’s conduct interferes with a ‘fundamental right or freedom’, which will not be the case in every complaint: see *Iliafi* (n 62).

¹¹⁹ See, eg, *Bropho* (n 114). The absence of similar exemptions in s 9 may be regarded as an argument *against* allowing vilification claims under s 9; that is, s 9 allows a complainant to effectively ‘circumvent’ such defences. However, as mentioned above, it is not unusual to have more than one cause of action available in respect of particular conduct, and for different defences to be available in respect of different causes of action.

and complementary provisions that work together to prohibit different types of racially discriminatory conduct.

Finally, maintaining separate and specific racial vilification laws is important in the message this conveys to the public. Specifically, these laws emphasise the unacceptability of this type of conduct. Racial vilification laws play an important symbolic role, particularly regarding public attitudes. As was highlighted in submissions to a recent inquiry into pt IIA, the existence of these laws sends a clear message to the general public regarding acceptable standards of public behaviour.¹²⁰ By way of analogy, some forms of sexual harassment may also be actionable under sex discrimination laws.¹²¹ However, the existence of some degree of overlap does not provide grounds to repeal laws specifically targeting sexual harassment. Rather, repealing such laws would likely be regarded by the public as the government condoning such conduct.

III IS PROTECTION FROM RACIAL VILIFICATION PART OF RACIAL DISCRIMINATION LAW?

Part II of this article examined issues concerning the overlap between racially offensive speech (generally considered the province of pt IIA of the *RDA*) and prohibitions on racial discrimination (the province of pt II). This part considers the relationship between racial vilification and racial discrimination on a deeper conceptual level. Specifically, it argues that laws prohibiting racial vilification should be understood as not merely *overlapping* with prohibitions on racial discrimination in a technical or fortuitous way, but conceptually as being *part* of the body of law and jurisprudence prohibiting racial discrimination.

As mentioned above, conceiving prohibitions on racial vilification in this way is significant for several reasons. Currently, pt IIA is understood by many commentators and judges as constituting a limitation on free speech, which is considered a fundamental right.¹²² Therefore, the provisions of pt IIA are sometimes interpreted restrictively, in a way that makes it difficult for complainants to vindicate their rights. Relatedly, the legitimacy of pt IIA is questioned, particularly in terms of its consistency with values of deliberative democracy and individual liberties. However, if pt IIA is understood as prohibiting a form of racial discrimination, it can be seen as *protecting* the rights of victims, and not merely limiting free speech.¹²³ Therefore, a broad and beneficial approach to interpreting pt IIA is required. This is because freedom from racial discrimination is a fundamental right, and an essential safeguard in a liberal democracy based on multiculturalism.

¹²⁰ Parliamentary Joint Committee on Human Rights (n 2) [2.64], [2.78].

¹²¹ See *O'Callaghan v Loder* [1983] 3 NSWLR 89. See also *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, in which French J described sexual harassment as a 'species of sex discrimination': at 274–5.

¹²² See below Part IV(B).

¹²³ See, eg, *Gama* (n 3) 575–6 [134] (Branson J).

Several contextual factors support this contention. First, the prohibitions in pts II and IIA of the *RDA* were both enacted pursuant to Australia's international obligations to prohibit various forms of racial discrimination.¹²⁴ Second, pts II and IIA are contained in the *RDA*, the purpose of which is to eliminate racial discrimination in all its forms. However, a more powerful argument, presented below, is that judges and scholars have emphasised that providing protection from racial vilification is necessary to maintain individual dignity and autonomy, and these same values also underpin prohibitions on racial discrimination.¹²⁵

*A Laws Prohibiting Racial Discrimination and Vilification
Are Based on Similar Values*

Two main accounts are given by scholars regarding the values underpinning anti-discrimination laws and laws prohibiting racial discrimination in particular.¹²⁶ Liberty-based accounts of such laws focus on the harmful effect of discriminatory acts on the autonomy of victims.¹²⁷ These accounts emphasise the moral wrong of interfering with a person's chosen plan of life based on 'morally irrelevant' grounds, such as the person's race.¹²⁸ Liberty-based accounts have a strong individualistic focus, as they emphasise the interests of the victim as an individual (rather than, for example, as a member of a particular group).¹²⁹ These accounts regard the underlying purpose of prohibitions on racial discrimination as facilitating rectification, or enabling a victim to obtain a legal remedy for the wrong done to them.¹³⁰

Equality-based accounts, by contrast, focus on the relative status of groups, and the connection between discrimination and group disadvantage.¹³¹ These accounts emphasise that members of certain groups are more likely to experience serious and entrenched forms of disadvantage than members of other groups.¹³² For example, Owen Fiss argues that African Americans are a 'specially disadvantaged group',¹³³ because their numerical minority, lack of political power, and typically low socio-economic status place them in a subordinate role in society.¹³⁴ Fiss also argues that the effects of any further acts of discrimination against members of disadvantaged

¹²⁴ See above Part II(A).

¹²⁵ See below Part III(B).

¹²⁶ Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5(2) *Philosophy and Public Affairs* 107; Colm O'Conneide, 'Justifying Discrimination Law' (2016) 36(4) *Oxford Journal of Legal Studies* 909.

¹²⁷ Sophia Moreau, 'What is Discrimination?' (2010) 38(2) *Philosophy and Public Affairs* 143.

¹²⁸ *Ibid.*

¹²⁹ See Gotanda (n 33).

¹³⁰ Moreau (n 127) 146–7.

¹³¹ Fiss (n 126) 155.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid* 150–5.

groups are likely to be more severe and long-lasting.¹³⁵ In a similar way, Aboriginal Australians and other minority racial groups currently have a subordinate status in Australian society.¹³⁶ Equality-based accounts regard the underlying purpose of laws prohibiting racial discrimination as facilitating a more equitable redistribution of goods in society.¹³⁷

Although liberty- and equality-based conceptions of racial discrimination laws are usually regarded as being in competition with each other and mutually exclusive, this article does not prefer one over the other.¹³⁸ Rather, this section argues that laws prohibiting racial vilification are underpinned by very similar values to those outlined above. Some scholars argue that racial vilification laws uphold the dignity and autonomy of members of minority racial groups.¹³⁹ This aligns with liberty-based conceptions of racial discrimination laws. On the other hand, some scholars argue that racial vilification laws seek to prevent vulnerable racial groups from being further marginalised and disadvantaged.¹⁴⁰ This aligns with equality-based conceptions of racial discrimination laws. Therefore, laws prohibiting racial vilification are underpinned by the same values as prohibitions on racial discrimination, and can be regarded as an aspect of that protection. Relatedly, Sophia Moreau notes that acts of discrimination paint the victim as ‘less worthy’ than others.¹⁴¹ Discriminatory conduct therefore has an ‘expressive dimension’ in that it stigmatises victims as ‘second class citizens’ who are ‘not worthy of consideration’.¹⁴² Although Moreau considers this to be merely a ‘side effect’ of discrimination,¹⁴³ this demonstrates that the practical effects of racial discrimination and vilification, from a victim’s perspective, are very similar.¹⁴⁴

Further, Australia’s commitment to multiculturalism supports the values underpinning racial vilification laws and laws prohibiting racial discrimination, as will be argued in the next section.

¹³⁵ Ibid.

¹³⁶ Wojciech Sadurski, ‘Gerhardy v Brown v the Concept of Discrimination: Reflections on the Landmark Case That Wasn’t’ (1986) 11(1) *Sydney Law Review* 5, 6.

¹³⁷ Moreau (n 127) 146–7.

¹³⁸ It is beyond the scope of this article to examine different conceptions of justice in relation to racial vilification laws.

¹³⁹ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

¹⁴⁰ See, eg, Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Westview Press, 2004).

¹⁴¹ Moreau (n 127) 163.

¹⁴² Ibid 177–8. See *Brown v Board of Education of Topeka*, 347 US 483 (1954), in which the United States Supreme Court held that racially segregated schools stigmatised African American children as inferior. See also Sadurski (n 136) 28. Sadurski emphasises that discrimination stigmatises the particular groups targeted.

¹⁴³ Moreau (n 127) 163.

¹⁴⁴ Moreau describes the expressive effect of discrimination as treating someone with contempt: *ibid* 177.

B *Australian Multiculturalism and Substantive Equality*

As mentioned above, the enactment of the *RDA* in 1975 closely coincided with Australia adopting a formal policy of multiculturalism.¹⁴⁵ This section argues that Australia's commitment to multiculturalism aligns with, and supports, laws prohibiting both racial discrimination and vilification. In particular, commitment to multiculturalism highlights the significance of group identity, and the importance of legal protections for members of minority racial and ethnic groups. Minority groups should be protected from discriminatory conduct by members of dominant social groups. This argument is based largely on the work of Will Kymlicka,¹⁴⁶ and it builds on, and completes, the discussion of racial discrimination above.

Kymlicka argues that providing certain legal protections for members of minority racial and ethnic groups is necessary to place members of such groups on an equal footing with members of dominant social groups, and also to respect the autonomy of individual members of such groups.¹⁴⁷ Such protections, therefore, are entirely consistent with liberal values. Notably, Kymlicka specifically argues that protecting members of minority groups from racial hate speech is necessary to ensure that they enjoy full multicultural citizenship, or full membership of society, on equal terms with others.¹⁴⁸

In terms of its drafting, the *RDA* applies equally to members of all racial and ethnic groups, regardless of whether they are dominant or minority groups. Therefore, such laws could be regarded as conferring universal rights,¹⁴⁹ rather than the group-differentiated rights argued for by Kymlicka. However, the rights provided for in the *RDA* are more often invoked by members of minority groups than by members of dominant racial groups.¹⁵⁰ Further, it has been argued that s 18C, in particular,

¹⁴⁵ Albert J Grassby, *A Multi-Cultural Society for the Future* (Australian Government Publishing Service, 1973).

¹⁴⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995) 2, 36. In relation to minority groups, Kymlicka distinguishes between the status, and the claims for inclusion, of indigenous groups on the one hand, and migrant groups on the other. He recognises, however, that not all minority groups fall into these two categories. Significantly, these categories overlook refugees and other forced migrants (such as African Americans), who may be even more disadvantaged and marginalised than the two categories on which Kymlicka focuses.

¹⁴⁷ *Ibid* 36–7.

¹⁴⁸ *Ibid* 43–4. Although Kymlicka does not present detailed arguments for racial vilification laws, support for such laws can be drawn from his discussion of multicultural citizenship.

¹⁴⁹ Universal rights are consistent with notions of formal equality, that all people should be treated the same, regardless of race.

¹⁵⁰ Australian Human Rights Commission, *2018–19 Complaint Statistics* (Report, 2019). This report demonstrates that protection from racial vilification is needed more by members of racial and ethnic minorities.

is inconsistent with notions of equality before the law.¹⁵¹ This is because liability under that section depends on the response of a reasonable member of the target group to the relevant conduct.¹⁵² Specifically, it has been argued that liability under the section depends on race.¹⁵³ It is correct that s 18C recognises the existence and reality of race, and racial groups, as does the *RDA* generally. Without doing so, it would be impossible to achieve the *RDA*'s purpose of eliminating racial discrimination. It is also correct that the *RDA* recognises the existence of racially-defined groups. For example, provisions concerning indirect discrimination (such as s 9(1A)) are premised on determining whether members of particular racially-defined groups are disadvantaged by particular practices, in comparison to other racially-defined groups.¹⁵⁴

However, this article rejects the argument that s 18C is inconsistent with principles of racial equality. Rather, the section actually promotes *substantive* equality, particularly for members of minority racial and ethnic groups. This is because, as will be outlined in the following paragraphs, s 18C protects members of racial and ethnic minorities from actions by others that undermine their dignity and autonomy. Providing substantive equality to members of such groups is particularly important in countries such as Australia that are committed to multiculturalism. These arguments are supported by the work of Kymlicka, which will now be examined.

Kymlicka presents two main arguments in favour of group-differentiated rights, or particular legal protections for minority groups. First, he argues that such protections are necessary to protect the autonomy of members of minority groups.¹⁵⁵ Kymlicka argues that autonomy is intimately linked with culture.¹⁵⁶ 'Cultures are valuable because [by] having access to a ... culture ... people have access to a range of meaningful options' in relation to their life choices.¹⁵⁷ He argues that access to culture is 'crucial to people's well-being', and that 'a liberal society does not compel people to revise their [cultural] commitments'.¹⁵⁸ He argues that the cultural practices of dominant social groups are invariably protected by, and indeed embedded in, the legal and political system in a given society.¹⁵⁹ Minority cultures, by contrast, are

¹⁵¹ See Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ See above Part II(B)(1).

¹⁵⁵ Kymlicka (n 146) 35–8.

¹⁵⁶ *Ibid.* 75.

¹⁵⁷ *Ibid.* 83.

¹⁵⁸ *Ibid.* 89–91.

¹⁵⁹ *Ibid.* 57. For example, the major public holidays in Australia (including Christmas and Easter) are based on specifically Christian celebrations, rather than those of any other culture or religion.

vulnerable to marginalisation and exclusion by the mainstream legal and political system.¹⁶⁰

Second, Kymlicka argues that group-differentiated rights promote fairness between minority and majority groups.¹⁶¹ He argues that members of minority cultural groups experience systemic economic disadvantage and political marginalisation.¹⁶² For example, members of such groups commonly face discrimination and exclusion in relation to education, housing and employment.¹⁶³ Kymlicka argues that ‘true social equality’ requires acknowledgement of the vulnerability, disadvantage and marginalisation frequently experienced by members of racial minorities.¹⁶⁴ Protection of minority groups is based on acknowledging the vulnerable situation of members of these groups, and their need for protection, specifically in relation to certain conduct by members of dominant cultural groups.¹⁶⁵

Acts of racial vilification undermine the autonomy of members of targeted groups by preventing them from participating in valuable opportunities such as education, employment and political activity.¹⁶⁶ Members of targeted groups are effectively barred from full inclusion in society in two separate but related ways: first, acts of racial vilification cause targeted groups to withdraw from contact with mainstream society, and from valuable opportunities generally,¹⁶⁷ and second, they cause listeners (who are *not* members of the target group) to shun and avoid members of targeted groups.¹⁶⁸ Racial vilification prevents members of targeted groups from accessing valuable opportunities on equal terms with others.

Similar to Kymlicka’s emphasis on autonomy and inclusion, Jeremy Waldron argues that racial vilification laws protect the dignity of members of disadvantaged groups.¹⁶⁹ He emphasises the importance of ensuring respect for a person’s

¹⁶⁰ Ibid 36–7. Gotanda also emphasises the need for laws to protect aspects of minority cultures: see Gotanda (n 33).

¹⁶¹ Kymlicka (n 146) 36–7.

¹⁶² Ibid 109, 126.

¹⁶³ Ibid 109–11.

¹⁶⁴ Ibid 126. This is also true for racial minorities in Australia: see, eg, Australian Human Rights Commission (n 150).

¹⁶⁵ Kymlicka (n 146) 126. Kymlicka’s emphasis on autonomy and fairness are similar to the purpose of prohibitions on racial discrimination — liberty and equality — discussed in Part III(A) of this article.

¹⁶⁶ See Waldron (n 139) regarding the harms of racial vilification.

¹⁶⁷ Because they are intimidated or humiliated, for example: see *RDA* (n 1) s 18C.

¹⁶⁸ The shunning and avoidance of members of targeted groups is examined by Waldron (n 139).

¹⁶⁹ Waldron (n 139). Waldron does not base his arguments, as Kymlicka does, on multi-cultural citizenship. Rather, Waldron bases his arguments on John Rawls’ notion of a ‘well-ordered society’. However, the values identified by Waldron as supporting freedom from racial vilification are very similar to those identified by Kymlicka. See also Gaze and Smith (n 20) 19.

‘elementary dignity’, or their status as a full member of society in good standing.¹⁷⁰ He argues that a person’s dignity is intimately linked with their ‘basic standing’ in society,¹⁷¹ and with ensuring basic respect for a person as a human being.¹⁷² Human dignity, and the principle that every person has inherent and equal moral worth, is a powerful underlying justification for human rights.¹⁷³ Respecting human dignity means that every person has a duty to act consistently with the equal moral value of every other person.

In summary, multicultural citizenship requires that vulnerable racial groups are protected from conduct that effectively excludes them from full participation in society. Acts of racial vilification undermine the full and equal citizenship of members of targeted groups in a multicultural society. Such acts are inconsistent with respecting a person’s dignity or their equal moral worth, which are core liberal democratic values. As mentioned above, respect for individual autonomy and for notions of fair and equal treatment underpins Australia’s laws prohibiting racial discrimination.

On this basis, protection from racial vilification can be seen as an aspect of legal prohibitions on racial discrimination. This is because such protection seeks to promote the autonomy and dignity of members of vulnerable racial and ethnic groups. Also, acts of racial discrimination stigmatise victims as inferior. Therefore, the harmful effects of racial vilification are very similar to those of racial discrimination. These conclusions indicate that a broad and beneficial approach should be taken when interpreting racial vilification laws, rather than the restrictive approach commonly taken by courts.¹⁷⁴

IV CAN A DISTINCTION BE MAINTAINED BETWEEN ACTS AND WORDS?

This part of the article examines the distinction between acts and words. This distinction underpins the concept of free speech,¹⁷⁵ which is said to be restricted or threatened by racial vilification laws.¹⁷⁶ However, as the following section will demonstrate, the distinction between speech on the one hand, and conduct on the other, cannot be maintained in many circumstances. Also, this distinction was implicitly rejected by

¹⁷⁰ Waldron (n 139) 46–7, 60.

¹⁷¹ Ibid 57.

¹⁷² Ibid 87–92.

¹⁷³ Ibid 60.

¹⁷⁴ Interpretive issues are examined in more detail in Part IV(C) of this article.

¹⁷⁵ Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (John Benjamins Publishing Company, 2002) 53–5. See also John L Austin, *How to Do Things with Words* (Harvard University Press, 2nd ed, 1975); MacKinnon (n 5).

¹⁷⁶ See Waldron (n 139).

the Federal Court in the decisions examined earlier in this article.¹⁷⁷ These decisions simply treated the relevant conduct *as conduct*, and therefore as subject to racial discrimination laws.

Regarding racially discriminatory conduct as conduct (rather than as speech) focuses attention on the *effects* of the conduct, particularly on its harmful effects on members of target groups. This contrasts strongly with a free speech perspective, which emphasises the importance of the ‘ideas’ the conduct is said to express or convey.¹⁷⁸ Also, focusing on the harmful *effects* of certain conduct (regardless of motive or intention) is consistent with an objective approach to interpreting and applying pt IIA of the *RDA*, and also with principles of interpretation in anti-discrimination law. This part of the article examines the work of Katharine Gelber, who argues that racial vilification is discrimination in discursive form, as it seeks to subordinate members of minority racial and ethnic groups. Gelber’s work also provides guidance on assessing the impacts of particular speech acts, and it emphasises the importance of examining the surrounding circumstances. This principle is particularly relevant to the interpretation of the requirement in s 18C that the respondent’s conduct be done ‘because of’ the race of the target group.¹⁷⁹

A *The Speech–Conduct Distinction Is Not Tenable*

The concept of ‘free speech’ relies on a distinction being made between speech on the one hand, and conduct on the other.¹⁸⁰ This distinction is often implicit, and indeed it is embedded in the structure of language.¹⁸¹ Many scholars argue, however, that this distinction is untenable. This section examines the work of Gelber, who argues that ‘hate speech’ should be understood and treated by the law as ‘harmful conduct’.¹⁸² Further, Gelber argues that racial vilification is a form of discrimination, in that it presents the target as inferior, and it seeks to normalise and legitimise unequal treatment of members of certain racial groups.¹⁸³ These arguments are inter-related and will be examined in turn.

¹⁷⁷ *Gama* (n 3); *Vata-Meyer* (n 3).

¹⁷⁸ MacKinnon (n 5) 8.

¹⁷⁹ This issue is examined in Part IV(C) of this article.

¹⁸⁰ Gelber (n 175) 53–5. See also Austin (n 175); MacKinnon (n 5). Judith Butler describes the speech–conduct distinction as ‘metaphysical’: Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 10–11.

¹⁸¹ Gelber (n 175) 53–5. For example, in ordinary language, we say that a person *does* an act, but they *say* a word.

¹⁸² Gelber (n 175) chs 3–5. Gelber uses the term ‘hate speech’, though her work focuses on racial vilification.

¹⁸³ *Ibid* 71, 81.

Gelber argues that certain words or speech do not merely state facts or opinions.¹⁸⁴ Rather, certain words *do something* in the saying of them.¹⁸⁵ Further, the significance of these utterances is recognised by the law and society. For example, when a bride and groom say ‘I do’, in the circumstance of a wedding ceremony, this has practical, social and legal effects on both people involved.¹⁸⁶ Also, when a firing squad sergeant yells ‘fire!’, this also has practical effects.¹⁸⁷ In both these examples, the speaker’s words have immediate, practical effects, for which the speaker is responsible.

Gelber argues that many types of speech are treated as ‘doing something’, or as ‘performative’.¹⁸⁸ That is, the practical effects of these ‘speech acts’ are treated as indistinguishable from the speech act itself.¹⁸⁹ Famously, John Austin described three types of speech acts: locutionary, illocutionary and perlocutionary. Locutionary speech acts are simply propositional statements that convey certain ideas or opinions.¹⁹⁰ Illocutionary speech acts create a certain result or effect in the saying of the words.¹⁹¹ Perlocutionary speech acts cause a certain result or effect as a consequence of saying the words.¹⁹² The distinction between illocutionary and perlocutionary speech acts therefore depends on the directness or immediacy of the result or consequence.

Significantly, Gelber argues that the meaning and effect of a particular speech act, and therefore the category into which it falls, depends on its particular nature, and the circumstances in which it is performed.¹⁹³ In other words, Gelber advocates a *contextual* approach to determining the meaning and effect of particular speech acts.¹⁹⁴ This can be contrasted to a *formal* approach, which looks merely at the expressive form of the relevant speech act (for example, whether it is expressed as words or as conduct).¹⁹⁵

¹⁸⁴ Ibid 55–6. That is, words do not merely state a proposition, or an idea.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 51.

¹⁸⁷ Butler also provides the example of a judge giving a sentence in court — this statement has legal effects: Butler (n 180) 49. Butler emphasises, however, that the speech acts of private individuals, and not merely those exercising public power (such as a judge), have practical effects: at 24. This is relevant to racial vilification, which may be conducted by private individuals.

¹⁸⁸ Gelber (n 175) 55–6.

¹⁸⁹ Austin in fact argued that all speech is conduct: *ibid* 58, 62–3. Establishing this broader claim is not necessary for the purposes of this article.

¹⁹⁰ Ibid 56.

¹⁹¹ Ibid 55.

¹⁹² Ibid 56.

¹⁹³ Ibid 56–7.

¹⁹⁴ Ibid 56–7, 63.

¹⁹⁵ It is notable that a contextual approach to interpreting conduct is required by the wording of s 18C, which requires that ‘all the circumstances’ be taken into account, in determining whether the relevant conduct has the required effect.

Gelber also draws on the work of Jürgen Habermas, and in particular on Habermas' concept of 'validity claims'.¹⁹⁶ This concept is used by Habermas to determine the meaning and effect of particular speech acts.¹⁹⁷ Significantly, Habermas highlights the complexity and difficulty in determining the meaning and effect of particular speech acts, as such acts are used to communicate ideas and propositions, but are also used 'strategically' for many other purposes.¹⁹⁸ Gelber uses Habermas' concept of validity claims in her definition of racial vilification (which is examined below).

Gelber argues that the meaning and effect of a particular speech act is determined by examining three aspects of the speech act. The first aspect is the factual claims made in the speech act.¹⁹⁹ This is the propositional content, or the ideas conveyed, which is the aspect of communication commonly emphasised by free speech proponents.²⁰⁰ The second aspect is the norms or values advanced in the speech act.²⁰¹ This focuses on the moral aspects, rather than the purely factual claims made.²⁰² This aspect has the potential to foster solidarity between a speaker and a listener who sympathises with the values expressed, but also to alienate the target of negative moral claims.²⁰³ Third, it is necessary to determine the 'speaker's subjectivities', such as their sincerity, motivation and intention.²⁰⁴ Gelber argues that this can be the most difficult, and perhaps the least important aspect of determining the meaning and effect of a speech act.²⁰⁵

As mentioned above, Gelber argues that racial vilification²⁰⁶ constitutes an act of racial discrimination. She bases this argument on her analysis of the theories of Austin and Habermas. Gelber specifically argues that racial vilification *constitutes* discrimination, rather than merely *causing* it.²⁰⁷ Thus, she distinguishes her approach from those who argue that vilification merely contributes to an environment in which acts of discrimination are more likely to occur (for example, by those who are influenced

¹⁹⁶ Gelber (n 175) 60–5. See Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Heinemann, 1984).

¹⁹⁷ Gelber (n 175) 63–4.

¹⁹⁸ *Ibid* 62–3.

¹⁹⁹ *Ibid* 64–5.

²⁰⁰ *Ibid* 54.

²⁰¹ *Ibid* 65.

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid* 74.

²⁰⁶ As noted above, Gelber uses the term 'hate speech', although her analysis focuses on racial vilification.

²⁰⁷ Gelber (n 175) 75.

to discriminate by the speech acts of others).²⁰⁸ Rather, Gelber argues that acts of racial vilification are *themselves* ‘discursive acts of racial discrimination’.²⁰⁹

Gelber uses Habermas’ concept of validity claims in her definition of racial vilification. Significantly, she does not accept the definition of racial vilification contained in Australian (or other) legislation.²¹⁰ Rather, she proposes a definition based on her understanding of the harms of such conduct, and also based on notions of racial discrimination. This section will first examine the relevance of the concept of validity claims to defining racial vilification. Then it will examine the relevance of racial discrimination to Gelber’s definition of racial vilification.

Gelber argues that racial vilification has three key features. First, it presents members of the target group as inherently inferior, based on race.²¹¹ This relates to the first aspect of Habermas’ validity claims — the factual content of the message. Second, racial vilification seeks to legitimise and normalise unequal treatment of people, based on their race.²¹² This relates to the second aspect of Habermas’s validity claims — the normative aspects. In other words, Gelber defines certain speech as racial vilification if it supports notions of racial inequality, inferiority, subordination or exclusion.²¹³ On the other hand, a speech act will not be vilification if, although it presents racial inequality as a fact, it seeks to criticise or challenge such inequality.²¹⁴ Third, racial vilification depends on an assessment of the intention, motive and sincerity of the speaker.²¹⁵ Gelber notes that these subjective factors are often difficult to assess,²¹⁶ and are ‘much less important ... than the empirically examinable’ evidence, such as the words used and the surrounding context.²¹⁷

Gelber’s approach to defining racial vilification is significantly different to the definitions currently found in Australian legislation. In particular, Gelber’s approach focuses on the *effects* of a particular speech act, especially on members of the target group. Her approach is based on preventing, minimising and ameliorating harm to individuals.²¹⁸

²⁰⁸ Thus, in Austin’s terms, Gelber argues that racial vilification is an illocutionary, rather than a perlocutionary, speech act.

²⁰⁹ Gelber (n 175) 95.

²¹⁰ *Ibid* ch 4.

²¹¹ *Ibid* 71.

²¹² *Ibid* 81.

²¹³ *Ibid* 82.

²¹⁴ *Ibid*.

²¹⁵ *Ibid* 65, 74.

²¹⁶ *Ibid* 65, 74, 78.

²¹⁷ *Ibid* 74. This approach is similar to the approach taken by Bromberg J in *Eatoock* (n 8). See below Part IV(C)(2).

²¹⁸ Gelber argues that ‘silencing of victims’ is the specific harm of racial vilification: Gelber (n 175) 69, 86. This article does not accept (as Gelber seems to claim) that this is the *only* harm of racial vilification. However, this article accepts that the main purpose of racial vilification laws is to prevent, minimise and ameliorate harm to members of target groups.

As noted above, Gelber argues for a contextual approach to assessing these harms. Indeed, such an approach is necessary to capture ‘[s]ophisticated, or sanitised’ vilification,²¹⁹ which is presented as being part of political discussion or debate.²²⁰ Definitions that focus only on the words used will not capture such speech.²²¹ Indeed, Gelber argues that her approach does not require legislative exemptions, and it is therefore easier to apply.²²²

Further, Gelber regards racial vilification as a form of racial discrimination. This seems to be for two reasons. First, the distinction between speech acts and conduct is not maintainable in many contexts and a range of factors should be taken into account in determining whether particular speech acts should be regulated. Whereas focusing on speech acts as speech emphasises the importance of their propositional content, this approach ignores the harmful effects of certain speech acts. Gelber argues for a contextual approach that takes these harms into account. Second, she highlights the significant similarities between the purposes of racial vilification laws, and prohibitions on racial discrimination.

Gelber argues that racial vilification presents members of target groups as inherently inferior, and it seeks to normalise unequal or discriminatory treatment of certain racial groups. Such acts, therefore, reinforce relationships of dominance and subordination based on race. Gelber also emphasises that vilification can exclude members of target groups from full inclusion in society.²²³ Racial vilification can promote fear or hatred of particular racial groups, for example by presenting the group as a threat (either physically, or as an existential threat to accepted values).²²⁴ As mentioned above, Gelber advocates a contextual approach to determining the meaning and effect of particular speech acts. Of particular relevance is the identity of the speaker and the target group,²²⁵ and also the historical relationship between the racial groups involved.²²⁶ Gelber argues that racial vilification is used by ‘powerful racially defined groups [to] circumscribe less powerful racially defined groups to limit the way they are able to participate in society’.²²⁷ She focuses on the relative power of particular groups, arguing that racial vilification often occurs — and is most harmful — when there is a ‘systemic power asymmetry between the speaker and the hearer, and in favour of the speaker’.²²⁸ As Gelber emphasises, the harms of racial vilification are very similar to those of racial discrimination, particularly in relation to the effects of racial vilification on members of target groups. These effects, although they may not

²¹⁹ Ibid 80.

²²⁰ Ibid 78–80.

²²¹ Ibid.

²²² Ibid 127.

²²³ Ibid 82, 85.

²²⁴ Ibid 76–7.

²²⁵ Ibid 84.

²²⁶ Ibid 81–2.

²²⁷ Ibid 73.

²²⁸ Ibid 87.

be as visible as the tangible harms required by discrimination laws, are nonetheless very real for members of vulnerable and marginalised racial groups.

Judith Butler highlights another aspect of speech that is relevant to racial vilification. She notes that the most harmful speech acts are repeated or ritualised ones, such as racial insults, epithets and slurs.²²⁹ The meaning and effect of these speech acts derive from history, and each use of these words ‘recalls prior acts’.²³⁰ Butler argues that racist speech ‘works through the invocation of conventions’.²³¹ In other words, racial vilification circulates certain ideas (such as racial inferiority) and it keeps them alive. Butler notes that all ‘injurious names have a history’,²³² highlighting that historical context must be taken into account in determining the meaning and effects of such words. Certain speech acts, such as cross burning by the Ku Klux Klan, are strongly associated, particularly in the minds of African Americans, with the threat of actual violence.²³³ Like Gelber, Butler argues that racial vilification can constitute discrimination by placing members of the target group in a subordinate position.²³⁴

Butler makes the important observation that scholars who seek to collapse the speech–conduct distinction do so specifically to strengthen the case for legal regulation of certain speech acts.²³⁵ She notes that scholars do this for ‘political purposes’, rather than for merely theoretical purposes.²³⁶ Further, Butler argues that increasing (or legitimising) legal regulation of certain speech acts may be the ‘greatest threat’ to the free speech of minority groups.²³⁷ Clearly, Butler is correct in arguing that scholars who seek to collapse the speech–conduct distinction do so in order to legitimise legal regulation of certain speech acts.²³⁸ However, this article does not accept Butler’s conclusion that increased regulation necessarily harms the interests of the groups that the regulation is intended to benefit. Rather, an approach to defining racial vilification that is sensitive to context, and the existence of appropriate exemptions to liability, minimises the risk that legal regulation may have the unintended consequences highlighted by Butler.

²²⁹ Butler (n 180) 3.

²³⁰ *Ibid* 20.

²³¹ *Ibid* 34.

²³² *Ibid* 36.

²³³ *Ibid* 55, 57.

²³⁴ *Ibid* 18.

²³⁵ *Ibid* 20, 23.

²³⁶ *Ibid* 22.

²³⁷ *Ibid* 23. Butler, like Gelber, favours a ‘more speech’ approach to racial vilification, rather than supporting legal regulation.

²³⁸ The distinction between speech and conduct is crucial in the United States context, as courts may invalidate legislation that is characterised as restricting ‘speech’. In Australia, communication also needs to be characterised as ‘political’ in order to be protected on constitutional grounds.

B *Implications of Gelber's Approach to Racial Vilification*

Although this article has examined Gelber's approach to racial vilification in detail, it does not argue that her definition of racial vilification should be adopted in place of the current definition in s 18C. However, her emphasis on the *effects* of racial vilification represents a significant development in the debate surrounding its regulation. Indeed, Gelber's approach presents a new paradigm for understanding and interpreting such laws, as will be outlined below. Also, Gelber's emphasis on the importance of social, historical and political context in determining the effect of particular speech acts is reflected in the language of s 18C and in the way that it has been interpreted by courts.²³⁹

Currently, racial vilification laws (including pt IIA of the *RDA*) are understood and interpreted predominantly within a free speech paradigm. This is reflected in certain judicial decisions,²⁴⁰ certain academic commentary,²⁴¹ and in a recent government report.²⁴² The understanding of s 18C as primarily *limiting* rights has implications for how it is interpreted by courts (and how it is understood more generally). For example, in *Bropho*, French J stated that s 18D should be interpreted 'broadly rather than narrowly'.²⁴³ This is because his Honour understood s 18D as representing a fundamental right.²⁴⁴ In other words, French J understood s 18C as *limiting* a fundamental right, and this informed his Honour's approach to interpreting the relevant provisions.

However, Gelber presents a very different framework for understanding racial vilification laws, and particularly for understanding the types of harm they seek to target. First, she challenges the free speech paradigm, by highlighting that a strict distinction between words and conduct can no longer be maintained. In this light, racial vilification laws can be seen as regulating a particular type of conduct (rather than speech). Indeed, it is notable that s 18C does not refer to 'speech' at all — it applies to 'any act' that meets the requirements of the section. Second, Gelber argues that a more appropriate paradigm for understanding racial vilification is the prohibition on racial discrimination. Indeed, there is a large overlap between these two areas of

²³⁹ In particular, s 18C requires that 'all the circumstances' be taken into account in determining whether the relevant conduct has the prohibited effects.

²⁴⁰ For example, in *Bropho*, French J described s 18C as a 'proscription' and 'an encroachment on freedom of speech and expression': *Bropho* (n 114) 123 [65], 125 [72]. On the other hand, his Honour described s 18D as protecting 'freedom': at 131 [94].

²⁴¹ For example, Meagher emphasises the 'limitations' that s 18C places on free speech and on political communication: Meagher (n 151).

²⁴² Parliamentary Joint Committee on Human Rights (n 2).

²⁴³ *Bropho* (n 114) 126 [73]. Justice French also suggested that the burden of proof in relation to s 18D may fall on complainants, rather than respondents, due to s 18D representing a fundamental right: at 126–7 [74]–[75].

²⁴⁴ *Ibid* 125–6 [72].

law.²⁴⁵ Notably, in the two Federal Court decisions examined in this article, *Gama* and *Vata-Meyer*, the Court stated that, in certain circumstances, ‘[t]he making of a remark is an act’.²⁴⁶ In both decisions, the Court did not elaborate further on this issue. It seems that it was self-evident to the Court that, in certain circumstances, what is usually considered as speech can constitute unlawful racial discrimination. Gelber argues that laws prohibiting vilification and discrimination both seek to protect members of target groups from particular harms. This is consistent with the analysis of the purposes of racial discrimination laws above.²⁴⁷

An important practical implication of these arguments concerns the interpretation of racial vilification laws, and in particular, s 18C. If these laws are regarded as protecting, rather than limiting rights, then they should be interpreted broadly and beneficially. This article will now apply this principle to the interpretation of one of the most contentious and difficult aspects of s 18C — the requirement that the relevant act be done ‘because of the race ... of the other person’.

C *The Proper Interpretation of ‘Because of Race’*

Under s 18C, the relevant act must be done ‘because of the race ... of the other person’. Courts and commentators have described this as the ‘causal’ requirement or connection.²⁴⁸ In interpreting and applying this requirement, courts have often focused to a large degree on the respondent’s motive, and other exculpatory reasons, and even on the reasons given by the respondent for their own conduct. As a result, courts have found that certain conduct was not done ‘because of race’, even when there is a clear connection to race. In other decisions, courts have focused on the surrounding circumstances, and on whether race is one of the reasons for the respondent’s conduct. This section argues that the latter approach is more consistent with the purpose of the *RDA*, which is to eliminate discrimination in all its forms. It is also consistent with the approach to racial discrimination laws, which focuses on the effects of the relevant act, rather than the motive or intention of the respondent.

1 *Court Decisions That Inappropriately Emphasise Motive*

This section examines two Federal Court decisions in which the Court emphasised the motive of the respondent.²⁴⁹ In both cases, the Court found that the relevant conduct was not done ‘because of race’. The circumstances surrounding each complaint will be examined in some detail, as this is necessary in taking context into account.

²⁴⁵ Notably, in two leading Australian decisions regarding the interpretation of s 18C, the complainant also alleged racial discrimination under s 9 of the *RDA*: see *Hagan* (n 90); *Creek* (n 90). In both these decisions, the Court determined liability based on s 18C, rather than s 9.

²⁴⁶ *Gama* (n 3) 564 [76] (French and Jacobson JJ), quoted in *Vata-Meyer* (n 3) [29].

²⁴⁷ See above Part III(A).

²⁴⁸ Meagher (n 151).

²⁴⁹ These decisions are examined as they demonstrate a restrictive approach to interpreting s 18C.

Hagan involved a complaint by a man of Aboriginal descent regarding a public sign in a Toowoomba sporting stadium that featured the name ‘ES “Nigger” Brown’.²⁵⁰ Justice Drummond noted that ‘the use of the word ... is ... well capable of being an extremely offensive racist act’, and that s 18C ‘would almost certainly’ be breached ‘[i]f someone were ... to call a person of indigenous descent’ by that name.²⁵¹ However, his Honour stated that it is ‘always ... necessary to take into account the context’, and that this involves considering the circumstances of the particular use of the word.²⁵² As an example, Drummond J stated that if the word was used ‘in a joking way’, or ironically, by one Aboriginal person to another, then there would be no breach of s 18C.²⁵³

Ultimately, Drummond J found that the respondent’s failure to remove the offending word from public display was not done ‘because of race’.²⁵⁴ To the contrary, Drummond J held that the respondent was ‘careful to avoid giving offence to [local Aboriginal people] who might be offended’.²⁵⁵ His Honour noted that the views of local Aboriginal people had been sought, and that they did not object to the sign.²⁵⁶ Justice Drummond also stated that the word ‘was not ... intended ... to convey ... a racist element’.²⁵⁷ Rather, the word was a ‘customary identifier’ of a non-Aboriginal man who was well-known in the area for his sporting achievements.²⁵⁸ Finally, Drummond J noted that the word had been part of the stand since 1960 and that it had ‘long ceased to have any racial connotation, even if it once did have that’.²⁵⁹ On appeal, the Full Court of the Federal Court upheld Drummond J’s decision, agreeing that the relevant conduct was not done ‘because of race’ as the respondent acted for other, non-discriminatory reasons.²⁶⁰

²⁵⁰ *Hagan* (n 90). The complaint in *Hagan* was made under ss 9 and 18C of the *RDA*.

²⁵¹ *Ibid* [7].

²⁵² *Ibid* [7]–[8].

²⁵³ *Ibid*. Justice Drummond did not appear to consider the issue of who determines whether particular words are used ‘jokingly’ or ‘ironically’.

²⁵⁴ *Ibid* [36].

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid* [19].

²⁵⁷ *Ibid* [13]. Justice Drummond also held that the use of the word was not ‘racially motivated or ... a deliberate racist gesture’: at [27].

²⁵⁸ *Ibid* [13].

²⁵⁹ *Ibid* [27]. Justice Drummond’s decision could be criticised on the grounds that his Honour focused unduly on the history of the sign itself, rather than on the specific word that was the gravamen of the complaint.

²⁶⁰ *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56; Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 26/2002*, 62nd session, UN Doc CERD/C/62/D/26/2002 (14 April 2003) (*Hagan v Australia*). The UN Committee on the Elimination of Racial Discrimination upheld Mr Hagan’s complaint regarding the use of the word on a public sports stand. The Committee stated that the use of the word must be seen in the circumstances of contemporary society, and particularly in the light of ‘increased sensitivities in respect of ... [racial slurs] appertaining today’: at [7.3]. The Committee determined the sign to be racially offensive and recommended its removal: at [8].

Similarly, in *Creek*, the complaint related to a newspaper report regarding a dispute over the custody of an Aboriginal child.²⁶¹ The report featured photographs of the complainant (an Aboriginal woman) in a remote, bush setting, and the non-Aboriginal couple who were contesting custody in their suburban lounge room. The newspaper report referred to the recently released Human Rights and Equal Opportunity Commission report, *Bringing Them Home*, concerning the Aboriginal Stolen Generations.²⁶² Justice Kiefel held that a member of the relevant audience would be offended by the use of the image, as it portrayed the complainant ‘as living in rough bush conditions in the context of a report which is about a child’s welfare’.²⁶³ The image ‘inaccurately ... portrayed the complainant’s usual living circumstances’,²⁶⁴ and invited an unfavourable comparison between her and the non-Aboriginal couple.²⁶⁵

Justice Kiefel held that the requirement in s 18C that the conduct be done ‘because of the race ... of the other person’ requires a causal connection between the conduct and race.²⁶⁶ As stated by Drummond J in *Hagan*, one reason for the respondent doing the act must have been the race of the target person or group.²⁶⁷ Justice Kiefel distinguished the requirement under s 9 that the conduct be ‘based on race’, which does not require a causal relationship.²⁶⁸ Under s 9, race need only be a ‘material factor’ in the respondent doing the relevant act.²⁶⁹ In determining whether that relationship exists, all the circumstances must be taken into account, including the words used, and the nature of the conduct.²⁷⁰ Justice Kiefel noted that ‘discrimination legislation operates with respect to unconscious acts’,²⁷¹ and that it is unnecessary to prove a motive or intention to discriminate.²⁷²

Despite emphasising the importance of context²⁷³ and the irrelevance of the respondent’s motives, Kiefel J ultimately held that the relevant conduct was not done

²⁶¹ *Creek* (n 90).

²⁶² Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, 1997).

²⁶³ *Creek* (n 90) 356 [13].

²⁶⁴ *Ibid* 355 [6].

²⁶⁵ *Ibid* 356 [13].

²⁶⁶ *Ibid* 359–60 [27]–[29].

²⁶⁷ *Ibid* 355 [12], citing *Hagan* (n 90) [15].

²⁶⁸ See *Hagan* (n 90) [39].

²⁶⁹ *Creek* (n 90) 359 [25]. It is unclear if there is any practical difference between race being a ‘reason’ for the making of the decision, and race being a ‘material factor’ in the making of the decision.

²⁷⁰ *Ibid* 358–9 [22]–[23].

²⁷¹ *Ibid* 358 [23].

²⁷² *Ibid* 359–60 [26].

²⁷³ Justice Kiefel stated that ‘[t]he context of the article is of course race’: *ibid* 359 [28].

‘because of race’.²⁷⁴ Rather, her Honour characterised the respondent’s conduct as thoughtless, rather than unlawful.²⁷⁵ This decision is difficult to reconcile with her Honour’s emphasis on context, and the irrelevance of motive. The decision seems to be based on an extremely narrow view of the impugned conduct. Justice Kiefel focused on the respondent’s decision regarding the choice of photographs used in the report, rather than on the effect of the news report as a whole. Her Honour held that *this particular decision* was not shown to be motivated by considerations of race.²⁷⁶ Considering that the newspaper report referred to the *Bringing Them Home* report,²⁷⁷ and the context clearly pertained to issues of the welfare of Aboriginal children, this decision seems hard to justify. Determined objectively, issues of race seem to have actuated the respondent’s conduct in constructing and publishing the report in the way that it did.²⁷⁸ As Kiefel J highlighted, proof of racial hatred (or even malice) is not required for an infringement of s 18C.²⁷⁹

These decisions highlight that judges sometimes appear to make a ‘qualitative assessment of the motivation behind the respondent’s conduct’.²⁸⁰ This requires the complainant to prove ‘something equivalent to malevolence’, which seems inconsistent with objectively assessing the effect of the conduct in question.²⁸¹ In addition, this interpretation ‘has the potential to significantly limit the scope of [s 18C]’.²⁸²

2 *How Should ‘Because of Race’ Be Interpreted?*

The proper interpretation of the wording ‘because of race’ in s 18C is complicated by s 18B, which provides that ‘the race, colour or national or ethnic origin’ of the person or group need only be *one* of the reasons for the respondent’s conduct.²⁸³ This section appears to be intended to assist complainants, by clarifying that race need not be the *only* reason, or the dominant reason, for the conduct.²⁸⁴ However, the use of the term ‘reason’ appears to draw attention to the respondent’s reasons, or motive, for acting as they did.²⁸⁵

²⁷⁴ Ibid 359 [29].

²⁷⁵ Ibid. Justice Kiefel stated that ‘[a] finding of contravention would have meant that the respondent had acted for racist reasons’: at 360–1 [35].

²⁷⁶ Ibid 359–60 [28]–[29].

²⁷⁷ Human Rights and Equal Opportunity Commission (n 262).

²⁷⁸ McNamara (n 7) 94.

²⁷⁹ *Creek* (n 90) 357 [18].

²⁸⁰ McNamara (n 7) 93.

²⁸¹ Ibid. The objective nature of the assessment was emphasised in *Hagan* (n 90) [15] (Drummond J), and in *Creek* (n 90) 355 [12] (Kiefel J).

²⁸² McNamara (n 7) 94.

²⁸³ See also *RDA* (n 1) s 18A, which applies to pt II of the *RDA*.

²⁸⁴ Rees, Rice and Allen (n 62) 707.

²⁸⁵ McNamara (n 7) 92.

This is how s 18B was interpreted by Kiefel J in *Toben v Jones* (*'Toben'*).²⁸⁶ In this decision, her Honour emphasised her approach in *Creek*, stating that courts must determine 'what ... the *reason* for the conduct in question [was]',²⁸⁷ and that a racially based motive is required.²⁸⁸ In this case, Kiefel J was not willing to impute such a motive to the respondent, based on the highly offensive nature of the statements he made asserting that Jewish people exaggerate the extent of the Nazi Holocaust for political advantage.²⁸⁹ Rather, her Honour suggested that the defendant may have been 'pursuing an historical ... discourse ... [in which] offence cannot be avoided'.²⁹⁰ Her Honour also stated that proving a racially-based motive is different to proving 'a lack of sensitivity or even thought towards others'.²⁹¹ Finally, her Honour stated that pt IIA of the *RDA* 'does not render unlawful insensitive statements or those made in poor taste'.²⁹²

With respect, Kiefel J's holding that the phrase 'because of race' requires proof of a 'racially based motive' is clearly incorrect. First, this requirement replaces the words 'because of race' with a different test. Second, s 18B is intended to clarify the relevance of race — that race must be one of the reasons, rather than other, non-discriminatory, reasons.²⁹³ Third, scholars such as Beth Gaze have noted that judges tend to focus on notions of individual fault and blame when interpreting and applying the *RDA*.²⁹⁴ This seems to be exemplified in Kiefel J's approach to 'because of race'.²⁹⁵

In *Eatock*, Bromberg J took an alternative, and preferable, approach to interpreting 'because of race'. His Honour noted that 'the inquiry ... is not to be limited to the explanation given by the person whose conduct is at issue or that person's genuine understanding as to his or her motivation'.²⁹⁶ This is because "'their insight might be

²⁸⁶ *Toben* (n 9).

²⁸⁷ *Ibid* 531 [61] (emphasis in original).

²⁸⁸ *Ibid* 531 [62].

²⁸⁹ Justice Kiefel held that determining whether a statement or other conduct is likely to offend or insult a group (the issue under s 18C (1)(a)) is 'a separate question' from the inquiry as to the respondent's motive (s 18C(1)(b)): *ibid* 531 [64].

²⁹⁰ *Ibid* 532 [70].

²⁹¹ *Ibid* 532 [69].

²⁹² *Ibid*. Justice Kiefel's approach to interpreting 'because of race' in *Toben* has not been followed by subsequent decisions. It represents an extreme judicial emphasis on the need to prove a racially-based motive on the part of the defendant.

²⁹³ Rees, Rice and Allen (n 62) 707. The key word in s 18B is therefore 'race', not 'reason'. Indeed, the word 'reason' seems to be copied by the draftsman from pt II.

²⁹⁴ Gaze (n 53).

²⁹⁵ *Ibid*. Gaze notes that judges' emphasis on motive, in interpreting the *RDA*, seems to be underpinned by the assumption that the purpose of the *RDA* is to address abhorrent individual conduct, rather than eliminate racial discrimination. It is also underpinned by assumptions regarding the stigma attached to defining certain conduct as 'racist'.

²⁹⁶ *Eatock* (n 8) 336 [325] (Bromberg J), citing *Toben* (n 9) 531 [63] (Kiefel J).

limited” and they “might not always be a reliable witness as to their own actions”²⁹⁷ This emphasises the objective nature of the assessment made by a court in determining the ‘true reason’ for the act.²⁹⁸ As Bromberg J noted, focusing on the impugned conduct itself (‘[w]hat the person actually said or did’) ‘may be a more reliable basis for discerning that person’s true motivation’, rather than relying on explanations provided at a later stage.²⁹⁹

Justice Bromberg’s approach is consistent with Gelber’s analysis of the dynamics of racial vilification. Gelber notes that it is difficult for a judge (or anyone else) to determine with any certainty the motive or intention of another person. Indeed, she highlights that racial vilification has the effect of discrediting members of the target group, who are typically less powerful than the hate speaker.³⁰⁰ As mentioned above, Gelber argues that the focus should be on ‘empirically examinable’ evidence, such as the actual words used by the defendant, and the surrounding circumstances, including the effect on members of the target group, rather than seeking to determine a defendant’s motive or intention.

In summary, Bromberg J’s approach to interpreting ‘because of race’ is preferable to that of Kiefel J (in *Creek* and in *Toben*). First, Bromberg J’s approach is consistent with the objective nature of the inquiry, which has been emphasised by many judges (including Kiefel J). Requiring (as Kiefel J does) proof of a ‘racially based motive’ is not consistent with an objective approach to interpreting and applying s 18C. Second, requiring proof of a ‘racially based motive’ is not consistent with the language of s 18C (‘because of race’). This is particularly so given s 18C pertains to civil (rather than criminal) liability, not otherwise containing a fault element.³⁰¹ Third, it is almost impossible for a complainant to prove that the defendant had a ‘racially based motive’, and this interpretation, therefore, does not support the legislative purpose of eliminating racial discrimination in all its forms. Finally, as was argued above, racial vilification laws should be regarded as rights-protecting legislation. Therefore, such laws should be interpreted in a broad and beneficial manner. A beneficial interpretation of ‘because of race’ is broadly along the lines of Bromberg J’s approach in *Eatoock*. This approach seeks to determine the ‘reasons’ for the relevant act by focusing on objective criteria, such as the nature of the defendant’s conduct, and the surrounding circumstances (including the historical relationship between the speaker and members of the target group).

²⁹⁷ *Eatoock* (n 8) 336 [325], quoting *Toben* (n 9) 531 [63] (Kiefel J). These words seem to cover cases of unconscious bias, where a person is in fact motivated by prejudiced views but is unaware of these views: see *Freeman* (n 56).

²⁹⁸ *Eatoock* (n 8) 336 [325]. In this context, ‘objective’ means that judges independently and critically review the ‘reason’ for the act, based on the words used and the surrounding circumstances.

²⁹⁹ *Ibid.* Justice Bromberg stated that ‘[r]ace, colour and ethnicity were vital elements of the message [made by the respondents] and therefore a motivating reason for conveying the message’: at 337 [327].

³⁰⁰ Gelber (n 175) 86–7.

³⁰¹ See, eg, *Criminal Code Act 1995* (Cth) sch 1 ch 2 pt 2.2 div 5.

V CONCLUSION

This article has argued that racial vilification should be considered a form of racial discrimination for two main reasons. First, two Federal Court decisions have determined that racially offensive speech may infringe the prohibition on racial discrimination contained in the *RDA*. Specifically, such speech will contravene s 9 if it limits a person's equal enjoyment of human rights in any field of public life. Second, prohibitions on racial discrimination and vilification both seek to protect the autonomy and dignity of individuals. In particular, these laws seek to protect members of racial and ethnic minorities from conduct that has the effect of excluding them from full participation in the community. Racial vilification laws therefore seek to promote equal access to civic life, which (as Kymlicka highlights) is fundamental in a liberal democracy based on multiculturalism.

Relatedly, this article examined whether the distinction between conduct and speech, on which free speech is based, can be maintained. It examined Gelber's arguments regarding speech act theory, which emphasise that many forms of speech (or speech acts) do more than merely describe something or advance a proposition. Many speech acts are recognised (legally and socially) as having direct and immediate practical effects. Gelber argues that racial vilification has direct effects on members of target groups, who are presented as inherently inferior and naturally subordinate. The effects of racial vilification are very similar to those of racial discrimination, particularly as both commonly involve subordination or exclusion of members of vulnerable racially-defined groups.

Understanding racial vilification as a type of discrimination, rather than as an exercise of free speech, has two main implications. First, it highlights the harms of such conduct, particularly regarding its impact on the dignity and autonomy of its victims. Protection from such conduct, just like protection from racial discrimination, can be considered a fundamental right. Therefore, s 18C can be regarded as rights-protecting, rather than merely rights-limiting. This means that such provisions should be interpreted in a broad and beneficial manner, rather than restrictively, consistent with the legislative purpose of eliminating racial discrimination.

Second, framing racial vilification as a discrimination issue challenges the free speech paradigm in which racial vilification laws such as pt IIA of the *RDA* are commonly understood. It challenges the distinction between words and conduct on which concepts of free speech are based. In a free speech paradigm, speech is associated with ideas, rather than effects. However, focusing on speech as conduct highlights its effects on particular people, and particularly on members of marginalised groups. Scholars such as Gelber argue that racial vilification is a form of racial subordination, achieved by means of legitimising notions of the racial superiority of certain groups, and the inferiority of others. Framing racial vilification laws in this way invokes a long history of struggle for racial equality, demonstrated, for example, in international treaties to which Australia is a party, such as the *ICCPR* and *ICERD*. This understanding of racial vilification laws can contribute to a richer debate concerning the legitimacy and importance of such laws in a liberal democracy, and particularly one based on multiculturalism, such as Australia.

LEGAL OBLIGATION AND SOCIAL NORMS

ABSTRACT

HLA Hart famously argues that legal obligation is best understood by analysing law as a species of social rule. This article engages with recent work in social psychology and norm theory to critically evaluate Hart's theory. We draw on the social intuitionist model of practical decision-making associated with Amos Tversky, Daniel Kahneman and Jonathan Haidt to argue that legal officials rely on holistic intuitive judgements to identify their legal obligations. We then explain the evolution and persistence of legal rules by reference to the theory of social norms offered by Cristina Bicchieri. This way of thinking about legal obligation lends support to Hart's account of law as a social practice. However, it challenges other aspects of his views, such as the idea that the only necessary factor in determining the content of law is its socially recognised sources. It also casts doubt on Hart's claim that legal obligation does not empirically extend beyond legal officials to other members of the community. Hart's account can be adapted to meet these criticisms, but not without undermining its commitment to legal positivism.

I INTRODUCTION

Legal philosophy today is dominated, for better or worse,¹ by legal positivism — the view that the only necessary factor in determining whether something counts as law is recognition by social sources.² A distinction is often drawn in

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¹ We say for worse. For further discussion, see Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019); Jonathan Crowe, 'Functions, Validity and the Strong Natural Law Thesis' (2019) 10(2) *Jurisprudence* 237; Jonathan Crowe, 'Metaphysical Foundations of Natural Law Theories' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017); Jonathan Crowe, 'Natural Law Theories' (2016) 11(2) *Philosophy Compass* 91; Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40(3) *Monash University Law Review* 737; Jonathan Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' (2014) 5(1) *Jurisprudence* 109.

² Crowe, *Natural Law and the Nature of Law* (n 1) 145–6; Crowe, 'Natural Law Theories' (n 1) 92–3.

this context between inclusive and exclusive legal positivist theories. Inclusive legal positivism holds that social sources are the only *necessary* factor in conferring legal status.³ In some legal systems, however, the recognised social sources may incorporate moral or other external standards into the test for legal validity.⁴ Exclusive legal positivism, on the other hand, holds that the existence and content of law can only ever depend upon social facts.⁵ It is therefore necessarily true that the existence and content of law *does not* depend on its substantive content.

Legal positivism's focus on social sources as the only necessary determinant of legal validity is well adapted to explain some important features of the concept of law, such as its jurisdiction-specific nature and propensity to clash with morality and justice. However, it faces the challenge of adequately explaining law's normativity without appealing to necessary moral content. HLA Hart, the most influential legal positivist of the last century — and the leading proponent of inclusive legal positivism, as defined above — sought to explain law's normativity by analysing it as a species of social rule. Legal officials regard law as normatively binding, according to Hart, because they recognise the existence of social pressure to conform with the rule of recognition, which supplies the ultimate test for legal validity.⁶

Hart's theory of law as a species of social rule foreshadows more recent and detailed philosophical work on the nature and origins of social norms.⁷ It also resonates to some extent with recent work in social psychology on the role of heuristics in practical decision-making.⁸ Our aim in this article is to critically evaluate Hart's account of legal obligation by drawing on these two related bodies of literature. We begin by drawing on the social intuitionist model of practical judgements developed by Amos Tversky, Jonathan Haidt and Daniel Kahneman to deepen Hart's account of the characteristic attitudes of legal officials. We argue that the acceptance of the rule of recognition by legal officials is plausibly understood as reflecting holistic intuitive judgements grounded in heuristics, learned and refined over time.

We then develop this picture further by reference to the theory of social norms outlined by Cristina Bicchieri. We contend that the heuristics used by legal officials to identify their obligations plausibly reflect emergent norms embedded in social practices. These norms represent evolved responses to social coordination problems. Their salience is reinforced by network effects or repeated interactions over time.

³ See, eg, HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 204, 250–4; Jules L Coleman, *The Practice of Principle* (Oxford University Press, 2001) 67–148; WJ Waluchow, *Inclusive Legal Positivism* (Clarendon Press, 1994).

⁴ Hart (n 3) 204, 250.

⁵ See, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 37–52; Joseph Raz, *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (Oxford University Press, 1995) 210–237; Scott J Shapiro, 'On Hart's Way Out' (1998) 4(4) *Legal Theory* 469, 497.

⁶ Hart (n 3) 114–17.

⁷ See Part IV below.

⁸ See Part III below.

This way of thinking about legal obligation lends general support to Hart's account of law as a species of social rule. It also helps to address an important challenge facing Hart's theory: its relatively weak account of legal obligation as merely presumptive and lacking any necessary foundation in normative reasons.

A theory of legal obligation grounded in social intuitionism and norm theory, however, also challenges some important features of Hart's account. We conclude by highlighting two of these critical implications. First, the holistic nature of the intuitive judgements discussed by social intuitionists challenges Hart's claim that the only necessary factor in determining the content of law is its sources, not its substance. Second, a theory of social norms based on network effects casts doubt on Hart's claim that legal obligation does not empirically extend beyond legal officials to ordinary citizens. It therefore undercuts his treatment of these groups as distinct hermeneutic communities. Hart's theory, we argue, can be adapted to meet these criticisms, but not without undermining its commitment to legal positivism.

Our reliance on the work of the social intuitionists and Bicchieri, therefore, has a twofold character. These theories, we argue, both augment Hart's view and call it into question. Hart does not directly explain how legal officials identify the content of legal norms while also judging themselves to be bound by them, and nor does he explain how these norms develop and persist over time. Social intuitionism and norm theory help to fill these explanatory gaps. However, the explanatory power offered by these theories puts pressure on central features of Hart's account. The most compelling response to this dilemma, in our view, is to modify Hart's theory to jettison those problematic commitments; this would involve, most notably, abandoning legal positivism. There might perhaps be other plausible ways that Hart's framework could fill the explanatory gaps noted above, while also avoiding these adverse implications. If so, we leave it to others to identify them.

II HART ON LEGAL OBLIGATION

Early versions of legal positivism sought to explain law's normativity by appealing to a centralised view of legal authority and emphasising the role of coercion. John Austin, widely viewed as the founder of legal positivism,⁹ famously defines law as the command of a sovereign, backed up by sanctions.¹⁰ Austin's view of a sovereign is premised on the notion of a single, dominant source of legal authority within a given jurisdiction. The sovereign is defined as the authority to whom everyone habitually renders obedience and who, in turn, habitually obeys nobody.¹¹ Austin's theory is therefore unable to accommodate less centralised forms of legal order, including those found in international and customary law. These normative orders,

⁹ Cf HLA Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined, etc.* (Weidenfeld and Nicolson, 1954) xvi.

¹⁰ Austin (n 9) 9–33.

¹¹ Ibid 193–4.

according to Austin, are not law ‘strictly so called’; rather, they are forms of ‘positive morality’.¹²

Hart’s theory of law, by contrast, deliberately abandons Austin’s emphasis on the commands of the sovereign in favour of an analysis of law as a system of social rules.¹³ Legal rules are distinguished from other social rules (such as rules of morality and etiquette) by reference to an overarching *rule of recognition* that supplies the criteria for legal validity. The rule of recognition is itself a social rule embodied in the practices of legal officials.¹⁴ According to Hart, something counts as law because legal officials acting in accordance with the rule of recognition accept it as having the necessary features to confer legal status upon it.

Hart’s theory of law (unlike Austin’s) is not necessarily incompatible with non-state forms of legal order, such as customary law. Customary legal norms stem from processes that may be accepted as legally binding if they are acknowledged by the secondary rules of the relevant jurisdiction. A similar point applies to norms arising from contracts and other voluntary agreements.¹⁵ The legal force of a contract or marriage, Hart points out, does not come directly from the sovereign (as Austin’s theory might appear to suggest) but rather from the voluntary agreement of the parties, which is then recognised as binding by legal officials.¹⁶ An appropriately inclusive rule of recognition could, in principle, recognise a wide variety of social institutions as legally binding.

Hart uses his critique of Austin’s emphasis on sanctions to make a more fundamental point. He draws a distinction between ‘being obliged’ to do something and ‘having an obligation’ to do it: if someone holds a gun to our heads and tells us to hand over our money, we may be *obliged* to comply, but we would not say we *had an obligation* to do so.¹⁷ Having an obligation requires more than mere compulsion; it implies that we *ought* to behave in a certain way, due to the existence of a binding rule. Hart argues that the existence of law depends upon having obligations, rather than being obliged.¹⁸ This is not a matter of having certain beliefs, motives or reasons, but rather involves recognising the existence of a social rule.¹⁹

¹² Ibid 140–1.

¹³ Hart (n 3) 56–7.

¹⁴ Ibid 94–5.

¹⁵ Ibid 27–8, 33–4.

¹⁶ Ibid 41, 96.

¹⁷ Ibid 82–91.

¹⁸ Hart does not deny that people are sometimes motivated to follow the law by fear of sanctions. However, he argues that this does not fully capture what people mean when they describe themselves as being bound by the law: *ibid* 57, 115–16.

¹⁹ *Ibid* 82, 88.

Hart fleshes out the notion of having an obligation by offering a detailed account of social rules. His view of social rules is often described as the *practice theory*.²⁰ The practice theory defines a social rule in terms of two fundamental components. The first is the existence of a *pattern of conduct* generally followed by members of a social group. The second is a *critical reflective attitude* towards that practice, according to which members of the group both use the practice to guide their own conduct and criticise others who do not conform to it.²¹ Hart calls the perspective of someone who has a critical reflective attitude towards social rules the *internal point of view*.²² We can only adequately grasp the notion of legal obligation — and therefore the concept of law — by taking this perspective into account.²³

Hart observes that considering the internal point of view allows us to distinguish *social rules* from *social habits*.²⁴ Social rules are patterns of behaviour in relation to which members of the social group hold a ‘reflective critical attitude’.²⁵ There are many different patterns of behaviour that fall into this category, including rules of law, morality, grammar and etiquette.²⁶ Each of these attracts some level of social pressure to conform. Hart illustrates this concept by reference to the rules of a game of chess, noting that players regard these rules not merely as patterns, but as setting a ‘standard for all who play the game’.²⁷ Social habits, by contrast, are patterns of social behaviour that do not attract a critical reflective attitude. Examples might include mowing the lawn on weekends and going to the cinema on a Saturday night.

Hart goes on to note that social rules can be divided further into those that confer *obligations* and those that do not.²⁸ We might usefully describe the latter category as mere *conventions*. Obligations differ from conventions, for Hart, in three crucial respects. First, the social pressure to conform with an obligation is more serious than that associated with a convention. Second, obligations are generally viewed as more important than conventions for the maintenance of social order. Finally, it is generally expected that obligations may conflict with self-interest. People are expected to make sacrifices to conform with these obligations. Hart considers that obligations encompass rules of law and morality, whereas conventions include other less serious types of social rules, such as norms of grammar, etiquette and sport.²⁹

²⁰ Ibid 254–5.

²¹ Ibid 57.

²² Ibid 89.

²³ Hart goes so far as to suggest that all the weaknesses in Austin’s theory boil down to his failure to acknowledge the internal point of view: *ibid* 83–4, 91.

²⁴ Ibid 55–7.

²⁵ Ibid 57.

²⁶ Ibid 86.

²⁷ Ibid 56–7.

²⁸ Ibid 85–7.

²⁹ Ibid 86.

What, then, sets legal rules apart from other social obligations? Hart's answer revolves around the role of secondary rules and, in particular, the rule of recognition. The rule of recognition identifies the criteria that are regarded by legal officials as conferring the status of law upon a primary rule. It is called the rule of recognition because it enables officials to *recognise* the primary legal rules.³⁰ The rule of recognition, like other legal standards, is a type of social rule. It depends upon acceptance by those who apply it and, as such, can only be identified and understood by taking account of the internal point of view. The precise rule of recognition in any given legal system is likely to be both vague and complex, since many different people and bodies, including legislatures, judges and other officials, typically have the power to enact legal rules.³¹ In principle, however, it enables us to identify the content of law.

III SOCIAL INTUITIONISM

Hart's theory of law offers a credible account of the nature and origins of social norms in the context of legal institutions. His treatment of this issue, however, leaves some important questions unanswered: how exactly do legal officials identify the content of their legal obligations and simultaneously judge themselves to be bound by them? How do these obligations emerge, evolve and persist over time? Our aim in the following sections is to offer some answers to these questions by drawing on recent work in social psychology and norm theory. We will begin by considering the contribution of social intuitionism, exemplified by the work of Tversky, Kahneman and Haidt,³² to our understanding of practical decision-making and, in particular, how practical decisions are influenced by the social environment.

It is admittedly beyond the scope of Hart's project to explain the cognitive process by which legal officials identify their legal obligations. However, insofar as he does not address this topic, it leaves an explanatory deficit in his theory. An account of how this occurs would usefully supplement his theory. Social intuitionism plays this role by showing how practical decision-makers rely on judgements that incorporate both factual and normative dimensions. It therefore helps to explain how legal officials not only identify the content of legal rules, but also accept them as binding. However, it then becomes significant to ask whether this account can be integrated with Hart's

³⁰ Ibid 94–5.

³¹ Ibid 147–54.

³² See, eg, Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' in Dirk Wendt and Charles Vlek (eds), *Utility, Probability, and Human Decision Making* (Springer, 1975); Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108(4) *Psychological Review* 814 ('The Emotional Dog and Its Rational Tail'); Jonathan Haidt, "'Dialogue Between My Head and My Heart": Affective Influences on Moral Judgment' (2002) 13(1) *Psychological Inquiry* 54 ('Dialogue Between My Head and My Heart'); Jonathan Haidt, 'The New Synthesis in Moral Psychology' (2007) 316(5827) *Science* 998; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

overall theory to yield a coherent explanatory picture. We will return to this question in the penultimate section of this article.

The social intuitionist literature mentioned above emphasises the central role of holistic judgements in practical decision-making. This research draws on dual process models of cognition, which distinguish two kinds of thought processes. The first (known as System 1) involves fast, intuitive snap judgements, while the second (System 2) involves controlled, reflective deliberation.³³ A series of experiments conducted by Haidt and his collaborators demonstrates that System 1 processes are central to ethical decision-making.³⁴ People typically react to ethical dilemmas by first forming snap judgements and then rationalising or modifying these judgements through further reflection. The resulting picture of practical decision-making differs considerably from the traditional idea of a reflective, considered process.

People do not usually respond to an ethical dilemma in a purely reflective way by weighing up the different options. Rather, they use System 1 thinking to form a holistic judgement about the case at hand. These judgements are not arbitrary, but are generally based on rough rules of thumb or heuristics that enable us to deal with complex situations in a cognitively efficient way. The soundness of the judgements will then depend on the reliability of the heuristics involved.³⁵ System 1 thinking, then, is typically the first element of a practical decision. It is not necessarily the end of the process, since decision-makers will often employ System 2 thinking to reflect upon and perhaps modify their conclusions. However, decision-makers nonetheless begin their reflective reasoning with a preconceived sense of the relevant factors and, in many cases, at least a presumptive outcome.³⁶

The kinds of intuitive judgements identified by Haidt and his collaborators seem to be irreducibly *holistic*, in that they involve a combination of descriptive and normative factors.³⁷ People confronted with ethically charged scenarios no doubt make intuitive judgements about the facts: they draw various inferences about what is going on in the situations described (including temporal ordering, causal relations and so on). However, these intuitive assessments also seem to have an intrinsic normative component. It is not that people make a purely factual judgement and then use

³³ See, eg, John A Bargh and Tanya L Chartrand, 'The Unbearable Automaticity of Being' (1999) 35(7) *American Psychologist* 462, 463; Shelly Chaiken and Yaakov Trope, *Dual Process Theories in Social Psychology* (Guilford, 1999); Kahneman (n 32).

³⁴ See, eg, Haidt, 'The Emotional Dog and Its Rational Tail' (n 32) 818; Haidt, 'Dialogue Between My Head and My Heart' (n 32) 54; Haidt, 'The New Synthesis in Moral Psychology' (n 32) 998; Jonathan Haidt, Silvia Helena Koller and Maria G Dias, 'Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?' (1993) 65(4) *Journal of Personality and Social Psychology* 613, 626.

³⁵ Cass Sunstein, 'Moral Heuristics' (2005) 28(4) *Behavioral and Brain Sciences* 531, 532.

³⁶ Haidt, 'The Emotional Dog and Its Rational Tail' (n 32) 822–3.

³⁷ See also Tony Bastick, *Intuition: How We Think and Act* (Wiley, 1982) ch 5.

sylogistic reasoning to conclude that because the conduct involves a particular kind of fact scenario it must be ethically wrong. This would involve a combination of System 1 and System 2 processes. Rather, the evidence suggests that the subject's judgement of wrongness forms part of their initial reaction to the scenario.³⁸

The body of research described above offers a potential answer to the question of how legal officials identify their legal obligations. It seems plausible, given the empirical studies conducted by Haidt and others, that the sense of legal obligation experienced by legal officials will be significantly guided by holistic intuitive judgements. These judgements might arise in response to a decision regarding a particular case; alternatively, they could arise in a more abstract way in response to a legal question. Importantly, the holistic nature of such judgements enables us to understand how they can incorporate both a descriptive understanding of the relevant legal rules and a normative sense of their obligatory nature. This sense of obligation, in turn, is plausibly shaped by the surrounding social context.

The empirical work of Haidt and his collaborators aims to show the role of intuition in ethical judgements. However, the same point applies, in principle, to practical decision-making generally. It would be surprising, given the results of these empirical studies, if holistic intuitive judgements did not play a central role in legal decision-making.³⁹ The limited empirical literature directly examining the pre-reflective dimension of legal determinations bears out this hypothesis. For example, an Israeli study found that judges gave significantly harsher parole decisions just before lunch (when they were hungry and tired) than just after lunch (when they were fed and rested).⁴⁰ An earlier study similarly found that sentencing decisions by legal experts were significantly affected by randomised anchors; in that instance, the lengths of the sentences were influenced by dice rolls.⁴¹ These results, if valid, seem to be best explained by the influence of System 1 thinking.⁴²

There is empirical literature to suggest that the use of holistic judgements is indicative of high levels of skill among trained experts in a range of fields, including

³⁸ Haidt, 'The Emotional Dog and Its Rational Tail' (n 32) 814, 817.

³⁹ For discussion, see Jonathan Crowe, 'The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1.

⁴⁰ Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences* 6889, 6890.

⁴¹ Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32(2) *Personality and Social Psychology Bulletin* 188, 189.

⁴² For doubts about the Israeli study, see Keren Weinshall-Margel and John Shapard, 'Overlooked Factors in the Analysis of Parole Decisions' (2011) 108(42) *Proceedings of the National Academy of Sciences* E833.

professional athletes,⁴³ chess players,⁴⁴ dancers,⁴⁵ surgeons⁴⁶ and writers.⁴⁷ The holistic judgements formed by legal officials will likewise be shaped by their training and experiences. This will include both formal legal training — which enables officials to identify the law in a skilled and proficient way — and their inculcation into a particular legal culture. This legal culture might be expected to value adherence to legal rules and therefore impart a robust sense of legal obligation.

We are not suggesting here that legal officials do not engage in significant levels of reflection and deliberation in making their decisions. We also do not deny that legal officials may reflect upon the reasons they have for following or not following the rule of recognition and make a conscious decision whether or not to do so. Our aim is rather to explain Hart's claim that the rule of recognition (and other social rules) produce a sense of obligation or reflective critical attitude in those who are bound by them. This sense of obligation, for Hart, is a product of the internal point of view. The internal point of view, in turn, must be more than a contingent product of the deliberations of individual agents if it is not to be perpetually unstable. It must, it seems, be a perspective that those agents use to evaluate their own actions and those of others, prior to engaging in all-things-considered reasoning about what to do. The social intuitionist framework helps to explain how this might occur.

A concern might be raised at this point as to whether social intuitionism can truly help to explain Hart's account of the attitudes of legal officials.⁴⁸ The crucial feature of legal obligation, for Hart, is that legal officials accept the binding character of the rule of recognition.⁴⁹ This attitude of acceptance involves identifying the practical reasons officials consider in order to make decisions; it does not determine what courses of action they will decide to take in light of those reasons. It might be thought that the social intuitionist model of practical decision-making only illuminates the latter issue, not the former. However, this concern misunderstands the focus of the social intuitionist account. Social intuitionism potentially applies at both these levels; it posits that both the identification of practical reasons and the application of those reasons to fact scenarios relies upon intuitive judgements. It therefore holds

⁴³ See generally Susan A Jackson et al, 'Relationships between Flow, Self-Concept, Psychological Skills and Performance' (2001) 13(2) *Journal of Applied Sport Psychology* 129.

⁴⁴ See generally Jerad H Moxley et al, 'The Role of Intuition and Deliberative Thinking in Experts' Superior Tactical Decision-Making' (2012) 124(1) *Cognition* 72.

⁴⁵ See generally Kate M Hefferon and Stewart Ollis, "'Just Clicks': An Interpretive Phenomenological Analysis of Professional Dancers' Experience of Flow' (2006) 7(2) *Research in Dance Education* 141.

⁴⁶ See generally David Alderson, 'Developing Expertise in Surgery' (2010) 32(10) *Medical Teacher* 830.

⁴⁷ See generally Susan K Perry, *Writing in Flow: Keys to Enhanced Creativity* (Writer's Digest, 1999).

⁴⁸ We thank an anonymous reviewer for pressing us to clarify this issue.

⁴⁹ Hart (n 3) 114–17.

potential to illuminate how legal officials (as well as ordinary citizens) identify their obligations.

IV THE ROLE OF SOCIAL NORMS

Social intuitionism deepens Hart's practice theory by explaining the cognitive process by which legal officials simultaneously identify the content of law and judge themselves to be bound by legal obligations. The role of heuristics in this account further helps to explain how the judgements of officials are shaped by their experiences over time and reinforced by the surrounding legal culture. More needs to be said, however, about how these heuristics are shaped by the social environment and, in particular, from where they derive their normative significance. How is it that legal officials are not only able to identify the content of legal rules, but also judge themselves to be bound by the associated legal obligations?⁵⁰ The previous section suggested that these assessments are formed at least partly at a pre-reflective level, but this does not tell us where their content comes from. The present section draws on theories of social norms to offer a response to this question.

The content of the rule of recognition, for Hart, is distinct from the reasons legal officials may have for accepting it as binding. '[W]hat is crucial', he says, 'is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity'.⁵¹ However, this does not mean that all legal officials accept the rule of recognition for the same reasons. Indeed, Hart doubts that this is the case. He suggests that their reasons for doing so may include: 'calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or, the mere wish to do as others do'.⁵² The puzzle here, in light of these pluriform motivations, is what, if anything, tends to ensure that legal officials converge upon a common rule, as opposed to making whatever decisions suit them from time to time. It is this question with which we engage in the current section.

A Bicchieri on Social Norms

Bicchieri's work on social norms offers an account of the coordinating role of norms in social life. Norms, for Bicchieri, have three aspects: motivations for engaging in behaviour, preferences and expectations. These characteristics are not discrete, but rather feed into each other. Motivations for engaging in behaviour can be of two

⁵⁰ Notice that this is a descriptive question, not a normative one. Julie Dickson has argued that Hart does not need to provide an account of why the rule of recognition is backed by normative reasons. We do not engage with that claim here. See Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule? (2007) 27(3) *Oxford Journal of Legal Studies* 373, 398.

⁵¹ Hart (n 3) 115.

⁵² *Ibid* 203.

main kinds: independent or interdependent.⁵³ Independent motivations give rise to behaviours that are determined by economic or natural reasons, regardless of whether these reasons are also recognised or acted upon by others. Interdependent motivations give rise to behaviours that are a result of other people's actions and opinions bearing upon one's own course of conduct.

Bicchieri's notion of preference builds upon her account of motivations for behaviour. Preferences are dispositions to act in particular ways in specific situations. An example is choosing to drive to work instead of taking the train.⁵⁴ Preferences, in the specialised sense set out above, can be distinguished from merely 'liking something better' than something else. As Bicchieri explains:

If I choose a vanilla ice cream instead of a chocolate one, you may infer that I like vanilla better. What you may not know is that I adore chocolate but am allergic to it. So despite liking chocolate more, I prefer (choose) vanilla instead. What preference really means is, in a choice situation, if ... I choose A over B, it must be the case that, all things considered, I prefer A.⁵⁵

Preferences may be individual (like the flavour of ice cream one prefers) or social. Social preferences take into account the 'behaviour, beliefs and outcomes of other people that, presumably, matter to the decision maker'.⁵⁶ For example, a person might choose not to consume ice cream when out with friends because they have passionate views about dieting.⁵⁷ Preferences can be further divided into two categories: conditional and unconditional. Unconditional preferences are those which are not influenced by knowing how others act in particular situations or of what they approve, and thus are specific to each individual. Conversely, conditional preferences are those which are influenced by how others act.⁵⁸ An example of a conditional preference is where a driver will stop on a red light and go on green because they expect others will do so as well.⁵⁹ Conditional preferences are therefore always interdependent.

Conditional preferences are, in turn, based on expectations. Expectations are beliefs about what is going to happen next; they therefore presuppose continuity between past and present.⁶⁰ They can be either individual or social. Individual expectations are those expectations we have for ourselves, while social expectations are the beliefs we have about other people's behaviour and attitudes. Social expectations

⁵³ Cristina Bicchieri, *Norms in the Wild: How to Diagnose, Measure and Change Social Norms* (Oxford University Press, 2017) 2.

⁵⁴ *Ibid* 6.

⁵⁵ *Ibid* 6–7 (emphasis omitted).

⁵⁶ *Ibid* 7.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* 7–8.

⁵⁹ *Ibid* 11.

⁶⁰ *Ibid*.

involve a reference network: that is, ‘the range of people we care about when making particular decisions’.⁶¹ Social beliefs can be both empirical and normative. An empirical belief is a belief about how other people in our reference network will act in certain situations. An example of this is that, having observed drivers driving on the left hand side of the road in England, we expect that the next time we go to England, the same will occur.⁶² A normative belief is a belief that other people regard certain behaviours as praiseworthy, while others are to be avoided. An example of this is the belief that ‘women in [one’s local community] believe that a good mother should abstain from nursing her newborn baby’.⁶³

A custom, for Bicchieri, is a norm that an individual conforms to because it conforms to their needs.⁶⁴ An example of this is the use of an umbrella when it rains. Since people have similar needs, the habitual action that meets the relevant need (in this case, using an umbrella to keep dry) will become a pattern of behaviour. This pattern is created and sustained by the motivations of actors acting independently. Each individual knows that when it rains, each person in their community will act in a similar way to oneself, but this awareness is not the reason why people engage in the behaviour.⁶⁵ Customs involve unconditional preferences because simply expecting other people to behave in a similar way does not influence one’s own actions.⁶⁶

Bicchieri further distinguishes customs from norms, which may be descriptive or social. Descriptive norms are norms that individuals prefer to conform to because they believe most people in their reference network conform to them.⁶⁷ These norms sometimes look like customs but differ in the reasons for engaging in the behaviour. In the case of customs, people prefer to engage in a particular behaviour irrespective of what others do. However, in the case of descriptive norms, their preference for conformity is conditional upon observing or believing how others in their reference network act. An example of this is women who wear makeup because they expect other women to do the same. Other examples include the use of traffic lights and language for coordination purposes.⁶⁸ Motivations for following descriptive norms are therefore interdependent, based on social preferences and empirical beliefs.

Like descriptive norms, social norms are rules of behaviour that individuals conform to because they believe that most people in their reference network conform to them. Unlike descriptive norms, however, social norms perform a double function because they tell us not only that certain behavioural responses are warranted, but also

⁶¹ Ibid 14.

⁶² Ibid 12.

⁶³ Ibid.

⁶⁴ Ibid 15.

⁶⁵ Ibid.

⁶⁶ Ibid 16.

⁶⁷ Ibid 19.

⁶⁸ Ibid 18.

express approval or disapproval of such behaviours.⁶⁹ The normative influence in social norms is strong and plays a crucial role in norm adherence. Social norms are always socially conditional (and therefore interdependent) because our ‘preference for obeying them depends upon our expectations of collective compliance’.⁷⁰ This does not mean that we necessarily lack good reasons to comply with them, but rather that most people follow them because they know they are generally followed and expect most individuals in their reference network to do so.⁷¹

The reaction to non-conformity of a social norm may range from slight displeasure to active or extreme punishment. The extent of the social reaction will usually depend on ‘how important or central to life the social norm is, how entrenched it is, and what sort of perceived harm disobedience creates’.⁷² Social norms also carry rewards such as ‘liking, appreciation, trust and respect’.⁷³ Norms which are onerous to follow are usually accompanied by strong negative and positive sanctions.⁷⁴ Social norms, because of their normative expectations, may take time to develop.⁷⁵ Bicchieri identifies three common conditions for the development of social norms: people must face a collective action problem; the social expectations of the people must collectively change; and people’s actions must be coordinated.⁷⁶

The first element — the existence of a collective action problem — means that there must be either a social dilemma or a tragedy of the commons that calls for a solution. A social dilemma occurs when a course of action is in the best interests of an individual but causes everyone else to be collectively worse off. An example of this is public defecation, because it is convenient for the individual performing the act but not for the other members of a community. A tragedy of the commons, on the other hand, involves a situation where multiple individuals act independently to deplete a shared resource.⁷⁷ An example of this is the extraction of groundwater. In both cases, the practice is one that an individual or group of individuals has reason to engage in because it benefits them personally, but is detrimental to the wider community.

⁶⁹ Ibid 30.

⁷⁰ Ibid 33.

⁷¹ Ibid 33–4.

⁷² Ibid 36.

⁷³ Ibid 38.

⁷⁴ Ibid 38–9.

⁷⁵ Ibid 118.

⁷⁶ Ibid 111. Bicchieri also discusses a fourth condition, ‘shared reasons for change’: at 106. However, this condition mostly arises in the process of norm abandonment and change. We have therefore omitted it from the current discussion, which is concerned predominantly with norm emergence. The requirement of ‘shared reasons’ in the case of norm emergence can largely be encapsulated in the notion of a ‘collective action problem’, since the reason for solving the collective action problem could be considered the ‘shared reasons’ behind the emergence of the norm.

⁷⁷ Ibid 113.

In order to solve these collective action problems, members of the community need to cooperate with each other. Norms thus emerge to motivate such cooperation. There are many historical examples of cooperation emerging when individuals repeatedly interact with each other. Stewart Macauley, for example, studies the relationship between automobile makers and their part suppliers and finds that these interactions are largely regulated by informal norms as opposed to positive law.⁷⁸ Participants in the study stated that demanding legal contracts would signal a lack of trust, therefore potentially damaging a good relationship.⁷⁹ The idea that norms arise through repeated interaction between individuals is borrowed from the folk theorem in game theory.⁸⁰ Bryan Druzin has likewise argued on the basis of the folk theorem that formal law should, in areas where there is repeated interaction between individuals, be scaled back to allow local norms to organise behaviour.⁸¹

Bicchieri argues that the second condition of norm emergence — that there be a change in social expectations — is typically achieved through formal or informal punishment. This is because applying sanctions to punish what is deemed as ‘wrong’ behaviour helps to produce and entrench normative expectations.⁸² Once normative expectations are in place, empirical expectations follow because people observe widespread compliance with the rule. While these normative expectations are developing, negative sanctions are necessary to induce people to follow the norm. Over time, however, the sanctions become progressively less important as people internalise the norm and the new pattern of behaviour becomes habitual.⁸³

The last condition of norm change according to Bicchieri’s theory is that people’s actions must be coordinated. The key to coordinating action for social norms lies in coordinated beliefs. Coordinated beliefs mean that ‘what each of us expects others to do corresponds to what they actually do.’⁸⁴ Coordinated beliefs are challenging to achieve. One way to do so is through public reports:

⁷⁸ Stewart Macauley, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) *American Sociological Review* 55, 60.

⁷⁹ *Ibid* 58–9.

⁸⁰ Bryan Druzin, ‘Social Norms as a Substitute for Law’ (2016) 79(1) *Albany Law Review* 67, 67.

⁸¹ *Ibid* 75.

⁸² Bicchieri (n 53) 117.

⁸³ *Ibid*. This process of changing empirical expectations by changing normative expectations through punishment is exemplified by institutional theorist Elinor Ostrom’s study of Nepalese communities solving the collective action problem of over-irrigation: Elinor Ostrom, ‘Design Principles of Robust Property-Rights Institutions: What Have We Learned?’ in Gregory K Ingram and Yu-Hung Hong (eds), *Property Rights and Land Policies* (Lincoln Institute of Land Policy, 2009) 25.

⁸⁴ ‘This is [a] well known theory in game theory’: Bicchieri (n 53) 110. ‘In order to coordinate actions, people must have correct beliefs about other people’s expected behavior. In a game, if players’ beliefs about each other are correct, their actions will be coordinated best replies to such beliefs’: at 141.

Think of conserving municipal water ... by being informed that collective water consumption is steadily diminishing, one can reasonably infer that an adequate proportion of one's neighbours are actively curbing their consumption, and thus one's conserving actions will not be in vain. In this example ... the information conveyed [in the report] would have effectively changed (and coordinated) people's expectations, resulting in coordinated action.⁸⁵

Another means of coordinating action, we propose, is through repeated interaction of individuals over time, as described by the folk theorem discussed above. We propose that through repeated interaction with others, an individual comes to observe that others do what we expect them to, and thus we are more likely to believe that our efforts are not wasted and that our 'good' actions will be reciprocated. We use this information about the way in which others have acted to infer that they will act this way in the future — and therefore to guide our expectations of how we should act, which in turn results in coordinated behaviour.

Bicchieri's theory suggests that the emergence of social norms typically involves the three conditions discussed above. We have seen that when a collective action problem arises, this potentially gives rise to the emergence of a new norm through a change in normative expectations about the behaviour which, in turn, leads to a change in empirical expectations through coordinated social action. This coordination can be achieved through mechanisms such as public reports or the repeated interaction of individuals over time, as described by the folk theorem.

B *Explaining Legal Obligation*

We suggested earlier in this article that social intuitionist theories of practical decision-making provide partial answers to some questions raised by Hart's account of legal obligation. Specifically, social intuitionism explains how legal officials may simultaneously identify the content of law and consider themselves to be bound by it. This account, however, raises further questions as to where legal norms come from and why legal officials consistently regard them as binding. Bicchieri's theory of social norms helps illuminate these issues. Legal norms, her theory suggests, arise in response to collective action problems, which prompt a change in social expectations and are reinforced through network effects.

Hart's account of legal obligation revolves around the rule of recognition. The rule of recognition is a kind of social rule; this means, for Hart, that it involves 'a combination of regular conduct with a distinctive attitude to that conduct as a standard'.⁸⁶ The attitude in question cannot be reduced to 'feelings of compulsion or pressure'.⁸⁷ Rather, it is the attitude of a person who considers themselves bound by a rule. The rule of recognition, for Hart, therefore 'must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something

⁸⁵ Ibid 110.

⁸⁶ Hart (n 3) 85.

⁸⁷ Ibid 88.

which each judge merely obeys for [their] part only'.⁸⁸ Otherwise, 'the characteristic unity and continuity of a legal system would have disappeared'.⁸⁹ The puzzle that Bicchieri's theory helps to address concerns how such a common rule emerges and persists among legal officials over time, given their diverse individual motivations.

Hart's account of legal obligation is an attempt to explain the rule-following behaviour of legal officials. Legal officials face a collective action problem in relation to the need for consistent and predictable outcomes in legal decisions. The mere need to make decisions is not in and of itself a collective action problem, because it could be accomplished by individual officials making decisions on an ad hoc basis. However, this approach (as Lon Fuller famously explained) would undermine the purpose of law, because it would not enable the law's subjects to use it to order their conduct.⁹⁰ Making legal decisions in accordance with the rule of law, understood as requiring consistent and predictable outcomes, therefore presents a collective action problem for officials. This problem can be resolved by officials adopting shared norms of conduct to coordinate their decision-making behaviour.

A situation in which legal officials make decisions on an ad hoc basis would be a kind of social dilemma because it would serve the interests or preferences of the official at the expense of the rule of law. The solution to this problem comes in the form of a norm created by the expectations that legal officials impose on each other. Legal officials will apply common rules in reaching decisions because they expect other officials to follow the same rules, leading to consistent outcomes. The normativity of these rule-following behaviours comes from the social pressure officials exert on each other to conform with them. Consistent application of the generally accepted rules will earn an official the appreciation, trust and respect of their peers, while failure to apply the rules in a way that is consistent with the understandings of other officials may earn opprobrium, distrust or, in an extreme case, formal sanctions.

Several authors have questioned whether Hart's concept of the rule of recognition is correctly understood as solving a social coordination problem. The two main objections to this idea, which have primarily been advanced in the context of David Lewis's account of conventions,⁹¹ are that the rule of recognition is not arbitrary and the coordination problem in question does not exist antecedent to the institutions that solve it.⁹² These features mean that Hart's rule of recognition does not strictly meet Lewis's definition of a convention.⁹³ However, they do not pose any inherent problem for regarding the rule of recognition as a social norm. There is no reason why social

⁸⁸ Ibid 116.

⁸⁹ Ibid.

⁹⁰ See Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39.

⁹¹ David K Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969).

⁹² See, eg, Dickson (n 50) 390; Coleman (n 3) 94–5; Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 11–12; Scott J Shapiro, 'Law, Plans, and Practical Reason' (2002) 8(4) *Legal Theory* 387, 392–4.

⁹³ Lewis (n 91) 58.

norms must be arbitrary to solve a collective action problem in Bicchieri's sense. Indeed, they are unlikely to be arbitrary because they will be grounded in existing social preferences and beliefs, for the reasons discussed previously.

The main point is that actors follow the norm at least partly because they expect others to do so. It seems hard to deny that legal officials are at least partly guided in their choice of sources of law by what sources they expect other legal officials to apply. If they were oblivious to this, it would be difficult to explain why the rule of recognition exhibits any coherence at all. Scott Shapiro argues that '[i]f most officials suddenly abandoned the *United States Constitution*, this would not lead all others to similar action'.⁹⁴ However, this unlikely and extreme hypothetical example does not defeat the more modest claim that legal officials generally follow the rule of recognition (which is not, in any case, identical to a written constitution) at least partly because they expect other legal officials to do so. They need not do this with the conscious aim of solving a collective action problem; indeed, we have suggested that their sense of obligation will typically be formed at an intuitive level.

There is also no inherent reason why social norms must solve a problem that exists prior to the institutions that give rise to the norm. The players in a game of chess face a collective action problem insofar as they require stable rules in order to enjoy a satisfying game. This problem is not one that existed prior to the creation of the game of chess,⁹⁵ but it is no less a collective action problem for that. Legal institutions will often arise initially as expressions of social power relations, but once these institutions are created they give rise to a collective need for consistent rules, presuming they are to be used to order social conduct. This collective action problem can be solved by the legal officials adopting shared norms about how to identify the rules to be followed in their decisions. The fact that the problem solved by these norms did not exist in any pure form before legal institutions came into being does not undermine the account offered above. Indeed, it gives explanatory context for both the emergence of the norms in question and the precise form they take.

Bicchieri's theory of norm change suggests that negative sanctions play an important role in altering social expectations, although these sanctions become less important over time as the new norm takes hold. Public information campaigns can also be critical because people need to believe that their actions are not isolated or futile. Alternatively, as we proposed in the previous section, network effects can also play this role. Repeated interactions will reassure people that their norm-following behaviour is reciprocated. This account, when applied to legal officials, suggests that in new legal systems (or following regime change) negative sanctions may be required to induce legal officials to apply the new rules. However, in long-established and stable legal systems, these inducements are likely to be less important. The rule-following behaviour of officials in such systems will be robust and well-established. It can be sustained by internalised expectations and network effects, rather than depending upon the threat of sanctions against those who do not comply.

⁹⁴ Shapiro (n 92) 393.

⁹⁵ Cf Andrei Marmor, 'How Law is Like Chess' (2006) 12(4) *Legal Theory* 347.

V IMPLICATIONS FOR HART'S THEORY

The account of rule-following behaviour of legal officials we outlined in this article is consistent with Hart's schematic account of legal normativity as involving a pattern of conduct along with a critical reflective attitude, guided by the overarching standard expressed in the rule of recognition. However, it adds detail to Hart's account on the critical questions of how legal officials identify the content and force of legal norms, as well as where these norms come from. The account offered here therefore provides a useful supplement to Hart's theory. At the same time, we also suggest that the theory challenges Hart's view in two important ways. The first concerns Hart's legal positivist claim that the only necessary factor in identifying the content of law is its sources, not its substance. The second concerns Hart's claim that the notion of legal obligation, as he understands it, does not empirically extend beyond legal officials to include other members of the community.

A The Content of Legal Obligations

Let us turn to the first point. Hart, as we have seen, argues that legal officials identify the content of law in accordance with a rule of recognition. The rule of recognition is itself a social rule that officials follow because they have an obligation to do so. The content of this rule, for Hart, is supplied by authoritative social sources (such as legislation, judicial decisions and social customs), although some legal systems may incorporate moral standards into this overarching rule.⁹⁶ Hart's account of the rule of recognition, in this way, lays the foundations for his defence of legal positivism. The content of law, for Hart, is a matter of examining the content of the relevant social rules. It does not depend on any necessary moral test, apart from the very minimal (and not overtly moral) requirements imposed by what he terms the 'minimum content of natural law'.⁹⁷

Morality does, of course, play a potential role in Hart's theory in a range of other respects. The rule of recognition is a social fact that identifies the criteria for legal validity. However, as Hart makes clear, it might be accepted by legal officials for moral (as well as non-moral) reasons.⁹⁸ Furthermore, according to Hart's inclusive legal positivist outlook, the rule of recognition might incorporate moral norms among the standards for identifying valid law.⁹⁹ It is also consistent with judicial reliance on moral principles in deciding certain kinds of cases.¹⁰⁰ Nonetheless, Hart insists there is no inherent moral component to the test for legal validity.¹⁰¹

⁹⁶ Hart (n 3) 269.

⁹⁷ See *ibid* 193–200.

⁹⁸ *Ibid* 203.

⁹⁹ *Ibid* 204. See generally: at 250–4.

¹⁰⁰ *Ibid* 204–5.

¹⁰¹ *Ibid* 202–3.

The account of legal obligation given in this article, however, challenges Hart's theory in two interlocking ways. First, as we have seen, Hart's account leaves open the question of how exactly legal officials identify legal rules and simultaneously judge themselves to be bound by them. We have suggested that social intuitionism offers a plausible answer to this question. However, social intuitionism indicates that legal officials identify the content and force of law as part of holistic normative judgements. It is not the case that legal officials first identify the content of law and then judge themselves bound by it; rather, officials make a holistic judgement about what they ought to do that incorporates relevant legal standards.

These judgements, however, will also be influenced by other factors, including the facts of specific cases, as well as their moral and social context.¹⁰² It is not plausible, in light of this picture, to maintain that the judgements legal officials make about their legal obligations may be based purely on authoritative social sources. The judgements that give the social sources their normativity occur in a wider moral and social context, meaning that the normativity in question is never solely legal in character. Experienced legal officials are likely to internalise the rule of recognition and use it consistently as a guide to their decisions. However, both the content of the rule (particularly in marginal cases) and the sense of obligation it provokes will inevitably be influenced by normative factors beyond the positive legal framework.

It is not a problem for Hart's theory that judges and other legal officials sometimes consider moral principles in reaching their decisions. Indeed, he explicitly recognises that this will occur in various circumstances, including where the rule of recognition incorporates moral standards or where the 'open texture of law' demands it.¹⁰³ It is, however, a problem for his view if legal obligation necessarily has a moral component. Our suggestion, in this respect, is that the holistic nature of intuitive judgements makes it impossible to distinguish legal and moral senses of obligation in the way Hart's theory proposes. Social intuitionism provides a plausible account of how legal officials identify the rule of recognition and accept it as binding, but it entails that the process of doing so will necessarily be influenced by moral factors, as well as other components of the broader social and cultural environment.

¹⁰² See also Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42(1) *University of New South Wales Law Journal* 91 ('The Narrative Model of Constitutional Implications'); Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40(1) *Statute Law Review* 75; Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 103; Jonathan Crowe, 'Levinasian Ethics and the Concept of Law' in Desmond Manderson (ed), *Essays on Levinas and Law: A Mosaic* (Palgrave Macmillan, 2009) 39.

¹⁰³ Hart (n 3) 204.

To take an example that one of us has discussed in detail elsewhere,¹⁰⁴ suppose the legislature passes the ‘Eldest Child Act’, commanding all parents to kill their eldest child immediately or pay a nominal fine. Further suppose that this legislation suffers from some procedural irregularity that places it within the penumbra of the rule of recognition. It is therefore not immediately obvious whether it is legally valid or not. Is it credible to maintain that the judgements legal officials make about the legal validity and binding nature of such a statute will not be influenced by their awareness of its moral repugnance and insufficiency as a rational guide for action? If the rule of recognition itself is the product of holistic intuitive judgements, then the content and force of the rule cannot be divorced from its moral and social environment.

This result is further supported by Bicchieri’s theory of social norms. The process of identifying and following social norms, on Bicchieri’s account, does not primarily involve interpreting legal documents and materials. Rather, it involves interpreting the behaviour of other actors, working out what they are expected to do and what their attitudes are towards various courses of action.¹⁰⁵ It is, in other words, a hermeneutic process. However, it is practically inconceivable that such a hermeneutic interpretation of the actions and attitudes of legal officials, particularly when carried out on an intuitive level, will consistently separate legal factors from other normative components. The sense legal officials have of what other officials are likely to do and believe will be influenced by their understandings of the moral, social and cultural values of those officials, as well as the positive law. The question of what a legal official expects others to do and believe — and what others expect the official to do and believe — will therefore not depend solely on legal sources.

It might be said that, on the account offered above, the rule of recognition is still a matter of social fact, because its content depends on interpreting the actions and beliefs of legal decision-makers. However, this is true only to the extent that the actions and beliefs of the legal officials are taken to be independent of other kinds of normative facts, such as facts about moral or prudential reasons. An interpretation of what others are likely to do and believe involves constructing a working theory of what motivational reasons they have, which will often involve asking what normative reasons they have (given the plausible assumption that people generally seek to act for reasons).¹⁰⁶

It is relevant here to return to Hart’s concept of the internal point of view. The internal point of view is the perspective of ‘a member of the group which accepts and uses [the rules] as guides to conduct’.¹⁰⁷ It contrasts with the external point of view, which

¹⁰⁴ See Crowe, *Natural Law and the Nature of Law* (n 1) 176; Crowe, ‘Functions, Validity and the Strong Natural Law Thesis’ (n 1) 242–3; Crowe, ‘Law as an Artifact Kind’ (n 1) 753. For discussion of a related example, see Crowe, ‘Levinasian Ethics and the Concept of Law’ (n 102) 48–9.

¹⁰⁵ Bicchieri (n 53) 33–4.

¹⁰⁶ See generally Crowe, *Natural Law and the Nature of Law* (n 1) ch 3.

¹⁰⁷ Hart (n 3) 89.

is the standpoint of ‘an observer who does not [themselves] accept [the rules]’.¹⁰⁸ Legal officials, Hart says, must adopt the internal point of view with regard to the rule of recognition.¹⁰⁹ The internal point of view has a hermeneutic component, insofar as it involves recognising and accepting shared social rules. However, Bicchieri’s theory shows us that identifying and accepting the rule of recognition as a social norm involves assessing the likelihood that other group members will comply with it. This, in turn, involves engaging with their motivational and normative reasons. These factors cannot be excluded, as the ‘Eldest Child Act’ case shows.

If Person A believes that Person B has strong moral or prudential reason to Φ , then Person A generally has at least a presumptive reason to believe that B will Φ . At the very least, A’s belief about B’s reasons is a relevant factor for A to consider in working out what B will do, unless A has reason to believe that B is oblivious to the reasons in question. People typically assume that others will not murder or assault them, not merely because social norms proscribe these kinds of behaviour, but because others have strong moral and prudential reason not to do so. It follows from this that the normative reasons legal officials have cannot be irrelevant to predicting their likely actions and expectations.¹¹⁰ However, if that is so, then the content of legal obligations cannot be solely a matter of social sources.

B *The Scope of Legal Obligations*

We turn now to our second challenge to Hart’s theory. Hart’s account of the rule of recognition places heavy emphasis on the practices of legal officials. The rule of recognition, for Hart, depends on what would be regarded as authoritative legal sources not by members of the general public, but by the officials tasked with administering and enforcing the rules.¹¹¹ Hart doubts whether the normative practices of the community at large would be widespread and coherent enough to yield a determinate set of criteria for legal validity.¹¹² However, the account of legal obligation offered in this article casts doubt on this argument in two ways. First, it suggests that the legal obligations accepted by legal officials are likely to be less homogenous than Hart assumes. Second, it explains how members of the community at large could come to hold a sense of legal obligation at least roughly analogous to that held by the officials. Hart’s distinction between the two domains is therefore undermined.

Why does Hart think legal officials could possess a coherent sense of legal obligation but ordinary citizens could not? His comments on the issue are brief and elusive. However, he seems to think that legal officials are likely to converge on a ‘shared and unified’ understanding of the rule of recognition, whereas ordinary members

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 116.

¹¹⁰ See also Crowe, ‘The Narrative Model of Constitutional Implications’ (n 102) 103–6.

¹¹¹ Hart (n 3) 113–15.

¹¹² Ibid 114–15. Cf Crowe, *Natural Law and the Nature of Law* (n 1) ch 8.

of the public are not.¹¹³ The first part of this assumption — that legal officials can converge on a common understanding of the rule of recognition — appears related to Hart's view that the content of legal obligation is supplied by social sources (and, in particular, authoritative legal sources). It seems reasonable to think that legal officials in a given jurisdiction will have a coherent understanding of what the authoritative legal sources are — even if, on Hart's account, they may have diverse reasons for abiding by them.¹¹⁴ However, the account of legal obligation in this article shows that this picture is more complex than it may at first appear.

Legal obligation, as Hart recognises, is not solely a matter of legal officials interpreting the law.¹¹⁵ It is, rather, a matter of legal officials interpreting the actions and beliefs of other officials. It is likely to be the case that this process of interpretation yields a picture of legal obligation in which the positive sources of law play a central role. However, the conception of rule-following behaviour that constitutes the relevant sense of obligation is unlikely to be wholly determined by those sources. It is tempting to assume that legal obligation, as a species of social norm, simply follows the positive law, but it would be more accurate to view the positive law as providing an arena within which such obligations are formed.¹¹⁶

Rule-following behaviour by legal officials is a complex social practice. Like social norms generally, its content can be captured in the formula 'perform action Φ in situation X'. However, the meaning of 'action Φ ' in this context will not simply equate to 'apply rule Y'. It will, rather, involve applying rule Y in accordance with method Z, where Z encompasses the methods used by the relevant community to interpret and apply the relevant rule. Furthermore, the specification of 'situation X' may be quite fine-grained, particularly when the role of holistic case-based judgements is taken into consideration. This complexity does not necessarily undermine Hart's claim that legal officials in a given jurisdiction can converge on a consistent understanding of legal obligation. However, it does mean that legal officials may well diverge in their precise conceptions of that obligation and that sub-groups are likely to exist that participate in distinctive sub-practices within the general norm.

The practices of legal officials, viewed from this perspective, appear more analogous to those of the general community than Hart's discussion suggests. Hart seems to think that the relatively small size of the community of legal officials makes it more likely to converge on a coherent sense of legal obligation than the community at large. However, this conjecture is not supported by a detailed account of how legal obligations emerge and are sustained over time. We have suggested that the emergence and persistence of legal obligations depend crucially upon network effects, supplemented by other mechanisms, such as negative sanctions and relevant information sharing

¹¹³ Hart (n 3) 115.

¹¹⁴ Ibid 203.

¹¹⁵ Ibid 89.

¹¹⁶ For a discussion on the 'arena', see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990) 216.

within the relevant group. The nature of network effects is such that their effectiveness depends not so much on the size of the group as the frequency and consistency of interactions between its members.¹¹⁷ A relatively large group may nonetheless form robust social norms, provided that its members interact regularly in ways that consistently manifest the relevant actions and attitudes. It is not necessary, of course, that every member of the group interact with every other, but merely that there is sufficient overlap between networks to produce uniform practices.

A large society with a well-developed and stable legal system may therefore converge over time on a relatively coherent and consistent idea of legal obligation. This sense of legal obligation will reflect a complex social practice and will therefore exhibit some dynamism and local variation. It will be unlikely to correspond exactly to the content of positive law, but will rather depend upon what we might call the ‘folk law’: the law as popularly understood within the community.¹¹⁸ It might be expected to track roughly the positive law in its most salient requirements, particularly if sanctions are regularly applied to reinforce this. However, its content is also likely to be influenced by moral and prudential considerations independent of the law, for reasons analogous to those canvassed in the previous section.

The complexity and consequent variation of this social practice should not prevent it from being described as legal obligation, particularly given what we have said above about complexity and variation in the practices of legal officials. It may indeed be the case that legal officials have a different understanding of legal obligation than the community at large, but this merely reflects their different role within the legal system. The question of which of these understandings of legal obligation is more salient for the concept of law is an important one that we cannot settle here.¹¹⁹ Hart’s decision to emphasise the understanding of legal officials cannot, however, be straightforwardly justified on empirical grounds alone.

It is possible that Hart might have welcomed this conclusion. He claims that ‘[i]n an extreme case the internal point of view with its characteristic normative use of legal language ... might be confined to the official world’, but then goes on to bemoan that such a society ‘might be deplorably sheeplike; the sheep might end in the slaughter-house’.¹²⁰ The discussion above suggests that, contrary to Hart’s fears, such a situation is empirically unlikely. He might well find this conclusion reassuring. In other respects, however, the view of legal obligation developed previously has less benign implications for Hart’s broader theory. For example, Hart’s analysis of law as the union of primary and secondary rules rests on the claim that ‘only a small community closely knit by ties of kinship, common sentiment, and belief ... could

¹¹⁷ Druzin (n 80) 77–81.

¹¹⁸ See Jonathan Crowe et al, ‘Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution’ (2018) 40(3) *Sydney Law Review* 319.

¹¹⁹ For discussion, see Jonathan Crowe, ‘Functions, Context and Constitutional Values’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 61.

¹²⁰ Hart (n 3) 117.

live successfully' under primary rules.¹²¹ This empirical claim, which Hart regards as 'plain',¹²² seems less obvious in light of the account of social norms elaborated above.

VI CONCLUSION

We have argued in this article that Hart's well-known theory of legal obligation can usefully be supplemented and extended by drawing on recent work in social psychology and norm theory. Hart's theory, while insightful and explanatorily powerful, leaves some critical questions unanswered. These include questions about how legal officials identify the content of legal norms while at the same time judging themselves to be bound by them, and how these norms emerge and are sustained over time. We have argued that these questions can be at least partially answered by drawing on the social intuitionism of Tversky, Haidt and Kahneman, along with the theory of social norms developed by Bicchieri. These theories support the general picture of legal norms developed by Hart, while supplementing his relatively schematic view of the emergence and operation of legal normativity.

At the same time, however, the theory of legal norms outlined in this article challenges Hart's view in two critical respects. First, Hart contends that the only necessary factor in determining the content of law is its socially recognised sources, not its substantive requirements. However, social intuitionism indicates that legal officials identify the content and force of law as part of holistic normative judgements, while Bicchieri's norm theory shows that this process involves interpreting the behaviour of other officials, as well as legal materials. Second, Hart claims that legal obligation, understood as involving acceptance of the internal point of view with respect to the rule of recognition, is empirically confined to legal officials. However, the role of network effects in perpetuating social norms casts doubt on this argument, at least in well-established and stable legal systems.

Our focus in this article has been on the implications of our account of social norms for Hart's theory of legal obligation. However, the theory advanced here has wider implications. We will conclude by mentioning three of them. First, the dependence of legal norms on social norms means that the two categories necessarily bleed together.¹²³ Legal officials necessarily take account of social norms in reaching their legal judgments. This suggests there is no clear and consistent distinction between the norms applied by legal officials and broader social processes of norm creation. Legal judgment, including the interpretation of legal materials, has an intrinsic social and cultural component. This challenges views of legal interpretation that

¹²¹ Ibid 92.

¹²² Ibid.

¹²³ We thank an anonymous reviewer for prompting us to address this point.

focus myopically on the literal or originally intended meanings of legal texts.¹²⁴ It also undercuts Hart's view of legal systems as 'Janus-faced' entities involving two distinct and contrasting interpretive communities — namely, ordinary citizens and legal officials.¹²⁵

Second, we have noted that the rule-following behaviour of legal officials rests on their interpretation of the actions and expectations of other officials, at least as much as the formal content of the legal rules. This explains why legal officials, as a social group, tend to have a conservative view of law that resists exogenous change. Legislative amendments do not always produce immediate changes in the courtroom.¹²⁶ This can be explained by the fact that the decision-making behaviour of legal officials will only change where their shared norms of conduct change — and this will only happen where they expect a general shift in the behaviour of their peers. The decision-making of legal officials is, in this sense, somewhat insulated from the effects of legal reform. A time lag may sometimes occur between changes in the positive law and changed outcomes in the courtroom and other decision-making arenas.

This finding will be comforting to those who think sudden shifts in the legal framework pose a threat to stability and the rule of law. However, this dynamic has a third implication: a breakdown in acceptance of the rule-following norm by legal officials can lead to a corresponding breakdown in the rule of law, regardless of what the positive law may provide. Legal officials who do not expect each other to follow the legal norms consistently or who do not impose social sanctions for not doing so can cause the collapse of legal obligation among those officials. This internal consensus, once lost, may be difficult to reimpose without some recourse to formal sanctions. The rule of law, on this account, is robust against exogenous influences — but it is also vulnerable to endogenous erosion. This observation carries considerable importance given current events in the world today.

¹²⁴ Cf Crowe, *Natural Law and the Nature of Law* (n 1) 196–240; Crowe, 'Pre-Reflective Law' (n 102) 116–19; Crowe, 'The Narrative Model of Constitutional Implications' (n 102).

¹²⁵ Hart (n 3) 117.

¹²⁶ For a recent example concerning changes to Tasmanian rape law, see Helen M Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 199–204.

*Daniel Goldsworthy**

THE FUTURE OF LEGAL EDUCATION IN THE 21st CENTURY

ABSTRACT

Technological progress will continue to fundamentally alter how we relate to each other and to our work, necessarily shaping the future of legal education. In considering its future direction, this article contemplates various perspectives regarding the purpose of legal education, and the pressures that may be brought to bear on pedagogical practices as a result of current and emerging technologies. Situating these considerations within the broader commentary regarding the future of work and the role of human beings in an age of automation, this article argues that the nature and type of skills taught to future lawyers, as well as the substantive knowledge relevant in the 21st century, will depend upon the irreducible value of human beings to the law and legal processes. Tasks that require creativity, complex reasoning or social intelligence (such as the ability to negotiate complex social relationships effectively) will remain the province of human beings. This must inform and shape legal education. Consequently, this article argues that the future of legal education is one that recognises lawyers will increasingly be required to attain a broad, liberal education enabling interdisciplinary insights, creativity and social intelligence.

I INTRODUCTION

In David Barker's text, *A History of Australian Legal Education*,¹ he cites as inspiration for his research a statement by the late John Merryman, a scholar from the United States, on the importance of legal education:

The examination of legal education in a society provides a window on its legal system. Here one sees the expression of basic attitudes about the law: what law is, what lawyers do, how the system operates or how it should operate. Through legal education the legal culture is transferred from generation to generation. Legal education allows us to glimpse the future of the society.²

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¹ David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 239.

² John Henry Merryman, 'Legal Education There and Here: A Comparison' (1975) 27(3) *Stanford Law Review* 859, 859.

No more evidently is this the case than when considering the influence of eminent jurispudent and scholar Julius Stone on various members of the High Court of Australia as a consequence of their time spent at Sydney Law School as students.³ Contemplating the future of legal education in the 21st century may appear speculative. However, careful consideration of the historical development of legal education as well as the societal and technological forces shaping the 21st century may offer insights into the direction of legal education in the following decades and beyond. Speculation of this sort must be grounded in the purpose of legal education, which itself generates competing claims. Perhaps this is most poignantly captured in the title of Professor William Twining's seminal lecture, 'Pericles and the Plumber'.⁴ His lecture, and its title, are an allusion to the tension between the contrasting views that legal education is an intellectual field of study on one hand, and on the other that it is essentially practical, vocational training in preparation for legal practice.⁵ Twining rejects each of these conceptions of legal education as 'crude, over-simplified and unrealistic' but the sentiment regarding the dichotomous views as to the purpose of legal education is evident.⁶

Speculating as to the future of the legal profession and legal education can be a fraught enterprise. In the mid-1990s, Richard Susskind famously opined that email would become the dominant form by which lawyers and clients would communicate.⁷ For such apostasy, he was labelled 'dangerous' and 'possibly insane', and that he 'should not be allowed to speak in public, and that [he] certainly did not understand anything about security or confidentiality'.⁸ In the 21st century, new technological advances that change the way people relate to one another and to the very notion of work, give us pause for renewed and careful speculation. Such advances naturally pose challenges for the legal profession and legal education.⁹ The law is not immune from technological development and the risks posed by automation. Legal roles that involve repetition and pattern recognition will increasingly become automated by

³ See, eg, Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20(1) *University of New South Wales Law Journal* 239; Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for the Decisions on Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107.

⁴ William Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997).

⁵ *Ibid.*

⁶ *Ibid.* 83.

⁷ See Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford University Press, 1996).

⁸ Richard Susskind, 'Legal Informatics: A Personal Appraisal of Context and Progress' (2010) 1(1) *European Journal of Law and Technology* <<http://ejlt.org/article/view/18/7>>.

⁹ Roman Batko and Anna Szopa, *Strategic Imperatives and Core Competencies in the Era of Robotics and Artificial Intelligence* (IGI Global, 2016).

smart and self-learning algorithms.¹⁰ In the long term, the roles humans have in the legal process will be reshaped and redefined by these forces and therefore, they must inform the future of legal education.¹¹

In addressing how these forces will inform the future of legal education, Part II of this article considers the major views regarding the purpose of legal education, which necessarily anchors considerations about possible future developments. Part III considers the nature of work and the continuing roles for human beings in the ‘Second Machine Age’ (the first being the Industrial Revolution) amidst increasing automation, arguing that insights gleaned from these developments must shape the future of legal education and of law schools. Part IV considers the future direction of the legal profession, and consequently what pressures may be brought to bear on legal education as a result. It addresses two distinct, though interrelated, issues. It considers first how technology will change pedagogical practices and delivery, and second, what substantive knowledge law students will require to remain relevant to the profession. Ultimately, I argue that the substantive knowledge relevant to law students in the 21st century is a broad, liberal legal education, invariably informed by the irreducible value human beings will continue to have to the law and legal processes.

II THE PURPOSE OF LEGAL EDUCATION

Any insight into the future of legal education must, self-evidently, be grounded in the purpose of legal education itself. This section therefore considers the major views regarding the function and purpose of legal education, which will affect how the academy generally, and law schools specifically, are likely to respond to future developments.

Barker has characterised the divergence of opinion on the purpose of legal education in Australia along similar lines as Twining some 50 years earlier.¹² Barker states that

the first and central theme is the ambiguity in the core purpose of legal education ... The main divide lies between those who regard legal education in instrumental terms, namely training individuals as future legal practitioners, and those who regard it as an academic discipline with its own intrinsic value. Among adherents to the former view, there has been a gradual evolution from a strict focus on the acquisition of legal knowledge to greater emphasis on learning skills relevant to legal practice. Among adherents of the latter, the principal concerns

¹⁰ See, eg, Cynthia Estlund, ‘What Should We Do after Work? Automation and Employment Law’ (Working Paper No 17–28, New York University School of Law, 24 September 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007972>.

¹¹ Jeremy Rifkin, *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism* (Palgrave Macmillan, 1st ed, 2014).

¹² Twining (n 4).

have revolved around legal theory and legal methodology when compared with other disciplines in the social sciences.¹³

Similarly, for Twining, ‘there is a need to draw a clear distinction between the *process* of professional formation of lawyers ... and the nature and roles of law schools as *institutions*’.¹⁴ There are two main conceptions of the role of law schools in modern industrial societies: the professional school model and the academic model.¹⁵ Prior to the end of the 20th century, Twining remarked with prescience that ‘legal professions in the modern world are so stratified, hierarchical, and fragmented that concepts like “the lawyer” or “the legal profession” are little more than fictions’.¹⁶ More recently, Harry Arthurs has provided a useful summary of the different views on the purpose of law schools, and sets out what he sees to be the three predominant positions.¹⁷ Although not mutually exclusive, one approach is likely to predominate. Of these views, he notes:

The first sees their primary, if not their sole, function as producing “practice ready lawyers” for today’s profession. The second proposes that they should produce “tomorrow’s lawyers,” lawyers with the capacity to adapt to the rapidly and radically changing circumstances of legal practice. And the third insists that the leading role played by law schools in the creation and transformation of legal knowledge, legal practice, and the legal system requires them to provide their students with a large and liberal understanding of law which alone will prepare them for a variety of legal and non-legal careers.¹⁸

This useful characterisation aids in situating many of the current debates concerning law school curricula as we move into the third decade of the 21st century. In Australia, legal education has customarily been informed by doctrinal approaches to legal pedagogy, most closely approximating the first view set out by Arthurs above — a vocational focus on ‘practice ready’ lawyers. As Nickolas James states:

Initially, legal education in Australia was little more than the uncritical transmission of legal doctrine by legal practitioners. It was not until the post-World War II emergence of the professional law teacher in Australia that a more scholarly approach was taken to the teaching of law.¹⁹

¹³ Barker (n 1) 3 (citations omitted).

¹⁴ Twining (n 4) 293 (emphasis in original).

¹⁵ Ibid 301.

¹⁶ Ibid 313.

¹⁷ HW Arthurs, ‘The Future of Law School: Three Visions and a Prediction’ (2014) 51(4) *Alberta Law Review* 705.

¹⁸ Ibid 706.

¹⁹ Nickolas J James, ‘A Brief History of Critique in Australian Legal Education’ (2000) 24(3) *Melbourne University Law Review* 965, 965.

Reiterating these sentiments, Mary Keyes and Richard Johnstone describe the dominant approach to legal education in the 20th century as a teacher-focused ‘traditional model’, characterised largely by ‘teachers uncritically replicat[ing] the learning experiences that they had when students, which usually [meant] that the dominant mode of instruction [was] reading lecture notes to large classes in which students [were] largely passive’.²⁰

In Australia, as in the United Kingdom, the historical decision to include legal education as an academic discipline was controversial.²¹ Many scholars viewed law as a practical vocation rather than a bona fide academic discipline. The first Australian law school was the University of Sydney, established in 1855.²² Law schools were then established at the University of Melbourne in 1857,²³ the University of Adelaide in 1883,²⁴ the University of Tasmania in 1893,²⁵ the University of Western Australia in 1927,²⁶ and the University of Queensland in 1935.²⁷ The ‘second-wave’ of law schools came after World War II and included institutions such as the Australian National University, Monash University, the University of New South Wales, and others.²⁸ It was not until the late 1980s that the state of Australian legal education received direct attention from the Commonwealth Government, with the publication of the Pearce Report in 1987.²⁹ As noted by Barker, one key recommendation of the report was that ‘there should be no more law schools established in the immediate future following on from publication of the report’.³⁰ Five years after the report was published, both Deakin University and La Trobe University opened law schools in 1992. As of 2020, describing what subsequently followed as an ‘avalanche’ of law

²⁰ Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26(4) *Sydney Law Review* 537, 539.

²¹ Linda Martin, ‘From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales’ (1986) 9(2) *University of New South Wales Law Journal* 111.

²² James (n 19) 966, citing Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) (‘Pearce Report’).

²³ *Ibid* 967, citing Council of Australian Law Deans, *Studying Law in Australia 2001* (Report, 2000) 4.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ David Barker, ‘The Swinging Sixties and Beyond: The Influence of the Second Wave University Law Schools in the Development of Australian Legal Education’ (2016) 9(3) *Journal of Australasian Law Teachers Association* 7.

²⁹ Pearce Report (n 22).

³⁰ David Barker, ‘The Pearce Report: Does It Still Influence Australian Legal Education?’ (2014) 7(1–2) *Journal of the Australasian Law Teachers Association* 1, 4 (‘The Pearce Report: Does It Still Influence Australian Legal Education?’).

schools,³¹ there are now 38 law schools in Australia.³² At his opening address at Deakin Law School, Sir Anthony Mason, then Chief Justice of the High Court of Australia, opined:

A university must conserve, extend and transmit knowledge; it must also encourage and stimulate a spirit of inquiry. Indeed, a strong criticism of legal education in Australia is that we have focused on professional knowledge and skills instead of relating Law as a subject of study to the context in which it exists as a discipline. That deficiency, it is said, is now evident at a time when our legal system is being subjected to ever-increasing scrutiny by critics who see it as non-responsive to the legitimate demands of society.³³

In a similar vein, Arthurs notes:

Law schools are knowledge communities: they exist to collect, critique, produce and disseminate knowledge. We therefore need briefly to consider what we mean by knowledge in the context of law. Obviously the profession is (or should be) as concerned about knowledge as the academy. After all, its monopoly over legal practice rests (somewhat tenuously) on the claim that lawyers know things that other people do not.³⁴

In 2004, Keyes and Johnstone wrote that a key

challenge is for Australian law schools to rethink their relationship with the legal profession, to ensure that law schools assert their autonomy in matters of curriculum, teaching and learning and research, so that legal education aims for more than preparing students for work in private legal practice.³⁵

This call to action to redefine and rearticulate the role and value of legal education to the legal profession, beyond merely the vocational model, has no less diminished since the statement was made. The authors make another prescient recommendation: there needs to be a

³¹ David Barker, 'An Avalanche of Law Schools, 1989–2013' (2013) 6(1–2) *Journal of the Australasian Law Teachers Association* 1. The only Australian university without a law school is Federation University. There are 237 law schools in the United States, 24 in Canada, and 38 in Australia. Per capita, there is 1 law school for approximately every 1.38 million people in the United States and 1 law school for every 1.56 million people in Canada. This compares with 1 law school for approximately every 671,000 people in Australia.

³² Council of Australian Law Deans, 'Australia's Law Schools' (Web Page, 10 June 2020) <<https://cald.asn.au/slia/australias-law-schools/>>.

³³ Sir Anthony Mason, 'Occasional Address at the Opening of the Deakin University Law Program' (1994) 1(1) *Deakin Law Review* 1, 2.

³⁴ Arthurs (n 17) 710.

³⁵ Keyes and Johnstone (n 20) 538.

collective, law school-wide, approach to integrate matters such as legal theory, interdisciplinarity, ethics, general and legal skills, and issues of internationalisation, gender and indigeneity, so that law students are provided with a co-ordinated and incremental approach to developing knowledge, skills and attitudes.³⁶

The genesis of this particular and unique problem facing law schools, compared with the pedagogical demands and pressures facing other professional degrees, arguably arises because

reconcil[ing] the liberal tradition with the demands of the world of affairs is one of the perennial problems of university education. Possibly of all university subjects, law faces the basic dilemma in its most acute form. Other 'professional' subjects such as medicine and engineering seem to an outsider to have been relatively uninhibited in their response to 'vocational' pressures, perhaps because they have been relatively isolated from the liberal arts tradition.³⁷

For these reasons, the challenges identified by Keyes and Johnstone remain. Historically, in the United Kingdom and elsewhere

the value of a university education long remained questionable to those who regulated the profession. The central position the academy has achieved in initial legal education and training has been primarily the result of socio-political, rather than profession-inspired, change from the 1950s onwards.³⁸

In Australia, and notwithstanding its relative age now, the Pearce Report of 1987 continues to influence the development of legal education.³⁹ Since 1992, Australian law schools have been required to deliver prescribed areas of knowledge, colloquially referred to as the 'Priestley 11'.⁴⁰ These regulatory requirements have remained unchanged for well over a quarter of a century. Since that time there has been vast technological progress, and it is certainly arguable that both the legal profession and legal education are now considerably shaped by such forces.⁴¹ In 2015, the Council

³⁶ Ibid 538.

³⁷ Twining (n 4) 65.

³⁸ Andrew Boon and Julian Webb, 'Legal Education and Training in England and Wales: Back to the Future?' (2008) 58(1) *Journal of Legal Education* 79, 88.

³⁹ See Barker, 'The Pearce Report: Does It Still Influence Australian Legal Education?' (n 30).

⁴⁰ Named after Justice Lancelot John Priestley, former Chair of the Law Admissions Consultative Committee. See *Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

⁴¹ Daniel Goldsworthy, 'Socrates and Smartphones: Why the Future of Legal Education Must Be Philosophy' (2017) 10 *Journal of the Australasian Law Teachers Association* 61, 66.

of Australian Law Deans released a report recognising and recommending statutory interpretation as a discrete topic due to its critical importance to the practice of law, noting that '[f]rom a doctrinal perspective, "statutory interpretation" refers to the body of law governing the determination of the legal meaning and effect of legislation'.⁴² The Council states that this 'requires students not only to develop a mastery of the body of law, *but also awareness of a range of explanatory contexts*'.⁴³ This recognition of the need for greater emphasis on statutory interpretation demonstrates that prospective lawyers must engage with the meaning and effect of the law within and across a variety of explanatory contexts.⁴⁴ These statements imply the need to contextualise and understand law beyond merely disciplinary and jurisdictional bounds; it is a clarion call for interdisciplinarity in a globalised world.

III THE ROLE OF HUMAN BEINGS IN THE SECOND MACHINE AGE

In what Erik Brynjolfsson and Andrew McAfee describe as the Second Machine Age, technology will continue to increasingly mediate our relations with each other as well as with the very notion of work itself.⁴⁵ This section considers the nature of work, automation and the opportunities for human beings to continue to engage and contribute meaningfully to the professions.⁴⁶ Insights gleaned from these developments must inform law schools and the future of legal education. Many jobs, and in some cases entire professions, risk being automated, which leads to the critical question: what types of work are most susceptible to automation?⁴⁷ According to some experts, there might soon be no need for lawyers because 'artificial intelligence will have advanced to the point that answers to legal questions would be derived more effectively from a computer, than from a human'.⁴⁸ As Carl Frey and

⁴² Council of Australian Law Deans, *Good Practice Guide to Teaching Statutory Interpretation* (Guide, June 2015) 7 <<https://cald.asn.au/wp-content/uploads/2017/11/Council-of-Australian-Law-Deans-Good-Practice-Guide-to-Teaching-Statutory-Interpretation.pdf>>.

⁴³ *Ibid* 10 (emphasis added).

⁴⁴ *Ibid*.

⁴⁵ Erik Brynjolfsson and Andrew McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (WW Norton & Company, 1st ed, 2014) ('The Second Machine Age').

⁴⁶ See Andrew McAfee and Erik Brynjolfsson, 'Human Work in the Robotic Future: Policy for the Age of Automation' (2016) 95(4) *Foreign Affairs* 139.

⁴⁷ See Peter Fleming, 'Robots and Organization Studies: Why Robots Might Not Want to Steal Your Job' (2019) 40(1) *Organization Studies* 23; David H Autor, 'Skills, Education, and the Rise of Earnings Inequality among the "Other 99 Percent"' (2014) 344(6186) *Science* 843; David H Autor, 'Why Are There Still So Many Jobs? The History and Future of Workplace Automation' (2015) 29(3) *Journal of Economic Perspectives* 3.

⁴⁸ Manveen Singh, 'In the Line of Fire: Is Technology Taking Over the Legal Profession?' (2017) 40(1) *North Carolina Central Law Review* 122, 126, quoting Andrew Sullivan, 'Technology and the Law: New Opportunities for Lawyers and Their Clients'

Michael Osborne note in their seminal study ('Oxford Study'), the legal profession is certainly not immune from technological development and the risk of automation.⁴⁹

In its assessment, the Oxford Study considered over 800 jobs and analysed them on the basis of susceptibility to automation.⁵⁰ Their core findings are instructive and provide a principled rationale to consider the risk posed to a raft of human roles and responsibilities, but also a basis upon which to speculate as to the emergence of new and hitherto unnecessary societal roles. Regarding the legal profession, the study found that

for the work of lawyers to be fully automated, engineering bottlenecks to *creative and social intelligence* will need to be overcome, implying that the computerisation of legal research will complement the work of lawyers in the medium term.⁵¹

The term 'bottleneck' refers to areas where artificial intelligence and machine learning are not (yet) useful.⁵² Herein lies the irreducible value of human beings. Governed by technological advancements, the future role of the human being in the legal academy will continue to be defined by what roles we can reasonably and valuably perform. If legal education is to stay relevant and contemporary, curricula must be informed by such considerations. For this reason, the skills required and valued in and by the legal profession will arguably change in acute ways for centuries to come. So, what are these legal roles and tasks that require creative and social intelligence? And, to what extent can human beings continue to reasonably and valuably perform them?

In 2018, the Organisation for Economic Co-operation and Development ('OECD') considered, with greater specificity, the susceptibility to automation of a more nuanced subset of occupations and roles.⁵³ It confirmed the findings of the earlier Oxford Study,⁵⁴ and further articulated the so-called 'bottlenecks' of creative and social intelligence. These bottlenecks are

social intelligence, such as the ability to effectively negotiate complex social relationships, including caring for others or recognizing cultural sensitivities;

(Scholarly Paper No 2648538, Social Science Research Network, 27 March 2015) 2–3 <<https://papers.ssrn.com/abstract=2648538>>.

⁴⁹ Carl Frey and Michael Osborne, 'The Future of Employment: How Susceptible Are Jobs to Computerisation?' (Working Paper, Oxford Martin School, Oxford University, 17 September 2013) ('Oxford Study').

⁵⁰ *Ibid.*

⁵¹ *Ibid* 41 (emphasis added).

⁵² In this article, the term 'artificial intelligence' is used broadly to indicate 'the ability of a computer or other device or application to function as if possessing human intelligence': *Macquarie Dictionary* (7th ed, 2017) 'artificial intelligence' (def 1).

⁵³ Ljubica Nedelkoska and Glenda Quintini, *Automation, Skills Use and Training* (Working Paper No 202, Organisation for Economic Co-operation and Development, 14 March 2018) 6.

⁵⁴ *Ibid.*

cognitive intelligence, such as creativity and complex reasoning; and perception and manipulation, such as the ability to carry out physical tasks in an unstructured work environment.⁵⁵

Yuval Noah Harari reiterates the view of Brynjolfsson and McAfee, insofar as to suggest that the Industrial Revolution was indeed ‘revolutionary’ as it did away with human jobs relying upon strength and repetitive action.⁵⁶ It was the cognitive abilities that machines could not replicate, and as such humans were largely safe in doing work and completing tasks that required this skillset. That is no longer the case: with artificial intelligence advancing, technology is now beginning to outperform humans on this metric too.

A further insight into the risk or susceptibility of certain roles and tasks to automation is Moravec’s Paradox, named for Austrian robotics researcher Hans Moravec.⁵⁷ It postulates that computers excel at tasks requiring speed and precision (such as playing chess, reviewing documents, driving cars or solving equations), whilst they remain poor at those tasks that require sensorimotor skills, perception and mobility (such as gardening, caring for animals or clearing the dinner table).⁵⁸ Moravec’s ultimate claim is that computers are adept at reasoning, but the often unconscious, sensorimotor knowledge which has evolved in humans over billions of years, and which human beings find innately simple, is almost impossible for artificial intelligences to imitate.⁵⁹ This has implications for the labour market, with automation most likely to result in a ‘hollowing out’ of jobs performed by the middle class.⁶⁰ Considering a broad analysis of the current status of artificial intelligence and of future prospects for work and employment, it follows that these developments will inform and shape the legal profession and, by extension, legal education.

Vincent Müller and Nick Bostrom provide a cross-sectional survey of expert opinion on the future progress of artificial intelligence and automation, and in doing so provide greater clarity in framing timelines, risks and opportunities.⁶¹ Whilst inherently speculative, its claims are strongly empirical and should be heeded. Harari also makes

⁵⁵ Ibid.

⁵⁶ Yuval Noah Harari, *Homo Deus: A Brief History of Tomorrow* (Harvill Secker, 2016).

⁵⁷ Tirthajyoti Sarkar, ‘Why Math is Easy for AI but Gardening is Not: Moravec’s Paradox’ *Towards Data Science* (Web Page, 8 March 2020) <<https://towardsdatascience.com/why-math-is-easy-for-ai-but-gardening-is-not-moravecs-paradox-99994b201d10>>.

⁵⁸ Ken Goldberg, ‘Countering Singularity Sensationalism’ (2015) 526(7573) *Nature* 320.

⁵⁹ Hans Moravec, ‘When Will Computer Hardware Match the Human Brain?’ (1998) 1 *Journal of Evolution and Technology* 1.

⁶⁰ See Organisation for Economic Co-operation and Development, *Under Pressure: The Squeezed Middle Class* (OECD Publishing, 2019) <<https://doi.org/10.1787/689afed1-en>>; Paul Davidson, ‘Income Inequality and Hollowing Out the Middle Class’ (2013) 36(2) *Journal of Post Keynesian Economics* 381.

⁶¹ Vincent Müller and Nick Bostrom, ‘Future Progress in Artificial Intelligence: A Survey of Expert Opinion’ in Vincent Müller (ed), *Fundamental Issues of Artificial Intelligence* (Springer, 2016) 553.

an additional and critically important distinction when contemplating what roles may be subject to automation, and in doing so provides further affirmation for the ‘creative and social intelligence’ hypothesis.⁶² He posits that there is a fundamental and informing distinction to be made between intelligence and consciousness, and it is this distinction that can illuminate what roles and tasks will likely be susceptible to automation.⁶³ Intelligence based on pattern recognition is replicable, whereas consciousness that informs creative and social dimensions is not. To appreciate the importance of this distinction, and how the decoupling of consciousness from intelligence can be conceptualised, Harari states:

Until today, high intelligence always went hand in hand with a developed consciousness. Only conscious beings could perform tasks that required a lot of intelligence, such as playing chess, driving cars, diagnosing diseases or identifying terrorists. However, we are now developing new types of non-conscious intelligence that can perform such tasks far better than humans. For all these tasks are based on pattern recognition, and non-conscious algorithms may soon excel human consciousness in recognising patterns.⁶⁴

These distinctions allow us to situate and make better sense of artificial intelligence and to comprehend the types of skills, roles and jobs that are most susceptible to automation — and more importantly, those that are seemingly protected, at least in the short to medium term, from such risks. The legal profession is vulnerable to artificial intelligence and associated technological developments, and there will be a need to consider how this will affect and inform legal education.

IV THE FUTURE OF LEGAL EDUCATION

Higher education is inescapably subject to technological forces, both in the context of new modes of delivery as well as substantive knowledge and disciplinary insights informed by technological progress.⁶⁵ Consequently, legal education is affected both in terms of its form (in its modes of delivery) and its substance (by the new substantive laws and regulation in response to technology). In the Second Machine Age, technology will continue increasingly to mediate our relations with each other as well as work itself.⁶⁶ These ideas offer a perspective through which to consider the types of changes that may be wrought on the legal profession and the academy. When considering the future direction of legal education, the sociopolitical and

⁶² Harari (n 56) 311.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ See Allan Collins and Richard Halverson, *Rethinking Education in the Age of Technology: The Digital Revolution and Schooling in America* (Teachers College Press, 2nd ed, 2018); Andreas M Kaplan and Michael Haenlein, ‘Higher Education and the Digital Revolution: About MOOCs, SPOCs, Social Media, and the Cookie Monster’ (2016) 59(4) *Business Horizons* 441.

⁶⁶ See Brynjolfsson and McAfee, ‘The Second Machine Age’ (n 45).

technological forces that shape our relationship with work are instructive. On the latter, John Stuart Mill wrote in 1848 that

[h]itherto it is questionable if all the mechanical inventions yet made have lightened the day's toil of any human being. They have enabled a greater population to live the same life of drudgery and imprisonment, and an increased number of manufacturers and others to make fortunes. They have increased the comforts of the middle classes. But they have not yet begun to effect those great changes in human destiny, which it is in their nature and in their futurity to accomplish. Only when, in addition to just institutions, the increase of mankind shall be under the deliberate guidance of judicious foresight, can the conquests made from the powers of nature by the intellect and energy of scientific discoverers, become the common property of the species, and the means of improving and elevating the universal lot.⁶⁷

In the words of Mill, those 'great changes in human destiny' may very well be occasioned by the growth of artificial intelligence.⁶⁸ Brynjolfsson and McAfee offer a compelling metanarrative for how to perceive the advances of technology, and they identify the importance of an education system that prepares people for the next economy instead of the last one.⁶⁹ They argue that the Second Machine Age will fundamentally reorient the nature of work and the roles human beings play in society.⁷⁰ In this regard, Richard Susskind and Daniel Susskind provide a context through which to situate and appraise the legal profession and legal education.⁷¹ They remark that all professions, including the legal profession, are united by certain common features and similarities. In order to make sense of the role and importance of the professions, Susskind and Susskind conceive of what they call the 'grand bargain', described as 'the traditional arrangement that grants professionals both their special status and their monopolies over numerous areas of human activity'.⁷² They argue that professions arise in the context of knowledge deficits. Noting the difficulties in defining precisely what the professions are, they employ Ludwig Wittgenstein's concept of 'family resemblances'⁷³ to characterise the professions as possessing four main overlapping similarities: first, they have specialised knowledge; secondly, their admission depends on credentials; thirdly, their activities are regulated; and lastly, they are bound by a common set of values.⁷⁴ They go on to argue that

⁶⁷ John Stuart Mill, *Principles of Political Economy: With Some of Their Applications to Social Philosophy* (Longmans, Green, Reader, and Dyer, 1878) vol 2, 332.

⁶⁸ Ibid.

⁶⁹ See Brynjolfsson and McAfee, 'The Second Machine Age' (n 45).

⁷⁰ Ibid.

⁷¹ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2017) 9.

⁷² Ibid.

⁷³ Ludwig Wittgenstein, *Philosophical Investigations* (Basil Blackwell, 2nd ed, 1958) 32.

⁷⁴ Susskind and Susskind (n 71) 15.

[i]n a print-based industrial society the professions have emerged as the standard solution to one shortcoming of human beings, namely, that we have ‘limited understanding’. When people need help in certain kinds of situation[s] in life, those that call for specific types of specialist knowledge, then we naturally turn to professionals. But we cannot assume that this current answer is the only or best answer for all time. We should be alive to the possibility, as we move from a print-based industrial society into a technology-based Internet society, that there are alternatives. And we should also want to investigate these.⁷⁵

Twining states that

[i]n modern industrial societies ... two main conceptions of the role of the law school have competed for dominance: the first is the law school as a service institution for the profession (the professional school model); the second is the law school as an academic institution devoted to the advancement of learning about law (the academic model).⁷⁶

Each type, he says, has significant variants and most law schools combine elements of both approaches.⁷⁷ The following sections consider, in turn, the effects of rapid technological advancement from the perspective of the professional school model and the academic model.

A Technological Progress and the Professional School Model

During the latter part of the 20th century, the global shift away from a print-based economy to a digital economy had a profound impact on the law, legal systems and legal education. This transition towards a ‘knowledge economy’ has resulted in the production of knowledge being valued over the production of goods.⁷⁸ Paul Adler states that this has resulted in a society and an economy in which the quantity, quality, and accessibility of information becomes more valuable than the means of production.⁷⁹ An abundance of knowledge in a knowledge economy — and its potential oversupply — challenges the fundamental tenets of a model based on scarcity or limited knowledge. This inescapably affects all knowledge disciplines, including the legal profession. The legal profession and law schools must consider this impact in a society where knowledge becomes infinitely replicable with no loss of quality and where information networks create a new mode of production.⁸⁰ Take the common example of a recorded lecture. Once a lecture is delivered, recorded and uploaded,

⁷⁵ Ibid 270.

⁷⁶ Twining (n 4) 301.

⁷⁷ Ibid.

⁷⁸ Alan Burton-Jones, *Knowledge Capitalism: Business, Work, and Learning in the New Economy* (Oxford University Press, 1999); Paul S Adler, ‘Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism’ (2001) 12(2) *Organization Science* 215.

⁷⁹ Adler (n 78) 216–17.

⁸⁰ Paul Mason, *Postcapitalism: A Guide to Our Future* (Allen Lane, 2015) 123.

there is no additional cost associated with the volume of downloads, and there is no additional cost that arises from its reproduction.⁸¹ This is an example of near-zero marginal cost.⁸² The concept of marginal cost refers to the increase in production costs resulting from producing one additional unit of the original product.⁸³ Zero marginal cost describes ‘a situation where an additional unit can be produced without any increase in the total cost of production, such that the product can be infinitely reproduced with no diminution in quality or to the ability of others to consume it simultaneously’.⁸⁴

This has obvious implications for higher education and, by extension, law schools. Technologies can now digitise knowledge and accelerate productivity to the point where the marginal cost of production and any subsequent reproduction, as in the example of recorded lectures, approaches zero. In this situation, goods and services after a particular point become priceless and potentially free.⁸⁵ The rise of massive open online courses (‘MOOCs’), which leverage technologies to reproduce content that is replicable at near-zero marginal cost, is a prime example.⁸⁶ Though challenges around infrastructure, sustainability and evaluation persist, the implications for higher education are evident.⁸⁷ MOOCs offer a product and service that is infinitely replicable because of digitisation and near-zero marginal cost, with a possible demand that is conceivably limitless. The motivation to seek out educational opportunities that are intrinsically rewarding, without the possibility for accreditation, perhaps says more about human motivation than it does about the power of these technologically enabled platforms.⁸⁸ In the context of law schools, Michele Pistone and Michael Horn contemplate alternative futures for legal education enabled through these types of technologies:

Online technologies make it possible to modularize the learning process ... Modular flexibility enables online competency-based providers to create and scale a multitude of stackable credentials or programs for a wide variety of audiences ... And teachers of these modules can come from a wide range of backgrounds, many outside the traditional legal academy. Lawyers, judges,

⁸¹ Goldsworthy (n 41) 62.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Goldsworthy (n 41) 62, citing Mason (n 80).

⁸⁵ See Rifkin (n 11).

⁸⁶ Nathan M Castillo et al, ‘MOOCs for Development: Trends, Challenges, and Opportunities’ (2015) 11(2) *Information Technologies and International Development* 35, 37–9. See generally Stephen P Balfour, ‘Assessing Writing in MOOCs: Automated Essay Scoring and Calibrated Peer Review’ (2013) 8 (Summer) *Research and Practice in Assessment* 40.

⁸⁷ Ibid.

⁸⁸ See Xinghua Wang, Allison H Hall and Qiyun Wang, ‘Investigating the Implementation of Accredited Massive Online Open Courses (MOOCs) in Higher Education: The Boon and the Bane’ (2019) 35(3) *Australasian Journal of Educational Technology* 1.

administrative agencies, anthropologists, psychologists, sociologists, historians, business leaders, communications experts, among many others, can provide well-designed modules on topics relevant to lawyer-based competencies.⁸⁹

Higher education is facing unprecedented transformation pressures triggered by these and other digital innovations.⁹⁰ Digitising knowledge and content allows the sharing, exchange and facilitation of ideas in a way that is unique and novel.⁹¹ In this context, the role that human beings continue to play in the production of knowledge becomes a necessary consideration for higher education institutions. Online knowledge communities will continue to fundamentally challenge the utility and value of more traditional communities such as universities.⁹² Law schools, as knowledge communities, are inescapably subject to these forces.⁹³ Notwithstanding these considerations, the expectation that humans will still remain integral to the creation of knowledge and content seems a reasonable expectation. However, as technology advances there is a critical juncture where content creation and information — the very capital of a knowledge economy — will be replicated by computers exercising artificial intelligence. Kevin Kelly postulates that

[o]ver the next century, scholars and fans, aided by computational algorithms, will knit together the books of the world into a single networked literature. A reader will be able to generate a social graph of an idea, or a timeline of a concept, or a networked map of influence for any notion in the library. We'll come to understand that no work, no idea, stands alone, but that all good, true and beautiful things are networks, ecosystems of intertwined parts, related entities and similar works.⁹⁴

⁸⁹ Michele R Pistone and Michael B Horn, *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World* (Report, 2016) 17–18 <<https://www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf>>.

⁹⁰ Dominic Orr, Martin Weller and Rob Farrow, *Models for Online, Open, Flexible and Technology-Enhanced Higher Education Across the Globe: A Comparative Analysis* (Final Report, April 2018) <https://oofat.oerhub.net/OOFAT/wp-content/uploads/2018/04/Models-report-April-2018_final.pdf>.

⁹¹ Peter H Diamandis and Steven Kotler, *Bold: How to Go Big, Create Wealth and Impact the World* (Simon & Schuster, 2015) 8–9.

⁹² See Hua Jonathan Ye, Yuanyue Feng and Ben CF Choi, 'Understanding Knowledge Contribution in Online Knowledge Communities: A Model of Community Support and Forum Leader Support' (2015) 14(1) *Electronic Commerce Research and Applications* 34. See also Elina H Hwang and David Krackhardt, 'Online Knowledge Communities: Breaking or Sustaining Knowledge Silos?' (2020) 29(1) *Production and Operations Management* 138.

⁹³ See generally Eyal Rabin, Yoram M Kalman and Marco Kalz, 'The Cathedral's Ivory Tower and the Open Education Bazaar: Catalyzing Innovation in the Higher Education Sector' (2020) 35(1) *Open Learning: The Journal of Open, Distance and e-Learning* 82.

⁹⁴ Kevin Kelly, 'What Books Will Become' *The Technium* (Forum Post, 15 April 2011) <<http://kk.org/thetechnium/what-books-will/>>.

This has farreaching implications for the law, particularly the common law tradition. Regarding the latter, technological processes exposing inconsistencies or outliers in search of greater coherence may affect the common law's development and judicial decision-making. A barrister's pleadings, for example, may be informed by insights garnered through such processes, in search of authorities that support one's case and those that may not. Arguments similar to those postulated by Ronald Dworkin and his seamless web of institutional coherence and 'right answer' thesis might become more compelling in the context of new and emerging technologies.⁹⁵

The digitisation of the world's literature began in 1971 with Project Gutenberg, named for the man who introduced the printing press to Europe in the 15th century.⁹⁶ It was this technology that subsequently ushered in the Printing Revolution, resulting in an era of mass communication that permanently altered the global landscape.⁹⁷ The printing press is widely regarded as the most important invention of the second millennium.⁹⁸ For higher education, the Digital Revolution promises to have an equally, if not more, profound impact than the Printing Revolution.⁹⁹ Artificially arranged and networked knowledge, possible through the use of artificial intelligence, will not only render information intrinsically valuable, but also its curation. Terry Hutchinson reiterates this point, suggesting that

[i]n the digital workplace, lawyers need to be expert at sifting through large amounts of unindexed text. Judges need the most relevant sources in order to produce timely, lucid and principled judgments. Librarians and publishers need to improve the systems for curating the vast amounts of data.¹⁰⁰

How knowledge and content is curated as a result of these processes will provide new insights and modulate human interaction with knowledge and content in ways previously not possible. Digitising the world's laws, judicial and administrative decisions, scholarly works and commentaries — and subjecting them to computational algorithms that synthesise, arrange, curate and catalogue legal information into networked patterns — will yield new conceptual insights previously inaccessible to

⁹⁵ See Kenneth J Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72(3) *California Law Review* 369.

⁹⁶ Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing 1450–1800*, tr David Gerard (Verso, rev ed, 1997) vol 10, 55.

⁹⁷ *Ibid* 55–60.

⁹⁸ See 'Free E-Books: Project Gutenberg', *Project Gutenberg* (Web Page) <<https://www.gutenberg.org/>>; Elizabeth L Eisenstein, *The Printing Press as an Agent of Change* (Cambridge University Press, 1st ed, 1979).

⁹⁹ See Carl A Raschke, *The Digital Revolution and the Coming of the Postmodern University* (RoutledgeFalmer, 2003); Martin Davies, 'Can Universities Survive the Digital Revolution?' (2012) 56(12) *Quadrant* 58, 58.

¹⁰⁰ Terry Hutchinson, 'Legal Research in the Fourth Industrial Revolution' (2017) 43(2) *Monash University Law Review* 567, 568.

the human mind alone. Devices such as e-books and e-readers make it possible to share ‘highlights ... with other readers, and ... read [theirs]’.¹⁰¹ Kelly further posits:

I can read the highlights of a particular friend, scholar, or critic. We can even filter the most popular highlights of all readers, and in this manner begin to read a book in a new way. This gives a larger audience access to the precious marginalia of another author’s close reading of a book ... a boon that previously only rare-book collectors witnessed.¹⁰²

Digital devices are now constantly able to collect data on users while they are reading books. As Harari states of Amazon’s Kindle, it

can monitor which parts of the book you read fast, and which slow; on which page you took a break, and on which sentence you abandoned the book, never to pick it up again ... If Kindle is upgraded with face recognition and biometric sensors, it can know what made you laugh, what made you sad and what made you angry. Soon, books will read you while you are reading them.¹⁰³

Contemplate, for a moment, what this may mean if you were able to access information of the sort posited by Harari and Kelly, from the likes of judges, lawyers, politicians and academics. Imagine for instance, the benefit to a barrister who has access to information on those aspects of their pleadings or legal arguments that most resonated with the judge (or indeed with various judges), those arguments that were carefully considered, and those dismissed without hesitation. This will come to revolutionise legal education, as this enables consumers of content and information to be rendered ‘prosumers’,¹⁰⁴ inadvertently or even unknowingly contributing to the design, customisation and production of goods and services for their own needs.¹⁰⁵ One obvious application for law schools and academic publishers is in the bespoke design and development of textbooks and content directly informed by students. In contemplating these applications, Stephen Henderson and Joseph Thai suggest that technological innovation of this sort ‘will catalyze the transformation of the traditional casebook from a static object to an increasingly social one’.¹⁰⁶

So, what will be the value of legal education when knowledge is digitised and infinitely replicable, ubiquitous and accessible to everyone? How will the role of the legal academic be re-imagined when previous limitations around ‘bricks and

¹⁰¹ Kevin Kelly, *The Inevitable: Understanding the 12 Technological Forces That Will Shape Our Future* (Viking, 2016) 94.

¹⁰² Ibid.

¹⁰³ Harari (n 56) 344.

¹⁰⁴ See George Ritzer and Nathan Jurgenson, ‘Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital “Prosumer”’ (2010) 10(1) *Journal of Consumer Culture* 13.

¹⁰⁵ See Alvin Toffler, *The Third Wave* (William Morrow, 1980).

¹⁰⁶ Stephen E Henderson and Joseph Thai, ‘Crowdsourced Coursebooks: The Future of Law School’ (2014) 51(4) *Alberta Law Review* 907, 924.

mortar' and student-teacher ratios are alleviated through the use of technology? What happens when information and content becomes self-arranging and networked through artificial intelligence and algorithms? These technologies are all possible, and promise to revolutionise legal education into the 21st century and beyond.

Technology will likely render the pedagogical practices of many law schools outdated or even obsolete, as the skills required of lawyers in the 21st century will change time and time again. Consequently, a legal pedagogy focusing on skills transmission in a world mediated by digital technologies arguably misses the point; the rate of technological progress means that an instrumental approach equipping lawyers with the skills required for a career in law today may well be outdated, if not obsolete, tomorrow.

B *Technological Progress and the Academic Model*

Contemplating the future of legal education requires consideration of two matters: first, the competing claims regarding the object and purpose of law schools; and second, the sociopolitical and technological forces shaping society generally, and legal systems more specifically. This context can reveal the continuing value and purpose of legal education. As noted above, the purpose of legal education remains contested space, not necessarily in aspect but in degree. Arthurs, Barker and Twining highlight some of the predominant views on legal education. Irrespective of the characterisation of law schools as knowledge communities or as vocational training grounds for future lawyers, the fact remains that legal education in the 21st century requires careful consideration and re-imagining of the continued role and importance of law schools into the Second Machine Age.

Richard Susskind's description of the legal profession has much in common with Twining's rejection of singular models of a legal professional identity. He similarly highlights the variety of legal jobs for which law schools need to start preparing their students, including legal project management, knowledge manipulation, legal technologies and online dispute resolution.¹⁰⁷ However, he is emphatic that changes to legal education in response to technologically altered work practices should not see an abandonment of teaching students about 'legal method — how to think like a lawyer, how to marshal and organize a complex set of facts ... how to reason with the law (deductively, inductively, analogically), how to interpret legislation and case law, and more'.¹⁰⁸ These skills will remain relevant even to new legal jobs, reflecting the general acknowledgement that the debate over how changes to legal practice will drive change in legal education is really about what is to be added to ensure lawyers have the ability to collaborate across many disciplines. This is parallel to the depth of substantive legal knowledge that law schools have traditionally fostered.¹⁰⁹

¹⁰⁷ See Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) 136.

¹⁰⁸ *Ibid* 137.

¹⁰⁹ Lyria Bennett Moses, 'Artificial Intelligence in the Courts, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561, 569.

Within this context, I argue that legal education requires reconsideration in both form and substance. Regarding the former, I argue that there is a need for all Australian law schools to embed digital and information literacies within and across relevant subject areas. But more critically regarding the latter, I argue for a reconsideration of the substantive knowledge areas prescribed by the Law Admissions Consultative Committee ('LACC') in Australia.

In Australia, the most recent changes to the academic requirements for admission by the LACC were in 2015–16, when it undertook a limited review that ultimately led to minor changes to the descriptions of two prescribed areas of knowledge. In its recent paper titled 'Redrafting the Academic Requirements for Admission' — which states its modest objectives as revising the descriptions of the existing academic requirements — the LACC acknowledges that

[t]he present 11 prescribed areas have proved to be extremely difficult to change ... This is manifestly undesirable. Any future prescriptions thus need to be expressed in a way that allows for such changes and consequent variations in emphases to be made as circumstances alter, without having to revise the description of a prescribed area.¹¹⁰

In the same document, the Committee further notes that

[w]hile each area sets out what knowledge of that area an applicant must acquire, it does not seek to prescribe how, and at what point in a law course, teaching and learning in the area will occur, to limit possible innovation in teaching methods, to prescribe the proportion of teaching to be devoted to particular topics, or to prevent the teaching of new developments in the relevant law, its context or practice.¹¹¹

Notwithstanding, some argue that these regulatory requirements exceed 'the ambit of regulating the business of education providers and overly restricts the educational delivery format in a way that foregrounds 20th century teaching models and discourages innovation'.¹¹² Consequently, there remains limited engagement with the idea of arranging and organising legal education in Australia around digital and technological literacies.¹¹³ Digital literacy is imperative for future lawyers who will increasingly come to utilise and manipulate information in a digitally mediated society.¹¹⁴ More than this, modern lawyers must also possess excellent critical abilities in order to

¹¹⁰ Law Admissions Consultative Committee, 'Redrafting the Academic Requirements for Admission' (Draft Descriptions, 2019) 3.

¹¹¹ *Ibid* 5.

¹¹² See Stephen Colbran, Scott Beattie and Anthony Gilding, 'Legal Education xMOOCs: A Mirage in the Australian Regulatory Environment?' (2018) 28(1) *Legal Education Review* 1, 1.

¹¹³ Kate Galloway, 'A Rationale and Framework for Digital Literacies in Legal Education' (2017) 27 *Legal Education Review* 117, 141.

¹¹⁴ *Ibid* 131.

sort through masses of data and information captured at an ever increasing rate, because today's law students 'need less instruction in how to find the law and more instruction in assessing and evaluating the sources they find'.¹¹⁵ Hutchinson refers to this as information literacy.¹¹⁶ Assisting legal academics within regulatory constraints to embed digital and information literacies within and across the curricula will lead to better practice and foster innovation.¹¹⁷ Ultimately, however, the purpose of legal education must be to understand the law and legal process in a range of social contexts.¹¹⁸ As Kate Galloway states:

The challenge for legal academics lies in re-imagining the way in which law is taught, particularly in the Priestley subjects that tend to be conceptualised in traditional ways. It is this traditional thinking that may stifle the development and reform of the law itself.¹¹⁹

In this article, I not only respond to Galloway's call for re-imagination concerning delivery of the prescribed law subjects, but to Arthurs' call for the 'creation and transformation of legal knowledge' through suggesting a fundamental reorientation of the substance of the prescribed knowledge areas for law degrees in Australia.¹²⁰ Though suggested reforms concerning digital and information literacies are necessary, they do not go far enough. Technology not only mediates the way society operates; it changes the very nature of social arrangements and therefore what is substantively the concern of law. Consequently, the substantive knowledge required of 21st century lawyers must be carefully reconsidered. In an age of rapid technological progress and automation, legal pedagogies that are informed by the distinction between intelligence and consciousness will be able to respond to evolving legal landscapes which will only come to be ever more mediated by and through technology. Legal education must consider those roles and tasks human beings can and will continue to engage meaningfully with — that is in those *humane* areas concerning justice and fairness. To this end, Martha Nussbaum has called for lawyers to have a broad liberal education, an argument she has developed and refined over many years.¹²¹ In the context of the technological progress, increasing automation, and the advancement in artificially intelligent machines, a broad liberal education equips law students to be able to situate and contextualise these developments and to orient thinking about societies' responses to these developments.

¹¹⁵ Hutchinson (n 100) 588 (emphasis omitted).

¹¹⁶ Ibid.

¹¹⁷ Galloway (n 113) 119.

¹¹⁸ Ibid 141.

¹¹⁹ Ibid.

¹²⁰ Arthurs (n 17) 706.

¹²¹ See Martha C Nussbaum, 'Cultivating Humanity in Legal Education' (2003) 70(1) *The University of Chicago Law Review* 265. See also Martha C Nussbaum, 'Why Lawyers Need a Broad Social Education' (2017) 91(11) *Australian Law Journal* 894.

Fundamental legal concepts, including areas as diverse as property or evidence law, will be outdated or ill-equipped to deal with future challenges ‘unless lawyers have the intellectual and practical tools to think differently about society, economy, environment and governance and how they are mediated by technology’.¹²² Law schools must educate law students to think analytically and creatively about these challenges, and should critically analyse what knowledge can and will ground deeper thinking about legal challenges in a broader sociopolitical and technological context — that is, with a truly globalised perspective. Notwithstanding the move by some Australian law schools to adopt the American approach of graduate legal education,¹²³ the substantive requirements of all law degrees remain externally regulated by the LACC. To be clear, I am not arguing for deregulation, but rather a reconsideration of the prescribed knowledge areas which enable deep thinking about contemporary local and global challenges.

To that end, I offer a suggestion for reconstituting the prescribed knowledge areas that would better position law students to think more deeply about the role of law in responding to contemporary, globalised challenges. These include:

- constitutional law;
- comparative constitutional law;
- public international law;
- legal history and jurisprudence;
- philosophy and statutory interpretation;
- ethics and professional responsibility;
- real and intellectual property;
- criminal law;
- administrative law and procedure;
- contract law; and
- comparative legal systems.

I recognise that such arguments may be considered subversive given the conservatism that characterises legal regulation in Australia and abroad. Though as Arthurs notes:

¹²² Galloway (n 113) 139.

¹²³ Anthony Potts, ‘Selling University Reform: The University of Melbourne and the Press’ (2012) 37(2) *Studies in Higher Education* 157, 158.

[T]he leading role played by law schools in the creation and transformation of legal knowledge, legal practice, and the legal system requires them to provide their students with a large and liberal understanding of law which alone will prepare them for a variety of legal and non-legal careers.¹²⁴

It is hoped that such suggestions will generate renewed academic debate on these important issues and the necessary pedagogical and regulatory responses if legal education is to remain relevant in the 21st century and beyond.

V CONCLUSION

The tension between the divergent views on the purpose of legal education — Pericles and the Plumber — may, in time, come to be resolved by the inevitable march of technological progress. There will continue to be an increasing number of skill-based vocational tasks that will be completed by machines, and lawyers will be freed from many more process-driven tasks that currently occupy their time, energy and resources. Naturally, these developments have the potential to inform and shape the nature of legal education. The Second Machine Age will continue to fundamentally alter the way we relate to each other and to our work, and it is for human beings to consider where the possible opportunities to contribute meaningfully to knowledge disciplines, including the legal profession, arise. If the law is to retain its status as a profession pursuant to Susskind and Susskind's 'grand bargain', then an appreciation of the distinction Harari draws between intelligence and consciousness is required. It is this distinction which seems most likely to inform those roles and responsibilities that are irreducibly and ultimately human.¹²⁵ Locating those tasks that require creativity, complex reasoning or social intelligence (such as the ability to negotiate complex social relationships effectively) will remain the province of human beings. This must inform and shape legal education.

Universities and law schools must recognise the importance of legal education through its function as a knowledge community, intrinsically valuable for its capacity to add to the corpus of academic knowledge and human endeavour. Now more than ever in the history of university legal education, law schools must position themselves to be able to identify and respond to the future role of the legal profession, technological advancement and automation, the future of work, and to be able to frame education accordingly. To do so necessitates a shift away from viewing legal education in instrumental and vocational terms to an appreciation that human lawyers will come to require a broad and liberal education that enables interdisciplinary insights, creativity and social intelligence.

During the Age of Pericles, Athens prospered as a centre of education, art, culture and democracy. It was a place where the arts, literature and philosophy flourished. In the Second Machine Age, universities and law schools must carefully consider the

¹²⁴ Arthurs (n 17) 706.

¹²⁵ Harari (n 56).

continuing purpose of legal education as the nature of law and the legal profession continue to change. Invoking Twining's distinction, it seems that the future of legal education may, by necessity, swing the way of Pericles. But as Pericles is credited with having said, time is the wisest counsellor of all.¹²⁶

¹²⁶ Plutarch, *Plutarch's Lives of Illustrious Men*, tr AH Clough (Little, Brown and Company, 1878) 115.

HOW DOES THE AREA OF LAW PREDICT THE PROSPECTS OF HARMONISATION?

ABSTRACT

Although each set of uniform Acts is unique, sets within an area of law have some common traits that impact the prospects for achieving uniformity in the process of harmonisation. Identifying these areas to explain how uniformity can be achieved offers valuable insights. This study is based on an empirical examination of 84 sets of uniform Acts. The key findings suggest that specific areas of the law could be susceptible to higher or lower levels of uniformity. Legislation in the following areas has been found to be ‘highly uniform’: commercial and corporate law, government, and energy and resources. In contrast, legislation concerning child protection, the regulation of road transport and criminal law have the lowest uniformity.

This study has unique practical and valuable research implications. In some policy areas, a uniform national response will be important. If consensus between the jurisdictions is lacking, and the area of law has historically had low uniformity, achieving a national response will require additional effort, resources and time. This may or may not be attainable. The key findings of this study are expected to help policymakers, law reformers and legislative drafters overcome the uncertainty related to developing strategic directions for harmonisation.

I INTRODUCTION

Most studies have approached national uniform legislation by classifying it according to structure.¹ At the same time, there has been a limited focus on how the area of law impacts the prospects for harmonisation within the federation. Indeed, some areas of law might be more susceptible to harmonisation than others. Public policy and federalist theories have explored how governments operate and what happens before and after legislation is introduced into parliaments. What has been missing is the link between the macro approaches to national uniform

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¹ Australasian Parliamentary Counsel’s Committee, *Protocol on Drafting National Uniform Legislation* (4th ed, 21 February 2018) (‘PCC Protocol’).

legislation (as examined within those theories), and a micro approach that is more familiar to legislative drafters and policymakers working with a particular set of uniform Acts on a specific topic, for instance, e-conveyancing. It is precisely this terrain that needs to be adequately analysed.

Harmonisation, as a process within the federation (and national uniform legislation as a result), is often complex and riddled with uncertainty. At times, controversial topics have led to the abandonment of harmonisation initiatives.² However, if a better understanding of the effort and support needed for national reform to succeed can be achieved prior to embarking on the expensive exercise of harmonisation it can add some predictability. Knowing how susceptible a specific area of law is to harmonisation can foster this understanding.

It is contended that although every set of national uniform legislation is unique, the sets of uniform Acts within an area of law have some common traits that influence the ability to achieve uniformity. Identifying these areas to explain how sustainable uniformity can be achieved offers valuable insights that can help policymakers, law reformers and legislative drafters overcome the uncertainty related to sustaining uniformity and develop strategic directions for harmonisation.

II GAPS IN LITERATURE AND THE ‘LAW AS DATA’ APPROACH TO ANALYSIS OF NATIONAL UNIFORM LEGISLATION

What makes a study of uniformity within a particular area of law important and relevant today is the tension between the need for a national response to a growing number of challenges and the need to respect the constitutional distribution of legislative powers between the Commonwealth, state and territory jurisdictions. National uniform legislation relates to many aspects of society, such as the search for cancer cures, counter-terrorism cooperation and surrogacy regulation. These are just some of the challenges the founders of the Australian federation knew nothing about. Yet policymakers, legislative drafters and law reformers must still work within the confines of the *Australian Constitution* and its distribution of law-making powers. As a result, contemporary challenges are addressed by regulations adopted through national uniform legislation. Thanks to legislation that is ‘neither State nor federal but simply Australian’,³ the seemingly impossible has been achieved through

² *Occupational Licensing (Adoption of National Law) Act 2010* (NSW); *Occupational Licensing National Law (Queensland) Act 2010* (Qld); *Occupational Licensing National Law (South Australia) Act 2011* (SA); *Occupational Licensing National Law Act 2011* (Tas); *Occupational Licensing National Law Act 2010* (Vic). See John Sutton, ‘Productivity? Who Cares, as National Licensing Trashed by COAG’, *The Fifth Estate* (Web Page, 26 February 2014) <<https://www.thefifthestate.com.au/columns/spinifex/productivity-who-cares-as-national-licensing-trashed-by-coag>>. Sutton is a former board member of the National Occupational Licensing Authority.

³ Sir Owen Dixon, ‘Sources of Legal Authority’ in Severin Woinarski (ed), *Jesting Pilate: and Other Papers and Addresses by Sir Owen Dixon* (Law Book, 1965) 198, 201.

collaborative efforts among the Commonwealth, state and territory governments. National uniform legislation has resolved problems of international prison transfers within a federation in which federal prisons do not exist.⁴ The Australia-wide business names register has ensured a single, simple register that is easily accessible to all Australians, who do not have to manage numerous registers with inferior transparency and infrastructure. National uniform legislation has been called upon to redress issues created by federalism, achieving ‘objects that neither [jurisdiction] alone could achieve’.⁵ Without national uniform legislation, the advancement of the Australian federation would have been impeded.

Despite the benefits national uniform legislation brings, it should not be treated as a universal remedy. In some cases, preserving the diversity of legislation between jurisdictions is preferable. Uniformity is not a panacea, and uniformity alone cannot cure deficiencies in the law. As the Productivity Commission pointed out, ‘[n]ational uniformity can deliver economies of scale for governments and firms, reduce transaction costs and enhance competition within the regulated industry. However, achieving uniformity requires significant jurisdictional cooperation.’⁶ Uniformity must therefore be supported by adopting best practices for both policy and drafting.

The drafting of national uniform legislation has been referred to as ‘the art of the possible’.⁷ Policymakers, law reformers and legislative drafters have to navigate a labyrinth of issues and uncertain conditions involving a wide range of stakeholders, while maintaining a tight focus to build momentum for uniformity. In so doing, they have to respond to the demands of a multifaceted debate among actors from divergent ideological backgrounds with diverse and sometimes irreconcilable values and perspectives. Issues are often strongly contested, exemplified by the debates over euthanasia and marriage equality. In these complex conditions, the law reformers and legislative drafters have to give guidance and advice to policymakers on strategic direction for national reforms.

⁴ *International Transfer of Prisoners Act 1997* (Cth); *Crimes (Sentence Administration) Act 2005* (ACT) pt 11.2; *International Transfer of Prisoners (New South Wales) Act 1997* (NSW); *International Transfer of Prisoners (Northern Territory) Act 2000* (NT); *Prisoners International Transfer (Queensland) Act 1997* (Qld); *International Transfer of Prisoners (South Australia) Act 1998* (SA); *International Transfer of Prisoners (Tasmania) Act 1997* (Tas); *International Transfer of Prisoners (Victoria) Act 1998* (Vic); *Prisoners (International Transfer) Act 2000* (WA).

⁵ *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 580 (Brennan J).

⁶ Productivity Commission, *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation* (Supplement to Research Report, January 2009) 5.

⁷ Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (Report, November 2006) vii (*‘Harmonisation of Legal Systems’*).

Most studies have approached national uniform legislation by classifying it through structures: referred, applied and mirror.⁸ At the same time, there has been limited focus on how these structures differ in various areas of law. Indeed, some areas of law might have helped or hindered uniformity. Public policy and federalist theories study how governments operate and what happens before and after legislation is introduced to parliaments. Missing is the link between the macro approaches to national uniform legislation as studied within those theories, and a micro approach that is more familiar to legislative drafters and policymakers working with a particular set of uniform Acts. It is precisely this terrain that needs to be adequately analysed. Although every set of national uniform legislation is unique, the sets of uniform Acts can be grouped by areas of law. The prospects of identifying these areas offers valuable insights, which are expected to help policymakers, law reformers and legislative drafters overcome the uncertainty related to sustaining uniformity and develop strategic directions for harmonisation.

In addition, divergent views have been expressed on the role that national uniform legislation should play in a federation. In the mainstream literature, commentators have largely been in three camps: (1) those who have contended that a uniform approach should be contained to specific areas;⁹ (2) those who have asserted that uniform or referred legislation is preferable, with deviations allowed only when a clear ‘states’ right’ issue has been identified;¹⁰ and (3) others who have been passionate advocates of the independence of the states.¹¹ These camps have arrived at a stalemate and they might have missed opportunities to constructively explore solutions. Therefore, this article contributes to understanding the inner workings of uniformity through ‘law as data’ approach without insisting on normative advantages or disadvantages of uniformity.

The research problem this article addresses can be summarised as follows: the development and drafting of national uniform legislation is riddled with practical

⁸ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 2–4. Referred structures include legislation drafted by the Commonwealth in relation to subject matters for which the states and territories refer their legislative powers pursuant to s 51(xxxvii) of the *Australian Constitution*. Conversely, applied legislation is a structure that allows for the adoption or application of laws enacted in other jurisdictions. Applied structures can be extremely complicated due to the variety of ways in which jurisdictions may ‘apply’ the law. Acts are usually composed of two parts. Mirror legislation is the most versatile of the three structures and grants maximum freedom to the states and territories. Mirror legislation is drafted by one jurisdiction as a model for other jurisdictions to follow.

⁹ See, eg, John Wanna et al, *Common Cause: Strengthening Australia’s Cooperative Federalism* (Final Report, May 2009).

¹⁰ See, eg, Cheryl Saunders, ‘Cooperative Arrangements in Comparative Perspective’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 414.

¹¹ See, eg, Michelle Evans, ‘Rethinking the Federal Balance: How Federal Theory Supports States’ Rights’ (2010) 1 *The Western Australian Jurist* 14, 14.

and conceptual problems. The complexity involved means a substantial effort is required to develop and draft national uniform legislation. This analysis might assist decision-makers in allocating resources for harmonisation when a national approach is sought in a particular area of law.

Following a thorough examination of the research problem, it became clear that a one-dimensional methodology would be insufficient to understand and address the issues at hand. To rely entirely on a doctrinal method would be cumbersome and limited to the areas of the law previously studied. Further, due to the proliferation of national uniform legislation, carrying out doctrinal case studies as scholars have done in the past,¹² would restrict this article to inferences that could only be drawn from these specific Acts. The methodology had to be expanded.¹³ With more information available, evidence-based and transparent approaches are now accessible (and needed). Thus, rather than justifying binary state-centred or Commonwealth-centred positions, it is more fitting to follow a ‘mixed methods’ approach to studying national uniform legislation, incorporating doctrinal, empirical and reflexive methods.

The ‘law-as-data’ movement¹⁴ offers an alternative to the doctrinal and case study methods. Viewing legislation as data or text, rather than rules, allows important empirical data to be introduced and statistical methods to be used to analyse the data. Rather than examining the substance of the legislation, a ‘law as data’ approach allows for analysis of the factors affecting national uniform legislation.

Introducing evidence into the decision-making process partially resolves the issues related to the ‘inherently fluid and ambiguous’ system of policymaking.¹⁵ As Brian Head noted, policy-driven evidence ‘is an inevitable part of democratic debate’.¹⁶ However, policymakers usually make decisions under circumstances of ambiguity, basing their decisions on the ‘available evidence’.¹⁷ Thus, despite support for evidence-based policymaking in the literature, Giada De Marchi points out that it is not easy to introduce evidence into policymaking, adding that ‘supporting the

¹² See *Harmonisation of Legal Systems* (n 7).

¹³ This was done in line with recent developments in legal research; more recent research uses, for instance, the Delphi method as a way of decision-making in policy development. See Evgeny Guglyuvatyy and Natalie P Stoianoff, ‘Applying the Delphi Method as a Research Technique in Tax Law and Policy’ (2015) 30(1) *Australian Tax Forum* 179.

¹⁴ Dru Stevenson and Nicholas J Wagoner, ‘Bargaining in the Shadow of Big Data’ (2015) 67(4) *Florida Law Review* 1337, 1352.

¹⁵ David Adams, HK Colebatch and Christopher K Walker, ‘Learning about Learning: Discovering the Work of Policy’ (2015) 74(2) *Australian Journal of Public Administration* 101, 107.

¹⁶ Brian W Head, ‘Toward More “Evidence-Informed” Policy Making?’ (2015) 76(3) *Public Administration Review* 472, 475.

¹⁷ *Ibid* 474.

design, implementation and assessment of public policies is such a hard problem'.¹⁸ Nevertheless, there have been calls for an increase in substantive, evidence-based policymaking.¹⁹ As Gary Banks observed, '[w]ithout evidence, policy makers must fall back on intuition, ideology, or conventional wisdom — or, at best, theory alone. And many policy decisions have indeed been made in those ways'.²⁰ However, even though evidence-based knowledge and decision-making are finally being applied to policy content,²¹ the procedure for implementing policy has been largely unexplored in empirical studies. Therefore, a gap exists in the knowledge of evidence-based approaches to harmonisation and its procedural process. Recent developments in the 'law as data' movement have opened a new era in policymaking. Unfortunately, in Australia the processes of national reform and harmonisation have not yet benefitted from this new development.

The benefits of this approach include turning "data into insights" for better decision making'.²² Policymakers are likely to benefit from this development because even with the most experienced professionals, the 'ability to make sound judgments takes years of practice to develop and a lifetime to master'.²³ The 'law as data' movement 'invites lawyers to make a fundamental change in their approach to the law itself by looking to statistical patterns, predictors, and correlations'.²⁴ Complex decisions need not be subjected to a process of trial and error. As Dru Stevenson and Nicholas Wagoner concluded, '[c]onsidering what is at stake, it seems imprudent to rely on experience, intuition, or instinct alone in predicting the path of the law ... however, lawyers are not entirely to blame'.²⁵ Only a few years ago, this study would not have been possible. However, with advances in technology and the increased availability of data, it can now be carried out.

In terms of limitations, the scope of the empirical portion of this article has been restricted by: (1) the sample size; and (2) the focus on textual uniformity. In relation to sample size, the article only considers national uniform legislation provided in the Parliamentary Counsel's Committee (PCC) table, which lists 84 sets of the most

¹⁸ Giada De Marchi, Giulia Lucertini and Alexis Tsoukiàs, 'From Evidence-Based Policy Making to Policy Analytics' (2016) 236(1) *Annals of Operations Research* 15, 15.

¹⁹ See Gary Banks, 'Evidence-Based Policy Making: What Is It and How Do We Get It?' in John Wanna (ed), *Critical Reflections on Australian Public Policy: Selected Essays* (ANU Press, 2009) 107.

²⁰ *Ibid* 110.

²¹ See Demissie Alemayehu and Marc L Berger, 'Big Data: Transforming Drug Development and Health Policy Decision Making' (2016) 16(3) *Health Services and Outcomes Research Methodology* 92.

²² Fatima Dargam et al, 'The Role of Decision Making in the Big Data Era' (Conference Paper, EWG-DSS International Conference on Decision Support System Technology on Big Data Analytics for Decision Making, 27–29 May 2015) 3.

²³ Stevenson and Wagoner (n 14) 1345.

²⁴ *Ibid* 1342.

²⁵ *Ibid* 1347.

significant uniform Acts. The sample size is thus not exhaustive, but it is sufficient. The focus on textual uniformity provides a good indication of the level of uniformity in Australia, based on the similarities in legal traditions among Australian jurisdictions and other mechanisms supporting national uniform legislation projects. There is no set definition of uniformity but the uniformity of national uniform legislation can be divided by types into ‘textual uniformity’ (having identical text provisions)²⁶ and ‘applied uniformity’ (uniformity of an outcome once the text has been applied to the circumstances of a particular situation).²⁷ This distinction was first made by Roscoe Pound, discerning ‘law on the books’ from ‘law in action’ and giving examples of the difference between the two.²⁸ Textual uniformity has ‘a profound effect on the applied uniformity’.²⁹ There is no guarantee, however, that similar texts will have the same effect in application.³⁰ Theoretically, it is possible to assume that in some cases where there are almost identical provisions, the effect of legislation may be different when applied in practice due to various factors, including the impact of other Acts (for example, Bill of Rights legislation³¹ or Interpretation Acts³²). By focusing on textual uniformity, there is some risk that the nuances (for example, differences in definitions that rely on other state or territory legislation not included in the text of the compared act) will be lost in the process of seeking the ‘big picture’. Nevertheless, this focus can identify the main factors that impact uniformity, and with a sample of 84 sets of uniform Acts, the article can still unlock key insights into national uniform legislation.

III THE DEFINITION OF PRIMARY FACTORS FOR EMPIRICAL STUDY

As this study uses empirical methods, it is important to provide definitions from the outset. This section provides definitions for structures of national uniform legislation, area of law, level of uniformity, level of implementation, and clarifies terminology for the sets of uniform Acts.

²⁶ Camilla Baasch Andersen, ‘Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG’ in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2012) 31–3.

²⁷ *Ibid.*

²⁸ Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44(1) *American Law Review* 12, 13.

²⁹ Andersen (n 26) 33.

³⁰ *Ibid.*

³¹ *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities 2006* (Vic).

³² *Acts Interpretation Act 1901* (Cth); *Legislation Act 2001* (ACT); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Acts Interpretation Act 1931* (Tas); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA).

A *Structures for National Uniform Legislation*

The structures of national uniform legislation are flexible in form but primarily comprise of three structures: referred, applied and mirror. Referred structures include legislation drafted by the Commonwealth in relation to subject matters for which the states and territories refer their legislative powers pursuant to s 51(xxxvii) of the *Australian Constitution*. From the perspective of uniformity, referred structures are highly uniform and very rigid and may require extensive ‘political lobbying and negotiation’.³³ To date, the states and territories have only referred to the Commonwealth the power to legislate on the following matters: consumer credit;³⁴ corporations;³⁵ mutual recognition;³⁶ the resolution of financial disputes in de facto relationships;³⁷ and counter-terrorism.³⁸

Conversely, applied legislation is a structure that allows for the adoption or application of laws enacted in other jurisdictions.³⁹ Applied structures can be ‘extremely complicated’⁴⁰ due to the variety of ways in which jurisdictions may ‘apply’ the law.

³³ Gerard Carney, ‘Uniform Personal Property Security Legislation for Australia: A Comment on Constitutional Issues’ (2002) 14(1) *Bond Law Review* 5:1–5, 1–2.

³⁴ *Credit (Commonwealth Powers) Act 2010* (NSW); *Consumer Credit (National Uniform Legislation) Implementation Act 2010* (NT); *Credit (Commonwealth Powers) Act 2010* (Qld); *Credit (Commonwealth Powers) Act 2010* (SA); *Credit (Commonwealth Powers) Act 2009* (Tas); *Credit (Commonwealth Powers) Act 2010* (Vic); *Credit (Commonwealth Powers) Act 2010* (WA).

³⁵ *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Northern Territory Request) Act 2001* (NT); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA).

³⁶ *Mutual Recognition (Australian Capital Territory) Act 1992* (ACT); *Mutual Recognition (New South Wales) Act 1992* (NSW); *Mutual Recognition (Northern Territory) Act 1992* (NT); *Mutual Recognition (Queensland) Act 1992* (Qld); *Mutual Recognition (South Australia) Act 1993* (SA); *Mutual Recognition (Tasmania) Act 1993* (Tas); *Mutual Recognition (Victoria) Act 1998* (Vic); *Mutual Recognition (Western Australia) Act 2010* (WA).

³⁷ *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *De Facto Relationships Act 1991* (NT); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2009* (SA); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2006* (WA).

³⁸ *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory) Request Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA).

³⁹ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 1.

⁴⁰ Joe Edwards, ‘Applied Law Schemes and Responsible Government: Some Issues’ in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy: Contemporary Questions* (ANU Press, 2014) 85, 96.

These Acts are usually composed of two parts. The first part is jurisdiction specific and the second part (which usually appears in the appendix or schedule) is the applied law. From a policy development and drafting perspective, there is also the option to ‘adopt’ [the legislation] as amended from time to time or apply the legislation on an ‘as is’ basis; however, in such cases, future amendments must be enacted separately. Reviews of applied sets of uniform Acts are usually undertaken by a lead jurisdiction (ie, the jurisdiction that was initially responsible for drafting the legislation), or via the mechanism of a ministerial council or national regulator.

It is possible that after a lead jurisdiction drafts a bill, some jurisdictions will ‘apply’ it and others will ‘adopt’ it. This occurred in relation to the *Health Practitioner Regulation National Law Act 2009* (Qld) (‘the Queensland Act’), for which Queensland was the leading jurisdiction responsible for the drafting of the Act. The Northern Territory passed the *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT)) (‘the Northern Territory Act’) to adopt the Queensland Act. Notably, s 4 of the Northern Territory Act provides for any amendments to the Queensland Act to be automatically adopted in the Northern Territory. Conversely, Western Australia applied the Queensland Act by passing the *Health Practitioner Regulation National Law Act 2010* (WA). However, as the Act was applied rather than adopted, a separate Act would have to be passed by both Houses of the Western Australian Parliament before any amendments could be implemented.

Mirror legislation is the most versatile of the three structures and grants maximum freedom to the states and territories. Mirror legislation is drafted by one jurisdiction as a model for other jurisdictions to follow.⁴¹ In the academic literature and government reports, ‘mirror legislation’ and ‘model legislation’ have been used interchangeably.⁴² However it should be noted that the term ‘model’ has sometimes been used to describe a model draft bill that is centrally drafted by the PCC or developed by one of the jurisdictions. To avoid any confusion, this paper uses the term ‘mirror’ throughout when referring to this structure of national uniform legislation. Mirror legislation can be flexible and adapted in each jurisdiction to allow for local differences. The degree of uniformity required is expressed by the relevant ministerial council and may be incorporated into an intergovernmental agreement.

Notably, none of these structures exist in a vacuum. If necessary, any structure can be modified to achieve the optimal result in a particular case. Some of the Acts have continued to exist in their pure form; however, a certain percentage have become hybrids (eg, a combination of applied and mirror legislation). These three structures represent the predominant forms of legislation today.⁴³

⁴¹ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 1.

⁴² See John Phillimore, ‘Intergovernmental Relations in Australia: Increasing Engagement’ in Rupak Chattopadhyay and Karl Nerenberg (eds), *A Global Dialogue on Federalism* (McGill-Queen’s University Press, 2011) vol 8, 13.

⁴³ Australasian Parliamentary Counsel’s Committee, ‘National Uniform Legislation: Acts of Jurisdictions Implementing Uniform Legislation’ (Web Page, March 2015) <<http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf>> (‘National Uniform Legislation’).

B *Area of Law*

The area of law could be an important factor influencing sustainable uniformity, however, the extent of its influence is currently unknown. It is possible that the sustainable uniformity of national uniform legislation could be explained based on the area of law because some areas of law might be more prone to uniformity than others. If this is so, then uniformity could simply be unachievable in certain areas of the law.

Resolving this conundrum has been hindered by the inability to find a set of classifications for different areas of the law. In this study, several electronic databases were explored in the hope of finding and adopting such a classification system. Among the databases used at the time the search was conducted (July to December 2016), AustLII did not have a function to browse legislation by subject or area of law. Two databases, Westlaw and CCH, specialised in specific areas, but failed to cover some topics. The two remaining electronic databases were LawLex by SAI Global and LexisNexis AU. LawLex was found to be the most suitable database, as it provided an open access system specifically designed to work with legislation and had an intuitive index. One limitation experienced with this database was double classification. In some cases, a set of uniform Acts fell into two areas of law. When this happened, the primary area was entered for the purpose of this research.

Table 1: LawLex Subject Index (First Level)⁴⁴

Banking and Finance	Business, Trades and Professions
Commercial and Corporate Law	Criminal Law
Culture and Recreation	Education, Training and Research
Employment and Industrial Law	Energy and Resources
Environment	Family Law and Relationships
Government	Government Financing
Health	Human Rights
Immigration and Citizenship	Indigenous Australians
Insurance	Intellectual Property
International Law	Legal System
Media and Communications	Primary Industry
Privacy	Property, Housing and Development
Social Services	Superannuation
Taxation	Transport
Wills and Estates	

⁴⁴ SAI Global, 'Legislation Alerts and Research', *LawLex* (Web Page) <<http://my.lawlex.com.au>>.

The research for this study followed a simple protocol, based on the LawLex data. Once an Act was located in the database, the area listed by LawLex was adopted. For example, the Agricultural and Veterinary Chemicals legislation⁴⁵ was indexed by LawLex under Primary Industries. The Work Health and Safety legislation⁴⁶ was indexed under Employment and Industrial Law. The Uniform Evidence Acts were indexed under Legal Systems.⁴⁷

C *Level of Uniformity*

Each area of law was examined against the measurement of uniformity. Defining the level of uniformity is not easy, as the definition of uniformity is somewhat ambiguous. National uniform legislation is usually defined as ‘legislation which is the same, or substantially the same, in all or a number of jurisdictions’.⁴⁸ The author was unable to locate a source describing the meaning of ‘substantially the same’. As Mads Andenas and Camilla Andersen observed, ‘[i]t is important to note that uniformity is not an absolute but a variable ... the definition has to encompass the concept of varying degrees’.⁴⁹ A review of national and international sources produced no clear indication of any set levels of uniformity. However, there may be room for intentional ambiguity in defining uniformity. Therefore, rather than defining the term using a dictionary, a classification is proposed based on the degree of uniformity. To add some clarity and to facilitate the empirical study, it is proposed that the degree of uniformity be classified as follows:

- (1) ‘Almost identical’: legislation where all provisions or nearly all provisions are uniform (minimal differences, for instance, relating to drafting style, gender neutral language, fines or the order of provisions). Ultimate uniformity could be an illusory goal. Therefore, in this research, ‘almost’ is used as a qualifier.

⁴⁵ *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (Code set out in Schedule) and Regulations; *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW); *Agricultural and Veterinary Chemicals (Northern Territory) Act 1994* (NT); *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld); *Agricultural and Veterinary Chemicals (South Australia) Act 1994* (SA); *Agricultural and Veterinary Chemicals (Tasmania) Act 1994* (Tas); *Agricultural and Veterinary Chemicals (Victoria) Act 1994* (Vic); *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA).

⁴⁶ *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Bill 2014* (WA).

⁴⁷ *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (NI); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

⁴⁸ Renee Gastaldon, *National Scheme Legislation* (Research Brief No 27/2011, Parliamentary Library, Queensland Parliament, 2011) 1.

⁴⁹ Andersen (n 26) 31.

- (2) ‘Substantially uniform’: legislation where the majority of provisions are uniform. Examples include commercial arbitration⁵⁰ and sports drug testing.⁵¹ In quantitative terms, more than half the textual provisions were similar between jurisdictions.
- (3) ‘Partially uniform’: largely consistent legislation with distinct differences between jurisdictions. Arguably, this could be the stage at which national uniform legislation is no longer considered uniform, and therefore might not be counted as national uniform legislation. However, this proposition must be tested using the database. Birth, death and marriage legislation⁵² is classified as ‘partially uniform’ because less than a majority of the provisions are the same.
- (4) ‘Some similarities’: legislation with only some similar provisions or uniformity in principle only. Surrogacy legislation exemplified the ‘some similarities’ category⁵³ because the provisions are similar in principle but were still classified as national uniform legislation by the *Protocol on Drafting National Uniform Legislation* (‘PCC Protocol’).

The current level of textual uniformity was determined by assessing the level of similarity between the text of Acts in different jurisdictions. Based on the foregoing, national uniform legislation, as the product of harmonisation, can be dynamic and sufficiently versatile to include sets of uniform Acts with high uniformity and legislation that has only some similarity in its provisions.

D *Level of Implementation*

The level of uniformity is interconnected with the level of implementation. In some cases, however, there have been serious obstacles to enacting national uniform legislation across all jurisdictions. Therefore, both the level of uniformity and the level of implementation must be assessed. In cases where most jurisdictions have enacted

⁵⁰ *International Arbitration Act 1974* (Cth); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA).

⁵¹ *Drugs in Sport Act 1999* (ACT); *Sports Drug Testing Act 1995* (NSW); *Sports Anti-Doping Act 2003* (Qld); *Sports Drug Testing Act 2000* (SA); *Sports Drug Testing Act 1995* (Vic); *Sports Drug Testing Act 2001* (WA).

⁵² *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Registration Act 1996* (NT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1998* (WA).

⁵³ *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA) pt 2B; *Surrogacy Act 2012* (Tas); *Status of Children Act 1974* (Vic) pt IV; *Surrogacy Act 2008* (WA).

national uniform legislation, even if legislation in the participating jurisdictions has been ‘almost identical’, the overall national regime has been treated as non-uniform because some jurisdictions have not participated in the uniform scheme. Simply put in mathematical terms, instead of one regime, there might be two or three. An example of this would be national heavy vehicle regulation,⁵⁴ where the Northern Territory and Western Australia refused to participate.

In Australia, there are nine jurisdictions. However, in this study the implementation count has been adjusted in some cases. Such adjustments have been based on the inability of the Commonwealth to enact certain Acts due to the unavailability of the head of power under the *Australian Constitution*. When this has occurred, the count has been adjusted to treat eight jurisdictions as ‘all jurisdictions’. In other cases, national uniform legislation has been agreed to by a specific number of jurisdictions. For instance, cross-border justice mirror legislation was agreed to by three jurisdictions and implemented by all jurisdictions that agreed. The level of implementation was entered as ‘adjusted as all jurisdictions’. Mirror legislation for cross-border justice was called on to address the particular problem of law enforcement between three jurisdictions: Western Australia, the Northern Territory and South Australia, with regard to the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (‘NPY’) Lands.⁵⁵ All three jurisdictions enacted the legislation, which is why the implementation in this case had to be adjusted to reflect the intention: enactment of national uniform legislation relevant to three jurisdictions. In other words, this adjusted implementation shows that all relevant jurisdictions did enact the national uniform legislation.

Finally, s 122 of the *Australian Constitution* empowers the Commonwealth Parliament to make laws related to the territories. Only two territories are currently self-governed:⁵⁶ the Northern Territory,⁵⁷ and the Australian Capital Territory.⁵⁸ Section 122 of the *Australian Constitution* does not preclude the territories from legislating Acts with consistent terms. For instance, the Northern Territory enacted the *Succession to the Crown (Request) (National Uniform Legislation) Act 2013* (NT), even though it was not strictly necessary.

By level of implementation, the sets of uniform Acts were calculated and divided into the following classes:

⁵⁴ *Road Transport (General) Act 1999* (ACT) s 96; *Road Transport (Vehicle Registration) Act 1997* (NSW) pt 24; *Vehicle and Traffic Act 1999* (Tas) s 34A, sch 2; *Road Traffic Act 1974* (WA).

⁵⁵ *Cross-Border Justice Act 2009* (NT); *Cross-Border Justice Act 2009* (SA); *Cross-Border Justice Act 2008* (WA).

⁵⁶ The Norfolk Island Legislation Amendment Bill 2015 passed by the Australian Parliament on 14 May 2015 (assented on 26 May 2015) abolished self-government on Norfolk Island and transformed Norfolk Island into a council as part of the New South Wales regime.

⁵⁷ *Northern Territory (Self-Government) Act 1978* (Cth).

⁵⁸ *Australian Capital Territory (Self-Government) Act 1988* (Cth).

- (1) ‘All jurisdictions’: in cases where nine jurisdictions, or in cases where the Commonwealth has no head of power, all states and territories.
- (2) ‘Adjusted as all jurisdictions’: in cases where
 - (a) jurisdictions that have committed to uniform legislation have implemented a set of uniform Acts; or
 - (b) all jurisdictions have implemented the set of uniform Acts except the Territories due to s 122 of the *Australian Constitution*.
- (3) ‘Most jurisdictions’: referring to five jurisdictions or more (in cases where legislation has only been intended for some jurisdictions and the majority of those who committed to it have implemented it).
- (4) ‘Some jurisdictions’: referring to four or fewer jurisdictions.

E *Sets of Uniform Acts*

The unorthodox nature of this empirical study is in approaching the sets of uniform Acts as a unit of reference. The *PCC Protocol* informed this research because it contains a comprehensive and up to date database of ‘some of the more significant’ sets of uniform Acts.⁵⁹ The terminology for the sets of uniform Acts used in this research is borrowed word for word from the *PCC Protocol*. The sets of uniform Acts were updated where necessary. The PCC’s database of national uniform legislation comprises 84 sets of the most important national uniform legislation initiatives.⁶⁰

F *Key to Interpret Tables*

The following key should be used to interpret the Tables:

Structure	Symbol	Level of Uniformity	Symbol
Referred	R	Almost Identical	AI
Applied	A	Substantially Uniform	SU
Mirror	M	Partially Uniform	PU
Hybrid	H	Substantially Similar	SS

Jurisdictional Implementation	Symbol
All Jurisdictions	All
All Relevant Jurisdictions	Adj. All
Most Jurisdictions	Most
Some Jurisdictions	Some

⁵⁹ Australasian Parliamentary Counsel’s Committee, *Protocol on Drafting National Uniform Legislation* (2nd ed, July 2007) app 4.

⁶⁰ Australasian Parliamentary Counsel’s Committee, ‘National Uniform Legislation’ (n 43).

IV SPECIFIC AREAS OF LAW

A simple frequencies statistical analysis was used to identify the number of sets of uniform Acts that belonged to certain areas of the law. The findings indicate that in some areas, the need for national uniform legislation has been more notable, and more importantly, the area of law has had a direct impact on sustainable uniformity. However, there have been variations within areas of law, indicating the importance of not over-relying on any one area of law for uniformity. Data from all 84 sets of uniform Acts were used. Areas of law with three sets of uniform Acts or less were not analysed in this study.

Table 2: Distribution of sets of uniform Acts by area of law in LawLex Index

Area of law	Number of sets of uniform Acts
Criminal law	12
Commercial and corporate law	10
Legal systems	9
Transport	9
Government	7
Energy and resources	7
Health	5
Family law and relationships	5
Business, trades and professions	4
Property, housing and development	3
Employment and industrial law	3
Education, training and research	2
Environment	2
Taxation	2
Media and communications	1
Immigration and citizenship	1
Primary industry	1
Wills and estates	1
Banking and finance, culture and recreation, government financing, human rights, indigenous Australians, insurance, intellectual property, privacy, social services, superannuation, international law	0

A Criminal Law

The area of law with the greatest amount of national uniform legislation is criminal law. One possible explanation for this is that the *Australian Constitution* does not expressly empower the Commonwealth to legislate in matters of criminal law. Therefore, criminal law has traditionally been within the remit of the states and

territories. However, ‘crime knows no borders’⁶¹ and ‘sophisticated criminals’ are able to ‘transcend’ state and national borders.⁶² Further, changes in technology and communication have allowed for new forms of cybercrime and the need to find ways to combat it.

In addition to being the most prevalent, criminal law has been represented at all levels of uniformity. There has also been an apparent preference for ‘mirror structure’ in criminal law, with only anti-terrorism legislation using a referred structure. The preference for a mirror structure in criminal law is partially explained by the desire of the states and territories to remain independent and flexible, agreeing to refer only in exceptional circumstances.⁶³ However, the preference has not only been due to aspects of centralisation. Legislation in general has grown and crime threats have expanded in all jurisdictions.⁶⁴

Table 3: Criminal Law

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Crimes at sea	<i>Crimes at Sea Acts 2000</i> (Cth); 1998 (NSW); 2000 (NT); 2001 (Qld); 1998 (SA); 1999 (Tas); 1999 (Vic); 2000 (WA).	M	AI	All
Prisoners, international transfer	<i>International Transfer of Prisoners Act 1997</i> (Cth); <i>Crimes (Sentence Administration) Act 2005</i> (ACT); <i>International Transfer of Prisoners (New South Wales) Act 1997</i> (NSW); <i>(Northern Territory) Act 2000</i> (NT); <i>(South Australia) Act 1998</i> (SA); <i>International Transfer of Prisoners (Tasmania) Act 1997</i> (Tas); <i>International Transfer of Prisoners (Victoria) Act 1998</i> (Vic); <i>Prisoners International Transfer (Queensland) Act 1997</i> (Qld); <i>Prisoners (International Transfer) Act 2000</i> (WA).	M	AI	All
Terrorism	<i>Criminal Code Act 1995</i> (Cth); <i>Terrorism (Commonwealth Powers) Acts 2002</i> (NSW); 2002 (Qld); 2002 (SA); 2002 (Tas); 2003 (Vic); 2002 (WA); <i>Terrorism (Northern Territory) Request Act 2003</i> (NT).	R	AI	Adj. All

⁶¹ Simon Bronitt and Mark Finnane, ‘Comparative Perspectives on Australian-American Policing’ (2012) 46(3) *Journal of California Law Enforcement* 18, 20.

⁶² Nikos Passas, ‘Globalization, Criminogenic Asymmetries and Economic Crime’ (1999) 1(4) *European Journal of Law Reform* 399, 399.

⁶³ As discussed below regarding the ‘fear of insignificance’ phenomenon.

⁶⁴ See Gary F Manison, ‘Policing in the Australian Federation 1970–2010: A Changed Paradigm’ (PhD Thesis, Curtin University, 2015).

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Fines (reciprocal enforcement against bodies corporate)	<i>Magistrates Court Act 1930</i> (ACT); <i>Fines Act 1996</i> (NSW); <i>Fines and Penalties (Recovery) Act 2001</i> (NT); <i>State Penalties Enforcement Act 1999</i> (Qld); <i>Cross-Border Justice Act 2009</i> (Qld); <i>Monetary Penalties Enforcement Act 2005</i> (Tas); <i>Magistrates' Court Act 1989</i> (Vic); <i>Fines Penalties and Infringement Notices Enforcement Act 1994</i> (WA).	M	SU	All
Prisoners, interstate transfer	<i>Crimes (Sentence Administration) Act 2005</i> (ACT); <i>Prisoners (Interstate Transfer) Acts 1982</i> (NSW); 1983 (NT); 1982 (Qld); 1982 (SA); 1982 (Tas); 1983 (WA).	M	SU	All
Community based sentencing orders (transfers)	<i>Crimes (Sentence Administration) Act 2005</i> (ACT) ch 12; <i>Crimes (Interstate Transfer of Community Based Sentences) Act 2004</i> (NSW); <i>Interstate Transfer (Community-Based Sentences) Act 2009</i> (Tas); <i>Sentence Administration (Interstate Transfer of Community Based Sentences) Act 2009</i> (WA).	M	PU	Some
Criminal code	<i>Criminal Code Acts 2002</i> (Cth); 2002 (NT) pt IIAA; <i>Criminal Code 2002</i> (ACT).	M	PU	Some
DNA database	<i>Crimes Acts 1914</i> (Cth); 1958 (Vic) pt III div 1 sub-div 30A; <i>Crimes (Forensic Procedures) Acts 2000</i> (ACT) pt 2.11; 2000 (NSW) pt 11; <i>Police Administration Act 1978</i> (NT) pt VII div 7; <i>Police Powers and Responsibilities Act 2000</i> (Qld) ch 17 pt 5; <i>Criminal Law (Forensic Procedures) Act 2007</i> (SA) pt 5; <i>Forensic Procedures Act 2000</i> (Tas) pt 8; <i>Criminal Investigation (Identifying People) Act 2002</i> (WA) pt 10.	M	PU	All
Forensic procedures	<i>Crimes (Forensic Procedures) Acts 2000</i> (ACT); 2000 (NSW); <i>Police Administration Act 1978</i> (NT) pt VII div 7; <i>Criminal Law (Forensic Procedures) Act 2007</i> (SA); <i>Forensic Procedures Act 2000</i> (Tas); <i>Crimes Act 1958</i> (Vic) pt III div 1 sub-div 30A; <i>Criminal Investigation (Identifying People) Act 2002</i> (WA).	M	PU	All
Child protection (offender prohibition orders)	<i>Crimes (Child Sex Offenders) Act 2005</i> (ACT) pt 5A; <i>Child Protection (Offenders Prohibition Orders) Act 2004</i> (NSW); <i>Child Protection (Offenders Reporting and Registration) Act 2004</i> (NT); <i>Child Protection (Offender Prohibition Order) Act 2008</i> (Qld); <i>Community protection (Offender Reporting) Act 2004</i> (WA).	M	SS	Adj. All
Child protection (offender registration)	<i>Crimes (Child Sex Offenders) Act 2005</i> (ACT); <i>Child Protection (Offenders Registration) Act 2000</i> (NSW); <i>Child Protection (Offenders Reporting and Registration) Act 2004</i> (NT); <i>Child Protection (Offender Reporting) Act 2004</i> (Qld); <i>Child Sex Offenders Registration Act 2006</i> (SA); <i>Community Protection (Offender Reporting) Act 2005</i> (Tas); <i>Sex Offenders Registration Act 2004</i> (Vic); <i>Community Protection (Offender Reporting) Act 2004</i> (WA).	M	SS	Adj. All

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Child protection orders (children and young persons (reciprocal arrangements))	<i>Children and Young People Act 2008</i> (ACT) ch 17; <i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) ch 14A; <i>Care and Protection Act 1999</i> (Qld) ch 7; <i>Children's Protection Act 1993</i> (SA) pt 8; <i>Children, Young Persons and Their Families Act 1997</i> (Tas) pt 8; <i>Children, Youth and Families Act 2005</i> (Vic) sch 1; <i>Children and Community Services Act 2004</i> (WA) pt 6.	M	SS	Adj. All

Minimal jurisdictional differences may be perceived as easier to overcome. However, in practice that has not always been the case, as an examination of Saskia Hufnagel's theory illustrates. Minor differences may become a point of dispute, due to 'fear of insignificance' (the situation in which jurisdictional differences become a point of identity and minor differences become almost impossible to harmonise).⁶⁵ In other words, it is 'the fear of state actors to lose their individual identities in the process of harmonisation' that may be the problem.⁶⁶ Hufnagel conducted interviews with Australian police enforcement practitioners from various jurisdictions to gain insight into their views on harmonising criminal procedure. According to the interviews, the respondents perceived the development of uniform criminal procedure legislation as encroaching on their powers.⁶⁷ Beyond the loss of identity, in cases where differences between jurisdictions are not significant, jurisdictions may be less enthusiastic about going through the negotiation process because there is not much to be gained.⁶⁸

To illustrate a typical set of uniform Acts in this area, the *Child Protection (Offender Prohibition Orders and Offender Registration)*⁶⁹ sets of uniform Acts are illustrative. The sets of Acts regulating sex offender registration have minimal textual similarity. The legislation is based on the New South Wales model, with some revisions.⁷⁰ It was agreed to by the Australasian Police Ministers' Council on 30 June 2004.⁷¹ The goal of the legislation was to reduce the probability of re-offending by requiring sex offenders to register with the police and regularly provide information on their

⁶⁵ Saskia Hufnagel, "'The Fear of Insignificance': New Perspectives on Harmonising Police Cooperation in Europe and Australia' (2010) 6(2) *Journal of Contemporary European Research* 165, 190.

⁶⁶ Ibid 165.

⁶⁷ Ibid 170.

⁶⁸ Ibid 165.

⁶⁹ See Table 3 for *Child Protection (Offender Prohibition Orders and Offender Registration)* legislative framework.

⁷⁰ Victorian Law Reform Commission, *Sex Offenders Registration* (Final Report, 2011) 21.

⁷¹ NSW Ombudsman, *Review of the Child Protection Register* (Report, May 2005) 3.

location within Australia or overseas. There have been substantial differences in regulations between jurisdictions because the legislation must fit into the existing framework of laws and advocacy coalitions within the corresponding police force units, departments of corrections, departments of children and families, departments of justice, local communities of Crime Stoppers and other interest groups within the area. These sets of uniform Acts regulate the two most controversial areas of harmonised legislation in Australia: children and criminal law. Thus, there is only minimal uniformity among jurisdictions in this area.

The set of uniform Acts called *Court Information Technology (Video Link)*⁷² is another typical case. The textual similarity within the set of uniform provisions is minor and would be classified as ‘some similarities’. The textual differences between jurisdictions have mostly related to the different types of technology used, pointing to the strong beliefs held by advocacy coalitions within the court system and corresponding departments in terms of the necessary policy.

Notwithstanding other difficulties, the jurisdictions have been willing to act swiftly and uniformly in the face of national crises. An atypical case of uniformity within the area of criminal law is counter-terrorism legislation. In the historically unsustainable area of criminal law, counter-terrorism legislation has been promptly implemented by all jurisdictions in the most uniform referred structure without any consecutive harmonisation efforts. Counter-terrorism legislation is the only set of uniform Acts in criminal law that falls into the referred structure, and it is categorised as ‘almost identical’. Prior to 2002, counter-terrorism regulations relied heavily on the criminal law of the states and territories, with the underlying assumption that the Commonwealth could rely on the criminal laws of general application, for instance the provisions regulating murder or grievous bodily harm.⁷³ Following the terrorist attacks on 11 September 2001, the Australian Government commissioned the then Secretary of the Attorney-General’s Department, Robert Cornall, to lead a review of counter-terrorism arrangements (‘Cornall Review’) to ensure that Australia had sufficient capability to respond to a terrorist threat.⁷⁴

On 5 April 2002, the heads of the Commonwealth, states and territories agreed ‘to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation’.⁷⁵ The Australian Bills were modelled on

⁷² See Table 6 for *Court Information Technology (Video Link)* legislative framework.

⁷³ See generally Anthony Reilly, ‘The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005’ (2007) 10(1) *Flinders Journal of Law Reform* 81.

⁷⁴ Daryl Williams, ‘Upgrading Australia’s Counter-Terrorism Capabilities’ (News Release 1080, 18 December 2001).

⁷⁵ Council of Australian Governments, *Agreement on Counter-Terrorism Laws* (Inter-governmental Agreement, 25 June 2004) recital 1.

UK legislation, with some modifications.⁷⁶ The standalone *Anti-Terrorism Act 2005* (Cth) was enacted in 2004. The states and territories referred certain matters related to terrorist acts to the Commonwealth Parliament in accordance with s 51(xxxvii) of the *Constitution*.⁷⁷ It was also agreed that any amendment to the Commonwealth legislation would be subject to consultation between the jurisdictions.⁷⁸ The action was prompt, and sustainability in this case was secured by both the referred structure and a national regulator: the Australian Criminal Intelligence Commission.

Counter-terrorism legislation has been somewhat controversial because it has given the law enforcement agencies wide powers to detain and question.⁷⁹ Nevertheless, the jurisdictions have agreed to cooperate to prevent terrorist attacks, and the implementation of counter-terrorism legislation has been quite effective. The Commonwealth Attorney-General's website states: 'Effective laws are a critical component of Australia's response to threatened or actual terrorist acts'.⁸⁰ Yet further harmonisation of the criminal law affixed to counter-terrorism cooperation has continued to be criticised. To counter that, in 2017, then Prime Minister Malcolm Turnbull urged, '[i]t's vital that we have nationally consistent terrorism laws. I'm asking state and territory leaders to work with me to deliver safety and security'. He also asserted that

[p]eople who are using the internet to spread terrorist propaganda and instructions will be tracked down and caught. ... We need nationally consistent pre-charge detention laws so that those who seek to do us harm can be held to account no matter where they are.⁸¹

⁷⁶ Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8(2) *Oxford University Commonwealth Law Journal* 159.

⁷⁷ *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory) Request Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA).

⁷⁸ Council of Australian Governments (n 75).

⁷⁹ See Michael Head, 'Another Threat to Democratic Rights: ASIO Detentions Cloaked in Secrecy' (2004) 29(3) *Alternative Law Journal* 127.

⁸⁰ Attorney-General (Cth), *Australia's Counter-Terrorism Laws* (Web Page) <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/AustraliascounterterrorismLaws.aspx>>.

⁸¹ James Massola, 'Malcolm Turnbull Pushes for Law to Detain Terror Suspects for Up To 14 Days before Charges', *The Sydney Morning Herald* (online, 3 October 2017) <<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-pushes-for-law-to-detain-terror-suspects-for-up-to-14-days-before-charges-20171003-gytil.html>>.

The idea of toughening counter-terrorism laws currently appears to be well supported by the jurisdictions,⁸² with concerns over the threat to multiculturalism fading. Taking this into consideration, it is unlikely the policy will be changed or that sustainable uniformity will be reversed based on the arguments raised by the policy's opponents.

Overall, criminal law can be characterised as the most voluminous and least uniform area of law with a lower level of implementation. It is highly likely that it will undergo even more serious shifts, given the opportunities created by the internet for a range of illegal enterprises. This may result in state and territory borders becoming less important, and national and international responses becoming more important. For example, the infamous 'Silk Road' website has an electronic platform for selling narcotics, fake identification documents and other illegal goods.⁸³ Peter Nash, an Australian citizen convicted for his involvement with the website, gave instructions in a discussion thread on how to bypass Australian customs authorities when trafficking narcotics.⁸⁴ The common threats and challenges faced by all Australian jurisdictions suggest that cooperation is becoming increasingly important for challenges that go beyond the state, territory and national borders.

B *Commercial and Corporate Law*

Commercial and corporate law has been a highly publicised area of harmonisation due to the widely-recognised importance of economic integration, increased mobility and technological advances. These have all contributed to erasing legal boundaries and inconsistent regulations. In addition, there have been powerful lobbying proponents supporting the full harmonisation of commercial and corporate law. These have included organisations such as major banks, large corporations,⁸⁵ advocates like the Business Council of Australia,⁸⁶ and various associations representing the rights of business persons and consumers.

⁸² 'Leaders Vow to Toughen Anti-terror Laws', *SBS News* (online, 9 June 2017) <<http://www.sbs.com.au/news/article/2017/06/09/leaders-vow-toughen-anti-terror-laws>>.

⁸³ James Ball, 'Silk Road: The Online Drug Marketplace That Officials Seem Powerless to Stop', *The Guardian* (online, 22 March 2013) <<https://www.theguardian.com/world/2013/mar/22/silk-road-online-drug-marketplace>>.

⁸⁴ Peter Mitchell, 'Australian Peter Nash to Be Sentenced Over Role in Silk Road Drug-Trafficking Website', *The Sydney Morning Herald* (online, 26 May 2015) <<http://www.smh.com.au/world/australian-peter-nash-to-be-sentenced-over-role-in-silk-road-drugtrafficking-website-20150525-gh9jes.html>>.

⁸⁵ See ANZ Bank, Submission No 82 to the Productivity Commission, *Review of Australia's Consumer Policy Framework* (May 2007); Telstra Corporation Ltd, Submission No 7 to House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and Between Australia and New Zealand* (November 2006).

⁸⁶ 'Towards a Seamless Economy', *Business Council of Australia* (Web Page, 2008) <<http://bca.com.au/towards-a-seamless-economy>>.

Commercial and corporate legislation is highly uniform, falling within either the ‘almost identical’ or ‘substantially uniform’ categories. Table 4 illustrates the harmonisation of commercial and corporate law, highlighting its uniformity and high degree of consensus across jurisdictions. The Hon Michael Kirby AC CMG stressed that, ‘although uniformity is not an end in itself or desirable in every area of the law, there is little doubt that in areas of business law and commercial law there is much to be said for greater uniformity’.⁸⁷ All sets of uniform Acts fall within the category of ‘almost identical’ or ‘substantially uniform’, and have a very high level of implementation in all jurisdictions. The legislation has largely been subject to consecutive harmonisation, with most sets of uniform Acts represented by referred and applied structures. One set of uniform Acts represented by mirror legislation is electronic transactions legislation. This points to a wider consensus between jurisdictions on the benefits of harmonising commercial and corporate law.

Table 4: Commercial and Corporate Law

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Business names	<i>Business Names Registration (Transition to Commonwealth) Act 2012 (ACT); Business Names (National Uniform Legislation) Request Act 2011 (NT); Business Names (Commonwealth Powers) Acts 2011 (Qld); 2012 (SA); 2011 (Tas); 2011 (Vic); 2012 (WA); 2011 (NSW).</i>	R	AI	All
Competition policy reform	<i>Competition Policy Reform Act 1996 (ACT); (New South Wales) Act 1995 (NSW); (Northern Territory) Act 1996 (NT); (Queensland) Act 1996 (Qld); (South Australia) Act 1996 (SA); (Tasmania) Act 1996 (Tas); (Victoria) Act 1995 (Vic); (Western Australia) Act 1996 (WA); (Taxing) Act 1996 (WA).</i>	A	AI	All
Consumer protection	<i>Competition and Consumer Act 2010 (Cth) sch 2; Fair Trading (Australian Consumer Law) Act 1992 (ACT), amended by Fair Trading (Australian Consumer Law) Amendment Act 2010 (ACT); Fair Trading Act 1987 (NSW), amended by Fair Trading Amendment (Australian Consumer Law) Act 2010 (NSW); Consumer Affairs and Fair Trading Act 1990 (NT); Fair Trading Act 1989 (Qld), amended by Fair Trading (Australian Consumer Law Amendment) Act 2010 (Qld); Fair Trading Act 1987 (SA), amended by Statutes Amendment and Repeal (Australian Consumer Law) Act 2010 (SA); Australian Consumer Law (Tasmania) Act 2010 (Tas); Fair Trading Act 1999 (Vic), amended by Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic); Fair Trading Act 2010 (WA).</i>	A	AI	All

⁸⁷ Michael Donald Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 55.

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Corporations	<i>Corporations Act 2001</i> (Cth); <i>Corporations (Commonwealth Powers) Acts 2001</i> (NSW); <i>2001</i> (Qld); <i>2001</i> (SA); <i>2001</i> (Tas); <i>2001</i> (Vic); <i>2001</i> (WA); <i>Corporations (Northern Territory Request) Act 2001</i> (NT).	R	AI	Adj. All
Mutual recognition	<i>Mutual Recognition Act 1992</i> (Cth); <i>(Australian Capital Territory) Act 1992</i> (ACT); <i>(New South Wales) Act 1992</i> (NSW); <i>(Northern Territory) Act 1992</i> (NT); <i>(Queensland) Act 1992</i> (Qld); <i>(South Australia) Act 1993</i> (SA); <i>(Tasmania) Act 1993</i> (Tas) (adopted); <i>(Victoria) Act 1998</i> (Vic) (adopted); <i>(Western Australia) Act 2010</i> (WA), replacing <i>Mutual Recognition (WA) Act 1995</i> (WA) (applied).	R	AI	All
Trans-Tasman mutual recognition	<i>Trans-Tasman Mutual Recognition Acts 1997</i> (Cth); <i>1997</i> (ACT); <i>(New South Wales) Act 1996</i> (NSW); <i>1998</i> (NT); <i>(Queensland) Act 2003</i> (Qld); <i>(South Australia) Act 1999</i> (SA); <i>(Tasmania) Act 2003</i> (Tas) (adopting); <i>(Victoria) Act 1998</i> (Vic); <i>(Western Australia) Act 2007</i> (WA).	R	AI	All
Co-operatives	<i>Co-Operatives (Adoption of National Law) Act 2012</i> (NSW); <i>Co-Operatives (National Uniform Legislation) Act 2015</i> (NT); <i>Co-Operatives National Law (South Australia) Acts 2013</i> (SA); <i>(Tasmania) Act 2015</i> (Tas); <i>2013</i> (Vic).	A	SU	Most
Electronic transactions	<i>Electronic Transactions Acts 1999</i> (Cth); <i>2001</i> (ACT); <i>2000</i> (NSW); <i>Electronic Transactions (Northern Territory) Act 2000</i> (NT); <i>(Queensland) Act 2001</i> (Qld); <i>2000</i> (SA); <i>2000</i> (Tas); <i>(Victoria) Act 2000</i> (Vic); <i>2003</i> (WA).	M	SU	All
Price exploitation	<i>Price Exploitation Code (New South Wales) Act 1999</i> (NSW); <i>New Tax System Price Exploitation Code (Northern Territory) Act 1999</i> (NT); <i>(Queensland) Act 1999</i> (Qld); <i>(South Australia) Act 1999</i> (SA); <i>(Tasmania) Act 1999</i> (Tas); <i>(Victoria) Act 1999</i> (Vic); <i>(Western Australia) Act 1999</i> (WA); <i>(Taxing) Act 1999</i> (WA).	A	SU	All

Business names legislation is an example of a typical progression that has experienced several waves of harmonisation. In the 1960s, the first wave of intended harmonisation produced mirror legislation based on a model Bill developed by the Standing Committee of Attorneys-General of the Commonwealth and states.⁸⁸ At that stage, the registration of business names was administered by the state and territory governments. On 3 July 2008, the Council of Australian Governments ('COAG') agreed to the development of a single national system for registering and regulating business names as part of the Commonwealth Government's seamless national economic

⁸⁸ See Table 4 for *Business Names* legislative framework.

reforms.⁸⁹ The states and territories would refer matters to the Commonwealth, and the Commonwealth would maintain online registration for both Australian Business Numbers and business names. Instead of the state and territory governments administering the register, it would be done by the Australian Securities and Investments Commission ('ASIC'). All jurisdictions have made the referral.⁹⁰ This register currently allows businesses to register once for all jurisdictions and identify a unique business name that can be used to build a brand throughout Australia. In addition, the register can be used to determine the identity of the entity behind the business name and its contact details.

Unlike business names, the trajectory of growth in uniformity through consecutive harmonisation of corporations legislation has been atypical. This legislation has gone through spontaneous harmonisation from a mirror to applied and then to a referred structure. The Acts went through the stages of spontaneous uniformity in the 1800s, when most of the Australian jurisdictions enacted company legislation based on the *Companies Act 1862* 25 & 26 Vict c 89 borrowed from England.⁹¹ From 1960 to 1969, each jurisdiction enacted uniform mirror legislation.⁹² Later, in an effort to bring greater uniformity, an applied structure was implemented: the *Corporations Act 1989* (Cth). State and territory legislation applied the laws of the *Corporations Act 1989* (Cth) in their jurisdictions and conferred powers on the Australian Securities Commission, now known as ASIC. As a result of case law putting constitutionality of cross-vesting provisions in doubt,⁹³ the *Corporations Act 2001* (Cth) in referred structure superseded the *Corporations Act 1989* (Cth) in applied structure to become the legislation governing corporations today. State and territory jurisdictions referred their powers to make laws to the Commonwealth with respect to the relevant subject matters through the uniform legislative framework.⁹⁴

Even in the case of corporate legislation, despite strong grounding from spontaneous harmonisation, full uniformity has not been achieved almost 60 years after the initial *intended* harmonisation attempt. In theory, the enactment of the *Corporations Act 2001* (Cth) should have resulted in 'a fully unified system'.⁹⁵ However, as argued by The Hon Reginald Barrett AO, although Australia has come a long way, 'we have not reached and will probably never reach a point of perfectly harmonised

⁸⁹ Explanatory Memorandum, Business Names Registration Bill 2011 (Cth) 3.

⁹⁰ See Table 4 for *Business Names* legislative framework.

⁹¹ *Companies Act 1874* (NSW); *Companies Act 1863* (Qld); *Companies Act 1864* (SA); *Companies Act 1869* (Tas); *Companies Act 1864* (Vic).

⁹² *Companies Ordinance 1962* (ACT); *Companies Ordinance 1963* (NT); *Companies Act 1961* (NSW); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA).

⁹³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

⁹⁴ See Table 4 for *Corporations* legislative framework.

⁹⁵ Tom Bathurst, 'The Historical Development of Corporations Law' (Speech, Francis Forbes Society for Australian Legal History: Introduction to Australian Legal History Tutorials, 3 September 2013) 18 [57].

uniformity’.⁹⁶ Examples of divergence include Tasmanian legislation in which additional preclusions were added for the appointment of an auditor. Specifically, an auditor could be anyone other than a particular office-holder.⁹⁷ Another example is the New South Wales legislation allowing court proceedings to be brought against a company in liquidation when leave to proceed has not been granted under the *Corporations Act 2001* (Cth).⁹⁸ In addition, due to the insertion of pt 1.1A into the Commonwealth Act entitled ‘Interaction between corporations legislation and State and Territory laws’, sections of the Act can be excluded from operation in a state or territory. Inclusion of these roll-over provisions has affected uniformity.

Overall, the area of commercial and corporate law has been characterised by a high level of uniformity and implementation. Absolute uniformity, however, even for legislation in referred structure might still be an elusive goal for the Australian federation.

C *Transport Law*

Transport law is the third most important area regulated by national uniform legislation. It regulates all types of transport: air, sea, road and rail. Legislative powers on matters of transport are not expressly assigned in the *Australian Constitution*. However, the regulation of transport has been treated as falling under s 51(i) ‘trade and commerce’ in some cases. ‘Trade and commerce’ was defined in the early case of *W & A McArthur Ltd v Queensland*,⁹⁹ in which the court found ‘the mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls “trade and commerce”’.¹⁰⁰

The need for inter-jurisdictional cooperation in ‘trade and commerce’ (in accordance with s 51(i) of the *Australian Constitution*), involves a vital distinction: interstate transport can fall within the remit of the Commonwealth, but transport within a state or territory is regulated by state or territory law. This distinction has not been clear in some circumstances. Given the advances in modern transport, as Dixon CJ pointed out, ‘[t]he distinction which is drawn between inter-State trade and the domestic trade of a State ... may well be considered artificial and unsuitable to modern times’.¹⁰¹

The constitutional head of power covers both interstate and intra-state activities, where they are ‘inseparably connected’.¹⁰² The mere fact that it might be uneco-

⁹⁶ RI Barrett, ‘Towards Harmonised Company Legislation: “Are We There Yet?”’ (2012) 40(2) *Federal Law Review* 141, 159.

⁹⁷ *Irrigation Company Act 2011* (Tas).

⁹⁸ *Dust Diseases Tribunal Act 1989* (NSW).

⁹⁹ (1920) 28 CLR 530.

¹⁰⁰ *Ibid* 547.

¹⁰¹ *Wragg v New South Wales* (1953) 88 CLR 353, 385–6.

¹⁰² *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194, 221 (Menziez J).

nomical to offer a purely intra-state service has been considered insufficient for the Commonwealth to regulate travel and transportation nationally.¹⁰³ Nevertheless, a remedy for this is now being sought through national uniform legislation.¹⁰⁴ Although the states and territories have mostly enacted applied legislation and vested powers regulating air transport to the Commonwealth,¹⁰⁵ other types of transport have been subject to recent major reforms. For instance, on 19 August 2011, ‘in a major step forward in improving the efficiency of transport regulation’,¹⁰⁶ COAG approved three intergovernmental agreements on heavy vehicles, rail and maritime safety.

The level of uniformity in transport law varies, as seen in Table 5. The regulation of air transport is the most uniform, regulation of sea and rail transport is less uniform, and regulation of road transport is divergent. As for consensus, only the set of Acts regulating heavy vehicle registration charges have had a low level of implementation. The level of the remaining sets of Acts has been high. Nonetheless, the low implementation of legislation of heavy vehicle registration charges has been changing as this article is being written. The National Transport Commission has announced its approval of amendments to the Heavy Vehicle Charges Model Law conceived by the COAG Transport and Infrastructure Council.¹⁰⁷ All Australian jurisdictions are expected to implement the model law and delegated legislation.¹⁰⁸

Table 5: Transport Law

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Air navigation	<i>Air Navigation Act 1920</i> (Cth); <i>1938</i> (NSW); <i>1937</i> (Qld); <i>1937</i> (SA); <i>1937</i> (Tas); <i>1958</i> (Vic); <i>1937</i> (WA).	A	AI	Adj. All
Civil aviation (carriers’ liability)	<i>Civil Aviation (Carriers’ Liability) Act 1959</i> (Cth); <i>1967</i> (NSW); <i>1964</i> (Qld); <i>1962</i> (SA); <i>1963</i> (Tas); <i>1961</i> (Vic); <i>1961</i> (WA).	A	AI	Adj. All

¹⁰³ *A-G (WA) v Australian National Airlines Commission* (1976) 138 CLR 492, 500–501 (Barwick CJ).

¹⁰⁴ Regulations under the *Air Navigation Act 1938* (NSW); *Air Navigation Act 1937* (Qld); *Air Navigation Act 1937* (SA); *Air Navigation Act 1937* (Tas); *Air Navigation Act 1937* (WA).

¹⁰⁵ See Table 5 for *Air navigations* legislative framework.

¹⁰⁶ *Council of Australian Governments* (Web Page) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communicue-19-august-2011>>.

¹⁰⁷ ‘Heavy Vehicle Charges Model Law’, *National Transport Commission* (Web Page) <<https://www.ntc.gov.au/laws-and-regulations/heavy-vehicle-charges-model-law>>.

¹⁰⁸ *Ibid.*

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Domestic commercial vessels	<i>Marine Safety Act 1998</i> (NSW) pt 1A; <i>Marine Safety (Domestic Commercial Vessel) (National Uniform Legislation) Act 2013</i> (NT); <i>Marine Safety (Domestic Commercial Vessel) National Law (Application) Act 2013</i> (SA); <i>Marine Safety (Domestic Commercial Vessel National Law Application) Acts 2013</i> (Tas); 2013 (Vic).	R	AI	Adj. All
Bills of lading	<i>Sea-Carriage Documents Act 1997</i> (NSW); 1998 (NT); 1996 (Qld); 1998 (SA); 1997 (Tas); 1998 (Vic); 1997 (WA).	M	SU	Adj. All
Heavy vehicle regulation	<i>Heavy Vehicle National Law Act 2012</i> (Qld); (<i>ACT</i>) <i>Act 2013</i> (ACT); (<i>South Australia</i>) <i>Act 2013</i> (SA); (<i>Tasmania</i>) <i>Act 2013</i> (Tas); <i>Heavy Vehicle National Law Application Act 2013</i> (Vic); <i>Heavy Vehicle (Adoption of National Law) Act 2013</i> (NSW).	A	SU	Most
Rail safety	<i>Rail Safety (Adoption of National Law) Act 2012</i> (NSW); <i>Rail Safety (National Uniform Legislation Act 2012</i> (NT); <i>Rail Safety National Law (South Australia) Act 2012</i> (SA); 2015 (WA); (<i>Tasmania</i>) <i>Act 2012</i> (Tas); (<i>ACT</i>) <i>Act 2014</i> (ACT); 2000 (Vic), as amended by <i>Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Act 2013</i> (Vic).	A	SU	Most
Road transport legislation (road rules)	<i>Road Transport (Safety and Traffic Management) Regulation 2000</i> (ACT) cl 6; <i>Road Rules 2008</i> (NSW); 2009 (Tas); <i>Traffic Regulations 1999</i> (NT) sch 3; <i>Transport Operations (Road Use Management — Road Rules) Regulation 2009</i> (Qld); <i>Road Traffic Act 1961</i> (SA); 1974 (WA) (and regulations); <i>Road Safety Road Rules 2009</i> (Vic).	H	SU	All
Heavy vehicles registration charges	<i>Road Transport (General) Act 1999</i> (ACT) s 96; <i>Road Transport (Vehicle Registration Act 1997</i> (NSW) pt 24; <i>Vehicle and Traffic Act 1999</i> (Tas) s 34A, sch 2; <i>Road Traffic Act 1974</i> (WA).	M	PU	Some
Road and rail (dangerous goods)	<i>National Transport Commission (Model Legislation — Transport of Dangerous Goods by Road or Rail) Regulations 2007</i> (Cth); <i>Dangerous Goods (Road Transport) Act 2009</i> (ACT); <i>Dangerous Goods (Road and Rail Transport) Act 2008</i> (NSW); <i>Act 2010</i> (Tas); <i>Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act 2011</i> (NT); <i>Dangerous Goods Act 1985</i> (Vic).	H	PU	All

Overall, the area of transport law is characterised by high uniformity and implementation, with the exception of road transport regulation.

D Legal Systems

Table 6 displays the level of uniformity, structure, and implementation in the area of legal systems. As shown, ‘legal systems’ mostly covers legislation that regulates

the judicial system. It is also an area of law that has traditionally been regulated at the state and territory levels. All of these Acts fall within the mirror structure. The regulation allowing higher flexibility appears to be the preferred approach of jurisdictions in this area of the law. However, as Table 6 illustrates, even if all sets of Acts in this area are mirror in structure, the levels of uniformity range from ‘almost identical’ to ‘some similarities’. Further, legal systems have high implementation, with only one set of uniform Acts (the *Evidence Acts*) enacted in ‘most jurisdictions’. All other sets of uniform Acts in the area of legal systems have been enacted by ‘all jurisdictions’ or ‘adjusted as all jurisdictions’.

Table 6: Legal Systems

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Cross vesting	<i>Jurisdiction of Courts (Cross-vesting) Acts</i> 1987 (Cth); 1993 (ACT); 1987 (NSW); 1987 (NT); 1987 (Qld); 1987 (SA); 1987 (Tas); 1987 (Vic); 1987 (WA).	M	AI	Adj. All
Federal Courts (State jurisdiction)	<i>Federal Courts (State Jurisdiction) Acts</i> 1999 (NSW); 1999 (Qld); 1999 (SA); 1999 (Tas); 1999 (Vic); 1999 (WA).	M	AI	Adj. All
Commercial arbitration	<i>International Arbitration Act</i> 1974 (Cth); <i>Commercial Arbitration Acts</i> 2010 (NSW); 2013 (Qld); (SA); 2011 (Tas); 2011 (Vic); 2012 (WA); <i>Commercial Arbitration (National Uniform Legislation) Act</i> 2011 (NT).	M	SU	All
Evidence	<i>Evidence Acts</i> 1995 (Cth); 2011 (ACT); 1995 (NSW); 2001 (Tas); 2008 (Vic); <i>Evidence (National Uniform Legislation) Act</i> 2011 (NT).	M	SU	Most
Proportionate liability	<i>Civil Law (Wrongs) Act</i> 2002 (ACT) ch 7A; <i>Civil Liability Acts</i> 2002 (NSW) pt 4; 2003 (Qld) ch 2 pt 2; 1936 (SA); 2002 (Tas) pt 9A; 2002 (WA) pt 1F; <i>Wrongs Act</i> 1958 (Vic) pt IVAA.	M	SU	All
Cross-border justice	<i>Cross-Border Justice Acts</i> 2009 (NT); 2009 (SA); 2008 (WA).	M	PU	Adj. All
Defamation	<i>Defamation Acts</i> 2005 (NSW); 2006 (NT); 2005 (Qld); 2005 (SA); 2005 (Tas); 2005 (Vic); 2005 (WA).	M	PU	Adj. All
Court information technology (video link)	<i>Crimes Act</i> 1914 ss 15YU–15UV, inserted by <i>Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act</i> 2005 (Cth); <i>Evidence (Miscellaneous Provisions) Acts</i> 1991 (ACT) pt 3; 1958 (Vic) pt IIA; <i>Evidence (Audio and Audio Visual Links) Acts</i> 1998 (NSW); 1999 (Tas); <i>Evidence (National Uniform Legislation) Act</i> 2011 (NT) (Part VA); <i>Evidence Acts</i> 1977 (Qld) pt 3A; 1929 (SA) pt 6C; 1906 (WA) ss 120–123.	M	SS	All
Crown proceedings	<i>Court Procedures Act</i> 2004 (ACT) pt 4; <i>Crown Proceedings Acts</i> 1988 (NSW); 1993 (NT); 1980 (Qld); 1992 (SA); 1993 (Tas); 1958 (Vic); <i>Crown Suits Act</i> 1947 (WA).	M	SS	All

E *Government*

Table 7 illustrates legislation in the area of government regulation. The high level of uniformity in this area is comparable to commercial and corporate law, and the level of implementation is the highest compared to all other areas of law.

Table 7: Government Regulation

Sets of Uniform Acts	Act	Structure	Level of Uniformity	Jurisdictional Implementation
Australia Acts	<i>Australia Act 1986</i> (Cth); <i>Australia Acts (Request) Acts 1985</i> (NSW); 1985 (Qld); 1985 (SA); 1985 (Tas); 1985 (Vic); 1985 (WA).	M	AI	Adj. All
Coastal waters	<i>Coastal Waters (State Powers) Act 1980</i> (Cth); <i>Constitutional Powers (Coastal Waters) Acts 1979</i> (NSW); 1980 (Qld); 1979 (SA); 1979 (Tas); 1980 (Vic); 1979 (WA).	M	AI	Adj. All
Commonwealth places (mirror tax)	<i>Commonwealth Places (Mirror Taxes) Act 1998</i> (Cth); <i>Commonwealth Places (Mirror Taxes Administration) Acts 1998</i> (NSW); 1999 (Qld); 1999 (SA); 1999 (Tas); 1999 (Vic); 1999 (WA).	A	AI	Adj. All
Succession (Crown)	<i>Succession to the Crown Acts 2015</i> (Cth); 2013 (Qld); 2015 (WA); <i>Succession to the Crown (Request) Acts 2013</i> (NSW); 2014 (SA); 2013 (Tas); 2013 (Vic); <i>Succession to the Crown (Request) (National Uniform Legislation) Act 2013</i> (NT).	R	AI	Adj. All
Trade measurement	<i>National Measurement Act 1960</i> (Cth); <i>Trade Measurement (Repeal) Act 2009</i> (NSW); 2010 (Tas); <i>Trade Measurement Legislation Repeal Act 2010</i> (Cth); 2009 (Qld); <i>Statutes Amendment and Repeal (Trade Measurement) Act 2009</i> (SA).	R	AI	All
Australian Crime Commission	<i>Australian Crime Commission Act 2002</i> (Cth); <i>(ACT) Act 2003</i> (ACT) (mirror); <i>(New South Wales) Act 2003</i> (NSW) (applied); <i>(Northern Territory) Act 2005</i> (NT); <i>(Queensland) Act 2003</i> (Qld); <i>(South Australia) Act 2004</i> (SA); <i>(Tasmania) Act 2004</i> (Tas) (mirror); <i>(State Provisions) Act 2003</i> (Vic); <i>(Western Australia) Act 2004</i> (WA).	H	SU	All
Standard time	<i>Standard Time and Summer Time Act 1972</i> (ACT); <i>Standard Time Acts 1987</i> (NSW); 2005 (NT); 1894 (Qld); 2009 (SA); 1895 (Tas); 2005 (WA); <i>Supreme Court Act 1986</i> (Vic) s 43.	M	SU	All

Three sets of uniform Acts in this area are directed at the resolution of an isolated problem: the *Australia Acts*, *Commonwealth Places (Mirror Tax)* and *Succession (Crown) Acts*. All of these sets are in the ‘almost identical’ category and are represented by various structures.

This section considers the *Australia Acts* first.¹⁰⁹ The Federal Parliament has no specific power to legislate on matters related to the monarchy. Thus, a decision was made to enact national uniform legislation to resolve this issue of nation-wide importance. The first step in the arrangement included a state request for legislation, specifically provided for in s 3 of the *Australia Acts (Request) Act 1985* (NSW). It stated, '[t]he Parliament of the State requests the enactment by the Parliament of the Commonwealth of an Act in, or substantially in, the terms set out in the First Schedule'. Sections 4 and 5 of the *Australia Acts (Request) Act 1985* (NSW), in similar terms, requested and consented to the simultaneous enactment of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).

Questions were raised about the constitutionality of these enactments.¹¹⁰ However, the High Court confirmed the validity of the *Australia Act* in its two versions, together with the state request and consent legislation.¹¹¹ Pursuant to this decision, Australian independence was established on the date the *Australia Act 1986* (Cth) came into operation, 3 March 1986.

The High Court's decision served as a focusing event in the *Commonwealth Places (Mirror Tax)* set of uniform Acts.¹¹² This set of uniform Acts was enacted in response to the High Court decision of *Allders International Pty Ltd v Commissioner of State Revenue (Vic)*,¹¹³ and was aimed at protecting the states. The High Court had held that tobacco franchise fees were excise duties and were thus constitutionally invalid. The legislation introduced the 'essential elements of safety net arrangements ... to ensure the continuation of appropriate taxation arrangements for Commonwealth Places'.¹¹⁴ All jurisdictions enacted legislation in an applied structure that was classified as 'almost identical'. Uniformity has remained almost unchanged from the outset with minimal or no amendments by the jurisdictions.

Another area of government regulation, *Coastal Waters* legislation,¹¹⁵ falls under the 'almost identical' level of uniformity. It resulted from the Offshore Constitutional Settlement of 1979, which included an intricate distribution of powers between the jurisdictions and was viewed as a 'milestone in cooperative federalism'.¹¹⁶ *Coastal Waters* legislation represents the consensus of the Australian jurisdictions on regulating offshore areas after a decade of disputes between the Commonwealth and states over sovereignty, culminating in the landmark High Court decision in

¹⁰⁹ See Table 7 for *Australia Acts* legislative framework.

¹¹⁰ *Sue v Hill* (1999) 199 CLR 462; *A-G (WA) v Marquet* (2003) 217 CLR 545.

¹¹¹ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

¹¹² See Table 7 for *Commonwealth Places* legislative framework.

¹¹³ (1996) 186 CLR 630.

¹¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 May 1999, 1823 (David Hamill).

¹¹⁵ See Table 7 for *Coastal Waters* legislative framework.

¹¹⁶ Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13(4) *Marine Policy* 334, 334.

the *Seas and Submerged Lands Act Case*.¹¹⁷ The Offshore Constitutional Settlement ‘reinforced shared jurisdiction in offshore areas’,¹¹⁸ offering a cooperative yet practical solution.¹¹⁹

[T]he Commonwealth agreed that the States should be put, so far as possible, in the position they believed they were in before the High Court case. At the October 1977 Premiers Conference, it was agreed that the territorial sea should be the responsibility of the States.¹²⁰

The arrangements involved were substantial and included cooperation among the following bodies: the Australian Minerals and Energy Council, the Australian Fisheries Council, the Australian Environment Council, the Council of Nature Conservation Ministers and the Standing Committee of Commonwealth, with the state Attorneys-General overseeing ‘the legal aspects of the exercise’.¹²¹ As Marcus Haward recounted, ‘the [Offshore Coastal Settlement] has been the most ambitious and significant intergovernmental framework for Australian marine resources policy ... in both scope and complexity’.¹²² Although the approach to implementing the agreement’s components has evolved from being integrated (where some parts of the agreement could not be implemented until others were) to sectoral (where components of the agreement were implemented within sectors),¹²³ the institutional support provided has allowed high levels of uniformity to be achieved.

Finally, due to government regulation, two sets of uniform Acts relating to measurement and time are now uniform. Trade measurement legislation was recently raised to the level of utmost uniformity, with jurisdictions ‘clearing the field’ for Commonwealth regulation.

Standard time legislation has achieved a ‘substantially uniform’ level, although, it has taken decades to come to a uniform position. This legislation dates back to 1892, when jurisdictions enacted uniform legislation related to standard Greenwich Mean Time. At that stage, the legislation and regulations were consistent. This continued until the Premiers’ Conference in May 1915, where the prospect of a national daylight savings regime was discussed.¹²⁴ During World War I and World War II national

¹¹⁷ *New South Wales v Commonwealth* (1976) 135 CLR 337 (‘*Seas and Submerged Lands Act Case*’).

¹¹⁸ Haward (n 116) 334.

¹¹⁹ Attorney-General’s Department, *Offshore Constitutional Settlement: Selected Statements and Documents 1978–79* (Australian Government Publishing Services, 1980) 5.

¹²⁰ *Ibid* 16.

¹²¹ *Ibid* 5.

¹²² Haward (n 116) 347.

¹²³ *Ibid*.

¹²⁴ Premiers’ Conference, *Report of the resolutions, proceedings and debates of the Premiers’ Conference held at Sydney May 1915* (Parliament of Victoria Paper No 24, Session 1915) 64–5.

daylight time operated throughout Australia. Tasmania and Victoria introduced it in 1916. In Tasmania, the Act was later repealed by the *Daylight Saving Repeal Act 1917* (Tas), but daylight savings was reintroduced in 1967.

By 1990, the jurisdictions were changing the dates on which to introduce daylight savings and their positions were not uniform. Senator Paul Calvert described the ‘maze of different times’ as a ‘shackle on the economy, as well as causing interruptions to work and family balance’.¹²⁵ Starting on 1 September 2005, all jurisdictions adopted the Coordinated Universal Time (UTC) standard, and following long deliberations, in April 2007, they agreed on a uniform start and end date. However, Queensland, Western Australia and the Northern Territory still do not have daylight savings. The sets of uniform Acts enjoy high uniformity because the legislation was initially mirror and only some changes have been required, even though it has taken decades to convince the jurisdictions to come to a consensus.

Overall, the level of uniformity and implementation is very high in the government area of law. There has been a high level of consensus when jurisdictions have been faced with challenges that impact the nation in a similar manner.

F *Energy and Resources*

Table 8 represents sets of Acts in areas related to energy and resources. Several of the Acts have resulted from the COAG reform agenda. These include the first three sets of uniform Acts — electricity, energy retail and gas — which came out of the COAG energy market reforms (overseen by the COAG Energy Council). Similarly, sets of uniform Acts regulating water resources have come from COAG’s national water initiative. The initiative covers ‘a range of areas where best-practice and nationally consistent approaches to water management will bring substantial benefits’.¹²⁶

As can be seen in Table 8, although energy and resources legislation falls under various structures, the level of uniformity is high. The best explanation for this is that legislation has been drafted within a highly uniform applied structure where there have also been rigid mechanisms limiting amendment and ensuring sustainable uniformity. In addition to the robust mechanism of amendment, the Australian Energy Regulator (‘AER’) has strong enforcement powers.¹²⁷

¹²⁵ Chris Pearce, *The Great Daylight Saving Time Controversy* (Australian eBook Publisher, 2017) 261.

¹²⁶ John Howard, ‘Council of Australian Governments’ Meeting 25 June 2004, Canberra Communique’ (Media Release 21340, Department of Prime Minister and Cabinet, 25 June 2004) <<https://pmtranscripts.pmc.gov.au/release/transcript-21340>>.

¹²⁷ ‘Enforcement Matters’, *The Australian Energy Regulator* (Web Page) <<https://www.aer.gov.au/wholesale-markets/enforcement-matters>>.

Table 8: Energy and Resources

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Electricity	<i>Electricity (National Scheme) Act 1997</i> (ACT); <i>Electricity – National Scheme (Queensland) Act 1997</i> (Qld); <i>National Electricity (New South Wales) Act 1997</i> (NSW); <i>(South Australia) Act 1996</i> (SA).	A	AI	Most
Energy retail	<i>Australian Energy Market Act 2004</i> (Cth), as amended by <i>Australian Energy Market Amendment (National Energy Retail Law) Act 2011</i> (Cth); <i>National Energy Retail Law (ACT) Act 2012</i> (ACT); <i>(Adoption) Act 2012</i> (NSW); <i>(South Australia) Act 2011</i> (SA); <i>(Tasmania) Act 2012</i> (Tas); <i>National Energy Retail Law (Victoria) Bill 2012</i> (Vic).	A	AI	Most
Gas	<i>National Gas (ACT) Act 2008</i> (ACT); <i>(New South Wales) Act 2008</i> (NSW); <i>(Northern Territory) Act 2008</i> (NT); <i>(Queensland) Act 2008</i> (Qld); <i>(South Australia) Act 2008</i> (SA); <i>(Tasmania) Act 2008</i> (Tas); <i>(Victoria) Act 2008</i> (Vic); <i>National Gas Access (WA) Act 2009</i> (WA).	A	AI	All
Water	<i>Water Act 2007</i> (Cth); <i>Water (Commonwealth Powers) Acts 2008</i> (NSW); <i>2008</i> (Qld); <i>2008</i> (SA); <i>2008</i> (Vic).	R	AI	Adj. All
Offshore minerals	<i>Offshore Minerals Acts 1994</i> (Cth); <i>1999</i> (NSW); <i>1998</i> (Qld); <i>2000</i> (SA); <i>2003</i> (WA).	M	SU	Adj. All
Petroleum (offshore/ submerged lands)	<i>Petroleum (Submerged Lands) Act 1967</i> (Cth) as redrafted in <i>Offshore Petroleum Act 2006</i> (Cth); <i>Petroleum (Offshore) Act 1982</i> (NSW); <i>Petroleum (Submerged Lands) Acts 1981</i> (NT); <i>1982</i> (Qld); <i>1982</i> (SA); <i>1982</i> (Tas); <i>1982</i> (Vic); <i>1982</i> (WA).	M	SU	All
Water efficiency labelling	<i>Water Efficiency Labelling and Standards Act 2005</i> (Cth); <i>2005</i> (ACT); <i>(New South Wales) Act 2005</i> (NSW); <i>2005</i> (NT); <i>2005</i> (Qld); <i>2006</i> (SA); <i>2005</i> (Vic) (mirror); <i>2006</i> (WA) (mirror).	H	SU	All

Energy regulation has been one of the most rigid in terms of structure, and yet adaptable in terms of implementing the changes, schemes for uniformity in applied legislation. The following case study illustrates how sustainability has been ensured through a combination of the COAG reform agenda, amending provisions in the Act, and national regulators. The legislative framework for energy includes three sets of uniform Acts, all with an applied structure: the National Electricity Law; National Gas Law; and National Energy Retail Law.¹²⁸ Each element of this framework secures high uniformity and streamlined amendment provisions.

¹²⁸ See Table 8 for *National Electricity*, *Natural Gas* and *National Energy* legislative frameworks.

Following reforms to regulate competition, the COAG Energy Council proposed a new government structure to regulate energy markets. Three national bodies were created to replace the state and territory bodies: the Australian Energy Market Commission ('AEMC') and the AER in 2005 and the Australian Energy Market Operator ('AEMO') in 2009. Together, these three bodies share the functions of providing broad policy direction, rulemaking and market development, economic regulation and compliance, and market operations.¹²⁹

The mechanisms relied on to secure and sustain high uniformity have included the COAG reform agenda, applied structure, national regulators and the amendment provisions of legislation. In addition to these factors, regular forums are held to ensure the dissemination of streamlined knowledge and expertise. In this case study, sustainability most closely reflects the law's adaptability to new circumstances as opposed to stagnant laws or conferrals of jurisdiction. Indeed, the area is far from stagnant; it is quite dynamic, with amendments constantly taking place. In May 2020, the current consolidated version of the national electricity rules was at version 139,¹³⁰ and for the national gas rules it was version 54.¹³¹ It is unlikely that this level of uniformity would be achievable (or sustainable) in other applied schemes without the additional mechanisms deployed by the energy framework.

To summarise, energy and resources law has substantial uniformity, but this uniformity is not the result of historical consensus. Rather there is a complex architecture supporting this uniformity. The advantages of national uniform legislation in cases of shared natural resources include creating an 'even playing field',¹³² creating equality for all Australians,¹³³ and bringing together legal talent from various jurisdictions.¹³⁴ The wider relevance of these national reforms has been made possible by national uniform legislation that benefits the economic development of Australia.¹³⁵

¹²⁹ Australian Energy Regulator, *Australian Energy Regulator Annual Report 2015–16* (Report, October 2016) 12–13.

¹³⁰ 'National Electricity Rules', *The Australian Energy Market Commission*, (Web Page) <<http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/Current-Rules>>.

¹³¹ 'National Gas Rules', *The Australian Energy Market Commission* (Web Page) <<https://www.aemc.gov.au/regulation/energy-rules/national-gas-rules/current>>.

¹³² Elizabeth Bluff and Neil Gunningham, 'Harmonising Work Health and Safety Regulatory Regimes' (2012) 25(2) *Australian Journal of Labour Law* 85, 87.

¹³³ Glenn Patmore and Kim Rubenstein, *Law and Democracy: Contemporary Questions* (ANU Press, 2014) 111.

¹³⁴ Peter B Maggs, 'The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code' (1998) 44(2) *McGill Law Journal* 281, 281.

¹³⁵ Rod Sims, 'Australia's Experience Driving Economic Growth through Competition Policy Reforms' (Speech, World Bank Forum - Making Markets Work for Development: A Reform Agenda on Competition, 23 April 2013) <<https://www.accc.gov.au/speech/australia%E2%80%99s-experience-driving-economic-growth-through-competition-policy-reforms>>.

However, it must also be noted that the costs of harmonisation have been high, and it might be impossible to accumulate the resources needed to achieve harmonisation in areas of law that are deemed less essential to the nation as a whole.

G Health

Table 9 presents sets of uniform Acts in the area of health law. As can be observed, the predominant structure is ‘applied’, the level of uniformity is at the medium level (ranging from substantially to partially uniform), and implementation is at the ‘most jurisdictions’ level. Health is an area of law that has historically been within the remit of the states and territories, but with the development of new technologies and new chemicals, national regulation might be more efficient. However, this would only be possible if jurisdictions agreed to legislate in applied structure. If legislation is in mirror structure, there is a high probability that the level of uniformity would diminish over the years, as occurred with human cloning legislation, discussed below. This area of law has a predominance of applied structure, something that was not observed in any other area of law researched for this study. Applied structure usually includes rigid mechanisms that limit amendment and ensure sustainable uniformity going forward.

Table 9: Health

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Level of Implementation
Human cloning	<i>Prohibition of Human Cloning for Reproduction Act 2002</i> (Cth); <i>Human Cloning and Embryo Research Act 2004</i> (ACT); <i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003</i> (NSW); <i>Research Involving Human Embryos and Prohibition of Human Cloning Act 2003</i> (Qld); <i>Prohibition of Human Cloning Act 2003</i> (SA); <i>Human Cloning and Other Prohibited Practices Act 2003</i> (Tas); <i>Infertility Treatment Act 1995</i> (Vic) pt 4A; <i>Human Reproductive Technology Act 1991</i> (WA).	M	SU to SS	Most
Human embryo research	<i>Research Involving Human Embryos Act 2002</i> (Cth); <i>Human Cloning and Embryo Research Act 2004</i> (ACT); <i>Research Involving Human Embryos (New South Wales) Act 2003</i> (NSW) (applied); <i>Prohibition of Human Cloning Act 2003</i> (Qld); <i>Research Involving Human Embryos Act 2003</i> (SA); <i>Human Embryonic Research Regulation Act 2003</i> (Tas); <i>Infertility Treatment Act 1995</i> (Vic) pt 2A (mirror); <i>Human Reproductive Technology Act 1991</i> (WA).	A	SU	Most
Food safety	<i>Food Standards Australia New Zealand Act 1991</i> (Cth); <i>Food Acts 2001</i> (ACT); <i>2003</i> (NSW); <i>2004</i> (NT); <i>2006</i> (Qld); <i>2001</i> (SA); <i>2003</i> (Tas); <i>1984</i> (Vic); <i>2008</i> (WA).	H	SU	All

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Level of Implementation
Therapeutic goods/poison	<i>Therapeutic Goods Act 1989</i> (Cth); <i>Medicines, Poisons and Therapeutic Goods Acts 2008</i> (ACT); <i>2012</i> (NT); <i>Poisons and Therapeutic Goods Act 1966</i> (NSW); <i>Controlled Substances Act 1984</i> (SA) pt 2A; <i>Therapeutic Goods Act 2001</i> (Tas); <i>Therapeutic Goods (Victoria) Act 2010</i> (Vic); <i>Medicines and poisons Act 2014</i> (WA).	A	PU	Most
Sports drug testing	<i>Australian Sports Anti-Doping Authority Act 2006</i> (Cth); <i>Drugs in Sport Act 1999</i> (ACT); <i>Sports Anti-Doping Acts 2003</i> (Qld); <i>2005</i> (Vic); <i>Sports Drug Testing Acts 2000</i> (SA); <i>2001</i> (WA).	A	SU	Most

As can be observed from Table 9, jurisdictions are less likely to harmonise legislation in this area. With anti-doping regulation, the jurisdictions responded to pressure imposed by the Commonwealth. The set of uniform Acts was enacted in mirror structure but included conferral from the outset. In 1990, the *Australian Sports Drug Agency Act 1990* (Cth) established an independent statutory agency, the Australian Sports Drug Agency, to address the issue of drug use in sport following a Senate inquiry.¹³⁶ This prompted action by the Commonwealth government, resulting in a further increase in sustainable uniformity. In 2006, the Agency was replaced by the Australian Sports Anti-Doping Authority with increased powers to conduct investigations, present cases before sporting tribunals, recommend sanctions and approve and monitor sporting organisations' anti-doping policies. In 2013, the *Australian Sports Anti-Doping Authority Amendment Act 2013* (Cth) granted the Authority the right to increase its investigatory powers.

Due to its highly controversial nature, human cloning legislation is one set of uniform Acts that is not in 'applied' structure and has experienced diminished uniformity over time. Prior to 2002, no Commonwealth regulations existed in this area and the state and territory jurisdictions all had different regulations with regard to human tissue and embryo research. In 2002, as a result of a conscience vote,¹³⁷ legislation was enacted that included the *Research Involving Human Embryos Act 2002* (Cth) and the *Prohibition of Human Cloning Act 2002* (Cth). On 5 April 2002, COAG agreed that the Commonwealth, states and territories would introduce nationally consistent legislation. From the outset, agreement was achieved through consistent legislation with the implication that any legislation would be uniform in principle only. The uniformity in this area has diverged over time and is less uniform now than it was at the time of its enactment. In 2006, following a review, the legislation was

¹³⁶ Senate Standing Committee on Environment, Recreation and the Arts, Parliament of Australia, *Drugs in Sport*, (Report No 2, May 1990).

¹³⁷ Susan Dodds and Rachel Ankeny, 'Regulation of hESC Research in Australia: Promises and Pitfalls for Deliberative Democratic Approaches' (2006) 3(1) *Journal of Bioethical Inquiry* 95, 98.

amended to allow somatic cell nuclear transfers or ‘therapeutic cloning’.¹³⁸ The prohibition against human embryo research remained. All jurisdictions, except Western Australia, have followed this development by preparing uniform amendments.

Strong support mechanisms, such as applied structure, have been used in the area of health regulation to support harmonisation. However, not all jurisdictions have been amenable to enacting applied legislation. Therefore, the implementation level is not high in this area.

H *Family Law and Relationships*

Table 10 displays sets of Acts in areas related to family law and relationships. Two sets of uniform Acts are in referred structure and are highly uniform, and two sets of uniform Acts fall under the ‘some similarities’ category, with only some similar provisions across jurisdictions. The level of implementation is at either the ‘adjusted as all jurisdictions’ or ‘most jurisdictions’ level. With the two extremes in structure (referred and mirror) there appears to be no inclination of jurisdictions to enact legislation in this area of law in an applied structure. Moreover, there seems to be a high level of divergence unless legislation is enacted in a referred structure. Thus, family law and relationships is the area of the law with the fewest prospects for achieving high uniformity.

Table 10: Family Law and Relationships

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Surrogacy	<i>Parentage Act 2004</i> (ACT); <i>Surrogacy Acts 2010</i> (NSW); <i>2010</i> (Qld); <i>2012</i> (Tas); <i>2008</i> (WA); <i>Family Relationships Act 1975</i> (SA) pt 2B; <i>Status of Children Act 1974</i> (Vic) pt IV.	M	SS	Most
Parentage presumptions	<i>Family Law Reform Act 1995</i> (Cth); <i>Parentage Act 2004</i> (ACT); <i>Status of Children Acts 1996</i> (NSW); <i>1978</i> (NT); <i>1978</i> (Qld) pt 3; <i>1974</i> (Tas); <i>1974</i> (Vic); <i>Family Court Act 1997</i> (WA) pt 5 div 11 sub-div 3.	M	SS	Most
De facto financial matters	<i>Family Law Act 1975</i> (Cth); <i>De Facto Relationships Act 1991</i> (NT); <i>Commonwealth Powers (De Facto Relationships) Acts 2003</i> (Qld); <i>2009</i> (SA); <i>2006</i> (Tas); <i>2004</i> (Vic); <i>2006</i> (WA); <i>2003</i> (NSW).	R	AI	Adj. All

¹³⁸ *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth).

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Family law	<i>Family Law Act 1975</i> (Cth); <i>Commonwealth Powers (Family Law — Children) Acts 1986</i> (NSW); 1986 (Vic); 1990 (Qld); <i>Commonwealth Powers (Family Law) Acts 1986</i> (SA); 1987 (Tas); <i>Family Court Act 1997</i> (WA) (not referred).	R	AI	Adj. All
Child protection (international measures; Hague Convention)	<i>Family Law Act 1975</i> (Cth) sch 1; <i>Child Protection (International Measures) Acts 2006</i> (NSW); 2003 (NSW); 2003 (Tas).	M	SU	Adj. All

Examples of three sets of uniform Acts are given in this section: most uniform, medium uniform and least uniform.

The most uniform is the *De Facto Financial Matters* set of uniform Acts,¹³⁹ which was enacted in referred structure from the outset. The referral of powers over property rights was raised at the Australian Constitutional Convention in 1998. The time for referral came when the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) was enacted, allowing the distribution of superannuation for married couples. This resulted in uncertainty over superannuation splitting orders for de facto couples across jurisdictions. The problem stream was characterised as follows:

Under the present regime, de facto couples in different States may have their property treated differently for no good reason. Even if States intend to enact and maintain uniform legislation, process delays can result in legislative anomalies. Such an approach would be highly complex, time-consuming, and impracticable.¹⁴⁰

As a result, the policy stream included a set of Acts in referred structure to refer these matters to the Commonwealth for regulation, particularly parenting and financial matters under the *Family Law Act 1975* (Cth). The legislation was enacted in referred structure from the outset by all jurisdictions. As Western Australia is the only jurisdiction with a State Family Court, it has some differences, but other than that, the current legislative regime has been characterised by high uniformity.

Another example of national uniform legislation in this area of law falls under the ‘substantially uniform’ set of uniform Acts in legislation intended to ratify the *Hague*

¹³⁹ See Table 10 for *De Facto Financial Matters* legislative framework.

¹⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 2003, 3843 (John Hatzistergos, Minister for Justice).

Convention on Child Protection (the ‘*Convention*’).¹⁴¹ Soon after the *Convention* was ratified, the Commonwealth Parliament passed legislation allowing the Family Court to register and enforce orders in accordance with the *Convention*. Regulation 4 of the *Family Law (Child Protection Convention) Regulations 2003* (Cth), under the *Family Law Act 1975* (Cth), included roll back provisions specifying that once a jurisdiction enacted the same or similar legislation, such legislation would prevail. The roll back provision was included not only to give expediency to the obligations under the *Convention*, but also to recognise that child protection had traditionally been within the remit of the state and territory Parliaments. This might have been the only case in which the non-enactment of national uniform legislation resulted in almost complete uniformity between jurisdictions due to Commonwealth regulation.

To implement the *Convention* at the state and territory level, Queensland drafted a model Bill. The Bill was approved by the PCC, the Standing Committee of Attorneys-General, and the Community Services Ministers Committee.¹⁴² The model Bill was subsequently enacted in Queensland and Tasmania, and later in New South Wales.¹⁴³ The Queensland and Tasmanian legislation followed the model. The New South Wales version had ‘two minor points’ of difference, related to the definition of ‘interested person’, and providing a ‘mechanism whereby the Director-General of the Department of Community Services can obtain relevant information necessary to prepare a report ... on the consultations undertaken prior to child being placed in foster care in a convention country’.¹⁴⁴ In a second reading speech in the New South Wales Legislative Assembly, it was noted that

since 2003 [the *Convention*] ... has been administered in Australia through the Commonwealth *Family Law Act 1975*. It has always been the intention that each State and Territory would also put in place its own legislation to implement these measures in its jurisdiction.¹⁴⁵

None of the remaining jurisdictions followed by enacting mirror legislation, allowing the Commonwealth legislation to apply.

The least uniform set of uniform Acts categorised under ‘some similarities’ is the regulation of surrogacy.¹⁴⁶ Although all jurisdictions except the Northern Territory

¹⁴¹ *The Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, signed 19 October 1996 (entered into force 1 January 2002).

¹⁴² Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (No 2 of 2006, 7 March 2006) 7.

¹⁴³ See Table 10 for *Child Protection* legislative framework.

¹⁴⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 2006, 20737 (Alison Megarrity).

¹⁴⁵ *Ibid* 20736 (Alison Megarrity).

¹⁴⁶ *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

allow altruistic surrogacy and prohibit commercial surrogacy, there have been great variations between the sets of uniform Acts. The uniformity found here is only based on a general principle. However, this legislation still falls under the definition of national uniform legislation. Looking at the structure, most sets of uniform Acts have been standalone legislation, although the South Australian provisions are contained in the *Family Relationships Act 1975* (SA). Variations in the substantive provisions have been quite significant. The Australian Capital Territory allows same sex couples to become parents of a surrogate child, but not single persons.¹⁴⁷ New South Wales prohibits advertising of surrogacy arrangements.¹⁴⁸ In Victoria, certain surrogacy arrangements must be approved by a patient review panel.¹⁴⁹ In Western Australia, approval must be granted by the Western Australian Reproductive Technology Council.¹⁵⁰ This disparity among regulations has caused inequities, because some Acts within the set contain discriminatory provisions.¹⁵¹ Thus, only the general principles of this set of uniform Acts are consistent, and the set itself has ‘some similarities’.

Thus, in the area of family law and relationships, jurisdictions have historically had disparate regulations and the only path to higher uniformity has been the almost coercive interference by the Commonwealth, with rigid structures such as referred legislation. In other circumstances, lobbying forces within jurisdictions have argued for different approaches and regulation has depended on the political distribution of the forces on the day.

I *Business, Trades and Professions*

Table 11 represents sets of Acts in areas related to business, trades and professions. Although the structures vary from mirror to applied, the level of uniformity is ‘substantially uniform’ for all four sets of uniform Acts. It must be noted from the outset that sets of uniform Acts for occupational licensing have been the only sets of uniform Acts where the harmonisation effort has been reversed, as will be outlined in the case study below. National reform of the legal profession is happening as this article is being written. Although mirror sets of uniform Acts have been enacted Australia-wide, only three jurisdictions have committed to the new set of uniform Acts in applied structure.

¹⁴⁷ *Parentage Act 2004* (ACT) s 24.

¹⁴⁸ *Surrogacy Act 2010* (NSW) s 10.

¹⁴⁹ *Assisted Reproductive Treatment Act 2008* (Vic) s 39.

¹⁵⁰ *Surrogacy Act 2008* (WA) s 16.

¹⁵¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (Report, April 2016) 5.

Table 11: Business, Trades and Professions

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Health practitioner regulation	<i>Health Practitioner Regulation (Adoption of National Law) Act 2009</i> (NSW); <i>Health Practitioner Regulation (National Uniform Legislation) Act 2010</i> (NT); <i>Health Practitioner Regulation National Law (ACT) Acts 2010</i> (ACT); <i>2009</i> (Qld); <i>(South Australia) Act 2010</i> (SA); <i>(Tasmania) Act 2010</i> (Tas); <i>(Victoria) Act 2009</i> (Vic); <i>(WA) Act 2010</i> (WA).	A	SU	All
Occupational licensing	<i>Occupational Licensing (Adoption of National Law) Act 2010</i> (NSW); <i>Occupational Licensing National Law (Queensland) Act 2010</i> (Qld); <i>(South Australia) Act 2011</i> (SA); <i>2011</i> (Tas); <i>2010</i> (Vic).	A	SU	Most
Legal profession	<i>Legal Profession Acts 2006</i> (ACT); <i>2006</i> (NT); <i>2007</i> (Qld); <i>2007</i> (Tas); <i>2008</i> (WA); <i>Legal Profession Act Uniform Law Application Act 2014</i> (NSW); <i>Legal Profession Act 2014</i> (Vic).	M to A	SU to AI	All to 3
Professional standards	<i>Civil Law (Wrongs) Act 2002</i> (ACT) sch 4; <i>Professional Standards Acts 1994</i> (NSW); <i>2004</i> (NT); <i>2004</i> (Qld); <i>2004</i> (SA); <i>2005</i> (Tas); <i>2003</i> (Vic); <i>1997</i> (WA).	M	SU	All

To illustrate how harmonisation operates to regulate trades and professions, this section compares two harmonisation attempts: occupational licensing and the legal profession. What can be observed from these two examples is that the area of law regulating professions has strong advocacy coalitions with set views on the rules and customs for operating professions and trades within certain jurisdictions. The jurisdictions are ready to cooperate but not under strict deadlines. This is not an area of law where the Commonwealth incentive can ‘speed up’ the process of harmonisation. Rather, time and genuine effort must be spent to find consensus among jurisdictions, under pressure from consumers for change. These are the appropriate conditions for national reforms in this area of the law.

This section first provides an analysis of a national reform that has been cancelled. That is what occurred in the case of occupational licensing reform. A national occupational licensing system was planned to regulate the entry requirements for the trades.¹⁵² The foundation for reform was supported by the National Partnership Agreement to Deliver a Seamless National Economy and financial incentives for

¹⁵² For example, electricians and plumbers. See *Occupational Licensing (Adoption of National Law) Act 2010* (NSW); *Occupational Licensing National Law (Queensland) Act 2010* (Qld); *Occupational Licensing National Law (South Australia) Act 2011* (SA); *Occupational Licensing National Law Act 2011* (Tas); *Occupational Licensing National Law Act 2010* (Vic).

meeting (or penalties for missing) progressive milestones.¹⁵³ The initial regulatory area was quite diverse, with all states and territories developing licensing requirements in cooperation with local businesses, occupational bodies and consumers.

Diversity has been and remains quite substantial within jurisdictions taking ‘pride’ in the regulatory regime.¹⁵⁴ This diversity has also been quite problematic in the context of Australia’s skills shortage. The ‘tyranny of diversity’ has included more than 27 licensing regimes, little consistency in training requirements and almost no unifying themes for fees.¹⁵⁵ As Delia Lawrie stated in the second reading speech for the Northern Territory Bill, ‘[t]here are currently 800 licence types ... This COAG reform will make it easier for occupational licensees to operate across State and Territory borders ... This will benefit the Territory in attracting skilled labour’.¹⁵⁶

The progress of reform has been riddled with difficulties. Nevertheless, even after continued lack of support and the inability to find consensus between jurisdictions, a Bill was produced. It received strong criticism for being ‘underdeveloped’ and putting ‘more detail into regulations than would be normal’.¹⁵⁷ As a result, regardless of the strong need for a consistent national regime, consensus has not been achieved, and occupational licensing legislation¹⁵⁸ has become the only example of recent national uniform Acts to be scheduled for intentional winding down. As one former official remarked: ‘In short, an unlikely unity ticket between those who wanted no change and those who wanted maximum, rapid change won the day and killed off the steady progress option.’¹⁵⁹ COAG’s decision to discontinue the proposed reform was made in December 2013.¹⁶⁰ Member of the New South Wales Legislative Council, Rick Colless, stated the reasons for its discontinuation during the second reading speech of the Occupational Licensing National Law Repeal Bill 2015 (NSW). In his words, the Bill ‘gives effect ... to the decision of the Council of Australian Governments to terminate the national occupational licensing reform in favour of

¹⁵³ COAG Business Advisory Forum Taskforce, *Report Card for National Partnership Agreement to Deliver a Seamless National Economy* (Report Card, April 2013).

¹⁵⁴ Janet Tyson, *Case Program the National Occupational Licensing Project* (Discussion Paper, Australia and New Zealand School of Government, 2016) 1 <<https://www.anzso.gov.au/preview-documents/case-study-level-1/930-national-occupational-licensing-project-the-nola-a-2016-177-1/file>>.

¹⁵⁵ *Ibid* 2.

¹⁵⁶ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 November 2010, 7009–10 (Delia Lawrie).

¹⁵⁷ Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Occupational Licensing National Law (WA) Bill 2010* (Report No 61, April 2011) 2, 20.

¹⁵⁸ See Table 11 for *Occupational Licensing* legislative framework.

¹⁵⁹ Sutton (n 2).

¹⁶⁰ Council of Australian Governments, *COAG Meeting Communiqué* (13 December 2013) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-december-2013>>.

jurisdictions minimising licensing impediments to labour mobility'.¹⁶¹ Thus, rather than continuing with harmonisation that established a national regime for regulation, the jurisdictions continued with harmonisation that minimised the differences. As a result, work on the set of uniform Acts was discontinued.

In this area of the law, harmonisation takes time, and this must be accompanied by a constant effort for consecutive harmonisation. Initial harmonisation of the legal profession took around 20 years, with the law of evidence taking more than 30 years to become 'substantially uniform'. Work health and safety harmonisation took decades, with constant administrative reforms. Corporations law went through cycles of consecutive harmonisation for almost a century, and it is still not identical law. Occupational licensing reform was rolled out and abandoned within less than five years.¹⁶² In a similar way, consecutive reform in the legal profession (requiring a change of structure from mirror to applied) was rolled out and opposed by jurisdictions within three years.¹⁶³ The general rule has been the constant search for consensus and the refinement of policy through cooperative federalism with adequate institutional support, rather than the opportunistic use of institutions or incentive measures to gain consensus in the area of law related to business, trades and professions.

The recent attempt to reform the legal profession was set on a similar rocky path in 2011, but it now appears to have promise due to the 2018 developments. In the first round of harmonisation, a model Bill was prepared by the Law Council of Australia in conjunction with the Standing Committee of Attorneys-General. Work on the Bill included consensus-building that started with the harmonisation of education and training requirements for legal practitioners. Thereafter, it followed the 'Blueprint for the Structure of the Legal Profession: A National Market for Legal Services'.¹⁶⁴ Between 2004 and 2006, all of the jurisdictions except South Australia incorporated the model.¹⁶⁵ These Acts can be classified as 'substantially uniform'.

Since then, an attempt at further harmonisation has been undertaken by New South Wales and Victoria. The *Legal Profession Uniform Law 2015* (Vic) and the *Legal Profession Uniform Law 2015* (NSW) were enacted to replace, respectively, the *Legal Profession Act 2004* (Vic) and *Legal Profession Act 2004* (NSW). Following COAG's decision in February 2009, the National Legal Profession Reform Taskforce

¹⁶¹ New South Wales, *Parliamentary Debates*, Legislative Council, 28 October 2015, 5169 (Rick Colless on behalf of John Ajaka).

¹⁶² Council of Australian Governments, *COAG Meeting Communiqué* (30 April 2009) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-30-april-2009>>.

¹⁶³ COAG's decision on formulating the National Legal Profession Reform Taskforce was made in February 2009. On 3 October 2012, the Attorney-General of Queensland announced that Queensland would not participate.

¹⁶⁴ Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994) 33.

¹⁶⁵ David Robertson, 'An Overview of the Legal Profession Uniform Law' [2015] (Summer) *Bar News* 36, 36.

was appointed to make recommendations and propose draft legislation. The goals of the Taskforce included achieving uniformity and enhancing the clarity of and accessibility to consumer protection.¹⁶⁶ At its meeting on 13 February 2011, COAG ‘agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)’.¹⁶⁷ These reforms offered ‘the prospect of significantly reduced interstate barriers to seamless national legal practice, while improving consumer protections and safeguarding an independent legal profession’.¹⁶⁸ However, they did not receive wide support from the jurisdictions. In 2011, it was reported that Tasmania and the Australian Capital Territory had ‘reservations about the scheme’.¹⁶⁹ On 3 October 2012, the Attorney-General of Queensland announced that Queensland would not participate in the reforms.¹⁷⁰ On 5 December 2013, the New South Wales and Victorian governments executed an intergovernmental agreement continuing the harmonisation effort and formalising their joint participation in the new scheme.¹⁷¹ Subsequently, although the level of uniformity post-harmonisation has been at an ‘almost identical’ level, the level of implementation has been low for this reform. The New South Wales and Victoria initiative has not received much attention from the other jurisdictions, and the level of implementation has remained at two jurisdictions. The legislation has all of the factors needed to achieve a high level of uniformity, and it has achieved a very high level of sustainable uniformity. The weakness of the consecutive harmonisation effort has not been that it is low in uniformity but that it has lacked implementation by other jurisdictions. New South Wales and Victoria have argued that an estimated three-quarters of Australian lawyers are now regulated by this uniform legislation.¹⁷² Nevertheless, the overall Australian regime is fractured, with two jurisdictions following one set of regulations and six jurisdictions following another.

¹⁶⁶ Consultative Group for COAG Taskforce, *National Legal Profession Reform* (Working Paper, 4 August 2009) <https://www.justice.nsw.gov.au/Documents/LPR_Documents/pdf/Consultative_Group_Paper_Background_Information.pdf>.

¹⁶⁷ Council of Australian Governments, *COAG Meeting Communiqué* (13 February 2011) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-february-2011>>.

¹⁶⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 2014, 28546 (David Clarke).

¹⁶⁹ The Law Society of New South Wales, *A New Framework for Practising Law in NSW* (Web Page) <<https://www.lawsociety.com.au/practising-law-in-NSW/rules-and-legislation/legal-profession-uniform-law/new-framework>>.

¹⁷⁰ Queensland Government, Attorney-General and Minister for Justice, ‘Queensland not signing up to National Legal Profession Reform’ (Media Statement, 3 October 2012) <<http://statements.qld.gov.au/Statement/2012/10/3/queensland-not-signing-up-to-national-legal-profession-reform>>.

¹⁷¹ NSW Attorney-General, ‘A New Era for Legal Services in NSW and Victoria’ (Media Release, Government of New South Wales, 1 July 2015).

¹⁷² Justine Rogers, Dimity Kingsford Smith and John Chellew, ‘The Large Professional Service Firm: A New Force in the Regulative Bargain’ (2017) 40(1) *University of New South Wales Law Journal* 218, 222.

The question has remained open whether any additional jurisdictions would implement this uniform legislation. However, it has now been several years and it is still unclear whether other state and territory jurisdictions will follow Victoria and New South Wales. On the one hand, sustainable uniformity has improved in two jurisdictions. On the other hand, from the position of Australia as a federation, sustainable uniformity has diminished because there are two distinct regimes rather than one.

In 2018, the reforms progressed without pressure from COAG. In June 2018, the Western Australian Government, with the support of the Law Society of Western Australia, announced its intention to join the Legal Profession Uniform Law.¹⁷³ ‘There are hopes that South Australia will follow the lead of Western Australia during the next year. However, there is still limited enthusiasm for the national scheme in Queensland, the third-largest jurisdiction, with almost 13,000 lawyers.’¹⁷⁴ This shows that pressuring jurisdictions into implementing legislation rarely works, even in cases where the legislation is a ‘good model’,¹⁷⁵ ‘eases the regulatory burden’¹⁷⁶ and protects consumers.

In this regard, institutional support from the Law Council has produced long-standing results. The continued involvement of the Council, with respect to the national regulation of the legal profession, and the presence of strong advocacy coalitions in the area of business, trades and professions, have prevented hasty changes. However, they could allow room for rational consensus if uniformity is given enough time to be negotiated and developed.

V POLICY IMPLICATIONS AND CONCLUSION

The inherent complexity surrounding national uniform legislation and its sustainable uniformity requires conceptual simplification to guide research, enable communication among scholars and practitioners, and develop effective decision-making strategies. This study has empirically examined how the area of law impacts the prospects for harmonisation. Some areas of law have not required national uniform legislation due to the clear distribution of power in the *Constitution*. Underpinning this has been the absence of consensus between jurisdictions on the need for a

¹⁷³ ‘Western Australia to Join Legal Profession Uniform Law Scheme’, *Queensland Law Society*, (WebPage, 13 June 2018) <https://www.qls.com.au/About_QLS/News_media/News/Western_Australia_to_join_Legal_Profession_Uniform_Law_scheme>.

¹⁷⁴ Michael Pelly, Western Australia to Join National Lawyers Scheme, *Financial Review* (online, 6 June 2018) <<https://www.afr.com/companies/professional-services/western-australia-to-join-national-lawyers-scheme-20180606-h1123m>>.

¹⁷⁵ Dale Boucher, ‘LSC Defends National Uniform Law’, *Lawyers Weekly* (online, 10 May 2016) <<https://www.lawyersweekly.com.au/opinion/18537-lsc-defends-national-uniform-law>>.

¹⁷⁶ *Ibid.*

national response in a given area, or the inability to find a policy model that would satisfy every jurisdiction involved.

The quantitative findings from this study support the direct impact of the area of law on the volume of national uniform legislation and its level of uniformity. Specific areas of the law were found to be more susceptible to higher or lower levels of uniformity. Whether these were based on an historical position, reflected consensus achieved among the Australian states and territories over the need for a national response or were partially the result of the most recent reforms, commercial and corporate law, government and energy and resources were found to be highly uniform.

In contrast, legislation regulating family law and relationships, road regulation and criminal law (with the notable exception of counter-terrorism legislation) was mostly non-uniform and unsustainable, even in cases where some uniformity had been achieved, and considerable effort and resources had been expended on harmonisation. In the area of energy and resources, the jurisdictions have only come to consensus when there has been strong institutional support, with some sets of uniform Acts requiring up to three national regulators. This level of resource provision in the harmonisation effort is extraordinary and would be harder to achieve in other areas of law. In the area of family law and relationships, the jurisdictions have preferred to maintain divergent regulations unless faced with strong actions from the Commonwealth. Without a rigid structure of referred legislation enacted from the outset, it is more likely that the regulation will remain at the 'some similarities' level in this area of law. The law of business, trades and professions has required time and a constant consensus searching effort to reach a higher level of uniformity, due to the presence of strong advocacy coalitions. Under these circumstances, set deadlines and incentives would not be effective measures.

Although national uniform legislation is not a panacea for all the legal challenges the Australian federation faces today, this article takes a step towards understanding those areas in which a national response might be most effective and efficient.

OLD ENOUGH TO KNOW BETTER? REFORM OPTIONS FOR SOUTH AUSTRALIA'S AGE OF CRIMINALITY LAWS

I INTRODUCTION

The minimum age of criminal responsibility is the age below which children are considered by law not to have the capacity to infringe the criminal law.¹ As the Australian Council of Attorneys-General grapples with the challenge of articulating a nationally consistent approach to the minimum age of criminal responsibility,² it is timely to consider where South Australia fits within the broader legal landscape and to reflect upon the options for legislative reform that meet recently updated international human rights standards. Not only is this a legal imperative, given Australia's voluntarily assumed obligations under the *Convention on the Rights of the Child* ('CRC'),³ but it also has significant normative and practical implications for the lives of South Australian children and their families.⁴ In this comment, we briefly outline South Australia's current juvenile criminal capacity laws and the

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¹ Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in Juvenile Justice*, UN Doc CRC/C/GC/24 (18 September 2019) para 6 ('*General Comment No 24*').

² Council of Attorneys-General, *Communiqué* (23 November 2018) 4; Council of Attorneys-General, *Communiqué* (29 November 2019) 4.

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2) ('CRC'). Indeed, international human rights bodies have consistently expressed concerns about Australia's current laws governing the criminal capacity of children and have advocated for change: see, eg, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) para 74 ('*Concluding Observations: Australia 40th sess*'); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) para 84 ('*Concluding Observations: Australia 60th sess*'); Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 44 ('*Concluding Observations on the Sixth Periodic Report of Australia*').

⁴ See Margaret White, 'Youth Justice and the Age of Criminal Responsibility: Some Reflections' (2019) 40(1) *Adelaide Law Review* 257.

extent to which they comply with the international human rights standards contained in the recently updated *General Comment No 24* from the United Nations Committee on the Convention of the Rights of the Child ('CRC Committee').⁵ We conclude by offering three options for reform of South Australian laws in this area, with the aim of contributing to the broader debate surrounding juvenile justice in this State. Throughout this comment, we retain an explicit focus on the *legislative* response to criminal conduct by children in South Australia. In so doing, we are acutely aware of the broader policy context in which any legislative reform in this area would take place, some of which has been articulated recently by Margaret White,⁶ and we recognise the critical need to take a holistic approach to juvenile justice in our community.

II CURRENT SOUTH AUSTRALIAN LAWS

The current South Australian approach to the age of criminality is a hybrid model — s 5 of the *Young Offenders Act 1993* (SA) ('*Young Offenders Act*') provides a 'bottom floor' by stipulating that a person under the age of 10 years cannot commit an offence, while the common law provides a rebuttable presumption that children aged between 10 and 14 'lack the capacity' to be criminally responsible for their acts.⁷ This presumption is called *doli incapax* and can be rebutted if the prosecution can show that the child possessed the required mental element of the offence and knew that what they were doing was wrong according to the ordinary principles of reasonable people.⁸ Taken together, this means that children under 10 in South Australia can never be held criminally responsible for offending conduct and, unless the prosecution can show otherwise, those between 10 and 14 will be presumed to lack criminal capacity. The current legal framework gives rise to at least three key questions for those contemplating law reform in this space to consider:

- how does the *doli incapax* presumption work in practice?
- is the current hybrid model appropriate, having regard to Australia's international human rights law obligations?
- what are the practical consequences that flow from any changes to the law in this area?

We examine these questions below in support of the conclusion that there is a strong case for reform in this area.

⁵ *General Comment No 24* (n 1).

⁶ White (n 4).

⁷ *R v Gorrie* (1918) 83 JP 136, affd *R v M* (1977) 16 SASR 589 ('*R v M*').

⁸ *R v M* (n 7) 591 (Bray CJ).

III HOW DOES THE *DOLI INCAPAX* PRESUMPTION WORK IN PRACTICE?

Before contemplating the options for legislative reform in South Australia, it is important to understand how the existing laws function in practice. Here, the use of the rebuttable *doli incapax* presumption is particularly important as it reveals significant insights into both the need for reform in this area, and the challenges associated with raising the age of criminality.

The traditional rationale behind the concept of *doli incapax* is that the law should punish those who behave in a way that they know is ‘morally wrong’ rather than ‘merely naughty or mischievous’.⁹ In previous reports on its compliance with its international human rights obligations, Australia has defended the use of the *doli incapax* presumption as part of its implementation of art 40(3) of the *CRC* on the grounds that it provides a ‘gradual transition to full criminal responsibility’¹⁰ which recognises the progressive psychological development of children and young adults.¹¹ Indeed, proponents of *doli incapax* explain that it is a ‘practical way of acknowledging young people’s developing capacities.’¹² By focusing on the individual’s capacity, *doli incapax* is thought to counteract the arbitrariness of setting an age limit and provide for a more individualised and transitional approach.

Notwithstanding the logic of this rationale, from a practical perspective, the presumption appears to be failing on a number of fronts.¹³ The case law suggests that the difficulty in proving a child’s capacity at the time of the alleged offence has resulted in questionable legal reasoning, highly prejudicial material being included in proceedings, and a practical reversal of the onus of proof. These factors mean that the presumption is rarely raised.¹⁴

The problematic elements of the *doli incapax* presumption, in particular the strategies used by prosecutors to rebut the presumption and the legal reasoning adopted by the courts when ruling on the application of *doli incapax*, can be seen in a number of cases. For example, in *C (a minor) v DPP* evidence that the defendant (who was a

⁹ Julia Fionda, ‘Doli incapax’ (1995) 5 *King’s College Law Journal* 114, 115.

¹⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/31/14 (13 January 2016) [132].

¹¹ White (n 4) 266; Nuria Carriedo et al, ‘Development of the Updating Executive Function: from Seven-Year-Olds to Young Adults’ (2016) 52(4) *Developmental Psychology* 666, 675–6.

¹² Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 30 September 1997) [18.20] (‘*Seen and Heard: Priority for Children in the Legal Process*’).

¹³ See, eg, Wendy O’Brien and Kate Fitz-Gibbon, ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice* 134, 140–1.

¹⁴ Lisa Bradley, ‘The Age of Criminal Responsibility Revisited’ (2003) 8(1) *Deakin Law Review* 73, 85.

minor) fled from police was sufficient for the presumption to be rebutted as it was found to indicate a knowledge that the actions constituted an offence.¹⁵ In the case of *A (a minor) v DPP* — involving two boys accused of homicide by throwing rocks from a freeway overpass — the prosecution adduced evidence from school teachers to rebut the *doli incapax* presumption on the basis that the defendants were aware that rock-throwing was banned at their school, and therefore they understood the criminal nature of their actions.¹⁶

Given the difficulty in proving the capacity of a child at the time of the alleged offence, highly prejudicial material such as confessions and previous offences have been admitted to show capacity. This is compounded by the criminal justice procedure in Australia, where the defence counsel's consideration of *doli incapax* occurs after substantial police contact with the accused juvenile.¹⁷

Also of concern is that, at least from a practical perspective, the defendant is likely to have to demonstrate that the juvenile is *doli incapax* by adducing expert psychological evidence if the prosecution seeks to rebut the presumption at trial.¹⁸ This gives rise to a range of strategic and resource-based questions for defence counsel to consider which may or may not align with the psychological status or needs of the child defendant. These tensions between exploring the viability of relying upon the *doli incapax* defence and the availability and affordability of expert psychological evidence can place acute pressures on the defendant and their counsel, particularly given the propensity for child defendants to come from low socio-economic backgrounds¹⁹. Further, there appears to be a shortage of qualified psychologists in some parts of Australia who can appropriately assess the criminal capacity of children and young people.²⁰ Taken together, these factors suggest that *doli incapax* is having a detrimental impact on a child's right to a fair trial.²¹ As discussed below, this is consistent with the observations of the CRC Committee in *General Comment No 24*.

¹⁵ [1996] 2 AC 1.

¹⁶ [1992] Crim LR 34. For discussion see Terence Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia' (1998) 5 *Psychiatry, Psychology and the Law* 95, 100–2.

¹⁷ Patricia Blazey-Ayoub, 'Doli Incapax' (1996) 20(1) *Criminal Law Journal* 34, 35.

¹⁸ O'Brien and Fitz-Gibbon (n 13) 140.

¹⁹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018–19* (Report, 15 May 2020) 12.

²⁰ O'Brien and Fitz-Gibbon (n 13) 140.

²¹ On the right to a fair trial see generally *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *CRC* (n 3) art 40(2).

IV IS THE CURRENT ‘BOTTOM FLOOR’ OF 10 YEARS APPROPRIATE HAVING REGARD TO AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS?

The short answer to this question is ‘no’ — both features of the South Australian approach (the 10 years of age ‘bottom floor’ and the use of the *doli incapax* presumption) are incompatible with the approach to age of criminality recommended by international human rights bodies.

The international community has long recognised that a child’s lack of moral and physical maturity demands that special considerations should apply before holding them criminally responsible for their conduct. Decades of scientific research into the development of the human brain has now revealed much about the capacity of children or adolescents to understand fully the consequences or culpability of their actions.²² As White summarises:

Even in optimal developmental circumstances, after a child leaves the highly vulnerable age of infant dependence and approaches adolescence, brain structure and processes undergo considerable change. Since its advent, magnetic imaging has shown that the adolescent brain is structurally different to that of a mature adult and, particularly in the area devoted to impulse control and decision-making, inclined to risk taking.²³

As White explains, over the years the international response to wrongdoing by children has been to ‘raise the age at which they are deemed to be criminally responsible for their acts’.²⁴ This is reflected in a range of international conventions to which Australia is a party, and most explicitly in art 40(3) of the *CRC* which provides that

States Parties shall seek to promote the establishment of laws ... in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law ...²⁵

Precisely what this ‘minimum age’ should be and how it should be implemented in practice has been subject to a developing body of international law, most recently culminating in a detailed pronouncement by the *CRC* Committee in *General*

²² See, eg, the range of research cited in Sara B Johnson, Robert W Blum and Jay N Giedd, ‘Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy’ (2009) 45(3) *Journal of Adolescent Health* 216, 218.

²³ White (n 4) 266, citing Staci A Gruber and Deborah A Yurgelun-Todd, ‘Neurobiology and the Law: A Role in Juvenile Justice?’ (2006) 3(2) *Ohio State Journal of Criminal Law* 321, 330.

²⁴ White (n 4) 267.

²⁵ *CRC* (n 3) art 40(3).

Comment No 24,²⁶ which replaces and clarifies previous iterations of the Committee's statements on children's rights in juvenile justice.²⁷

In *General Comment No 24*, the CRC Committee acknowledges that while art 40(3) of the *CRC* requires States parties to prescribe a minimum age of criminal responsibility, it does not set out what that age should be.²⁸ Reports submitted to the CRC Committee from States parties to the *CRC* suggest that a wide variety of minimum ages have been prescribed, ranging from a very low level of age seven or eight to 'the commendably high level' of 14 or 16.²⁹ This prompted the CRC Committee to provide the States parties with clear guidance regarding the minimum age of criminal responsibility. In *General Comment No 10* (2007), the CRC Committee considered 12 years to be the absolute minimum age — the appropriate 'bottom floor'.³⁰ However, in its 2019 *General Comment No 24*, it considered 12 years to be still too low.³¹ It now encourages States parties to increase their minimum age to 'at least 14 years of age' and commends States parties that have a higher minimum age, such as 15 or 16 years.³²

This leaves South Australia — with its 'bottom floor' of 10 years — well below the international standard. Even if the rebuttable *doli incapax* presumption is taken into account, the South Australian hybrid model appears to fall well short of the parameters set by the CRC Committee. The CRC Committee expressed particular concern about States parties allowing exceptions to the minimum age of criminal responsibility 'in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'³³ as a way to approach their international obligations in this area. As the use of *doli incompax*, in effect, reduces the age of criminality from 14 to 10, it may be viewed as an example of an exception that the CRC Committee 'strongly recommends' that States parties do not allow.³⁴ The CRC Committee also expressed concern about the reliance on presumptions and principles that depend exclusively on the use of judicial discretion to determine questions of the child's psychological maturity, which 'results in practice in the use of the lower minimum age in cases of serious crimes'.³⁵ The Committee concluded that such hybrid models create confusion and uncertainty, and also 'may result in discriminatory practices'.³⁶

²⁶ *General Comment No 24* (n 1).

²⁷ See, eg, Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) ('*General Comment No 10*').

²⁸ *Ibid* para 31.

²⁹ *General Comment No 24* (n 1) para 32.

³⁰ *General Comment No 10* (n 27).

³¹ *General Comment No 24* (n 1) para 33.

³² *Ibid*.

³³ *Ibid* para 35.

³⁴ *Ibid*.

³⁵ *Ibid* para 43.

³⁶ *Ibid*.

This is consistent with the views of the CRC Committee in earlier iterations of *General Comment No 24*, such as in *General Comment No 10*, where it expressed concerns that *doli incapax* assessments are confusing, elevate judicial discretion over psychological assessments, and lead to lower minimum age ranges being applied.³⁷ Indeed, both the CRC Committee and the Human Rights Committee have criticised Australia's juvenile justice framework for failing to meet international standards and have recommended that the age of criminal responsibility in Australia be raised.³⁸

Before setting out its views on the minimum age of criminal responsibility, the CRC Committee acknowledged the fact that even very young children can commit offences, but explained that when they do so, they should be dealt with through diversionary or special protective measures, rather than through the criminal process.³⁹ As discussed further below, South Australia's response to criminal behaviour of young children is one of the practical implications that needs to be considered carefully when contemplating reform in this area.

V WHAT ARE THE PRACTICAL CONSEQUENCES THAT FLOW FROM ANY CHANGES TO THE LAW IN THIS AREA?

In light of the above considerations, it appears that there is a strong case for reform to raise the age of criminality in South Australia. Calls for reform have also been made by a wide range of organisations with direct experience in the juvenile justice system, including the South Australian Guardian for Children and Young People and the South Australian Commissioner for Children and Young People.⁴⁰

The South Australian Government is not opposed to reform per se but has expressed a desire for a consistent national approach.⁴¹ It has been openly supportive of the Council of Attorneys-General's approach of undertaking a national consultation on

³⁷ *General Comment No 10* (n 27) para 30.

³⁸ *Concluding Observations: Australia 60th sess* (n 3) para 82; *Concluding Observations: Australia 40th sess* (n 3) para 74(a); *Concluding Observations on the Sixth Periodic Report of Australia* (n 3) para 44.

³⁹ *General Comment No 10* (n 27) para 31; *General Comment No 24* (n 1) paras 24–26.

⁴⁰ See, eg, Rebecca DiGirolamo, 'Children Charged as Criminals: But Is the Age of Responsibility Too Young in South Australia?', *The Advertiser* (online, 22 June 2019) <<https://www.adelaidenow.com.au/news/south-australia/children-charged-as-criminals-but-is-the-age-of-responsibility-too-young-in-south-australia/news-story/f06a3620acdc2154cf98401adba3cdbf>>.

⁴¹ National Children's Commissioner, *Children's Rights Report 2017* (Australian Human Rights Commission Report, 5 December 2017) 46 ('*Children's Rights Report 2017*'); Harrison Schultz, 'Member for Mayo Rebekha Sharkie Pushes for Criminal Responsibility Age to be Raised from 10 to 14', *The Times* (online, 16 October 2019) <<https://www.victorharbortimes.com.au/story/6442212/push-to-change-criminal-responsibility-age/?cs=3991>>.

the age of criminality laws in different jurisdictions with the aim of developing a national best practice model.⁴²

South Australia could be well placed to lead this discussion. For example, it could present a range of clear legislative reform options for improving compliance with international human rights standards. South Australia could also share research and other qualitative and quantitative data about the impact of various reform options on the juvenile justice system and, most importantly, on the lives of children and their families. This is not to suggest that reform in this space will be easy — any legislative change that would remove children and young people from the scope of the *Young Offenders Act* would need to be accompanied by complementary policy changes and additional resourcing of alternative measures of responding to criminal behaviour from this cohort of offenders. Some of these alternatives are discussed below in the context of three possible legislative reform options for South Australian policymakers — and the community more generally — to consider as part of the broader conversation about raising the age of criminality in this country.

*A Option 1: Raise the Minimum Age of Responsibility to 12 and
Codify the Doli Incapax Presumption*

This option would retain the existing hybrid model by raising the current ‘bottom floor’ of criminality up from 10 years to 12, whilst at the same time maintaining the common law *doli incapax* rebuttable presumption for ages 12 to 14, albeit in codified form.

This approach could encapsulate the potential benefits of the *doli incapax* approach (described above) whilst improving certainty of its application and addressing the risk of misuse by setting out in legislation precisely how the presumption should be applied or rebutted.

If effectively achieved, the legislated form of *doli incapax* could work to ensure that an individualised and non-discriminatory approach to criminal capacity is maintained, whilst attempting to limit any prejudicial effect of the *doli incapax* presumption as currently applied. These recommendations are consistent with the Australian Law Reform Commission’s recommendations that *doli incapax* should be established by legislation in all jurisdictions.⁴³

Central to the issues arising from *doli incapax* is the difficulty in determining the capacity of the child at the time of the offence. Therefore, a legislated form of *doli incapax* would need to involve a psychological assessment of the child at the earliest possible stage. This would ensure the assessment of criminal capacity is contemporary to the alleged crime and minimise the contaminating effect of criminal law procedures. To address international concerns with the broad discretion afforded to the judiciary when determining if a child has criminal capacity, a mandated

⁴² *Children’s Rights Report 2017* (n 41) 46.

⁴³ *Seen and Heard: Priority for Children in the Legal Process* (n 12) [18.20].

psychological assessment of the child and instructions for judicial officers to consider the psychological assessment when making decisions should be included. To avoid imposing a reverse onus upon defendants who may seek to rely upon the *doli incapax* principle, any legislation should include explicit provisions to require the prosecution to rebut the presumption once raised. It is important to note that increasing the minimum age to 12 years does not meet the age requirement of 14 years expressed in *General Comment No 24*. However, this option would go some way to addressing the international concerns with *doli incapax* and allow for the protection of children under 12 years old, who do not possess criminal capacity.

B *Option 2: Raise the Minimum Age of Criminal Responsibility to 14 Years and Abolish the Doli Incapax Presumption*

This option would require amending s 5 of the *Young Offenders Act* to replace the reference of 10 years to 14 years, ensuring that no children under the age of 14 could be held criminally responsible in South Australia. This could be accompanied by a clear legislative statement within the *Young Offenders Act* that the common law *doli incapax* rebuttable presumption is abolished.

This option would greatly improve South Australia's compliance with art 40(3) of the *CRC*, as outlined in *General Comment No 24*. It would also address the range of difficulties associated with *doli incapax*, as described above. Such an approach is supported by the Australian Human Rights Commission and the Law Council of Australia.⁴⁴

It would, however, need to be accompanied by careful consideration as to what civil or administrative responses should be implemented in order to respond to criminal conduct undertaken by children aged between 10 and 14, and what types of investments would need to be made to prevent, deter and rehabilitate offending within that demographic.

C *Option 3: Adopt a Public Health or Welfare Model to Juvenile Offending Regardless of Age*

A third, alternative option to simply raising the age of criminality would be to undertake a more holistic reform of South Australia's approach to juvenile justice by adopting what White describes as a 'public health and welfare model'.⁴⁵ Such a model would be better suited to deal with issues that can lead to juvenile offending,

⁴⁴ National Children's Commissioner, *Children's Rights Report 2019* (Australian Human Rights Commission Report, 28 October 2019) 19 ('*Children's Rights Report 2019*'); Law Council of Australia, 'Law Council Backs Push for Increase to Minimum Age of Criminal Responsibility' (Media Release, 14 October 2019).

⁴⁵ White (n 4) 271.

such as poverty, mental or physical illness, family violence, childhood neglect, and substance abuse.⁴⁶

Public health and welfare models have now been trialled and evaluated in other comparable jurisdictions. This includes the long-running and much-praised Scottish approach to rehabilitating children and adolescents who engage in criminal conduct, which was first recommended by the Kilbrandon Committee more than 50 years ago.⁴⁷ These approaches aim to remove children from the criminal justice system and focus resources on rehabilitation and education. Instead of bringing children before courts, young offenders are brought before welfare panels for assessment as to their rehabilitation needs.⁴⁸ While prosecutors retain a discretion to prosecute in exceptional cases, this option is rarely used.⁴⁹ As White concludes:

So much more is now known about the fundamental damage that exposure to poverty, violence, neglect and the other calamities of life do to the structure of the brain, with consequences of mental, cognitive and physical ill health than when our legal responses to childhood delinquency were developed. It is irrational to continue to base a system on processes that do not produce beneficial outcomes when other, more successful approaches are known and not beyond reach.⁵⁰

VI CONCLUSION

South Australia's existing laws on the age of criminality are part of an Australia-wide approach to juvenile justice that results in many thousands of young people being subject to supervision or detention every day,⁵¹ and can lead to high rates of recidivism and more serious offending, particularly for those subject to custodial sentences.⁵² The Council of Australian Governments has agreed to examine whether to raise

⁴⁶ See, eg, Judy Cashmore, 'The Link between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' (2011) 89 *Family Matters* 31, 36; Elizabeth Brown and Mike Males, 'Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates? A Preliminary Investigation' (2011) 8(1) *Justice Policy Journal* 23, 23; V A Morgan et al, 'A Whole-of-Population Study of the Prevalence and Patterns of Criminal Offending in People with Schizophrenia and Other Mental Illness' (2013) 43(9) *Psychological Medicine* 1869, 1869.

⁴⁷ John A Mack, 'The Kilbrandon Report' (1964) 4(6) *The British Journal of Criminology* 604; Gerry Maher, 'Age and Criminal Responsibility' (2005) 2(2) *Ohio State Journal of Criminal Law* 497; White (n 4) 269.

⁴⁸ White (n 4) 268.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* 271.

⁵¹ Australian Institute of Health and Welfare (n 19) 5.

⁵² *Children's Rights Report 2019* (n 44) 235; Australian Human Rights Commission, *Review of the Age of Criminal Responsibility* (Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, 26 February 2020) 11.

the age of criminal responsibility and has a consultation plan in mind.⁵³ However, immediate action could be taken by South Australia to reform its particular version of the hybrid model, which sets the ‘bottom floor’ at 10 years of age and incorporates the problematic *doli incapax* presumption. These current laws are inconsistent with Australia’s human rights obligations and, in particular, the CRC Committee’s recent *General Comment No 24*. They are also inconsistent with a growing body of evidence that points to the need to reassess this type of approach to assessing a child’s maturity and capacity to understand the consequences of their offending behaviour.

In *General Comment No 24*, the CRC Committee emphasises what it considers to be the core elements or objectives of state practice when it comes to juvenile justice, which include:

- the prevention of child offending, including through the use of interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings;
- establishing a minimum age of criminal responsibility;
- protecting the rights of children in detention including in pre-trial detention and post-trial incarceration; and
- protecting the rights of children in the post-detention phase, including reintegration services.⁵⁴

In this comment, we have sought to discuss just one of these elements and suggest options for reform. We recognise, however, that states should refrain from making changes to one of these elements of a broader juvenile justice policy without carefully considering the implications for other elements and objectives. We look forward to South Australia taking a leadership role in the national discussion on this important issue.

⁵³ Council of Attorneys-General, *Communiqué* (29 November 2019) 4.

⁵⁴ *General Comment No 24* (n 1) para 17.

**ALL IS FAIR IN LOVE AND REMOTE
INDIGENOUS COMMUNITIES?
ASIC V KOBELT (2019) 368 ALR 1**

I INTRODUCTION

In 2018–19, mainstream discussions about unfair financial services centred on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (‘Banking Royal Commission’). The Australian Securities and Investments Commission (‘ASIC’) was embroiled in this ‘war’,¹ waged mainly in Melbourne courtrooms,² and banks have incurred over \$10 billion in remediation costs.³

At roughly the same time as the Banking Royal Commission, ASIC was also involved in a skirmish. It concerned financial services too, but was not nearly as high profile. It arose from events in Mintabie, a remote South Australian town 1,100 km northwest of Adelaide. The case concerned a ‘book-up’⁴ system operated by 75-year-old general store owner Lindsay Kobelt, through which he provided credit to Indigenous customers. If the war in Melbourne was a question of big sums, the skirmish with Mr Kobelt was the sum of big questions. Above all, how should protections against

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¹ James Thomson, ‘Banks Hold Back in War of Attrition’, *The Australian Financial Review* (Sydney, 11 August 2018) 8. For ASIC’s involvement, see, eg, Sean Hughes, ‘The Financial Services Royal Commission and Other Emerging Issues Relating to the General Insurance Industry from an ASIC Perspective’ (Speech, Insurance Council of Australia Annual Forum, 27 February 2019); Stephanie Chalmers, ‘Banking Royal Commission Grills ASIC Boss James Shipton, Telling Him to Start Naming Names’, *ABC News* (online, 22 November 2018) <<https://www.abc.net.au/news/2018-11-22/banking-royal-commission-asic-boss-james-shipton-name-names/10546098>>.

² See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, ‘Public Hearings’ (Web Page) <<https://financialservices.royalcommission.gov.au/public-hearings/Pages/default.aspx>>.

³ Stephen Letts, ‘NAB Takes Another Billion-Dollar Hit as Royal Commission Customer-Remediation Costs Double’, *ABC News* (online, 2 October 2019) <<https://www.abc.net.au/news/2019-10-02/nab-takes-another-billion-dollar-hit-customer-remediation/11566792>>.

⁴ Book-up systems allow a customer to obtain credit from a storekeeper. The customer provides their debit card and personal identification number (‘PIN’) and authorises the storekeeper to ‘withdraw funds from the customer’s account in reduction of the customer’s debt and in return for the supply of goods over the interval between the customer’s “pay days”’: *ASIC v Kobelt* (2019) 368 ALR 1, 4 [1] (Kiefel CJ and Bell J) (‘*Kobelt*’).

unconscionable conduct in connection with financial services apply at the ‘intersection’⁵ of the colonial legal system and Indigenous culture and practices?

The High Court’s answer was delivered by a 4:3 majority in *Australian Securities and Investments Commission v Kobelt* (‘*Kobelt*’). The majority held that Mr Kobelt’s book-up system did not contravene the prohibition against unconscionable conduct in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (‘*ASIC Act*’). *Kobelt* provides the most authoritative articulation of the approach to assessing unconscionable conduct under both s 12CB of the *ASIC Act* and, by analogy, its more widely applicable analogue: s 21 of the *Australian Consumer Law*.⁶ It confirms that statutory unconscionability does not set a lower bar for relief than unconscionability in equity. While the facts of the case might be a world away from the Banking Royal Commission, the developments heralded by *Kobelt* will likely influence future litigation against Australia’s banks.⁷ More broadly, the stark contrast between the Banking Royal Commission and the *Kobelt* litigation underscores the chasm between applying consumer protections to mainstream financial services and applying them within a vastly different cultural and historical context.

This case note analyses the High Court’s reasoning in *Kobelt*. I contend that both the majority and dissenting judgments are liable to criticism for judicial paternalism, but that the dissents ultimately strike a better balance between respect for freedom of choice and protection from exploitation. Further, the majority’s approach to the issue of voluntariness undermines Parliament’s attempt to legislate a protection against unconscionable conduct that is broader than that offered by equity. This case note concludes that it is time to reform s 12CB of the *ASIC Act* (and s 21 of the *Australian Consumer Law*) by replacing the word ‘unconscionable’ with ‘unjust’ or ‘unfair’.

II BACKGROUND

A *Mr Kobelt, His Customers and His Book-Up System*

Since the mid-1980s, Mr Kobelt operated ‘Nobbys Mintabie General Store’ (‘Nobbys’). He sold groceries, fuel and second-hand cars. Almost all of his customers were Anangu⁸ people from remote communities in the Anangu Pitjantjatjara

⁵ *Kobelt v ASIC* (2018) 352 ALR 689, 746 [328] (Wigney J).

⁶ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’).

⁷ See, eg, Australian Securities and Investments Commission, ‘ASIC Sues ANZ for Misrepresentations and Unconscionable Conduct over Account Fees’ (Media Release 19-191MR, 25 July 2019).

⁸ Anangu (more correctly styled Anangu) is pronounced ‘arn-ahng-oo’. It is the term for Aboriginal people from the Western Desert region in the Pitjantjatjara and Yankunytjatjara tongues: see Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Tjukurpa’ (Web Page) <<https://aiatsis.gov.au/exhibitions/tjukurpa>>; Lindsay Kobelt, ‘Respondent’s Submissions’, Submission in *ASIC v Kobelt*, A32/2018, 2 November 2018, 1 [2] n 1 <http://www.hcourt.gov.au/cases/case_a32-2018>.

Yankunytjatjara Lands ('APY Lands').⁹ They had limited formal education, lacked 'financial literacy', lived far from Nobbys and were generally 'impoverished'.¹⁰ Most could not 'add up' sums of money.¹¹



Figure 1: Nobbys¹²

Mr Kobelt supplied credit under a rudimentary book-up system to 117 Anangu customers.¹³ The few records he kept were generally illegible, but customers understood the system's basic elements.¹⁴ They would give Mr Kobelt the keycard and PIN for the account into which they received wages or Centrelink payments. Mr Kobelt would regularly withdraw most or all available funds through 'trial and error' on the day funds were credited to the account.¹⁵ For example, between 1 July 2010 and 30 November 2012, Mr Kobelt withdrew almost \$1 million from 85 customer accounts for book-up credit to purchase second-hand cars.¹⁶ It was understood that withdrawals would be applied in part to reduce the customer's debt to Nobbys and in part for future purchases.¹⁷ As the customers had no access to funds except through Mr Kobelt, they had to either travel to Nobbys to shop, or ask

⁹ *Kobelt* (n 4) [20] (Kiefel CJ and Bell J).

¹⁰ *Ibid* 9 [20], 22 [79] (Kiefel CJ and Bell J), 42–3 [165]–[167] (Nettle and Gordon JJ).

¹¹ *Ibid* 42 [166] (Nettle and Gordon JJ).

¹² Rebecca Opie, 'APY Mintabie Store Owner Fined for Taking \$1m from Customers' Accounts through Book-Up Scheme', *ABC News* (online, 13 April 2017) <<https://www.abc.net.au/news/2017-04-13/mintabie-store-owner-fined-over-credit-book-up-scheme/8443410>>.

¹³ *Kobelt* (n 4) 7 [9] (Kiefel CJ and Bell J).

¹⁴ *Ibid* 11 [31] (Kiefel CJ and Bell J).

¹⁵ *Ibid* 10 [22] (Kiefel CJ and Bell J).

¹⁶ *Ibid* 45 [181] (Nettle and Gordon JJ).

¹⁷ *Ibid* 10 [23] (Kiefel CJ and Bell J).

Mr Kobelt to issue ‘purchase orders’ to other stores (for a fee).¹⁸ The majority of book-up credit was supplied so that customers could purchase out-of-warranty second-hand cars from Mr Kobelt, which frequently broke down.¹⁹ Mr Kobelt embedded a credit charge in the car prices, which exceeded commercial rates.²⁰ However, Mr Kobelt generally did not act dishonestly,²¹ and Anangu customers were generally ‘well-disposed’ towards him.²²

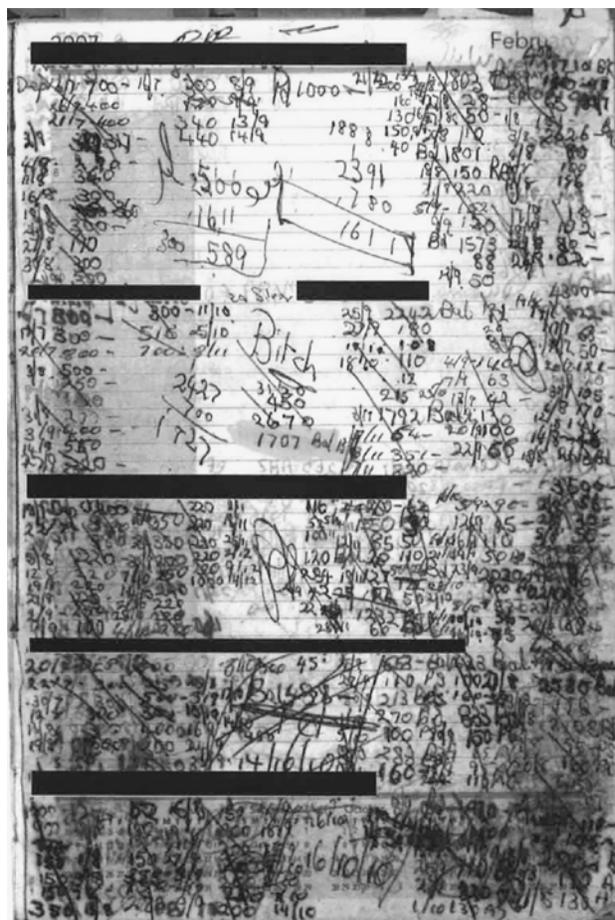


Figure 2: An example of Mr Kobelt’s book-up records²³

¹⁸ Ibid 46–7 [189]–[192] (Nettle and Gordon JJ).

¹⁹ Ibid 44 [175]–[176] (Nettle and Gordon JJ).

²⁰ Ibid 44–5 [177]–[179], 47–8 [198]–[204] (Nettle and Gordon JJ).

²¹ Ibid 11 [31] (Kiefel CJ and Bell J).

²² Ibid 13 [40] (Kiefel CJ and Bell J).

²³ Australian Securities and Investments Commission, ‘Appellant’s Submissions with Redacted Attachments’, Submission in *ASIC v Kobelt*, A32/2018, 5 October 2018, attachment 4 <http://www.hcourt.gov.au/cases/case_a32-2018>.

Although unusual to an outsider, book-up arrangements have existed in remote Indigenous communities for decades.²⁴ Anthropological evidence collected from Anangu customers gave no sense that book-up was seen as unfair.²⁵ Rather, it was a simple way to obtain credit that was not otherwise available.²⁶ It also reflected a cultural preference ‘to conduct financial transactions through the use of brokers, such as storekeepers’.²⁷ Further, it had two particular advantages in the context of Anangu culture and practices. First, the control on spending imposed by Mr Kobelt ‘had a beneficial effect in ameliorating the boom and bust cycle’, whereby the Anangu customers tended to spend money as it became available ‘without regard to the medium-to-long-term consequences’.²⁸ Second, a ‘foundational principle of Anangu life’ is a social obligation to share resources with specific categories of kin.²⁹ This obligation, known as ‘demand sharing’ or ‘humbugging’, manifests in demands for resources such as cash from those believed to have it.³⁰ There was some limited evidence that Mr Kobelt’s customers used book-up to avoid demand sharing.³¹

B *Applicable Legislation*

Section 12CB of the *ASIC Act* provides:

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of financial services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.³²

²⁴ *Kobelt* (n 4) 4 [1]–[2], 22 [79] (Kiefel CJ and Bell J). See also Gordon Renouf, *Book Up: Some Consumer Problems* (ASIC Report No 12, March 2002); Australian Securities and Investments Commission, *Book Up in Indigenous Communities in Australia: A National Overview* (Report No 451, October 2015) 5 [10], 10 [18].

²⁵ *Kobelt* (n 4) 12 [33] (Kiefel CJ and Bell J).

²⁶ *Ibid* 12 [34] (Kiefel CJ and Bell J); *ASIC v Kobelt* [2016] FCA 1327, [510].

²⁷ *Kobelt* (n 4) 12 [32] (Kiefel CJ and Bell J).

²⁸ *Ibid* 12 [35] (Kiefel CJ and Bell J).

²⁹ *Ibid* 12 [36] (Kiefel CJ and Bell J).

³⁰ *Ibid* 12–13 [36]–[39] (Kiefel CJ and Bell J).

³¹ *Ibid* 13 [38] (Kiefel CJ and Bell J), 51 [218] (Nettle and Gordon JJ).

³² This is the form of s 12CB(1) from 1 January 2012 to 25 October 2018. Mr Kobelt’s conduct dated back to at least 1 June 2008, but the case proceeded on the basis that differences in the prior legislation were immaterial to the result: *ibid* 6–7 [9] (Kiefel CJ and Bell J), citing *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [33] (Tamberlin, Finn and Conti JJ).

This is supplemented by ss 12CB(2)–(4), particularly ss 12CB(4)(a)–(b):

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
 - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; ...

Section 12CC provides a lengthy but non-exhaustive list of factors for courts to consider, including the relative strengths of the parties' bargaining positions, whether conditions are imposed that are not reasonably necessary to protect the supplier's legitimate interests, and the availability of equivalent services elsewhere.³³

C Issue

Kobelt turned on whether Mr Kobelt's conduct in providing book-up credit was 'unconscionable' under s 12CB.³⁴

D The Lower Court Decisions

At first instance, White J of the Federal Court held that Mr Kobelt's conduct was unconscionable.³⁵ Mr Kobelt exploited Anangu customers by taking advantage of their vulnerability. This vulnerability 'must have been apparent to Mr Kobelt'.³⁶ His system resulted in Anangu customers having 'little practical alternative but to continue shopping at Nobbys despite the inconvenience'.³⁷

On appeal, the Full Court of the Federal Court unanimously held that Mr Kobelt's conduct was *not* unconscionable.³⁸ Justices Besanko and Gilmour said the fact that Anangu customers 'voluntarily entered into the book-up arrangements' was a 'powerful consideration against a finding of unconscionable conduct'.³⁹ Given the

³³ *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CC(1)(a), (b), (e) ('ASIC Act'). These examples are illustrative only and the legislation lists many more factors. Paragraphs (c), (d), (j) and (l) were also relevant in this case: see *Kobelt* (n 4) 6 [6] (Kiefel CJ and Bell J).

³⁴ *Kobelt* (n 4) 6 [8] (Kiefel CJ and Bell J).

³⁵ *ASIC v Kobelt* [2016] FCA 1327, [624]. At [3], White J also held that Mr Kobelt contravened s 29 of the *National Consumer Credit Protection Act 2009* (Cth), but that issue did not reach the High Court.

³⁶ *ASIC v Kobelt* [2016] FCA 1327, [620].

³⁷ *Ibid.*

³⁸ *Kobelt v ASIC* (2018) 352 ALR 689, 736 [269] (Besanko and Gilmour JJ), 759 [387] (Wigney J).

³⁹ *Ibid* 735 [266] (Besanko and Gilmour JJ).

advantages of book-up and the customers' basic understanding of it (amongst other factors),⁴⁰ Mr Kobelt's conduct was also not predatory or exploitative.⁴¹ Justice Wigney agreed, adding that White J 'gave insufficient weight to the anthropological and other evidence which explained why the Anangu [customers] freely chose to engage in book-up arrangements with Mr Kobelt'.⁴²

III DECISION

ASIC appealed to the High Court. By a bare majority of Kiefel CJ and Bell J, Gageler J, and Keane J, the High Court dismissed the appeal and held that Mr Kobelt's conduct was *not* unconscionable under s 12CB. Justices Nettle and Gordon, and Edelman J dissented.

A *The Majority*

The majority in *Kobelt* was united by a finding that Mr Kobelt's book-up system was used voluntarily in addition to a conservative construction of 'unconscionable' in s 12CB. It followed that book-up did not exploit any special disadvantage of the Anangu customers.⁴³

For Kiefel CJ and Bell J, what proved determinative was 'the absence of *unconscientious* advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system'.⁴⁴ That conclusion rested on several findings. Most importantly, the circumstances causing Anangu customers to use book-up were 'not the product of [their] special disadvantage'.⁴⁵ Rather, Anangu customers voluntarily used book-up because it ameliorated the boom and bust cycle, reduced demand sharing and provided access to credit despite their low incomes and few assets.⁴⁶ They understood its 'basic elements' and their perception simply 'reflected aspects of Anangu culture that are not found in mainstream Australian society'.⁴⁷ The absence of any undue influence or dishonesty also militated against unconscionability.⁴⁸

⁴⁰ Ibid 735–6 [260]–[267] (Besanko and Gilmour JJ).

⁴¹ Ibid 735–6 [267]–[268] (Besanko and Gilmour JJ).

⁴² Ibid 741 [296] (Wigney J).

⁴³ *Kobelt* (n 4) 15–16 [48]–[50], 18–19 [62]–[63] (Kiefel CJ and Bell J), 24 [88]–[90], 29 [110]–[111] (Gageler J), 30 [115], 31–2 [119] (Keane J). Note, however, that the evaluative approach to unconscionability involves a broad analysis of all the circumstances, not 'a mere balancing of the applicable considerations': at 27 [101] (Gageler J). For brevity, only the most significant considerations have been extracted here.

⁴⁴ Ibid 9 [19], 21 [75]–[76] (Kiefel CJ and Bell J) (emphasis in original).

⁴⁵ Ibid 18–19 [62]–[63], 20 [69] (Kiefel CJ and Bell J).

⁴⁶ Ibid 19–20 [64]–[69] (Kiefel CJ and Bell J).

⁴⁷ Ibid 21 [78] (Kiefel CJ and Bell J).

⁴⁸ Ibid 17–18 [58]–[59] (Kiefel CJ and Bell J).

Justice Gageler focussed more on the ‘gravity’ imparted by Parliament’s use of the word ‘unconscionable’.⁴⁹ As Anangu customers could end their relationship with Mr Kobelt by not returning their keycards, cancelling them or redirecting their income,⁵⁰ it followed that the use of book-up was ‘a matter of choice’,⁵¹ and thus it did not exploit any vulnerability.⁵² To hold otherwise would ‘dilute’ the gravity of the term ‘unconscionable’.⁵³

For Keane J, the key was that tying customers to Nobbys ‘was not itself an exploitation for pecuniary advantage’,⁵⁴ nor were Anangu customers worse off because of book-up.⁵⁵ Overall, the book-up terms merely reflected the ‘highly unusual market’ in which Mr Kobelt operated.⁵⁶

B *The Dissents*

The dissenting judges were more sceptical of the ‘choice’ to use book-up. Justices Nettle and Gordon stated that unconscionability developed precisely *because* people at a special disadvantage might voluntarily enter exploitative arrangements.⁵⁷ In this case, Mr Kobelt’s customers were at an ‘obvious’⁵⁸ special disadvantage due to their remoteness, poverty, limited financial literacy and lack of education.⁵⁹ It was therefore unconscionable for Mr Kobelt, who ‘held all the power’,⁶⁰ to tie his customers to Nobbys⁶¹ by providing credit to them through a system that

deprived customers of independent means of obtaining the necessities of life. It prevented them from shopping in their own communities. It created a prolonged dependence on Mr Kobelt’s exercise of discretion.⁶²

⁴⁹ Ibid 24 [88] (Gageler J).

⁵⁰ Ibid 28 [105]–[106] (Gageler J).

⁵¹ Ibid 28 [107] (Gageler J).

⁵² Ibid 29 [111] (Gageler J).

⁵³ Ibid 28 [107] (Gageler J).

⁵⁴ Ibid 33 [125] (Keane J).

⁵⁵ Ibid 33 [125], 34 [128] (Keane J).

⁵⁶ Ibid 33 [127] (Keane J).

⁵⁷ Ibid 55 [238] (Nettle and Gordon JJ).

⁵⁸ Ibid 49 [208] (Nettle and Gordon JJ).

⁵⁹ Ibid 54 [235] (Nettle and Gordon JJ).

⁶⁰ Ibid 55 [241] (Nettle and Gordon JJ).

⁶¹ Ibid 58–9 [254]–[256] (Nettle and Gordon JJ).

⁶² Ibid 49 [206] (Nettle and Gordon JJ).

Their Honours rejected the use of cultural preferences to excuse Mr Kobelt's conduct:

Surely, anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu people.⁶³

Justice Edelman agreed with Nettle and Gordon JJ,⁶⁴ but added further reasons. His Honour was particularly forthright in declaring that the 'most basic error' in the Full Court's reasoning was 'that the choice of Mr Kobelt's system of credit by the Anangu customers was no real choice at all'.⁶⁵

IV COMMENT

A Paternalism or Paternalism: Choose One

One of the most difficult questions raised by a case like *Kobelt* is the issue of whether distant courts can ever be an effective mechanism for empowering Indigenous people.

To illustrate, the majority's conclusion arguably perpetuates the paternalistic control exercised through book-up systems. That conclusion could impede financial independence for book-up customers. It also risks disregarding the paternalistic context which led to book-up developing at all. This context includes 'colonial exploitation' and government policies and laws that 'deprived members of Indigenous communities of control of their finances'.⁶⁶ Or, even worse, the majority's conclusion arguably uses historical and cultural factors which make the Anangu people more vulnerable to *excuse* what is otherwise unconscionable. It thus establishes what Tania and Yates call 'a lower standard of business conscience' in the Anangu community.⁶⁷

⁶³ Ibid 60 [260] (Nettle and Gordon JJ). Justice Edelman made a similar point: at 75–6 [313].

⁶⁴ Ibid 62 [268] (Edelman J).

⁶⁵ Ibid 73 [302] (Edelman J).

⁶⁶ Sharmin Tania and Rachel Yates, 'Australian Securities and Investments Commission v *Kobelt*: Evaluating Statutory Unconscionability in the Cultural Context of an Indigenous Community' (2018) 40(4) *Sydney Law Review* 557, 568. See also Australian Securities and Investments Commission, *Book Up in Indigenous Communities in Australia: A National Overview* (n 24) 10 [18]–[20]; Renouf (n 24) 16–18; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006).

⁶⁷ Tania and Yates (n 66) 566. For an approach to unconscionability in a similar factual scenario that does not apply a lower standard of business conscience, see *Driscoll v Tomarchio* [2010] WASC 157.

However, grimly, the dissenting approach is equally liable to criticism. It may be ‘ultimately a worse form of paternalism’,⁶⁸ in that it dictates to the Anangu customers what is purportedly in their interests, discounts a cultural approach to money management and could limit their only prospect of affording goods such as cars. As Renouf observes, the prohibition of certain book-up practices could lead to ‘short-term disadvantage’ and would be regarded by some as a ‘significant interference’,⁶⁹ particularly in the absence of alternatives.⁷⁰

B *Balancing Choice and Protection*

Nevertheless, there are consequentialist and conceptual reasons for preferring the dissenting view in *Kobelt* (the latter are considered in Part C). The former rest on how the dissenting judgments balance choice and protection. Crucially, the dissenting approach does not demand the abolition of book-up credit. As Nettle and Gordon JJ emphasise (and Edelman J echoes), ‘[b]ook-up is not itself unconscionable. The problems were with Mr Kobelt’s book-up system and its particular features.’⁷¹ The dissenting approach merely requires that any book-up system be accompanied by full fee disclosure, no retention of a customer’s bank card and PIN, an agreement about how much money can be withdrawn and transparent record-keeping.⁷² I respectfully submit that such an approach still respects the choice of Indigenous people to use book-up credit for cultural and historical reasons, but at least sets a baseline standard for how such credit should be offered across Australia. In particular, it would facilitate more informed decision-making and curb exploitative forms of book-up. From a consequentialist perspective, there is therefore much to recommend the dissenting view in *Kobelt*.

C *Voluntariness Taken a Step Too Far?*

The conceptual reasons for preferring the dissenting approach concern the issue of voluntariness.

In *Commercial Bank of Australia Ltd v Amadio* (*‘Amadio’*),⁷³ Mason J explained that relief from unconscionable conduct will be granted where an unconscientious advantage ‘is taken of an innocent party who, *though not deprived of an independent*

⁶⁸ Lindsay Kobelt, ‘Respondent’s Submissions’, Submission in *ASIC v Kobelt*, A32/2018, 2 November 2018, 10 [36] <http://www.hcourt.gov.au/cases/case_a32-2018>.

⁶⁹ Renouf (n 24) 51 [15].

⁷⁰ Nathan Boyle, ‘Book Up: Current Regulation and Options for Reform’ (2016) 8(22) *Indigenous Law Bulletin* 3, 7.

⁷¹ *Kobelt* (n 4) 61 [264] (Nettle and Gordon JJ), 73 [301] (Edelman J).

⁷² *Ibid* 52–3 [227] (Nettle and Gordon JJ), 73 [301] (Edelman J).

⁷³ (1983) 151 CLR 447 (*‘Amadio’*).

and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest'.⁷⁴

The same point was recently made by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ — all of whom sat on *Kobelt* — in *Thorne v Kennedy* ('*Thorne*').⁷⁵ ASIC may therefore have been quietly confident in submitting that voluntarily entering a book-up arrangement was 'no barrier to a finding of unconscionability'.⁷⁶ However, four of the judges who endorsed Mason J's view held in *Kobelt* that the choice of Anangu customers to use book-up negated a finding that Mr Kobelt's conduct was unconscionable.⁷⁷

Of course, both *Amadio* and *Thorne* concerned unconscionability in equity. The language of ss 12CB–12CC of the *ASIC Act* justifies some differences in the approach to statutory unconscionability.⁷⁸ But, with respect, the majority's approach to voluntariness is not one of them. It raises two issues, one logical and the other doctrinal.

On the logical issue, the dissenting judges in *Kobelt* make a powerful argument that '[i]t does not alleviate the unconscionability of Mr Kobelt's book-up system that his customers were so disadvantaged as to regard Mr Kobelt's offering as acceptable'.⁷⁹ Moreover, Mr Kobelt gave the Anangu customers 'Hobson's choice — no matter how badly they need credit, they can either "choose" that system or "choose" no credit at all'.⁸⁰

The doctrinal issue has broader implications. The majority's approach erodes the principle at the root of unconscionability: 'protection of the vulnerable from exploitation by the strong'.⁸¹ It does this by taking the role of voluntariness a step further than *Kakavas v Crown Melbourne Ltd*.⁸² In that case, a problem gambler argued that

⁷⁴ Ibid 461 (Mason J) (emphasis added). See also *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

⁷⁵ (2017) 263 CLR 85, 104 [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*').

⁷⁶ Australian Securities and Investments Commission, 'Appellant's Submissions with Redacted Attachments', Submission in *ASIC v Kobelt*, A32/2018, 5 October 2018, 10 [32] <http://www.hcourt.gov.au/cases/case_a32-2018>.

⁷⁷ *Kobelt* (n 4) 17–18 [58], 21 [78] (Kiefel CJ and Bell J), 28 [107] (Gageler J), 30 [115] (Keane J).

⁷⁸ *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 180–2 [38]–[47] (Santamaria JA, Neave and Osborn JJA agreeing). See also Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2016) 339–46.

⁷⁹ *Kobelt* (n 4) 60 [262] (Nettle and Gordon JJ). Justice Edelman makes the same point: at 76 [313].

⁸⁰ Ibid 61 [266] (Edelman J).

⁸¹ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [282] (Allsop CJ).

⁸² (2013) 250 CLR 392.

the casino engaged in unconscionable conduct by luring him to its tables and letting him lose \$20.5 million over 14 months. A key reason why Mr Kakavas' claim failed was because 'he was present at the gaming table ... because of decisions *voluntarily made by him when he was not in the grip of his abnormal enthusiasm*'.⁸³ There is sense in that approach, which denies relief to those who *choose* to make themselves vulnerable. *Kobelt* is not such a case. The Anangu customers did not choose to use book-up before being affected by their poverty, lack of formal education, limited financial literacy and lack of alternatives. Those factors were omnipresent. In such circumstances, as Tania and Yates suggest, 'voluntariness should not be considered in isolation from vulnerability'.⁸⁴

The majority's approach in *Kobelt* opens the door to arguing that a person's vulnerabilities can be dismissed because other factors contributed to their 'choice' to accept unjust or unfair conduct. If this development makes relief harder to obtain under s 12CB than in equity, Parliament's attempt to legislate a protection 'not limited by the unwritten law'⁸⁵ may have actually resulted in one that is even *more* limited.

D Law Reform: Should We Call Time on 'Unconscionable'?

Finally, *Kobelt* exemplifies the ongoing difficulty with the word 'unconscionable'. All of the majority reasoned that Parliament's use of 'unconscionable' carries a requirement for exploitation or victimisation of the weaker party, and prevents 'lowering the bar' for relief.⁸⁶ In stark contrast, Edelman J insisted that the history of s 12CB reveals 'a clear legislative intention that the bar over which conduct will be unconscionable must be lower than that developed in equity'.⁸⁷ Curiously, Kiefel CJ and Bell J did not rule this out, but stated that further consideration should only occur if 'the proposition is squarely raised and argued'.⁸⁸ The proposition could well be argued. Justice Edelman provides the blueprint.⁸⁹

⁸³ Ibid 402 [23] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) (emphasis added).

⁸⁴ Tania and Yates (n 66) 562. See also *Kobelt* (n 4) 41 [158]–[159] (Nettle and Gordon JJ); Jeannie Marie Paterson, Elise Bant and Matthew Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13(1) *Journal of Equity* 81, 99–101.

⁸⁵ *ASIC Act* (n 33) s 12CB(4)(a).

⁸⁶ *Kobelt* (n 4) 15–16 [48]–[50] (Kiefel CJ and Bell J), 24 [88]–[90] (Gageler J), 31–2 [119] (Keane J).

⁸⁷ Ibid 72 [295] (Edelman J). Justices Nettle and Gordon do not expressly endorse this view, but it is unclear precisely where their Honours fall on the spectrum between Edelman J and the majority on this point: see, eg, *ibid* 37 [144] (Nettle and Gordon JJ).

⁸⁸ Ibid 16 [50] (Kiefel CJ and Bell J).

⁸⁹ Ibid 65–72 [279]–[295] (Edelman J).

However, post-*Kobelt*, lowering the bar for relief ‘may only be possible if “unconscionable” is replaced with “unjust” or “unfair”’.⁹⁰ This option warrants serious consideration for four reasons.

First, s 12CB has produced a 4:3 split decision with three majority judgments. I do not agree with the observations of Lee J and Bromwich J that *Kobelt* merely shows how the legal principles on the meaning of statutory unconscionability are ‘settled’ and that minds just differ when evaluating specific conduct.⁹¹ In contrast, I suggest that important disagreements remain over the role of voluntariness in assessing statutory unconscionability, as well as how to balance Parliament’s choice of a word with an established use in equity against the history of s 12CB and the intentions expressed in s 12CB(4). Justice Robb and Archer J have similarly noted residual uncertainty in post-*Kobelt* judgments.⁹² In any event, the existence of uncertainty over whether there is uncertainty emphasises the problem! It follows that Parliament’s plan to ensure the courts receive ‘a clear message about the way in which [P]arliament intends the law to apply’⁹³ has fizzled.⁹⁴ As Paterson, Bant and Clare observe, *Kobelt* ‘is likely to hamper the interpretation and use of the novel provisions offered by the statutory doctrine of unconscionable conduct’.⁹⁵ In the long run, retention of the term ‘unconscionable’ may inhibit rather than promote certainty.

Second, Edelman J is not a lone voice. Chris Maxwell has suggested that ‘better understanding’ and ‘higher standards of conduct’ might be achieved by replacing

⁹⁰ Ibid 75 [311] (Edelman J) (citations omitted). This view is arguably vindicated post-*Kobelt* in *Commonwealth Bank of Australia v Dinh [No 2]* [2019] WASC 456, where counsel invited Archer J to assume that the test under s 12CB was the same as the test at equity: at [682].

⁹¹ The quotation is from *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177, [212] (Lee J). See also *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) [No 3]* [2019] FCA 1982, [90] (Bromwich J).

⁹² *Almona Pty Ltd v Parklea Corporation Pty Ltd* [2019] NSWSC 1868, [781] (Robb J); *Commonwealth Bank of Australia v Dinh [No 2]* [2019] WASC 456, [682] (Archer J). See also *Realtek Holdings Pty Ltd v Wetamast Pty Ltd* [2019] NSWSC 1869, where Robb J observed that ‘the members of the High Court explained the meaning of statutory unconscionable conduct in somewhat different terms’: at [237].

⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4359 (Craig Emerson, Minister for Competition Policy and Consumer Affairs).

⁹⁴ Further, even before *Kobelt*, divergent lines of authority were developing: Consumer Action Law Centre, ‘Unfair Trading and Australia’s Consumer Protection Laws’ (Discussion Paper, July 2015) 10 <<https://consumeraction.org.au/wp-content/uploads/2015/07/Unfair-Trading-Consumer-Action-2015-Online.pdf>>; Gerard Brody and Katherine Temple, ‘Unfair but Not Illegal: Are Australia’s Consumer Protection Laws Allowing Predatory Businesses to Flourish?’ (2016) 41(3) *Alternative Law Journal* 169, 171.

⁹⁵ Paterson, Bant and Clare (n 84) 83. See also Consumer Action Law Centre, ‘Unconscionable Conduct: Divided High Court Confirms Need for Change to the Law’ (Media Release, 13 June 2019) <https://consumeraction.org.au/20190613-unconscionable-conduct/#_ftn2>.

‘unconscionable’ with ‘unfair’.⁹⁶ Rod Sims has also advocated for replacing statutory unconscionability with a new ‘unfair conduct’ provision.⁹⁷ They join a growing chorus.⁹⁸ The European Union⁹⁹ and the United States¹⁰⁰ have shown how it can be done.

Third, we already have legislation prohibiting some types of ‘unjust’ or ‘unfair’ conduct.¹⁰¹ Despite early concerns over the ambiguity of such terms, ‘[t]he sky did not fall in’¹⁰² and the analytical process is similar to ss 12CB–12CC.¹⁰³ Of course, if such a reform was pursued for s 12CB, it should be crafted so that it does not prohibit commercial parties from ever pursuing their legitimate self-interest, nor should it allow everyone who faces hardship to escape a bargain they have simply come to regret.

Finally, the Banking Royal Commission provides additional impetus to ensure that protections against misconduct by financial service providers are up to the task. Even if the bar for relief should not be lowered, the problem remains that ongoing uncertainty makes the prospects of any statutory unconscionability claim ‘impossible to predict with any confidence’.¹⁰⁴

⁹⁶ Chris Maxwell, ‘Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce’ (Speech, Victorian Law Foundation Oration, 14 August 2019) 16.

⁹⁷ Ben Butler, ‘Not Fair? Why Judges Have Been Accused of Failing Australian Consumers’, *The Guardian* (online, 8 September 2019) <<https://www.theguardian.com/australia-news/2019/sep/08/not-fair-why-judges-have-been-accused-of-failing-australian-consumers>>.

⁹⁸ See, eg, Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, March 2017) 50–1; Jeannie Marie Paterson and Gerard Brody, ‘“Safety Net” Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models’ (2015) 38(3) *Journal of Consumer Policy* 331; Brody and Temple (n 94).

⁹⁹ *Parliament and Council Directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149/22, art 5(1).

¹⁰⁰ *Federal Trade Commission Act of 1914*, 15 U.S.C. § 45(a) (2019).

¹⁰¹ *Contracts Review Act 1980* (NSW) s 7(1) uses ‘unjust’; *Australian Consumer Law* (n 6) s 23(1) and *ASIC Act* (n 33) s 12BF(1) use ‘unfair’; *Corporations Act 2001* (Cth) s 912A(1)(a) uses the combination of ‘efficiently, honestly and fairly’.

¹⁰² James Allsop, ‘The Judicialisation of Values’ [2018] *Federal Judicial Scholarship* 14, [14].

¹⁰³ See the similarity between *Contracts Review Act 1980* (NSW) s 9 and *ASIC Act* (n 33) s 12CC.

¹⁰⁴ Boyle (n 70) 5.

V CONCLUSION

Kobelt is the latest development in the jurisprudence on statutory unconscionability. It illustrates how s 12CB of the *ASIC Act* operates and it clarifies the High Court's view that statutory unconscionability does not involve a lower bar for relief than equity. However, despite both the majority and dissenting views being liable to criticism for judicial paternalism, the dissents at least strike a better balance between promoting choice and ensuring consumer protection. The majority's approach to voluntariness may also mean that it will now be harder to establish that conduct was unconscionable if other factors contributed to a consumer's acceptance of that conduct.

The great irony of *Kobelt* is that it represents a role reversal. Whereas once the courts invoked equity 'to mitigate the rigours of strict law',¹⁰⁵ the majority's insistence on not lowering the bar for relief invokes equitable unconscionability to *exacerbate* the rigours of s 12CB of the *ASIC Act*. The goal of more flexible statutory protection against unconscionable conduct has been frustrated. Reform is the best path forward.

¹⁰⁵ *Crabb v Arun District Council* [1976] 1 Ch 179, 187 (Lord Denning MR), being a modern take on the principle that '[t]he Office of the Chancellor is ... to soften and mollify the Extremity of the Law': *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485, 486.

**PROTECTING OR NEGLECTING?
THE CASE OF *PUBLIC ADVOCATE V C, B*
(2019) 133 SASR 353**

I INTRODUCTION

As Australia's population ages, and the prevalence of dementia increases,¹ questions regarding the powers of those who take on legal responsibility for persons recognised as mentally incapacitated will likely become more common.² One such question recently came before the Full Court of the Supreme Court of South Australia in *Public Advocate v C, B*.³ This case concerned an appeal by the Public Advocate against a declaration made by Stanley J in the Supreme Court of South Australia that the respondent, a 95-year-old man named 'BC', was unlawfully detained at a residential aged care facility by reason of the Public Advocate's exercise of guardianship over him under s 29 of the *Guardianship and Administration Act 1993* (SA) ('*Guardianship Act*').

At first glance, the decision by the Full Court to dismiss the appeal appears to be a sweeping judgment, with wide-ranging implications as to how our health system currently treats those with mental incapacities such as dementia. After all, by upholding Stanley J's decision to grant a writ of habeas corpus, the Full Court (Kourakis CJ, Kelly J and Hinton J) effectively dissolved the legal basis that South Australian families and medical practitioners have relied upon when making the difficult decision to remove elderly persons into secure dementia wards or nursing homes, concluding that this constitutes unlawful detention.

However, upon closer examination, the Full Court's decision does not necessarily involve a radical reconceptualisation of the law's treatment of those who lack the mental capacity to make decisions for themselves. Instead, it is a judgment consistent

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¹ Deaths due to dementia have increased by 68.6% in Australia since 2009: Australian Bureau of Statistics, *Causes of Death, Australia, 2018* (Catalogue No 3303.0, 25 September 2019).

² See, eg, James D Gallagher and Cara M Kearney, 'Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go' (2003) 16(4) *Georgetown Journal of Legal Ethics* 597.

³ (2019) 133 SASR 353 ('*Public Advocate v C, B*').

with the principle of legality, international covenants and statute. Although the question of the scope of a guardian's powers in emergency circumstances is left unresolved, the decision ensures additional protections, transparency and oversight for protected persons under the *Guardianship Act*. The decision thus serves as an important reminder of the role our courts play in upholding community values and providing crucial oversight of statutory offices — showing us that where those charged with protecting the vulnerable fail, our courts will be there to protect us and ensure that these failures do not go unnoticed.

II FACTS

The respondent, referred to by the pseudonym BC, suffered from dementia of 'moderate severity'.⁴ Following an application by the respondent's wife and a medical practitioner to the South Australian Civil and Administrative Tribunal ('SACAT') on 27 September 2018, the Public Advocate was appointed as BC's limited guardian for the purposes of his 'accommodation and lifestyle' pursuant to s 29(2) of the *Guardianship Act*.⁵ SACAT also appointed the respondent's wife as his limited guardian for the purposes of his health care.⁶

In a purported exercise of these powers, the Public Advocate gave a direction that BC reside in the Memory Support Unit of the Barossa Village Aged Care Facility ('the Memory Unit') on 5 October 2018.⁷ Access to and from the Memory Unit was controlled by a set of locked doors which could only be opened with a classified key code, or using an electronic key card held by staff.⁸ BC's ability to exit the Memory Unit was restricted to the intermittent occasions when he would be escorted outside by a member of staff or a permitted family member.⁹

Soon after the placement of the respondent in the Memory Unit, the respondent's son lodged an application to SACAT for internal review of the guardianship orders, which later became an application for judicial review and habeas corpus in the Supreme Court of South Australia.

III DECISION BY STANLEY J

At first instance, Stanley J granted the application, declaring that the respondent was unlawfully detained in the Memory Unit and that a writ of habeas corpus should issue.¹⁰

⁴ Ibid 354 [1].

⁵ Ibid 354 [2].

⁶ Ibid.

⁷ Ibid 354 [3].

⁸ Ibid.

⁹ Ibid 368 [63].

¹⁰ Ibid 355 [4].

This decision turned on two separate findings: first, that the conditions in the Memory Unit did in fact restrict the respondent's freedom of movement;¹¹ and secondly, that the powers of the limited guardianship granted to the appellant did not provide a lawful justification for authorising BC's detention.¹²

IV ISSUES BEFORE THE FULL COURT

On appeal to the Full Court, the Supreme Court (composed of Kourakis CJ, Kelly and Hinton JJ) was asked to consider the following two questions:

- i. whether the scope of the general guardianship powers contained in s 31 of the *Guardianship Act* extend to making an order to detain a person ('the statutory construction issue');¹³ and
- ii. whether a person is falsely imprisoned when their alleged detention is intermittent and includes occasions of 'conditional liberty' ('the false imprisonment issue').¹⁴

V THE JUDGMENTS

The appeal was dismissed in separate judgments by Kourakis CJ, Kelly J and Hinton J, each finding that Stanley J had been right to issue habeas corpus and declare that BC's detention constituted false imprisonment.¹⁵

A Chief Justice Kourakis

The Chief Justice began his judgment by addressing the issue of statutory construction. Section 31 of the *Guardianship Act* provides that the powers of a guardian appointed under s 29 are

subject to this Act and the terms of the Tribunal's order, all the powers a guardian has at law or in equity.¹⁶

Defining the scope of the powers granted under s 31 therefore required consideration of two further issues: first, might the powers of a guardian at common law and equity extend to authorising a person's detention? If so, did the *Guardianship Act* limit these powers?

¹¹ Ibid 355 [5].

¹² Ibid.

¹³ Ibid 356 [11]–[12], 366 [50].

¹⁴ Ibid 370 [67].

¹⁵ Ibid 355 [5].

¹⁶ *Guardianship and Administration Act 1993* (SA) s 31 ('*Guardianship Act*').

1 *A Guardian's Powers at General Law*

As a result of extensive legislative reform to the law of mental health and guardianship since the first intervention into the general law by the *Lunacy Regulation Act 1853*, 16 & 17 Vict, c 70,¹⁷ defining the content of the powers of a guardian at common law and equity required consideration of 'relatively old authorities'.¹⁸ The power to grant guardianship over a person of 'unsound mind' was originally derived from the equitable jurisdiction exercised by the Court of Chancery, received in South Australia pursuant to s 17 of the *Supreme Court Act 1935* (SA).¹⁹ This equitable power included the discretion 'to use force, to detain a protected person, and to authorise others to do the same'.²⁰

The scope of this power was considered in relation to the power to detain persons of 'unsound mind' in *McLaughlin v Fosbery* ('*McLaughlin*').²¹ In that case, the High Court was required to determine whether the conduct of the respondent police officers in forcibly removing the appellant to a private hospital could be lawfully justified by an order given by the appellant's wife within her powers as 'the committee of his person' (his guardian with respect to his personal care, but not property).²² Dismissing the appeal, the High Court found that at general law, the powers held by the appellant's wife as his guardian did extend to 'caus[ing] the removal of the lunatic from one place of residence to another if circumstances justify such action'.²³

Therefore, on the face of it, the general powers of a guardian provided by s 31 of the *Guardianship Act* appear to authorise a power of detention.

2 *Construction of the Guardianship Act*

Justice Stanley found that that the powers contained in s 31 of the *Guardianship Act* were limited by s 32.²⁴ Section 32 sets out additional orders for which a guardian (as an 'appropriate authority') may apply:

The Tribunal, on application made by an appropriate authority in respect of a person to whom this section applies—

¹⁷ Sir Henry Studdy Theobald, *The Law Relating to Lunacy* (Stevens and Sons, 1924) 40.

¹⁸ *Public Advocate v C, B* (n 3) 359 [25].

¹⁹ *Ibid* 356 [11].

²⁰ *Ibid* 356 [12]; Theobald (n 17) 49.

²¹ (1904) 1 CLR 546 ('*McLaughlin*').

²² *Public Advocate v C, B* (n 3) 360 [25]–[27].

²³ *Ibid* 361 [27], quoting *McLaughlin* (n 21) 564 (Griffith CJ).

²⁴ *Public Advocate v C, B* (n 3) 366 [50]–[51].

- (a) may, by order, direct that the person **reside**—
 - i. with a specified person or in a specified place; or
 - ii. with such person or in such place as the appropriate authority from time to time thinks fit,

...
- (b) may, by order, **authorise the detention** of the person in the place in which he or she will so reside; and
- (c) may, by order, authorise the persons from time to time involved in the care of the person to **use such force as may be reasonably necessary** for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person.²⁵

An order under s 32 may only be made in cases where SACAT is satisfied that ‘the health or safety of the person or the safety of others would be seriously at risk’.²⁶

3 *The Parties’ Submissions*

It was the applicant’s submission that Stanley J had been wrong to find that the *Guardianship Act* abrogated the content of the general law powers of a guardian contained in s 31 by creating an exhaustive and exclusive power for detaining a protected person in s 32.²⁷ Justice Stanley’s construction was stated to be consistent with the principle of legality, which requires that rights such as ‘personal liberty’ and ‘freedom of movement’ not be infringed except by ‘clear lawful authority’, or express words by Parliament.²⁸

In response, the Public Advocate contended that the powers contained within s 32 were instead properly construed as conferring *additional* powers to those held by a guardian under s 31. Whereas the general law authorised a guardian to detain a protected person by restricting their freedom of movement, s 32 further provided lawful justification to enter premises and use reasonable force in order to return a person to a place of detention pursuant to s 32(4)(a) — acts which would be illegal at general law alone.²⁹

The Public Advocate further submitted that Stanley J had been wrong to strictly construe the *Guardianship Act* by reference to the principle of legality, given that the

²⁵ *Guardianship Act* (n 16) s 32(1) (emphasis added).

²⁶ *Ibid* s 32(2).

²⁷ *Public Advocate v C, B* (n 3) 362 [31].

²⁸ *BC v Public Advocate* [2018] SASC 193, [29] (Stanley J).

²⁹ *Public Advocate v C, B* (n 3) 366 [53].

general law had ‘always accepted the abrogation of the right to liberty of persons of unsound mind’.³⁰

4 *The Chief Justice’s Decision*

The Chief Justice rejected the Public Advocate’s submissions, finding that the *Guardianship Act* had in fact abrogated the general law powers of a guardian contained in s 31 by creating an exclusive power for detention in s 32.³¹ His Honour concluded that

the very conferral of the power on the Tribunal to order detention suggests that the power to do so unilaterally has been withdrawn from the guardian.³²

This construction was supported by reference to the increasingly progressive legislative history relating to the care of persons suffering from mental illness in South Australia,³³ including the replacement of the *Lunatics Act 1864* (SA) by the *Mental Health Act 1977* (SA), and the introduction of a requirement to treat the welfare of the protected person as the ‘paramount consideration’.³⁴ A similar requirement is now contained in s 5 of the *Guardianship Act*, which emphasises the importance of personal autonomy and deference to the wishes of the protected person in construing the Act. Combined with the shift in community attitudes towards the treatment of the mentally ill since *McLaughlin*, Kourakis CJ considered that any authority suggesting a guardian has the power to detain had since ‘receded even further into legal history’.³⁵

The Chief Justice further upheld Stanley J’s decision to construe the *Guardianship Act* alongside the principle of legality, and extended this reasoning by reference to art 9 of the *International Covenant on Civil and Political Rights* (‘ICCPR’),³⁶ which recognises the right to liberty and security of the person.³⁷ The Chief Justice found this construction to be consistent with the High Court’s decision in *McLaughlin*, which gave substantial weight to individuals’ rights to personal freedom and autonomy, as

³⁰ Public Advocate, ‘Appellant’s Submissions’, Submission in *Public Advocate v C, B*, SCCIV 1402 of 2018, 21 February 2019, [14.1].

³¹ *Public Advocate v C, B* (n 3) 366 [50]–[51].

³² *Ibid* 366 [51].

³³ *Ibid* 363–4 [33]–[40].

³⁴ *Mental Health Act 1977* (SA) s 27(4)(b), repealed by *Mental Health Act Amendment Act 1986* (SA) item 7(b); *Public Advocate v C, B* (n 3) 364 [40].

³⁵ *Public Advocate v C, B* (n 3) 361 [29].

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’). Article 9(1) provides that ‘[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.

³⁷ *Public Advocate v C, B* (n 3) 366 [52].

well as the importance of judicial scrutiny of detention orders and any associated use of force.³⁸ Even at common law, there was a widespread practice ‘from long ago’ of guardians obtaining judicial sanction before restraining the liberties of a protected person.³⁹

Yet perhaps the factor that had the most bearing on Kourakis CJ’s decision was the public interest in ensuring that orders for detention are only made in transparent ways by independent bodies such as courts and legal tribunals.⁴⁰ This public interest was described by his Honour as ‘so obvious that it requires no explanation’, and one which must inform the construction of the *Guardianship Act*.⁴¹

Finally, Kourakis CJ also upheld Stanley J’s finding that BC was, in fact, falsely imprisoned.⁴² Even though the respondent was occasionally permitted outside of the Memory Unit, with supervision but without physical restraint, the effect of the appellant’s direction was to restrict his liberty to ‘goe at all times to all places whither he will without baile or main, prise or otherwise’.⁴³ This restriction, and only conditional liberty, was therefore sufficient to constitute the tort of false imprisonment.

Chief Justice Kourakis therefore found that Stanley J had been right to issue habeas corpus and declare the respondent falsely imprisoned.

B *Justices Kelly and Hinton*

Agreeing generally with the reasons of Kourakis CJ,⁴⁴ Kelly J and Hinton J also dismissed the appeal. However, their Honours’ agreement was subject to certain reservations set out by Hinton J.⁴⁵

First, Hinton J expressed reservation over whether an exception to the construction of s 32, as an exhaustive source of power to use force to detain a protected person, might arise in ‘emergency situations’.⁴⁶ Such situations could arguably lawfully justify the use of force to detain a protected person in circumstances of urgency

³⁸ Ibid 362 [32].

³⁹ Ibid 361 [29].

⁴⁰ Ibid 362 [29].

⁴¹ Ibid.

⁴² Ibid 371 [72].

⁴³ Ibid 370 [67], quoting Duke LJ’s reading of John Rastell, *Les Termes De La Ley: or, Certaine Difficult and Obscure Words and Termes of the Common Lawes and Statutes of This Realme Now in Use Expounded and Explained* (Jo Beale and Rich Hearne, 1641) 188 in *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, 51.

⁴⁴ *Public Advocate v C, B* (n 3) 372 [76]–[77].

⁴⁵ Ibid.

⁴⁶ Ibid 372 [77].

where it is necessary to ensure a protected person's 'safety and wellbeing', but there is insufficient time to obtain the appropriate order under s 32.⁴⁷

Secondly, Hinton J also stated that he would not draw the same conclusions regarding the construction of the *Guardianship Act* in relation to art 9 of the *ICCPR* before hearing submissions on the topic.⁴⁸

VI COMMENT

A *The Protection of the Vulnerable*

The Supreme Court's construction of the *Guardianship Act* is consistent with the fundamental value the law places upon personal freedom and liberty, reflected in art 9 of the *ICCPR*.⁴⁹ The importance of personal autonomy and deference to the wishes of the protected person in construing the *Guardianship Act* is similarly explicitly protected in s 5, which provides that when granting guardianship orders, the wishes of the protected person must be the 'paramount consideration'.⁵⁰ But most importantly, such a reading is also consistent with public expectations and community standards. When vulnerable people are detained, community expectations dictate that an independent body will evaluate whether such detention is necessary. Without such independent oversight, the only means of varying unjustified detention orders is if the protected person (who, it must be remembered, lacks the capacity to make decisions regarding their own wellbeing) or a benevolent intervener applies for a variation or revocation of the guardian's order under s 30 of the *Guardianship Act*. We cannot expect persons so vulnerable that they have been placed into the care of another to fight for their rights and freedoms, nor can we sit idly by and hope that some unrelated and benevolent person will intervene and fight for the vulnerable. This is particularly so in the case of the elderly who often lack social and familial support systems,⁵¹ leaving them with no one to protect and fight for them.

No person's fundamental freedoms of personal liberty and movement should be subject to removal at whim. Such a construction is not only an affront to the principle of legality and the *ICCPR*, but most importantly, to community values and expectations at large. Both Stanley J and Kourakis CJ (with whom Kelly J and Hinton J agreed) are correct in their construction of the *Guardianship Act* not only because of the law, but also because of its correlation with community values. These values underlie the *Guardianship Act* itself, and thus must be at the forefront of any decision interpreting the Act. After all, the *Guardianship Act* was enacted for the purpose

⁴⁷ Ibid.

⁴⁸ Ibid 373 [79].

⁴⁹ *ICCPR* (n 36) art 9(1).

⁵⁰ *Guardianship Act* (n 16) s 5(a).

⁵¹ For more information, see Aged & Community Services Australia, *Social Isolation and Loneliness Among Older Australians* (Issues Paper No 1, October 2015).

of protecting the vulnerable.⁵² Similarly, as its title suggests, the role of the Public Advocate is to advocate for members of the public, in particular the vulnerable. When the office was established, then-Governor Dame Roma Mitchell described the Public Advocate as ‘a watchdog on behalf of mentally incapacitated persons’.⁵³ In light of this, how can a reading of the *Guardianship Act* that abrogates the rights of the vulnerable, by restricting their personal liberties and freedoms without oversight, be within the spirit of the Act?

Thankfully for the mentally incapacitated and vulnerable, our courts have not forgotten the role of the Public Advocate. Nor have they forgotten the purpose of the *Guardianship Act* to ‘strike a sound balance between an individual’s right to autonomy and freedom and the need for care and protection from neglect, harm and abuse’,⁵⁴ with this reflected throughout the Supreme Court’s judgment. Instead, the Supreme Court has read the *Guardianship Act* in a way that is consistent with its purpose and with Australia’s international obligations under the *ICCPR*, reminding us that where our institutions and public offices fail, the courts will be there to protect our rights and liberties.

B *The Importance of Transparency*

It is important to understand that the Supreme Court has not imposed a blanket prohibition on the detention of those suffering from dementia in the secure wards of nursing homes. The decision in *Public Advocate v C, B* is not a comment on the way our society treats the elderly, nor is it in any way an extension of the *Royal Commission into Aged Care Quality and Safety*. It is, however, a decision that highlights the importance of the judiciary in upholding community values and providing crucial oversight of statutory offices.

Going forward, the Public Advocate can no longer unilaterally order the detention of those in its care. Instead, s 32 of the *Guardianship Act* stipulates that SACAT must oversee any decision to deprive a vulnerable person of their liberty.⁵⁵ As Kourakis CJ identified, such a process ensures that the orders which justify any restraint on liberty, and authorise others to take action which would otherwise be unlawful, are a matter of public record rather than private memoranda.⁵⁶ Importantly, s 32 also provides a further limitation on the guardian’s power to detain, by requiring that a detention order only be made where SACAT is satisfied that ‘the health or safety of the person or the safety of others would be seriously at risk’ otherwise.⁵⁷

⁵² South Australia, *Parliamentary Debates*, Legislative Council, 6 August 1992, 3 [29] (Dame Roma Mitchell, Governor).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Public Advocate v C, B* (n 3) 366 [54].

⁵⁶ *Ibid.*

⁵⁷ *Guardianship Act* (n 16) s 32(2).

If such orders could be made by guardians such as the Public Advocate alone, there would be no transparency or accessible review mechanism to challenge these decisions. Without the oversight of SACAT, the vulnerable could be rendered more susceptible to arbitrary detention. Instead, the Supreme Court's decision ensures that decisions that curtail the rights of the vulnerable are made by independent public bodies. This, in turn, ensures that principles such as independence, transparency, consistency and natural justice govern the determination,⁵⁸ rather than any other factors that may influence a body such as the Public Advocate. Unlike SACAT, the Public Advocate is under no obligation to provide reasons for its decisions, and its review mechanisms are significantly less accessible,⁵⁹ making its processes less transparent and open.

Through its construction of the *Guardianship Act*, the Supreme Court has ensured that principles of transparency, openness and natural justice remain at the heart of determinations affecting protected persons' freedom of movement. Through holding that such determinations can only be made by SACAT, a quasi-judicial body with transparency and natural justice at its core,⁶⁰ the Supreme Court has ensured that our right to freedom can only be abrogated by a public body in a decision of public record.

C Powers in Emergency Situations

Chief Justice Kourakis acknowledged the difficulties that his construction of the *Guardianship Act* would impose on guardians wishing to act to protect a person's safety under emergency circumstances.⁶¹ By construing s 32 as the exclusive and exhaustive source of power to detain a protected person, any legal justification which a guardian might have previously been seen to have under s 31 is now removed, without replacement. This clearly leaves guardians in an unenviable position when faced with the need to make urgent decisions as to a protected person's safe residence and accommodation, as doing so may now expose them to the risk of liability without lawful justification.

Such a scenario is hardly unlikely or unforeseeable in the circumstances of ensuring the safety of mentally incapacitated persons — guardians may in fact frequently be faced with scenarios where they must make urgent decisions as to the best course of action for the protected person. The continuing spread of COVID-19 may yet lead to such issues, with aged care facilities across Australia enacting increasingly strict lockdown measures, such as limiting residents' use of communal living areas and

⁵⁸ See the objectives of SACAT in dealing with matters: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8 ('SACAT Act').

⁵⁹ While the Public Advocate's decision in this case was reviewed through the courts, this was a lengthy and costly process, whereas the *SACAT Act* provides for both internal review and appeals: *ibid* ss 70–1.

⁶⁰ *Ibid* s 8.

⁶¹ *The Public Advocate v C, B* (n 3) 372 [73].

visitation rights, to minimise the risk of residents contracting the virus.⁶² Is it possible that such actions could now be characterised as restricting residents' freedom of movement, exposing hundreds of facilities across Australia to liability for unlawfully detaining residents?

Ultimately, the Full Court could not provide an answer as to what the lawful justification for actions taken by guardians in emergency situations might be. However, such an answer may already be found in s 31 of the *Guardianship Act*. At general law, *McLaughlin* established that guardians are authorised to make directions as to the accommodation of a person of 'unsound mind', and to use reasonable force 'if circumstances justify such action' and were sanctioned by judicial authority.⁶³ The general law powers contained in s 31 therefore arguably already contain a justification for the use of force in emergency situations. It remains to be seen whether the Supreme Court would accommodate such an interpretation alongside their decision in *Public Advocate v C, B* once the issue inevitably arises.

VII CONCLUSION

The decision in *Public Advocate v C, B* is not only a 'win' for the respondent, BC, but more broadly, a 'win' for the principles of natural justice, transparency and judicial oversight — principles fundamental to the operation of a democratic society like Australia. In standing up for some of the most vulnerable members of our society and ensuring that decisions that encroach upon some of our most fundamental liberties such as freedom of movement are subject to statutory protections, oversight and scrutiny, the Supreme Court has reminded us all of its place in upholding community values and protecting the vulnerable.

Importantly, the Supreme Court's decision should not be interpreted as imposing a blanket prohibition on the placement of mentally incapacitated persons in secure residential facilities. Instead, the decision has switched the burden of proving the lawfulness of a detention order from the more vulnerable protected person to the guardian. Doing so ensures greater protection, transparency and oversight for decisions made under the *Guardianship Act* — themes which are particularly pertinent in light of the *Royal Commission into Aged Care Quality and Safety* — and highlights the importance of the judiciary in upholding community values and providing crucial oversight of statutory offices.

⁶² Claire Moodie, 'Aged Care Operators Defend Coronavirus Lockdown as Premier, Prime Minister Urge Facilities to Relax Visit Bans' *ABC News* (online, 23 April 2020) <<https://www.abc.net.au/news/2020-04-23/aged-care-providers-defend-coronavirus-lockdown-amid-criticism/12177096>>.

⁶³ *The Public Advocate v C, B* (n 3) 361 [27], quoting *McLaughlin* (n 21) 564 (Griffith CJ).

*Melissa de Zwart**

***ACCESSORY TO WAR: THE UNSPOKEN ALLIANCE
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I INTRODUCTION: WAR AND TECHNOLOGY

Whilst there has long been an understanding of the importance of technological superiority in the battlespace, recent years have witnessed a growing realisation that the battlespace itself has shifted to the technological domain. New frontiers of grey zone tension include outer space, cyberspace and influence operations.¹ Whilst outer space may have always been susceptible to military operations, cyberspace, in particular the commercial internet and social media, does not at first regard appear to be a natural environment for international tension and hostile operations. Yet examples such as the recent elections in the United States and United Kingdom have revealed covert influence operations which push the boundaries of international laws applicable to hostility and conflict undertaken

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¹ Grey zone conflicts arise where there is ambiguity surrounding the nature and legitimacy of activities undertaken by adversaries: Aurel Sari, 'Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats' (Working Paper No 2019/1, Exeter Centre for International Law, January 2019) 14.

in cyberspace. They also flag the complexities of new relationships between private operators and governments.²

Two recent publications explore the relationship between war and technology from very different perspectives. The first of these books, Neil deGrasse Tyson and Avis Lang's *Accessory to War: The Unspoken Alliance between Astrophysics and the Military* explores the 'curiously complicit' alliance between astrophysicists and the military, reaching back into the earliest days of stargazing and astrology through to current tensions and proposed solutions.³ At the heart of this discourse is the direct relationship between technology, knowledge and power. The other book, *Routledge Handbook of War, Law and Technology*, provides a much broader overview of the various technologies which now, or in the near future, present a challenge to international peace.⁴ However, the multiple authors of this work too are concerned with recognising and celebrating the importance of technological innovation, as well as understanding the legal and ethical challenges of possible uses of new technologies.

Both books consider the importance of the fact that technology and research are vital to military superiority and conversely that investment in technology produces an extensive array of civilian benefits. As deGrasse Tyson and Lang note: 'waging war requires clever thinking and promotes technical innovation'.⁵ In this endeavour, scientists, industry and the military are complicit. Although each may act from their own motivations, they have a common interest in the developments and advances in technology that their discoveries may bring, whether that results in new knowledge, profits or military advantage and strategic success.

II ACCESSORY TO WAR: THE UNSPOKEN ALLIANCE BETWEEN ASTROPHYSICS AND THE MILITARY

DeGrasse Tyson and Lang make a compelling case for the bipolar relationship between research astrophysicists and the military, and are clear in their assertion that they are well aware that their cutting edge research 'plugs firmly and fundamentally into the nation's military might'.⁶

² Washington Post Editorial Board, 'Facebook is Looking a Lot Like a Government', *The Washington Post* (online, 24 February 2020) <https://www.washingtonpost.com/opinions/facebook-is-looking-a-lot-like-a-government/2020/02/23/2977a204-53f1-11ea-929a-64efa7482a77_story.html>.

³ Neil deGrasse Tyson and Avis Lang, *Accessory to War: The Unspoken Alliance between Astrophysics and the Military* (WW Norton, 2018) xiii–xiv.

⁴ James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019).

⁵ DeGrasse Tyson and Lang (n 3) 5.

⁶ Ibid 17.

The book explores the means and justification for attaining and maintaining the technological edge in the context of space security. The book is divided into two sections: the first part, titled ‘Situational Awareness’, provides a rich and engaging historical overview of the development of space-related technology with a general exploration of the importance of stargazing in areas as diverse as astrology, navigation, reconnaissance and surveillance, weather prediction and communications. The second part, called ‘The Ultimate High Ground’, explores the context, impetus and factors surrounding the development of key space technologies and, in particular, the close relationship between military purposes and scientific ingenuity. Interestingly, deGrasse Tyson and Lang emphasise that the influence does not always flow one way. Research scientists and private industry have derived enormous benefits from military research and manufacturing. For example, at the end of World War II

private industry attracted many scientists whose skills were no longer required for war work. Former adversaries became allies, and vice versa. The Iron Curtain descended, and Cold War projects multiplied. Postwar research in the radio band swiftly ramped up as astronomers outfitted their observatories with wartime radar surplus, often bought at fire-sale prices or simply rescued from being thrown down a mineshaft.⁷

This symbiotic relationship continues in space exploration today, with extensive partnerships being developed between military and private space actors.⁸

DeGrasse Tyson and Lang amass and cite from a massive range of scientific, technical, historical and even literary sources, drawing together the overarching themes and preoccupations of human endeavour and rivalry which resulted in the capacity to explore and exploit outer space. It is a fascinating read for a general audience whilst providing sufficient insight and detail to those more interested in space security and global politics. DeGrasse Tyson and Lang present ample vignettes and case studies of the political history of space to keep even the casual enthusiast engaged and keep explanations short and relevant. For example, discussing the question of legality of overflight of nations on Earth by satellites in orbit, they explain:

Some analysts maintain that the Eisenhower administration, intentionally or inadvertently, either allowed the Soviet Union to go first or was hugely relieved when it did so, because the historic flight of the first world-circling satellite effectively resolved the fraught issue of ‘freedom of space’: whether flights through the airspace above the territory of another country violated that country’s sovereignty. Insistence on ‘vertical sovereignty’ and prohibitions against overflights would mean that a country deemed military satellite reconnaissance illegal. But now, having launched the first satellite, the ‘Soviets had unwittingly placed themselves

⁷ Ibid 191.

⁸ Debra Werner, ‘Military Turns to Private Sector for Rapid Space Innovation’, *SpaceNews* (online, 9 October 2019) <<https://spacenews.com/warfare-satellite-innovation-2019/>>.

in a position where they could hardly argue the illegality of the trespass of their own Sputnik'. Thenceforth, in principle, anyone could go anywhere in space.⁹

They go on to navigate carefully the early days of Cold War space rivalry and the background to the 1967 *Outer Space Treaty*,¹⁰ right up to the present day tensions over proposed instruments such as the draft *Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects* ('PPWT') proposed by Russia and China to the UN Conference on Disarmament in 2008 and 2014.¹¹ They also examine current national articulations of the need for space superiority, a claim essentially based in technological superiority.¹² They also provide an overview of the key provisions of the *Outer Space Treaty*.

In the chapter titled 'Space Power', deGrasse Tyson and Lang address the emergence of new powers in the space domain alongside the decline in the United States' dominance in space, precipitated by decreased investment in space research. Importantly, deGrasse Tyson and Lang directly address the assertion that space is 'a warfighting domain just like air, land and sea'.¹³ The complex issue of the characterisation of space as both the 'province of all mankind' as per art 1 of the *Outer Space Treaty* and as a domain to be used for both peaceful and military and strategic purposes is confronted directly with realism and facts. Space is an inherently dual-use domain.¹⁴ For example, rendezvous and proximity operations of satellites promise new opportunities for refuelling and repair of spacecraft that may otherwise become space junk. However, like much of the space domain, this technology also carries within it both the potential for productive peaceful use, and

⁹ DeGrasse Tyson and Lang (n 3) 268–9 n 79, citing Everett C Dolman, *Astropolitik: Classical Geopolitics in the Space Age* (Frank Cass, 2002) 107–9; William Burrows, *This New Ocean: The Story of the First Space Age* (Random House, 1998) 187; Curtis Peebles, *High Frontier: The US Air Force and the Military Space Program* (Air Force History and Museums Program, 1997) 10; Walter McDougall, *The Heavens and the Earth: A Political History of the Space Age* (Johns Hopkins University Press, rev ed, 1997) 123–4, 134.

¹⁰ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*').

¹¹ Conference on Disarmament, *Draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects*, UN Doc CD/1839 (29 February, 2008) ('PPWT'); deGrasse Tyson and Lang (n 3) 294–5.

¹² DeGrasse Tyson and Lang (n 3) 350–77.

¹³ Ibid 325, citing Marcia Smith, 'Top Air Force Officials: Space Now Is a Warfighting Domain', *SpacePolicyOnline.com* (online, 17 May 2017) <<https://spacepolicyonline.com/news/top-air-force-officials-space-now-is-a-warfighting-domain/>>.

¹⁴ Melissa de Zwart, 'Outer Space' in William Boothby (ed), *New Technologies and the Law in War and Peace* (Cambridge University Press, 2018) 339. See also deGrasse Tyson and Lang (n 3) 159, 298.

use as a space weapon.¹⁵ Much of the uncertainty arises from lack of transparency or certainty regarding what function the satellite is actually performing, something which is virtually impossible to discern from observation.¹⁶

DeGrasse Tyson and Lang certainly share their love of space with the reader and leave us with a sense of awe and optimism: that investment in science and discovery, whatever the source of funding, has led to advancement and knowledge for all of humankind. In the final chapter, 'A Time to Heal', they explore current threats to the space environment from space junk to space war, highlighting the disparity in national budgets spent on science and those spent on military projects. However, their final message is one of hope, that all of this human ingenuity, used to solve great problems and to explore the universe, can be brought to bear for the benefit of humankind. Ultimately they flag that this is one of the amazing aspects of space: its ability to inspire and engage human endeavour.

III ROUTLEDGE HANDBOOK OF LAW, WAR AND TECHNOLOGY

The main weakness of the *Routledge Handbook of Law, War and Technology* is that, whilst it was published in 2019, it is based on a symposium and project originally commenced in 2013. As with everything concerning cutting edge technology, this means that there have been many changes and developments since that time. Some of the issues flagged have become far more prominent, including the topics of space and the global impact of information operations on elections worldwide, which receive fairly cursory attention. The original contributions to the 2013 symposium were peer reviewed to identify where there were gaps in the coverage of new technologies and additional chapters were commissioned to redress them.

The book is divided into six sections: 'Law, War and Technology'; 'Cyberwarfare'; 'Autonomy, Robotics and Drones'; 'Synthetic Biology'; 'New Frontiers'; and 'International Perspectives'. As the introduction to the book explores, some of these new technologies 'so profoundly' challenge the recognised categories of warfare that we are forced not only to determine if the existing principles of the law of armed conflict, also known as international humanitarian law, can be applied to the deployment of such technologies in an offensive manner, but even whether the effects of their use can in fact be recognised as war.¹⁷ One of the obvious examples of this is information

¹⁵ Theresa Hitchens, 'The Stellar Dance: US, Russia Satellites Make Potentially Risky Close Approaches', *Breaking Defense* (online, 10 April 2019) <<https://breakingdefense.com/2019/04/the-stellar-dance-us-russia-satellites-make-potentially-risky-close-approaches/>>.

¹⁶ Brian Weeden, 'Dancing in the Dark Redux: Recent Russian Rendezvous and Proximity Operations in Space', *The Space Review* (online, 5 October 2015) <<https://www.thespacereview.com/article/2839/1>>.

¹⁷ Rachel Kerr, 'Introduction: Technological Innovation, Non-Obvious Warfare and Challenges to International Law' in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 1, 2.

warfare or its more subtle manifestation, influence operations. Multiple complications ensue: is it clear who is the proponent of such acts? And how can their effects be predicted? Thus the book explores and challenges our preconceptions regarding the nature of war and how it can be recognised and subjected to international law. Clearly there is also significant scope in a book of this nature to explore the ethical issues created by the concepts of dual-use technology and the desire to create technology which improves society, yet is susceptible also to causing great harm. However the main focus of the majority of the chapters is rather on the identification and categorisation of the technology and its potential uses.

The chapters in the first section of the book provide vital context for the discussion and analysis in the individual chapters that follow. In their chapter ‘Obvious and Non-Obvious: the Changing Character of Warfare’, Ernst Dijkhoorn and James Gow discuss the increasing importance of legitimacy as the key issue in contemporary warfare, identifying that the ‘key to war is the struggle for the will of “the people”’¹⁸ who ‘consume, and base their judgement on, a constant stream of information and commentary’.¹⁹ Noting that this information can be sourced from a vast number of providers and platforms, on a rapidly accelerating timeframe, information (or its sinister counterpart, disinformation) itself becomes a weapon, drawing state, non-state, private and commercial actors into the evolving sphere of hybrid warfare.

The section dealing with cyberwarfare raises the key issue of whether a cyber attack may constitute an armed attack and the vexing problem of attribution, as well as some more nuanced considerations.²⁰ Sir David Omand explores the damage done to intelligence work by the Snowden revelations.²¹ He considers the entry into popular discourse of concepts and terminology such as ‘mass surveillance’ and ‘bulk data’, and the reaction of consumers to the spectres raised by this language. The fear of a consumer backlash

¹⁸ Ernst Dijkhoorn and James Gow, ‘Obvious and Non-Obvious: The Changing Character of Warfare’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 13, 18.

¹⁹ Ibid 19.

²⁰ Elaine Korzak and James Gow, ‘Computer Network Attacks under the *Jus ad Bellum* and the *Jus in Bello*: “Armed” — Effects and Consequences’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 65; Elaine Korzak and James Gow, ‘Computer Network Attacks under the *Jus ad Bellum* and the *Jus in Bello*: Distinction, Proportionality, Ambiguity and Attribution’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 76; Marco Roscini, ‘Proportionality in Cyber Targeting’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 88.

²¹ The ‘Snowden revelations’ related to the mass, warrantless surveillance of United States citizens by the United States Government, as well as the collection of data by the United Kingdom’s Government Communications Headquarters and the role of tech companies such as Apple, Google, Microsoft, Facebook and Skype in the collection of user data. Disclosures of information on these matters were made by former defence contractor Edward Snowden to *The Guardian* in 2013. Snowden still lives in exile in Russia. For a timeline of the various disclosures: see Lawfare Institute, ‘Snowden Revelations’, *Lawfare* (Blog Post, 8 June 2020) <<https://www.lawfareblog.com/snowden-revelations>>.

consequently resulted in the reassurance by platform and device providers that their data would be ‘safe’ behind their encryption tools.²² This section concludes with Gow’s exploration of the key weakness of cybersecurity: the human factor.²³

The next section deals with autonomy, robotics and drones. It focuses significantly less on the robots and more on the role of the human operator in decision-making. Providing an interesting departure from a fixation on killer robots, the five chapters in this section take a step back to look at how far a human can be held responsible for decisions being made by autonomous computer systems.²⁴

Considering that the writing of this review occurs in the context of the COVID-19 pandemic and related theories regarding the origins of the disease, the next section of the book dealing with the existence and uses of synthetic biology appears significantly relevant. The chapters in this section explore the complexity of developing bioweapons and their indiscriminate effect, as well as flagging the potential for the development and use of such weapons to increase.²⁵ One of the key issues raised by the authors in this section is the extent to which research in this area should be allowed to proceed. The authors raise the question regarding the effectiveness of a complete ban on research on bioweapons, creating a knowledge gap which not only counters principles of academic freedom,²⁶ but potentially weakens the ability to recognise, verify and counter a bioweapon attack.²⁷

²² Sir David Omand, ‘Digital Intelligence and Armed Conflict after Snowden’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 101, 114–15.

²³ James Gow, ‘The Ambiguities of Cyber Security: Offence and the Human Factor’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 118.

²⁴ Thrishantha Nanayakkara, ‘Autonomy of Humans and Robots’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 131; Jack McDonald, ‘Autonomous Agents and Command Responsibility’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 141; Kenneth Anderson and Matthew C Waxman, ‘Legal-Policy Challenges of Armed Drones and Autonomous Weapons Systems’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 154; Maziar Homayounnejad and Richard E Overill, ‘The “Robots Don’t Rape” Controversy’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 169; Tony Gillespie, ‘Humanity and Lethal Robots: An Engineering Perspective’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 182.

²⁵ Matteo Bencic Habian, ‘A Threat Assessment of Biological Weapons: Past, Present and Future’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 237.

²⁶ Guglielmo Verdirame and Matteo Bencic Habian, ‘The Synthetic Biology Dilemma: Dual-Use and the Limits of Academic Freedom’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 251, 258.

²⁷ Filippa Lentzos and Cecilie Hellestveit, ‘Synthetic Biology and the Categorical Ban on Bioweapons’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 215, 226–7; Habian (n 25).

The following section is headed ‘New Frontiers’ and deals with outer space, biometrics and future war crimes. Bleddyn Bowen’s chapter ‘Space Oddities: Law, War and the Proliferation of Spacepower’ provides a refreshing approach to the characterisation of space, asserting that contrary to rhetoric of peaceful purposes and the concept of a space sanctuary, space has always been militarised, noting:

Given the integration of spacepower into our daily lives and military capabilities, and not only in the Western world, it is time to view outer space and astropolitics beyond the inhibitive lenses of the ‘militarisation’ and ‘weaponisation’ of space.²⁸

Rather, space should be regarded as an extension of Earth politics and contest.²⁹ The following chapter identifies the consequences of the growth of the commercial space sector.³⁰

Further chapters cover fascinating issues of ‘Biometrics and Human Security’, highlighting the potential risks and benefits of using biometric data in tracking refugees.³¹ Subsequent chapters canvass views towards future war crimes, specifically involving cyberwarfare, autonomy and synthetic biology,³² and digital evidence.³³

The final section features an eclectic selection of topics which can all be broadly held together under the title of ‘International Perspectives’. Clearly outer space was an add-on to the book as attitudes to space are not canvassed in this section. The first part of the section is a chapter providing key insights into Russian information warfare, examining the strengths and vulnerabilities of Russian versus Western attitudes to information warfare.³⁴ The final four chapters in this section round out

²⁸ Bleddyn Bowen, ‘Space Oddities: Law, War and the Proliferation of Spacepower’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 265, 276.

²⁹ *Ibid.*

³⁰ Pawel Frankowski, ‘Outer Space and Private Companies: Consequences for Global Security’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 280.

³¹ James Gow and Georg Gassauer, ‘Biometrics and Human Security’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 293.

³² James Gow and Ernst Dijxhoorn, ‘Future War Crimes and the Military (1): Cyber Warfare’, in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 305; James Gow and Ernst Dijxhoorn, ‘Future War Crimes and the Military (2): Autonomy and Synthetic Biology’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 317.

³³ Maziar Homayounnejad, Richard E Overill and James Gow, ‘Future War Crimes and Prosecution: Gathering Digital Evidence’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 329.

³⁴ Oscar Jonsson, ‘Russian Information Warfare and its Challenges to International Law’ in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 339.

Islamic ethics and law with respect to unconventional warfare,³⁵ French attitudes and responses to cyber attack³⁶ and the complexity of the application of international law to cyber attacks, given the vast difference in norms and attitudes in the United States, United Kingdom, Russia and China.³⁷

IV CONCLUSIONS

Each of these books makes a strong contribution to understanding the technological environment and background to current grey zone and hybrid conflicts. They each attempt to meld technological concepts and the application of legal principles, as well as social contexts. They both provide excellent background reading for an understanding of the current complex issues affecting national security. However, one may feel slightly more optimistic after reading deGrasse Tyson and Lang's tome, as at the end of it all, the optimism of the astrophysicist wins out against the struggles and despair of international rivalries.

³⁵ Ariane Tabatabai, 'Unconventional Warfare and Technological Innovation in Islam: Ethics and Legality' in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 354.

³⁶ Anne-Marie le Gloannec and Fleur Richard-Tixier, 'Cyber Security, Cyber-Deterrence and International Law: The Case of France' in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 366.

³⁷ Elaine Korzak, 'The US, the UK, Russia and China (1): Regulating Cyber Attacks Under International Law — Developments at the United Nations' in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 375; Elaine Korzak, 'The US, the UK, Russia and China (2): Regulating Cyber Attacks under International Law — the Potential for Dedicated Norms' in James Gow et al (eds), *Routledge Handbook of War, Law and Technology* (Routledge, 2019) 381.

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