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The *Adelaide Law Review* is a refereed journal that is published twice a year by the Adelaide Law Review Association of the Adelaide Law School, The University of Adelaide. A guide for the submission of manuscripts is set out at the back of this issue. Articles and other contributions for possible publication are welcomed.

Copies of the journal may be purchased, or a subscription obtained, from:

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Adelaide Law Review Association
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For North America:
William S Hein & Co
1285 Main Street
Buffalo NY 14209
USA

This volume may be cited as:
(2016) 37 *Adelaide Law Review*
The articles in this volume are published in 2016.

**ISSN 0065-1915**

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Dr George I O Duncan
1930–72
DR GEORGE IAN DUNCAN REMEMBERED

I Horrors and Indignities

Dr George Ian Ogilvie Duncan died on 10 May 1972.1 He was drowned in the Torrens River when, at about 11pm, he was pushed from an embankment, reportedly by a well-dressed young man. His assailant had approached him and asked ‘how would you like a swim?’ We know that his death occurred at exactly 11:07 pm because that was the time that his watch stopped, inferentially by sudden immersion in three metres of water. Another victim was thrown into the river at the same time by another assailant in a group of three. He injured his ankle, but could swim to safety. Dr Duncan was unable to swim. One of the assailants stripped off his upper garments and plunged into the river in search of the victim, but without success. Later Dr Duncan’s body was retrieved from the river, his long arms already outstretched, fixed by rigor mortis, protesting his fate.

Dr Duncan was born in 1931 in England of New Zealand parents — a late child to his father by a second marriage. The little family came to Australia from New Zealand when he was a boy. He attended Melbourne Grammar School where he immediately displayed high academic talent. He then commenced university studies in law at the University of Melbourne. However, at about this time he contracted tuberculosis, inferentially from his father who had earlier been committed to a sanatorium. The family moved back to England. Eventually, he was encouraged by a friend to apply for admission to Cambridge University. There too he displayed stellar academic ability. His special interest was legal history. He wrote a well reviewed, if somewhat esoteric, book on the High Court of Delegates: a medieval tribunal whose origins were lost in history.2

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After graduation, Dr Duncan was appointed to teach law part-time at the University of Bristol. However, he must not have enjoyed the provinces of England. He soon noticed an advertisement for a post at the University of Adelaide School of Law. This attracted him to the possibility of returning to the warmer climate of the antipodes. By this time nothing held him to England. His parents had died: first the younger mother and then his father. Even his half-sister was soon to die. He had no surviving relatives.

Intriguingly, just before he was due to set out on the boat journey to Adelaide in 1971, Dr Duncan must have had second thoughts. An urgent telegram was sent to Dr Horst Lücke, Head of the Department of Law in Adelaide, stating: ‘Regret unable to accept/writing/Duncan’. Had he adhered to his revised intention and survived, Dr Duncan would now be aged 84. He would probably be a venerable professor of law in England, remembered for his peculiar interests in medieval history and disconnected from the robust earthiness of his brief youthful sojourn in Australasia.

However, something caused him to change his mind again. He wrote to ask whether he could be reconsidered for the position in Adelaide. He was told that it was still his. Dr Lücke presented at the foot of the gangplank on his arrival in South Australia to help him with his baggage. He observed that Dr Duncan seemed somewhat frail and breathless, surprising for his age — possibly lingering remnants of tuberculosis. Photographs and contemporary descriptions of Dr Duncan suggested that he fitted the stereotype of the academic that the Australian public often expects. As Tim Reeves describes it, his photo at the time displayed a ‘cocked head, high forehead, greying, receding hair, thick framed glasses, straight mouth and almost vacant stare.’ Unfortunately, he was to be subjected to many indignities in the short time between his arrival in Adelaide and his death a few months later. Tim Reeves has no doubt that Dr Duncan would have disliked intensely (‘deplored’ is the word he uses) his elevation into a ‘cause’ for law reform. This is because he was an intensely private man, specially private about things sexual. He was not to be blamed for these attitudes. They were very common in the English-speaking countries in which he grew up. They were certainly very common in Australia. I know because I was raised in the same environment, although almost a decade later. We were both children of the 1930s: he born in 1931, I in 1939. For gay men and boys, ‘don’t ask; don’t tell’ was the rule of those days.

The word picture of Dr Duncan, painted by quoted comments in Adelaide News and The Advertiser at the time of his death, also pandered to the stereotype of a gay man—a non-swimmer (it was even suggested that the assailants had perhaps given him a swimming lesson to teach him that gays needed to learn to swim). Portraying him as a weak, one-lunged weed of a man fitted neatly into comfortable preconceptions. So did the description of him as a ‘loner’; someone ‘extremely timid’, ‘aloof’,
with ‘ingrained insecurity’. However, thanks to a little further detective work by Tim Reeves, it appears that this was far from the full story of the real Dr Duncan. A Mrs Richards from England, on reading of his death, was moved to write to the Registrar of the University of Adelaide, stating ‘[i]n this little Essex village, we were shocked beyond measure when we read of the tragic death of Dr George Ian Duncan. It was here that he had spent all his vacations, even in his Cambridge days and he had a large circle of friends’.7

Still, he had to run the gauntlet of attitudes of hostility that existed in those days towards sexual minorities generally, and gay men in particular. Like Chief Justice John Bray (as we have recently learned from John Emerson’s splendid biography)8 Dr Duncan received proposals for marriage, pressed upon him by a woman in England with a persistence to which he could not respond.

When, as appears from a letter found amongst his meagre possessions brought to Australia, he explained the reason of his sexual orientation that made her proposal impossible, she replied that she was aware but pressed on. His response was a cruel one:

> Your letter … implies that you feel that all you have done is to ‘hurt my feelings’ as you put it. You must be very unperceptive if you imagine that that is all your wanton behaviour has done. Disgust and revulsion are words by no means too strong to describe my reaction to your improprieties and, but for my firm conviction that you are not in your right mind, I would express myself in language much more emphatic … [Y]ou are ill (perhaps seriously ill) and … you should be in the hands of a doctor.9

Still greater horrors were heaped on Dr Duncan in death. When his body was ultimately recovered and dragged from the Torrens with arms awry, it was unceremoniously thrown back into the river when television cameras arrived late, demanding graphic film to screen in the nightly news. At the coroner’s inquest, held soon after his death, a ‘medical expert’ was permitted to describe the rectum of a ‘practising homosexual’, stating that ‘the anus was generally funnel-shaped and had the appearance of that of a passive homosexual [who engages in receptive anal intercourse]’.10

This type of evidence also served the stereotypes held widely in the heterosexual community at that time, and perhaps even now. So-called ‘passive’ homosexuals

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6 Ibid 9.
7 Ibid 9, quoting Letter from M Richards to the Registrar of the University of Adelaide, 29 May 1972.
9 Reeves, ‘Dr Duncan Revisited’, above n 3, 10, quoting Letter from Ian Duncan to Dorothy Glover, 10 May 1966.
allegedly had buttocks of a ‘feminine’ shape and ‘funnel-shaped anuses’, but ‘active homosexuals’ allegedly had a ‘dog-like or club shaped penis’. Their mouths were ‘crooked’ with ‘sharp teeth and thick lips’ suited for oral intercourse. Tim Reeves comments that ‘this archaic thinking … equated homosexuality with deformed physiology’. It was rarely questioned. It became the accepted wisdom about people like Dr Duncan.

Many gay people to the present time cannot understand the obsessive speculation of heterosexual commentators about the physiognomy and sexual acts of gays. Given the variety of heterosexual conduct described in the Kama Sutra, on the Ajanta Caves and in Alfred Kinsey’s research, it is intriguing why there should be so much titillation in the speculation fuelled by hatred. But Dr Duncan knew that, whereas in the United Kingdom, where he had lived during his studies at Cambridge and work in Bristol, the law was on a path to repealing the worst of its criminal prohibitions against gay men, Australia was still largely a barren continent. No state had reformed its criminal laws. In South Australia, only belatedly in the year before his arrival had a few brave souls had come together to demand repeal.

Dr Duncan, in death, has even lost the given name that he preferred. Tim Reeves tells us that although George was his first baptismal name, as a child his mother had insisted — for reasons unknown — that he be called ‘Ian’. This was reported in Australian newspapers after his death. However, reporting soon reverted to calling him ‘George Duncan’. Dr Horst Lücke, in the contemporary correspondence demanding further and better investigation by the police, simply calls him ‘Dr G I O Duncan’. If Ian Duncan is how he described himself, it is usual in countries of the law derived from England to respect that wish. But, by now, it is probably too late to try to turn things around, least of all to respect his own wishes.

II The Police and Law Reform

The feature of the homicide involving Dr Duncan that elevated the case to special public significance was the fact that it soon became known that police had been operating in the vicinity where the victim was sent for his swim. Three of them were from the South Australian Police Vice Squad. They were, inferentially, performing their usual rounds as agents provocateurs for gay men seeking sex and love: to trap

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12 Sexual Offences Act 1967 (UK) c 60; The Committee on Homosexual Offences and Prostitution, Report of the Committee on Homosexual Offences and Prostitution, Cmnd 247 (1957) (‘Wolfenden Report’).

13 The Australian (Sydney), 30 May 1972, 3.

14 Letter from Horst Lücke to the Police Commissioner of South Australia, 28 May 1972, reported in The Advertiser, 2 June 1972, 8.
them in a criminal proposition. No one suggests that Dr Duncan fell for their line; he was simply singled out by one of them.

Two of the police who had been at or near the scene declined to join a line-up for identifying the offender guilty of pushing Dr Duncan into the Torrens River. One, on legal advice, refused to answer police questions. Soon after, these three officers were suspended and later resigned from the police force. The Police Commissioner of the day declared that there was no reason ‘at the moment’ to implicate police in a homicide. The other victim, who had swum to safety, a direct witness to the crime, hurriedly left South Australia for the anonymity of New South Wales. To his great credit, Dr Lücke wrote a strong letter to the Commissioner. He pointed to the fact that Dr Duncan did not appear to have any close relations. Accordingly, he felt that it was incumbent on him, as Head of the School of Law, to ensure ‘as far as it is within my power to do so, that those responsible for his violent death are brought to justice’. In the manner of those times, his full letter was reproduced in *The Advertiser*.15

Eventually a new Police Commissioner from England, Harold Salisbury, called in detectives from New Scotland Yard in London to add an external scrutiny to the investigation. Their report was quickly provided but kept under wraps until released years later in 2002.16 According to the text of the report, the English detectives concluded that Dr Duncan was killed after what was ‘merely a high spirited frolic that went wrong’. Apparently, it was judged a ‘mere frolic’ to throw a quiet citizen, fully clothed, walking in a public space, into a river from which he might not be able to extricate himself. Frolic or not, we now know that the British detectives believed that the local police officers were guilty of the homicide and recommended charges.17 Eventually, even the local prosecuting authorities concluded in 1985 that the case should be reopened. In 1987, two of the police were put on trial. However, on 30 September 1988, the accused were acquitted. By that time, Dr Duncan, like the criminal case, was cold — he in his grave at Centennial Park for 16 years under a headstone that read: ‘endowed with modesty and scholarship’.

### III Utter Horror

I wondered how the community of the Adelaide Law School at that time reacted to this trauma in its midst. Were they simply embarrassed that a side of their new, quiet colleague (that they had not known or merely suspected) came into sharp light? Were they distressed that this reserved and obviously very clever man had a secret life that he had not shared with them? One of the leaders of the Law School of that time, the late Professor Alex Castles (my colleague later at the Australian Law Reform Commission) was called to identify the body of his deceased colleague. Another academic of that time, Professor John Keeler, recalls that Dr Duncan was ‘shy and a

15 Ibid.
17 Ibid.
Mr David St L Kelly (later also a Professor and colleague of mine in the Australian Law Reform Commission) wrote to me that he remembered Dr Duncan well:

[A] very reclusive, private man; scholarly and very shy. Never at ease, at least with me. Shortly before his death I gave him comments on a draft article he had submitted to the *Adelaide Law Review*. It was a difficult interview. He was ‘twitchy’... [T]he reaction in the Law School [to his death] was to leave everything to the ‘leaders’ — who were Alex [Castles] and Horst [Lücke]. They had my full trust in the matter and, I believe, all others. They were very active in pursuing the tragedy. They were no doubt constrained in what they could say to us, but they kept us as well informed as they could. There was no culture of embarrassed silence at the Law School or in the wider University. It was a dreadful event, and recognised as such. The fact that he was slight, and obviously vulnerable, emphasised the utter horror of what had happened.19

That feeling of ‘utter horror’ inevitably spread into the public domain. Dr Duncan was only nine weeks in his grave when the first steps were taken to repeal the laws of South Australia that criminalised adult private homosexual conduct.

Don Dunstan, later Premier of South Australia, as a young ambitious member of the South Australian Parliament had pushed the idea of gay law reform in the 1960s. However, this was blocked by the Caucus of the Australian Labor Party. In 1970, Dunstan had urged again, this time in government, the removal of the ‘outdated’ criminal laws. He promised the establishment of a criminal law and penal methods reform committee under the already redoubtable Justice Roma Mitchell. However, in 1971 his Attorney-General, Len King (later a gifted Chief Justice), demonstrated the difficult road that lay before Dunstan. King described homosexual acts, in the language of the catechism of the Roman Catholic Church to which he belonged, as ‘intrinsically evil’.20 Still, by December 1971, Len King was relying on the investigation into law reform by then being undertaken by the Mitchell committee. By that time, Dr Duncan was already living in South Australia.21

Such was the outcry and horror at the circumstances of the death of Dr Duncan that Mr Murray Hill, a member of the Liberal Party, could wait no longer. On 6 July 1972, he took the first steps to introduce a Bill to achieve reform into the Legislative Council of South Australia. It was strongly attacked by the Anglican Archbishop. Later that churchman recanted a little and accepted that ‘these unfortunate people’ needed to be pitied, not criminalised. Similar approaches were uttered by churchmen of the Roman Catholic and evangelical denominations of Christianity. Gay people were either unfortunate victims of a mental illness, or they needed medical help in order

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18 Letter from John Keeler to Michael Kirby, 15 August 2015.
19 Letter from David St L Kelly to Michael Kirby, 16 August 2015.
to be cured. But the spell of silence was at last being broken. Supporters of reform were ambivalent about Murray Hill’s proposed legislation. It did not decriminalise male homosexual acts, but it did provide a defence against a prosecution if it were proved that the sex involved was private, adult and consensual. A differentiated age of consent was proposed for homosexuals, higher than for heterosexual activity.

Meanwhile, the movement for more substantive reform continued to gather pace in South Australia. No doubt it was greatly helped by the support of Don Dunstan, first as Attorney-General and then as Premier of the State. In due course, a majority for change was growing on both sides of politics. Change had to come. On 31 October 1972, the Deputy Leader of the Opposition in South Australia called for a Royal Commission into the Duncan case. In July 1973, a Gay Activists’ Alliance was established to breathe more vigour into the sometimes apologetic endeavours of the Campaign Against Moral Persecution (‘CAMP’) that had first called for reform in South Australia. On 17 June 1974 the Australian Labor Party in South Australia at last formally declared its support for reform of the criminal laws against gays. On 27 August 1975, Mr Peter Duncan, Attorney-General, introduced a third attempt to secure full reform of the criminal laws. The legislation was piloted to success by the Honourable Anne Levy MLC in the Legislative Council. On 17 September 1975 South Australia became the first State in Australia to decriminalise male homosexual acts.22

Unfortunately, this reform did not end the saga of police hostility towards gay men in South Australia (the criminal laws in Australia, as in England, had never targeted women). Many gay and bisexual men suspected that they were still the subject of police surveillance. This surveillance, as we now know, targeted the highest citizens of the State and included Chief Justice John Bray, one of the most distinguished jurists Australia has produced.23 It was a shabby period in the legal history of South Australia, but by no means was it confined to this State. It was a period many have now forgotten, but those who lived through it, like me, remember.

Three decades after the death of Dr Duncan, ‘In Memoriam’ notices were published in The Advertiser:

Duncan, George Ian Ogilvie. Martyred May 10, 1972. Remembered by the members of the Campaign Against Moral Persecution.

Duncan — In memory of George Duncan. He taught justice and died without it.

Duncan, George Ian Ogilvie — suffered and died because of his homosexuality. How many more Duncans? 24

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22 Criminal Law (Sexual Offences) Amendment Act 1975 (SA).
23 Emerson, above n 8.
24 Reeves, ‘The 1972 debate on Male Homosexuality in South Australia’, above n 1, 149.
Now in 2015, the Law School to which Dr Duncan had come remembers him. At last it reflects upon the terror of his end and the unexpected, undesired yet salutary consequences of his death: the leadership that South Australia gave to the effort to change the criminal laws that oppressed gay men throughout Australia.

It took another 27 years after Duncan’s drowning before the last of those laws, in Tasmania,25 was amended so that nowhere in the nation did the criminal laws remain to oppress people for adult, private and consensual acts arising from their sexual orientation or gender identity and expression. However, the same laws remain and are proving as difficult as Paterson’s Curse to eradicate from the lands that were painted red in the school atlas of my youth. Throughout the former British Empire, save in the United Kingdom and little more than the former settler colonies, reform has reached a log-jam.26 In countries where the legislature has failed, the courts have refused to act.27 In countries where a lower court has invoked equality provisions of the local constitution, higher courts have restored the old laws to oppress the minority.28 Although there are exceptions,29 in most countries nothing is done.30 It is a bleak tale. It shows how hard it is to change the law when reform provokes visceral hatred on matters such as Aboriginality, race, gender or sexuality in combination with lethargy and indifference.

IV Five Lessons

What lessons can we derive from this sad story of George Ian Duncan and his brief encounter with South Australia and its laws and attitudes 43 years ago? There are, I suggest, five:

First, law gives its instruction mainly through constitutional texts, enacted legislation and case decisions. The constitution and the legislation spring to life when they affect

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25 Criminal Code Act 1924 (Tas) s 122. See also Croome v Tasmania (1997) 191 CLR 119, 123.


27 Lim Meng Suang v Attorney-General [2015] 1 SLR 26 (Singapore Court of Appeal).


29 Nadan and McCoskar v State [2005] FJHC 500 (Fiji).

30 Kirby, above n 25, 149.
a person in a case, or when the events of a life illustrate the harsh impact of the law. In this way, the law is full of parables. The operation of the law commonly reveals unexpected and sometimes unlikely or reluctant heroes. The slave who was set free by his arrival in England in *Somerset's case*, Mrs Donoghue, who became sick on finding a snail in a bottle of ginger beer. Eddie Mabo, who could not understand why his rights to traditional lands were not respected in Australian courts of justice. Geoffrey Dudgeon, and Senator David Norris, who successively challenged Irish laws — of North and South — that oppressed them as gay men. Vicki Roach, the prisoner, who contested her disenfranchisement in a federal election.

The story of George Ian Duncan came before a court — the Coroner’s Court of South Australia — only after his death. We, bystanders in his tragedy, look at his end in order to derive lessons for the living. Fortunately, one important lesson was quickly learned: the need to reform the criminal laws against gay men in South Australia and then in other jurisdictions of this country. Tragically, it took the death of this most private man to help propel reluctant Australian legislators into effective action. But it also required a courageous, innovative and sympathetic political leader to get things moving against the forces of opposition and inertia. It took leadership in South Australia to stimulate change elsewhere in the nation. The journey to law reform in Australia is often long and hazardous. People suffer in their lives whilst decision makers overcome their stereotypes and move to a higher level of knowledge and human empathy. We should strive to expedite this process. The Law Reform Institute of South Australia has delivered a report in 2015 that points the still remaining way ahead, and when these are addressed there are still more awaiting attention.

Secondly, the Duncan story teaches the importance of vigilance in respect of those who are trusted with the enforcement of the law. Instead of wise and prudent leadership, the successive Commissioners of the South Australian Police, in the time

31 *Somerset v Stewart* (1772) Lofft 1; 98 ER 499.
32 *Donoghue v Stevenson* [1932] AC 562.
33 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
34 *Dudgeon v United Kingdom* (1981) 45 Eur Court HR (Ser A).
35 *Norris v Ireland* (1988) 142 Eur Court HR (Ser A).
38 See, eg, the obstacles faced by a gay tourist who came to Adelaide in 2016 with his spouse whom he had married under English law. When his spouse died in an accident he had to face the indignity of flying out his father-in-law from London as he was not allowed to identify the body and arrange its return, and he received a death certificate inscribed ‘never married’; Elle Hunt, ‘Briton who Died on Honeymoon in Australia to Have Same-Sex Marriage Recognised’, *The Guardian* (online), 21 January 2016 <http://www.theguardian.com/australia-news/2016/jan/21/briton-who-died-on-honeymoon-in-australia-to-have-same-sex-marriage-recognised>.
that Dr Duncan lived and worked under their protection, were largely unquestioning of Police conduct. They turned a blind eye to the regular harassment of a vulnerable minority. Even after the repeal of criminal laws, far from promoting overdue law reform, they spied on good citizens. They monitored their private lives. They abused their official powers. Oppressive and unlawful conduct was excused as merely a ‘high spirited frolic’.

We should not think that this risk of abuse is a happening confined to the past. The recent initiative of the Australian Border Protection Service in Melbourne to stop people in the streets of that city, demanding identity papers at random in the hope of finding a few visa over-stayers, was apparently undertaken without legal authority. The event illustrates the wisdom of the rejection in Australia of the Hawke Government’s 1985 proposal for a universal identity card: the ‘Australia Card’. If compulsory identity papers are introduced, officials will be unable to resist the temptation to demand their production, and our legislatures will all too often surrender to the demand on the flimsiest of excuses. The relationship of authority to the citizen — ordinarily limiting official intervention to the presence of a provable ‘reasonable cause’ — would be changed forever.

The peril of abuse of public power was illustrated by the so-called ‘high spirited frolic’ of police officers on Dr Duncan’s last night. The police officers involved thought that, in pushing him into the river, they were beyond scrutiny. In the necessary enhancement of official powers to respond to dangers of lawlessness and terrorism, we must always remember the lesson of the Duncan case, and of the Communist Party Case in Australia. History, and not just ancient history, teaches the risks of abuse of official power. Leadership of officials in the public space, scrutiny by the courts and attention in the legislatures are required to prevent the misuse of official power. When abuse happens, it should not be soon forgotten. The stories of abuse teach the need for eternal vigilance.

Thirdly, equality in respect of legal rights is a normal aspiration of civilised societies. Under the law, human beings should be treated equally, unless for very good reason, and then any exceptions must be justified and provided by law. In many countries, the constitutional text itself contains a specific promise of equality. This permits courts to safeguard equality against the ever-present risk in an electoral democracy that the majority in parliament will forget, or override, the rights of minorities — especially if they are unpopular minorities, as homosexuals in Dr Duncan’s time were, or as Aborigina l s in Eddie Mabo’s time, or women in Caroline Chisolm’s time, or even refugees and prisoners in just about any time. The Australian Constitution contains no such basic equality right. A referendum is currently being proposed, suggesting special recognition of Aborigina l s in a preamble. This may be welcome, but it would be better, in my view, if the idea of recognition were expressed substantively in generic terms: to protect legal equality for all people — and especially citizens — unless some strong and convincing reason exists to deny it.

39 Australian Communist Party v Commonwealth (1951) 83 CLR 1.

40 Cf Thomas v Mowbray (2007) 233 CLR 307, 442 [386].
Fourthly, the private religious beliefs of some people — even in a majority — should not stand in the way of equality for all, including minorities. The secular state is one of the greatest gifts of the British to global constitutionalism. We should be more vigilant in protecting secularism, defending it and upholding it in Australia. Experience has shown that unequal treatment under the law is sometimes the product of undue caution because of supposed religious instruction (as Murray Hill’s first attempt at reform was). Sometimes it is the outcome of private religious beliefs (as Len King’s initial reaction to gay law reform was). Sometimes, it is just plain wrong-headed and based on a reluctance to changing oppression that has continued for a long period. The right to insist upon observance of one’s own religious beliefs is like the right to swing one’s arm. It finishes when it comes into contact with my fundamental right to equality as a citizen.

A gift of seeing over the horizon and perceiving the direction in which the law is moving is a special gift. We need more leaders in Australia — political, judicial and in civil society — who enjoy that capacity and share it with us all. Foresight combined with courage constitutes a marvellous legal coincidence. The prize belongs to those who see the future most clearly, who have the courage to pursue it and who enjoy the skill and persuasiveness to take others with them on the journey.

Fifthly, the final lesson from Dr Duncan’s ordeal is the need to look beyond the single issue of its contribution to gay law reform to the lessons it teaches on broader issues. After a series of fitful efforts (now almost completed), Australia’s legislatures have repealed the inherited colonial criminal laws against gay men. No longer are people required to deny or suppress their nature, disguise their identity, or suffer humiliations, deprivations and injustices as a result of their sexual orientation, gender identity or gender expression. At least, in Australia, they are not forced to such consequences by a risk of criminal prosecution and punishment.

Other laws still in place, however, serve only to oppress a minority in Australia on the grounds of their sexual orientation and gender identity or expression. Lesbians, gays, bisexual, transgender, intersex and other queer people are denied rights that are accorded without hesitation to other Australians. I refer not only to equality in relationship recognition and the facility of marriage, if that is their wish. For example, in every jurisdiction of Australia (except in the Australian Capital Territory) transgender citizens who wish to alter their birth certificate — to replace what they perceive as a serious misassignment of their gender identity or expression affecting them first and foremost — can only do this if they undergo extremely radical, costly and sometimes risky gender reassignment surgery. All for a bit of paper. In death Dr Duncan was to suffer, mercifully unknown to him, from the obsession of some people about his private parts and sexual acts. Australians must grow up from the ignorance of insisting on a binary division of humanity and face the reality of the existence of sexual differences and diversity.

The diversity that we must accept is not confined to the issues of sexual orientation and gender identity and expression. It extends to Aboriginality, race, gender, disability and other like indelible causes. It also extends to religious beliefs and differing cultural values. If Dr Duncan’s tragedy teaches anything, it is the need
to accept and celebrate diversity, not to regard it as a reason for criminalisation, denial of equality, imposition of humiliation and insistence on compliance with an unnatural stereotype. Plenty of other issues face us in the law. They include global issues of climate change, refugee movements, nuclear non-proliferation and searing global poverty. But to honour Dr Duncan we can certainly add the law and sexuality to our list.

V Conclusion

The haunting question left to us by Dr Duncan’s death is: what are the issues of injustice in Australian law and society today that are neglected and upon which our politicians, judges, lawyers and civil society are reluctant, reticent or silent? Today we look back on Dr Duncan’s tragedy, not as a ‘high spirited frolic that went wrong’, but as a product of ignorance, cruelty and a failure of law and of legal institutions. Lawyers need to be in the vanguard of questioning stereotypes and questioning the assumptions of the law. Doing this is not inconsistent with observance of the rule of law and the defence of legalism. On the contrary, it is an essential ingredient in a legal system that endures for the benefit of all of the people living under it.

I congratulate the Adelaide Law School and Professor John Williams for the initiative of providing a photographic portrait of George Ian Ogilvie Duncan to be placed at the entrance of the School. A scholarship fund in Dr Duncan’s name will also be established to provide recurrent support for a law student in need, however identifying in sexuality, who is committed to equal rights for all people irrespective of their sexual orientation, gender identity, gender and intersex status.

I hope that Dr Duncan’s presence again, in this way, amongst the law students of today will remind them that law is sometimes unjust. Public officials are sometimes oppressive. But good lawyers are committed to vigilance for universal human rights and constant law reform. As Chief Justice John Bray once said: ‘diversity is the protectress of freedom’.41 This lesson should always be held in our minds, especially as we meditate on the short life and violent death of Dr George Ian Duncan, onetime lecturer in law at the Adelaide Law School.

ACHIEVING FAIRNESS IN THE ALLOCATION OF PUBLIC FUNDING IN REFERENDUM CAMPAIGNS

ABSTRACT

In 2013 the Gillard Government caused controversy when, in the lead-up to its planned referendum on local government recognition, it allocated 95 per cent of available promotional funding to the Yes campaign. This occurrence affirms that funding allocation is emerging as a contentious area in Australian referendum practice, and there are signs that disagreements about funding could have an impact on the proposed referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. This article argues that the existing regulation of federal referendum expenditure is inadequate and a more principled and long-term approach is required. It evaluates the merits of three different approaches to funding allocation: equal funding, which sees funding shares divided equally between the Yes and No campaigns; proportionate funding, by which available money is allocated in proportion to parliamentary support; and discretionary funding, whereby promotional funds are apportioned at the discretion of the federal government. The article argues that legislation should be passed to establish a sustainable approach to funding allocation that advances, as much as possible, the objective of fairness in referendum campaigns. To this end it identifies and evaluates several reform options that, although imperfect, are preferable to the status quo.

I INTRODUCTION

In 2013 the federal Labor Government proposed, and then abandoned, a referendum on the constitutional recognition of local government.1 That proposal is largely forgotten now and it seems unlikely that the issue will be revisited in

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the near future. However, the events leading up to the shelving of the 2013 poll are of enduring interest for the spotlight they placed on the regulation of federal expenditure in Australian referendum campaigns. In a controversial move, the Gillard Government secured Parliament’s agreement to a suspension of statutory limits on referendum expenditure, and then used its newly acquired spending freedom to grant a massive financial advantage to the Yes campaign. Of the $10.5 million the government set aside to fund partisan campaigns, it allocated $10 million (or 95 per cent) to the Australian Local Government Association (ALGA), and just $500 000 to opponents of local government recognition. These funding shares were in line with the proportion of votes cast for and against the proposed constitutional amendment in Parliament. The Opposition accused the government of putting the ‘fairness’ of the referendum at risk by ‘trying to buy the result’, and of ‘skew[ing] public information’. The fallout ultimately proved damaging to the fragile bipartisanship that had formed around the referendum proposal.

The events of 2013 affirm that funding allocation is emerging as a contentious area in Australian referendum practice. They mark the second consecutive occasion on which Parliament has moved to override legal limits on referendum spending; it did the same in the lead-up to the 1999 republic referendum, freeing the Howard Government to allocate promotional monies (in equal shares) to Yes and No

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4 Anthony Albanese, ‘Funding Provided to Promote Public Debate about Constitutional Change’ (Media Release, 17 June 2013).

5 Ibid. The House of Representatives and the Senate approved the Constitution Alteration (Local Government) 2013 by margins of 134–2 and 46–8, respectively.


7 Commonwealth, Parliamentary Debates, Senate, 19 June 2013, 3424 (David Bushby). See also Commonwealth, Parliamentary Debates, Senate, 19 June 2013, 3359–60 (George Brandis).

campaign committees. In each case the effect of Parliament’s actions was to leave decisions about funding shares entirely in the hands of the federal government that had initiated the referendum. While a virtue of this ‘ad hoc’ approach is flexibility, its vice is that it leaves a critical aspect of the referendum campaign to be determined in the absence of agreed standards.

The shortcomings of this are apparent when we consider the proposed referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples, which could take place as early as May 2017. Should the sponsoring government make promotional funding available, the apportionment of that money between the Yes and No campaigns is likely to be a matter of debate. Already, leading Indigenous commentator Marcia Langton has argued that the referendum ‘will almost certainly fail’ if public funding is made available to the No case. The Australian Monarchist League, meanwhile, has said that both sides should receive equal funding. This is not a trivial disagreement and it underscores the need for a principled approach to funding allocation to be developed well in advance of polling day. To delay doing so risks the possibility of controversy over Commonwealth spending flaring up during the campaign, just as it did in 2013, and damaging the legitimacy of the process. Debates about funding allocation could also prove divisive in connection with the proposed plebiscite on same-sex marriage.

This article argues that a principled and long-term regulatory approach to funding allocation is needed. It evaluates the merits of three different approaches to funding allocation: equal funding, which sees funding shares divided equally between the Yes and No campaigns; proportionate funding, by which available money is allocated in proportion to parliamentary support; and discretionary funding, whereby promotional funds are apportioned at the discretion of the federal government. Each model is assessed with respect to its capacity to advance fairness in referendum campaigns. The article acknowledges that any attempt to develop a sustainable approach to funding allocation must confront a variety of design challenges, and it is probably impossible to fashion a ‘perfect’ set of legislative rules that meets

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9 The Howard Government allocated $7.5 million each to the two campaign committees; it also used its spending freedom to establish a $4.5 million neutral public education campaign: Daryl Williams and Chris Ellison, ‘Committees for the Advertising for the Referendum on the Republic’ (Joint News Release, 19 February 1999).


12 Australian Monarchist League, Submission No 104 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, 31 January 2015, 3.
all of these. Nonetheless, even an imperfect regulatory regime, devised following careful parliamentary consideration of the complex issues involved, is preferable to the status quo.

This article continues in Part II with an overview of the legislative framework that governs Commonwealth funding of referendum advocacy, followed by an analysis of its shortcomings and recent calls for reform. Part III considers the meaning of fairness in the context of referendum finance, and suggests that it can be broken down into the values of equal opportunity, deliberation and administrative neutrality. Part IV examines the merits of the three models of funding allocation and assesses the extent to which they promote fairness. In Part V, the article gives an overall assessment of the three models, before identifying and evaluating several reforms that could help provide a principled, long-term approach to funding allocation.

II Referendum Finance in Australia: The Legal Framework

A Scope and Rationale

Across the globe, a range of approaches is taken to the regulation of money in referendum campaigns. Some jurisdictions place little or no legal limits on campaign finance, while others employ a variety of regulatory tools including disclosure obligations, expenditure caps, rules about media access and the provision of public funding. A key objective behind much of the regulation is the creation of a ‘level playing field’, by minimising the advantage that wealthier groups might enjoy due to a greater ability to raise and spend money. This is not to say that money will necessarily determine the outcome of a referendum — one can point to instances where one side had a large financial advantage and lost — although research on ballot initiatives in the United States indicates that a group is more likely to win if it significantly outspends its opponents.

15 In Canada, for example, supporters of the Charlottetown Accord were defeated at a 1992 referendum despite spending $11.25 million compared to their opponents’ $883 000: Richard Johnston, ‘Regulating Campaign Finance in Canadian Referendums and Initiatives’ in Karin Gilland Lutz and Simon Hug (eds), Financing Referendum Campaigns (Palgrave Macmillan, 2009) 23, 27.
Australia takes a mostly ‘laissez faire’ approach to the regulation of referendum finance.\textsuperscript{17} There are no spending caps or media access rules, and campaign groups are not required to disclose the sources or amounts of their funding. This ‘light touch’ approach to regulation might be explained by the fact that referendums in Australia have not historically been the site of substantial expenditure.\textsuperscript{18} The primary piece of campaign material has long been the official pamphlet, which is funded by the federal government, and other campaigning has traditionally been limited to newspaper advertisements and public meetings.\textsuperscript{19} Further, commercial interests have not played a major role in campaigns, perhaps because most proposals for constitutional amendment are technical in nature and are directed at reallocating political power rather than disturbing existing social and economic interests.\textsuperscript{20}

In an otherwise loose regulatory regime, legislation places strict limits on Commonwealth expenditure on referendum advocacy.\textsuperscript{21} Section 11(4) of the \textit{Referendum (Machinery Provisions) Act 1984} (Cth) provides that the Commonwealth ‘shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law’ unless that spending is in relation to:

- the preparation, printing and distribution of the official Yes/No information pamphlet, its translation into other languages and its adaptation for the visually impaired.\textsuperscript{22} This pamphlet sets out arguments for and against the proposed constitutional amendment, as authorised by members of Parliament, and includes a statement showing the relevant textual changes.\textsuperscript{23}

\textsuperscript{17} Compare Orr and Tham, who use the same term to describe Australia’s approach to political finance regulation generally: Graeme Orr, The Law of Politics: Elections, Parties and Money in Australia (Federation Press, 2010) 239; Joo-Cheong Tham, Money and Politics: The Democracy We Can’t Afford (UNSW Press, 2010) 23–4.

\textsuperscript{18} Contrast the United States, where enormous resources are spent on campaigns promoting and opposing ballot initiatives: Daniel A Smith, ‘US States’ in Karin Gilland Lutz and Simon Hug (eds), Financing Referendum Campaigns (Palgrave Macmillan, 2009) 39, 44–6.


\textsuperscript{20} Ibid 16.

\textsuperscript{21} Note that, outside of such spending, referendums make large demands on the public purse. Some of the most costly activities include the administration of the ballot and the running of advertisements to raise awareness of the referendum. In 1999, for instance, the Australian Electoral Commission (AEC) spent approximately $33 million on the administration of the republic referendum and $7 million on advertising. In 2013, the government allocated $44 million to the AEC to run the poll on local government recognition. See George Williams and David Hume, People Power: The History and Future of the Referendum in Australia (UNSW Press, 2010) 87; Commonwealth, Budget Measures 2013–14 — Part 2: Expense Measures (2013) 246 <http://www.budget.gov.au/2013-14/content/bp2/download/BP2Consolidated.pdf>.

\textsuperscript{22} \textit{Referendum (Machinery Provisions) Act 1984} (Cth) s 11(4)(a)–(ac).

\textsuperscript{23} Ibid s 11(1).
the ‘provision by the Electoral Commission of other information relating to, or
relating to the effect of, the proposed law’;\textsuperscript{24} or

- the salaries and allowances of MPs, their staff and public servants.\textsuperscript{25}

These spending restrictions were introduced in 1984 with the objective of ensuring
even-handedness in federal referendum spending. The catalyst for these reforms was
an announcement by the Hawke Government in late 1983 that it was going to spend
$1.25 million exclusively on the promotion of five proposals it intended to put to a
referendum. Non-government MPs viewed this as an unjustified departure from the
longstanding practice in which governments had limited their advocacy spending to
the official pamphlet and had sought to persuade voters through other means that did
not require the expenditure of public funds.\textsuperscript{26} While Hawke’s referendum was later
abandoned, disquiet among these MPs persisted and in 1984 they sought to impose
expenditure limits by introducing amendments to a government Bill covering general
matters of referendum administration.\textsuperscript{27} After initial resistance, the government
supported the amendments, now enshrined in s 11(4).

The parliamentary debates of the time reveal striking parallels with the sentiments
and language of the more recent conflict over funding in 2013. Opposition MPs
complained that Hawke’s extra funding was ‘unfair’,\textsuperscript{28} ‘unprincipled’\textsuperscript{29} and an
‘unprecedented misuse of public funds’.\textsuperscript{30} Australian Democrat Senator Michael
Macklin, who introduced the measure in the Senate, stressed the importance of
spending limits to ensure that voters were provided with fair and balanced informa-
tion.\textsuperscript{31} Liberal MP Steele Hall, another protagonist in the debate, spoke of the need
for legislation to restrain governments from intervening in referendum campaigns

\begin{footnotes}
\footnote{\textsuperscript{24} Ibid s 11(4)(b).}
\footnote{\textsuperscript{25} Ibid s 11(4)(c).}
\footnote{\textsuperscript{26} See, eg, Commonwealth, \textit{Parliamentary Debates}, Senate, 6 December 1983, 3312
(Shirley Walters).
}\footnote{\textsuperscript{27} Referendum (Machinery Provisions) Bill 1984 (Cth).
}\footnote{\textsuperscript{28} Ibid 3320 (Noel Crichton-Browne).
}\footnote{\textsuperscript{29} Ibid 3325 (Michael Townley).
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\footnote{\textsuperscript{31} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1984, 2763 (Michael
Macklin). See also comments by Philip Ruddock (‘there is a democratic right to be
able to hear the arguments unhindered by an enormous amount of public moneys
being advanced in relation to only one side of the case’) and Senator Noel Crichton-
Browne (equal funding as ensuring ‘full knowledge of all the facts’ and ‘objective
judgments’ by voters): see respectively, Commonwealth, \textit{Parliamentary Debates},
House of Representatives, 29 May 1984, 2362; Senate, 6 December 1983, 3320.}
\end{footnotes}
in a partisan fashion. For Hall, ‘[t]he morality of the situation [wa]s quite clear: A government going to the public in a referendum must be even-handed.’

B Shortcomings and Vulnerability

Section 11(4) ensures that the federal government will be neutral when it comes to expenditure on referendum arguments. Its means of achieving neutrality, however, suffers from three shortcomings. These shortcomings have made s 11(4) vulnerable to override despite its legislative status, and with the risk of override comes the prospect of the Commonwealth having absolute discretion as to how it allocates promotional funding.

First, s 11(4) prevents the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, even if it wishes to do so in an even-handed manner. It also prohibits federal governments from funding Yes and No committees to undertake their own advertising and other campaigning. This restriction seems particularly tough in a modern campaign environment that relies so heavily on television advertising. In 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs (‘House Standing Committee’) expressed the view that s 11(4) ‘severely restricts the way in which the Government can engage with electors on issues of constitutional change’. The Committee concluded that the existing expenditure limits were too strict and recommended that they be lifted.

Second, s 11(4) presents a barrier to government spending on education campaigns. While the provision concerns spending on the presentation of arguments, educational spending is capable of being brought within its scope due to the fact that the distinction between argument and neutral information is often difficult to identify. This was confirmed in Reith v Morling, a case in which Liberal MP and Shadow Attorney-General Peter Reith successfully sought an injunction restraining Commonwealth spending on two advertisements produced by the Attorney-General’s Department

33 Surprisingly, this aspect of s 11(4) provoked little comment from parliamentarians when they debated the legislation. Exceptionally, see contributions by Gareth Evans (‘[m]ost people now look to television for information about what is going on’) and Michael Macklin, who suggested that television might be used for the promotion of the Yes and No cases: see respectively, Commonwealth, Parliamentary Debates, Senate, 7 June 1984, 2764; 7 December 1983, 3370.
35 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, recommendation 11.
in connection with the 1988 referendum. One advertisement mentioned that the referendum proposals had emerged from a consultative Constitutional Commission process ‘representing a cross-section of Australians’; the other drew a comparison between the referendum and the federal Parliament ‘outgrow[ing] its old home’ and moving to a ‘magnificent new Parliament House’.

Justice Dawson, sitting alone, acknowledged that making a judgment on such an issue was ‘to some extent, a matter of impression’, but ultimately ruled that the advertisements went beyond the raising of public awareness and engaged in promotion of the arguments in favour of the referendum proposals. This ‘strict’ interpretation of s 11(4) creates considerable uncertainty for federal governments wishing to spend money on public education campaigns. Indeed, this uncertainty directly influenced the Howard Government’s decision to seek the suspension of s 11(4) in 1999: it feared that expenditure on educational material would amount to a ‘technical breach’ of the Act. The Reith decision also signals to the AEC that its own educational initiatives — which are the subject of federal expenditure under s 11(4)(b) — will be vulnerable to challenge should they stray beyond promoting awareness about the fact of the referendum and the method of voting.

Third, s 11(4) is selective in its application. The spending limits apply only to the Commonwealth; there are no equivalent restrictions on expenditure by state and territory governments, political parties, interest groups or individuals. These entities remain free to spend as much money as they like promoting or opposing federal government proposals for constitutional change. This asymmetry is most significant with respect to state governments, which have on occasion been willing to fund campaigns opposing referendum proposals. An argument can be mounted that states should be allowed to spend freely in referendum campaigns, as only the Commonwealth can initiate amendments to the Constitution and state governments need to be able to defend themselves against referendum proposals that centralise power. On the other hand, it might be said that s 11(4) impedes the ability of the Commonwealth to persuade the public about changes it considers to be in the national interest, by leaving it exposed to well-funded opposition campaigns conducted by the states. This raises questions about the fairness of current spending regulations, which are taken up later in this article.

36 (1988) 83 ALR 667 (‘Reith’).
37 Ibid 670.
38 Ibid 672.
39 Williams and Hume, above n 21, 66.
42 State-funded campaigns are discussed in Part IV. See generally, Williams and Hume, above n 21, 160–1, 175.
In hindsight, these three shortcomings rendered the expenditure limitations in s 11(4) unsustainable. It was only a matter of time before they were challenged by a federal government seeking greater spending freedom during a referendum campaign. It is in this context that we should view the decisions of the Howard and Gillard Governments to evade the constraints imposed by s 11(4). In both instances, the government sponsoring the referendum wanted more capacity than the law allowed to utilise mass media for the presentation of arguments, and to run genuine public education initiatives.43 Putting aside the recent controversy over funding allocation, the actions of the Howard and Gillard Governments affirm how unsuited s 11(4) is to the contemporary campaign context.

It seems unlikely that the terms of s 11(4) will be revisited anytime soon, despite the recommendation of the House Standing Committee. The federal government, in its response to the Committee’s report, said that it would instead consider changes to referendum machinery (including funding arrangements) ‘on a case by case basis’.44 However, whether the government retains the status quo, or undertakes reform by lifting the existing expenditure restrictions, the issue of funding allocation remains to be confronted. If governments are left to suspend spending limits on an ad hoc basis, we will intermittently be faced with the question of whether promotional funding should be distributed equally between the Yes and No campaigns. As the events of 2013 show, any legal obligation to neutrality falls away once s 11(4) is suspended and the government has absolute discretion as to how much financial support it gives to each campaign. Alternatively, if the Parliament decides to permanently lift the spending limits in s 11(4), as recommended by the House Standing Committee, the question naturally arises as to how much discretion the government should have in allocating promotional funding between supporters and opponents of constitutional change. Should the government be required to apportion funds equally, in proportion to parliamentary support, or should it have complete freedom in how it spends promotional money?

The remainder of this article seeks to develop a principled approach to this question. It does so by assessing the degree to which these different approaches to funding allocation help to advance the value of fairness. Undertaking such an analysis is particularly important when we consider that, in Australia’s mostly ‘laissez faire’ regulatory environment, the allocation of public funding is one of the few regulatory tools available for promoting fairness. Before commencing this analysis it is necessary to say more about what the idea of ‘fairness’ means in the context of referendum expenditure.

43 In addition to its promotional spending, the Gillard Government used its spending freedom to allocate $11.6 million to the Department of Regional Australia, Local Government, Arts and Sport to run a civics education campaign: Commonwealth, Budget Measures 2013–14 — Part 2: Expense Measures (14 May 2013) 246 <http://www.budget.gov.au/2013-14/content/bp2/download/BP2_consolidated.pdf>.

III Fairness and Referendum Expenditure

One of the challenges in assessing the fairness of different approaches to referendum expenditure is that the very idea of fairness is difficult to define and can take on different meanings depending on the context.\(^45\) On the other hand, it is imprecise and generally unhelpful for an author to make an argument for or against a certain position by simply stating that it is more or less ‘fair’. With this in mind, I have broken down the concept of fairness into three distinct, if overlapping, values: equal opportunity, deliberation and administrative neutrality. The choice of these three particular values is informed both by the literature on campaign finance,\(^46\) and by a close analysis of parliamentary and public debates in which the ‘fairness’ of public funding is discussed.

In taking this approach, I do not pretend to set down a comprehensive notion of fairness that can be applied to all policy debates. Nor should this approach be seen as precluding reference to other considerations — such as federalism — that are relevant to any debate about the allocation of referendum funding. The purpose of my approach is to provide a useful and transparent framework for organising my analysis of the different models of referendum funding.

Turning to the first of the three values, the notion of equal opportunity captures the ideal that both supporters and opponents of constitutional change have a roughly equal chance to make their case to voters. They should each have an effective opportunity to participate in the referendum process, and to attempt to influence those casting a vote.\(^47\) An important element of this is that both sides enjoy fair access to the public arena so that they can make their case to voters.\(^48\) Where one side is denied fair access of this kind, the chances of a ‘fair rivalry’\(^49\) between Yes and No campaigns is diminished. The allocation of advocacy funding obviously has the potential to promote or undermine the achievement of equal opportunity. To the extent that one side of a referendum debate enjoys superior campaign resources, it has a larger capacity to access the public arena through television advertising and other means. In relative terms, the ability of the wealthier campaign group to influence voters’ preferences is greater, and the competitiveness of the referendum is weakened.

\(^{45}\) International IDEA, above n 13, 145.
\(^{47}\) Geddis, above n 46, 67.
\(^{48}\) Here I draw on Tham’s discussion of fairness in the context of political finance regulation: Tham, above n 17, 9.
\(^{49}\) Adopting Keith Ewing’s term to describe the promotion of fair competition between political parties in the context of elections: Keith Ewing, The Funding of Political Parties in Britain (Cambridge University Press, 1987) 182, cited in Tham, above n 17, 12.
The second value, deliberation, is closely related to equal opportunity. Where opposing campaign groups have fair access to the public arena, public debate and the free exchange of ideas are likely to be fostered. Voters will be able to access a variety of information, weigh up competing arguments, and make considered choices at the ballot box. On the other hand, where one side enjoys a substantial financial advantage over the other, the information environment may become distorted and weaken the quality of public deliberation. Tony Abbott captured the essence of the deliberative ideal in a letter to Julia Gillard in 2013 when he said that proposals for constitutional change should succeed on the strength of a fair and well-argued case, not the weight of advertising, and that ‘[a]rgument, not money, should determine the outcome’. The fear being expressed here is that, where one side enjoys a financial advantage over the other, voters will be overexposed to arguments from one side of the issue and their ability to form reasoned judgments will be diminished.

The third value, administrative neutrality, is also tightly connected to equal opportunity. It refers to the notion that elections and referendums should be administered in an impartial manner. Elements of administrative neutrality include the conduct and oversight of elections by independent electoral management bodies, and the locating of polling booths in politically neutral venues. Most importantly for this article, it also encompasses neutrality in government spending — that is, the notion that ‘[t]here should be protections against the inappropriate use of the resources of the state for political benefit.’ This idea informs the Australian government’s guidelines on information and advertising campaigns, which provide that campaign materials ‘should be presented in an objective, fair and accessible manner’ and ‘should be objective and not directed at promoting party political interests’. Applied to the specific context of referendum campaigns, a government would be seen as violating the principle of administrative neutrality where it used public funds in a one-sided way to help bring about its favoured outcome.

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51 Kerr, above n 6.

52 Of course, ensuring fair access to the public arena will not guarantee a high standard of public discourse — campaigners may make misleading arguments, and the adversarial, ‘high stakes’ nature of referendums may present a barrier to reasoned debate more generally. On the relationship between referendums and deliberation see Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’ in Matthew Mendelsohn and Andrew Parkin (eds), Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns (Palgrave Macmillan, 2001) 231.


54 Ibid.

Having broken down the concept of fairness into three more specific values, we are now in a position to appraise the three different models of funding allocation: equal, proportionate and discretionary.

IV Allocating Promotional Funding: Three Models

A Equal Funding

In many ways, equal funding seems the obvious means of achieving a fair division of referendum campaign resources. It advances all three of the values set out above. It helps to secure equal opportunity by giving each campaign group the same amount of federal resources to access the public arena and make their case to voters. This even share of federal funds fosters deliberation by ensuring that voters will be exposed to arguments from both sides, thus aiding an informed choice at the ballot box. And, as the Commonwealth refrains from giving a financial advantage to one side over the other, administrative neutrality is maintained.

For more or less the same reasons, the adoption of a neutral position on the allocation of public funding is considered to be an element of good referendum practice in many overseas jurisdictions. The Venice Commission, an advisory body to the Council of Europe on constitutional matters, has developed a Code of Good Practice on Referendums in which it endorses ‘a neutral attitude by administrative authorities’ towards public funding of campaigns. The Commission regards this as necessary to achieving ‘equality of opportunity’ for the supporters and opponents of reform proposals.

In the United Kingdom, there exist a number of regulatory measures which aim to achieve ‘parity of arms’ between campaign groups at referendums. Legislation mandates the equal allocation of public funding between the Yes and No sides: it is a statutory requirement that identical grants of up to £600 000 be given to the two ‘designated organisations’ that act as the umbrella groups arguing for and against a reform proposal. A spending cap of £5 million also applies to these organisations. The legislation contemplates that, aside from the two umbrella groups, other entities (such as political parties, trade unions, corporations and interest groups) may also participate in the campaign. These organisations must register as permitted participants if they wish to spend above £10 000, and face a limit on how much

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57 Ibid.
59 Political Parties, Elections and Referendums Act 2000 (UK) c 41, s 110.
referendum expenditure they may incur. A separate measure prohibits the publication of promotional material by the central or local governments; this encompasses material providing general information about the referendum, or putting arguments for or against a proposal.

In Ireland, following a decision of the Supreme Court in *McKenna v An Taoiseach [No 2]*, the government is prevented from spending public money to support one side of a referendum campaign. In that case, Green Party MEP Patrick McKenna successfully challenged the government’s spending of £500 000 to promote a Yes vote in the divorce referendum. The Court ruled that the use of public funds to promote a particular result breached the Irish Constitution. A constitutional amendment would now be necessary for the Irish government to allocate unequal shares of funds to campaign groups.

The House Standing Committee, in considering reforms to referendum expenditure regulation in Australia, endorsed an approach in line with these international practices. It recommended that, should existing expenditure limits be removed, s 11(4) be amended ‘to include provisions to ensure that spending is directed … to equal promotion of the Yes/No arguments’. In the Committee’s view, this would help to achieve ‘equality and fairness’ and would be ‘consistent with democratic ideals of informed debate’. Subsequent to this inquiry, Williams and Hume expressed a similar view, stating that a requirement for equal funding of Yes and No cases should be seen as a ‘quid pro quo’ for the lifting of existing restrictions on Commonwealth spending.

Of course, the fact that numerous overseas jurisdictions favour a neutral approach by governments to the allocation of public funding does not mean that it is the best approach for Australia, or that it carries no downsides. A strict commitment to equal funding can be criticised for being rigid, and thus insensitive to contextual factors affecting particular referendum campaigns. For instance, parity in public funding may seem incongruous where a proposal enjoys widespread community backing and the case against is supported by only a marginal few. The 1967 Aboriginals proposal arguably falls into this category. Similar issues could arise with respect to narrow,

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60 Ibid ss 117–18, sch 14.
61 Ibid s 125.
64 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, 65, recommendation 11.
65 Ibid 66 [5.53].
66 Williams and Hume, above n 21, 261.
67 This was a proposal to amend the race power in s 51(xxvi), to enable the Commonwealth to legislate with respect to Aboriginal peoples, and to repeal s 127, which prevented ‘aboriginal natives’ from being counted in reckoning Australia’s population.
mechanical alterations to the constitutional text. In such cases, some may ask, ‘is it really fair that opponents of this change get equal funding?’ There would be particular uncertainty in situations where parliamentary approval of the referendum Bill was unanimous — with no MPs lined up on the ‘No’ side, it would be unclear who the recipient of the available promotional funds should be. Further, an equal funding requirement leaves no capacity for federal governments to give extra resources to Yes campaigns in the event of significant oppositional spending by third parties.

The case for the equal allocation of promotional funds is nonetheless a strong one. It is built on sound conceptual foundations, is consistent with international practice and has been endorsed by leading scholars and a recent parliamentary inquiry.

B Proportionate Funding

Under a proportionate approach, the funding shares allocated to Yes and No campaigns will vary from referendum to referendum, in line with the level of support that the proposed amendment receives in Parliament. Given that a proposal can only proceed to a referendum if a majority of parliamentarians supports it, the Yes campaign will always receive more promotional funds than its opponents.

Despite the controversy that this approach generated in 2013, it was not the first time that it had been advocated by an Australian government. In 1984, Attorney-General Gareth Evans put forward a detailed proposal for proportionate funding in an attempt to counter the (ultimately successful) push by opposition MPs to ban the Commonwealth from funding any advocacy outside of the official pamphlet. Evans’s measure would have permitted the Commonwealth to spend money on advocacy beyond the pamphlet, and required that this additional ‘promotional’ spending be allocated in proportion to the support that the proposed constitutional amendment enjoyed in Parliament. While the Senate roundly rejected this proposal, it remains of contemporary interest for the robust defence Evans gave to the idea of apportioning promotional funds unequally.

As I explain below, the proportionate model resists the notion that an even split of funds produces fairness in a referendum campaign. Its claims to fairness rest instead on its connection with community opinion, and an in-built flexibility that allows it to respond to existing inequalities in the campaign environment.

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68 Except in the case of a deadlock between the two Houses, where the support of a minority of MPs may be sufficient. Section 128 of the Constitution provides that, where one House proposes a change that is rejected twice by the other House (with a three month interval in between), the Governor-General retains a discretion to submit the proposed constitutional change to a referendum.

69 Commonwealth, Parliamentary Debates, Senate, 7 June 1984, 2729 (Gareth Evans).

70 Ibid 2762.
1 Fairness and Community Opinion

The driving rationale behind proportionate funding is that it enables an allocation of funds that roughly reflects the balance of community opinion on a referendum proposal. The votes cast for and against the referendum Bill serve as a proxy for the views of the public. Gareth Evans gave voice to this chain of reasoning in the following way:

Funding in proportion to the votes cast in Parliament seems to the Government to be fair and equitable. After all, Parliament represents, or is supposed to represent, the will of the people. Votes in Parliament are a fair indication of the interests that are lined up in support of, or in opposition to, any proposal for amending the Constitution.\(^\text{71}\)

Evans describes proportionate funding as ‘fair and equitable’ and, in doing so, presents an alternative view of fairness to that which underpins equal funding. Fairness in the allocation of public money is achieved by apportioning funds in line with the views of those who, collectively, are the source of that money: the people. Institutionally, Parliament is seen as the best available representation of those views.

This approach to funding allocation can be said to promote ‘fair rivalry’ by ensuring that views that are unpopular in the community are not accorded a disproportionate voice in the public arena. The equal funding model, on the other hand, can be criticised on this basis — it arguably undermines fair rivalry by giving opponents of constitutional change the means to promote their message in the public arena to a degree that far exceeds their public support. This in turn distorts public deliberation, as unpopular or marginal arguments are given close to equal footing in the campaign environment. Administrative neutrality might be maintained under equal funding, but it conceals these distortions. In any event, administrative neutrality is also maintained under proportionate funding, as it is not the government but the public (via Parliament) that determines the proportion of funds that each campaign receives.

This alternative notion of fairness already informs the allocation of federal public funding to political parties.\(^\text{72}\) After each election, parties receive a certain amount of money for every first preference vote they obtained above a certain threshold.\(^\text{73}\) This allows parties to recoup expenses incurred by them in the lead-up to an election. The rationale behind tying funding to votes is that it ensures that the amount of public money claimable by parties is in line with the degree of electoral support they command.\(^\text{74}\) Under a proportionate approach to allocating referendum funding, monies are similarly divided according to public support, but the respective shares are determined in advance of the poll and by reference to votes cast in Parliament.

\(^{71}\) Ibid 2731 (Gareth Evans).

\(^{72}\) Orr, The Law of Politics, above n 17, 269.

\(^{73}\) Ibid 249. This amount was $2.49 per vote at the 2013 federal election: AEC, Current funding rate (24 November 2015) <http://www.aec.gov.au/parties_and_representatives/public_funding/Current_Funding_Rate.htm>.

\(^{74}\) Orr, The Law of Politics, above n 17, 249.
The proportionate model can be said to be especially appropriate where a strong community consensus exists around a referendum proposal. As noted above, where the weight of opinion is behind a constitutional amendment, it may seem odd that a few opponents of change should receive an equal share of federal money. Looking back over Australia’s referendum history, some proposals have received very strong endorsement in federal Parliament: four proposals have received unanimous support in both Houses,\(^\text{75}\) while others were opposed by only a handful of MPs.\(^\text{76}\) It might be queried whether a No campaign really deserves to receive equal funding in such situations.

This justification arose in debates about proportionate funding in both 1984 and 2013. Gareth Evans cited community consensus as a reason for unequal funding, arguing that ‘there are some proposals which have such overwhelming majority support and such idiosyncratic opposition that public funds really ought not to be advanced to that idiosyncratic, eccentric, perhaps tendentious … fringe’.\(^\text{77}\) Similarly, Anthony Albanese saw opposition to local government recognition as a fringe view that had only a weak claim to public funding. He remarked: ‘the idea that we are going to fund either the Institute of Public Affairs to the tune of $10m, or Green Left Weekly, for that matter, is, I think, absurd’.\(^\text{78}\)

2 Fairness and Substantive Equality

The proportionate model can also claim to promote fairness by advancing equal opportunity in a more substantive way than is possible with equal funding. It does this by giving the Commonwealth the flexibility to respond to two factors that prevent a true level playing field in referendum campaigns: the possibility of unlimited spending by third parties, and the natural advantages of No campaigns. The equal funding model, far from addressing these matters, assumes the existence of a level playing field and so only reinforces these existing inequalities.

Proportionate funding enables the federal government to offset campaign expenditure by other entities, such as state and territory governments, political parties, interest groups and individuals, who face no legal restrictions on their spending abilities. Referendum history demonstrates the willingness of state governments, in particular, to fund campaigns opposing constitutional change. In 1988 the Queensland National government spent over $1 million on advertisements opposing the Fair Elections proposal, which would have required the State to abandon its long-standing

\(^\text{75}\) The Aboriginals proposal (1967), and the Senate Casual Vacancies, Retirement of Judges and Referendums proposals (1977).

\(^\text{76}\) For example, in 1967 just seven MPs voted against the proposal to remove the parliamentary nexus, while in 1999 only Independent Peter Andren opposed the Bill that proposed the insertion of a new preamble into the Constitution. Just 10 MPs voted against the 2013 proposal to grant constitutional recognition to local government.

\(^\text{77}\) Commonwealth, Parliamentary Debates, Senate, 7 June 1984, 2732 (Gareth Evans).

gerrymander and put in place electoral arrangements that respected the principle of ‘one vote, one value’.\(^7^9\) In 1977 the Queensland and Western Australian governments both ran advertising campaigns against the federal government’s referendum proposals.\(^8^0\) It is also noteworthy that fear of state spending was a key motivation for the Hawke Government when it gave extra funds to the Yes campaign in 1983. At the time of its controversial spending announcement, the government was aware that Queensland and Tasmania were considering giving financial support to an opposition campaign.\(^8^1\)

Given that state governments and other entities are not bound to be even-handed in their spending, a proportionate funding model is a means of restoring balance. In situations where state governments are expected to run advertising campaigns against proposed constitutional reforms, this model frees the Commonwealth, through the weight of votes in Parliament, to offset that by giving extra money to support the Yes case, and in so doing promote fair rivalry between the Yes and No campaigns. The extra money for supporters of constitutional change could also foster deliberation, as it would help expose voters to a wider variety of arguments.

Proportionate funding might also be said to provide a means of offsetting the inherent advantages of No campaigns. Gareth Evans made much of this when seeking to justify extra funding for the Yes case in 1983. In his view, supporters of constitutional amendment always have the tougher task because they have to convince a cautious public of the need for change. By contrast, opponents need only argue in favour of the status quo and exploit voters’ bias in favour of retaining it.\(^8^2\) Other perceived advantages are that No campaigns attract more media attention\(^8^3\) and can more readily appeal to the emotions and fears of voters.\(^8^4\) Evans put this last point in characteristically direct fashion when he remarked that the Yes campaign required additional funding ‘to give it a chance of competing with the raw, crude, vulgar emotion of the kind which gets generated in referendum campaigns.’\(^8^5\) If Evans is

\(^7^9\) Williams and Hume, above n 21, 175.

\(^8^0\) Ibid 160–1.

\(^8^1\) Commonwealth, _Parliamentary Debates_, Senate, 6 December 1983, 3328 (Gareth Evans). The prospect of state spending may have also been a consideration in 2013: at the time of the funding announcement it was understood that New South Wales, Victoria and Western Australia were all opposed to the proposed amendment, although whether those States would have actively funded an opposition campaign is not known: Heath Aston and Judith Ireland, ‘Warning over “Truncated” Run to Referendum’, _The Sydney Morning Herald_ (Sydney), 10 May 2013, 10.

\(^8^2\) Commonwealth, _Parliamentary Debates_, Senate, 6 December 1983, 3327–8 (Gareth Evans). On status quo bias, see Williams and Hume, above n 21, 207–8.

\(^8^3\) Commonwealth, _Parliamentary Debates_, Senate, 6 December 1983, 3315 (Alan Missen).

\(^8^4\) For examples of ‘unscrupulous campaigning’, see Williams and Hume, above n 21, 82–5.

\(^8^5\) Commonwealth, _Parliamentary Debates_, Senate, 6 December 1983, 3328 (Gareth Evans).
correct, the extra money that proportionate funding generates for the Yes case is a way of levelling out the campaign playing field.

Of course, an argument can also be made that Yes campaigns have distinct advantages of their own. The Yes case will usually have the backing of the federal government and enjoys the benefits that flow from that. For instance, the government controls the timing of the referendum and so can choose to hold it at a time when support is expected to be highest. The Yes campaign also benefits from the Prime Minister’s unrivalled capacity to generate media coverage. As one senator put it, ‘[t]he reality is that the Yes case has the advantage because the Government is on its side’. These considerations weaken the contention because the extra funding is necessary to bring balance to the campaign environment.

3 Criticisms

Proportionate funding’s claims to fairness can be challenged on at least three grounds. First, it is arguable that the very idea of making funding shares contingent upon the prevailing balance of community opinion is problematic from a deliberative point of view. According to deliberative principles, the strength of an argument is not to be judged on the degree of support it enjoys at a given point in time. Instead, a proposition should stand or fall only on the strength of the reasons supporting it — that is, the ‘force of the better argument’ is decisive. If an argument is weak or marginal, this is not something that can be determined in advance by reference to public opinion. Instead, it is something to be tested and exposed in the public arena through debate and discussion. The proportionate funding model is problematic in this sense because it effectively pre-judges one referendum argument as more meritorious than the other based on a consideration that — from a deliberative perspective, at least — is irrelevant. That argument is then given greater exposure in the public arena, thanks to the additional funds its supporters receive, which undermines the deliberative nature of the wider referendum process.

This objection to proportionate funding has particular relevance in the referendum context, as neither community opinion nor parliamentary votes are necessarily a good reflection of the merits of a proposed constitutional amendment. Debates about constitutional reform are often sharply contested, with sensible, plausible arguments to be made on both sides. The proposal to empower the Commonwealth to directly

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86 Commonwealth, Parliamentary Debates, Senate, 7 June 1984, 2767 (Noel Crichton-Browne).
88 Senator George Brandis put this in colourful terms when criticising the Gillard Government’s funding allocation: ‘to put a proposition that a three-year-old child could understand, there are two sides to every story’: Commonwealth, Parliamentary Debates, Senate, 19 June 2013, 3359.
fund local government provides a good demonstration of this. Some constitutional experts endorsed the reform, arguing that the amendment was necessary to address funding uncertainties that had arisen in recent High Court decisions. At the same time, other experts disputed the necessity of the amendment and expressed concerns that the change would increase Commonwealth power at the expense of the states. In situations like this, where the merits of a referendum proposal are genuinely open to contest and debate, the allocation of promotional funds on the basis of existing community opinion seems arbitrary from a deliberative perspective, and risks weakening the deliberative quality of the referendum campaign.

Second, even if one accepts community opinion as a fair basis on which to allocate referendum funding, the use of parliamentary votes as a proxy is problematic. Close inspection of the referendum record suggests that the asserted link between parliamentary and public opinion is doubtful. Of the 44 referendum proposals that have passed through Parliament and proceeded to a vote, 31 have failed to win majority support among voters. Within that category of failed referendums, some have displayed especially large discrepancies between legislator and voter preferences. The 1967 proposal to remove the parliamentary ‘nexus’, for example, was supported by almost all MPs but endorsed by just 40 per cent of voters. In 1999, all but one MP (Independent Peter Andren) supported the proposal to insert a new preamble into the Constitution, but more than 60 per cent of Australians voted against it. The 2013 proposal to recognise local government also enjoyed much higher levels of support inside Parliament than it did among voters. Surveys in May and June registered public backing of constitutional recognition at 65 per cent and 47 per cent, respectively: in both cases, well short of the 95 per cent registered within Parliament.

An especially large disjuncture between parliamentary and public opinion is likely to occur where the referendum proposal would affect the personal interests of politicians. For example, proposals to amend the Constitution to significantly increase

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90 Twomey, above n 1; Cheryl Saunders, ‘Recognising Local Government Needs Rethink’, The Age (Melbourne), 22 May 2013, 41.

91 The other 13 proposals include the eight that have been successful, and five that achieved a national majority of votes but failed to win the support of at least four states.

92 The parliamentary ‘nexus’ refers to the requirement in s 24 of the Constitution that the number of members in the House of Representatives be, as near as practicable, twice the number of members in the Senate.

the length of parliamentary terms (say, to five years in the House and twice that in the Senate), or enhance MP salaries, might receive strong backing from politicians but be viewed suspiciously by citizens. On such contentious proposals it would seem peculiar to apportion promotional funds according to levels of parliamentary support. In practical terms, opponents of the most blatantly self-interested reform proposals will likely attract funding from other sources, and in any event the funding question could be moot given that referendums on such proposals seem unlikely to succeed. All the same, proposals of this nature test the claimed connection between parliamentary votes and community opinion which is at the heart of the legitimacy of the proportionate funding model.

This is not to say that the views of parliamentarians and citizens never align on referendum issues. In 1967, for example, the Aboriginals proposal received unanimous support in Parliament and was endorsed by 90.8 per cent of referendum voters. But the referendum record suggests that parliamentary votes are an unreliable guide to public preferences on constitutional reform questions. This naturally raises a question as to whether those votes should be relied upon as a yardstick for allocating advocacy funds.

One response to this second challenge would be to identify a better proxy for community opinion. However, it is unclear what that might be. Opinion polls present an obvious alternative, but they suffer from their own limitations in terms of accurately capturing public opinion on an issue, and lack the democratic legitimacy of a parliamentary vote.

Third, the proportionate model has the capacity to generate large disparities in funding allocation, which in turn undermines any reasonable notion of equal opportunity. This is not a merely hypothetical possibility, but will eventuate whenever there is bipartisan support in the Parliament for a reform proposal. In such cases, the No campaign will receive only the smallest share of available promotional funds. Far from ensuring equal opportunity, this outcome may damage the objective of a fair rivalry. This is the scenario that played out in 2013. Following the Gillard Government’s decision to adopt proportionate funding, opponents of local government recognition faced the immense challenge of mounting a strong campaign with just $500,000 of public funding. Absent substantial private fundraising on their part, there is a risk that the referendum campaign would have been uncompetitive. Any scenario in which the No side receives a paltry share of public funding will be especially problematic where, as occurred at the 1999 republic referendum, there are divergences among referendum opponents as to why the proposed constitutional change should be resisted. In such circumstances, a scarcity of public funds may mean that the diversity of opposition views is not adequately communicated to the public, or alternatively that one view is allowed to dominate. Further, large disparities of the kind that occurred in 2013 may influence how the public views the referendum campaign. There is a risk that voters, having seen the lion’s share of funding go to

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supporters of the government’s referendum proposal, will lose faith in the integrity of the referendum process.

C Discretionary Funding

A third possible approach to funding allocation is to permit the federal government to exercise complete discretion in how it apportions funds. This was the approach taken by the Hawke Government in 1983: it pledged an additional $1.25 million in funding for the Yes campaign purely as a matter of discretion and without reference to the levels of support that the five proposed amendments had attracted in Parliament.

Under this approach, the federal government is openly viewed as a partisan actor in referendum campaigns and, by virtue of this status, it spends as much public money as it likes in supporting its proposals for constitutional change. Gareth Evans expressed some sympathy for this approach during the funding debates of 1984. As non-government MPs argued in favour of expenditure limits, Evans remarked:

I do not join in this debate with any gigantic sense of enthusiasm because this is not what I want. I want to get in there and hammer away the Yes case with a degree of vigour, and flail all the eccentrics pursuing the idiosyncratic resistance to legitimate constitutional change. That is what I would like to do with government funds. I am quite open and unashamed about that. I think that is legitimate, given the whole course of referendums in this country.95

In situations where the Commonwealth exercised its discretion to fund Yes campaigns exclusively, it would be up to other entities — such as state governments, or private individuals — to provide financial support to opposition campaigns.

The difficulty with this approach to funding is that it creates the conditions for all three core values to be undermined. It permits the federal government to give a major funding advantage to the Yes campaign, thus weakening equal opportunity. In turn, this undermines deliberation by making it less likely that voters will hear a balance of information. A discretionary approach also abandons any pretence of administrative neutrality.

Of course, the federal government could choose to use its discretion to allocate funds equally between partisan campaigns, or in some other way that was aimed at achieving fairness. However, without external regulation the Commonwealth would retain the ability to fund one side primarily or exclusively. Unlike proportionate funding, which also permits large disparities in funding, the discretionary model could not lay claim to an underlying democratic legitimacy as expressed through parliamentary votes.

95 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2772 (Gareth Evans).
V Towards Fairness

A Assessing the Three Models

Of the three funding models, discretionary funding is the least credible. It is the least likely to produce an allocation of funds that will be accepted as ‘fair’. Both equal and proportionate funding, on the other hand, are sound approaches to the apportionment of promotional funding, each with their own claims to achieving fairness in the referendum process. However, as is apparent from the discussion in Part IV, each come with their downsides and, as a consequence, there is no ‘perfect’ model of funding allocation that will deliver fairness in all cases.

Equal funding can claim to deliver fairness by ensuring that both supporters and opponents of a referendum proposal receive identical amounts of federal money to make their case to the public, thus fostering equal opportunity, deliberation and administrative neutrality. Proportionate funding’s claim to fairness rests partly on the notion that a fair approach requires that funding reflect the balance of community opinion, and partly on the idea that variation in funding allocations is sometimes necessary to achieve a level playing field. A weakness of equal funding is that it is insensitive to existing inequalities in the campaign environment, such as the absence of regulation of third party spending, which leaves state governments free to run well-funded campaigns of their own. A commitment to equal funding may also be inappropriate where a proposed reform has broad community support, and/or unanimous approval within Parliament, as it could result in marginal views receiving substantial amounts of public money. Proportionate funding can claim to be more responsive to campaign inequalities, but it rests on a contestable connection between parliamentary votes and community opinion, and can generate highly unequal funding shares that serve to weaken competition and undermine public trust in the integrity of the process.

The strengths and weaknesses of these two funding approaches are apparent when we consider how they might play out with respect to the proposed referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. An equal allocation of funds would help to give supporters and opponents of constitutional recognition a reasonable opportunity to persuade the public of their views, ensure that voters are exposed to diverse perspectives, and permit the federal government to retain a neutral position on spending even if it otherwise campaigned in favour of constitutional change.

In other ways, however, an equal allocation of funds seems ill-suited to the issue of constitutional recognition. There is bipartisan agreement in the federal Parliament that some form of recognition is desirable, even if a shared view about which reform option should proceed to referendum is yet to emerge.96 There also appears to be a broad public consensus on the issue. A public opinion survey conducted in

July–August 2015, for instance, found that 79 per cent of the general Australian community are in favour of constitutional recognition; support was slightly higher (85 per cent) among Aboriginal and Torres Strait Islander peoples. This was in line with earlier polls in 2015. With this in mind, it could be seen as incongruous for opponents of constitutional recognition to receive half of available promotional funds.

If proportionate funding were adopted, opponents of constitutional recognition would receive only a small share of promotional funding. Assuming the continuance of a strong parliamentary consensus, the Yes campaign could receive upwards of 90 per cent of available public money. Defenders of this funding outcome could claim that it reflected community support for constitutional recognition and was therefore fair.

However, critics would likely question the use of parliamentary votes as a proxy for community opinion, and it is doubtful that the No campaign could be competitive with so small a share of public money. It could also be argued that such funding shares do not reflect the relative merits of the cases for and against reform, given the robust critique of constitutional recognition offered by various respected commentators. Were Parliament to give strong endorsement to a minimalist form of recognition (for example, the insertion into the Constitution of a statement of recognition), a

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proportionate approach would leave little money to those who wished to prosecute the case for more substantive reform (such as a prohibition against racial discrimination). Importantly, such a large disparity in the amounts received by the respective campaigns could create a perception of unfairness and damage the credibility of the referendum process. It could alienate opponents by making them feel as if their voices had not been heard. Such feelings could be deepened by a sense, held by some commentators, that the federal government’s funding of the ‘Recognise’ campaign has given proponents of recognition a ‘head start’. Any controversy over funding would divert public debate from the merits of reform to the integrity of the process.

The example of Indigenous constitutional recognition demonstrates that both equal and proportionate funding, while credible models, are capable of generating outcomes that might be viewed as incongruous, unbalanced or otherwise ‘unfair’. This presents a significant challenge for the regulation of referendum funding. It means that it is not possible to develop a regulatory regime that delivers optimal, fair outcomes in all cases.

This reality is reinforced by the fact that one of the main threats to equal opportunity in referendum campaign funding — the asymmetrical regulation of Commonwealth and state spending — is likely irremediable by federal action. Any attempt by the Commonwealth to pass legislation imposing expenditure restrictions on the states would be at risk of invalidity for breaching constitutional rules as to intergovernmental immunities. There would be a strong argument that federal limits on state campaign spending would amount to an undue interference with the exercise by state governments of their constitutional powers and functions. This constitutional barrier casts a shadow over funding allocation, as it means that any reform attempts must begin by acknowledging that a main cause of the uneven campaign playing field is likely irrevocable.

Reform of funding allocation must therefore start by recognising that the inherent limitations of the two most credible models, and a probable constitutional barrier, make any search for a ‘perfect’ regulatory mechanism futile. The regulatory objective should instead be to develop the fairest possible mechanism in the circumstances.

B Promoting Fairness in Funding Allocation

Given these realities, five regulatory options present themselves. One is to do nothing and leave matters of funding allocation to governments on a case-by-case basis.

100 On the different options for advancing constitutional recognition, see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Final Report (2015) xiii–xvi.

101 Recognise receives federal funding, through Reconciliation Australia, to promote public awareness and support for constitutional recognition: <http://www.recognise.org.au/>.

This approach was endorsed by the federal government in its response to the House Standing Committee’s inquiry into referendum machinery and has the virtue of flexibility. It recognises that no funding approach is perfect and that the most appropriate allocation may depend on contextual factors. Its great weakness, however, is that it leaves funding decisions in the hands of the government that has proposed the constitutional amendment. It therefore provides enormous scope to the federal government to set funding rules that advance its self-interest, or at least allows for the appearance of the same. In order to ensure public faith in funding allocation, it is far preferable for some rules to be set down in advance.

Another option would be for the Parliament to specify, in legislation, that governments that elect to provide promotional funding must allocate it in line with one or other of the equal and proportionate funding models. A firm legislative commitment of this kind would bring clarity to the ‘rules of the game’ and in so doing enhance the integrity of future referendum processes. This would be an improvement over the status quo. Ideally, a detailed parliamentary debate about the respective merits of each model, including the different conceptions of fairness that underpin them, would precede any statutory endorsement. However, the downside of Parliament adopting one or other of these two models in their entirety is that the potential for undesirable outcomes, discussed above, would remain.

If implementing either the equal or proportionate funding models in full is problematic, it remains to be considered whether any regulatory measures exist that would help to promote fairness, while avoiding some of the weaknesses of the equal and proportionate funding models. Are there measures that would help us locate a middle ground between the two?

One such initiative would be to remove decisions about funding allocation from the hands of the government and transfer them to an independent body such as a Referendum Panel.103 The decision to provide promotional funding would remain with the government, but the size of funding shares would be determined by the Panel. The membership of such a body would ideally be the subject of bipartisan agreement and include a mix of people, such as experts in constitutional law, retired judges, senior electoral officials and perhaps members of the general public.104 The Panel could be tasked with determining funding shares according to a series of set criteria — these might include matters such as the likelihood of state oppositional spending, the balance of votes in Parliament and recent indications of public opinion. The advantage of this approach is that it combines independent judgment with flexibility. It would put funding decisions at arm’s length from government and so help to remove any impressions that funding shares were allocated to advance self-interest or manipulate referendum outcomes. Further, the process is unlikely to generate...

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103 The creation of a Referendum Panel was recommended by the 2009 inquiry into referendum machinery: see House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, 62, recommendation 7. On the possible composition and operation of a Referendum Panel, see Kildea and Williams, above n 34.

104 Kildea and Williams, above n 34.
the incongruous or unbalanced funding shares that are possible under the equal and proportionate funding models.

However, the Panel proposal has significant drawbacks. Determinations about funding allocation, even when guided by criteria, are matters on which reasonable minds can differ. They are also consequential in that they have the capacity to influence the dynamics of a referendum campaign. These two factors make it highly likely that any Panel determinations would become the subject of debate and controversy. Campaigners unhappy with the allocation of funds would dispute the determination, and raise questions about Panel members’ legitimacy and capacity to make such decisions. This would in turn shift public debate from the merits of a referendum proposal to issues of process and fairness. The transfer of funding decisions to a Referendum Panel is therefore unlikely to provide the long-term solution that this issue requires. On the contrary, it could ensure that arguments about funding arise at each and every referendum. Another downside is that Panel decisions would be subject to judicial review (given that members would be ‘officer[s] of the Commonwealth’ under s 75(v) of the Constitution), which would provide another avenue for conflict and controversy.

Another reform possibility would be to legislate to prescribe a funding floor. This would require that, should the government elect to provide promotional funding, a minimum proportion of it — say, 25 per cent — be allocated to each side. The balance would be distributed at the government’s discretion. This approach would have several advantages. It would prevent large disparities in funding shares of the kind that occurred in 2013, and that are possible under the proportionate model. Even if tempted to give most or all available funds to the Yes campaign, governments would be bound to provide one-quarter to opponents. Further, this basic level of funding would be sufficient for opponents to run a competitive campaign and thus furthers the goal of fair rivalry. A funding floor would also give the government the flexibility to give more money to the Yes campaign where it felt it was justified — for example, if state-run opposition campaigns were expected, or if the proposed amendment had overwhelming public support. The main downside of a funding floor is that it still leaves significant spending discretion to the federal government — it would be free to allocate 75 per cent of funding to the Yes campaign, even if public opinion were evenly divided. This could in turn prompt conflict and controversy. Looked at another way, however, the risk of a public backlash over funding would provide a political incentive to the government to carefully justify to the public how it intends to spend the balance.

A final reform option, along similar lines to a funding floor, would be to prescribe funding bands that correspond to the balance of votes cast in Parliament. Again, the initial decision to elect to provide promotional funding would rest with the government. Beyond that, legislation would require that such funding be allocated according to a set formula. It could stipulate, for example, that equal funding must be provided where the proportion of parliamentary votes cast in favour of the referendum Bill falls within the range of 50–69 per cent. In the event that parliamentary approval of the proposed constitutional amendment exceeded this range, other bands would apply: for instance, if between 70–89 per cent of MPs supported the
Bill, the Yes campaign could receive 60 per cent of available funds; if parliamentary support exceeded 90 per cent, proponents could receive 70 per cent of any promotional funding.

This is the best of the five reform options. It is a hybrid of the equal and proportionate models, in that it effectively sets equal funding as the norm, but permits departures from funding parity should the balance of votes in Parliament warrant it. This in-built flexibility allows it to avoid some of the main downsides of those two models — for instance, the prospect of a No campaign receiving an equal share of funds despite widespread community support for constitutional change is diminished, and the baseline of a 70:30 per cent allocation guards against extreme disproportion in funding allocation and ensures the No campaign will always have sufficient funds to run a competitive campaign. Of course, this reform proposal is not without its weaknesses. It makes funding shares contingent on parliamentary votes which, as we have seen, are an uncertain guide to community opinion on constitutional matters. And it does not overcome the potential problem of third parties engaging in unlimited spending. Nonetheless, of the five options outlined here, it has the most promise in terms of advancing fairness in referendum campaigns, and providing a durable solution to the problem of funding allocation.

A much larger reform project would be to revisit the wider regime of referendum finance regulation. If fairness is the overriding objective, then at some point other elements of referendum finance — beyond issues of federal expenditure — may need to be considered. Detailed discussion of what that wider reform debate might entail is beyond the scope of this article. However, it is likely that it would include consideration of both public and private funding, and specific measures such as spending caps and more stringent disclosure obligations. It might also address the manner in which public funding is allocated within the Yes and No camps, in recognition of the fact that campaign groups may share an orientation towards a referendum proposal but hold entirely different reasons for doing so. The United Kingdom’s referendum finance regime, discussed above, serves as a possible model should this wider debate occur, but any attempt to replicate its approach would need to take account of Australia’s federal structure and the constitutional barrier posed by intergovernmental immunities.

VI Conclusion

The events surrounding the planned referendum on local government recognition in 2013 placed a spotlight on weaknesses in Australia’s regulation of referendum finance. It marked the second consecutive occasion on which Parliament has suspended statutory limits on Commonwealth spending, following the precedent set in the lead-up to the 1999 republic referendum. In both cases, the suspension of those limits created uncertainty about the allocation of promotional funding between the Yes and No campaigns, and effectively left decisions about funding shares to the federal government that had initiated the referendum. The shortcomings of this ad hoc arrangement were on display in 2013, when the Gillard Government, in line with the balance of parliamentary votes on the referendum proposal, distributed
95 per cent of available funds to the Yes campaign. This funding decision was
criticised for undermining the fairness of the referendum process, and proved so
controversial that it ultimately damaged bipartisan support for the proposed consti-
tutional amendment. Looking ahead, it is apparent that disagreement about funding
allocation could affect the proposed referendum on Indigenous constitutional recog-
nition and, in the absence of agreed standards, damage the legitimacy of the process.

This article has argued for a more principled approach to the allocation of promo-
tional funding during referendum campaigns. Parliament should lift the current
restrictions on federal expenditure and set down in legislation an agreed approach
to funding allocation. The two most credible models for guiding funding decisions
are equal funding and proportionate funding. Each, in their own way, can claim to
advance fairness in referendum campaigns by fostering equal opportunity, delibera-
tion and administrative neutrality. For the equal funding model, its claims rest on the
 provision of identical funding shares to supporters and opponents of constitutional
change; proportionate funding, meanwhile, purports to link funding to community
opinion and to offset existing inequalities in the campaign environment.

A legislative regime that implemented either of the equal or proportionate funding
models would be an improvement on the status quo in that it would provide more
certainty about funding rules. However, both models are capable of generating
funding outcomes that seem incongruous, unbalanced or otherwise ‘unfair’ in the
circumstances. For this reason, the best regulatory approach would be to provide a
middle ground by prescribing, in legislation, funding bands that correspond to the
balance of votes cast in Parliament. This mechanism may not produce fair outcomes
in all cases, and does not address the threat to equal opportunity posed by the
ability of state governments to spend unlimited amounts on referendum campaigns.
However, it would go a long way to achieving fairness in referendum campaigns and
is the best of the available options. It recognises the virtues of equal funding, while
permitting departures from it where the weight of parliamentary votes warrants it.
It allows flexibility at the same time as it provides a minimum baseline for funding
and removes government discretion on the size of funding shares. Just as impor-
tantly, it promises to provide certainty and stability in the funding arrangements for
referendum campaigns.
ABORTION IN THE SHADOW OF THE CRIMINAL LAW? 
THE CASE OF SOUTH AUSTRALIA

Abstract

In 1969, the South Australian Parliament passed amendments to the criminal law designed to liberalise abortion and clearly state the circumstances in which abortion services might lawfully be provided by medical practitioners. Nevertheless, abortion offences, and the circumstances under which abortion may lawfully be provided, are stated in the Criminal Law Consolidation Act 1935 (SA), and this fact has given rise to continued concern about the legality of abortion in South Australia. This article considers whether there is any basis for these concerns, with particular focus on the provision of medication abortion, which was not contemplated by Parliament in 1969. In doing so, it draws on the language of the provisions and the extensive parliamentary debates that preceded their passage into law, arguing that Parliament’s primary goal was to preserve women’s health through clarifying the contexts in which lawful abortion would be available. We contend that any suggestion that medical abortion is criminal in South Australia, or that medical practitioners who comply with the statutory scheme in good faith run the risk of being prosecuted, is not grounded in an accurate account of the positive law. Nor is it supported by the application of the law in practice since 1969.

Introduction

In 1969, the South Australian Parliament liberalised abortion and clearly stated the circumstances in which medical practitioners could lawfully provide abortion services. Nevertheless, abortion offences, and the requirements for the provision of lawful abortion, continue to be set out in the Criminal Law Consolidation Act 1935 (SA).

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Australian research has demonstrated that the continued status of abortion as a potential criminal offence in some jurisdictions affects the willingness of medical practitioners to provide abortion services and the manner in which abortion services are provided. Researchers have shown that abortion services in New South Wales and Queensland, in particular, adopt restrictive practices to manage the perceived risk of prosecution even though these practices are not explicitly required by the law. These procedures may take place even where medical practitioners indicate this is ‘usually unnecessary, time consuming, emotionally distressing for the woman concerned and often detrimental to her physical and/or mental health’.

This article considers whether there is any basis for concern about the legality of medical abortion (the term used in the legislation for abortion provided by a medical practitioner) in South Australia. Arguments that abortion may not be lawful are made both by supporters and opponents of the provision of abortion services. Such arguments sometimes make reference to a case which (unsuccessfully) asserted the illegality of medical practitioner-provided abortion in South Australia.

We begin by investigating the history and context in which South Australia’s abortion laws were amended. We argue that like the English Parliament, which reformed abortion laws only slightly earlier, the South Australian Parliament passed these laws with the intention of liberalising access to safe abortion services in order to protect women’s health. As we show below, prior to liberalisation, some women were able to access safe and effective services, but others were subjected to unsafe services.

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2 de Costa, Douglas and Black, above n 1, 188.


Some died as a result. In order to protect women’s health in this context, Parliament sought to resolve doubt about the circumstances under which lawful abortion was available in South Australia. It created legislative provisions containing clearly stated circumstances in which abortion could lawfully be provided, in which decisions about the provision of abortion services were placed in the hands of medical practitioners rather than women seeking abortion. The well-demonstrated safety of medical abortion since 1970 indicates the success of the 1969 Parliament’s efforts to safeguard women’s health.

The positive law has thus been stated in relatively clear terms since 1969. The 1969 reforms successfully ended uncertainty about when abortion was lawful, allowing safe, lawful abortion to be offered through the public health system. Non-medical abortion provision came to an end, and prosecutions of abortion providers ceased. In the 45 years that have passed since liberalisation, we have identified only one prosecution of a medical practitioner for abortion offences in South Australia. He was acquitted of one charge at trial and had his conviction on the other quashed on appeal after allegations that he had failed to comply with the statutory scheme could not be proved beyond reasonable doubt.

It is a truism of the legal realist tradition that the law is not merely to be found tucked within the (admittedly now digital) pages of the statutes and judgments which are commonly supposed to be its primary sources. Oliver Wendell Holmes famously stated this principle in 1897: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.’ Given the lack of prosecutions in the post-liberalisation period, it might seem that a confident prophecy could be made about the criminal liability of South Australian medical practitioners in relation to the provision of abortion services: compliance with the statutory scheme established in 1969 means that abortion is lawful, and medical practitioners can provide abortion services without concern that they might be prosecuted. Yet, the presence of abortion in the criminal law continues to be deployed as evidence that abortion is both illegal and fraught with risk (including risk to medical practitioners). This perception clearly does affect medical practitioners, as other researchers have demonstrated. No doubt these concerns are driven, in part, by the repeated portrayal of these jurisdictions as places where abortion provision depends on non-prosecution and where the law is ‘vulnerable, unclear and untested’; portrayals that Kate Gleeson has persuasively argued are unsubstantiated and incorrect. We contend that surgical abortion in a medically supervised setting is clearly lawful in South Australia provided it complies with the statutory scheme. The assertion that ‘abortion

5 R v Anderson (1973) 5 SASR 256.
7 See the detailed account provided by Kate Gleeson, ‘The Other Abortion Myth — The Failure of the Common Law’ (2009) 6 Bioethical Inquiry 69.
8 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1, 109.
9 Gleeson, above n 7, 70.
is and has always been illegal’ is, as Gleeson has argued, one of the ‘tenacious myths about abortion law and politics in Australia’.10

However, one potential area of doubt arises in relation to the provision of medical abortion by medication rather than by surgical procedure, which was not contemplated by Parliament in 1969. The laws dealing with the induction of abortion through drugs in South Australia are still closely modelled on the provisions of the Offences Against the Person Act 1861 (UK).11 At the time it was drafted, safe, effective abortion by medication was not available, and Parliament chose to prohibit attempts to procure abortion using ‘any poison or other noxious thing’,12 language which the reforms of 1969 left untouched.

We argue that under a literal construction of the statute, the drugs currently in use are neither poisons nor noxious. However, currently, the provisions created to ensure safe surgical abortion in 1969 are being applied to abortion by the use of drugs in South Australia. We contend that this situation is unsatisfactory for a number of reasons, including the likelihood that this approach no longer performs the function intended for it in 1969: protecting women’s health. We argue that any Parliament concerned about the ambiguity of the law or by its impacts on women’s health (as the Parliament of 1969 clearly was) might consider taking the democratic and thorough approach which led to the laws we now have.

We begin this paper by considering the context in which the South Australian Parliament came to consider abortion and pass liberalising legislation in 1969. This investigation forms the basis for our contentions about the mischief Parliament sought to address by amending the law in 1969, and the interpretation of the statutory provisions that continue to state the circumstances under which abortion is lawful in South Australia. In doing so, they form the foundation of our argument that abortion is lawful in South Australia.

II THE IMPACT OF UNCERTAINTY: THE CHILLING EFFECT OF THE COMMON LAW PRIOR TO 1969

Prior to the passage of the 1969 amendments, abortion was an offence in South Australia unless performed in circumstances which would render it ‘lawful’. However, these circumstances were not stated in the Criminal Law Consolidation Act 1935 (SA). Rather, they were to be sought in the common law, which offered very little in the way of dependable precedent. A decision of a single judge of the English Central Criminal Court offered the best guidance then available.13 Dr Bourne had

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10 Ibid.
12 Criminal Law Consolidation Act 1935 (SA) ss 81(2), 82.
13 R v Bourne [1939] 1 KB 687 (‘Bourne’).
been acquitted after having put himself forward as a defendant for a test case. He had performed an abortion on a 14-year-old girl who had been gang raped. At least one other medical practitioner had refused to provide an abortion in spite of the girl’s profound distress.

In determining the case, Macnaghten J found that abortion was not ‘unlawful’ if it was performed to preserve a woman’s life. If a medical practitioner held the honest belief, ‘on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck’, the medical practitioner could be seen as having acted for the purpose of preserving the mother’s life. This case established the principle that a serious threat to the pregnant woman’s physical or mental health was sufficient to ground lawful abortion. In doing so, it liberalised access to abortion which some had believed might only be lawful if the woman’s life was in imminent physical danger.

While it was seen as likely that the decision in Bourne would be accepted as persuasive in South Australia, given that the relevant provisions were closely based on the English statute, this was not certain. As early as 1938, a local doctor proposed a South Australian test case to allow clarification of the law (as Bourne had done for England). This approach was not supported by the local medical association and failed to go forward.

Uncertainty about the legal status of abortion had a profound impact on its availability prior to 1969. In practice, abortion might have been available where two doctors agreed in writing that abortion was necessary to save the woman’s life, or that she was psychologically incapable of continuing the pregnancy or (from the 1960s onwards) that there was a case of severe deformity of the foetus due to rubella or Huntington’s chorea. Jill Blewitt summarises: ‘In this situation, with few doctors caring to find out what was “lawful”, the incidence of notified abortions was low.’ Psychological grounds were usually only viewed as sufficient if the woman was ‘in dire distress’, ‘at the point of overt psychiatric illness or actually psychiatrically sick’ according to a doctor who practised during this period and was interviewed for Baird’s oral history of abortion.

15 Bourne [1939] 1 KB 687, 694.
As a result, the vast majority of abortions that took place in South Australia prior to reform were performed in the belief (incorrect though it may have been) that they were illegal, even when they were performed by doctors.20 Despite doctors having come to predominate among abortion providers in most parts of Australia prior to liberalisation, Baird has argued it is likely that non-medical practitioners provided a higher proportion of abortion services in South Australia before 1969 because there were so few doctors performing abortions in this State.21 Abortion was primarily provided by non-doctor practitioners with a wide variety of skill levels22 or through self-abortion, practices which Bourne would not have sanctioned.23

Historians have constructed a complex picture of abortion provision in the pre-liberalisation period using a variety of sources ranging from court data and newspaper reportage to oral history. Their research certainly documents ‘the existence of mercenary and unskilled abortionists who created severe health problems for women’.24 Yet, as Barbara Baird and Judith Allen have persuasively argued, despite the widely held idea that ‘backyard’ or non-doctor abortionists were the primary cause of such suffering, the reality was quite different. While safe and compassionate care was provided by some non-doctor abortionists (including medically trained providers such as nurses and midwives), some doctors notoriously provided unsafe and unethical abortion services, some of which resulted in deaths.25

Even in the 1960s, sex education was rare and contraception was unreliable and difficult to obtain. High demand for abortion and the legal uncertainty surrounding the status of abortion services created an environment in which corruption and selective prosecution could thrive. Well-known doctor and abortion reform campaigner Bertram Wainer began actively campaigning for legal change and the eradication of non-medical providers in the eastern states in 1968.26 Wainer’s campaign brought

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20 Ibid 63. Baird explains that while the 1969 reforms made their way through Parliament, a general practitioner who had done many abortions during the 1960s was arrested and charged along with a patient. The trial was scheduled to take place in early 1970 but the Crown chose not to proceed when the reforms came into effect.


25 Baird, ‘The Incompetent, Barbarous Old Lady Round the Corner’, above n 21, 17; Allen, above n 24, 99–100; Haigh, above n 23, 17–18, 58–60, 97. See also Gleeson, above n 7, 71; Finch and Stratton, above n 18, 62.

26 Allen, above n 24, 204.
greater public notoriety to claims that some abortion services were being provided by unqualified practitioners as well as by doctors charging high fees for providing poor quality care in an environment of police corruption.

The widespread refusal of doctors to provide abortion even in circumstances of extreme mental distress or risk to the life or health of the pregnant woman left these women with no access to legal abortion. By the 1960s, rises in the price of medical abortion had created a new market for non-medical abortion even in states where it was more readily available.27 As Gideon Haigh puts it: ‘Abortion suited the avaricious’.28 This state of affairs was clearly known to some members of the South Australian Parliament, who made apparent references to rumours of corruption and profiteering in abortion services in Victoria during parliamentary debate. For example, members who expressed opposition to decisions about abortion being made by medical practitioners often based their opposition on the potential for medical practitioners to be profiteers: ‘We have no proof that every doctor is a “goodie”, that he would not capitalize on some of this legislation to make a fairly good business out of it.’29

This was the context in which the South Australian Parliament began to consider the law in relation to abortion in 1968, first through a select committee process and then through extensive debate on the Bill itself. There had been no decisive ruling on when an abortion might be lawful in any common law Australian state. There was a minority of opinion in Parliament that Bourne30 stated the law with sufficient clarity. The Honourable Colin Davies Rowe, for example, argued that Bourne was sufficient ‘because it makes it clear that the medical man who acts in good faith has proper protection’.31 However, uncertainty about the way a South Australian court would view Bourne predominated: ‘As regards Bourne’s case, we can only guess what the courts in this State would determine. I think everyone is hoping that no case will be brought before the court so that it can be tested.’32

Parliamentary debate over the Bill makes it clear that Parliament sought to clarify the law through the democratic process rather than leaving it in the hands of the courts.33

[T]he proper way to proceed is to bring before the State Parliament a proposal to establish what the law on abortion should be, rather than to take some doctor,

27 Ibid 247.
28 Haigh, above n 23, 54.
30 [1939] 1 KB 687.
31 South Australia, Parliamentary Debates, Legislative Council, 19 November 1969, 3104 (Colin Rowe).
32 South Australia, Parliamentary Debates, House of Assembly, 28 October 1969, 2517 (John Ryan) — seeking clarity for the medical profession.
33 Parker, above n 16, 73.
who, according to his own lights, is acting with complete legitimacy, before the courts, and get the courts to determine the law.\(^{34}\)

We argue that the thoroughness with which the 1969 amendments were debated provides considerable guidance about Parliament’s intention in passing the amending legislation. As we have already argued, part of the task Parliament set for itself was the resolution of doubt about the circumstances in which abortion was lawfully available: clarity which the common law did not then provide. As a result, it is possible to offer both a confident account of the statutory law and a strong sense of parliamentary intention which might guide the interpretation of any provision that has become ambiguous as social and medical circumstances have changed in the subsequent 45 years.

**III PARLIAMENT SETS OUT TO OFFER LEGAL CERTAINTY**

[W]e should not be calamity howlers about what might happen under the provisions of this Bill — Geoffery Virgo.\(^{35}\)

We argue that when the South Australian Parliament passed the 1969 amendments, its intention was to address the risk to women’s health posed by ‘the potentially dangerous practice of illegal abortion’.\(^{36}\) Very few abortions were provided by doctors in South Australia prior to liberalisation, meaning that women had virtually no access to abortion services which would have been lawful under *Bourne*.\(^{37}\) The abortion services that were available were unregulated and sometimes unsafe or even lethal. Parliament was determined to address this risk to women’s health by stating the law in clear terms, which had been thoroughly and publicly debated,\(^{38}\) rather than leaving the legal regulation of abortion in the hands of the courts. As we will explain below, it did so by placing central decisions about the provision of abortion in the hands of medical practitioners.

\(^{34}\) South Australia, *Parliamentary Debates*, House of Assembly, 23 October 1969, 2469 (Hugh Hudson) — rejecting the idea that the law should be rendered certain by the prosecution of a doctor, but supporting legal access to abortion, which he ‘abhors’ but thinks is sometimes necessary. Reliance on a policy of non-prosecution was also rejected by Mr William Field Nankivell of the Australian Labor Party (‘ALP’), district of Mallee: South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2511.


\(^{36}\) Parker, above n 16, 75.

\(^{37}\) [1939] 1 KB 687.

\(^{38}\) The law of abortion was referred to a select committee in December 1968 prior to being debated in Parliament. An ‘unprecedented number of petitions’ and several opinion polls were placed before Parliament during the select committee hearings and debate over the Bill. They were summarised by Attorney-General Robin Rhodes Millhouse (Liberal, Mitcham): South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2318.
The plain language of any statute is central to its interpretation, and the abortion provisions are no different. In South Australia, however, parliamentary debates may also be consulted in order to discover the mischief Parliament sought to address by passing legislation — the purpose of the statute — and thus to establish the context for the application of contemporary principles of statutory interpretation. There are some specific features of the passage of these particular amendments that offer more guidance than usual in determining the mischief Parliament sought to address, despite the absence of a clause setting out the objectives of the Act.

The Bill was introduced by the then Liberal Attorney-General, Robin Millhouse during the premiership of Steele Hall (Liberal and Country League). The Bill was subject to a conscience vote, and public interest in the proposed legislation was high. A large number of members declared that they would follow the tradition of the time by not allowing their vote on a piece of ‘social legislation’ to be cast in silence. Many members delivered speeches articulating their voting intentions as well as the reasons for their positions on the Bill.

As a result of the conscience vote, votes were not cast along party lines. The then ALP leader of the opposition (Don Dunstan) articulated his preference for abortion on demand: ‘my own position is that a woman should have a right to determine whether she proceeds with a pregnancy or not and, if required to vote on this, I would vote in favour of abortion on demand.’ However, the deputy leader of the opposition — the Honourable James Corcoran (ALP, Coles) — not only opposed the Bill on the basis that it provided for the destruction of life but articulated an anti-abortion perspective in relation to virtually every clause throughout a debate in which most members stood to make only a single speech. This level of division led to a thorough testing of the Bill.

The debate was complex. Some members who had grown up in working-class environments observing the frightened and desperate clientele of the neighbourhood abortionist believed the Bill did not go far enough. A few advocated for access to sex education and contraceptives and spoke of desperate constituents seeking

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41 Robin Rhodes Millhouse (Liberal, Mitcham) subsequently resigned from the Liberal Party in 1973 and later became the first Australian Democrats Member of Parliament elected in South Australia.

42 South Australia, Parliamentary Debates, House of Assembly, 21 October 1969, 2325–6 (Donald Dunstan).

43 Ibid 2330 (James Corcoran).

44 Ibid 2337–8 (Cyril Hutchens).

45 South Australia, Parliamentary Debates, House of Assembly, 22 October 1969, 2422 (Molly Byrne).
access to abortion services.\textsuperscript{46} Other members articulated their opposition to abortion on demand but supported the Bill as offering a medically supervised gateway to access abortion in some circumstances.\textsuperscript{47} Still others rejected the Bill on moral and/or religious grounds, likened abortion to the Nazi death camps,\textsuperscript{48} railed against the permissive society,\textsuperscript{49} and opposed abortion even in cases of rape and serious foetal abnormality.\textsuperscript{50}

Debate included statements from some of the first women elected to the South Australian Parliament. The Honourable Joyce Steele (Liberal), one of the first two women elected to the South Australian Parliament in 1950, said she regarded the foetus as a potential life. Nevertheless, she went on to say: ‘I believe that this matter should be left to a woman’s conscience to decide whether she has the right to have an abortion performed.’\textsuperscript{51} Mrs Molly Byrne (ALP) also supported reform: ‘I do not think our laws should force women into this position [backyard abortion], as is the case at present.’\textsuperscript{52}

Notwithstanding the complexity of the debate and the variety of views expressed, opposition to the Bill proceeded through a series of proposed amendments which were voted on by the House of Assembly one by one. Many amendments were also proposed in the Legislative Council. As a result, almost every clause was tested and concrete alternative positions were rejected in Parliament despite the Bill having come through a select committee process prior to being debated in Parliament. The degree of confidence it is possible to have about the statutory language ultimately chosen and that which was rejected is therefore unusually high in comparison to a good deal of contemporary legislation.

It is clear that this legislation was understood as liberalising and not merely codifying access to abortion at the time it was passed. Parliamentary debate proceeded on the basis that when the \textit{Criminal Law Consolidation Act (SA) 1935} referred (then, as now) to ‘unlawful’ abortion, there was a clear implication that abortion must be lawful in some circumstances. Prior to reform, these circumstances were established by the common law, presumptively based on the persuasive case of \textit{Bourne}, as explained

\textsuperscript{46} Ibid (Molly Byrne).
\textsuperscript{47} South Australia, \textit{Parliamentary Debates}, House of Assembly, 21 October 1969, 2337 (Raymond Hall).
\textsuperscript{49} Ibid 2419 (William McAnaney).
\textsuperscript{50} Ibid 2416 (Thomas Casey).
\textsuperscript{51} South Australia, \textit{Parliamentary Debates}, House of Assembly, 21 October 1969, 2340 (Joyce Steele).
\textsuperscript{52} South Australia, \textit{Parliamentary Debates}, House of Assembly, 22 October 1969, 2422 (Molly Byrne).
above. Millhouse introduced the Bill as substantially enacting the common law position, yet, rather than requiring a serious risk to the physical or mental health of the woman, as Bourne had, the Bill established the grounds for lawful termination of pregnancy more widely. Rather than asking whether there was a probability of serious risk to the woman’s physical or mental health as Bourne did, it compared the risk presented by the continuation of the pregnancy with the risks presented by termination. When it finally emerged as law, s 82A(1)(a)(i) required that two medical practitioners examine the woman and form an opinion in good faith ‘that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated’.

Proposals for a wider test failed. Abortion on demand, without the agreement of a doctor, was canvassed as an option which some members preferred to the provisions of the Bill. Abortion on request was proposed through an amendment which would have rendered abortion a decision to be made by a woman and her doctor. It was defeated by a substantial majority. Medical practitioners were seen as enabling health and safety to be made paramount. However, they were also seen as an appropriate gateway to abortion which would prevent abortion on demand.

I do not accept the statement that this Bill will provide abortion on demand, because it requires that medical practitioners should act in good faith. I have sufficient confidence in the medical profession to believe that doctors will act in good faith, and we should not be calamity howlers about what might happen under the provisions of this Bill.

As Clare Parker’s historical research makes clear, the process of abortion law reform in South Australia did not begin because of a campaign for women’s reproductive freedom. Rather, it rose on the twin pillars of liberal regard for the principle that law and morality should be distinct domains, and safe abortion as a public health issue.

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55 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i).
59 South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2516 (Geoffrey Virgo) (emphasis added) — rejecting the social clause but otherwise supporting the Bill.
60 Parker, above n 16, 60.
The politicians who supported the bill did not seek the empowerment of women. Rather, it was seen as an exercise in sound law-making that separated morality from the secular law, granting freedom of conscience to the individual rather than imposing a state-sanctioned morality on everyone, as well as a measure designed to save the life and improve the reproductive health of women by placing control of the procedure in doctors’ hands.\textsuperscript{61}

Abortion on demand was not the only test discussed by Parliament in 1968 which would have resulted in more liberal abortion laws in South Australia. The original Bill included a proposal for a ‘social clause’ which was the most controversial aspect of the Bill, and a significant departure from the common law as stated in Bourne. It would have enabled consideration of the impact of continuing the pregnancy on the existing children of the family as a factor in determining whether an abortion should be permitted. This provision was eventually removed by an amendment proposed by Millhouse himself.\textsuperscript{62}

Another proposal for a wider test involved the requirement for a period of residence in South Australia prior to termination,\textsuperscript{63} which was designed to prevent South Australia from becoming the abortion capital of the country at a time when the passage of these reforms would have made lawful abortion more readily available in South Australia than in any other state or territory. During debate, the duration of residence required was reduced to two months, and then passed in the face of passionate advocacy from Joyce Steele, in particular, that the clause placed women’s health in danger and should be removed.\textsuperscript{64} A further proposal to remove this clause failed in the Legislative Council.\textsuperscript{65}

However, amendments designed to narrow the scope of lawful abortion proposed in the Bill also failed. Many would have restricted the scope of lawful abortion contemplated by Bourne at common law.

One clear example was a proposal to have access to lawful abortion based only upon danger to maternal physical health by removing all reference to mental health from the Bill. This proposal was rejected by the House of Assembly.\textsuperscript{66} Numerous amendments to the s 82A(1) test, which provides for lawful abortion where ‘the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated’\textsuperscript{67} designed to narrow the test were proposed. Amendments which

\textsuperscript{61} Ibid 77–8.
\textsuperscript{63} \textit{Criminal Law Consolidation Act 1935 (SA)} s 82A(2).
\textsuperscript{64} South Australia, \textit{Parliamentary Debates}, House of Assembly, 4 December 1969, 3680 (Joyce Steele).
\textsuperscript{65} South Australia, \textit{Parliamentary Debates}, Legislative Council, 3 December 1969, 3513.
\textsuperscript{66} South Australia, \textit{Parliamentary Debates}, House of Assembly, 4 December 1969, 3676.
\textsuperscript{67} \textit{Criminal Law Consolidation Act 1935 (SA)} s 82A(1)(a)(i).
would have deleted ‘greater risk’ and substituted ‘serious danger’,68 ‘grave danger’ or ‘substantially greater risk’ all failed.69 Some of these amendments were proposed on the basis that by 1969 it was clear that an abortion in the first trimester carried less risk to maternal health than carrying a pregnancy to full term.70 The Legislative Council was told that abortion in early pregnancy represented an ‘almost negligible’ risk to the health of the woman,71 and this remains the case today.

A further unsuccessful proposal to restrict the test proposed in the Bill involved the ‘emergency clause’. The clause ultimately became part of the Criminal Law Consolidation Act 1935 (SA) and now states that abortion is lawful

if the pregnancy of a woman is terminated by a legally qualified medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman.72

During debate, the ‘emergency clause’ was subject to a proposal that it be deleted, but this motion was lost in the House of Assembly and the emergency clause was therefore retained.73

Several other amendments were also viewed as too restrictive and therefore failed to pass. Proposals for the two medical practitioners involved in making the decision about the availability of an abortion to be psychiatrists and/or obstetricians were rejected by a substantial majority. Members of Parliament expressed concern about the limitations this would impose on access and quality of care, especially for poor and rural women. Concerns that restricted access would lead to a continuation of illegal abortion were expressed and resulted in defeat of the proposed amendment.74 In the Northern Territory, it continues to be the case today that an obstetrician or gynaecologist must be one of the two medical practitioners who agree an abortion is warranted.75 Concerns similar to those expressed in South Australian Parliament in 1969 continue to be expressed in the Northern Territory today.76

68 South Australia, Parliamentary Debates, House of Assembly, 29 October 1969, 2596.
69 South Australia, Parliamentary Debates, Legislative Council, 3 December 1969, 3506, 3511.
70 South Australia, Parliamentary Debates, House of Assembly, 29 October 1969, 2596 (James Corcoran).
72 Criminal Law Consolidation Act 1935 (SA) s 82A(1)(b).
73 South Australia, Parliamentary Debates, House of Assembly, 4 December 1969, 3676.
74 South Australia, Parliamentary Debates, House of Assembly, 28 October 1969, 2534.
75 Criminal Code Act 1983 (NT) sch 1 ss 208B–208C. See also Medical Services Act 1982 (NT) s 11.
76 de Costa et al, above n 1, 109.
The ‘Eugenic clause’, as it was called at the time, now s 82A(1)(a)(ii), was retained despite a proposal to strike it out. The section states that abortion is not an offence where two medical practitioners form the opinion in good faith ‘that there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped’. Discussion in the House of Assembly focused on thalidomide and rubella. A further proposal to strike out this clause failed in the Legislative Council.

The medicalisation of abortion was central to the 1969 amendments. Parliamentary debate — and the legislation that emerged from it — evince a clear preference for decisions about abortion to be made by medical professionals and not by women seeking an abortion. Parliamentary debate contains repeated references to the professionalism, ethics and good faith of the medical profession. ‘We entrust members of the medical profession with great responsibilities … when they hold life in their hands in many cases’.

The medicalisation of abortion has been the subject of critique. The South Australian legislation was modelled closely on the Abortion Act 1967 (UK), which has itself since been amended. Sally Sheldon argues that the UK Act, which cast abortion ‘as essentially a matter for the expert knowledge and control of doctors and medical science has had very positive effects in paving the way for women’s access to the provision of safe, legal terminations.’ It appears clear that medicalisation has been similarly successful in enabling access to affordable and safe abortion services in South Australia through placing decision-making power in the hands of medical practitioners rather than of women seeking an abortion. In South Australia, in contrast to many other Australian jurisdictions, abortion is primarily provided as a public health service rather than being primarily provided through the private sector as it is in jurisdictions such as New South Wales and Queensland, where the law is less clear.

Yet, as Sally Sheldon (among other critics) has pointed out, medicalisation carries risks. Legal safety and medical safety do not necessarily correlate with affordability

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77 South Australia, Parliamentary Debates, House of Assembly, 29 October 1969, 2601.
78 Criminal Law Consolidation Act 1935 (SA) s 82A(1)(a)(ii); Parker, above n 16, 74.
79 South Australia, Parliamentary Debates, Legislative Council, 3 December 1969, 3511.
80 South Australia, Parliamentary Debates, House of Assembly, 21 October 1969, 2337 (Raymond Hall). See also South Australia, Parliamentary Debates, House of Assembly, 22 October 1969, 2410 (Glen Pearson).
82 de Costa et al, above n 1, 109.
or accessibility, and the interests of women seeking abortion and of the medical professionals who might provide these services, will not always be consonant. Further, as Barbara Baird has argued, legislation that places access to abortion in the hands of medical practitioners and hospitals means that ‘the legislatively enforced limits on the ways that abortions can be performed … leave the way open for hospitals to impose limits on service provision’. Caroline de Costa and her co-authors have demonstrated that this is occurring in Queensland and New South Wales.

As South Australian law requires surgical abortion to be provided in a hospital in order for it to be lawful, and contains extensive mandatory reporting requirements, the possibility of hospitals limiting abortion service provision is clearly also a risk in South Australia. As de Costa and her co-authors have argued, this risk arises because the law permits only hospitals and medical practitioners to provide lawful abortion services. This places hospitals and medical practitioners in a unique position to restrict the provision of abortion services in ways which the statutory regime itself does not demand. If it should be the case that hospitals or medical practitioners are imposing restrictions on the provision of abortion services, we would argue that it is important to inquire into whether these restrictions are required by law, or imposed as a matter of practice. This distinction is a significant one in many areas where the law comes into contention. We now turn to one area of South Australian law affecting a significant number of procedures where we would argue that restrictions imposed on contemporary practice exceed what the law requires.

IV Medication Abortion

While the law relating to abortion has remained unchanged since 1969, the way that abortion is managed by medical practitioners is changing in ways that were not contemplated in 1969. The combination of the drugs mifepristone (also known as RU486) and misoprostol, (which we are referring to as ‘medication abortion’) has radically changed abortion provision. However, the laws we now have were never designed to address such drugs. Instead, they date back to a period when women could buy or acquire ‘potions, purgatives, enemas, emetics and uterine douches prepared at home from the likes of oil of savine, oil of tansy, ergot of rye, pennyroyal, aloes and myrrh, or ready-mixed by amateur apothecaries’. Some caused abortion and poisoned the woman herself, while others were neither poisonous nor effective, though no doubt they were profitable. The South Australian provisions dealing with

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84 For recent Australian examples, see Sifris, above n 3, 110–11.
86 Ibid 15.
87 Ibid.
88 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1.
89 Haigh, above n 23, 13.
90 This appears to have been the case in relation to the pills involved in R v Lindner [1938] SASR 412, discussed below. Finch and Stratton, above n 18, 56 discuss the effectiveness and availability of chemical abortion in Australia prior to 1939, suggesting it was...
abortifacients are based on the *Offences Against the Person Act 1861* (UK). They were not altered in 1969 when surgical abortion was the only safe method used by the medical profession and no safe, effective medication option was available.

This has given rise to understandable concern about whether the prescription and administration of mifepristone (which renders the pregnancy unviable) and misoprostol (which causes the expulsion of the contents of the uterus) must comply with the s 82A requirements in order to be lawful. In South Australia, the s 82 requirements for performing lawful surgical abortion are currently being routinely applied to medication abortion. Notification through the prescribed form in the *Criminal Law Consolidation Act 1935* (SA) and regulations is completed; two medical practitioners must agree on the request for abortion meeting the statutory test, there is an expectation that the drugs will be prescribed and taken in a hospital setting, and so on.

Caroline de Costa and her co-authors demonstrate that a great deal of circumspection that is not required by the legislation that sets out the relevant law is being exercised in relation to abortion services in Queensland and New South Wales. It seems logical to us to inquire whether the same is true of South Australia. In South Australia, the criminal law regulates abortion procured through the use of a ‘poison or other noxious thing’.

81 — Attempts to procure abortion

(2) Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of an offence and liable to be imprisoned for life.

The language of the provision dealing with supply is very similar:

82 — Procuring drugs etc to cause abortion

Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.

well known within working class women’s networks but that its failure often led to the use of mechanical methods.

91 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1.
92 *Criminal Law Consolidation Act 1935* (SA) s 81(2).
93 Ibid s 82.
In order to make the issue clear, we compare the law of the Northern Territory with the South Australian law. The *Criminal Code Act 1983 (NT)* regulates the use of any ‘drug’ for the termination of pregnancy. ‘Drug’ is defined to include ‘a poison’. The law thus has a wider reach than ‘poison or other noxious thing’, the language of the South Australian law, with the result that mifepristone unquestionably falls within the *Criminal Code Act 1983 (NT)* provisions.94

In South Australia, there are two ways to reach the conclusion that mifepristone is regulated by s 82A. The first implies an acceptance that mifepristone is a ‘poison or other noxious thing’.95 The second relies on the language of s 82A(9), which provides that: ‘For the purposes of sections 81 and 82, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by this section.’96

A *Is Mifepristone a ‘Poison or Other Noxious Thing’?*

Section 21 of the *Acts Interpretation Act 1915 (SA)* makes it clear that legislation is deemed to be ‘always speaking’ and therefore applicable to ‘[new] circumstances as they arise’. *National Mutual Life Association of Australasia Ltd v Commissioner of State Taxation*97 indicates that this provision requires the natural meaning of the words of the statute to be informed by their meaning at the time they were enacted, but not limited to it. Rather, a contextual approach will be taken.

At one time the approach of the courts was that Acts were to be construed … in accordance with their natural meaning at the time of enactment. This approach has largely been abandoned, particularly in jurisdictions such as South Australia which have an express ‘always speaking’ requirement.98

Further, s 22(1) of the *Acts Interpretation Act 1915 (SA)* establishes that

where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.

The term ‘poison or other noxious thing’ is not defined in the Act. The question therefore arises whether mifepristone can be regarded as ‘a poison or other noxious thing’ within the natural meaning of these words. We contend that it is neither poisonous nor noxious.

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94 *Criminal Code Act 1983 (NT)* sch 1 ss 208A–208B.
95 *Criminal Law Consolidation Act 1935 (SA)* ss 81(2), 82. Section 81(2) deals with attempts to procure abortion and s 82 deals with procuring drugs etc to cause abortion.
96 *Ibid* s 82A(9).
97 (2011) 110 SASR 536.
98 *Ibid* 566 [111].
The only precedent on the interpretation of this phrase is *R v Lindner*.\(^99\) Lindner was charged under s 82 with supplying pills to a woman referred to in the judgment as ‘Jacka’. As the other elements of the offence were not seriously disputed, this case turned on whether the pills were a ‘poison or other noxious thing’, which the appeal court found was a matter of fact for the determination of the jury.\(^100\) The jury at trial had been asked whether the pills were ‘noxious, that is capable of doing harm to a pregnant woman’.\(^101\) The jury had found that they were not, and the language of the instruction was not impugned on appeal. On this basis, the guilty verdict reached at trial was set aside on appeal as insupportable in law. The Court stated that ‘the means, adopted or intended [to induce miscarriage], must be such as to involve some appreciable risk of harm’.\(^102\) The fact that the legislation is applicable whether or not the woman is actually pregnant strongly suggests the conclusion that the risk of harm must be to the woman herself and not to the foetus.\(^103\)

The Court in *R v Lindner* expressly discarded case law from New South Wales on the basis that the legislation there used the expression ‘drug or noxious thing’.\(^104\) In the New South Wales cases, it was clearly enough for the prosecution to show that the accused had supplied a ‘drug’, but these cases were found to be inapplicable in South Australia.

The Crown prosecutor apparently drew language from both s 81(2):

\[
\text{Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of an offence …} \text{\cite{95}}
\]

And from s 82:

\[
\text{Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.} \text{\cite{96}}
\]

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100 Ibid 416.
101 Ibid 413.
103 *Criminal Law Consolidation Act 1935* (SA) s 81(2), for example, states: ‘Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child’ (emphasis added).
105 *Criminal Law Consolidation Act 1935* (SA) s 81(2) (emphasis added).
106 Ibid s 82 (emphasis added).
The prosecutor stated: ‘The words “any other means” [in s 81(2)] are intended to prohibit anything done with intent to procure abortion. The word “whatsoever” [in s 82] must have some effect’.\textsuperscript{107} The Court instead accepted the appellant’s contention that the Statute deals separately — in two distinct sentences — with the two recognized methods of procuring miscarriage, first by means of active agents — poisons or noxious things — which are ‘administered’ or ‘taken,’ to operate by their intrinsic force or properties, and secondly by other means as for instance by ‘instruments or other things,’ which are ‘used’ but possess no active properties.\textsuperscript{108}

The Court went on to explain that in s 81

\begin{quote}
[t]he Statute specifies the things that it is felony to take, and having done so, it turns to the use of other means — force in one form or another — but it is very doubtful whether the second limb of the prohibition was intended to embrace the subject matter — things that can be taken — which is completely covered in the preceding sentence. The word ‘other’ is referable to ‘instrument’; it is not referable to ‘poison or noxious thing.’\textsuperscript{109}
\end{quote}

In reaching its judgment, the Court considered cases from the UK where the language of the statute was then identical. It also considered cases from New Zealand — in each case a conviction was precluded by a finding that the substance in question was not a ‘poison or other noxious thing’. The Court referred to an unreported decision of the South Australian Court of Criminal Appeal in which the jury had been instructed ‘that they could not convict unless the stuff was a poison or noxious thing’.\textsuperscript{110}

\textit{R v Lindner} suggests that unless a substance is capable of causing appreciable harm to a pregnant woman it cannot be regarded as ‘a poison or other noxious thing’ within the meaning of ss 81–2. This was also the approach taken in \textit{R v Brennan},\textsuperscript{111} in which the jury was instructed to decide whether mifepristone and misoprostol were ‘noxious’ by reference to whether they were noxious to the second defendant, Leach, and not whether they would have been ‘noxious’ to any foetus she may or may not have been carrying. Since ss 81–2 of the South Australian Act are applicable whether or not the woman is pregnant, the conclusion that the law regulates only substances which are poisonous or noxious to the woman herself is especially compelling.

‘Poison or other noxious thing’ bears a clear natural meaning now, just as it did in 1938. It therefore appears entirely plausible that in the absence of proof that mifepristone is a ‘poison or other noxious thing’ it is not an offence in South Australia

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{107} \textit{R v Lindner} [1938] SASR 412, 413 (citations omitted).
\item \textsuperscript{108} Ibid 414.
\item \textsuperscript{109} Ibid 415.
\item \textsuperscript{110} Ibid 416 citing \textit{R v Cornelius} (Unreported, Supreme Court of South Australia, October 1937).
\item \textsuperscript{111} (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).
\end{itemize}
\end{footnotesize}
to procure, supply, administer or cause it to be taken with intent to procure a miscarriage unless s 82A(9) compels this conclusion.

There is no medical evidence that mifepristone, alone or in combination with misoprostol, is poisonous or noxious. Rather, there is a substantial body of evidence that demonstrates that mifepristone (and the combination of mifepristone and misoprostol) are medically safe. Extensive international use of mifepristone and misoprostol has generated data collection with the statistical power to demonstrate the frequency of complications with a high degree of confidence despite their very low frequency. The death rate resulting from medication abortion in the USA is one in 100,000. For an Australian woman, the risk of death from continuing a pregnancy to term is six times higher than if she were to terminate the pregnancy. The risk of death following abortion in the USA has also been assessed comparatively. It is lower than the risk associated with plastic surgery or dental procedures and equivalent to the risk of death associated with running a marathon, driving a car for 782 miles or participating in a major bicycle race. Rates of complications, such as transfusion, infection and haemorrhage are also very low.

Should doubt remain, the Court in *R v Lindner* reiterated the long-standing principle that in the case of any ambiguity, ‘the accused is entitled to the benefit of the doubt’ in the interpretation of a penal statute. Although this principle is more narrowly

112 Mifepristone (in combination with misoprostol) has been in routine use to induce abortion in France and China since 1988. These drugs were approved for use in a further 58 countries by 2013. Marketing approval was granted in Australia in 2012. Gynuity Health Projects, *List of Mifepristone Approvals* (June 2015) <http://gynyuity.org/resources/read/list-of-mifepristone-approval-en/%20countries>.


interpreted now than in the past, the principle that a penal statute should be strictly construed in the case of ambiguity remains. The principle that penal statutes are to be strictly construed has been applied by an English court in the context of abortion.

A purposive interpretation of the statute would, we argue, produce the same result. We have argued that protecting women’s health was a central focus of the amending legislation. It is logical that Parliament would seek to control the supply and administration of poisons and noxious substances, which represent a clear risk to women’s health. Parliament did not amend the language of the statute in line with other readily comparable statutes in existence in 1968–69 in order to regulate ‘drugs’ rather than poisons and noxious substances.

We contend that mifepristone is not a ‘poison or other noxious thing’, within the meaning of the statute.

B What is the Effect of s 82A(9)?

If mifepristone and misoprostol are neither poisons nor noxious substances, the broad language of s 82A(9) remains as the only provision which might bring abortion through the use of safe medications within the criminal law in South Australia. Again, there is only one case which considers this issue. Chief Justice Bray considered this provision in R v Anderson. There, he considered the possibility that this provision would render all abortion unlawful unless undertaken within the terms of s 82A.

From the perspective of 1973, and perhaps also from the perspective of one so concerned to protect the defences afforded by the common law from all but the most clearly expressed of incursions from Parliament, this struck Bray CJ as ‘very odd’. It implied that even abortions which would have been lawful under the common law might become unlawful under the liberalised 1969 provisions. This was a conclusion Bray CJ was not ready to embrace. However, no decision on this question was required by the case before him. He found the consequences of a broad reading of the provision ‘unpalatable’ and stated that this might be grounds for reading down the provision. Finally, he proposed that ‘the unsatisfactory state of s 82a in this regard should be drawn to the attention of the legislature.’

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118 Beckwith v The Queen (1976) 135 CLR 569, 576.
121 (1973) 5 SASR 256, 270–1.
122 Ibid 270, then accepted by Bray CJ as having been stated by Bourne [1939] 1 KB 687.
123 Then accepted by Bray CJ as having been stated by Bourne [1939] 1 KB 687.
124 R v Anderson (1973) 5 SASR 256, 271.
It remains the case that no court has ruled on the meaning of s 82A(9) and the interpretation of this provision must remain a source of potential concern in relation to the provision of abortion induced by the use of drugs. If this provision leaves room for the operation of the common law, the ongoing lack of clarity about the common law and its continued dependence on a small number of decisions made by single judges means that the common law itself is not clear.125

C What is ‘Treatment for the Termination of the Pregnancy’?

In the case of surgical abortion, the conduct which amounts to ‘treatment for the termination of the pregnancy’ has a clear beginning and end, and s 82A requires that this procedure is conducted within a hospital in order for it to be lawful. It is far less obvious what might amount to ‘treatment for the termination of the pregnancy’ in relation to medication abortion. As we stated above, current practice in South Australia requires medical practitioners to prescribe mifepristone inside a hospital, and for both mifepristone and misoprostol to be taken by the patient in a hospital. Which part of the process of a medication abortion amounts to ‘treatment for the termination of the pregnancy’?

Taking mifepristone renders the pregnancy unviable, terminating the pregnancy. Does s 82A mean that the ingestion of this drug is ‘treatment for the termination of the pregnancy’, which must take place in a hospital? Section 82A was not drafted to address such a situation.

The function of misoprostol is to cause the expulsion of the contents of the uterus. Requiring misoprostol to be taken in a hospital setting is likely to mean that, for women who live some distance away from the hospital where they have received ‘treatment’, the process of expelling the contents of the uterus will commence before they arrive home, as misoprostol can take effect from 30 minutes to six hours after ingestion. This does not represent optimal health care. Indeed, it seems likely to compromise women’s health needlessly, coming into conflict with the intention with which this legislation was passed.

V If the Law Is so Clear, Why all the Angst?

Assertions that abortion is illegal in South Australia (and in general) have persisted in spite of the 1969 legislation (and the common law grounding of lawful abortion before 1969). One obvious example is City of Woodville v SA Health Commission,126 in which the plaintiff sought to prevent the Pregnancy Advisory Centre opening within their council area on the basis that abortion was an offence under s 82A of the Criminal Law Consolidation Act 1935 (SA). The application was refused on the basis that s 82A establishes that treatment for the termination of pregnancy must be carried out in a

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hospital and the proposed centre would be a hospital in the relevant legal sense. Justice Matheson found that the plaintiff did not have standing, and stated:

this Court should not exercise its discretion to grant interlocutory relief on the assumption that the South Australian Health Commission or any other person would be an accessory to the commission of a serious crime when the determination of such issues has been left by Parliament to a jury.\footnote{Ibid [50].}

Such arguments are not limited to South Australia. Standing was the conclusive issue in Right to Life Association (NSW) Inc v Secretary of the Department of Human Services and Health,\footnote{\textit{Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health} (1995) 56 FCR 50.} in which Right to Life sought review of the Therapeutic Goods Administration’s decision to permit clinical trials of mifepristone as a breach of s 83 of the \textit{Crimes Act 1900} (NSW) and s 65 of the \textit{Crimes Act 1958} (Vic). The Court found that Right to Life did not have standing on this issue and this decision was affirmed on appeal.\footnote{\textit{Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health} (1994) 52 FCR 209.}

Cases such as these give the impression that abortion is always unlawful without any substantive underpinning. In doing so, they give a sense of plausibility to concerns that medical abortion providers may be prosecuted, as do arguments which emphasise ‘the fundamental criminal status of abortion’.\footnote{Rankin, ‘Disappearing Crime of Abortion’, above n 3, 4.} These concerns are not, in any obvious sense, based on the letter of the law. If we take our eyes off the letter of the law and look to its substantive operation, historians have documented low rates of arrest, prosecution and conviction of doctor abortionists even prior to liberalisation. Judith Allen, for example, contends (based on New South Wales data) that selective policing and prosecution meant that from the early 1900s, ‘the competent attracted little attention and had little to fear’.\footnote{Allen, above n 24, 104. Haigh, above n 23 allows a similar conclusion.} She identifies the likelihood of prosecution in that period as being associated with: female non-doctor abortionists; late-term abortion (in the fourth month of pregnancy or later — often occasioned by the time taken to save the necessary fee); high charges; and a critically ill or dead patient.\footnote{Allen, above n 24, 165.} Juries have long been reluctant to convict abortionists\footnote{Finch and Stratton, above n 18, 47.} (especially doctors), and in the 1950s through to the 1970s, abortion was widely available, seldom prosecuted and even less frequently resulted in conviction.\footnote{Gleeson, above n 7, 72–3.}

If prosecution and conviction were rare prior to liberalisation, they have become rarer still since. Yet, prosecutions have had an immense impact in debates over abortion, and their apparent capriciousness\footnote{Jenny Morgan, ‘Abortion Law Reform: The Importance of Democratic Change’ (2012) 35 \textit{University of New South Wales Law Journal} 142, 149.} has often been part of the reason for their impact.
Some prosecutions, however, have been triggered by controversy. *Wald*[^136] took place during a spate of arrests driven by a scandal about police corruption in relation to abortion — arrests which abruptly halted after all of the accused were acquitted.[^137] As Kate Gleeson has argued, ‘this reactionary moment in corrupt state governance … does not support a theory that Australia has a long history of prosecuting women and doctors over abortions.’[^138] Rather, *Wald* formed a turning point in New South Wales. Judith Allen contends that *Wald* eroded the capacity of corrupt police to extort abortion providers and their patients by clarifying the circumstances under which medical abortion would be lawful. She argues public funding further undermined the provision of non-medical abortion and attendant corruption by reducing the price of medical abortion.[^139]

In other cases, prosecution has triggered controversy to such an extent that it has resulted in law reform. Tasmania saw law reform after the ‘sudden and unanticipated’[^140] police investigation of doctors providing abortion services.[^141] In Western Australia, decriminalisation occurred when a change in the Director of Public Prosecutions’ policy led to a prosecution which was subsequently discontinued.[^142] In each case, prosecutorial action called into question the previously accepted belief in those jurisdictions that the Menhennitt ruling was the source of the law in each state. This experience quite appropriately gives rise to concern in other jurisdictions where the grounds for lawful abortion continue to be stated by the common law.

Only one medical practitioner has, so far as we can discover, been prosecuted for abortion-related offence in South Australia since the 1969 amendments became law.[^143] He was charged with abortion offences in relation to two procedures carried out in his surgery and thus not complying with the s 82A(1) requirement for abortion to take place in a hospital. He was acquitted of the first at trial after asserting that he

[^137]: Allen, above n 24, 209.
[^138]: Gleeson, above n 7, 73.
[^139]: Allen, above n 24, 209. See also Gleeson, above n 7, 73.
[^142]: Dixon, above n 140, 17. Historically, changes in the policing and prosecution of abortion, which have often occurred after changes in crucial personnel, have resulted in abrupt changes in policy. One example is the appointment of ‘an activist Catholic, Francis Holland’ to the role of Police Commissioner in Victoria in the mid-1960s, which led to a sudden and dramatic escalation in prosecutions for abortion offences. These events appear to have triggered the test case that produced clarification in the law of Victoria: the Menhennitt ruling [1969] VR 667. See Morgan, above n 135, 146. 
[^143]: *R v Anderson* (1973) 5 SASR 256. Some of the medical evidence before the Court suggested that Anderson was using ‘the backyard method’ rather than dilation and curettage, which was clearly, at this stage, the accepted method, and a method with which Anderson was clearly familiar.
had performed the abortion ‘pursuant to [s 82A(1)], because he thought an immediate termination necessary to prevent grave injury to [the woman’s] physical or mental health, particularly her mental health’. His conviction on the second charge was quashed on appeal on the basis that there was reasonable doubt about whether he had ever believed the complainant was pregnant. This gave rise to doubt about whether the mental element of the offence had been proved and whether an abortion had actually been performed. It follows that there has been no conviction of a medical practitioner for providing an abortion in South Australia in the post-liberalisation period.

If prosecutions are rare (though unpredictable), convictions of medical practitioners for abortion-related offences in the post-liberalisation period have been rarer still. Yet, the potential consequences of a prosecution mean that the small number of prosecutions that do exist have a disproportionately chilling effect: they participate in generating the perception that abortion is not a standard medical procedure, nor even a medical procedure with profound ethical implications. After all, many medical procedures have profound ethical implications which do not result in their inclusion in the criminal law or their being subject to claims of illegality.

The sense that abortion is not a standard medical procedure is constantly emphasised in South Australia by the requirements that must be met for lawful abortion, which are extensive and certainly not dictated by the medical risks of the procedure. Abortion is medically straightforward and very safe. The requirements imposed by the amendments of 1969 require personal examination of the patient, the agreement of two medical practitioners, provision of the service in a hospital, completion of a form recording a required set of personal details collected by the state government and so on. Even more restrictive requirements are imposed in the Northern Territory, with the result that abortion services are not available outside Alice Springs and Darwin, despite the highly dispersed remote population of the Northern Territory.

As Jenny Morgan has pointed out, the regulatory regime that resulted from the liberalisation of abortion in South Australia is more restrictive than that which was obtained in New South Wales and Victoria (and continues in New South Wales) under the common law after the Menhennitt ruling. For example, the Menhennitt ruling does not stipulate a requirement for two medical practitioners to agree, does

144 Ibid 262 (Bray CJ).
145 There has been a conviction for a non-doctor attempting to procure an abortion R v C [2004] SADC 26 (27 February 2004). The attempted charge was one of 11 charges and formed part of a series of alleged assaults. The defendant was not medically qualified and the charge related to conduct that was clearly dangerous and apparently non-consensual.
146 Key among them is R v Sood [2006] NSWSC 1141 (31 October 2006), which involved the conviction of a doctor for an abortion performed without an examination of the patient. This action could not hope to meet the requirements for a lawful abortion in New South Wales. See commentary in Gleeson, above n 7, 69–70.
147 de Costa et al, above n 1, 109.
not involve reporting requirements and does not require the procedure to take place in a hospital.\textsuperscript{148}

However, conviction is not the only form of harm a medical practitioner can suffer for providing abortion services. A widely-publicised Victorian case in which a doctor was sacked (though later reinstated), six doctors were suspended and an eight-year process which ultimately exonerated them followed, is instructive.\textsuperscript{149} The history of Australian abortion service provision is littered with examples of medical practitioners apparently passed over for important roles because of their support for abortion services,\textsuperscript{150} expert authors pilloried in mainstream media for their participation in writing reports on the subject and medical practitioners stopped in Australian airports or required to agree to conditions prior to being permitted entry to Australia to speak to other abortion providers.\textsuperscript{151} The reports themselves have been downgraded, withdrawn, censored (and needless to say, not acted upon)\textsuperscript{152} when they cast abortion as a health service and not only a moral issue.\textsuperscript{153} It should therefore not be assumed that the expectation of conviction is the only issue that might concern abortion providers.

\section*{VI Conclusion}

In this article, we have argued that when the South Australian Parliament liberalised access to abortion in 1969 its primary goal was to preserve women’s health through clarifying the contexts in which lawful abortion would be available. It chose to do so through a select committee process followed by exhaustive debate in Parliament, resulting in new provisions that were thoroughly tested by the democratic process. We have argued that despite public claims to the contrary, abortion services that comply with the statutory scheme in South Australia are lawful. The demonstrable safety of abortion services in South Australia since 1969, and the absence of prosecutions and convictions in this State, suggest that Parliament achieved its goals. The law in relation to surgical abortion was rendered clear, with immediate, positive

\begin{flushleft}
\textsuperscript{148} Morgan, above n 135, 147–8. The common law position is summarised in \textit{the Menhennitt ruling} [1969] VR 667, 672:

\begin{quote}
For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.
\end{quote}


\textsuperscript{150} Baird, ‘Abortion Politics During the Howard Years’, above n 141, 250.

\textsuperscript{151} Ibid 251.


\textsuperscript{153} Baird, ‘Abortion Politics During the Howard Years’, above n 141, 251.
\end{flushleft}
impacts on women’s health. The deaths and serious injuries that were a persistent feature of abortion provision prior to 1969 have been all but eliminated.154

The advent of safe, effective medication abortion is not addressed by the statutory language we now have. We have argued that the drugs now in use for this purpose are neither poisons nor noxious substances. The current South Australian legislation using these terms was drafted to address the social, moral and medical context of much earlier times. If abortion through the use of medication is caught within the current legislation, it is caught by virtue of s 82A(9) rather than by the language adopted to address abortion through the use of poisons and noxious substances. The s 82A provisions of 1969, designed to ensure the safety and legality of surgical abortion, are poorly adapted to the contemporary provision of abortion by medication. They now conflict with the provision of quality medical care. In our view, the legislation should be amended to render it consistent with the provision of best practice medical care, at the very minimum. The use of legislation designed to ensure women’s health and safety to prevent best practice in medical care is an affront to the intentions with which this legislation was originally passed.

We would contend that any suggestion that abortion carried out in compliance with the statutory scheme is criminal in South Australia, or that medical practitioners who comply with the statutory scheme in good faith run the risk of being prosecuted, is not grounded in an accurate account of the positive law. Nor is it supported by the application of the law in practice since 1969.155

Nevertheless, the continued presence of abortion-related offences in the criminal law is undesirable. As researchers have demonstrated in relation to other jurisdictions, the presence of abortion offences generates concern in the medical profession and creates potential for the imposition of restrictions on abortion services which the legislative scheme itself does not demand. These circumstances give rise to treatment regimes and restrictions on the availability of abortion that prejudice women’s health, rather than protect it. Currently, law reform is under discussion in New South Wales.156 Reforms are currently before the Parliament of the Northern Territory in the form of the Medical Services Amendment Bill 2015 (NT). The Victorian Parliament has recently passed amendments to the Public Health and Wellbeing Act 2008 (Vic) creating buffer zones around reproductive health services.157 The time is ripe for reconsideration in South Australia. We would argue that South Australia


155 Kate Gleeson makes a similar argument in relation to New South Wales and the 1998 debates over abortion law in Western Australia: Gleeson, above n 7.


should follow Victoria and the Australian Capital Territory in removing abortion from the criminal law so that abortion provision can be driven by concern for the provision of quality health care services rather than by concern to avoid criminal consequences (expressed in language that dates back, in some cases, to the Victorian era) or by unfounded beliefs that parliamentary support for safe, medical abortion will be punished by the electorate.159

158 See discussion of the Victorian example as evidence of democratic process being used to remove abortion from the criminal law in a way that ‘configures women as responsible decision-makers, at least until the foetus is at 24 weeks’ gestation’: Morgan, above n 135, 172.

THE MEDIA’S STANDING TO CHALLENGE DEPARTURES FROM OPEN JUSTICE

Abstract

Open justice is essential to the integrity of our justice system. When a court departs from open justice, it is appropriate that media organisations are able to question whether the circumstances warrant the departure. This article addresses the standing of media organisations to challenge departures from open justice. In some jurisdictions, the issue is resolved by statute. However, the position is not uniform around Australia. The article explains the position under the differing statutes and at common law. It focuses on the common law position, where the standing of media organisations is controversial. It argues that at common law, media organisations may intervene as of right, as a matter of natural justice, in any proceedings contemplating a departure from open justice.

Introduction

The principle of open justice is an essential characteristic of courts, but it is not an absolute principle. A court may depart from open justice by: closing proceedings to the public, concealing information from those present in court, or restricting publication of material arising from the proceedings. Superior courts have the power to depart from open justice in exercise of their inherent jurisdiction. Inferior courts and federal courts created by statute have the same power in

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2 John Fairfax Group Pty Ltd (recs and mgs apptd) v Local Court of New South Wales (1991) 26 NSWLR 131, 160 (Mahoney JA) (‘John Fairfax Group’).
3 Ibid 160–1 (Mahoney JA).
4 On the distinction between these proceedings suppression orders and more ‘general’ suppression orders, see News Digital Media Pty Ltd v Mokbel (2010) 30 VR 248, 258–9 [34]–[36] (Wayne CJ and Byrne AJA).
exercise of analogous implied powers. Courts may also depart from open justice in exercise of statutory powers. When these powers are exercised, it is appropriate for those with the greatest stake in open justice to question whether the circumstances warrant the departure. Journalists, and the media organisations behind them, have the greatest stake in open justice in Australia. For some, this is an obvious truism. For others, this position is contentious. This article argues that when courts are closed, the media is aggrieved in a way that the remainder of society is not. The issue is important because in some cases it will determine whether an organisation that reports the news — a ‘media organisation’ — has standing to challenge a departure from open justice.

To an extent, this was addressed by model legislation on suppression and non-publication orders developed by the Standing Committee of Attorneys-General in 2010. The model legislation was implemented by New South Wales in the Court Suppression and Non-publication Orders Act 2010 (NSW) and in a modified form in relation to federal courts via the Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth). Other jurisdictions did not implement the model legislation. For much of Australia, the standing of media organisations is an issue addressed by alternative legislation, or the common law.

The common law position is contentious. In Western Australia, a majority of the Supreme Court held in Re Bromfield; Ex parte WA Newspapers Ltd that a newspaper publisher had sufficient interest to establish standing before a magistrate to oppose the making of a suppression order. That decision is contrary to New South Wales Supreme Court decisions, including John Fairfax Group and Nationwide News Pty Ltd v District Court of New South Wales. This article argues that the majority in Re Bromfield ought to be followed, and that the weight of authority provides that at common law, media organisations may intervene as of right, as a matter of natural justice, in any proceedings contemplating a departure from open justice.

The article is structured as follows. Part II looks at legislation providing standing to challenge departures from open justice. The legislative provisions are then compared

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8 This Standing Committee was replaced by the Standing Council on Law and Justice, which was, in turn, replaced by the Law, Crime and Community Safety Council in December 2013.
9 Standing Committee of Attorneys-General, ‘Model Court Suppression and Non-publication Orders Bill 2010’ (2010) s 9 (‘Draft Model Bill’).
10 Bosland and Bagnall, above n 7, 673.
11 (1991) 6 WAR 153 (‘Re Bromfield’).
12 (1991) 26 NSWLR 131, 167 (Mahoney JA).
13 (1996) 40 NSWLR 486, 489 (Mahoney P), 496 (Priestley JA), 497 (Meagher JA) (‘Nationwide’).
to the common law position. Part III explains how non-parties may become involved in adversarial proceedings, and addresses the controversy over the common law standing of media organisations in more detail. Parts IV–VI seek to resolve that controversy. Part IV is concerned with the jurisdiction of courts to permit non-parties to become involved in proceedings by way of ‘intervening’, and Part V explains the test for permitting intervention. Part VI applies the preceding analysis to media organisations.

II The Media’s Standing Under Statute

A The Model Legislation

The model legislation provides courts with statutory powers to make suppression or non-publication orders.14 A ‘suppression order’ is defined as one ‘that prohibits or restricts the disclosure of information (by publication or otherwise)’, whereas a ‘non-publication order’ is one ‘that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).’15 When a court makes one of these orders, it will depart from open justice.

Section 9 of the model legislation sets out the procedure for making an order. The section provides certain persons with an entitlement to ‘appear and be heard’ by the court on an application for a suppression or non-publication order.16 From the plain language of the section, the relevant persons are given rights that are less than those of the parties to the proceedings: parties can do more than ‘appear and be heard’.17

A ‘news publisher’ is given that entitlement in s 9(2)(d), and is defined as ‘a person engaged in the business of publishing news or a public community broadcasting service engaged in the publishing of news through a public news medium.’18 The entitlement is also provided to ‘any other person who, in the court’s opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.’19

The model legislation does not displace courts’ other powers in this area. Section 4 provides that the model legislation ‘does not limit or otherwise affect any inherent jurisdiction or any powers that a court has apart from this Act to regulate its proceedings or to deal with a contempt of the court.’ This provision is important because, under the analysis below, those powers provide media organisations with rights that go beyond those provided by s 9 of the model legislation.

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14 Draft Model Bill s 7.
15 Ibid s 3.
16 Ibid s 9(2).
18 Draft Model Bill s 3.
19 Ibid s 9(2)(e).
B New South Wales and Federal Legislation

The Parliament of New South Wales enacted legislation substantially identical to the draft model legislation in the Court Suppression and Non-publication Orders Act 2010 (NSW) (‘NSW Act’). Section 9 of the NSW Act reads like s 9 of the model legislation, but for one difference. Instead of ‘news publisher’, the NSW Act refers to a ‘news media organisation’, which is defined as ‘a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.’

This distinction is probably insignificant. A ‘business’ may be reasonably defined as a ‘commercial enterprise’. The NSW Act refers to ‘broadcasting or publishing news’, but ‘broadcasting’ is considered a form of ‘publication’ in media law jurisprudence.

The only distinction to worry about is the use of ‘organisation’ as opposed to ‘publisher’. ‘Organisation’, unlike ‘publisher’, implies that more than one person is a part of it. This might have been intended to exclude individuals working by themselves, such as bloggers or freelance journalists. If so, an individual would need to satisfy the court under s 9(2)(e) that he or she ‘has a sufficient interest in the question’. Nonetheless, the definition in the NSW Act is broad enough to cover individuals working by themselves.

The Parliament of Australia substantially enacted the model legislation by amending Acts constituting federal courts, including the Family Law Act 1975 (Cth), the Federal Court of Australia Act 1976 (Cth), the Federal Magistrates Act 1999 (Cth), and the Judiciary Act 1903 (Cth). The implementing Act, the Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth), preserves the term ‘news publisher’ used in the model legislation.

C Victoria

The Open Courts Act 2013 (Vic) is also based on the model legislation, but has several differences. In the Bill’s second reading speech, it was described as ‘framed having regard’ to the model legislation, but applying ‘a more rigorous standard for making suppression orders in Victoria’.

Section 19 provides ‘news media organisations’ and sufficiently interested persons with the entitlement to ‘appear and be heard’ on an application for a ‘proceeding suppression order’. The term ‘proceeding suppression order’ denotes an order that

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20 Court Suppression and Non-publication Orders Act 2010 (NSW) s 3.
22 As amended by the Federal Circuit Court of Australia (Consequential Amendments) Act 2013 (Cth).
23 Victoria, Parliamentary Debates, Legislative Assembly, 27 June 2013, 2418 (Robert Clark, Attorney-General).
24 Open Courts Act 2013 (Vic) s 19(2)(e)–(f).
prohibits or restricts the disclosure by publication or otherwise of a report of the whole or any part of a proceeding, or any information derived from a proceeding.\(^{25}\)

By linking the relevant information to the proceeding, a proceeding suppression order is significantly narrower than the conjunction of suppression orders and non-publication orders that is addressed in the model legislation. The Victorian Act distinguishes proceeding suppression orders from ‘broad suppression orders’\(^{26}\) and ‘closed court orders’.\(^{27}\) The distinction follows the authority of the Victorian Court of Appeal in *News Digital Media Pty Ltd v Mokbel*, which held that proceeding and broad suppression orders are ‘essentially different’, and ‘raise very different issues of policy and jurisdiction’.\(^{28}\) The procedural rights afforded to non-parties in respect of proceeding suppression orders are not afforded to non-parties in respect of broad suppression orders or closed court orders.

The Victorian Act also departs from the model legislation jurisdictions by explicitly making the point that ‘an applicant for a proceeding suppression order is not required to give notice of the application’ to the persons entitle to appear and be heard.\(^{29}\) But an applicant for a suppression order\(^{30}\) is required to give the court three days’ notice.\(^{31}\) The court must then take reasonable steps to provide notice of the application to the media.\(^{32}\) The notice mechanism provided by these sections enables media organisations to decide whether to challenge the prospective departure from open justice.

Another difference in the Victorian Act is its approach to courts’ jurisdiction, apart from the Act, to regulate their proceedings. Section 29 makes the familiar reservation: ‘Subject to section 28, nothing in this Part limits or affects any jurisdiction or any power that a court or tribunal has apart from this Act to regulate its proceedings.’ However, the reservation is framed in relation to closed court orders only, and not in relation to proceeding or broad suppression orders. On the face of it, the provisions regulating suppression orders displace the common law principles. This is consistent with the Bill’s second reading speech: ‘The bill will exclude the operation of common-law or implied powers to make [suppression and closed-court] orders,

\(^{25}\) Ibid s 17.

\(^{26}\) Ibid pt 4.

\(^{27}\) Ibid pt 5.

\(^{28}\) (2010) 30 VR 248, 258 [34] (Wayne CJ and Byrne AJA).


\(^{30}\) Which means (a) a proceeding suppression order, (b) an interim order, (c) broad suppression orders (made under ss 25 or 26 of the Act), or (d) an order made by the Supreme Court in the exercise of its inherent jurisdiction that prohibits or restricts the publication or other disclosure of information in connection with any proceeding, whether or not the information was derived from the proceeding: *Open Courts Act 2013* (Vic) s 3.

\(^{31}\) Ibid s 10(1).

\(^{32}\) Ibid s 11(1).
except for the inherent jurisdiction of the Supreme Court.'\textsuperscript{33} It is confirmed by s 5 of the Act, which abrogates courts’ common law powers in respect of certain departures from open justice.\textsuperscript{34}

The sum of these principles is that in Victoria, media organisations will have standing to challenge departures from open justice: (1) in relation to proceeding suppression orders, under the \textit{Open Courts Act 2013} (Vic) s 19(2)(e); and (2) in relation to other departures from open justice, if provided for by common law principles. Thus, although the media enjoys statutory rights in Victoria, the common law principles are still relevant.

\textbf{D South Australia}

South Australia has not enacted the model legislation. However, s 69A of the \textit{Evidence Act 1929} (SA) deals with suppression orders and provides certain persons with the entitlement ‘to make submissions to the court on the application’, and ‘with the permission of the court, call or give evidence in support of those submissions’.\textsuperscript{35} The other jurisdictions do not provide an equivalent statutory right to call or give evidence.

Section 69A is quite different to both the model legislation jurisdictions and the Victoria position. Firstly, ‘suppression order’ is defined as an order forbidding the publication of certain forms of evidence, the names of various persons involved in the proceedings, or of any other material tending to identify any such persons.\textsuperscript{36} Non-parties would not have those statutory rights to appear in relation to a decision to close a court. Secondly, s 69A does not attribute the procedural rights to news publishers or news media organisations, but to ‘a representative of a newspaper or a radio or television station’.\textsuperscript{37} This language is dated, and ought to be amended to cover new forms of news media, such as wholly online publications.

\textbf{E The Remaining States and Territories}

The remaining states and territories do not provide media organisations with the kinds of statutory rights previously described. This does not mean that media organisations cannot be heard in these jurisdictions. Rather, it means that media organisations do not enjoy the benefit of an ‘entitlement’ recognised by statute. Instead, they must rely on general principles regulating the involvement of non-parties in litigation.

\textsuperscript{33} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 27 June 2013, 2418 (Robert Clark, Attorney-General).

\textsuperscript{34} Note that s 7(d)(i) provides that the Act does not affect common law powers to make pseudonym orders.

\textsuperscript{35} \textit{Evidence Act 1929} (SA) s 69A(5).

\textsuperscript{36} Ibid s 68.

\textsuperscript{37} Ibid s 69A(5)(a)(iii).
III The Media’s Standing at Common Law

A Non-Party Involvement in an Adversarial Justice System

The essential function of judicial power is to resolve disputes, quell controversies, and ascertain and determine rights and liabilities. There is a tension between that function and the judge’s object of doing justice according to law. The parties to a dispute will make submissions in their self-interest, and in doing so they may avoid certain issues. If our judicial system were merely designed to resolve disputes, this would be entirely desirable. However, because individual decisions impact the broader public, in some cases, this is not desirable. By failing to ventilate important perspectives on issues of public significance, the adversarial system has the potential to create injustice. So it is important that non-parties have the opportunity to be heard when appropriate. The ‘appropriate’ caveat reflects the practical concern that an open-ended process would be costly and inefficient. The common law has developed to map the outline of appropriateness of non-party involvement. That outline is drawn with the concepts of standing, intervention and amicus curiae.

In Allan v Transurban City Link Ltd the High Court held that ‘standing’ is a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain remedies. To have standing, a plaintiff or applicant must have a sufficient interest in the subject matter of the proceedings and the relief sought. Usually, standing is only relevant to the issue of whether proceedings can be commenced at all, thus it is relevant to those media challenges made by the commencement of proceedings. A broader meaning of ‘standing’ is simply the right

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38 South Australia v Totani (2010) 242 CLR 1, 162 [444] (Kiefel J).
39 Jones v National Coal Board (1957) 2 QB 55, 63 (Denning LJ).
46 See, eg, in the Police Tribunal case a newspaper publisher commenced proceedings seeking prerogative relief in respect of a decision of the Police Tribunal suppressing publication of evidence; standing was a central issue. See John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465, 470 (Mahoney JA). See also Re Bromfield (1991) 6 WAR 153, 168 (Malcolm CJ).
to appear in court and argue a case.\textsuperscript{47} This definition does not chain the right to the \textit{commencement} of proceedings. Non-parties can have standing to appear and argue a case in existing proceedings in which they are strangers by way of intervention.

Questions of \textit{locus standi} and non-party intervention are closely related.\textsuperscript{48} In \textit{Corporate Affairs Commission v Bradley}\textsuperscript{49} the New South Wales Court of Appeal held that a person accepted by the court as an intervener becomes a party to the proceedings with all the privileges of a party, including the ability to appeal.\textsuperscript{50} ‘Intervention’ involves the application of principles of standing to non-parties approaching proceedings already commenced. The common thread between the concepts of standing and intervention is the issue of the appropriate parties to legal proceedings.

An amicus curiae or ‘friend of the court’ is a person who is allowed to put submissions to court not as a party, but in order to assist the court on a point of fact or law.\textsuperscript{51} The role of an amicus must be distinguished from an intervener.\textsuperscript{52} Amici curiae do not acquire the procedural rights of parties.\textsuperscript{53} They appear entirely in the court’s discretion, and only if they can assist the court in a way in which the court would not otherwise have been assisted.\textsuperscript{54} Although, like a party with standing, an amicus is allowed to appear in court, it does not do so \textit{as of right}, whereas an intervener is often entitled to present argument \textit{as of right}.\textsuperscript{55} Strictly speaking an amicus does not ‘argue a case’.

\begin{itemize}
\item \textsuperscript{47} LexisNexis, \textit{Encyclopaedic Australian Legal Dictionary} (at January 2011) ‘Locus Standi’.
\item \textsuperscript{49} [1974] 1 NSWLR 391, 39 (Hutley JA, Reynolds and Glass JJA agreeing) (‘Bradley’).
\item \textsuperscript{50} Re Medical Assessment Panel; Ex parte Symons (2003) 27 WAR 242 (‘Symons’). See also, eg, \textit{United States Tobacco Co v Minister for Consumer Affairs} (1988) 19 FCR 184; see further Susan Kenny, ‘Interveners and Amici Curiae in the High Court’ (1998) 20 \textit{Adelaide Law Review} 159, 159.
\item \textsuperscript{52} \textit{Wilson v Manna Hill Mining Co Pty Ltd} (2004) 51 ACSR 404, 414 [87] (Lander J); \textit{Perdaman Chemicals and Fertilisers Pty Ltd v Griffin Coal Mining Company Pty Ltd (No 7)} 92 ACSR 281, 301 [112]–[113] (Edelman J).
\item \textsuperscript{53} Campbell, above n 48, 255.
\end{itemize}
B The Form of the Media’s Challenge

When a media organisation purports to challenge a departure from open justice in the jurisdictions that afford media organisations statutory rights, the media organisation is exercising a statutory entitlement ‘to appear and be heard’. When the same occurs in the jurisdictions that do not afford media organisations those statutory rights, the position is less clear.

Leading authorities in this area do not actually use the terms ‘intervene’ or ‘amicus’. Instead, they speak of a ‘right to be heard’. The language of the leading judgments and the principles cited indicate that the media organisations are challenging a departure from open justice by actively seeking an outcome, in the form of orders. For example, in Medical Practitioners Board, the publisher sought to ‘apply’ to have a suppression order lifted. The better view is that, when media organisations seek court orders in cases of departures from open justice, just as other parties to the proceedings would, they are intervening rather than appearing as amici.

Intervention is superior to appearing as amici curiae in a number of respects. With substantially the same benefits as a party to the proceedings, interveners enjoy rights that amici are not entitled to. Interveners can seek orders, but amici cannot. Interveners may have standing to appeal a decision when amici would not. It is telling that in John Fairfax Group the publisher did not even seek to appear as an amicus. The leading authority on intervention, Levy, allowed intervention by media organisations and confined amici to written submissions. Further, an appearance as amicus is entirely a matter of discretion. As explained below, this is not necessarily the case.

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58 Or revocation of orders, see, eg, Re Bromfield (1991) 6 WAR 153.
60 Explained below.
for interveners. For these reasons, it may be more valuable for a media organisation to seek intervention rather than mere appearance as amicus curiae.64

C The Uncertainty of the Media’s Standing at Common Law

The media’s standing to challenge a departure from open justice depends on the nature of the challenge and the forum in which it is made.65 As observed by Mason J in Robinson v Western Australian Museum66 speaking on the interest sufficient for locus standi: ‘The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.’ The remainder of this Part examines the uncertainty over the media’s standing at common law in various contexts. It looks at: (1) an application to the court or tribunal at first instance; (2) an appeal of a decision to depart from open justice; and (3) an application to a superior court for relief in respect of a decision to depart from open justice. The position is clearest in relation to the third category, which is addressed first.

1 Standing to Seek Relief from a Superior Court

If a magistrate or inferior court judge makes an order departing from open justice, a media organisation might seek judicial review from a superior court by applying for a prerogative remedy, an injunction or a declaration. Numerous cases have held that media organisations have the standing to seek this review.67 More recently, French CJ made the point in Hogan v Hinch.68 The standing considered in these cases might be distinguished from the standing to oppose an order at first instance; the latter would involve intervening, and the former does not. However, as discussed, the principles governing non-party intervention are closely related to the principles of locus standi applicable here.

In John Fairfax & Sons Ltd v Police Tribunal of New South Wales,69 the Court found that the newspaper publisher had standing to seek prerogative relief and went on to

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64 In practice, the distinction may be of little significance: an intervener may be subject to orders that confine their role. However, the Parts below explain that this will occur when intervention occurs in exercise of the court’s discretion, rather than by right. This article argues that media organisations should be able to intervene by right in appropriate cases.
65 John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465 (1986) 5 NSWLR 465, 468 (Mahoney JA).
67 See the review of Hedigan J in Medical Practitioners Board [1999] 1 VR 267, 296–7. Re Bromfield (1991) 6 WAR 153 is an example. Media organisations have ‘standing’ in these cases, in the sense that they have a right to seek a remedy: Allan v Transurban City Link Ltd (2001) 208 CLR 167.
69 (1986) 5 NSWLR 465 (‘Police Tribunal’).
quash a decision to suppress the identity of an alleged police informer. In making this order, Mahoney JA cited English cases such as *R v Russell; Ex parte Beaverbrook Newspapers Ltd*, which support the proposition that a newspaper publisher has standing as a ‘person aggrieved’ in these circumstances.

Whatever the uncertainty in relation to other forms of challenge to departures from open justice, media organisations clearly have standing in these cases. This favours recognition of standing at first instance too. As recognised by Kirby P in *John Fairfax Group*, ‘it would be a curious result if they were to enjoy standing to approach the Supreme Court but to lack it before the Local Court dealing with the very same matter’. However, as his Honour continued, ‘curiosities are not unknown to the law’.

2 Standing to Oppose an Order at First Instance

This is a vexed area of law. More than a decade ago Hedigan J observed in *Medical Practitioners Board* that the issue of the standing of the media to make a first instance application to oppose an order departing from open justice has led to the expression of differing judicial opinions.

In *Nationwide* the New South Wales Court of Appeal held that representatives of the media have no absolute right to be heard in relation to the making of a suppression order or a pseudonym order. President Mahoney cited the majority decision in *John Fairfax Group* in support of this proposition. The *Nationwide* case is also authority for the proposition that media organisations do have a right to seek leave to be heard. Butler and Rodrick cite *Nationwide* and state that the current law is that

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70 [1969] 1 QB 342. See also *R v Blackpool Justices; Ex parte Beaverbrook Newspapers Ltd* [1972] 1 WLR 95.
71 *Police Tribunal* (1986) 5 NSWLR 465, 468, 470 (Mahoney JA). The same point was made by Hunt J in *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 6–9. However, his Honour also made the point that even a ‘stranger’ can seek prerogative relief to ensure a tribunal is not acting in excess of jurisdiction. See also the dictum of Kirby P in *John Fairfax Group* (1991) 26 NSWLR 131, 151.
72 (1991) 26 NSWLR 131, 151 (Kirby P).
73 Ibid.
74 [1999] 1 VR 267, 297.
75 To an inferior court or tribunal, or even a superior court at first instance.
76 Which Hedigan J framed in a limited way, as an order ‘restricting publication in whole or in part’: [1999] 1 VR 267, 297.
77 (1996) 40 NSWLR 486, 489 (Mahoney P), 496 (Priestley JA), 497 (Meagher JA).
78 The case was cited by Whealy J to make the same point in: *Regina v Lodhi* (2006) 163 A Crim R 448, 474 [124].
79 It is notable that the cited majority was a bare one that included Mahoney JA, as he then was, which was juxtaposed to Kirby P’s leading dissent: *John Fairfax Group* (1991) 26 NSWLR 131, 152–3 (Kirby P).
80 *Nationwide* (1996) 40 NSWLR 486, 491 (Mahoney P).
81 See Ibid 498 (Priestly JA).
media organisations have no absolute right to be heard, but do have a less extensive right to seek leave to be heard. Respectfully, this article argues that they are wrong.

In Medical Practitioners Board a newspaper publisher sought to be heard by the Board in relation to a pseudonym order. The Board decided that the publisher did not have standing to apply to it to have the order lifted. In a judgment quashing the pseudonym order, Hedigan J held in obiter that the finding that the publisher had no standing ‘was probably incorrect’. However it was also held that ‘it is entirely up to the relevant tribunal to decide the circumstances and time at which it will hear any such application, consistent with the efficient and just disposition of the dispute committed to it for determination’. The case affirms the view that the media has no ‘absolute right’ to be heard, but can be heard. As expressed in Nationwide, the ‘entitlement to be heard depends upon the nature of the order and the effect that it has upon the media interest’.

The majority in Re Bromfield expressed a different view. Re Bromfield concerned an application by West Australian Newspapers Ltd (WAN) to seek judicial review of a decision of Magistrate Bromfield to suppress publication of all details of a criminal hearing. Counsel for WAN had sought to be heard by Magistrate Bromfield in relation to the continuation of the suppression order at the conclusion of the preliminary hearing, which was denied.

Chief Justice Malcolm and Nicholson J each found that the Magistrate’s decision to suppress publication was of such a nature that WAN had a right to be heard. The Chief Justice reasoned that WAN was ‘directly affected’ by the suppression. Citing Attorney-General v Leveller Magazine Ltd, his Honour held that the fact WAN was bound by the order on pain of contempt meant that it had an interest in the subject matter of the proceedings which gave rise to a right to be heard. Adopting that reasoning, a media organisation will have standing to challenge a departure from open justice at first instance, no matter if the departure is either proposed to be made or already made, if the departure could result in the organisation being in contempt of court. On this view, media organisations have an absolute right to be heard if acting contrary to the departure would place the media in contempt.

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82 Unless afforded that right by legislation.
83 Butler and Rodrick, above n 29, 270–272.
85 Ibid 298.
86 Ibid 297 (Hedigan J).
87 Nationwide (1996) 40 NSWLR 486, 492 (Mahoney P).
88 This view has been followed, see eg, Queensland v Nuttall [2007] QSC 79 (22 February 2007) (Moynihan J); Mills v Hendriksen (2008) 184 A Crim R 212, 225 (Halsuck J).
92 Ibid.
Justice Nicholson came to the same conclusion, but relied instead on WAN’s identity as a newspaper publisher to make out the ‘sufficient interest’. His Honour cited Mason J in *Kioa v West*, where it was held that a person must be afforded natural justice whenever a decision will deprive a person of a right, interest or legitimate expectation of a benefit. Evoking that language his Honour held that the liberty WAN usually enjoyed to report the news and the nature of WAN’s business gave rise to an ‘interest or legitimate expectation of benefit’ which meant that the Magistrate had denied WAN natural justice. The Magistrate’s duty to afford WAN natural justice meant that, at a minimum, WAN should have been given a reasonable opportunity to present its case at first instance.

In dissent, Rowland J held that WAN’s financial interest in reporting the news was insufficient to support a duty on the part of the Magistrate to afford WAN natural justice.

In the *Police Tribunal* case McHugh JA considered, in obiter, the position if an invalid order departing from open justice had been binding on the applicant newspaper publisher. His Honour held, consistently with Malcolm CJ in *Re Bromfield*, that such an order would have directly affected the applicant. Nonetheless, his Honour found that the applicant had no absolute right to be heard by the decision-maker at first instance. This characterisation of the effect on the applicant is ultimately supportive of the view that media organisations have a right to be heard at first instance in relation to departures from open justice.

We are left with an inconsistency in the law: the majority view in *Re Bromfield* is inconsistent with the majority in *John Fairfax Group*, and later, *Nationwide*. The key difference is their characterisation of the effect of the departure on the media organisations’ interests.

It is notable that the *Re Bromfield* judgment was dated 1 January 1991. The bare majority judgment in *John Fairfax Group* was dated 24 December 1991. In the latter case, Kirby P cited the majority in *Re Bromfield* as illustrative of the view that members of the media have a ‘special interest’ in departures from open justice.

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93 (1985) 159 CLR 550, 582–4 (‘Kioa’).
98 (1986) 5 NSWLR 465, 482.
99 Ibid.
100 Textbooks such as Butler and Rodrick favour the view that media organisations have no absolute right to be heard at first instance in relation to departures from open justice: see Butler and Rodrick, above n 29, 270–272.
Although there was support for the ‘no absolute right’ view before 1991, it was not presented as a binding ratio. With respect, their Honours Mahoney JA and Hope AJA should have followed Malcolm CJ and Nicholson J in Western Australia. The ‘right to be heard as a matter of natural justice’ view, that is, the view that there is an absolute right to be heard, followed from the ratio that Magistrate Bromfield denied WAN procedural fairness. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* the High Court made it clear that intermediate appellate courts in one jurisdiction should not depart from decisions made at common law by intermediate appellate courts in another jurisdiction, unless convinced that those decisions are plainly wrong. If Mahoney JA and Hope AJA were deciding their case consistently with the principle in *Farah*, perhaps it would have gone differently.

3 *Standing to Appeal a Decision to Depart from Open Justice*

Any right to appeal a departure from open justice will come from legislation and not the common law. The statutes considered in Part II above do contain provisions in respect of appeals. The model legislation does not provide news publishers with a right to appeal in respect of a suppression order. However, media organisations can appeal if they are considered ‘by the court to have a sufficient interest in the making of the order’. They do have an entitlement to appear and be heard in an appeal in respect of a suppression order, if, for example, that appeal is brought by someone else. This is the position in New South Wales and federal courts. The *Open Courts Act 2013* (Vic) contains no clear right of appeal, although s 15 provides that a court may review a suppression order on the application of a news media organisation. Media organisations are in a slightly stronger position in South Australia. Under s 69AC(2)(c) of the *Evidence Act 1929* (SA), a representative of newspaper, radio or television station has a right to appeal a suppression order. It must be remembered though that these statutes provide for statutory suppression orders. The rights of appeal provided by those statutes relate to decisions to make, or not to make, statutory suppression orders. They have little relevance to jurisdictions that lack equivalent legislation.

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104 Ibid.
107 Draft Model Bill s 9(1)(b).
109 Court Suppression and Non-publication Orders Act 2010 (NSW) s 14(3)(d).
110 See generally Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth).
For jurisdictions like Western Australia, media organisations will need to appeal to the ‘usual’ statutory authorities in order to appeal. For example, the Court of Appeal of the Supreme Court of Western Australia gains jurisdiction from s 58 of the Supreme Court Act 1935 (WA), which is exercised in accordance with the Supreme Court (Court of Appeal) Rules 2005 (WA). In those jurisdictions, the question is whether a media organisation, as a non-party, has a right to appeal a decision made in proceedings to which it is not a party. A judgment is not binding on a person who was not a party to the proceedings in which it was granted and so generally a non-party has no right of appeal.112

The issue was considered in Herald & Weekly Times Ltd v Williams.113 The Federal Court considered a publisher’s standing to appeal a decision under s 24 of the Federal Court of Australia Act 1976 (Cth), prior to that Act’s amendment by the Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth), in circumstances where the publisher was not a party. It held that the non-party is usually required to show it is ‘aggrieved’, ‘prejudicially affected’ or ‘sufficiently interested’ in the proceedings to get leave to appeal.114

Although the standing to appeal will depend on the legislation relevant to the situation, as a general proposition, this position ought to be followed.115 Media organisations are affected by decisions to depart from open justice and so should have a right to appeal such decisions. Thus French CJ held in Hogan v Hinch that where legislation provides for a general right of appeal from a decision by a judge, a media organisation will generally have standing in an appellate court to challenge the order by way of appeal.116

4 Conclusions on the Media’s Standing at Common Law

An orthodox view of the current law is that: (1) media organisations do not have an absolute right to be heard at first instance; (2) media organisations do have a right to seek leave to be heard at first instance; (3) media organisations have standing to seek judicial review in respect of a departure from open justice; and (4) media organisations might have standing to appeal a decision to depart from open justice, depending on the statute and their rights at first instance.117 Western Australians face a challenge in that the majority in Re Bromfield contradicts the first proposition.

117 See Butler and Rodrick, above n 29, 270–272.
Much of the remainder of this article focuses on clarifying this uncertainty, arguing that the orthodox view is incorrect.

IV Jurisdiction to Permit Non-Party Intervention

‘Jurisdiction’ is a troublesome term with various meanings, including ‘authority to decide’.118 The following is concerned with courts’ authority to decide to permit non-party intervention. This authority is a necessary condition of a media organisation intervening as a non-party. This Part looks at the jurisdiction of State Supreme Courts, statutory courts of appeal, inferior courts, and the High Court.

A Jurisdiction of State Supreme Courts

Chapter III of the Commonwealth Constitution recognises the Supreme Courts of the States and the High Court, which are ‘superior courts of record’.119 This characterisation corresponds to broad powers that allow for non-party intervention.

The Supreme Court of Western Australia (WASC) is illustrative of the position in respect of each of the State Supreme Courts. The WASC is conferred with general jurisdiction under s 16 of the Supreme Court Act 1935 (WA). Its powers are to be identified with reference to the ‘unlimited’ powers of the courts of Westminster.120 As a superior court, it is said to have ‘inherent jurisdiction’.121 Its broad jurisdiction is a product of its position at the peak of the hierarchy of the West Australian judicial system. As explained by Dawson J in Grassby,122 “it is undoubtedly the general responsibility of a superior court … for the administration of justice which gives rise to its inherent power”.123


119 Leeming, above n 106, 29.

120 Grassby v The Queen (1989) 168 CLR 1, 16 (Dawson J, Mason CJ, Brennan, Deane and Toohey JJ agreeing) (‘Grassby’). However, due to the provisions of our Commonwealth Constitution, there is no Australian court with truly unlimited jurisdiction: PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission (2012) 247 CLR 240, 247 [16]. (French CJ, Gummow, Hayne and Crennan JJ).


122 (1989) 168 CLR 1 (Dawson J).

123 Ibid 16 (Dawson J).
There is no specific provision in the *Supreme Court Act 1935* (WA) that explicitly provides the Court with the power to permit intervention. However, the *Rules of the Supreme Court 1971* (WA) (‘*SCR*’) do consider intervention by non-parties. See *SCR O 18 r 6(2):*

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application …

(b) order that any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, be added as a party,

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

This rule exists because the WASC determined that it should. Section 167(1)(a) of the *Supreme Court Act 1935* (WA) empowers the judges of the Court to make rules, which they have done in the form of the *SCR*. Although the *SCR* have the force of law, they do not confer the Court with any jurisdiction, or alter its jurisdiction. This proposition is important for present purposes, as it means that *SCR O 18 r 6* does not confer the WASC with any jurisdiction that it did not otherwise have. The WASC would have jurisdiction to permit non-party intervention even if *SCR O 18 r 6* did not exist. However, in *Bradley*, the New South Wales Court of Appeal held otherwise.

An action in the common law tradition is usually thought of as a private controversy between plaintiff and defendant (or the State and the accused). In *Bradley* Hutley JA summed up this view with the words: ‘to permit intervention would be contrary to the whole drive of the common law system’.

The Court of Appeal considered whether the Commonwealth should have been allowed to intervene in proceedings in the Supreme Court of New South Wales in circumstances where it did not come under the equivalent rule of the Western Australian *SCR O 18 r 6*. Counsel argued that, although the Commonwealth was not covered by either limb of the rule, the Court could allow intervention by exercise of its inherent jurisdiction.

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128 *Supreme Court Rules 1970* (NSW) pt 8 r 8(1). See Ibid 396–7 (Hutley JA).
Justice of Appeal Hutley provided a short history of the judiciary’s disposition to non-party intervention, illustrating that intervention was not permitted at common law or in equity. Intervention was permitted in jurisdictions derived from ecclesiastical or civil law, including in matrimonial cases, admiralty and probate jurisdictions. His Honour rejected the Commonwealth’s position and held, with Reynolds and Glass JJA agreeing, that ‘there is no inherent power in the court to order that an intervener be joined as a party, either at common law or in equity’.

Bradley has received a mixed response. In Rushby v Roberts, Street CJ held that it should be strictly confined in its operation and that it may require reconsideration in an appropriate case. Justice Wheeler picked up those comments in Western Power Corporation v Woodside Petroleum Development Pty Ltd and said that they were referable purely to statutory provisions peculiar to New South Wales. In Lukic v Lukic Young J recognised that Bradley had been distinguished on at least six occasions ‘as being out of kilter with modern attitudes to litigation’.

The status of Bradley’s ratio, that State Supreme Courts have no inherent jurisdiction to permit non-party intervention, is open to serious question. In any event, its authority is largely superseded by the dictum of Brennan CJ in the leading case of Levy.

In Levy and Lange v Australian Broadcasting Corporation the High Court considered important issues of the freedom of political communication implied in the Commonwealth Constitution. When hearing these cases together, the Court allowed a number of interveners, including media organisations. In his Honour’s reasoning Brennan CJ set out in detail the proper basis for allowing intervention.

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130 Ibid 392.
132 [1983] 1 NSWLR 350, 353 (‘Rushby’).
134 However, since Farah, one should question her Honour’s finding that ‘there is no decision binding on me in relation to the jurisdiction of this Court to permit intervention. See: Farah (2007) 230 CLR 89, [135], (the Court); Western Power Corporation v Woodside Petroleum Development Pty Ltd [1998] WASC 185 (12 June 2008).’
135 (1994) 18 Fam LR 301, 302.
137 (1997) 189 CLR 520.
138 Williams, above n 51, 380.
His Honour recognised that, other than s 78A of the *Judiciary Act 1903* (Cth), there is no constitutional or statutory provision that confers jurisdiction on the High Court to permit non-party intervention. In a judgment that allowed for intervention, his Honour held that:

If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine matters prescribed by the several constitutional and statutory provisions which confer this Court’s jurisdiction.141

Citing *Commissioner of Police v Tanos*142 it was held that jurisdiction must be exercised in accordance with the rules of natural justice. The exercise of jurisdiction should not affect the legal interests of persons who have not had an opportunity to be heard. Consistently with the majority decisions in *Re Bromfield*, his Honour held that:

a non-party whose interests would be affected directly by a decision in the proceedings — that is, one who would be bound by the decision albeit not as a party — must be entitled to intervene to protect the interest liable to be affected.143

His Honour went on to consider the status of a non-party who is not directly affected by a decision. An indirect effect, through for example, the operation of a precedent, does not give rise to the same right to be heard. Ordinarily this sort of affection would not justify an intervention, “[b]ut where a substantial affection of a person’s legal interests is demonstrable … or likely, a precondition for the grant of leave to intervene is satisfied”.144 In these cases, although there is no absolute right to intervene, a court may allow the non-party to intervene in exercise of its discretion, if it can show that the parties may not present fully the submissions on a particular issue.145

Chief Justice Brennan’s approach to intervention was applied by the High Court in *Roadshow Films Pty Ltd v iiNet Ltd*.146 Further, it is consistent with a recent High Court decision on standing.147 *Argos* concerned an application for a commercial development, which would likely result in a loss of profits for nearby supermarkets. The Court held that the operators of those supermarkets were persons aggrieved by

140 Which provides for intervention by Attorneys-General as of right in constitutional matters. See Campbell, above n 48.
144 Ibid 602.
145 Ibid 602-3.
147 *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394 (‘*Argos*’).
the decision, which provided them with the entitlement to seek (statutory) review. Chief Justice French and Keane J cited another Brennan J dictum on ‘directness’ in their contribution to the majority finding that the operators had locus standi. Accordingly, the approach to intervention set out by Brennan CJ in Levy is an authoritative statement of the law of Australia.

Although Brennan CJ was considering intervention in the High Court, the principles that he set out are of general application. There is a strong presumption that natural justice applies to any exercise of judicial power by court. Unless there is a clear, contrary statutory intention, judicial decision-makers will be bound by the requirements of natural justice. If they fail to comply with those requirements, they will ordinarily fall into jurisdictional error. Natural justice requires that sufficiently affected persons be given an opportunity to be heard. So any person directly affected by a court’s decision has a right to intervene as a matter of natural justice. Chief Justice Martin applied Brennan CJ’s approach in Levy in relation to a State Supreme Court in Smith v Commissioners of the Rural and Industries Bank of Western Australia.

Bradley is not entirely inconsistent with this position. In that case, the would-be intervener was not covered by the equivalent of SCR O 18 r 6(2) and so was not covered by the expression ‘ought to have been joined as a party’. Arguably, if a person’s interests are directly affected, they ‘ought to be joined’ (or at least they ought to be given the opportunity) as a matter of natural justice.

However, the Court’s finding in Bradley that the New South Wales Supreme Court had no inherent jurisdiction was, with respect, plainly wrong. Justice of Appeal Hutley misplaced the source of the Court’s jurisdiction in the Rules, which brought nothing to the table that was not already there. The Supreme Court’s jurisdiction to

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149 Note, that ‘directness’ is described as a conclusionary judgment: Argos (2014) 254 CLR 394, 408 [39]. The test for whether a person is ‘directly’ affected is explored further below.
151 Kioa (1985) 159 CLR 550, 584 (Mason J).
155 ‘Inherent jurisdiction’ corresponds to the power which a court has simply because it is a court of a particular description: R v Forbes; Ex parte Bevan (1972) 127 CLR 1, 7 (Menzies J); see Parsons v Martin (1984) 5 FCR 235, 240–1 (the Court).
157 Supreme Court Rules 1970 (NSW) pt 8 r 8(1), now repealed; cf Uniform Civil Procedure Rules 2005 (NSW) r 6.27.
permit intervention was an ‘incident’, in the words of Brennan CJ, of its general jurisdiction. This is an application of the maxim *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*: a grant of power carries with it everything necessary for its exercise.\(^\text{158}\) As Supreme Courts determine disputes between parties that sometimes directly affect the interests of non-parties, and as judges have a duty to act judicially, the State Supreme Courts have the power to permit non-party intervention.

This power is identifiable within superior courts’ inherent jurisdiction to control their own procedure.\(^\text{159}\) Indeed, the very existence of SCR O 18 r 6 is owed to that inherent jurisdiction. The fact that common law courts did not historically exercise their jurisdiction to permit intervention does not preclude the existence of that jurisdiction. Statements to the contrary are now overborne by the endorsement of *Levy* in *iiNet*.

Further, the position articulated by Brennan CJ shows that courts have the power to permit intervention even when a non-party’s interests are not directly affected, if it is a substantial indirect effect. To the extent that *Bradley* provides that State Supreme Courts do not have the jurisdiction to even consider this sort of intervention, *Levy* provides that *Bradley* was incorrectly decided, as foreshadowed by Street CJ in *Rushby*.\(^\text{160}\)

### B Jurisdiction of Statutory Courts of Appeal

In *Perdaman Chemicals & Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd*\(^\text{161}\) Pullin JA held that the Western Australian Court of Appeal ‘being a statutory court [has] no inherent jurisdiction’ but has ‘incidental powers’. His Honour considered the Court’s power to grant an injunction, which he identified as being an implied incident of its substantive appellate jurisdiction, citing *DJL v The Central Authority*\(^\text{162}\) and *Jackson v Sterling Industries Ltd*\(^\text{163}\) in support.

In *DJL*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ considered the powers of the Family Court, a court that derives its jurisdiction from statute.\(^\text{164}\) The Court confirmed that, in addition to the powers conferred on it expressly or by implication, the Family Court has such powers as are incidental and necessary to the exercise of the jurisdiction or powers so conferred. Similarly, in *Jackson* the High Court found that the Federal Court had jurisdiction to grant a Mareva injunction under s 23 of the *Federal Court Act 1976* (Cth). It went further and said that even in the absence of that section, the Court would have the power to make such orders

\(^{158}\) *Grassby* (1989) 168 CLR 1, 16 (Dawson J).


\(^{160}\) *Rushby* [1983] 1 NSWLR 350, 353.

\(^{161}\) [2011] WASCA 188 (29 August 2011) [4].


\(^{163}\) *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (‘*Jackson*’).

\(^{164}\) *DJL* (2000) 201 CLR 226, 240–1 [25].
in relation to matters properly before it, as an incident of the general grant to it as a superior court.  

Although courts of appeal constituted by statute do not have an inherent jurisdiction to permit intervention, they do have implied incidental powers corresponding to the inherent jurisdiction of a court to control its own procedure. Statutory courts of appeal are bound by the same rules of natural justice that apply to State Supreme Courts. Accordingly, applying the same reasoning of Brennan CJ in *Levy*, statutory courts of appeal have the power to permit non-party intervention even if their rules do not provide for it. Their jurisdiction to do so is an incident of their general jurisdiction to hear and determine the matters.

C Jurisdiction of Inferior Courts

As Dawson J explained in *Grassby*, inferior courts do not have inherent jurisdiction. They possess jurisdiction by implication in the same way that Courts of Appeal do. The legislative grant of power to an inferior court carried with it everything necessary for its exercise. Thus Gleeson CJ held in *R v Mosely* that the New South Wales District Court has the implied power to do what is necessary to carry its statutory powers into effect. A decade later Gaudron J also considered the power of a District Court and said, expressing the matter generally, that a court whose powers are defined by statute has ‘an implied power to do that which is required for the effective exercise of its jurisdiction’. These cases follow the cited maxim, and an English line of authority that there ‘can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction’.

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166 In the case of the Western Australian Court of Appeal, that jurisdiction is provided by the *Supreme Court Act 1935 (WA)* s 58(1)(b).


168 Ibid.

169 (1992) 28 NSWLR 735, 739 (Gleeson CJ), citing *Stanton v Abernathy* (1990) 19 NSWLR 656, 671 (Gleeson CJ).


171 In *Pelechowski* Gaudron, Gummow and Callinan JJ held, after considering the judgment of Dawson J in *Grassby*, that '[i]n this setting, the term ‘necessary’ does not have the meaning of ‘essential’; rather it is to be ‘subjected to the touchstone of reasonableness’: *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 452 (Gaudron, Gummow and Callinan JJ).

In *John Fairfax Publications Pty Ltd v District Court of New South Wales*\(^{173}\) Spigelman CJ held that the test for determining whether an inferior court has an implied power is the test of necessity. To comply with the requirements of natural justice, courts *need* the power to hear persons whose interests are directly affected. The power to hear interveners is necessary for any court, including an inferior court.

Adopting the same reasoning as presented in relation to statutory courts of appeal, inferior courts have the jurisdiction to allow non-party intervention as an exercise of an implied power carried with the statutory conferral of their jurisdiction.

D *Jurisdiction of the High Court*

Chief Justice Brennan’s decision in *Levy* was in relation to the High Court’s jurisdiction to permit intervention. The position is clear: the Court has the necessary jurisdiction.

E *Conclusions on Jurisdiction to Permit Non-Party Intervention*

Aside from specific legislation contemplating intervention, every Australian court has either inherent or implied incidental powers that form an indispensable part of their jurisdiction. Intervention is possible\(^{174}\) in each Australian court by virtue of the fact we are talking about a court. Courts, by definition, must act judicially. Natural justice lies at the heart of the judicial function and the rule of law.\(^{175}\) Applying *Levy*, intervention is available as a matter of natural justice. This principle lays the foundation for the proposition that, at common law, media organisations may intervene ‘as of right’ in any court contemplating a departure from open justice, rather than as a matter of the court’s discretion. That proposition turns on the way that courts must exercise their jurisdiction to permit non-party intervention.

V **EXERCISE OF JURISDICTION TO PERMIT NON-PARTY INTERVENTION**

A *The Levy Test for Intervention*

Chief Justice Brennan’s judgment in *Levy* is significant not only for its identification of the source of power to permit non-party intervention, but also for the provision of principles that determine when a non-party can intervene. Those principles can be summarised as follows (‘*Levy test’*):

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\(^{174}\) Subject to legislative exclusion.

(1) A non-party has a right to intervene in proceedings that directly affect its legal rights or interests.\textsuperscript{176}

(2) A court has discretion to allow a non-party to intervene in proceedings that have an indirect but substantial effect on the non-party’s legal rights or interests. A court may exercise that discretion if a non-party seeking leave to intervene can show that the parties may not fully present submissions on a particular issue.\textsuperscript{177}

In his Honour’s judgment, Brennan CJ states: ‘a non-party whose interests would be directly affected by a decision in the proceeding … must be entitled to intervene to protect the interest liable to be affected’.\textsuperscript{178} Thus, the first limb of the test is not discretionary. In these cases, intervention is of absolute right. The perceived usefulness of the intervener’s submissions will not affect the right to intervene if intervention is of right. That perceived usefulness will be critical in cases of only an indirect effect on a non-party’s interest.

If the court considers that a non-party is only indirectly affected by a decision, it may permit intervention and limit that intervention to particular issues.\textsuperscript{179} Media law cases like \textit{Medical Practitioners’ Board} that are inconsistent with the ‘absolute right to be heard’\textsuperscript{180} view may be intelligible as statements that media organisations fall under the second limb of the \textit{Levy} test. On this view, as media organisations are only indirectly affected by decisions to depart from open justice, courts may exercise their discretion to ‘allow them to be heard’ (that is, courts may exercise their discretion for media organisations to intervene on a limited basis).

Chief Justice Brennan’s decision invokes principles familiar to administrative law. The grounding of the first principle of the \textit{Levy} test in ‘natural justice’ deserves consideration of that topic.

\textbf{B The Threshold Test for Natural Justice}

In \textit{Kioa}, Mason J referred to affection of a person’s ‘rights, interests and legitimate expectations’ as the basis for the duty to afford natural justice.\textsuperscript{181} This ‘threshold test’ determined when the requirements of natural justice would apply.\textsuperscript{182} He held that ‘[t]he reference to

\begin{itemize}
\item\textsuperscript{176} \textit{Levy} (1997) 189 CLR 579, 601.
\item\textsuperscript{177} Ibid 602.
\item\textsuperscript{178} Ibid 601 (emphasis added).
\item\textsuperscript{179} See Ibid 603–4 (Brennan CJ).
\item\textsuperscript{180} See \textit{Medical Practitioners Board} [1999] 1 VR 267, 298 (Hedigan J).
\item\textsuperscript{181} (1985) 159 CLR 550, 584, applying \textit{Schmidt v Secretary of State for Home Affairs} [1969] 2 Ch 14 (Lord Denning), following \textit{FAI Insurances v Winneke} (1982) 151 CLR 342, 360 (Mason J).
\item\textsuperscript{182} \textit{Kioa} (1985) 159 CLR 550, 616 (Brennan J). See also Mark Aronson, Bruce Dyer and Matthew Groves, \textit{Judicial Review of Administrative Action} (Lawbook, 5\textsuperscript{th} ed, 2013) 405.
\end{itemize}
‘right or interest’ in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.¹⁸³ It is notable that in the same case Brennan J (as he was) was critical of the ‘legitimate expectations’ criterion,¹⁸⁴ emphasising the importance of the way a person’s interest is affected as determining whether natural justice will apply.¹⁸⁵

The ‘legitimate expectations’ doctrine was affirmed in decisions such as Minister of State for Immigration and Ethnic Affairs v Teoh.¹⁸⁶ However in Re Minister for Immigration and Multicultural Affairs; Ex parte Hieu Trung Lam (‘Lam’),¹⁸⁷ Justices McHugh and Gummow said that there was a fundamental question about the relevance and utility of the doctrine of legitimate expectation.¹⁸⁸ Still, a majority did not overturn the doctrine. In 2012 the High Court decided Plaintiff S10,¹⁸⁹ where a majority extended the criticism flagged in Lam and held that ‘legitimate expectations’ ‘either adds nothing or poses more questions than it answers’.¹⁹⁰ More recently, that view was affirmed by another majority in Minister for Immigration and Border Protection v WZARH (‘WZARH’).¹⁹¹ Each member of the High Court criticised the ‘legitimate expectations’ concept.¹⁹²

After WZARH and Plaintiff S10, the proper approach to the threshold test for whether natural justice applies is that of Brennan J in Kioa.¹⁹³ His Honour gave a very broad definition of the requisite ‘interest’, going beyond proprietary, financial interest¹⁹⁴ or reputation, and covering ‘any interest possessed by an individual’. Significantly, his Honour equated the requisite interest to that which gives standing at common law to seek a public law remedy.¹⁹⁵

The key question endorsed in WZARH and Plaintiff S10 is whether an exercise of power is apt to affect any individual’s interest in a way substantially different from

¹⁸³ Kioa (1985) 159 CLR 550, 582 (Mason J).
¹⁸⁴ Ibid 617.
¹⁸⁵ Ibid 619; see Aronson, Dyer and Groves, above n 182, 428.
¹⁹⁰ Plaintiff S10 (2012) 246 CLR 636, 658 [64]–[65] (Gummow, Hayne, Crennan and Bell JJ).
the way in which the exercise it is apt to affect the interests of the public at large.\textsuperscript{196} If so, the threshold test will be satisfied and natural justice will apply.\textsuperscript{197} These cases are a strong affirmation that the \textit{Levy} test is complete and affirm Brennan J's approach to the 'requisite effect' stated in \textit{Kioa}. Applying that approach, the standing of an intervener depends on whether that person is likely to be affected in the same way that a litigant with standing to obtain public remedies is affected.

\section*{VI The Media as Intervener at Common Law}

Applying \textit{Levy} and \textit{WZARH}, if a departure from open justice has or will have a direct effect on a media organisation's legal rights or interests, intervention is as of right. If the effect is or will be only indirect, intervention is discretionary, and so the majority in \textit{Re Bromfield} was incorrect.

'Directness' depends on whether the individual’s interest is likely to be affected more than the interests of other members of the public are likely to be affected.\textsuperscript{198} Thus Rowland J was right to ask in \textit{Re Bromfield}: 'what is the special interest that a newspaper has in that issue, that any other member of the public does not?'\textsuperscript{199} In most proceedings, the media will not be 'directly affected' in the required sense. Even when a media organisation does seek to be heard (by intervention or otherwise), it will not be seeking an outcome that affects the rights or duties that are the primary focus of the proceedings. But in those cases in which the court is contemplating a departure from open justice, a media organisation seeking to be heard will be directly affected in the required sense. Media organisations have a special interest in open justice, which distinguishes them from other members of the public.

\textit{A Pecuniary Interests}

In \textit{Re Bromfield} Rowland J accepted that 'a newspaper has a pecuniary interest in publishing the news'.\textsuperscript{200} A pecuniary interest can satisfy the threshold test for whether the requirements of natural justice apply, as identified by Brennan J in

\begin{itemize}
\item[Ibid 619 (Brennan J); \textit{Plaintiff S10} (2012) 246 CLR 636, 658–9 (Gummow, Hayne, Crennan and Bell JJ).]
\item[Although Brennan J in \textit{Kioa} was considering limitations on the exercise of statutory power, the same principles apply at general law. The source of a judge’s power statute, inherent or implied jurisdiction is irrelevant. The more important question is whether legislation has ousted the application of the principles. Cf \textit{Re Minister for Immigration and Multicultural Affairs; Ex parte Miah} (2001) 206 CLR 57, 69–70 (Gleeson CJ and Hayne J), 83–4 (Gaudron J).]
\item[(1991) 6 \textit{WAR} 153, 182.]
\item[Ibid 185. See also Ibid 193 (Nicholson J).]
\end{itemize}
Further, courts have recognised that if a decision affects a business interest, there is a strong presumption that the requirements of natural justice apply.202

It could be objected that not every departure from open justice will directly affect the pecuniary interests of every media organisation. However, if a media organisation seeks to contest a flagged departure from open justice, this demonstrates that reporting on the matter serves that organisation’s commercial objectives.203 The motivation to challenge in itself indicates that the court’s decision will affect the organisation’s commercial interests. As a general proposition, media organisations’ pecuniary interests distinguish them from other members of the public, and so provide them with the right to intervene whenever they seek to intervene.

Accepting this argument, an emerging issue is the status of non-traditional journalists, as compared to what this paper calls media organisations, in the courts. Working for an organisation like Fairfax is no longer a necessary condition of disseminating information to a wide audience. Social media allows anyone with an internet connection and a web browser to participate in news creation. Bloggers can earn income through individuals reading their content,204 or by referring consumers to some other product.205 If a blogger operating autonomously — that is, a sole-proprietor of a blogging business — sought to challenge a departure from open justice, and could demonstrate a pecuniary interest in reporting the news online, that blogger should be allowed to intervene as of right.206

B Freedom, or the Interest in Being Not in Contempt

Media organisations enjoy a ‘liberty of reporting and publishing in the absence of prohibition’.207 A court order can restrict that liberty. A departure from open justice may lead to a journalist or a media organisation being in contempt of court, even for conduct occurring outside the court.208 For example, if an organisation publishes material protected under a non-publication order, it may be liable in contempt even

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204 See, eg, Entrepreneur Press and Jason R Rich, Start Your Own Blogging Business (Entrepreneur Press, 2nd ed, 2010).
206 It is important to couple this argument with a conservative approach to the hearing rule. This is described below. It would be an unjustifiable burden to require courts to inform individual bloggers of every proposed departure from open justice.
208 In re Johnson (1887) 20 QBD 68, 71–2 (Lord Esher MR).
if the organisation was not specifically named in the order.\textsuperscript{209} The organisation itself may be fined in contempt.\textsuperscript{210}

In \textit{Nationwide}, Mahoney P affirmed his previous judgment in the \textit{Police Tribunal}\textsuperscript{211} case in holding that orders restricting publication of information only \textit{indirectly} affect media organisations.\textsuperscript{212} When orders like those contemplated are made, the entire world is bound on pain of contempt. However, it is important to remember that the ‘directness’ criterion lies in the issue of whether the exercise of power is ‘apt to affect the interests of [a media organisation] in a way that is substantially different from the way in which it is apt to affect the interests of the public at large’.\textsuperscript{213} Anyone \textit{could} be in contempt by disobeying one of these orders, but most people would not want to. The pecuniary interests of media organisations, combined with their special role in disseminating news to the public (explored below), means that media organisations are motivated to report on court proceedings. Media organisations and their journalists are more likely to actually be in contempt for defying these orders.\textsuperscript{214} Accordingly, media organisations are affected in a way substantially different from the way that the public at large is affected.

With respect, \textit{Nationwide} was wrongly decided. If a media organisation is aware of an order that might put it in contempt, it will be directly affected.\textsuperscript{215} Thus Malcolm CJ recognised in \textit{Re Bromfield} that there could be ‘no doubt’ that a newspaper was directly affected by a suppression order,\textsuperscript{216} which provided a sufficient interest for standing at first instance. As media organisations are often served with notice of orders departing from open justice, their unique position is even more pronounced.

Not every departure from open justice will provide an opportunity for a media organisation to be in contempt by publication. Non-publication orders and pseudonym orders may provide that opportunity, but a decision to close a court entirely may not. In those cases where contempt is not a prospect, a media organisation’s pecuniary interests should still provide it with standing to make a challenge.


\textsuperscript{210} See, eg, \textit{Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd} [1997] NSWCA 29 (3 October 1997).

\textsuperscript{211} (1986) 5 NSWLR 465.

\textsuperscript{212} (1996) 40 NSWLR 486, 492.

\textsuperscript{213} \textit{Kioa} (1985) 159 CLR 550, 619 (Brennan J).

\textsuperscript{214} ‘[S]ome types of contempt of court are more likely than others to be committed by the media’: David Rolph, Matt Vitins and Judith Bannister, \textit{Media Law} (Oxford, 2010) 428.

\textsuperscript{215} See \textit{Attorney-General v Leveller Magazine Ltd} [1979] AC 440, 466 (Lord Edmund-Davies).

\textsuperscript{216} \textit{Re Bromfield} (1991) 6 WAR 153, 167.
C The Interest in Fulfilling a Special Role in Our Democracy

Media organisations recognise that they have a special role in our democracy. One aspect of that role is fulfilling our ‘right to know’ about matters of public interest. Another aspect lies more specifically in court reporting. Not all members of the public are able to attend court, and so the media is the eyes and ears of the public. This serves the operation of the judiciary. It encourages honesty on the part of all stakeholders and guards against the arbitrary exercise of judicial power. In turn, court reporting encourages the impartial administration of justice, thus serving the values at the heart of our liberal democracy.

The media’s special role was mentioned by McHugh JA in Mayas: ‘we live in an era where almost everybody depends on the media for information concerning matters which affect the public interest’. The gravity of this statement has waned in the post-Twitter world, but it is still valid. Most would-be journalists on social media are merely ‘curators’ of news; media organisations are the ‘creators’.

However, in Nationwide, Mahoney P explicitly rejected the proposition that this special role could provide a right or entitlement ‘to be heard’. Aside from citing himself, Mahoney P justified this conclusion by linking the counterfactual (that is, recognition of a right to be heard) to the need to be notified of the matter. Applying the orthodox approach of Brennan J, the media’s common law right to intervene

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221 Syme [1984] 2 NSWLR 294, 300 (Street CJ).
225 Ian Marsh and Sam McLean, ‘Why the Political System Needs New Media’ in Helen Sykes (ed), More or Less — Democracy & New Media (Future Leaders, 2012) 68, 78.
228 Kioa (1985) 159 CLR 550, 615.
does not require notification. 229 Affording the right to be heard to only those organisations in the courtroom does not unreasonably burden the court, thus undermining the cogency of Nationwide on this point.

Court reporting is a special role of the media, and when court reporting is restricted, the media is especially affected in a way that other members of society are not. If a media organisation wants to report on a case involving a departure from open justice, it is directly affected, and so has a right to intervene at common law.

D What Does the Right to Intervene Look Like?

The Levy test shares the language of natural justice for a reason. Non-parties have a right to intervene in proceedings that directly affect their legal rights and interests, because it would not be just to deny them the opportunity to be involved. In accordance with the hearing rule, ‘involvement’ requires a reasonable opportunity for the non-party to present its case, 230 or the right to be heard.

Although historically a right to a ‘hearing’ has not entailed a right to an oral hearing, 231 if the non-intervening parties are given the opportunity to make oral submissions, denying an intervener the same opportunity may be unfair. 232 Thus, Sir Anthony Mason once observed that ‘[i]ntervention status has traditionally carried an entitlement to present oral argument, an entitlement that is both necessary and appropriate to a person who has the status of a party’. 233 Moreover, in Bradley, Hutley JA held that interveners can ‘participate fully in all aspects of argument’ and have ‘all the privileges of a party’. 234

A further aspect of the hearing rule is the requirement that decision makers provide affected persons with reasonable prior notice of the decision. 235 A contrary view, expressed by Brennan J, is that because the content of natural justice can be reduced to ‘nothingness’, notice is not required. 236

229 Cf the position under Open Courts Act 2013 (Vic) ss 10, 11.
233 Mason, above n 55, 174; cf Police Tribunal (1986) 5 NSWLR 465, 482 (McHugh JA).
235 See, eg, Andrews v Mitchell [1905] AC 78, 80 (Lord Halsbury).
236 Kioa (1985) 159 CLR 550, 615.
The media law jurisprudence has sided with the latter position. The cases allude to directly affected media organisations who are not in court or seeking to intervene and who may not even know about the proposed departure. Chief Justice Malcolm cleared a path to clarity in *Re Bromfield*, adding the caveat that if an affected media organisation seeks to be heard at the right time, they ought to be heard. This is a sensible approach to the hearing rule, tailored to the situation of media interveners. If a media organisation wants to intervene, it is important that it should be able to. If it is not even represented in court, the parties should not be needlessly impeded in the resolution of their dispute. This reflects the orthodox flexibility allowed by courts in the interests of fairness in complying with the hearing rule.

VII Conclusion

The standing of media organisations to challenge departures from open justice varies around Australia. The position in New South Wales, Victorian, South Australian and federal courts is clear, albeit varied. Common law jurisdictions have the benefit of a weak majority in *Re Bromfield*, which is contradicted by the New South Wales line of authority expressed in *Nationwide*. This inconsistency betrays the proposition that there is a common law of Australia. State Supreme Courts can ignore interstate principles if convinced they are plainly wrong, but they are of course bound by the High Court. Since *Levy*, and certainly since *iNet* and *Plaintiff S10*, the jurisdiction to permit intervention, and the test for when a non-party may intervene as of right, are settled. The only remaining question facing a court when a media organisation seeks to be heard is this: would this court’s decision directly affect this organisation’s legal rights or interests? When that decision involves a departure from open justice, the answer will be yes. The media is uniquely and inseparably linked to open justice. This unique connection is the foundation of the media’s standing to challenge departures from open justice. We ought to encourage their challenges to these departures. Open justice preserves the integrity of our judicial system and so strengthens our democracy.


238 Ibid.

239 In some States, this is an area for law reform through introduction of a register of suppression orders, or an obligation to inform the media. This would be consistent with other jurisdictions. See, eg, *Evidence Act 1929* (SA) s 69A(10)–69A(12).


241 *Kioa* (1985) 159 CLR 550, 584 (Mason J), 612 (Brennan J); *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J). See further Aronson, Dyer and Groves, above n 182, ch 8.


243 Ibid.
Abstract

The issue of defence disclosure in criminal proceedings has come under renewed focus as a result of the recent Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013 (NSW) which imposes comprehensive duties similar to those that exist in Victoria and England. This article argues that South Australia also needs legislative reform to implement broader requirements for pre-trial defence disclosure. This article suggests that cultural change amongst lawyers and judges is also required. South Australia would benefit from such reforms as it would improve the efficiency of the criminal trial process. The increased complexity and length of modern criminal trials, combined with the current financial climate, means that criminal procedural reform must be shaped by considerations for efficacy. The legislature must be willing to take a more managerialist approach to criminal procedure, while still preserving an accused’s rights within the adversarial system. It is suggested that the traditional arguments against defence disclosure are more rhetorical than real and that current resistance to South Australia’s existing pre-trial defence disclosure regime is explicable by a wider cultural resistance within the legal community to mandated defence disclosure. In order for a stricter regime of defence disclosure to be successfully implemented, Parliament needs to be mindful of this culture and provide incentives for an accused to participate in pre-trial disclosure, rather than relying solely on sanctions for noncompliance. Despite the challenges in this controversial area, a scheme for fair, effective and enforceable pre-trial defence disclosure can be identified and should be adopted in South Australia.
I INTRODUCTION

I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where the players may keep their cards up their sleeves.¹

These comments, offered by de Jersey CJ of the Supreme Court of Queensland in 2013, typify the regular calls over recent years for increased pre-trial defence disclosure in criminal proceedings.² This longstanding debate³ has been given renewed impetus in Australia following the recent introduction in New South Wales of the Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013 (NSW) (‘2013 NSW Act’). The 2013 NSW Act, reflecting similar approaches in England and Wales⁴ and Victoria,⁵ imposes comprehensive requirements for pre-trial defence disclosure.⁶ Managerial approaches to the administration of criminal justice


⁵ See Crimes (Criminal Trials) Act 1999 (Vic).

⁶ New South Wales, Parliamentary Debates, Legislative Assembly, 19 March 2013, 1883–2 (Greg Smith, Attorney-General).
have gained increased acceptance\(^7\) and inquisitorial characteristics have been increasingly adopted in recent years in pre-trial criminal case management.\(^8\) In this sense, criminal procedure reform may be seen as shifting away from a traditional and purely ‘adversarial’ approach.\(^9\)

At present, there are few defence disclosure requirements in South Australian criminal proceedings.\(^10\) However, even these duties are rarely observed\(^11\) and suffer problems with enforceability.\(^12\) The comprehensive pre-trial obligations of the prosecution to disclose both the evidence that it intends to lead at trial, and any relevant material in its possession (whether it helps or hinders the prosecution case),\(^13\) is entrenched and regarded as ‘the foundation of a fair trial’.\(^14\) It is widely accepted

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\(^{9}\) See Owusu-Bempah, above n 7, 15; Arie Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205.

\(^{10}\) See below Part II.

\(^{11}\) See below Part VI.

\(^{12}\) See *Criminal Law Consolidation Act 1935* (SA) ss 285BA–285C. See below Part V.


that the prosecutor’s duty of disclosure is required to level the playing field between the prosecution and the defence in an adversarial criminal process where the defence typically lacks the investigative ability and power available to police and prosecutors. As Abraham notes, ‘[t]he existence of the [prosecution disclosure] obligation is now beyond question.’ In contrast, the defence in South Australia plays a strictly limited disclosure role.

This article asserts that the current requirements of defence disclosure in South Australia are inadequate and that changes to present law and practice are appropriate. As early as 1998, Brian Martin QC observed that reform was necessary and that the ability of a well-resourced accused to put the prosecution to proof on every conceivable issue in a criminal trial without any notification of what was really in dispute ‘involves a cost that the prosecution and community can no longer afford’. The failure to resolve what is really in issue in a criminal trial ‘necessarily results in longer trials, confused juries and greater inconvenience and expense to victims, witnesses, police, prosecuting authorities and courts.’

Martin argued that a ‘realistic and balanced approach’ to disclosure was necessary and that ‘reform can be achieved without unfairly affecting the essential rights of defendants’. This article agrees with this view and suggests a more comprehensive framework for defence disclosure that is fair, realistic and effective. In a contested indictable case, this framework would encourage the defence to identify any positive defence, the issues of fact or law that it intends to dispute at trial and the basis on which this is to be taken. This approach can be viewed as part of the paramount role of any lawyer to act as an officer of the court, to present issues as clearly and expeditiously as possible, to cooperate in order to reduce unnecessary disputes and to maximise the effective use of limited judicial time and resources.
This article covers six main topics. First, it outlines the current limited requirements for defence disclosure in South Australia. Second, it summarises and then dismisses the usual arguments against increased defence disclosure in criminal proceedings. Third, it discusses the benefits of increased defence disclosure in South Australia. Fourth, it critically examines the more comprehensive regimes of defence disclosure that exist in Victoria, England and New South Wales to identify what measures South Australia could successfully adopt. Fifth, it suggests that while reform to increase defence disclosure may initially prove unpopular, it will be an important step in declaring best practice and in fostering a cultural change among the legal profession over time regarding this issue. Sixth, it argues that any reform in South Australia in this area would be more successful if it provided incentives for increased defence disclosure, rather than simply relying upon penalties for noncompliance.

This article is confined to consideration of defence disclosure after the prosecution has complied with its pre-trial duties of disclosure of any relevant material, as it is accepted by all Australian Directors of Public Prosecutions that the defence cannot be expected to make any disclosure until after the prosecution has satisfied its disclosure obligations. As Martin observes, whilst the notion of pre-charge investigative defence disclosure presents ‘obvious difficulties’, different considerations apply when the accused is before a court and through the committal and prosecution disclosure processes, is in a position ‘to see the full extent of the prosecution case’.

II THE EXISTING LAW IN SOUTH AUSTRALIA

The current defence duties of disclosure in South Australia are limited. If the defence wishes to raise an alibi during trial, it is required within seven days after an accused is committed for trial to provide the DPP with a ‘summary setting out with

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22 The highly contentious issue of defence disclosure in the police interview stage will not be considered in this article.

23 See, eg, Michael Rozenes, ‘Who Needs a Fair Trial’ (Speech delivered at the Sixth International Criminal Law Congress, Melbourne, 9 October 1996); Abraham, above n 2, 1–2; Martin, above n 17. It is accepted that significant problems remain in practice in both Australia (see, eg, Moynihan, above n 14, 93, 95–7; R v Mallard (2005) 224 CLR 125; Western Australia v JWRL [2010] WASCA 179 (10 September 2010) [91]) and England (see, eg, Gross and Treacy, above n 20, iv [14], 9 [62]; Plater and De Vreeze, above n 14, 146–53; Chris Taylor, ‘Advance Disclosure and the Culture of the Investigator: the Good Idea that never quite caught on’ (2005) 33 International Journal of the Sociology of Law 118; Chris Taylor, ‘The Disclosure Sanctions Regime: Another Missed Opportunity’ (2013) 17 International Journal of Evidence and Proof 272, 273, 279–81) as to the prosecution’s performance of its modern duties of disclosure.

24 Brian Martin, ‘Defence Disclosure, Points of Discussion: Summary of Personal Views’ (Paper presented at ‘Reforming Court Process for Law Enforcement — New Directions’, Australian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal and Civil Law Enforcement Cases, Brisbane, 3 July 1998); See also New South Wales Law Reform Commission, above n 2, 122 [3.112], where it was highlighted that an accused is in a ‘completely different’ position in relation to investigative, as opposed to pre-trial, defence disclosure.
reasonable particularity the facts sought to be established by the evidence’. The name and address of the alibi witness must also be provided.25

Various additional requirements of defence disclosure came into operation in South Australia on 1 March 2007 through amendments to the Criminal Law Consolidation Act 1935 (SA) (‘CLCA’), effected through the Statutes Amendment (Defence Disclosure) Act 2005 (SA). These changes were introduced in the aftermath of the Kapunda Road Royal Commission,26 amidst concern as to ‘ambush defences’27 (arising from a criminal trial in 2005 in which the accused was controversially acquitted after adducing mid trial expert evidence to explain his flight from the scene of a fatal collision).28 The duties in the 2005 Act are confined to the trial of an indictable offence before either the Supreme or District Courts.29

The defence may be asked under s 285BA of the CLCA to agree with specified facts nominated by the prosecution.30 The defence are then under a duty to respond. If an accused unreasonably fails to make an admission of facts, ‘the court should take the failure into account in fixing sentence’.31 A defendant may unreasonably fail to make an admission if he or she claims privilege against self-incrimination as a reason for not making the admission, and puts the prosecution to proof of facts that are not seriously contested at the trial.

Under s 285BB of the CLCA, a court may also on the application of the prosecutor, require the defence to provide the DPP with written notice of an intention to introduce evidence relevant to certain defences. These are namely mental incompetence or unfitness to stand trial, self-defence, provocation, automatism, accident, necessity or duress, claim of right, or intoxication.32 When the defence intends to introduce

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25 See Criminal Law Consolidation Act 1935 (SA) s 285C. Similar duties exist throughout Australia and in other common law jurisdictions.
26 South Australia, Kapunda Road Royal Commission, Report (2005).
28 See below n 179.
29 It is usually considered that it would not be cost effective to introduce a mandated system of defence disclosure in summary proceedings. See, eg, New South Wales Law Reform Commission, above n 2, 134 [3.14]. It is generally accepted that any disclosure scheme for the Magistrates’ Court needs to be simpler than that applying in the higher courts. See, eg, Senior District Judge (Chief Magistrate) Howard Riddle and Judge Christopher Kinch, ‘Magistrates Courts Disclosure Review’ (Review, Judiciary of England and Wales, May 2014) 43 [203]–[206].
30 Criminal Law Consolidation Act 1935 (SA) s 285BA(1).
31 Ibid s 285BA(6).
32 Ibid s 285BB(1). A court may also under s 285BB(4) at the application of the DPP ask the defence whether it consents to dispensing with the calling of witnesses proposed to be called by the prosecution to establish the admissibility of evidence of a technical nature such as surveillance or interview.
expert evidence at either trial or sentencing, it is required under s 285BC of the CLCA to provide the prosecution with the name and qualifications of the expert and must describe the general nature of the evidence and what it tends to establish. Additional requirements apply if the expert evidence is of a psychiatric or medical nature and relates to an accused’s mental state or medical condition at the time of an alleged offence.

These reforms were heralded by the then South Australian Attorney-General as ‘exciting’ and ‘controversial’. The Attorney declared it was ‘a major step forward in criminal trial reform’ and amounted to ‘the most important changes proposed to the criminal justice system since the major changes to the courts structure passed by parliament in 1992.’ However, the practical effect of the 2005 Act, despite the Attorney’s enthusiasm, has proved modest at best. The existing powers under ss 285BA and BB of the CLCA ‘are very rarely used’.

III ARGUMENTS AGAINST REFORMS INCREASING PRE-TRIAL DEFENCE DISCLOSURE IN SOUTH AUSTRALIA

Arguments in favour of maintaining the defence’s limited disclosure obligations emphasise the protection of fundamental principles including the right to a fair trial, the right to silence, the presumption of innocence and the privilege against self-incrimination. However, the arguments against increased defence disclosure in criminal proceedings are often more rhetoric than substance.

The elements constituting a fair trial cannot be exhaustively defined. It is often claimed that pre-trial defence disclosure somehow infringes the defendant’s ‘right

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33 Ibid s 285BC(2). The defence is not required to furnish the prosecution with the actual report of the expert it proposes to call. See R v Rice [2008] SADC 49 (2 May 2008) [26].
36 Ibid 3465.
37 Attorney-General’s Department (SA), Transforming Criminal Justice Consultation Paper: Efficient Progression and Resolution of Major Indictable Matters (2015) 13. See also South Australia, Parliamentary Debates, House of Assembly, 1 March 2012, 489 (John Rau, Attorney-General), noting that s 285BA, which encourages the use of agreed facts in criminal trials, is ‘underused’. Though there are no publicly available court statistics on this issue, Tim Preston of the South Australian DPP made a similar point to the authors.
39 See, eg, Dietrich v The Queen (1992) 177 CLR 292, 300.
to silence’.40 This argument is simplistic.41 As was noted in R v Director of Serious Fraud Office, ex parte Smith42 by Lord Mustill, the ‘right to silence’ is imprecise and means different things to different people and includes immunities ‘from being compelled … to answer questions the answers to which may incriminate them’ and for ‘persons who have been charged with a criminal offence, from having questions … addressed to them by police officers or persons in a similar position of authority’.43 Lord Justice Auld asserts that simply obliging the defence to disclose what he or she will only admit later at trial is not an attack on an accused’s right to silence.44 An accused remains entitled to not provide the details of their defence if they wish to put the prosecution to strict proof at trial.45

Those who oppose increased defence disclosure also argue that the notion of defence disclosure ‘degrades the presumption of innocence, the foundation principle of Anglo-American accusatorial criminal law’.46 This view asserts that defendants, who are presumed innocent, are compelled to contribute to their own conviction and they (or the State) are required to remunerate their lawyer to comply with pre-trial disclosure obligations.47 This argument is unconvincing. To require the defence to indicate prior to trial what aspect of the prosecution case is disputed, does not alter the fact that the burden of proof remains firmly on the prosecution, and the defence remains free to decide what its case will be, including to put the prosecution to proof of everything.48

41 See, eg, Sulan, above n 2, 9; Sir Robin Auld, Review of the Criminal Courts in England and Wales (Stationery Office, 2001) 396 [5].
44 Auld, above n 41, 459 [153]; See also Flatman and Bagaric, above n 38, 330.
45 Though with the qualification that there should be potential adverse consequences if the accused later raises a positive defence; See R v Rochford [2011] WLR 534, 540–1 [24].
47 Law Reform Commission of Western Australia, above n 7, 201; Victoria, Parliamentary Debates, Legislative Council, 26 May 1999, 1038 (Don Nardella); Griffith, above n 3, 16.
The privilege against self-incrimination is also raised as an objection to greater pre-trial defence disclosure.49 It is claimed that insisting upon pre-trial defence disclosure ‘conscripts a defendant into aiding his [or her] adversary’.50 However, as the English Royal Commission on Criminal Justice argued, requiring an accused to disclose the substance of their defence early on, ‘will no more incriminate the defendant nor help prove the case against him or her than it does when it is given in evidence at the hearing’.51 Every accused who raises a positive defence at trial (as opposed to simply putting the prosecution to strict proof to establish each element of the alleged offence) can be said to have waived any privilege against self-incrimination.52 It is, as the Royal Commission on Criminal Procedure found, simply a matter of timing.53

There is a lack of reason explaining, practically, how defence disclosure may undermine fair trial rights.54 Whether defence disclosure contravenes such fundamental rights may come down to the detail of the particular regime in place.55 However, when obligations are limited to requiring the defence to disclose only what they will later raise during the trial, the usual arguments against defence disclosure are overstated. Fair trial considerations do not create a complete shield against any capacity for the accused to assist the State.56 Pre-trial defence disclosure may occur without encroaching on the essential rights of an accused.57

The effects of defence disclosure on fair trial rights at the pre-trial stage compared to the police interview stage are minimal. At the pre-trial stage, an accused has had time to consider the nature and strength of the prosecution case, reflect on their position and obtain informed legal advice.58 As the New South Wales Law Reform Commission notes, ‘[t]he importance of the right to silence after the defendant has been committed for trial does not ... rest upon the same basis as that which exists before the event.’59 Much of the criticism on defence disclosure is more applicable to


51 Royal Commission on Criminal Justice, above n 48, 84 [2].

52 Cosmas Moisidis, Criminal Discovery: From Truth to Proof and Back Again (Institute of Criminology, 2008) 60.

53 Royal Commission on Criminal Justice, above n 48, 97–8 [60].

54 Flatman and Bagaric, above n 38, 327, 330.

55 Griffith, above n 3, 9.


57 Sulan, above n 2, 3.

58 New South Wales Law Reform Commission, above n 2, 121 [3.112].

the police interview stage. At that stage, an accused may be legally unrepresented and have little, if any, knowledge of the accusations against them.

IV Arguments for Reforms Increasing Pre-Trial Defence Disclosure in South Australia

A Reducing the Length and Complexity of Criminal Trials

Efficiency is a common theme in modern rules and practices for criminal procedure. As Spigelman CJ stated:

Throughout the common law world, over recent decades, the judiciary has accepted a considerably expanded role in the management of the administration of justice, both with respect to the overall caseload of the court and in the management of individual proceedings.

This purpose is reflected in various court rules. The South Australian Supreme Court Criminal Rules 2013, for example, promote the ‘just and efficient determination’ of the court’s business. The Rules endorse ‘a system of positive case-flow management’ under the court’s supervision to maximise ‘the efficient use of the available judicial and administrative resources’ and ‘[facilitate] the timely disposal of business at a cost affordable by the parties and the community generally.’ Similar Rules apply to the South Australian District Court. Asking the defence to disclose before trial the points of fact or law that they intend to rely upon is integral to modern proposals to streamline and improve the effectiveness of the criminal trial process.

The issue of defence disclosure is inevitably contentious. Whilst there is strong support for the ‘golden rule’ of modern criminal procedure that the prosecution should disclose to the defence in any criminal case any ‘relevant’ material in its

60 Most of the parliamentary opposition to the 2013 NSW Act focussed on the ‘right to silence’ during police interview as opposed to the enhanced requirements for pre-trial defence disclosure; See, eg, New South Wales, Parliamentary Debates, Legislative Council, 20 March 2013, 18856–72, 18886–904.

61 See, eg, Magistrates Court Criminal Rules 1992 (SA) r 8.01; District Court Criminal Rules 2013 (SA) r 13.06; Supreme Court Criminal Rules 2013 (SA) rr 4.01, 4.02, 13.06; Magistrates Court Act 1989 (Vic) s 1(c); Crimes (Criminal Trials) Act 1999 (Vic) s 1; Criminal Procedure Rules 2013 (UK) r 1.1(2)(e).


63 See, eg, Criminal Procedure Rules 2013 (UK).

64 Supreme Court Criminal Rules 2013 (SA) r 4.01.

65 Ibid r 4.02.

66 District Court Criminal Rules 2013 (SA) r 13.

possession,68 ‘any hint of reciprocating the disclosure obligation draws nothing less than howls of protest from the defence bar.’69 It is asserted by opponents that the notion of pre-trial defence disclosure is unfair, being at odds with the traditional paradigm of the adversarial criminal trial that requires no cooperation or assistance from an accused, and being inconsistent with the presumption of innocence.70

However, this view is increasingly untenable and concerns for efficiency provide the momentum for modern procedural reform in this area.71 The efficient use of resources in a climate of financial stringency and the timely resolution of disputes are vital objects of the modern criminal justice system.72 The increasing number of defendants and associated delays in a climate of economic austerity that confront the South Australian (and other Australian)73 higher courts are conspicuous.74 The most recent statistics highlight an 18-month backlog in criminal trials before the District

68 See, eg, R v H [2004] 2 AC 134, 147; Plater and de Vreeze, above n 14, 134; Abraham, above n 2, 1–2.

69 Brian Edward Maude, ‘Reciprocal Disclosure in Criminal Trials: Stacking the Deck against the Accused, or Calling Defence Counsel’s Bluff’ (1999) 37 Alberta Law Review 715; See also Rofe, above n 18, 23.

70 Moisidis, above n 52, 58.


72 Attorney-General’s Department (SA), Transforming Criminal Justice Strategic Overview (2015); See, eg, Magistrates Court Criminal Rules 1992 (SA) rr 8.01, 8.02.

73 Similar pressures exist elsewhere in Australia; See, eg, Nicola Berkovic, ‘Fewer Judges equals more Delays, says Wayne Martin’, The Australian, 19 May 2014; Emily Moulton, ‘Resources Shortage Delays Trials in WA Supreme Court, Magistrate Court hurt Victims’, Perth Now, 23 August 2014.

Court of South Australia.\textsuperscript{75} It is said that modern criminal litigation has descended into an ‘almost Dickensian procedural morass’.\textsuperscript{76} Pre-trial disclosure is a vital aspect of modern criminal procedure, shaping a trial’s nature, content and duration.\textsuperscript{77} Reform to pre-trial defence disclosure obligations in South Australia is necessary and overdue. ‘It is beyond argument that reform is needed’.\textsuperscript{78} Increased pre-trial defence disclosure would improve the efficiency of the criminal justice system.

Judicial officers and practitioners running modern criminal trials grapple with increased complexities and demands.\textsuperscript{79} This results both from the growing scope and sophistication of the evidence now led by the prosecution\textsuperscript{80} and the increased volume and complexity of the modern law, whether from Parliament\textsuperscript{81} or appellate courts.\textsuperscript{82}

It is no coincidence that the average length of criminal trials has drastically heightened over recent years.\textsuperscript{83} For example, the New South Wales Attorney-General

\textsuperscript{75} Sean Fewster, ‘SA District Court’s Backlog of 577 Cases Would Take More Than 18 Months To Hear, Court Reveals’, \textit{The Advertiser}, 27 March 2015.

\textsuperscript{76} \textit{R v Durette} (1992) 72 CCC 3(d) 421, 440.

\textsuperscript{77} Rozenes, ‘The Right to Silence’, above n 2, 1.

\textsuperscript{78} Attorney-General’s Department (SA), \textit{Transforming Criminal Justice Consultation Paper}, above n 37, 3.


\textsuperscript{80} See, eg, Rozenes, ‘The Right to Silence’, above n 2, 2; Johnson and Latham, above n 8, 5–6.


\textsuperscript{83} Chris Corns, \textit{Anatomy of Long Criminal Trials} (Australian Institute of Judicial Administration Inc, 1997) 1; Weinberg, ‘Criminal Trial Process’, above n 7, 11; South Australia, \textit{Parliamentary Debates}, Legislative Council, 29 November 2005, 3313 (Robert Lawson); McClellan notes that 30 years ago many murder trials took only a couple of days but now two and even four weeks were not uncommon; See McClellan, above n 2, 12. Average trial lengths in the NSW District Court increased from approximately 4.6 days in 1996 to 7.25 days in 2007 (see New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 6 May 2009, 14677 (John Hatzistergos)). The average length of a criminal trial before the District Court of South Australia is 6.5 days (see Fewster, ‘SA District Court’s Backlog of 577 cases’, above n 75).
commented during the passage of the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW) that the average length of criminal trials at the New South Wales District Court had increased in length from two and a half days in the 1970s, to four days in the late 1980s, to over eleven days in 2011. The ill effects of prolonged and drawn-out trials and the demands that such cases place on an overstretched criminal justice system are inestimable. Concerns about the volume, length and complexity of modern criminal trials support the argument for increased defence disclosure. There is, as Chief Justice De Jersey observes, ‘a seriously recognised need to keep trials within reasonable limits.’

The complexity and length of modern criminal trials is compounded by the fact that much time and resources may be expended in arguing issues that are not even in dispute. This was manifest in *R v Wilson*, a notorious fraud trial that took nearly two years and remains the longest criminal trial in Victorian history. The two accused were charged with the creation of a false prospectus. The defence of one of the accused was that he had not seen, nor was he aware of, the prospectus. Nevertheless, all of the prosecution evidence establishing the fact that the prospectus was false was challenged despite the fact that it was irrelevant to that accused’s defence. The other accused declined to admit anything, leaving all matters in issue. The result was that the prosecution was required to strictly prove each and every bit of evidence

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84 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18580 (Greg Smith, Attorney-General); The average trial length at the District Court had increased from 8.3 days in 2002, to 9.03 days in 2008 and to 11.62 days in 2011; See also New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18858–9 (Michael Gallacher).

85 See, eg, Janet Chan and Lynne Barnes, *The Price of Justice?: Lengthy Criminal Trials in Australia* (Hawkins Press, 1997) 1–4, 13–20, 44–6; Corns, above n 83, 1, 4–10; Chief Justice’s Advisory Committee on Criminal Trials, ‘New Approaches to Criminal Justice: Report of the Chief Justice’s Advisory Committee on Criminal Trials in the Superior Court of Justice’ (Report, Superior Court of Justice, May 2006) [3]; Brian Martin, ‘Adversarial Model’, above n 56, 1, 12. See, eg, *R v Lonsdale and Holland* (District Court of NSW, Judge Zahra, June 2008); see also McClellan, above n 2, 11; *R v Higgins* (1994) 71 A Crim R 429; *R v Petroulias [No 36]* [2008] NSWSC 626 (20 June 2008). A recent example of such a case was the six month trial of 12 defendants charged of terrorist offences in 2008 in *R v Benbrika* [2008] VSC 80 (20 March 2008) at the Supreme Court of Victoria. There were 27 barristers involved in the trial and the jury deliberated for 23 days. The exhaustive police investigation covered 18 months and generated 402 eight hour surveillance shifts by the police and 224 by ASIO. There were 16 400 hours of recordings including 98 000 telephone intercepts of which 62 968 related to the 12 defendants. These were eventually whittled down to 482 which were played at the trial and of which just three were arguably pivotal to the prosecution case; See Gary Hughes, ‘Lies, Bombs and Jihad’, *The Australian*, 16 September 2008.

86 See, eg, Rozenes, ‘Fair Trial’ above n 23; *R v Ling* (1996) 90 A Crim R 376, 382 (Doyle CJ).

87 Chief Justice de Jersey, above n 2, 5.

irrespective of whether it was in dispute.89 Similarly, in *Director of Public Prosecutions v Sarosi*90 in 2000, the indiscriminate taking and argument by the defence of every point, whether bad or good, and their ‘inexcusable obfuscation’ in a straightforward case of obstructing police made a ‘travesty of the adversarial system’ and prolonged what should have been a one day trial into an ‘ungovernable monster’ of 27 days in duration.91

Whilst *Wilson* and *Sarosi* may be extreme examples, they are not unique. One trial judge as early as 1994 deplored the ‘alarming culture’ at the Victorian Bar that dictated that no case was too long or too costly, no issue too small to explore at inordinate length, no number of questions too many, no speech too long and that concessions and admissions should never be made.92 It is not unusual for defence lawyers to refuse to admit anything and insist that the prosecution establish each element of the alleged offence, whether or not those elements are in dispute.93 A former Commonwealth DPP similarly remarked that there are defence lawyers (both privately funded and legally aided) ‘who simply instruct their counsel to leave no stone unturned’.94

A recent example of this approach is the South Australian case of *R v Mustac*95 (even though the accused belatedly pleaded guilty on the first day of trial). The South Australian Court of Criminal Appeal was critical of the unreasonable failure of the defence in that case to respond to a notice to admit facts. The court commented that well before the trial, the DPP had filed a notice to admit facts pursuant to s 285BA of the *CLCA* and was granted leave to serve the notice on the defence.96 The notice identified several straightforward facts surrounding the circumstances of the charge, such as whether the accused owned a particular mobile phone found in a vehicle he

90 [2000] VSC 71 (10 March 2000) (‘Sarosi’).
91 Ibid [3], [16]; See also *R v Lonsdale and Holland*, where the trial judge was compelled to abort the trial after 66 days of testimony from 100 witnesses after it was discovered that several of the jurors had been playing Sudoku during the trial. The defence had contended that the police acted improperly during a search and insisted upon the jury listening to the entire tape recording of the search (even though many hours of it was only silence) and a large amount of surveillance tapes being played. See McClellan, above n 22, 11; Criminal Law Review Division, above n 89, 19.
95 (2013) 115 SASR 461 (‘Mustac’).
96 Ibid 467 [27].
was said to have driven. The defence, once served, replied that it did not admit the facts. The Court of Criminal Appeal noted that ‘in the course of sentencing submissions, the judge asked defence counsel why facts which were “so venial as to really not interfere or should not interfere with the proper defence of the matter” should not be admitted by the defence’. Defence counsel had responded at an earlier stage that it was not his role to provide the DPP with ‘assistance in proving their case’ and intimated his practice was never to respond to a notice to admit agreed facts.

Chief Justice Kourakis was critical of the approach of defence counsel, ruling that there was no valid reason for not admitting any facts which were capable of proof by business records or police witnesses and that were true and not genuinely in dispute. The Chief Justice held that the failure to admit these straightforward and non-contentious facts was material to sentencing under s 285BA and reflected an unwillingness on the part of the accused ‘to facilitate the course of justice’.

Mustac exemplifies the judiciary’s emphasis on reasonable efficiency and serves as a warning that a defence lawyer’s ill-considered adherence to silence may not be well received. In this case, the Appeal Court invoked s 285BA (its first apparent use in South Australia) and treated the defendant’s failure to admit facts as a factor weighing against a reduction of sentence when it considered other factors that may otherwise have had a mitigating effect, such as Mustac’s belated guilty plea on the first day of the trial.

Pre-trial defence disclosure is likely to improve efficiency at a time when the criminal courts are struggling to deal with the volume of work before them. Pre-trial defence disclosure should provide for the early identification of the issues to be contested between the parties. Prosecution disclosure of ‘relevant’ material may proceed on a speculative basis in ignorance of the real issues at trial, and reciprocal pre-trial defence disclosure has the potential to make prosecution disclosure more accurate and comprehensive. It will also serve to reduce the length and complexity of the

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97 Ibid 468–9 [28].
98 Ibid 469 [30].
99 Ibid 469 [30]–[31]. See also R v Gannon (2012) 113 SASR 1, 3[9], where the defence failed to even respond to the prosecution’s application to agree facts under s 285BA.
100 (2013) 115 SASR 461, 469 [32].
101 Ibid 470 [36]. This aspect of the decision was appealed to the High Court. The High Court refused leave to appeal. See Transcript of Proceedings, Mustac v The Queen [2013] HCATrans 326 (13 December 2013).
102 New South Wales Law Reform Commission, Report No 95, above n 2, 118 [3.107].
103 See, eg, Royal Commission on Criminal Justice, above n 48, 100 [73]; Leng, above n 71, 708; Martin, ‘Defence Disclosure’, above n 23, [1]; Flatman and Bagaric, above n 38, 329, 334; Abraham, above n 2, 3, 6, 14; New South Wales Law Reform Commission, ‘Report No 95’, above n 2, 118–9 [3.107]; Auld, above n 41, 460 [156]; Sulan, above n 3, 3.
104 See, eg, Abraham, above n 2, 6, 13; Plater and de Vreeze, above n 14, 166; Rofe, above n 18, 1, 23.
trial to ensure that it only focuses on contested issues.\textsuperscript{105} The necessary evidence to be adduced will also be limited once the real issues become clear.\textsuperscript{106} Confining the issues is likely to benefit the jury’s understanding of the case and evidence presented at trial.\textsuperscript{107} Increased defence disclosure may lead to the charge being withdrawn or an earlier resolution of the case through guilty pleas.\textsuperscript{108} The early identification and determination of issues also provides certainty as to the content and duration of a criminal trial.\textsuperscript{109}

Though some delay in the progress of criminal proceedings is both necessary and inevitable (such as until the prosecution satisfies its duty of disclosure), it is avoidable delay that should be addressed.\textsuperscript{110} Brian Martin QC states that ‘carefully managed’ changes to the adversarial system will not unfairly affect the interests of the accused.\textsuperscript{111} Procedural reforms must recognise the interests of all parties within the criminal justice system, while maintaining the accused’s right to a fair trial. While it is permissible for the defence to insist that the prosecution prove each element of the alleged offence (if that is the approach the defence wish to follow), care should be taken to ensure that the defence’s conduct remains responsive, considered and reasonable in the circumstances. As McEwan argues, it is not a fundamental defence right to be able to compel prosecutors to operate in the dark and to force them to spend their limited time and resources amassing evidence to rebut a range of possible defences, which may not even be pleaded, or otherwise risk an ‘unmeritorious acquittal’ arising from a distorted or inadequate presentation of the facts.\textsuperscript{112}

To require the defence to disclose its broad case before trial is also consistent with the wider purpose of a criminal trial. Though it is understandable why, as a matter...


\textsuperscript{108} Royal Commission on Criminal Justice, above n 48, 97 [59]; See also Glynn, above n 106, 841; NSW Law Reform Commission, ‘Report No 95’, above n 2, 118 [3.107].


\textsuperscript{110} Weinberg, ‘Criminal Trial Process’, above n 7, 3.

\textsuperscript{111} Martin, ‘Adversarial Model’, above n 56, 8.

of tactics, a defendant and/or his or her lawyers might prefer to keep their case close to their chest, that is not a valid reason for preventing a full and fair hearing on the issues canvassed at trial.\textsuperscript{113} As Auld LJ observes:

A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.\textsuperscript{114}

B Reducing Costs

Improving the efficiency of criminal trials should benefit all parties, namely victims, the accused and the public that the court serves.\textsuperscript{115} The reduction of costs, delays and backlogs in the court system will spare victims, witnesses and jurors the time and emotional stress of unnecessarily prolonged proceedings.\textsuperscript{116} An accused may also enjoy sentencing benefits for early cooperation if found guilty, as well as decreased legal costs.\textsuperscript{117} Indeed, a level of informal pre-trial disclosure by the defence currently often exists in criminal proceedings,\textsuperscript{118} indicating that it may well be in the interests of the accused for his or her lawyer to divulge certain material at an early stage.

C Increased Pre-Trial Defence Disclosure is Consistent with Counsel’s Duty to Assist the Court

Traditionally, the parties in an adversarial trial are viewed as opponents, battling to promote the interests of their client above all else.\textsuperscript{119} The Supreme Court of

\textsuperscript{113} \textit{R v Gleeson} [2004] 1 Cr App R 406, 416.

\textsuperscript{114} Auld, above n 41, Ch 10 [154].

\textsuperscript{115} See, eg, Craigie, above n 107, 4; Abraham, above n 2, 14.

\textsuperscript{116} Standing Committee of Attorneys-General, above n 93, 36; Victoria, \textit{Parliamentary Debates}, Legislative Council, 2 June 1999, 1041 (Carlo Furlgetti); New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 13 March 2013, 18537 (Greg Smith, Attorney-General).

\textsuperscript{117} Victoria, \textit{Parliamentary Debates}, Legislative Council, 2 June 1999, 1041 (Carlo Furlgetti); Sulan, above n 2, 3. See also \textit{Criminal Law (Sentencing) Act 1988 (SA)} s 10B.


Canada in *R v Stinchcombe*\textsuperscript{120} observed that under such a model, the defence had ‘no obligation to assist the prosecution’ in a criminal trial in the context of disclosure and was ‘entitled to assume a purely adversarial role toward the prosecution’.\textsuperscript{121} This approach is reflected in a number of decisions of the High Court of Australia which emphasise the accusatorial nature of a criminal trial and that the defence is entitled to say and do nothing and is entitled to put the prosecution to strict proof and establish each element of the alleged offence beyond reasonable doubt.\textsuperscript{122} The Victorian Bar *Practice Rules* provide that ‘a barrister appearing for the accused is under no duty, other than by compulsion of law, to disclose to the court or the prosecution the nature of the defence case’.\textsuperscript{123}

The overriding duty of counsel to act diligently and expeditiously has become increasingly prominent over recent years.\textsuperscript{124} The paramount duty of all lawyers to promote the efficient use of public resources and court time has been emphasised in both English\textsuperscript{125} and Australian\textsuperscript{126} Court Rules (though the Australian Rules do not do this to the same extent as the English Rules) and endorsed in numerous Australian

\textsuperscript{120} [1991] 3 SCR 326.

\textsuperscript{121} Ibid 332. See also Dawkins, above n 50, 38.


\textsuperscript{125} Criminal Procedure Rules 2013 (UK). The objectives of the English Rules include: acquitting the innocent and convicting the guilty; dealing with the prosecution and defence fairly; respecting the interests of witnesses and dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in issue, the severity of the consequences to the defendant and others affected and the needs of other cases. Rule 1.2 imposes upon all the participants in a criminal case a duty to prepare and conduct the case in accordance with the overriding objective; to comply with the rules; importantly, to inform the court and all parties of any significant failure, whether or not the participant is responsible for that failure and to take any procedural step required by the Rules. Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing the case. These Rules apply to all criminals courts and all stages of the criminal process and, as observed in *R (On the Application of the DPP) v Chorley Justices* [2006] EWHC Admin 1795 [20], ‘have effected a sea change in the way in which cases should be conducted … The rules make clear that the overriding objective is that criminal cases be dealt with justly; that includes … dealing with the case efficiently and expeditiously.’ See also *Newcombe v Crown Prosecution Service* [2013] EWHC 2160 (Admin) [7]; *R v Clarke* [2013] EWCA Crim 162 [75]; *R v Siddall* [2006] EWCA Crim 1353 [57]; See also McEwan, ‘From Adversarialism to Managerialism’, above n 61.

\textsuperscript{126} See above n 61.
cases. For example, in Victoria, it has been held that: ‘... part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed.’

In the High Court of Australia, Mason CJ observed:

notwithstanding that the client may wish to chase every rabbit down its burrow ... a barrister’s duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client’s success, but also to the speedy and efficient administration of justice.

This approach is confirmed in the South Australian Barristers’ Conduct Rules, which provide that a barrister must promote the efficient administration of justice by confining the case to those issues genuinely in dispute and occupying ‘as short a time in court as is reasonably necessary to advance and protect the client’s interests’. This approach has gained wide acceptance.

The duty to act expeditiously may raise issues of conflict with a lawyer’s duties to their client, notably the duty to ‘promote and protect fearlessly and by all proper and lawful means the lay client’s best interests’. The Victorian Court of Appeal requires that both duties must be served, stating that a legal practitioner must ensure

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130 South Australian Bar Association, Barristers’ Conduct Rules (at February 2010) r 57(a), (e).


132 Ipp, above n 21, 99.


134 South Australian Bar Association, Barristers’ Conduct Rules (14 November 2013) r 37(a).
that the ‘course chosen in the interests of the client is compatible with this overarch-
ing duty (to the court)’.  

These apparently competing duties can be reconciled. Increased pre-trial defence
disclosure can assist an accused and does not necessitate abandoning a robust
defence. As Warren CJ points out, the interests of the client are usually served
best by the presentation of only the real issues in dispute.  

Defence counsel can and should be ‘adversarial’ while appreciating that the defence’s strongest possible
argument is likely to be the one that focuses the judge and/or jury’s minds directly
and concisely on the defence’s best points and does not irritate or confuse with
protracted or wasteful tactics. As such, cooperation with the prosecution in identi-
fying the issues in dispute and the defences to be raised is useful and beneficial for
all parties. Finally, it is clear that counsels’ duty to the court is paramount, and the
obligation to effectively use the limited time and resources of the court precludes
reliance upon such devices.

V Lessons from Other Jurisdictions’
Pre-Trial Disclosure Schemes

This article now examines the comprehensive regimes of defence disclosure that
exist in Victoria, England and New South Wales to identify what measures South
Australia could successfully adopt. Unfortunately, in the various jurisdictions, efforts
at successful reform have proved elusive. The formulation of a fair yet efficient
and workable disclosure regime has been described as impossible. No disclosure
scheme attracts universal acceptance. Nevertheless, this should not deter efforts
to establish the best possible system, which should be continually reviewed and
improved as practice norms and attitudes evolve.

A 1993 Reforms in Victoria

The first extensive pre-trial disclosure regime in Australia was established in Victoria
by the Crimes (Criminal Trials) Act 1993. This Act was introduced to ‘facilitate the
efficient conduct of criminal trials’. Under this Act, the defence was obliged to
disclose elements of the alleged offence which were not admitted and notify the

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135 A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd (2009) 25 VR 189, 193–4 [15]; See also lpp, above n 21, 103.
136 Ibid.
137 Plater and de Vreeze, above n 14, 183–5.
138 Ibid.
140 Ibid.
141 Crimes (Criminal Trials) Act 1993 (Vic) s 1.
prosecution of facts and inferences within the prosecution statement with which issue was taken. They were also required to divulge any expert witness statements, reply to propositions of law within the prosecution statement and disclose any propositions of law the defence intended to rely on at trial.\textsuperscript{142} These duties did not apply in all cases and were only invoked when ordered by a judge.\textsuperscript{143} The obligations proved controversial and were rarely used in practice.\textsuperscript{144} The scheme was frustrated by the combative approach of participants, notably defence lawyers.\textsuperscript{145} The scheme was amended in 1999 by the \textit{Crimes (Criminal Trials) Act 1999} (Vic) to narrow the matters that the defence needed to disclose. The Victorian Attorney-General explained that the 1999 Act was designed to build upon the 1993 Act and allow effective judicial case management, enable the issues in dispute to be defined prior to the trial and facilitate effective discussion between the parties.\textsuperscript{146}

B 1996 Reforms in England, Wales and Northern Ireland

The \textit{Criminal Procedure and Investigations Act 1996} (‘\textit{CPIA}’) introduced comprehensive defence disclosure requirements in England and Wales.\textsuperscript{147} Changes in 2003 detail the contents of a defence statement in response to prosecution disclosure.\textsuperscript{148} This includes the disclosure of any particular defence or defences an accused tends to rely upon, as well as a response to whether the defence takes issue with aspects of the prosecution’s case.\textsuperscript{149}

The English disclosure system has attracted support.\textsuperscript{150} Lord Justice Auld, for example, stated that the English requirements were a fair way to identify the issues and may have the effect of allowing the prosecution to disclose further material that could assist the defence, once the prosecution is put on notice of the defence’s case.\textsuperscript{151} Conversely to the situation in Victoria, the British Parliament has not only retained

\textsuperscript{142} Ibid ss 4, 5(1)(f), 11.
\textsuperscript{144} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 5 May 1999, 812 (Jan Wade, Attorney-General); New South Wales Law Reform Commission, ‘Report No 95’, above n 2, 86 [3.31].
\textsuperscript{145} See Dawkins, above n 50, 48–9, 52; Corns, above n 83, 38.
\textsuperscript{146} See Moisidis, above n 52, 75.
\textsuperscript{147} \textit{Criminal Procedure and Investigations Act 1996} (UK) ss 5–6E.
\textsuperscript{148} \textit{Criminal Justice Act 2003} (UK) s 33(2).
\textsuperscript{149} \textit{Criminal Procedure and Investigations Act 1996} (UK) s 6A(1)(a)–(c).
\textsuperscript{150} See, eg, McEwan, ‘Truth, Efficiency and Justice’ above n 112, 204–6, 209–10; Gross and Treacy, above n 20, 1–2 [23].
\textsuperscript{151} Auld, above n 41, 455 [142].
the 1996 disclosure model but has strengthened the defence disclosure requirements on more than one occasion.\footnote{152}

However, the English defence disclosure regime has often been described as a failure.\footnote{153} Defence statements have often been noted to be inadequate and failing to meet the requirements of the CPIA.\footnote{154} Commentators note that the English system has been frustrated by the adversarial culture of defence lawyers and their perhaps unsurprising reluctance to co-operate with a process that they consider incriminates defendants.\footnote{155}

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\textbf{C 2013 Reforms in New South Wales}

The 2013 NSW Act is broadly based on the Victorian and English provisions. Previously, the court could order pre-trial disclosure obligations on the prosecution and defence on a case-by-case basis.\footnote{156} Though these powers were only sparingly used,\footnote{157} there is some indication that such pre-trial disclosure reduced trial time by narrowing the issues in dispute.\footnote{158} However, there were continued concerns in New South Wales over the length of criminal trials and delays.\footnote{159} The New South Wales Trial Efficiency Working Group stated that, despite some progress in addressing

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\footnote{152}{The first amendments through s 33 of the \textit{Criminal Justice Act 2003} that came into operation on 4 April 2005 require the accused to set out the nature of the defence in general terms, to indicate the matters upon which the accused takes issue with the prosecution case and to set out in relation to each such matter why issue is taken. The CPIA was further tightened by s 60 of the \textit{Criminal Justice and Immigration Act 2006} that came into operation on 3 November 2008 and requires the defence to notify the prosecution of the particulars of any matters of fact on which the accused intends to rely on in his or her defence. There is an additional requirement for the defence to provide to the prosecution the names, addresses and dates of birth of any defence witnesses.}


\footnote{155}{Quirk, above n 124, 46; Plotnikoff and Woolfson, above n 154, 131.}

\footnote{156}{\textit{Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001} (NSW) sch 1 \[2\].}

\footnote{157}{See, eg, Criminal Law Review Division, above n 89, 6–7, 28–9; Johnson and Latham, above n 8, 10; New South Wales, \textit{Parliamentary Debates}, Legislative Council, 20 March 2013, 18859 (Michael Gallacher).}

\footnote{158}{Standing Committee on Law and Justice, ‘\textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001}’ (Report No 26, NSW Legislative Council, 8 December 2004) 34 \[4.10\].}

\footnote{159}{Criminal Law Review Division, above n 89, 10; Standing Committee on Law and Justice, above n 158, 7, 32; New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 13 March 2013, 18578 (Greg Smith, Attorney-General).}
delays, ‘there are nevertheless compelling grounds to suggest that the efficiency of criminal trials could be improved’.  

Though there was support for the 2013 NSW Act, there was also criticism. Ian Barker QC, for example, argued that enhanced defence disclosure was unnecessary. He noted that more than 95% of criminal cases involve guilty pleas and of those that eventually proceed to trial before a jury, more than 90% are straightforward and speedy. Barker states that agreements and informal disclosures between the prosecution and defence occur frequently and should lead to voluntary disclosure protocols, rather than any mandatory disclosure scheme. However, Barker’s view overlooks the importance of defence disclosure in those 10% of criminal cases that are lengthy and complex in nature. It also overlooks the fact that even comparatively straightforward cases may give rise to subtle issues of disclosure and the undesirable consequences of ‘trial by ambush’. As Smith argues:

> It should be noted that the problems associated with defence by ambush are not confined to those cases where it manifests itself in a way which necessarily catches the prosecution off guard. The fact that the defence … is not obliged to serve a defence statement means that the prosecution must prepare itself for every conceivable defence. If the prosecution simply prepares for the obvious defence it risks being taken by surprise and being ‘headed off at the pass’. Usually preparation for the obscure, undisclosed, defence will turn out to have been overcautious and unnecessary. If the defence were required to give advance notice of the issues … it would not simply avoid ambush defences but would save the prosecution’s time (and the public’s money) in preparing to counter phantom

160 Criminal Law Review Division, above n 89, 15.
162 See, eg, David Dixon and Nicholas Cowdery, ‘Silence Rights’ (2013) 17 Australian Indigenous Law Review 23, 25–6, 34; David Hamer, ‘Mandatory Defence Disclosure in NSW’ (2013) 38 Alternative Law Journal 129. Of the interested parties on the relevant Working Group, it was reported that only Latham and McClellan JJ supported the enhanced defence disclosure requirements whilst the new regime was opposed by the DPP, the Chief Judge of the NSW District Court and defence lawyers as unnecessary and bureaucratic. See Harriet Alexander, ‘Push for Unpopular Laws that Reduce Safeguards’, Sydney Morning Herald (online), 14 March 2013 <http://www.smh.com.au/nsw/push-for-unpopular-laws-that-reduce-safeguards-20130313-2g0t7.html>.
163 Griffith, above n 3, 24.
164 Ibid.
165 Colin Wells, Abuse of Process: A Practical Approach (Legal Action Group, 2006) 70. Prosecutors ‘cannot be expected to know what might be useful to the defence at trial’ (Quirk, above n 124, 52).
defences that were never contemplated. It would also save the court wasting time on hearing evidence on matters which are not in dispute.\textsuperscript{166}

A disclosure regime is likely to not have the effect of stifling voluntary disclosure between parties, but, by making defence disclosure more common, should rather normalise and encourage it in the culture of criminal practice. Reforms should be drafted in a way to make it clear that any mandatory requirements do not prohibit the parties making further additional disclosure arrangements should they desire.

\textbf{D Lessons to be Learnt From the Other Jurisdictions}

From examining the regimes in the jurisdictions above, it can be readily concluded that to be successful, pre-trial disclosure schemes should improve efficiency. Without this, including time and cost savings, their purpose will be frustrated. A main concern is that increased pre-trial defence disclosure may result in an increase in pre-trial applications or interlocutory proceedings, thus leading to more delay before any trial.\textsuperscript{167} The criminal trial process should not become more cumbersome as a result of pre-trial disclosure.\textsuperscript{168}

It cannot, however, be expected that pre-trial disclosure will increase efficiency in all cases. It might cause further delay in some matters. However, this possibility does not weaken the argument for an improved scheme with a practical focus. It is suggested that defence disclosure requirements could be effective overall in reducing the length of proceedings. Pre-trial defence disclosure obligations should not be limited to being imposed by court order. This would risk the possibility that courts may rarely order defence disclosure. In order to achieve consistency and real effect, it is preferable that a statutory duty of defence disclosure exists, which should arise in any contested indictable case to be heard before a superior court.

Defence disclosure obligations could apply automatically to all defendants charged with an indictable offence. This article argues that defence disclosure obligations should arise in any contested indictable case to be heard before a superior court but that the summary courts should be exempted from such a requirement. A blanket rule of mandatory defence disclosure in all criminal cases, whether or not they are actually needed, is likely to prove an unnecessary and even unhelpful bureaucratic formality and any such rules may have the effect of causing greater delays and costs.

\textsuperscript{166} Victor Smith, ‘Defence by Ambush’ (2004) 168 Justice of the Peace Notes 24. Though Smith argues in favour of extending mandated defence disclosure to summary proceedings, his underlying themes are of general application.

\textsuperscript{167} Royal Commission on Criminal Justice, above n 48, 222 [9]; Dawkins, above n 50, 41–2; NSW Standing Committee on Law and Justice, above n 158, 36–7 [4.14]–[4.15]; Criminal Law Review Division, above n 89, 29; Craigie, above n 107, 13.

Of course, without the acceptance of the judiciary and prosecution and defence lawyers, new statutory procedures and duties are of little use. The inflexibility of such obligations compared to nuanced voluntary disclosure between skilful lawyers means that they may well fail to be accepted by the legal profession. In both Victoria and England, the reluctance of defence lawyers to comply with statutory disclosure obligations and the unwillingness or inability of judges to enforce such statutory obligations was notable.

Critically, a feasible level of defence disclosure must be required for any reforms to be successful. To understand what level is appropriate, it is helpful to grasp that defence disclosure may include the divulging of a wide range of fact, law, evidence or responses to the prosecution’s case. The options fall into three categories.

First, the defence may be required to state the general terms of their case, including an identification of the aspects of the prosecution’s case with which they take issue and perhaps the facts of the case they intend to present. Requiring the defence to state the general terms of their case is controversial. Any such proposal is likely to attract opposition from defence lawyers and the judiciary may prove reluctant to enforce strict compliance.

Second, the defence may be required, (as under s 285BB of the *CLCA*), to specify any defences they intend to rely on at trial. The necessity of requiring the accused to disclose particular defences is sometimes questioned. It is argued that any competent prosecutor can anticipate most defences before a trial as they are generally identifiable from the relevant evidence (especially as most accused volunteer their account in interview with the police) and that so called ‘ambush’ defences that

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169 Wade, above n 114, 812, 813; Criminal Law Review Division, above n 89, 47. See also below Chapter V: Enforceability and Sanctions — *A Trial Participants Influencing Enforceability*.

170 Wade, above n 144, 812; Plotnikoff and Woolfson, above n 154, 131; Criminal Law Review Division, above n 89, 46; Quirk, above n 124, 46; Plater and de Vreeze, above n 14, 165–6.


173 NSW Law Reform Commission, Report 95, above n 2, 129 [3.131]. Under the UK regimes, the defence must disclose both the general nature of their defence and any particular defences that they intend to raise at trial (see *Criminal Procedure and Investigations Act 1996* (UK) s 6A(1)(a); *Criminal Procedure (Scotland) Act 1995* s 70A(9)(a).


175 Roger Leng, ‘The Right to Silence Debate’ in David Morgan and Geoffrey Stephenson (eds) *The Right to Silence in Criminal Investigations* (Blackstone Press, 1994) 19, 22–8 (only 5% of defendants refused to answer questions); John Pearse and Gisli Gudjonsson, ‘Police Interviewing and Legal Representation: a Field Study’ (1997) 8 *Journal of Forensic Psychiatry* 200, 200–8 (the majority of suspects in a survey where the majority had been legally represented in interview not only answered all
take the prosecution by surprise are rare in practice. However, it is by no means always possible to anticipate what defence will be mounted at trial. A significant number of accused exercise their right to silence in interview with the police. Also ambush defences, whilst not routine, are far from unknown in both Australia and questions but even admitted their guilt); NSW Law Reform Commission, Report No 95, above n 2, 15 [2.15] (noting ‘most’ suspects answered questions in interview and quoting three Australian studies showing only 4, 7 and 9% of suspects failed to answer questions: at 16 [2.16].


For example in 2003 in *R v Huntley* [2005] EWHC 2083 (QB) (29 September 2005), the Soham murder trial, it was not until the end of the third week of the trial that the accused first volunteered his ‘preposterous’ defence that the two young female victims had been accidentally killed by him: see Editorial, ‘Accounting for Huntley’, *The Guardian* (online), 18 December 2003, <http://www.theguardian.com/uk/2003/dec/18/soham.ukcrime9>. In a similar vein, the trial of two of the individuals responsible for the foiled July 2005 London terrorist bombing was delayed by nine months after they, came up with a completely new defence at the start of the original date fixed for trial, and, in the words of the trial judge, ‘attempted cynically to manipulate the process of this court’ (Lord Justice Brian Leveson, ‘Criminal Justice in the 21st Century’, the Roscoe Lecture, Liverpool, 29 November 2010).


See NSW Law Reform Commission, *Research Report*, above n 194, [3.64]–[3.65]. It was also noted that ambush defences were not ineffectual when used, but contributed to the outcome of the trial: at [3.69]–[3.70]. For examples of ambush defences, see *R v Clark* [2005] VSCA 294 (9 December 2005) [11]; *DPP v Cummings* [2006] VSC 327 (11 September 2006) [69]–[70]; *R v Stoten* [2010] QSC 136 (27 January 2010). The expert evidence adduced at the controversial trial of Eugene McGee in South Australia in 2005 explaining his flight from the scene of a fatal accident due to automatism can be seen as an ‘ambush’ defence. Prosecution counsel described it as a ‘good ambush’
even England (where such defences, despite strong statutory and judicial censure, persist).¹⁸⁰

Increased certainty promotes prosecutorial efficiency, which is in the public interest. Requiring an accused to disclose their defence before a trial should require the provision of a good reason at trial if they wish to amend the defence or raise a different one.

Third, there exists a category of disclosure that may be described as ‘machinery provisions’ concerned with expert and other technical evidence that will often be in dispute.¹⁸¹ Sections 285BB¹⁸² and 285BC¹⁸³ of the CLCA can be seen as examples of this form of defence disclosure.

Finally, if the defence wishes to put the prosecution to strict proof on each element of the offence and raise no positive defence, this entitlement should be retained under any disclosure regime. The English Court of Appeal found that an accused may satisfy the defence statement requirements under the CPIA by simply stating that it puts the prosecution to proof and raises no positive defence.¹⁸⁴ However, the vital qualification to this entitlement (as was made clear in R v Rochford)¹⁸⁵ is that an accused should not raise a positive defence and, if the accused does so, potential adverse consequences should result.

E The Take-Away for South Australia

Defence disclosure in South Australia should be limited to the present obligations in the CLCA as well as the requirement that the defence also disclose the aspects of the prosecution case with which they have issue (including the basis of that issue) and any positive defence that they intend to raise. This obligation should arise in any contested indictable case to be heard before a superior court. This is the most pragmatic and effective solution, which aims to assist the prosecution and promote

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¹⁸² The defence in South Australia must notify the prosecution under s 285BB if it is willing to agree to various technical types of evidence to be led by the prosecution. See also above n 32.
¹⁸³ The defence in South Australia must provide the prosecution under s 285BC with details of any expert evidence it proposes to adduce. See also above Part II.
efficiency while also recognising the accusatorial characteristic of the common law criminal trial and striking an appropriate balance. As the Standing Committee of Attorneys-General summarises, ‘[i]t must be recognised that a defendant should not be expected to identify the defence case to the same depth and breadth as the Crown.’

Another option to consider in conjunction with stronger statutory requirements is the appointment of specialist judges to conduct and oversee pre-trial conference or directions hearings. Such judges may have particular expertise in facilitating disclosure and agreement on issues in dispute. The judge’s prospects of encouraging agreement on issues not in dispute may be affected by factors such as the judge’s familiarity with the case, the judge’s acquaintance with the practitioners and the attitude of counsel.

VI A CULTURAL CHANGE

Legal representatives may fearlessly advocate their client’s interests, but only so far as it is consistent with the proper and effective use of court resources and time. The cooperation of counsel in complying with disclosure obligations is imperative to the success of fair and efficient criminal proceedings. A fundamental cultural change is needed so all lawyers regard it as part of their professional duty to fully comply with disclosure obligations and promote the fair and efficient administration

186 Standing Committee of Attorneys-General, above n 93, 48.
187 Criminal Law Review Division, above n 89, 77; Griffith, above n 3, 32, 35; Standing Committee of Attorneys-General, above n 93, 8; WA Law Reform Commission, above n 7, 97 [12.2].
188 Standing Committee of Attorneys-General, above n 93, 8; Victoria, Parliamentary Debates, Legislative Council, 2 June 1999, 1042 (Carlo Furletti); Griffith, above n 3, 32, 35.
189 Criminal Law Review Division, above n 89, 77.
190 Ibid.
191 A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd (2009) 25 VR 189, 193 [15].
193 See, eg, A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd [2009] VSCA 208 (24 September 2009) [15]; Wilson [1995] 1 VR 163, 180, 185; Aronson, above n 2, 28; Martin, ‘Adversarial Model’, above n 56, 8; Redmayne, ‘Process Gains and Process Values’, above n 8, 86; Martin, ‘Prosecution Issues’, above n 17, 3; Standing Committee of Attorneys-General, above n 93, 43; Abraham, above n 2, 14; Criminal Law Review Division, above n 89, 17, 18, 70–4; Chief Justice de Jersey, above n 1, 7.
of justice. Professional obligations to outline disclosure requirements and the consequences of compliance and noncompliance should be expressly included in practice rules.

Aronsen states that the ‘Achilles’ heel’ of any disclosure regime ‘turns on persuading counsel to co-operate’. Justice Sulan observes that changing the habits and attitudes of legal practitioners will require ‘tangible incentives and/or real penalties’. Education is another means to secure change in practice habits and attitudes. The success of any disclosure regime also depends on the relationship between individual prosecutors and defence lawyers and the nature of informal communication. Uncooperative defendants and counsel will always exist under any system. However, as long as the majority of participants recognise their overriding duty to the court and embrace objectives to improve the efficiency of trials, a disclosure regime should be successful in promoting efficient practices.

Despite the unpopularity of some of the reforms in other jurisdictions that have increased pre-trial defence disclosure obligations, if such reforms are introduced in South Australia, it is argued that their mere existence will promote the beginnings of cultural change. This is because such reforms will set the benchmark for future practice. It will give a framework for mandated disclosure that will provide defence lawyers, who may be reluctant to embrace self-directed cultural change, a ‘safety net’. Such reforms will further signal to young lawyers that pre-trial defence disclosure is a beneficial and permissive element of modern criminal procedure. It will help to shape new norms and cultures that are incompatible with traditional objections to pre-trial defence disclosure.

VII ENFORCEABILITY OF A PRE-TRIAL DEFENCE DISCLOSURE REGIME

A Sanctions

The potential sanctions for noncompliance with defence disclosure are in abundance. These include adverse comment or inference on the defence’s noncompliance being

194 See, eg, Standing Committee of Attorneys-General, above n 93, 69, 73; Roderick Denyer, ‘Non-Compliance with Case Management Orders and Directions’ (2008) 10 Criminal Law Review 784, 784, 792; Chief Justice de Jersey, above n 1, 7. Martin, Adversarial Model’, above n 56, 10.

195 Standing Committee of Attorneys-General, above n 93, 5, 11, 50, 71.

196 Aronson, above n 2, 39.

197 Sulan, above n 2, 11.


199 See Ibid 7, 8; Jason Payne, ‘Criminal Trial Delays in Australia: Trial Listing Outcomes’ (Research and Public Policy Series No 74, Australian Institute of Criminology, January 2007) 46.

200 Standing Committee of Attorneys-General, above n 93, 48.
made by the judge and/or prosecution to the jury, a factor to take into account in sentencing, wasted costs orders against an accused and/or their lawyer, staying or adjourning the proceedings to allow the defence to comply with disclosure orders and/or for the prosecution to gather further material, exclusion of the undisclosed evidence to be led, professional disciplinary action against the lawyer involved and even a finding of contempt against the accused and/or their lawyer.

However, these various sanctions are riddled with complications. There are inherent practical and philosophical difficulties associated with sanctions for noncooperation to enforce any disclosure regime. Sulan states that generally sanctions are ‘difficult to enforce and their effectiveness is questionable’. Denyer also argues that

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201 See, eg, Criminal Procedure Act 1986 (NSW) s 146A(2)(a); Criminal Law Consolidation Act 1935 (SA) ss 285BB(3), 285BC(4), 285C(4); Crime (Criminal Trials) Act 1999 (Vic) s 16(1); Criminal Procedure Act 2004 (WA) s 97(4); Criminal Procedure and Investigations Act 1996 (UK) s 11(5)(a).

202 See, eg, Crimes (Sentencing) Act 2005 (ACT) ss 33(1)(k), 35A; Sentencing Act 2009 (Vic) ss 5(2C), (2D); Criminal Law Consolidation Act 1935 (SA) s 285BA(6). The obligation to take into account in sentence an unreasonable failure under s 285BA arises whether the defendant is found guilty following trial or pleads guilty; See Mustac (2013) 115 SASR 461, 469 [33], 470 [35].

203 See, eg, Crime (Criminal Trials) Act 1999 (Vic) ss 24–6; Criminal Code Act 1899 (Qld) s 590AAA(4)(b)–(c); Prosecution of Offences Act 1985 (UK) s 19A; Costs in Criminal Cases (General) Regulations 1986 (UK). See also Standing Committee of Attorneys-General, above n 93, 51. See R v SVS Solicitors [2012] EWCA Crim 319 for a recent example of a wasted costs order arising from the defence lawyer's noncompliance with pre-trial defence disclosure.

204 See, eg, Criminal Procedure Act 1986 (NSW) s 146(3); Criminal Law Consolidation Act 1935 (SA) s 285BC(7); Criminal Procedure Act 2004 (WA) s 97(2). See also Griffith, above n 3, 36.


207 See, eg, R v Rochford [2011] WLR 534. See further Gross and Treacy, above n 20, 4 [36]–[38].

208 Aronson, above n 2, 30; Standing Committee of Attorneys-General, above n 93, 43, 49; Griffith, above n 3, 35; Dawkins, above n 50, 38.

209 In particular, practically pinpointing who is to blame for noncompliance between an accused and their lawyer will often prove difficult. See, eg, Auld, above n 41, 471 [181]; Sulan, above n 2, 12.

210 Standing Committee of Attorneys-General, above n 93, 43.

211 Sulan, above n 2, 13. See also Riddle and Hinch, above n 29, 39 [189]; Grosse and Treacy, above n 20, 8 [56].
procedure mistakes or non-compliance with orders by or on behalf of a defendant cannot be allowed to affect that defendant’s right to a fair trial.212 There should not be reliance upon sanctions alone. Rather, the focus should be placed on incentives for compliance rather than sanctions.

However, with the appropriate caution and safeguards or limits placed on the use of sanctions, they may offer effective options for a successful disclosure regime. Though sanctions should not be the sole means of securing compliance with duties of disclosure, they still have a valid place. Sanctions may be appropriate in cases of patent or gross negligence or misconduct by the legal practitioner213 or unnecessary delaying tactics by an accused.

B The Accused’s Role in Influencing Enforceability of Sanctions

The notion of an accused and/or his or her lawyer freely divulging details of their case is not something that is likely to come naturally to either accused or defence lawyers.214 An accused is likely to be unwilling to do anything that may assist the prosecution to prove their case or put them at a disadvantage on a tactical level. Often an accused may have a misunderstanding of the level of cooperation required between the prosecution and the defence or the ways in which early disclosure will benefit the accused and the overall trial. If the accused has not provided their lawyer with sufficient instructions due to a lack of contact or understanding, this will inhibit the ability of the defence to comply with disclosure obligations.215

It is necessary that defence lawyers provide detailed advice and obtain proper instructions from their clients before making any disclosure or admissions.216 The client should be advised that legal professional privilege and the accused’s privilege against self-incrimination survive disclosure requirements.217 It is likely an accused will require further encouragement when it comes to complying with disclosure obligations.218 An accused should be informed not only by counsel, but also by the court, about any sanctions for noncompliance as well as the incentives or benefits for complying with disclosure requirements.219 It is preferable that such warnings be given at an early stage to promote maximum efficiency and compliance. This

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212 Denyer, above n 194, 791.
213 Standing Committee of Attorneys-General, above n 93, 51.
216 Craigie, above n 107, 14.
218 Standing Committee of Attorneys-General, above n 93, 50.
219 Ibid 5, 11, 50.
obligation to inform the client and the potential sanctions for noncompliance should be expressly included in any relevant professional conduct rules.  

C The Judiciary’s Role in Influencing Enforceability of Sanctions

The judiciary may be reluctant or even unwilling to impose disclosure obligations or orders on the defence, even if they have the statutory power. Lax judicial enforcement will only frustrate the effectiveness of pre-trial disclosure. It may also decrease the public’s faith in the administration of court processes. Strong judicial leadership is necessary to encourage the parties to work together to determine or resolve issues early, and grant incentives or enforce sanctions if necessary. Active judicial management will promote the acceptance of any reforms by the legal profession.

D Feasibility of the Reforms Themselves; Emphasise Incentives to Comply

The feasibility and acceptability of any defence disclosure reforms in South Australia must be carefully considered if they are to be a success. Any reforms must be drafted with an appreciation of the conflicting interests that arise between the legitimate public interest in promoting the efficiency and effectiveness of the criminal justice system and the protection of fundamental rights. Efficiency can be taken too far. Any disclosure regime must find a compromise between the level of participation asked of the defence and recognition of the burden of proof; namely between ‘managerialism’ and a strict adversarial approach. One way to assist in the success of the reforms is to emphasise incentives for accused and their representatives to comply with broader defence disclosure obligations.

220 See Standing Committee of Attorneys-General, above n 93, 11, 50. Such an obligation may fall under rules 39 and 40 of the South Australian Barristers’ Conduct Rules. See also Council of the Law Society of South Australia, Australian Solicitors’ Conduct Rules (at June 2011) r 7.1.


222 Gross, above n 192, 44–5.

223 Johnson and Latham, above n 8, 6–7.

224 See, eg, Glynn, above n 106, 844; Corns above n 83, 117; Criminal Law Review Division, above n 89, 47; Craigie, above n 107, 14–5; Johnson and Latham, above n 8, 7; Gross, above n 192, 8, 9, 95.

225 Standing Committee of Attorneys-General, above n 93, 73.

226 See, eg, Weinberg, ‘Criminal Trial Issues’, above n 7, 2; Chief Justice de Jersey, above n 1, 6.

For example, in South Australia, sentence reductions could be given when an accused has complied with defence disclosure obligations. Legislation exists in Victoria,228 the Australian Capital Territory,229 and New South Wales230 to the effect that a court may impose a lesser penalty having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial).

Though incentives in sentence for pre-trial cooperation are not without difficulty in terms of both principle and application,231 the idea of a reduction in sentence for complying with defence disclosure is consistent with the existing established doctrine that an accused who pleads guilty to an offence is entitled to a discount in sentence. It is now accepted by both courts232 and legislators233 that an offender remains entitled to a discount in sentence for pleading guilty, regardless of any ‘remorse’, on the strictly utilitarian basis that they have spared any victim from the likely stress of testifying and the State from the cost and trouble of a contested trial.234

Section 10 of the Criminal Law (Sentencing) Act 1988 (SA) already allows a court to take into consideration in sentence ‘the degree to which the defendant has co-operated in the investigation of the offence.’235 An incentive by way of a discount in sentence for compliance with pre-trial defence disclosure is a logical extension of this provision and is both reasonable and necessary to encourage greater defence cooperation and disclosure. Such an incentive should apply to both compulsory and voluntary defence disclosure.236 There should not be reliance purely upon sanctions for noncompliance.

228 Sentencing Act 1991 (Vic) ss 5(2C)–(2D).
229 Crimes (Sentencing) Act 2005 (ACT) ss 33(1)(k), 35A.
230 Crimes (Sentencing Procedure) Act 1999 (NSW) s 22A(1).
231 Dawkins, for example, argues that such a ‘discount’ translates into ‘reverse sanctions in all but name’ for a non-compliant accused. See Dawkins, above n 50, 39. See also Richard Refshauge, ‘Sentencing and the Prosecution’ (Paper Presented at the 4th National Symposium on Crime in Australia, ‘New Crime or New Responses’, Canberra, 21 June 2001) 1–9.
233 See, eg, Criminal Case Conferencing Trial Act 2008 (NSW); Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 (SA). See further South Australia, Parliamentary Debates, House of Assembly, 11 July 2012, 2427 (John Rau).
234 The rationale of such a proposition is that an accused is not punished for exercising his or her right to plead not guilty (which is impermissible; see R v Shannon (1979) 21 SASR 442, 445; Siganto v The Queen (1998) 194 CLR 656, 663), but rather that an accused who pleads guilty is receiving a ‘reward’ or ‘discount’ from what otherwise have been the appropriate sentence that they would not be entitled to had they pleaded not guilty. This distinction ‘is not without its subtleties but it is, nevertheless, a real distinction’ (R v Cameron (2002) 209 CLR 339, 343).
235 Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(h).
236 Griffith, above n 3, 34.
VIII Conclusion

Though any suggestion of pre-trial defence disclosure is invariably contentious, there have been many calls in both Australia and elsewhere for increased pre-trial defence disclosure. Such calls are, within certain limits, justified. The traditional arguments against defence disclosure do not withstand close scrutiny. It is time for a realistic, workable and enforceable defence disclosure regime to be adopted in South Australia. The current limited statutory defence disclosure requirements should be amended. When contested indictable cases are to be heard before a superior court, and after the prosecution has satisfied its duties of disclosure, the requirements should compel the defence to respond by identifying: any positive defence it intends to raise; the issues of fact or law which it intends to dispute at trial; and the basis on which these intend to be disputed. This will enable the court and parties to know what the real issues in dispute are and allow the trial to ‘proceed as smoothly as possible’.

Two fundamental flaws with the various current schemes for comprehensive defence disclosure is their absence of enforceability and workability. The focus should be on motivating the defence through incentives to comply with statutory requirements, rather than purely relying on sanctions. Whilst sanctions for blatant noncompliance have their place, sanctions alone are a blunt instrument. They are an ineffective solution given their potential to be unjust and proven ineptitude in encouraging adherence with disclosure obligations. The current statutory scheme in South Australia (and elsewhere) needs to be improved by robust enforcement by the judiciary and a cultural change amongst the legal profession.

While the defence should disclose what is ‘necessary to allow the prosecution to avoid addressing areas not disputed by the defence’, one must remember that the adversarial system remains one of justice. Any system must operate fairly and thoroughly, rather than fostering a culture of speed and efficiency above all else. The defence should not have to disclose their case to the same level of detail as the prosecution. This is not to say that reform is inappropriate. Rather, a workable and balanced approach consistent with that outlined in this article should be implemented.

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SENTENCING PARENTS: THE CONSIDERATION OF DEPENDENT CHILDREN

ABSTRACT

Sentencing a parent will necessarily impact upon their dependent children; if a parent is imprisoned, hardship to their children is inevitable. In all Australian jurisdictions, judges and magistrates are able to consider the hardship that would be caused to an offender’s family and dependants when determining a sentence. However, Australian courts have held that the circumstances will have to be ‘exceptional’ for hardship to children to influence sentencing. In this research, we considered 85 sentencing appeal cases from all Australian jurisdictions where hardship to the defendant’s dependent children as a result of the sentence was considered. This article discusses the cases in order to consider the kinds of circumstances that have been found to be ‘exceptional’. The authors also consider the mercy discretion, and its relationship with the exceptional circumstances test. The article identifies concerns with the requirement for exceptionality and argues that the best interests of offenders’ children should always be a significant factor to be weighed in the sentencing process.

I INTRODUCTION

Sentencing is an important aspect of the criminal law, and yet it is one of the ‘least principle-based and coherent’ areas of the law.1 Judges must balance a range of factors when making sentencing decisions. These factors include the aims of the sentence, such as rehabilitation, deterrence and community protection, among others.2 These aims have been referred to as ‘guideposts’ that sometimes ‘point in different directions.’3 Sentencing courts have significant latitude to take into account a broad range of factors that are specific to the particular offence and offender. As part of their wide-ranging discretion in sentencing, magistrates and judges can consider hardship to offenders’ families and dependants as a mitigating

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3 Ibid.
factor. In ‘exceptional’ cases, hardship can have an impact on the sentence, yet the role of hardship and exceptional circumstances in this context has received relatively little academic attention.

This article considers a number of Australian sentencing appeal cases determined between 2000 and 2014 where hardship to the defendant’s dependent children as a result of the sentence was considered. The aim of the case analysis in this article is to better understand judicial approaches to hardship, exceptional circumstances and the ‘mercy’ discretion when sentencing parents who have dependent children. We begin with an overview of sentencing law as it relates to concepts of hardship, exceptional circumstances and mercy in the context of sentencing parents of dependent children in Australia. This is followed by the analysis of a number of cases where hardship to dependants has been raised and considered in sentencing appeals. In the final section we argue for a change of approach in sentencing such that ‘exceptionality’ is not necessary. We suggest that the human rights of children and their best interests should always be a significant consideration when sentencing an offender who is the parent of dependent children, especially where the offender is the sole or primary carer.

II The Consideration of Dependent Children in Australian Sentencing Law

A Hardship as a Mitigating Factor

It is well-established that the discretion of judges in sentencing is extremely broad and ‘hardship’ has long been recognised as a factor for consideration by judges when sentencing offenders. Offenders have received more lenient sentences on the basis that they are of old age, suffering from physical or mental ill health, or have a serious disability. Such factors are taken into account in sentencing because the impact of a particular sentence upon the offender could result in exceptional hardship, or

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4 See Crimes Act 1914 (Cth) s 16A(2)(p); Crimes (Sentencing) Act 2005 (ACT) s 33(1)(o); Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3); Sentencing Act (NT) s 5(2)(s); Penalties and Sentences Act 1992 (Qld) s 9(2)(f), (q); Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(f), (n), (o); Sentencing Act 1991 (Vic) s 5(2)(g), Sentencing Act 1995 (WA) ss 6(2)(d), 8.

5 Edney and Bagaric, above n 1, 16; Markarian v The Queen (2005) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

6 Although, this has not been without criticism; see Richard G Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25(1) Monash University Law Review 1, 16.

7 In relation to older age, see Gulyas v Western Australia (2007) 178 A Crim R 539 and R v Sopher (1993) 70 A Crim R 570. In relation to mental illness and cognitive impairment, see R v Verdins (2007) 16 VR 269. In R v Bernier (1998) 102 A Crim R 44, the combined effect of the offender’s severe depression, the fact that he didn’t speak English and the separation from family were taken into account in reducing the penalty.
additional hardships that other prisoners would not experience. Von Hirsch and Ashworth describe this as the ‘equal-impact’ principle.8

Prison might conceivably impose a more substantial burden on an offender with a terminal medical condition, or a defendant who is blind or has a cognitive impairment, for example.9 In York v The Queen,10 the High Court of Australia confirmed that a significant risk to an offender’s safety whilst in prison was a relevant consideration in sentencing, and could justify a decision by a sentencing judge to not impose an immediate custodial sentence. In Queensland, judges have recommended that leniency should be extended towards 17 year olds who are sentenced to periods of imprisonment because they will be required to serve their sentence in an adult correctional facility.11 It has also been recognised that the hardship likely to be experienced by some Aboriginal people in prison may be a mitigating factor.12

To argue that an offender should be afforded leniency because of their personal characteristics is one thing. It is quite a separate issue to argue that an offender should be afforded leniency because their sentence has the potential to cause harm to others. The effects on people other than the offender have sometimes been referred to as the ‘collateral consequences’13 of sentencing or ‘third party hardship’.14 Third parties that might be affected by an offender’s sentence include spouses and elderly parents, particularly those with serious illnesses or disabilities who require care.15 But most obviously, sentencing a parent can have a significant impact upon their dependent children.

11 See, eg, the dissenting opinion of McMurdo P in R v Loveridge (2011) 220 A Crim R 82, 83–84 [5]–[7], 85 [11]. Seventeen-year-old children are treated as adults by the criminal justice system in Queensland: see Youth Justice Act 1992 (Qld) s 6.
14 Fox, above n 6, 16.
15 See, eg, R v Lane (2007) 176 A Crim R 471 (the offender was a full time carer for his wife who had multiple sclerosis); Fermanis v Western Australia [2005] WASCA 212 (9 November 2005) (the offender was a carer for his invalid father).
Sentencing and Hardship to Dependent Children

When parents are imprisoned this necessarily has implications for their dependent children, especially where both parents are incarcerated or the offender is a primary carer or a sole parent. In some Australian sentencing Acts, specific provision is made for the consideration of family hardship. For example, s 16A(2)(p) of the Crimes Act 1914 (Cth) states that in determining the sentence to be passed, the court must take into account ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.’ Similar provisions exist in sentencing legislation in the Australian Capital Territory\(^{16}\) and South Australia.\(^{17}\) In most other states and territories, the impact on the person’s dependants can be taken into account under general sentencing provisions that require the court to consider any mitigating factors\(^{18}\) or other relevant circumstances.\(^{19}\)

The situation in New South Wales and Tasmania is somewhat different. The Crimes (Sentencing Procedure) Act 1999 (NSW) sets out an (apparently) exhaustive list of aggravating and mitigating factors in s 21A(3), none of which allow for the impact on dependants to be considered. However, notably, the New South Wales Act states that nothing within it limits the prerogative of mercy.\(^{20}\) It is the ‘mercy discretion’, therefore, that is explicitly used to take family hardship into account in New South Wales.\(^{21}\) Tasmanian sentencing legislation does not specifically list mitigating or aggravating factors, but the legislation does give judicial officers a broad discretion to consider alternatives to imprisonment where a non-custodial sentence better meets the interests of justice.\(^{22}\) It also allows the court to take the offender’s ‘economic or social wellbeing’ into account when determining whether or not to record a conviction.\(^{23}\)

‘Exceptional Circumstances’ Approach

There is nothing in s 16A(2)(p) of the Commonwealth Crimes Act, or the equivalent provisions in the Australian Capital Territory and South Australia, to indicate that the effect of the sentence on an offender’s family or dependants must be ‘exceptional’ to be taken into account. On the contrary, these provisions direct the court to take into account the ‘probable’ effect on the offender’s family or dependants when determining the sentence to be passed. Yet, generally, the common law has found that hardship on others, such as dependants, must be ‘exceptional’ in order to mitigate the penalty. The Australian Law Reform Commission, in its inquiry into federal sentencing,

\(^{16}\) Crimes (Sentencing) Act 2005 (ACT) s 33(1)(o).
\(^{17}\) Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(n), (o).
\(^{18}\) Sentencing Act 1995 (NT) s 5(2)(f); Penalties and Sentences Act 1992 (Qld) s 9(2)(f); Sentencing Act 1991 (Vic) s 5(2)(g); Sentencing Act 1995 (WA) ss 6(2)(d), 8.
\(^{19}\) Sentencing Act 1995 (NT) s 5(2)(s); Penalties and Sentences Act 1992 (Qld) s 9(2)(q).
\(^{20}\) Crimes (Sentencing Procedure) Act 1999 (NSW) s 102.
\(^{21}\) The mercy discretion is discussed further below.
\(^{22}\) Sentencing Act 1997 (Tas) s 12(2).
\(^{23}\) Sentencing Act 1997 (Tas) s 9(c).
advocated in favour of ‘an approach that would encompass consideration of the impact of sentencing [on the offender’s family and dependants] without the need to establish exceptional circumstances’. Nevertheless the relevant provisions in the Australian sentencing Acts have been read down by courts to require circumstances that are exceptional.

In *Markovic v The Queen*, the Victorian Court of Appeal was specifically asked to consider the ‘circumstances in which an offender can legitimately seek an exercise of mercy on the ground that his/her imprisonment is likely to cause hardship to members of his/her immediate family or other dependants.’ The Court recognised the importance of the ‘mercy’ question and convened a bench of five who held that circumstances needed to be ‘exceptional’ to influence sentencing. The Court noted that the ‘exceptional circumstances test’ was developed by the common law for several reasons:

First, it is almost inevitable that imprisoning a person will have an adverse effect on the person’s dependants … Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would ‘defeat the appearance of justice’ and be ‘patently unjust’.

As the Court in *Markovic* observes, imprisonment often causes hardship for dependants, indeed this is ‘almost inevitable’; normal and to be expected. Therefore, hardship must have an exceptional or extraordinary character in order to have an impact on the sentence. Consistent with the case of *Markovic*, Edney and Bargaric point to two policy reasons behind this approach.

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26 (2010) 30 VR 589 (‘Markovic’).

27 Ibid 591 [2].


29 Ibid 591 [6].


31 Edney and Bargaric, above n 1, 303.
does not occur, the efficacy of sentencing may be undermined and the appearance of justice may be defeated. The sentence is supposed to produce hardship by way of punishment. Secondly, they note that a punishment is directed at the individual in response to the crime they have committed; it is not directed to punishing other innocent people (such as dependants). Indeed, Murphy argues that the law should remain blind to the impact of an offender’s sentence on third parties because the purpose of sentencing is to respect and reassert the worth of the victim.

However, it is also ‘paradoxical’ that the suffering caused to the offender by separation from her dependant through imprisonment could be taken into account if it could be shown that the offender’s prison experience would be worse, as compared to others, as a result of her separation. Ashworth notes that in the United Kingdom, courts have sometimes reduced a penalty where the offender is pregnant, although it is not absolutely clear whose hardship the court is responding to. Also in the United Kingdom, a sentence of intermittent imprisonment was specifically developed with mothers of young children in mind to allow parents to retain their jobs and maintain their childcare responsibilities; factors arguably associated with the parent’s rehabilitation rather than hardship on the child. Nevertheless such sentences reduce the disruption to the child and reduce their chances of growing up in care, so there is a clear interrelationship between hardship to the offender and to the child in such circumstances.

D The Mercy Discretion

In some Australian cases it has been held that, in the event that the offender cannot meet the stringent test of ‘exceptional circumstances’, the effect of a sentence on the offender’s children could still attract leniency under the court’s residual ‘mercy discretion’. The mercy discretion under English common law is related to the royal prerogative of mercy, which Fox notes is ultimately based on the religious notion of

32 Ibid.
33 Ibid.
37 Ibid. Arguably this approach clearly recognises that appropriate childcare is not merely a private issue, but is indeed an issue of interest to the state: Jonathan Herring, Caring and the Law (Hart Publishing Ltd, 2013) 3, 325.
'God’s pitying forbearance towards his creatures'. It does not amount to forgiveness, but rather allows for a partial release from punishment based on the balancing of relevant considerations. Some commentators have insisted that granting mercy is necessarily unjust because it amounts to a departure from accepted legal rules. Murphy describes ‘the paradox of mercy’; he observes:

If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. ... Thus to be merciful is perhaps to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue, but a vice — a product of morally dangerous sentimentality.

The concept of mercy as a ‘factor’ in sentencing is rarely discussed in Australian case law. Fox argues that if mercy is invoked to assist judges in balancing mitigating factors, and determining the weight that should be attributed to them, it is merely an aspect of a judge’s sentencing discretion. He remarks that, if revulsion of an offender can be taken into account in sentencing, so too should pity. However, he finds it less defensible for mercy to be invoked as an independent doctrine that ‘operates outside the main framework of sentencing’. If mercy is used in a way that allows weight to be given to factors that would not ordinarily be considered in sentencing, Fox argues it should rarely be used, otherwise the appearance of justice may be defeated.

As noted earlier, in *Markovic*, the Victorian Court of Appeal determined that the exceptional circumstances test could not be separated from the mercy discretion. It found that:

The common law requirement of ‘exceptional circumstances’ accepts that an offender is entitled to call for an exercise of mercy on the ground of family hardship, but confines the exercise of that discretion to a case where the circumstances are shown to be exceptional.

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39 Fox, above n 6, 4. Fox notes that the mercy discretion has not always been used in a benevolent fashion, but at times was applied in a biased and classist manner to advance particular interests: at 5. See further: A T H Smith, ‘The Prerogative of Mercy, the Power of Pardon and Criminal Justice’ [1983] *Public Law* 398; Daniel T Kobil, ‘The Quality of Mercy Strained: Wresting the Pardoning Power from the King’ (1991) 69 *Texas Law Review* 569.

40 Fox, above n 6, 6.


42 Murphy, above n 34, 167; see also Von Hirsch and Ashworth, above n 8, 168.

43 Fox, above n 6, 4.

44 Ibid 11–12.


46 Ibid 11.

47 Ibid 13, 16.

48 Ibid 15, 23.

Thus the Court decided that an appeal to the ‘residual discretion’ of mercy was a ‘contradiction in terms’.\textsuperscript{50}

E Instinctive Synthesis

In Australia, the High Court has characterised sentencing as, almost always, a process of ‘instinctive synthesis’.\textsuperscript{51} As was observed in \textit{Markarian v The Queen}:

\begin{quote}
the [sentencing] judgment is a discretionary judgment … what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached.\textsuperscript{52}
\end{quote}

Von Hirsch and Ashworth consider matters like the offender’s hardship as equity factors. They reason that ‘[i]f a court regards equity factors as part of the process of arriving at a just sentence, then the issue of an unjust sentence does not arise’.\textsuperscript{53} This analysis is consistent with an understanding of sentencing as a process of instinctive synthesis. The instinctive synthesis approach to sentencing inevitably makes it difficult to disentangle the effect of various aggravating and mitigating factors, including hardship (and the effect of mercy), on the sentence.

Mercy may be extended as part of a judge’s sentencing discretion in Australia, and whilst there is no right to mercy,\textsuperscript{54} a failure to extend mercy is reviewable on the basis that it amounts to an inaccurate weighing of mitigating factors in sentencing.\textsuperscript{55} In the Victorian case of \textit{R v Miceli},\textsuperscript{56} Tadgell JA said that ‘an element of mercy has always been … properly regarded, as running hand in hand with the sentencing discretion’.\textsuperscript{57} In the South Australian case of \textit{R v Osenkowski},\textsuperscript{58} King CJ similarly remarked that ‘[t]here must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case’.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{50} Ibid 594 [16].
\item \textsuperscript{51} \textit{Markarian v The Queen} (2006) 228 CLR 357, 373 (Gleeson CJ, Gummow, Hayne and Callinan JJ); \textit{Wong v The Queen} (2001) 207 CLR 584, 621–622 (Gaudron, Gummow and Hayne JJ).
\item \textsuperscript{52} \textit{Markarian v The Queen} (2006) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne and Callinan JJ), although the Court did recognise that there may be some occasions where a two-staged approach may be appropriate: at 375.
\item \textsuperscript{53} Von Hirsch and Ashworth, above n 8, 168.
\item \textsuperscript{54} As Lord Diplock said in \textit{De Freitas v Benny} [1976] AC 239, 247, mercy ‘is not the subject of legal rights’ rather it ‘begins where legal rights end.’
\item \textsuperscript{55} See, eg, \textit{R v Miceli} (1998) 4 VR 588.
\item \textsuperscript{56} Ibid.
\item \textsuperscript{57} Ibid 592.
\item \textsuperscript{58} (1982) 30 SASR 212.
\item \textsuperscript{59} Ibid 212.
\end{itemize}
The role of mercy in sentencing was earlier noted by Windeyer J in the High Court case of Cobiac v Liddy, where his Honour said: ‘[t]he whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy’; not that mercy should ‘season justice’, but that ‘a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.’ Justice Windeyer also said, however, that a cautious approach should be taken, and that before extending mercy a court ‘ought gravely to hesitate’ and ‘weigh the matter well’. More recently, in Dinsdale v The Queen (an appeal from Western Australia), the High Court considered the circumstances in which such judicial discretion should be exercised to suspend a sentence. Justice Kirby observed:

discretion must be left to permit those with the responsibility of sentencing to take into account the peculiar circumstances of the case, any exceptional circumstances affecting the prisoner, and in some cases the prisoner’s family, or some feature of the matter that reasonably arouses a judicial decision that a measure of mercy is called for in the particular case.

While Kirby J’s comments seem to suggest that exceptional circumstances may be separate from the mercy discretion, in Victoria at least it is exceptional circumstances that may evoke mercy.

III Analysis of Australian Cases

A General Overview

With this legal context in mind, we examined reported sentencing appeals heard by state and territory criminal appeal courts between January 2000 and June 2014 in which the offender appealed their sentence, at least in part, because of the hardship it would cause to their dependent children. The aim was to better understand judges’ reasoning in relation to the offender’s parenting responsibilities and its impact on sentencing decisions. Case searches were conducted on all major online Australian case law databases.

The Australian Constitution does not give the Commonwealth Government an express power to make laws with respect to criminal law. As a result, criminal law and sentencing in Australia is an area largely regulated by the states and territories. The Commonwealth’s laws in this area are limited to matters incidental to other

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60 (1969) 119 CLR 257.
61 Ibid 269.
62 Ibid 268.
64 Ibid 343.
66 Specifically, Casebase, LexisNexis, Westlaw and Austlii.
heads of power, such as offences relating to social security and tax fraud. This factor makes it difficult to compare cases where they have been heard under differing legal regimes in the states and territories. Despite this, improved understanding of the judicial approach to dependent hardship in sentencing decisions may be gained from the consideration of the reasoning in the cases considered.

The cases we identified involve offenders of diverse backgrounds and circumstances. A total of 85 sentencing appeal cases were identified from all Australian jurisdictions where hardship to the defendant’s dependent children as a result of the sentence was considered. In 51 of the cases, the offender was female, and in 34 the offender was male. Sixteen of the female offenders were pregnant at the time they were sentenced, and 20 of the offenders had a child aged less than one year. The offender was known to be Aboriginal in seven cases, and in all of these cases, the offender was female. At least 38 of the offenders were single parents: 28 women and 10 men. Thus slightly more than one third of the sole parent offenders in this sample were men. This is not surprising given that, although women in the broader community are more likely to be single parents, men are much more likely to be charged with offences than women.

At least 20 of the offenders had at least one child with a disability or a serious medical condition. Of the offenders, 71 had either one or two children, not including any unborn children; the remainder had more than two children. In 37 cases the offender was stated to have a criminal history. The children mentioned in the cases ranged in age from unborn to 16 years. In 62 cases, the offender’s youngest child had not yet reached school age. In a further 14 cases, the offender’s youngest child was aged between six and 10 years.

In 16 cases, the children were still in the care of the offender, however in most cases (n=49) the children were in the care of a relative: 24 were in the care of the other parent, 14 were in the care of grandparents and 11 were in the care of another relative (most often an aunt). There were four cases where the children were being cared for by a friend. In a further six cases, there was no alternative carer available, other than state care.

Most of the offenders had committed either a drug offence (n=32) or a fraud offence (n=17), most often social security fraud. Most of the offenders in this sample of cases ultimately received a full-time custodial sentence.

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67 See Criminal Code Act 1995 (Cth) ss 137.1, 135.2. As to the taxation and social security powers, see Australian Constitution s 51(ii), (xxiiiA).

68 United States statistics are also consistent with this finding. There, roughly half of the claims of exceptional hardship to dependants in sentencing cases are made by men, although many more men face the criminal courts than women in all jurisdictions: Patricia M Wald, “‘What About the Kids?’: Parenting Issues in Sentencing” (1995) 8 Federal Sentencing Reporter 137, 139.

69 That is, it was noted in court that they were single parents or parents of a child with a disability or serious medical condition.
B Exceptional Circumstances and the Mercy Discretion

It is important to note that the basis upon which the appeals were decided was not always clear from the judgment. Given the process of instinctive synthesis generally applied by judges in determining sentences,\(^{70}\) this comes as no surprise. It is likely that there were a number of factors that contributed to the sentencing decision on appeal, including parenting considerations, but also considerations such as the seriousness of the offence, the part the offender played in the commission of the offence and the nature of the offender’s criminal history. The legal basis for any mitigation of sentence was also not always explicitly stated by judges in the cases we examined.\(^{71}\)

The relationship between the ‘exceptional circumstances’ test and the mercy discretion seems to be a matter of some debate and uncertainty.\(^{72}\) In the 2009 case of \(R v Xeba,^{73}\) the Victorian Court of Appeal held that the court still has a discretion to show mercy, even if exceptional circumstances cannot be shown, yet this was clearly rejected the following year in \(Markovic\). As noted earlier, in \(Markovic\) the Victorian Court of Appeal unanimously rejected the argument that the ‘mercy’ discretion for family hardship was available, as distinct from, and as an alternative to, exceptional circumstances.\(^{74}\) In that case, the Court determined that the purpose of the exceptional circumstances test was to limit the availability of the court’s discretion to exercise mercy on the grounds of family hardship. The Court pointed to other cases in which a ‘residual’ mercy discretion had been denied, such as the 1976 case of \(R v Wirth,^{75}\) where Wells J of the South Australian Supreme Court said that circumstances related to family hardship would have to be ‘highly exceptional’ to be taken into account in mitigation, and that a court should go no ‘further than that’.\(^{76}\)

Having said this, in some of the Western Australian cases, the requirement of exceptionality was questioned. For example, in \(Michael v The Queen,^{77}\) despite involving a state crime of burglary, Wallwork AJ of the Western Australian Court of Criminal Appeal referred to s 16A(2)(p) of the Commonwealth \(Crimes Act\), and noted that ‘[t]he section makes no mention of “exceptional” circumstances’.\(^{78}\)

\(^{70}\) \(Markarian v The Queen\) (2006) 228 CLR 357, and see earlier discussion.

\(^{71}\) In 43 cases, the basis for the decision related to mitigation was not stated.


\(^{73}\) [2009] VSCA 205 (17 September 2009).

\(^{74}\) (2010) 30 VR 589.

\(^{75}\) (1976) 14 SASR 291.

\(^{76}\) Ibid 296.


\(^{78}\) Ibid [57] (Wallwork AJ). Similar misgivings were noted by the Australian Capital Territory Supreme Court: see \(Craft v Diebert\) [2004] ACTCA 15 (12 August 2004) [10]; \(Scheele v Watson\) [2012] ACTSC 196 (17 December 2012) [86].
C Understanding ‘Exceptional’

Regardless of what the basis for mitigation was, a common refrain in the cases was that although an offender’s circumstances were ‘sad’, ‘special’ or worthy of sympathy, they were not sufficient to receive leniency in sentencing.\(^{79}\) In most of the cases, the judges agreed that to be relevant, the impact upon the children must be ‘exceptional’ — that is, ‘quite out of the ordinary’\(^{80}\) — and that this was understood as a stringent test.

In the sample of cases we reviewed there were 16 cases where judges explicitly stated that the appeal outcome was based on a finding of exceptional circumstances due to hardship to the offender’s children.\(^{81}\) Below we examine these cases more closely to consider further the kinds of circumstances that may underlay ‘exceptionality’.

1 Child Illness or Disability

In a number of cases, circumstances were considered ‘exceptional’ where there were medical concerns regarding at least one of the offender’s children or where at least one of the children had a disability. Medical concerns noted by the judges included recognised disabilities (physical, sensory, psychological and cognitive) and serious illnesses (such as cancer and neurological conditions). Some examples of cases are discussed below which illustrate judges’ approaches to these issues.

(a) Immediate Release to Care for a Child with a Serious Medical Condition

In some cases the appeal court found that the offender should be released immediately in light of their child’s medical needs. For example, in the case of *Macri v Moreland*,\(^ {82}\) a single mother had committed social security fraud in the context of caring for two children with disabilities, one with ADHD and epilepsy, and another with cerebral palsy that had caused paralysis in one arm. The evidence indicated that both children were heavily dependent upon the offender for their personal care needs and the administration of medication. The Appeal Court held that the probable effect

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of the offender’s incarceration on the children could be described as ‘exceptional’ and the offender was released forthwith.\(^{83}\) In *Ramezanian v The Queen*,\(^{84}\) the offender’s 11-year-old son had been diagnosed with leukemia on the day he was sentenced. The diagnosis and its effect were admitted as fresh evidence on the appeal; the information had not been available to the original sentencing judge. The offender, the child’s father, had been the primary carer of his two sons before he was imprisoned. The children were in the care of their mother at the time of the appeal, however there was evidence that, in light of their son’s diagnosis, the mother would have to cease employment to care for him. The two appeal judges agreed Ramezanian should be released immediately, rather than serving the three-month non-parole period imposed by the trial judge.\(^{85}\)

(b) *Reduction in Sentence to be Reunited with a Child with Disabilities or an Illness*

In several other cases involving dependent children with an illness or disability, the non-parole period, prison sentence or both were reduced on appeal.\(^{86}\) For example, in *Roberts v The Queen*,\(^{87}\) the offender was the father of a five-year-old daughter who had been diagnosed with a serious neurological condition and was not expected to survive beyond middle childhood. Roberts had been the sole carer of the child until he was placed in custody. Despite the fact that the daughter was now being cared for by her mother and there were no specific care concerns raised, two of the three judges agreed that his non-parole period should be reduced primarily so he could be reunited with his daughter at an earlier time.

*Day v The Queen*\(^{88}\) concerned an offender who had committed drug offences to raise money to care for his severely disabled son. The child’s condition, cortical dysplasia, rendered him unable to toilet or care for himself, and it was anticipated that his care needs would increase as he got older. Whilst the Court acknowledged that the motive behind his offending did not diminish his culpability,\(^{89}\) it concluded that some (although not substantial) reduction of his prison sentence should be granted having regard to the needs of the child and the heavy burden that his absence would place upon the boy’s mother.\(^{90}\)

In *R v McConachy*,\(^{91}\) the offender was a sole father. The Court heard that one of his children had epilepsy, one had developmental delays and the third, an infant,

\(^{83}\) Ibid [32].

\(^{84}\) (2013) 37 VR 92.

\(^{85}\) Ibid 100 [32].


\(^{87}\) [2007] NSWCCA 112 (20 April 2007).


\(^{89}\) Ibid 406 [13], 410 [35].

\(^{90}\) Ibid 409 [29].

\(^{91}\) [2011] QCA 183 (3 August 2011).
had recently been diagnosed with whooping cough. The children had been split between their two grandmothers as their mother was mentally unwell and unable to care for them. There was evidence that the children, particularly the eldest, were ‘greatly emotionally distressed’ at the separation from their father. The Court determined that the offender’s head sentence and non-parole period should be reduced so that he could ‘return to his young family and to care for them in a united family unit’.

In *R v La Mude*, the concerns related to the mental health of the offender’s eight-year-old daughter. The offender was convicted of drug trafficking, and she was a mother of two children aged 8 and 14 years. The children had different fathers, both of whom had committed suicide. At the time of the offence, both the children were living with other carers. The eight year old was living with her maternal grandmother; however the grandmother’s husband (the offender’s step-father) had been diagnosed with terminal cancer. As a result, the grandmother had become substantially pre-occupied with his medical care. The eight-year-old child had begun having suicidal thoughts and claimed to have seen her deceased father on a number of occasions. Phillips JA observed: ‘Having given this matter anxious consideration, I think … we should intervene in the particular circumstances of this case, which in many respects I regard as quite extraordinary’. The Appeal Court reduced the offender’s head sentence and non-parole period; however she was still required to serve a minimum period of two years imprisonment.

In *DPP (Vic) v Gerrard*, the fact that the offender’s young son had autism contributed to a finding of exceptional circumstances, along with the fact that his de facto wife, the mother of their two children, was profoundly deaf and therefore substantially reliant upon the offender in certain situations. In *Stumbles v The Queen*, the Court found that having two severely autistic young children amounted to exceptional circumstances, but that, in view of the seriousness of the offences, this only warranted a reduction of the non-parole period by six months, to eight months.

(c) Children with an Illness or Disability Where There Was a Risk of Both Parents Being Incarcerated

The court’s concerns regarding the welfare of a child with a medical condition or disability were particularly acute in cases where there was a risk that both parents would be incarcerated. In some of these cases, the mother received a non-custodial penalty so there would be one parent available to care for the child, but the father was

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92 Ibid.
95 (2011) 211 A Crim R 171.
imprisoned. For example, Milosevski v Police concerned a mother whose nine-year-old daughter had Perthe’s disease, a disease of the hip joint. The child’s father was already incarcerated, and there was no extended family available to properly care for her. Again, this was a case where fresh evidence was admitted on appeal. A psychologist’s report stated that the appellant and child had an exceptionally ‘close emotional bond’ that would be ‘disrupted’ if the appellant was imprisoned; he expected the child to become behaviorally and emotionally disturbed if the appellant was incarcerated. The Court found the ‘combination of circumstances’ to be exceptional. The mother’s 18 month prison sentence was suspended by the Appeal Court so the mother could recommence care of the child.

In S v The Queen, the offender was a mother of three children, one of whom had autism. The child’s father was co-accused with the offender. Both parents were substantially involved in the child’s care and the school viewed them as valued ‘partners’ in his education. Justice Miller held that the offender’s sentence should be suspended because, according to expert medical evidence, the child ‘would probably never recover’ if both his parents were imprisoned. Interestingly Wallwork AJ, concurring with Miller J, referred to the United Nations Convention on the Rights of the Child (‘CROC’), and observed that: ‘It can be a serious derogation of a child’s rights to order a particular offender go to prison.’

The jointly heard cases of R v Gip and R v Ly also concerned co-accused parents. Their two young children, aged three and one, were both described as unwell; the three year old was held to be of ‘fragile health’ while the one year old experienced ‘significant health problems’ when the mother was detained on remand. The original sentencing judge had sentenced the mother, Gip, to a suspended sentence and the father, Ly, to a period of immediate imprisonment. The Crown appealed

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Ibid [12].


Ibid [12].


Ibid [16].

Ibid [18].

Ibid [38].


Ibid 179 [27]–[28].

Ly was originally sentenced to serve two years imprisonment with a non-parole period of 15 months.
against both sentences. On the appeal, McLellan CJ at CL underlined the difficulties in determining whether a case was exceptional. In dismissing the appeal, he commented:

> there may be difficulties in defining in a particular case whether the circumstances are relevantly ‘highly exceptional.’ Minds will differ about whether it is appropriate to classify a particular case in this manner … I am not persuaded that the finding made by [the sentencing judge] was not open.108

**(d) Children with an Illness or Disability Where Circumstances Were Not ‘Exceptional’**

Although some appeal judges saw fit to reduce certain offenders’ sentences in view of the ill health of their children, this was not the outcome in all cases where the offender had a child with a serious illness or disability. For example, in *Chislett v The Queen*,109 the offender’s seven-year-old daughter had a congenital hip condition that required major surgery. The child was in the care of the grandmother (the offender’s mother), however the grandmother believed she would require assistance to care for the child after the operation. The offender was also the mother of two other children, a two year old and a one year old. The Court concluded that these particular circumstances did not outweigh ‘the need to impose deterrent sentences for drug dealers’,110 and the offender’s non-parole period of two years and one month was not disturbed.

In *Craft v Diebert*,111 the offender was a sole father caring for his 15-year-old son with ADHD. The evidence indicated that the offender was a dedicated father and that his son’s condition had improved considerably since the offender took over his care. Yet, the magistrate concluded that such matters were generally not given ‘much weight’.112 She said that whilst she ‘pondered long and hard’ and felt ‘considerable sympathy and empathy’ for the offender, this could not be allowed to overtake the importance of general deterrence.113 The three appeal court judges held unanimously that the magistrate had not erred in exercising her sentencing discretion. In support of their findings, the Court quoted the judgment in *R v Tilley* where the separation of a mother from her two-year-old daughter was at issue and that court said: ‘An offender cannot shield himself under the hardship he or she creates for others’ and ‘undue weight’ should not be given ‘to personal or sentimental factors.’114

Similarly, in *Markovic*,115 the offender had three children — the eldest child had epilepsy, the second child had asthma and the youngest child had learning difficulties.

110 Ibid [10].
112 Ibid [32].
113 Ibid [34].
The children were in the care of their mother, the offender’s estranged wife. These circumstances, combined with the ill health of the offender’s parents and brother, were considered ‘sad’ but not exceptional and thus there was no sentence reduction on this basis.116

*Hopley v The Queen*117 suggests that concerns related to a child’s mental health will not always be considered exceptional. In that case, the offender was a sole father with a 13-year-old son who had clinical depression. The Court held that this level of emotional distress was ‘commonplace’ for children in these circumstances, and that single parents ‘do not automatically receive a lesser sentence because their imprisonment will have adverse consequences on children in their care’.118 In relation to other cognitive and psychological concerns, in *Harrison v The Queen*119 the Court held that the mild intellectual impairment of one child was not sufficient to render the circumstances exceptional, and in *R v Hinton*120 having a ‘difficult’ child with ‘rapid mood changes’ (but no formal diagnosis) was not considered sufficient to amount to exceptional circumstances justifying leniency.121

The importance of detailed pre-sentence reports and submissions relating to the care of unwell children cannot be underestimated. In *Sowaid v The Queen*,122 there was evidence that at least one of the offender’s children had a medical condition, but the Court concluded that the reports suggested only ‘modest’ cause for concern.123 Similarly, in *R v Orphanides*,124 there was evidence that one of the offender’s children experienced serious health problems, but there was insufficient evidence to establish that the offender father’s incarceration would constitute ‘exceptional hardship’.125 The child was cared for by the mother and on appeal Phillips J observed:

> True it is that [the child] suffers significantly from ill-health, but, as is so often the case, it is the family which suffers when gaol is ordered. Such might have provided a basis for an exercise of mercy, but in itself that does not bespeak error on the part of the sentencing judge.126

The comments of Phillips J suggest that the circumstances may have justified the exercise of mercy at the original sentencing, but the failure to do so given its discretionary basis did not constitute an error.

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116 Ibid 603 [75].
118 Ibid [17].
121 Ibid 289 [12].
123 Ibid [16].
125 Ibid 409 [21].
126 Ibid 409 [22].
2 No Alternative Carer

Another factor that sometimes contributed to a finding of exceptionality was where there was no alternative carer for the child or children available other than state care. In *R v Edwards*, the offender’s two daughters were older children (aged 16 and 18 years) but they had been left with no lawful means of support since the offender’s incarceration; there was no family to care for them, and the offender’s 16-year-old daughter had left school because they were unable to make their rent payments. The offender mother was granted immediate parole. The judge also took into account the *CROC* art 3.1 which states: ‘In all actions concerning children … undertaken by … courts of law … the best interests of the child shall be a primary consideration’, noting this was a ‘relevant circumstance’ pursuant to s 9(2)(r) of the *Penalties and Sentences Act 1992* (Qld).

In *Michael v The Queen*, the offender was an Aboriginal mother of four children who were in separate foster homes. Some of the foster families were under investigation for alleged abuse of the children. The Court held that her sentence for burglaries should be reduced to provide her with the chance to regain care of her children at an earlier time. Despite the fact that these were state offences, and therefore subject to *Sentencing Act 1995* (WA), Wallwork AJ referred to s 16A(2)(p) of the Commonwealth *Crimes Act* which requires the court to take into account the probable effect that any sentence would have on the offender’s family members. He suggested that the provision ‘puts into statutory form the modern thinking on punishment and it should be applied with respect to sentencing for State offences.’

In two other cases, *R v Penno* and *Scheele v Watson*, there was fresh evidence indicating that the current carer of the children had experienced a significant deterioration in health and was unexpectedly unable to continue to care for the children. In both these instances, a lesser sentence was imposed to enable the offenders to regain care of the children.

Having said this, there were a number of other cases where there was no alternative carer available for the child other than state care, yet the court nevertheless concluded that this did not make the case exceptional. In *Cooper v The Queen*, the Court remarked:

> It is trite to say that the separation from a loving natural parent will have a significant impact on a child which foster care can never replace. And the deprivation

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128 Ibid [69].
130 Ibid [57].
of a child’s parental care is a relevant consideration when sentencing an offender and the rights of children in this respect need to be protected.\textsuperscript{134}

However, the Court then acknowledged that ‘single parenthood these days is not an unusual circumstance’\textsuperscript{135} and that the risk that the child would go into state care did not outweigh the fact that the drug offences committed by the offender were at the higher end of seriousness.\textsuperscript{136} In \textit{Egan v Western Australia},\textsuperscript{137} the offender was a single mother of two children who would likely end up in foster care if she was incarcerated for an extensive period of time. The elder child, 15 years of age, had begun drinking excessively. Nevertheless the Appeal Court did not find the circumstances exceptional.\textsuperscript{138} In \textit{Winter v The Queen},\textsuperscript{139} the Court concluded that there were no exceptional circumstances despite the fact that the offender’s incarceration meant that her 16-year-old son (who himself had ADHD) was forced to become a primary carer of the offender’s other child, who was 19 years old with multiple disabilities and confined to a wheelchair.

3 Pregnancy and Breastfeeding

In several cases submissions were made that circumstances were exceptional for offenders who were pregnant or had recently given birth and may have been breastfeeding. However, the cases examined here suggest that being a breastfeeding mother alone will not amount to ‘exceptional circumstances’ for the purpose of sentencing. Indeed, in \textit{R v O’Dea},\textsuperscript{140} Dunford J explicitly remarked: ‘there is no evidence that there is any greater burden on a female prisoner who is pregnant than there is on any other prisoner, or on any other woman who is pregnant in the community’.\textsuperscript{141}

In this sample of cases, pregnancy alone was similarly not generally considered to be ‘exceptional’ by the judges; however, in some cases judges did explicitly consider the implications for the mother and baby of the mother’s incarceration.\textsuperscript{142} For example,

\begin{itemize}
\item \textsuperscript{134} Ibid [16].
\item \textsuperscript{135} Ibid [18].
\item \textsuperscript{136} It did not assist the offender that cannabis had been found on the kitchen bench at the offender’s home, easily accessible to his four-year-old son. As Daly says, ““bad” parents’ tend to be seen as undeserving of court mercy: Kathleen Daly, ‘Structure and Practice of Familial-Based Justice in a Criminal Court’ (1987) 21 \textit{Law and Society Review} 267, 285.
\item \textsuperscript{137} [2007] WASCA 182 (5 September 2007).
\item \textsuperscript{138} While the Appeal Court did suspend the offender’s sentence, this was in response to an error made by the sentencing judge about the offender’s role and culpability in the offending, see \textit{Egan v Western Australia} [2007] WASCA 182 (5 September 2007) [13]–[14].
\item \textsuperscript{139} [2011] NSWCCA 59 (28 March 2011).
\item \textsuperscript{140} (2002) 36 MVR 184.
\item \textsuperscript{141} Ibid [17].
\end{itemize}
in the case of *R v SLR*, the judge sentenced a young pregnant woman to detention and recommended that she be transferred to an adult prison upon the birth of her baby so that she could be accommodated within the mothers and babies unit there. In *R v Chong*, the Attorney-General of Queensland appealed against a sentence for wounding and breach of an intensive correction order. The sentencing judge had ordered Chong to undertake 15 months probation and two and a half years imprisonment with court ordered parole to begin on the day of sentence. The offender had a number of children, one of whom she was currently breastfeeding. Justice Atkinson provided the lead judgment dismissing the appeal. She observed that the best interests of the children who are dependent on the offender fell within s 9(2)(r) of the *Penalties and Sentences Act 1992* (Qld), which requires the court to have regard to ‘any other relevant circumstance’. Justice Atkinson referred to art 3.1 of the *CROC* and noted that although s 9 of the Act precluded the court from regarding the best interests of the child as the primary consideration, the court could regard the child or children’s best interests as a ‘relevant circumstance’.

There was no clear difference between the appeal outcomes of men with parenting responsibilities and the treatment of women. While this might be because women more often receive mitigation of their sentence at the initial sentencing hearing, meaning that an appeal is not contemplated, Bray CJ of the South Australian Supreme Court has reflected:

> [It is said] that more weight will be given to the position of the offender’s family in the case of women than in the case of men. I find it difficult to see why this should be so. The contemporary sociological climate frowns on discrimination on the basis of sex.

### 4 Other Exceptional Circumstances

Although submissions related to economic dependency of a family upon a male breadwinner were made in some cases we examined, this was not held to amount to exceptional circumstances in any of the cases.

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144 It is notable that at the time SLR was sentenced there was no legislative basis for this recommendation in New South Wales. This has subsequently been addressed and is discussed further below.
146 Ibid 207 [33].
147 Ibid 207 [34].
149 *R v Wirth* (1976) 14 SASR 291, 293.
Other factors raised by judges when coming to conclusions regarding the exceptionality of the case were the possibility that a parent’s incarceration might make the children vulnerable to a risk of offending themselves,\(^{151}\) and the special vulnerability of young children.\(^{152}\) For example, in *Adams v The Queen*, Hasluck J considered that:

> it is open to the Court of Criminal Appeal in the circumstances of the present case to take account of and give weight to the role of the applicant as a mother, especially in regard to her role as the mother of a young child of less than 12 months of age.\(^{153}\)

However, generally judges did not consider these factors, on their own, to amount to ‘exceptional circumstances’.

### D What the Cases Suggest

As observed in our initial comments, the fact that sentencing is a process of instinctive synthesis in Australia makes it difficult to disentangle the various factors that may have been most influential in sentencing a particular offender. The relevant sentencing principles, the diversity of offending, the criminal histories and the variety of circumstances experienced by offenders are all relevant to the sentencing judge’s exercise of their discretion. Furthermore, only selected sentencing decisions are appealed. Despite these caveats, in our consideration of the cases several matters were prominent. First, judges often found an offender’s care responsibilities for a child with a serious illness or disability to be ‘exceptional’. Second, the fact that an offender was pregnant or was breastfeeding was not by itself generally viewed as an exceptional circumstance. Third, while considerations of children’s human rights played a part in some of the sentencing decisions, this was rare. We consider these matters in turn.

### 1 Caring for a Child with a Serious Illness or Disability

The disability of a dependent child was identified by offenders in a number of cases we examined. Often the dependant’s disability was identified in fresh evidence brought to the appeal.\(^{154}\) Given that most children do not have a severe disability,\(^{155}\) perhaps the existence of disability which requires complex care arrangements can be more easily identified as ‘exceptional’. While the community benefits from retaining the

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\(^{152}\) *Adams v The Queen* [2003] WASCA 91 (2 May 2003).

\(^{153}\) [2003] WASCA 91 (2 May 2003) [57].


services of those who provide voluntary care to dependent individuals generally, the cost of providing such services to children with a disability is particularly high and can be particularly complex. Moreover, Jeffries and Bond suggest that strong community or family ties may indicate higher levels of ‘informal social control’, and thus lower risks of reoffending — this is particularly the case for an offender who is responsible for the care of a child with a disability.

In cases where the dependent child has a serious illness, a judge may be influenced as much by the offender’s hardship in being absent for the last months or years of a child’s life as by the caring needs of very unwell child. In addition, considerations of ‘mercy’ may be more persuasive for a judge where the offender’s child suffers from an illness or disability.

2 Pregnant and Breastfeeding Offenders

Generally judges did not find pregnancy or breastfeeding exceptional on its own. This approach may be based in part on an assumption in some cases that, once imprisoned, a pregnant or breastfeeding mother may be able to retain care of the baby by being accommodated in a mothers and babies facility. This is not an accurate assumption for a judge to make. Whilst almost all Australian jurisdictions have some facility for admitting young children to prison with their mothers, very few places are available. Capacity, and the selection process, varies from state to state. In New South Wales, s 26(2)(l) of the Crimes (Administration of Sentences) Act 1999 allows for mothers of young children to obtain a ‘local leave permit’ to enable them to serve their sentence

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156 Herring, above n 37, 6–7, 93–95.
159 As to mercy and sentencing in Australia, see Edney and Bagaric, above n 1, 311–314. As to mercy in the context of sentencing mothers, see Ann-Claire Larsen, ‘Gendering Criminal Law: Sentencing a Mothering Person with Dependent Children to a Term of Imprisonment’ (2012) 1 Australian Journal of Gender and Law 21.
160 R v Moss [2004] NSWCCA 422 (2 December 2004); cf R v Togias (2002) 132 A Crim R 573, where the judge identified the reality that she would most likely be separated from her child for the sentence if assessed as not appropriate for the mothers and babies unit.
with their child or children in an ‘appropriate environment’. Jacaranda Cottage is a purpose-built facility at the Emu Plains Correctional Centre in New South Wales that accommodates female prisoners and their young children, however, it has capacity for only 16 mothers. The Parramatta Transitional Centre also houses female prisoners pre-release and it has some limited capacity to house children. However, there is a detailed application and assessment process for women who wish to be accommodated at these facilities, and demand may outstrip supply.

In Queensland, the Chief Executive makes the decision to allow a child up to the age of five to reside with his or her mother in prison based on the availability of accommodation and a consideration of the best interests of the child. Victoria has a similar process to Queensland. In Western Australia the superintendent of the prison, based on a recommendation of the Child Management Committee, makes the decision in relation to children up to 12 years (but usually up to four years), grounded on a number of exclusionary factors mainly related to the mental and physical health of the mother.

The situation is even more problematic for young mothers who are in juvenile detention centres. Whilst mothers and babies units are available in some adult prisons, there are no such units in Australian youth detention facilities. This issue was raised in some of the New South Wales cases in this study’s sample. In the case of *R v SLR*, the judge sentenced a young pregnant woman to detention, and recommended that she be transferred to an adult prison upon the birth of her baby so that she could be accommodated within the mothers and babies unit there. However, at that time, there was no legislative basis for this recommendation. Now, under s 26 of the *Crimes (Administration of Sentences) Act 1999* (NSW), young offenders can be transferred to adult prisons for this purpose.

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163 Section 26(2)(j) of the *Crimes (Administration of Sentences) Act 1999* (NSW) allows a local leave permit to be obtained to enable an inmate to reside at a transitional centre. See also Cleo Lynch, ‘The Parramatta Transitional Centre: Integrating Female Inmates into the Community Before Release’ (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October–1 November 2000).

164 Dianna Kenny, ‘Meeting the Needs of Children of Incarcerated Mothers: The Application of Attachment Theory to Policy and Programming’ (Consultant Report, The University of Sydney for the Department of Corrective Services, New South Wales, October 2012) 3.


167 Department of Corrective Services, ‘Prisoners Mothers/Primary Carers and Their Children’ (Policy Directive 10, Government of Western Australia, 4 April 2007) 4 [3], 5–6 [6.1]. See also Larsen, above n 159.


169 The amendment is discussed in *HJ v The Queen* [2014] NSWCCA 21 (28 February 2014), although in that case the Court decided to release the offender on parole.
3 Human Rights Arguments in Sentencing

As noted earlier the CROC, to which Australia is a signatory, states at art 3.1 that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ While art 9 of the CROC recognises that the State may legitimately separate a child from his or her parents, such decisions should be made in the shadow of art 3.1. This suggests that the best interests of the child should be a primary consideration in the decision to incarcerate the parent of a dependent child. Furthermore, art 23 of the International Covenant on Civil and Political Rights (‘ICCPR’) states that ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society.’

Of course, neither the CROC nor the ICCPR are legally binding in Australia unless they are incorporated into domestic law. The two Australian jurisdictions that have introduced human rights instruments, Victoria and the Australian Capital Territory, have legislated to protect the rights of children and the family unit. Section 17 of the Victorian Charter of Rights and Responsibilities Act 2006 (‘Victorian Charter’) states that ‘[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State’ and that ‘[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child’. Section 11 of the Human Rights Act 2004 (ACT) states similarly that ‘[t]he family is the natural and basic group unit of society and is entitled to be protected by society’ and that ‘[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind’.

The Victorian Charter and the Australian Capital Territory state that legislation must be interpreted in a manner that is compatible with human rights, so far as it is possible to do so consistently with its purpose. The protections the interpretive principle affords may have been diluted as a result of the High Court’s decision in Momcilovic v Commonwealth, however, the recent Victorian Supreme Court case of Victorian Police Toll Enforcement v Taha suggests that in accordance with the principle of ‘unified construction’, relevant Charter rights are still to be taken into account in the interpretive process.

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170 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).


172 Victorian Charter s 32(1); Human Rights Act 2004 (ACT) s 30.

173 (2011) 245 CLR 1. In that case, it was held by a majority of the High Court that s 32(1) of the Victorian Charter does not go beyond the general principle of legality.


175 Ibid [24]–[25].
In Victoria, therefore, it may be appropriate to reconsider the approach to sentencing offenders with dependants in accordance with Charter rights. While the High Court ruled in *Momcilovic v The Queen* that the Victorian Charter does not justify courts departing from the clear text or purpose of statutory provisions, the *Sentencing Act 1991* (Vic) does allow the sentencer to consider ‘any other relevant circumstances’.176 Following *Victorian Police Toll Enforcement v Taha*,177 this would require the sentencer to inquire as to the offender’s particular circumstances and have regard to them before making an imprisonment order.

Domestic law in the other states and territories has introduced specific sentencing legislation that may be understood to exclude the considerations of the rights of the child and family enshrined in the *CROC* and *ICCPR*. Protection of the human rights of dependants is not specifically identified as a sentencing consideration in any Australian sentencing legislation. While one of the aims of sentencing is to protect the community, and this could be read to protect the dependent child and the family unit, it is just one aim of sentencing that is required to be balanced with others that are focused on the offender and future potential offenders.178 Nevertheless, the Australian High Court has recognised that human rights instruments may be consulted in the sentencing process with ‘discrimination and care’.179

Regardless, the human rights of children were rarely discussed in the cases in our review. In the Queensland case of *R v Chong*,180 as noted earlier, Justice Atkinson found that human rights instruments such as the *CROC* are a relevant consideration for the purposes of sentencing, without the requirement for exceptionality. In Queensland, Justice of Appeal Fraser took a similar approach in *R v Edwards*,181 and in Western Australia, Wallwork AJ has referred to the *CROC* and observed that: ‘[i]t can be a serious derogation of a child’s rights to order a particular offender go to prison.’182 But in none of the cases we examined were human rights determinative of the outcome, or central to the court’s reasoning.

176 *Sentencing Act 1991* (Vic) s 5(2)(g).
177 [2013] VSCA 37 (4 March 2013) [14]–[15].
180 *R v Chong; Ex parte A-G (Qld)* (2008) 181 A Crim R 200, 207 [34]. Section 9(2)(q) of the *Penalties and Sentences Act 1992* (Qld) similarly allows for the consideration of ‘any other relevant circumstance’.
181 [2011] QCA 331 (22 November 2011) [69].
182 *S v The Queen* [2003] WASCA 309 (10 December 2003) [38]. In the *Sentencing Act 1995* (WA) specific mitigating factors are not exhaustively listed.
IV Conclusion

This study considers the kinds of circumstances where caring for a dependent child has been upheld as ‘exceptional’ in sentencing appeals. Our review of the available Australian cases suggests that offenders who have children with serious disabilities or medical conditions may be more likely to be understood as presenting a case of exceptional circumstances. However, and perhaps surprisingly, it suggests that pregnancy and breastfeeding is not generally considered exceptional. Finally our review of the cases shows that the human rights of children are rarely (explicitly) considered by judicial officers. We suggest that the consideration of the human rights of the child and, relatedly, the family should play a more important role in consideration of the appropriate sentence in Australian jurisdictions. Only a few judges identified the rights of the child as a significant factor when considering the impact of a sentence on the offender’s dependent children.183

Maintaining the family unit often has benefits for the parent and child, but also for the community as a whole: it is costly to replace a parent in a child’s life, and negative social outcomes can result from separation as the child grows older, particularly where the child is vulnerable due to physical or mental health concerns. The trend in some Australian jurisdictions to reduce, rather than increase, non-custodial sentencing options is worrying in this context.184 Periodic detention, home detention and mothers and children’s units in correctional facilities all have the potential to strike the right balance between child welfare and just punishment, and to reduce the social costs associated with imprisoning parents.

As observed earlier, the CROC, to which Australia is a signatory, states at art 3.1 that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. In its review of federal sentencing law, the Australian Law Reform Commission observed that:

An offender’s family and dependants may be seen as indirect ‘victims’. They may suffer adverse consequences as a result of the sentencing of the offender, through no fault of their own. … [the Australian Law Reform Commission] advocates an approach that would encompass consideration of the impact of sentencing on this particular group of persons without the need to establish exceptional circumstances.185

Acting Justice Wallwork of the Western Australian Supreme Court has said that the Commonwealth approach, which requires sentencers to take into account the probable effect that any sentence would have on the offender’s family members or


184 In Queensland, for example, the sentencing options of periodic detention and home detention were abolished by the Corrective Services Act 2006 (Qld).

185 Australian Law Reform Commission, above n 24, 190 [6.127].
dependants,\textsuperscript{186} reflects ‘the modern thinking on punishment’ and ‘should be applied with respect to sentencing for State offences.’\textsuperscript{187} We suggest that the probable impact of a sentence on the offender’s dependants should be a significant factor that is weighed with other factors in the process of ‘instinctive synthesis’ applied by Australian sentencing judges. We suggest that the notion of ‘exceptionality’ may not be a useful concept in determining the appropriate outcome in any given case, given its vagueness and openness to different interpretations. In our view, when a parent is being sentenced, the best interests of the child should always be considered.

\textsuperscript{186} \textit{Crimes Act 1914} (Cth) s 16A(2)(p).

\textsuperscript{187} \textit{Michael v The Queen} [2004] WASCA 4 (22 January 2004) [57].
CONFLICT IN STRATA TITLE DEVELOPMENTS: 
The Need for Differentiated Dispute Resolution Rules

Abstract

Conflict arising in apartment buildings, medium-density housing and master planned estates is an important issue as strata title developments become more prevalent in Australia. In Victoria, the Owners Corporations Act 2006 (Vic) (‘OC Act’) provides for a dispute resolution scheme for conflicts arising in strata developments. This article reports on research into dispute resolution under the OC Act, and in particular into the effectiveness of the model rules for dispute resolution provided in the associated regulations. The research, which was conducted in Victoria in 2011, gathered data from a range of key stakeholders in owners corporations, including 34 strata managers of owners corporations. This article reports on the range of conflicts experienced by the strata managers who participated in the study. Analysis of the data provided by the strata managers shows that difficulties with conflict and the model rules for dispute resolution under the OC Act were most evident in small and large developments. The participants most satisfied with the model rules were managers in medium-sized owners corporations. Whilst a majority of managers used the model rules, over a third used their own informal rules. These findings lead the authors to argue that there is a need for differentiated rules for dispute resolution that are dependent upon the size of the development. Additionally, the authors suggest that further research is needed into the informal rules applied by a significant proportion of managers to ascertain their effectiveness and to provide owners corporations with added choice in dispute resolution.

Introduction

Strata title developments consist of individual lots founded on a legal structure where some shared areas and services are jointly owned. In Victoria, the legal entity holding shared assets is known as the owners corporation and the

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legislation that regulates ownership of shared assets is the Owners Corporations Act 2006 (Vic) (‘OC Act’). Strata title is increasingly being used by developers in Australia. Wider use of strata title in urban planning encourages higher density living, thereby ‘reducing the need for peri-urban development’. Strata title developments are often in the form of high-rise tower buildings and medium density townhouse developments. Less commonly, strata title can be included in master planned estates to allow for the provision of shared lifestyle assets, environmental features and, on occasion, private infrastructure including roads. This kind of communal living is on the rise globally but with the increase in strata title development, various challenges, including conflict experienced by owners and residents, has arisen.

Approximately 3 million Australians now live in strata titled homes. In particular, strata title developments have increased in the two largest cities of Australia, Sydney and Melbourne. In Australia, strata title systems date from the early 1960s and each state and territory has its own strata legislation. This legislation enables shared

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4 Shared lifestyle assets can include gymnasiaums, pools and tennis courts and may also include community facilities: Therese Kenna and Deborah Stevenson, ‘Negotiating Community Title: Residents’ Lived Experiences of Private Governance Arrangements in a Master Planned Estate’ (2010) 28 Urban Policy and Research 435.
7 Easthope et al, above n 2, 297–8.
8 Hazel Easthope, Bill Randolph and Sarah Judd, ‘Governing the Compact City: The Role and Effectiveness of Strata Management’ (Final Report, City Futures Research Centre, May 2012) 1.
9 Bob Birrell and Ernest Healy, ‘Melbourne’s High Rise Apartment Boom’ (Research Report, Centre for Population and Urban Research, September 2013) 4. Increased apartment blocks in Melbourne are driven by property investors and younger buyers who sometimes struggle to afford detached housing: at 23–4.
ownership and provides the governance mechanisms for the entity that holds the joint assets. Such legislation is an important part of policy development in urban planning, providing the framework for the governance of shared property through by-laws or rules. These by-laws/rules may be part of the rules adopted in the initial development plan or they may be formulated by the management committee. They can impact on residents’ lived experiences, including control over lifestyle choices such as the keeping of pets or the fitting of awnings in outside areas. With the increasing use of strata title, particularly in the context of apartment living, research into the impact on residents of this type of legal arrangement is needed.

What is of interest to the discussion in this article is the degree of conflict and methods of conflict resolution now used in strata title developments. The occupants of strata title properties generally live in close proximity and share a range of joint assets. These two factors can result, at times, in significant levels of conflict and therefore a dispute resolution scheme is needed in the relevant regulatory legislation. The best ways to address conflict amongst owners and residents in strata title is a question debated in many jurisdictions. For example, Canadian legislation regulating strata title, including dispute resolution schemes, was recently subject to review.

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14 Simon Libbis, ‘Avoiding the Lot Knots’ (2012) 86 Law Institute Journal 46, 48. In Victoria, under s 27E of the Subdivision Act 1998 (Vic) these rules can be lodged with the plan of subdivision.
17 Easthope et al, above n 2, 292–3.
21 The City of Toronto is experiencing significant growth in private apartment (condominium) living. As a consequence, the province of Ontario is undergoing an extensive review of its Condominium Act, SO 1998, c 19.
Australian legislators have been considering the best ways to deal with disputes in strata title. In Victoria, after a review of legislation governing strata title in 2006, and in recognition of the heightened prospect of conflict occurring in strata developments, the OC Act established a three-tier dispute resolution scheme for conflict resolution within owners corporations. The Owners Corporations Regulations 2007 (Vic) provide a set of model rules for owners corporations, which includes the requirements for an internal dispute resolution scheme. There is presently a further review of the legislation being undertaken in Victoria that may address dispute resolution when considering issues relating to common property.

This article reports on research on conflict and dispute resolution in owners corporations in Victoria. The research was conducted in 2011 and documented the range of conflict experienced by resident committees and managers in owners corporations. Analysis of the data gathered in the study shows that difficulty with conflicts arising in strata title developments, and with challenges implementing the dispute resolution provisions of the OC Act, is most evident in high-rise apartment buildings. Given that a great deal of development in strata title in Melbourne is now focused on high-rise apartment towers, this finding points to the need to change the present arrangements in relation to dispute resolution in Victoria. This leads the authors to recommend the provision of differentiated model rules for dispute resolution. The differentiated rules should take into account the size and magnitude of the development and available amenities. An understanding of the community (owners, investors, residents, tenants, older residents and younger people) who are affected by the rules, and of whether the rules are relevant to their lived experiences, is highly important but perhaps not

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24 The three-tier dispute resolution scheme is described in detail in Part IV below.

25 OC Act ss 152–62. Previously in Victoria, the legal entity holding the common assets was called a body corporate. OC Act s 3 defines ‘owners corporation’ as ‘a body corporate which is incorporated by the registration of a plan of subdivision or a plan of strata or cluster subdivision’. The use of the term ‘multi-titled development’ to describe the forms of strata title has been recommended: Easthope et al, above n 2, 290.

26 Owners Corporations Regulations 2007 (Vic) sch 2 r 6.

easily achieved. To address this, the authors consider the complex factors that may potentially contribute to conflict in strata title developments.

II Strata Schemes in Australia

A strata scheme is a building or collection of buildings where individuals have title to a small portion known as a ‘lot’ and share access to and responsibility for the maintenance of common property. In an apartment building, for example, a buyer purchasing a unit would receive title to a ‘lot’ comprising a private apartment and a share in the common property that includes areas such as lifts, stairwells, access lanes, visitor car parks and recreation facilities such as function rooms, swimming pools and tennis courts. The plan of subdivision will determine the common property and the specification of boundaries will define shared areas.

Prior to the development and introduction of strata title, the most common way of buying into an apartment building was through company title, where individuals would buy shares in the company that owned the building. These shares in turn gave the right to occupy one or more units. Over time, however, company title proved to be administratively onerous and strata title evolved to address concerns over the rights of ‘shareholders’ and other management issues.

All Australian jurisdictions regulate the subdivision of land through a variety of legislative models (see Appendix 1). Unfortunately, there is no uniform regulatory template across the Australian jurisdictions, which has resulted in a kaleidoscope of arrangements. For example, there is no agreement across the states and territories about nomenclature, although historically the most common term has been ‘strata title’. Also, the various state jurisdictions lack a common approach to managing conflict and disputes in strata developments (see Appendix 2).

Several commentators and legislative reviews have indicated that strata legislation in Australia is so diverse and complex that it poses very real practical problems for stakeholders, and, in particular, for practitioners operating across state borders. There has so far been little research into, and analysis of, the differences between these state jurisdictions particularly relating to dispute management provisions.

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28 In South Australia the relevant terminology for ‘lot’ is ‘unit’ under Strata Titles Act 1988 (SA) s 3 and ‘community lot’ under Community Titles Act 1996 (SA) s 6.
29 Libbis, above n 14, 46.
31 Bradbrook et al, above n 10.
32 See Everton-Moore et al, above n 11.
33 See, eg, Body Corporate and Community Management Act 1997 (Qld) ch 6.
One of the significant players in engaging with conflict is the strata manager. The role of the strata manager is to assist with the administration of the owners corporation, including compliance issues. A common misunderstanding among lot owners is that the strata manager is responsible for the operation and decision-making within the owners corporation. In fact, the manager acts in an agency relationship with the owners corporation. A strata manager is considered therefore to be a fiduciary vis-a-vis their principal (the owners corporation). The relationship between an agent and their principal creates fiduciary obligations on the part of the agent to the principal, because the agent is acting on behalf of the principal. Trust and honesty underpin this relationship. As agent of the owners corporation, the strata manager undertakes a number of duties on behalf of the owners corporation. It is common for strata managers to sign a management agreement with the owners corporation and many of the duties and responsibilities of the strata manager are set out in this management agreement. As the relationship of agent and principal is predominately contractual, the manager’s failure to observe their duties may result in a breach of contract, giving rise to liability for damages in favour of the principal. The main contractual and fiduciary duties owed by the manager to the owners corporation are to:

- follow instructions from the principal;35
- use reasonable care, skill and diligence;36
- act in the principal’s best interests;37
- disclose conflicts of interest to the principal;38
- not make a secret profit;39
- act in person;40 and
- keep and render accounts.

35 Complications can arise where instructions are vague or ambiguous. The agent may be liable in negligence to the principal if they do not seek further clarification of such instructions: see, eg, *Bertram, Armstrong & Co v Godfray* (1830) 12 ER 364.


37 The strata manager, as agent, must avoid conflicts of interests, because the agent cannot put his or her interests before the interests of the owners corporation (principal).

38 The duty to disclose conflicts of interest is strictly enforced by the courts and an agent is only released from this obligation in the most exceptional of circumstances. If a conflict of interest does arise between the agent’s personal interests and those of the principal, the agent must disclose the conflict to the principal and seek their approval. See, eg, *Dargusch v Sherley Investments Pty Ltd* [1970] Qd R 338.

39 See, eg, *Secret Commissions Act 1905* (Cth) and *Crimes Act 1958* (Vic) s 175.

40 At all times, the agent is to perform duties personally unless expressly or impliedly authorised by the principal to delegate authority. See, eg, *John McCann & Co v Pow* [1975] 1 All ER 129.
Some of these common law duties are codified in the *OC Act*. Under s 122 of the *OC Act*, for instance, a manager:

(a) must act honestly and in good faith in the performance of the manager’s functions; and

(b) must exercise due care and diligence in the performance of the manager’s functions; and

(c) must not make improper use of the manager’s position to gain, directly or indirectly, an advantage personally or for any other person.

Often, the strata manager is the first person to be notified of conflict and will attempt to address the issue of concern. As such, the strata manager plays a pivotal role in conflict resolution under the *OC Act*. The strata manager, however, as agent, cannot agree on a mediated outcome without first obtaining instructions from the owners corporation.

III Conflict and Strata Living

Strata living can exert a range of pressures that may result in disputes. For instance, Hazel Easthope and Bill Randolph report a wide variety of conflicts in strata living. There may be conflict between those who rent and those who own lots, as tenants are often concerned with amenity and most owners are concerned with return on investment. Living in close proximity may engender disputes due to conflicts over rules or by-laws such as those relating to noise and pets. Easthope and Randolph note that:

Mechanisms for resolving disputes in strata schemes therefore become very important in order to manage neighbour disputes that are compounded by both close living arrangements and more formal interactions that are of necessity conducted through the owners’ corporation.

Queensland has a large amount of strata title development, including both residential and tourist accommodation. In research conducted in Queensland assessing the experience of apartment owners living in a large apartment development, researchers found apartment owners in conflict with the caretaker of the development and the property manager over the letting of apartments to tourists. They found that residents were largely dissatisfied with the dispute resolution processes available to

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41 See, eg, Easthope et al, above n 2; Sherry, ‘The Legal Fundamentals of High Rise Buildings and Master Planned Estates’, above n 3; Kenna and Stevenson, above n 4; Goodman and Douglas, above n 5.

42 Easthope and Randolph, above n 19, 249.

43 Ibid.

44 Ibid.

45 Fisher and McPhail, above n 18, 8–9.
them to deal with this and other concerns.\footnote{Ibid 11.} Research in New South Wales found there was also significant conflict in strata title developments.\footnote{Easthope, Randolph and Judd, above n 8, 1. This major research project included surveys and interviews with 1020 owners of strata title lots, 413 committee members and 106 managers. Other sources of data included peak bodies, strata databases and legislation.} In a large study that consulted 1550 individuals involved in owners corporations, researchers found the major areas of conflict related to parking (61%), breaking of by-laws (59%) and noise (50%).\footnote{Ibid 87. Other areas of conflict included rubbish (41%), repairs and maintenance of common property (39%), renovations within individual owners’ lots (38%), use of common property (36%), pets (35%), financial costs to the owners corporation/owners (33%), actions of the strata manager (28%), access to common property (24%), laundry displayed on balconies (24%), smells (including smoking complaints) (22%), setting of levies (20%), short term letting (11%), actions of the building manager or caretaker (10%), other disputes over common property (11%) and other (26%).} The research found that informal dispute resolution was common in developments in New South Wales, although around a third of disputes eventually required formal dispute resolution:

in the majority of cases where disputes take place, a settlement is reached before formal measures need to be taken. This suggests that the informal mediation processes used by owners and managers are effective in defusing and resolving emerging disputes among parties. However, in around a third of cases where disputes were noted, more formal procedures had to be invoked, indicating a sizeable number of disputes proceed beyond informal mediation.\footnote{Ibid 91.}

The informal measures considered in the Easthope, Randolph and Judd study often involved personal discussion and negotiation led by the owners corporation manager and the committee using a variety of means including face-to-face meetings, telephone and email.\footnote{Ibid 92.} The next possibility available under the New South Wales legislation is a formal process of mediation through New South Wales Fair Trading or another agency. This process had some support amongst the respondents to the Easthope, Randolph and Judd study. However, some of those in conflict appear to give up at this stage rather than proceed to formal methods of conflict resolution.\footnote{Ibid 93.} The last option, a hearing before a tribunal resulting in adjudication, was found to be the least satisfactory of the options available to residents, committees and managers.\footnote{Ibid 93–5.} The findings from the study led the researchers to argue that ‘some review of current practices may be needed to explore how the outcomes of the mediation and adjudication process can be improved.’\footnote{Ibid 95.}

The position of tenants in strata developments is a largely neglected area in the literature and legislation. Residents in strata developments include both owner-occupiers and
occupiers under tenancy agreements. Whilst strata legislation such as the OC Act makes some reference to ‘occupiers’,\textsuperscript{54} the legislation favours the position of owners and owner-occupiers. Due to the growth in Australia of private apartment living, strata legislation needs to ‘catch up’ to ensure that tenants have a greater contribution and share an active ‘interest’ in the governance of the buildings in which they reside. This will become increasingly important as the number of strata tenants increases due to affordability concerns over rising prices in Australian cities.\textsuperscript{55}

IV OWNERS CORPORATION DISPUTE RESOLUTION IN VICTORIA

The OC Act, which was passed in 2006 and became operational in 2007, includes a three-tier (sometimes known as a three-step) process to deal with conflict in owners corporations.

A First Tier

Under s 152(2), the first tier of the dispute resolution scheme, parties have the opportunity for early conflict engagement through use of an internal dispute resolution under the model rules or under an alternative scheme registered by the owners corporation.

B Second Tier

The second tier provides for access to low cost dispute resolution. A state government department, Consumer Affairs Victoria, provides conciliation or mediation for disputes. Under s 161 of the OC Act, the Director of Consumer Affairs can direct a dispute to conciliation or mediation from:

- a current or former lot owner;
- a mortgagee of a lot;
- an insurer;
- an occupier of a lot;
- a purchaser of a lot; or
- a manager of an owners corporation.\textsuperscript{56}

\textsuperscript{54} See, eg, OC Act s 167 which deals with duties of occupiers of lots, including tenants and owner-occupiers.

\textsuperscript{55} Kath Hulse et al, ‘The Australian Private Rental Sector: Changes and Challenges’ (Positioning Paper No 149, Australian Housing and Urban Research Institute, July 2012).

C Third Tier

The third tier is the option of a hearing at the Victorian Civil and Administrative Tribunal (VCAT). An owners corporation cannot apply to VCAT for an order in relation to an alleged breach unless the dispute resolution process required by the internal owners corporation rules has been followed and the owners corporation is satisfied that the matter has not been resolved through that process. Section 18 provides that an owners corporation cannot take legal action, except upon the issue of repayment of overdue fees or to enforce the rules of the owners corporation, without a special resolution of the committee of management. Small two-lot allotments are exempt from many requirements of the OC Act including ss 152–61 of the Act. This means that two-lot corporations do not need to comply with the internal dispute management process.

In terms of the third tier in the dispute resolution scheme, s 162 of the OC Act states that VCAT must be satisfied that there is a ‘dispute’ involving an owners corporation before it can intervene. Section 165(1) of the Act provides that in determining an owners corporation dispute, VCAT may make any order it considers fair including, amongst a large range of options, the right to require a party to:

- refrain from doing something;
- comply with the Act; and
- an order to require a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation.

Additionally, s 124 of the OC Act provides that VCAT may make a ‘declaration’ that clarifies a legal question rather than an order that would bind the parties. This is a useful power to draw on when there is a dispute where the facts are agreed or relatively straightforward and the law or the statute in relation to the issue is vague or difficult to interpret.

Importantly, s 138 of the OC Act provides that:

(1) By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1.

Schedule 1 specifically provides for the making of a broad variety of rules, in addition to dispute resolution, including internal grievance, hearing and communication procedures. If an owners corporation does not make its own internal dispute

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57 OC Act s 153(3).
58 Ibid s 7(1).
59 See Boves v Owners Corporation No 1 PS 514665E (Civil Claims) [2009] VCAT 2405 (10 November 2009).
60 See ss 165(1)(a)–(m) for the various orders available.
management rules, then s 139(2) of the *OC Act* provides that the default model rules will apply:

139 Model rules

(1) The regulations may prescribe model rules in relation to any matter in respect of which rules can be made.

(2) If the owners corporation does not make any rules or revokes all of its rules, then the model rules apply to it.

(3) If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matter are deemed to be included in the rules of the owners corporation.

The model rules provide as follows:61

6 Dispute resolution

(1) The grievance procedure set out in this rule applies to disputes involving a lot owner, manager, or an occupier or the owners corporation.

(2) The party making the complaint must prepare a written statement in the approved form.

(3) If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant.

(4) If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute.

(5) The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working days after the dispute comes to the attention of all the parties.

(6) A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.

(7) If the dispute is not resolved, the grievance committee or owners corporation must notify each party of his or her right to take further action under Part 10 of the *Owners Corporations Act 2006*.

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The model rules are thus general in approach and therefore may not meet the needs of a particular owners corporation. The model rules do not specifically address issues associated with the size of the development or the likely complexity of the issues of conflicts that may arise within a large development, such as an apartment tower. The rules fail to provide detail or guidance about the process of forms of dispute resolution such as mediation. Also, the 14-day period within which a meeting must be scheduled is a tight timeline that may be challenging for owners corporations to fulfil. Lastly, the rules mean that in some circumstances, for instance if there is no appointed grievance committee, the entire owners corporation committee must meet with the complainant.

The *OC Act* permits the option of creating an alternative dispute resolution scheme for an owners corporation committee. However, the adoption of alternative rules can be a complex process involving:

- the promulgation of a set of model rules;
- presentation of a special resolution for ratification at an owners corporation meeting;
- setting up a dispute resolution committee; and
- registration of the new rules with the Registrar of Titles at the Land Titles Office (Victoria) to ensure they are enforceable.

Day-to-day administration of the owners corporation is carried out by a committee of management elected from the owners corporation lot owners. The management committee then usually appoints and liaises with professional strata property managers. Managers provide the necessary expertise in day-to-day management, facilitation of meetings and compliance with regulatory requirements under relevant legislation. The committee of members is normally elected at the annual general meeting of the owners corporation. The number of votes held by an individual lot

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63 Ibid 56.
64 Ibid.
65 Ibid.
66 Ibid 45.
67 Sherry, ‘How Indefeasible is Your Strata Title: Unresolved Problems in Strata and Community Title’, above n 13, 161–2.
68 Easthope, Randolph and Judd, above n 8, 24.
owner is determined by his or her lot entitlement based on the relative value of that lot owner’s property. This measure is proportional to a member’s liability for levies.69

V Project Methodology

The research into conflict in owners corporations in Victoria was funded in 2011 by a grant from the Legal Services Board, Victoria. Data was obtained from three sources:

• a survey of owners corporation managers;

• semi-structured interviews with owners corporation committees; and

• a content analysis of websites dealing with the disputes within owners corporation or like entities.

In this article, the authors focus on the data from the owners corporation managers. The data was collected via a survey instrument that included a Likert scale of forced-choice questions and the opportunity for open-ended responses. The researchers received 34 responses to the survey of managers. At the time of collecting data, there were approximately 350 managers in Victoria. The survey included 30 questions, some dealing with participant demographic information and the bulk of the questions enquiring about the experience of managers using internal dispute resolution within owners corporations. Although the sample size of 34 surveys was small, the authors argue that useful inferences from the data analysis are possible.

In terms of the size of owners corporations managed by the 34 respondents, three portfolios70 or categories were used when analysing the data. These were:

(i) small: up to 20 lots;71

(ii) medium: 21 to 100 lots; and

(iii) large: 101 to 250 lots.

Eleven respondents (32.3%) managed owners corporations of up to 20 lots. Nineteen respondents (55.9%) indicated that they managed owners corporations of 21–100 lots. Four of the managers (11.8%) were responsible for owners corporations of 101–250 lots. Participants were asked to provide open-ended comments at key moments in the survey. The responses to the questions were cross-tabulated and analysed for themes. Selected open-ended responses are included in the analysis below.

69 Levies include insurance, maintenance, repairs and management of the common property. See, eg, OC Act ss 59–61, which require public liability for common property and replacement insurance of buildings. See also Libbis, above n 14, 48.

70 Portfolio in this context refers to the grouping of lots, ie up to 20 lots as ‘small’.

71 In the data analysis, the small category is further divided with a sub-category of equal to or less than five lots.
VI Dispute Resolution and the Model Rules

One of the key concerns of this study was the use of the model rules under the *OC Act*. The aim was to discover whether the strata managers who participated in the study found the model rules effective in dealing with conflict in owners corporations. The *OC Act*, with the model rules, had been operating for approximately five years when the study was undertaken in 2011. The researchers reasoned that there had been sufficient time for managers to experience using the model rules to gauge their effectiveness. The researchers were also aware of the possibility that some managers, and the committees that they served, may not be using the model rules and instead may have devised their own, or are alternatively applying informal rules. These informal rules are not registered with the Land Titles Office.

Of the managers surveyed, the majority (55.9%) reported that they relied on the model rules. Of this group who relied on the model rules, almost half (48.4%) were not satisfied with these rules. The survey showed that 35.3% used informal rules.72 This represents a high percentage of owners corporations that for some reason choose not to apply — or do not value — the model rules. Devising their own approaches to conflict indicates that the model rules were found to be deficient in some way.

The respondents reported that they dealt with the following kinds of conflicts:

- financial issues, including debt recovery for quarterly and special levies (73.5%);
- lifestyle concerns, including pet ownership and neighbour disputes (79.4%); and
- maintenance conflict, including owner repair and upkeep of joint assets (67.6%).73

In response to the main question on dealing with conflict (question 6 of the survey), ‘have there ever been any disputes between owners and/or occupiers in any of the schemes you manage?’ 76.5% of the 34 respondents indicated occasional disputes between owners and/or occupiers (see Table 1).

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72 8.8% of respondents did not provide answers to this question.
73 Additionally, 73.5% reported conflict with respect to the original formation of the owners corporation. This type of dispute would largely be confined to the beginning of an owners corporation’s existence rather than ongoing throughout the life of an owners corporation. Qualitative data gathered in the study from members of owners corporation committees indicated a number of areas of conflict: compliance and enforcement with the owners corporation rules; the level and payment of owners corporation fees; disputes with owners corporation management companies and disputes with developers. See Rebecca Leshinsky et al, ‘What are they Fighting About? Research into Disputes in Victorian Owners Corporations’ (2012) 23 Australasian Dispute Resolution Journal 112, 115–19.
Table 1: Frequency of disputes between owners/occupiers

Q6. Have there ever been any disputes between owners and/or occupiers in any of the schemes you manage?

<table>
<thead>
<tr>
<th>Frequency of Disputes Between Owners/Occupiers</th>
<th>Frequency N</th>
<th>Percent (%)</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frequently</td>
<td>6</td>
<td>17.6</td>
<td>17.6</td>
</tr>
<tr>
<td>Occasionally</td>
<td>26</td>
<td>76.5</td>
<td>94.1</td>
</tr>
<tr>
<td>Never</td>
<td>2</td>
<td>5.9</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>34</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

Question 7 aimed to elicit the time managers spent on managing disputes and their degree of comfort with that amount of time. In answer to the question ‘how much of your time is spent being involved in disputes between owners and/or occupiers?’ 47.1% of respondents indicated that they spent up to 10% of their time on disputes. In addition, 23.5% spent 10–20% of their time on disputes. A further 14.7% spent 20–30% of their time on disputes leading to a cumulative total of 88.2% who spent 0–30% of their time on conflict. Only 2.9% of those surveyed reported that they spent none of their time on disputes (see Table 2).74

Table 2: Time spent on managing disputes between owner/occupiers

Q7. How much of your time is spent being involved in disputes between owners and/or occupiers?

<table>
<thead>
<tr>
<th>Time Spent on Managing Disputes Between Owner/Occupiers</th>
<th>Frequency N</th>
<th>Percent (%)</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–none</td>
<td>1</td>
<td>2.9</td>
<td>2.9</td>
</tr>
<tr>
<td>0–10%</td>
<td>16</td>
<td>47.1</td>
<td>50.0</td>
</tr>
<tr>
<td>10–20%</td>
<td>8</td>
<td>23.5</td>
<td>73.5</td>
</tr>
<tr>
<td>20–30%</td>
<td>5</td>
<td>14.7</td>
<td>88.2</td>
</tr>
<tr>
<td>30–40%</td>
<td>4</td>
<td>11.8</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>34</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

Additionally, in answer to question 8 ‘are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers?’ 41.2% of respondents indicated that they were uncomfortable with the period of time that they spent on dispute resolution (see Table 3).

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74 Note in the data there is a slight overlap between categories of time for example, 0–10% overlaps with 10–20%.
Table 3: Comfortable with time spent on dealing with disputes of owners/occupiers

Q8. Are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers? (Please select one option!)

<table>
<thead>
<tr>
<th>Comfortable with Time Spent on Dealing with Disputes of Owners/Occupiers</th>
<th>Frequency</th>
<th>Percent (%)</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>8</td>
<td>23.5</td>
<td>23.5</td>
</tr>
<tr>
<td>Neither comfortable, nor uncomfortable</td>
<td>10</td>
<td>29.4</td>
<td>52.9</td>
</tr>
<tr>
<td>No</td>
<td>14</td>
<td>41.2</td>
<td>94.1</td>
</tr>
<tr>
<td>Don’t know</td>
<td>2</td>
<td>5.9</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>34</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

Of the eight respondents who indicated that they were comfortable with the time commitment relating to dispute resolution, five provided open-ended responses. From these responses, it would appear that these managers saw dispute resolution as part of the role and only a relatively minor responsibility:

It is a natural part of our role that we become involved in these disputes (Manager R8).

Comfortable with the amount of disputes as it is manageable and not too time consuming and provides ‘on the job’ training in dealing with the issues (Manager R30).

Of the 10 respondents who stated that they were neither comfortable nor uncomfortable with the amount of time spent on disputes, six provided open-ended responses. Analysing these responses, it is evident that this group also saw disputes as an inevitable part of their position. Nevertheless, this group indicated some concern over the amount of time spent on resolving disputes. For example:

It’s always desirable to minimize dispute resolution time however its occurrence is unavoidable and simply needs to be dealt with (Manager R6).

I am comfortable in dealing with them, however at the time they can be time consuming and in some cases people can be simply inflexible in the resolution process (Manager R16).

Responses to the survey showed that 14 (41.2%) of the managers did not feel comfortable with the level of time required to deal with disputes. Of these, 13 provided open-ended responses. The participants expressed frustration with the time taken to deal with disputes and also with the ways that lot owners engaged with conflict, reporting that this was often inconsistent and purely self-interested. For example:
While I like helping people and inform people of their rights and obligations, often they are not honest with us and have long held misbeliefs about the situation, making it very hard to make them happy with the result (Manager R2).

I charge for my time in handling disputes, but regularly only end up charging about 50% of the hours (Manager R3).

They change their minds, do not participate, do not [give] a straight answer. [There are] communication difficulties. Most of the time they cannot be bothered with sorting the problem out or just don’t respond (Manager R14).

Dispute Resolution should be handled by the Committee; however, most Committee Members are reluctant to be involved which leaves the matter in the hands of the Manager (Manager R33).

Cross-tabulation analysis of the data showed that the frequency of disputes increased with the portfolio size of the strata manager. Respondents managing larger portfolios of owners corporations indicated they experienced more frequent conflicts than was the case for those handling smaller portfolios (see Table 4).

Table 4: Frequency of disputes between owners/occupiers according to number of owners corporations managed

Q6. Have there ever been any disputes between owners and/or occupiers in any of the schemes you manage? (Please select one option!)

Q1. How many owners corporations do you manage?

<table>
<thead>
<tr>
<th>Frequency of Disputes Between Owners/Occupiers</th>
<th>Number of OCs Managed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>≤ 5 N (%)</td>
</tr>
<tr>
<td>Frequently</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Occasionally</td>
<td>2 (5.9)</td>
</tr>
<tr>
<td>Never</td>
<td>1 (2.9)</td>
</tr>
<tr>
<td>Total</td>
<td>3 (8.8)</td>
</tr>
</tbody>
</table>

Larger portfolios reported the highest amount of time spent on disputes. In the large portfolios, three out of a total of four strata managers indicated time spent on disputes was in the 10–20% and 20–30% categories. For medium portfolios, nine out of the total of 19 managers responded that they spent 0–10% of their time on disputes. The rest indicated significant time spent on disputes, ranging from 10–40%. The managers of the small portfolios indicated the least time spent on disputes (see Table 5).
Table 5: Time spent on managing disputes between owner/occupiers according to number of owners corporations managed

Q7. How much of your time is spent being involved in disputes between owners and/or occupiers? (Please select one option!)

Q1. How many owners corporations do you manage?

<table>
<thead>
<tr>
<th>Time Spent on Managing Disputes Between Owners/Occupiers</th>
<th>Number of OCs Managed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>≤ 5 N (%)</td>
</tr>
<tr>
<td>None</td>
<td>1 (2.9)</td>
</tr>
<tr>
<td>0–10%</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>10–20%</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>20–30%</td>
<td>1 (2.9)</td>
</tr>
<tr>
<td>30–40%</td>
<td>1 (2.9)</td>
</tr>
<tr>
<td>Total</td>
<td>3 (8.8)</td>
</tr>
</tbody>
</table>

The satisfaction with these time requirements seems to be counter-indicative of portfolio size. In fact, dissatisfaction with the time spent on resolving disputes between owners/occupants seems to be relatively more frequent in both the case of respondents with the smaller and the larger portfolios. For instance, four strata managers of 11 with small portfolios indicated that they were uncomfortable with the time spent on disputes. In the category of large portfolios, three of the four strata managers indicated that they were not comfortable with the time spent on disputes. Whereas, seven out of 19 strata managers with medium portfolios indicated that they were not comfortable (see Table 6).

Table 6: Satisfaction with conflict time requirement between owners and/or occupiers across portfolio size

Q8. Are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers? (Please select one option!)

Q1. How many owners corporations do you manage?

<table>
<thead>
<tr>
<th>Comfortable with Time Spent on Dealing with Disputes of Owners/Occupiers</th>
<th>Number of OCs Managed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>≤ 5 N (%)</td>
</tr>
<tr>
<td>Yes</td>
<td>1 (2.9)</td>
</tr>
<tr>
<td>Neither comfortable or uncomfortable</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>No</td>
<td>2 (5.9)</td>
</tr>
<tr>
<td>Don’t know</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Total</td>
<td>3 (8.8)</td>
</tr>
</tbody>
</table>
It is strongly displayed, that in the case of frequent disputes between owners/occupiers, respondents are dissatisfied with the model rules (see Table 7).

**Table 7: Frequency of disputes between owners/occupiers according to degree of satisfaction with model rules if used**

Q6. Have there ever been any disputes between owners and/or occupiers in any of the schemes you manage? (Please select one option!)

Q17. If you use the model rules process, are you satisfied with the model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Frequency of Disputes Between Owners/Occupiers</th>
<th>Satisfaction with Model Rules if Used</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes N (%)</td>
</tr>
<tr>
<td>Frequently</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Occasionally</td>
<td>10 (83.3)</td>
</tr>
<tr>
<td>Never</td>
<td>2 (16.7)</td>
</tr>
<tr>
<td>Total</td>
<td>12 (100.0)</td>
</tr>
</tbody>
</table>

The distribution of managers’ time spent on resolving disputes between owners/occupiers does not seem to be consistently linked with the use of model rules. However, managers using their own informal rules indicated slightly higher time-consumption on attending to conflict, when comparing the distribution of responses between the two categories (see Table 8).

**Table 8: Conflict time requirement between owners and model rules usage**

Q7. How much of your time is spent being involved in disputes between owners and/or occupiers? (Please select one option!)

Q16. Do you have your own dispute resolution process or do you rely on the Owners Corporations Act 2006 model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Time Spent on Managing Disputes between Owners/Occupiers</th>
<th>OC Act Model Rules or Own Process for Dispute Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>OC Act Model Rules</td>
</tr>
<tr>
<td></td>
<td>N (%)</td>
</tr>
<tr>
<td>0–none</td>
<td>1 (5.3)</td>
</tr>
<tr>
<td>0–10%</td>
<td>8 (42.1)</td>
</tr>
<tr>
<td>10–20%</td>
<td>4 (21.1)</td>
</tr>
<tr>
<td>20–30%</td>
<td>4 (21.1)</td>
</tr>
<tr>
<td>30–40%</td>
<td>2 (10.5)</td>
</tr>
<tr>
<td>Total</td>
<td>19 (100.0)</td>
</tr>
</tbody>
</table>
Responses suggest that the managers spending over 10% of their time resolving disputes between owners/occupiers are less satisfied with using model rules. This indicates that frequent users of the model rules prefer to develop their own rules of dispute resolution (see Table 9).

Table 9: Conflict time requirement between owners/occupiers and model rules satisfaction

Q7. How much of your time is spent being involved in disputes between owners and/or occupiers? (Please select one option!)

Q17. If you use the model rules process, are you satisfied with the model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Time Spent on Managing Disputes Between Owners/Occupiers</th>
<th>Satisfaction with Model Rules if Used</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes N (%)</td>
</tr>
<tr>
<td>0–none</td>
<td>1 (8.3)</td>
</tr>
<tr>
<td>0–10%</td>
<td>6 (50.0)</td>
</tr>
<tr>
<td>10–20%</td>
<td>2 (16.7)</td>
</tr>
<tr>
<td>20–30%</td>
<td>1 (8.3)</td>
</tr>
<tr>
<td>30–40%</td>
<td>2 (16.7)</td>
</tr>
<tr>
<td>Total</td>
<td>12 (100.0)</td>
</tr>
</tbody>
</table>

It seems that the managers are less frequently uncomfortable with the time they spend on disputes between owners/occupiers if they are using their own informal rules in place of the model rules. This suggests that even though model rules may be saving them time, they tend to make managers feel less comfortable with the time they spend on these disputes (see Table 10).

Table 10: Satisfaction with conflict time requirement between owners and/or occupiers and model rules usage

Q8. Are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers? (Please select one option!)

Q16. Do you have your own dispute resolution process or do you rely on the Owners Corporations Act 2006 model rules? (Please select one option!)
It is clearly shown in the data that managers who are not comfortable with the time spent on disputes between owners/occupiers are predominantly dissatisfied with the model rules, suggesting that they feel using the model rules is not an efficient use of their time (see Table 11).

Table 11: Satisfaction with conflict time requirement between owners and/or occupiers and model rules satisfaction

Q8. Are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers? (Please select one option!)

Q17. If you use the model rules process, are you satisfied with the model rules? (Please select one option!)

Managers are experiencing more disputes within owners corporations committees that use their own rules as opposed to model rules. This could be an indication of a tendency of their own rules to bring such disputes to the committee level or of a shortcoming of the model rules to accommodate this possibility (see Table 12).
Table 12: Cross-tabulation of the frequency of conflict within owners corporations committees with the use of the model rules

Q9. Have there ever been any disputes within owners corporations committees?

Q16. Do you have your own dispute resolution process or do you rely on the Owners Corporations Act 2006 model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Frequency of disputes within Owners Corporations Committees</th>
<th>OCA Model Rules or Own Process for Dispute Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Model Rules N (%)</td>
</tr>
<tr>
<td>Yes, occasionally</td>
<td>12 (63.2)</td>
</tr>
<tr>
<td>No</td>
<td>7 (36.8)</td>
</tr>
<tr>
<td>Don’t know</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Total</td>
<td>19 (100.0)</td>
</tr>
</tbody>
</table>

Responses show that managers are much more often dissatisfied with model rules if disputes within owners corporations are frequent. Exposure to model rules and the obligation to apply them seems to lead to discontent with the way the rules function (see Table 13).

Table 13: Cross-tabulation of frequency of conflict within owners corporations committees and satisfaction with model rules

Q9. Have there ever been any disputes within owners corporations committees?

Q17. If you use the model rules process, are you satisfied with the model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Frequency of disputes within Owners Corporations Committees</th>
<th>Satisfaction with Model Rules if Used</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes N (%)</td>
</tr>
<tr>
<td>Yes, occasionally</td>
<td>7 (58.3)</td>
</tr>
<tr>
<td>No</td>
<td>5 (41.7)</td>
</tr>
<tr>
<td>Don’t know</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Total</td>
<td>12 (100.0)</td>
</tr>
</tbody>
</table>

Most respondents indicated that they managed medium-sized portfolios (between 21 and 100 owners corporations). The majority of the managers with medium-sized portfolios relied on model rules, while managers with smaller portfolios displayed a tendency of using their own rules (see Table 14).
Table 14: Cross-tabulation of portfolio size and model rules usage

Q1. How many owners corporations do you manage?

Q16. Do you have your own dispute resolution process or do you rely on the Owners Corporations Act 2006 model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Number of OCs Managed</th>
<th>OCA Act Model Rules N (%)</th>
<th>Own Rules N (%)</th>
<th>Total N (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N (%)</td>
<td>N (%)</td>
<td>N (%)</td>
</tr>
<tr>
<td>≤ 5</td>
<td>2 (10.5)</td>
<td>1 (8.3)</td>
<td>3 (9.7)</td>
</tr>
<tr>
<td>6–20</td>
<td>2 (10.5)</td>
<td>5 (41.7)</td>
<td>7 (22.6)</td>
</tr>
<tr>
<td>21–100</td>
<td>13 (68.4)</td>
<td>4 (33.3)</td>
<td>17 (54.8)</td>
</tr>
<tr>
<td>101–250</td>
<td>2 (10.5)</td>
<td>2 (16.7)</td>
<td>4 (12.9)</td>
</tr>
<tr>
<td>Total</td>
<td>19 (100.0)</td>
<td>12 (100.0)</td>
<td>31 (100.0)</td>
</tr>
</tbody>
</table>

An overwhelming proportion of managers of medium-sized portfolios indicated satisfaction with the model rules, while it was shown that managers of smaller portfolios were relatively less satisfied. This suggests that the model rules are tailored around the preferences of managers of medium-sized portfolios. It was also evident that managers of large portfolios were dissatisfied with the model rules, suggesting that they also had substantial difficulty with their implementation (see Table 15).

Table 15: Cross-tabulation of portfolio size and satisfaction with model rules

Q1. How many owners corporations do you manage?

Q17. If you use the model rules process, are you satisfied with the model rules? (Please select one option!)

<table>
<thead>
<tr>
<th>Number of OCs Managed</th>
<th>Satisfaction with Model Rules if Used</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes N (%)</td>
</tr>
<tr>
<td></td>
<td>N (%)</td>
</tr>
<tr>
<td>≤ 5</td>
<td>2 (16.7)</td>
</tr>
<tr>
<td>6–20</td>
<td>1 (8.3)</td>
</tr>
<tr>
<td>21–100</td>
<td>9 (75.0)</td>
</tr>
<tr>
<td>101–250</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Total</td>
<td>12 (100.0)</td>
</tr>
</tbody>
</table>

VII Conclusion

In summary, analysis of the data gathered for this study shows that conflict is common in owners corporations. From the perspective of the managers of owners
corporations, there were three main areas of conflict: financial issues, lifestyle issues and maintenance conflict. Significantly, although some managers saw conflict engagement as part of their role, many expressed dissatisfaction with the amount of time that they spent on conflict resolution. The internal dispute resolution scheme, with the provision of model rules, was a source of dissatisfaction.

The data in this study makes clear that for some managers in Victoria the present model rules are not adequate to engage successfully and efficiently with conflict. This is particularly the case in small and large owners corporations. Although those in medium-sized developments expressed some level of satisfaction with the model rules, managers who used the rules in small or large developments were more dissatisfied. This finding suggests that the model rules suit a medium-sized development but do not generally assist small or large developments. This suggests the need for differentiated rules to accommodate developments of varying sizes, amenities and land use. An added difficulty for providing one set of model rules for owners corporations in all kinds of strata development is that the developments differ in the types of services they offer, the demographics of their residents and the complexity of issues they need to address. A one-size-fits-all approach to formulating model rules does not appear to meet the needs of strata managers and the conflicts that they address in owners corporations.

The dissatisfaction with model rules in small and large developments is in contrast with the use of informal and undocumented rules adopted within some of the owners corporations, which the managers reported as useful. They indicated greater comfort and satisfaction with using informal rules, although managers reported that this approach may sometimes be more time consuming. This finding suggests that there is a degree of experience in dealing with conflict using informal rules that is currently undocumented. It would appear that some informal rules are proving effective in dealing with conflict but, unfortunately, the design and implementation of these rules were neither identified nor described in this study.

The authors can only speculate that the ability to apply informal rules and take action increased the likelihood of swift resolution of conflict. Informal rules may permit greater flexibility in their application and avoid unnecessary formality and better enable managers to adapt the rules to the specific needs of their owners corporation. The findings from this study suggest the need for further research to identify successful strategies and informal rules of dispute resolution that are being used in Victorian owners corporations and which better meet the needs of owners and occupants. This research will have relevance not just for owners and residents of strata developments managed by owners corporations in Victoria, but also for those in other states in Australia and internationally. Through assessment of the details and effectiveness of informal rules, it may be possible to draft a range of alternative model rules. Owners corporation committees could then be given the option of choosing amongst a range of model rules so that the needs of each type of development can be addressed. The high level of growth in strata title developments in urban and regional areas of Australia warrants careful attention to the provision of dispute resolution processes that are flexible and effectively meet the needs of all owners and residents in times of conflict.
## APPENDIX 1: APPLICABLE LEGISLATION IN EACH STATE AND TERRITORY IN AUSTRALIA

<table>
<thead>
<tr>
<th>State or Territory</th>
<th>Applicable Legislation</th>
</tr>
</thead>
</table>
| Queensland         | *Body Corporate and Community Management Act 1997*  
                     | *Body Corporate and Community Management (Accommodation Module) Regulation 2008*  
                     | *Body Corporate and Community Management (Standard Module) Regulation 2008*  
                     | *Body Corporate and Community Management Act (Commercial Module) Regulation 2008*  
                     | *Body Corporate and Community Management (Small Schemes Module) 2008* |
| New South Wales    | *Strata Schemes (Freehold Development) Act 1973*  
                     | *Strata Schemes (Freehold Development) Regulation 2012*  
                     | *Strata Schemes (Leasehold Development) Act 1986*  
                     | *Strata Schemes (Leasehold Development) Regulation 2012*  
                     | *Strata Schemes Management Act 1996*  
                     | *Strata Schemes Management Regulation 2010*  
                     | *Community Land Management Act 1989*  
                     | *Community Land Management Regulation 2007*  
                     | *Community Land Development Act 1989*  
                     | *Community Land Development Regulation 2007* |
| Victoria           | *Owners Corporations Act 2006*  
                     | *Owners Corporations Regulations 2007*  
                     | *Subdivision Act 1988*  
                     | *Subdivision (Registrar’s Requirements) Regulations 2011*  
                     | *Company Titles (Home Units) Act 2013* |
| Tasmania           | *Strata Titles Act 1998* |
| South Australia    | *Community Titles Act 1996*  
                     | *Community Titles Regulations 2011*  
                     | *Strata Titles Act 1988* |
| Western Australia  | *Strata Titles Act 1985* |
| Australian Capital Territory | *Unit Titles Act 2001*  
                            | *Unit Titles Regulation 2001*  
                            | *Unit Titles (Management) Act 2011*  
                            | *Unit Titles (Management) Regulation 2011* |
| Northern Territory | *Unit Titles Act*  
                     | *Unit Titles (Management Modules) Regulations*  
                     | *Unit Title Schemes Act*  
                     | *Unit Title Schemes (Management Modules) Regulations*  
                     | *Unit Title Schemes (General Provisions and Transitional Matters) Regulations*  
                     | *Unit Title Schemes Act 2009* |
### APPENDIX 2: A SUMMARY OF AUSTRALIAN STRATA LEGISLATION AND DISPUTE MANAGEMENT MECHANISMS

<table>
<thead>
<tr>
<th>State or Territory</th>
<th>Name of Primary Legislation</th>
<th>Key Dispute Management Provisions</th>
<th>Forms of Dispute Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>Owners Corporations Act 2006</td>
<td>- Owners corporation: Sections 155-57 notice by owners corporation or on approved complaint form by various affected persons</td>
<td>Commissioner for Body Corporate and Community Management can recommend conciliation, mediation or adjudication</td>
</tr>
<tr>
<td>Queensland</td>
<td>Strata Schemes (Freehold Development) Act 1973; Community Management Act 1997</td>
<td>- Body corporate: Sections 238, 242, 248 and 250 application after reasonable attempts using an internal dispute resolution procedure</td>
<td>Mediation by Department of Fair Trading, adjudication on the papers by Civil and Administrative Tribunal</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Body Corporate and Community Management Act 1997</td>
<td>- Owners corporation: Chapter 6 — Commissioner for Body Corporate and Community Management is responsible and refers out to a dispute process</td>
<td>Commissioner for Body Corporate and Community Management can recommend conciliation, mediation or adjudication</td>
</tr>
<tr>
<td>Victoria</td>
<td>Owners Corporations Act 2006</td>
<td>- Owners corporation: Sections 238, 242, 248 and 250 application after reasonable attempts using an internal dispute resolution procedure</td>
<td>Magistrates Court</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State or Territory</td>
<td>Victoria</td>
<td>Queensland</td>
<td>New South Wales</td>
</tr>
<tr>
<td>--------------------</td>
<td>----------</td>
<td>------------</td>
<td>----------------</td>
</tr>
<tr>
<td><strong>Appeal</strong></td>
<td>From owners corporation to Director of Consumer Affairs or VCAT with usual appeal rights</td>
<td>From adjudicator to District Court on questions of law</td>
<td>Consumer, Trader &amp; Tenancy Tribunal</td>
</tr>
<tr>
<td><strong>State or Territory</strong></td>
<td>Tasmania</td>
<td>Northern Territory</td>
<td>Australian Capital Territory</td>
</tr>
<tr>
<td><strong>Name of Primary Legislation</strong></td>
<td><em>Strata Titles Act 1998</em></td>
<td><em>Unit Title Schemes Act 2009</em></td>
<td><em>Unit Titles (Management) Act 2011</em></td>
</tr>
<tr>
<td><strong>Terminology</strong></td>
<td>Body corporate</td>
<td>Body corporate</td>
<td>Owners corporation</td>
</tr>
<tr>
<td><strong>Key Dispute Management Provisions</strong></td>
<td>Parts 9 and 10</td>
<td><em>Unit Titles Regulations</em> sch 5 (‘Model Dispute Resolution Procedure’)</td>
<td>Part 8</td>
</tr>
<tr>
<td><strong>Formal Initiation of Dispute/ Complaint</strong></td>
<td>Section 105 — Application for Relief</td>
<td>Section 106 — application to local court</td>
<td>Sections 125–28 set out application process to ACT Civil and Administrative Tribunal (ACAT)</td>
</tr>
<tr>
<td><strong>Forms of Dispute Management</strong></td>
<td>Written submission to the Recorder of Titles</td>
<td>Local Court</td>
<td>Section 129 lists the powers of ACAT to resolve disputes</td>
</tr>
<tr>
<td><strong>Appeal</strong></td>
<td>To Resource Management and Appeals Tribunal</td>
<td>Usual appeal rights from Local Court</td>
<td>Appeals to the ACAT Appeals Tribunal</td>
</tr>
</tbody>
</table>
REBUTTING THE BAN THE BURQA RHETORIC: A CRITICAL ANALYSIS OF THE ARGUMENTS FOR A BAN ON THE ISLAMIC FACE VEIL IN AUSTRALIA

ABSTRACT

The re-emergence of the ban the burqa campaign in Australia and the short-lived Commonwealth parliamentary ban on the wearing of face coverings in Parliament House highlight the ongoing hysteria surrounding the veil and the dangers of responding to that hysteria. This article critically examines the arguments put forward in support of a ban on the burqa. Arguments examined include that the wearing of a full face veil is not a religious requirement in Islam, that the veil is oppressive to women, that it is un-Australian, that the veil poses a security risk, that a ban is necessary for facial identification and that banning the veil is consistent with Australian society’s treatment of other forms of face covering. The article concludes that these arguments do not provide a justification for a ban in Australia, either alone or in concert. Further, it demonstrates that many of the arguments put forward in support of a ban are counterproductive and contradictory. It argues that instead Australia should strive to identify where limited restrictions may be necessary and that any restrictions on the wearing of the face veil should be as minimally invasive as possible.

INTRODUCTION

In the wake of the rise of the terrorist organisation Islamic State (IS), Muslims around the world have become the target of vitriol by private individuals, public officials and states. Similar reactions were seen in the aftermath of the

* BEc LLB (Murd), PhD (UWA), Lecturer, University of Western Australia Faculty of Law, Honorary Research Fellow Centre for Muslims States and Societies. An early version of this paper was presented at a public lecture for the Centre for Muslim States and Societies at the University of Western Australia in October 2014. The author would like to thank the participants in that forum for their participation, feedback and comments.

1 Also known as ISIL, ISIS and Daesh among others.

September 11 terrorist attacks and the London and Bali bombings. As with these earlier incidents, it is Muslim women, most visible as a result of their distinctive head and face coverings, who have borne the brunt of this backlash.

In Australia, the backlash against IS has been manifested most visibly in the renewed debate over the wearing of Islamic face veils, commonly referred to as the burqa and niqab. As recently as 2014, Australian politicians Cory Bernardi, Jacqui Lambie, Fred Nile and Pauline Hanson all called for the Islamic face veil to be banned. The debate culminated in the Speaker of the House of Representatives and the President of the Senate agreeing to prevent people who ‘do not wish to be readily identified’ from sitting in the open public galleries. Instead, these people were relegated to the glassed viewing galleries, usually reserved for school children.

Those who call for the banning of the Islamic face veil in public offer a litany of reasons for their stance. These include: assertions that the face veil is not part of Islam; gender equality; the success of the ban in France in the European Court of Human Rights; claims that the burqa is un-Australian; and security concerns. Many of these arguments are not unique to the Australian debate. They have been well rehearsed in debates over the Islamic face veil in both North America and Europe. However, these arguments do not stand up to close scrutiny, either in Australia, North America or Europe. While there may be some justification to restrict the wearing of face coverings in limited circumstances, a blanket ban is disproportionate to the aims it seeks to achieve.


5 In this article I will refer to the burqa and niqab collectively as the Islamic face veil. The burqa is a form of veiling which covers the wearer’s face with a mesh covering the eyes, while the niqab leaves a slit open for the eyes. In Australia, the niqab is the more common of the two garments, although popular media usually refers to both garments as the burqa.


8 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014).

Further, a ban violates the fundamental human right to freedom of religion. While freedom of religion is not absolute in either Australian or international law, curtailing this fundamental freedom requires extraordinary justification. The arguments so far advanced for a ban on the Islamic face veil in Australia do not offer such a justification. Despite this, a growing number of Australians are in favour of a ban on the Islamic face veil in public. In 2014, a Morgan poll showed 55.5 per cent of Australians were in favour of a ban on the burqa in public places, up 3.5 per cent from 2010. It is therefore important that the weaknesses and contradictions in the arguments in support of a ban are clearly articulated.

This article will critically examine each of the arguments that have been put forward to support a ban on the Islamic face veil in Australia. It will demonstrate that these arguments do not provide a justification, either alone or when taken together, for a ban on the Islamic face veil in Australia. Before doing so, the article will put the most recent debate into the context of the wider Australian experience of the niqab and burqa in the public sphere.

II A RENEWED DEBATE

Debate around the place of traditional female Islamic dress generally — and the Islamic face veil specifically — in the public sphere in Australia is not new. As early as 2002, New South Wales Christian Democrat Party MLC the Reverend Fred Nile called for the banning of the chador in public places, while in 2005, federal MPs Bronwyn Bishop and Sophie Panopoulos called for the banning of the hijab in schools. More recently, in 2010, federal Liberal Senator Cory Bernardi and Nile both called for the banning of the Islamic face veil in Australia. While no legislation was introduced at the federal level, Nile introduced a private member’s Bill in New South Wales that, if passed, would have banned the wearing of face coverings

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11 Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth (1943) 67 CLR 116 (‘Jehovah’s Witnesses Case’).
13 Tanja Dreher and Christina Ho, ‘Introduction: New Conversations on Gender, Race and Religion’ in Tanja Dreher and Christina Ho (eds), Beyond the Hijab Debates: New Conversations on Gender, Race and Religion (Cambridge Scholars Publishing, 2009) 1, 3. Sophie Panopoulos is also known by her married name Mirabella. The MPs’ call for a ban on the wearing of the hijab in schools followed France’s 2004 decision to ban the wearing of ‘ostentatious signs or dress by which pupils openly manifested a religious affiliation’ including hijabs: see Erica Howard, Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education (Routledge, 2012) 2.
in public in a similar way to the laws in France and Belgium.\(^\text{15}\) While Nile has so far been unsuccessful in having laws of this nature passed, he has persisted in his attempts. In 2011 and 2014, he again introduced Bills to ban the wearing of face coverings in public.\(^\text{16}\) His most recent attempt came in the wake of the rise of IS and the decision by the European Court of Human Rights that the ban in France did not breach art 9 of the *European Convention on Human Rights*.\(^\text{17}\) However, the introduction of Nile’s latest Bill garnered little public attention. By contrast, Bernardi’s renewed call for the banning of the burqa, along with those by the then newly elected Palmer United Senator Jacqui Lambie, grabbed national headlines.

The primary difference in the media coverage was timing. Bernardi and Lambie both called for the banning of the Islamic face veil in the aftermath of some of the largest anti-terrorist raids ever seen in Australia.\(^\text{18}\) Bernardi struck first; tweeting on 18 September: ‘Note burqa wearers in some of the houses raided this morning? This shroud of oppression and flag of fundamentalism is not right in [Australia]’.\(^\text{19}\) Lambie followed, posting a photo on her Facebook page showing a woman in a burqa pointing a handgun with the words: ‘For security reasons it’s now time to ban the burqa’.\(^\text{20}\) It was later revealed that the image was of the first female police officer in Afghanistan, Malalai Kakar, who was killed by the Taliban. The use of the photo in this way by Lambie and others was criticised by the photographer, Lana Slezic, as an insult to Kakar and a desecration of her memory.\(^\text{21}\)

While the calls to ban Islamic face veils by Nile, Lambie and Bernardi have been in response to specific domestic and international incidents, public hostility towards Muslims — and Muslim women in particular — is an ongoing issue in Australia. The

\(^{15}\) Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011.

\(^{16}\) Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2011 (NSW); Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW).


call to ban the burqa is just the latest evolution of this hostility. As noted above, there have previously been calls to ban less covering forms of Islamic dress worn by some Muslim women such as the chador and hijab.  

In 1991, the Australian Human Rights and Equal Opportunity Commission identified hostility towards Muslims as an area of concern. In its report *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, the Commission noted a generalised identification of Arabs and Muslims with violence (such as terrorism and the taking of hostages), a stereotyped identification of Arabs and Muslims with ‘un-Australian values’ (for example, religious fundamentalism, conservative views about women and moral issues, dietary restrictions, conservative and conspicuous clothing, prohibitions on alcohol, and a desire for a separate cultural identity), media coverage reinforcing these perceptions, and responses by some groups within the Arab and Muslim communities which have the effect of reinforcing these stereotypes (for example, calls for the death of Salman Rushdie).

While the report found that such sentiments had increased in the wake of the Gulf War, ‘the Inquiry received evidence of verbal and physical violence against Arab and Muslim Australians, and their property, well before the Gulf crisis.’ Specific incidents of harassment and violence towards Muslims were also recorded in the report, including the subjection of Muslim school children to harassment and rejection at school, attempts to remove women’s hijabs, verbal and physical threats and vandalism and arson at Islamic centres, schools and mosques. Further, ‘[t]he Inquiry received evidence, during the Gulf War, of Arab and Muslim people, particularly women, feeling afraid to leave their homes, and of parents believing that it was too dangerous for their children to do so.’

Seven years later, in its 1998 report *Article 18: Freedom of Religion and Belief*, the Human Rights and Equal Opportunity Commission again identified vilification and harassment of Muslims as an area of concern. In particular, this report highlighted the consistent negative media portrayal of Muslims and Islam. As Salaheddin Bendak submitted to the Inquiry on behalf of the Islamic Council of Victoria:

> In newspapers and on radio and TV channels in Australia, we are bombarded daily with tens of lies about Islam and Muslims, while there appears to be no legal way to stop this. To clarify this point, … [a] person who tried to kill his

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22 The chador and hijab cover the wearer’s head and hair and, in the case of the chador, the wearer’s upper body. In both cases the wearer’s face is left uncovered.


24 Ibid.


26 Ibid 145.

daughter in Melbourne two years ago was marked by newspapers to have done this because of his Islamic beliefs (although in this specific case, the same man allegedly converted to Catholicism years before he tried to kill his daughter, a fact that was never mentioned in these newspapers). Although the Islamic faith prohibits its followers from harming any creature (not even a harmless insect!), these newspapers could get away with this lie. Later, newspapers were bombarded with hundreds of protesting letters, but failed to publish any.28

The 1998 report was followed up in 2011 by a report entitled *Freedom of Religion and Belief in 21st Century Australia.* As with the preceding two reports, negative sentiments towards Muslims were reported.29 In relation to media reporting, the report noted ‘Muslims and Sikhs in particular … reported being misrepresented and denigrated or neglected by the mainstream media.’30

Most recently, the Australian Human Rights Commission released its consultation report, *Rights and Responsibilities,* ahead of its planned round table on freedom of religion. While the report does not make general comment on negative sentiments directed towards Muslims and Islam, it does comment on the impact the public debate to ban the burqa has had on Muslim women.31 The United Muslim Women’s Association in their submission was particularly concerned that

the rhetoric in public discourse and call for prohibitions against Muslim women’s dress is impinging on a Muslim woman’s right to freedom of religion. We are also concerned that fear in relation to safety concerns as a result of such treatment will further compromise the right to freedom of movement for Muslim women …32

Preliminary findings by the Islamophobia Register Australia indicate that the primary targets of Islamophobia are ‘women wearing religious headwear’.33 They also noted that there was a spike in reported incidents following specific events such as the September 2014 anti-terror raids, federal Parliament’s temporary ban on face coverings in Parliament, the Martin Place siege, former Prime Minister Tony Abbott’s national security statement, the April 2015 Reclaim Australia rallies and the Paris terrorist attacks.34 Anecdotal evidence reported by the media supports this

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28 Ibid 118.
30 Ibid 82.
32 Ibid 27.
34 Veiszadeh, above n 33.
finding. For example, following the September 2014 anti-terror raids, Islamic leaders reported a spike in attacks against Muslim women wearing Islamic head coverings.\(^3\)\(^5\) A similar spike in incidents was seen after the November 2015 Paris terrorist attacks, including threats against workers at an Optus store that had an advertisement in Arabic, forcing the store to remove the sign.\(^3\)\(^6\)

The campaign to ban the burqa is therefore one element in the public hostility faced by Australian Muslims, which also includes anti-refugee sentiments,\(^3\)\(^7\) the Reclaim Australia rallies,\(^3\)\(^8\) anti-halal campaigns\(^3\)\(^9\) and individual instances of racial and religious vilification directed against individuals and Islamic institutions.

### III I’M GOING TO TELL YOU WHAT YOUR RELIGION SAYS

A common argument put forward in support of a ban on Islamic face veils is that veiling is not a requirement of Islam. Lambie claimed:

> I have been assured that the need to wear the burqa is not written in the Koran. Dr Raihan Ismail, lecturer in Middle East politics and Islamic studies at the Australian National University, states: ‘The Koran does not explicitly say you have to cover yourself in this manner.’\(^4\)\(^0\)

However, the issue is more complex than presented by Lambie. The question of whether the face veil is obligatory, encouraged, permissible or discouraged by Islam is debated by Muslims. The requirement for veiling of some kind is based on five Qur’anic verses.\(^4\)\(^1\) These verses have been interpreted in a variety of ways over time and across Muslim communities.\(^4\)\(^2\) In addition, many women cite the example of the

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35 Aston, above n 2.
Prophet’s wives as an inspiration for their own veiling. However, the question of whether or not the wearing of the face veil is part of the orthodoxy of Islam is not the point.

In claiming that face veiling is not a part of Islam, proponents of a ban are attempting to sidestep the issue of freedom of religion. International and domestic laws protect the right of an individual to freedom of religion. For example, art 18 of the Universal Declaration of Human Rights states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In Australia, s 116 of the Australian Constitution prohibits the Commonwealth from, inter alia, making any laws ‘for prohibiting the free exercise of any religion’.

Restrictions can be placed on freedom of religion; however, such restrictions must be ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’ As Zamani and Gerber explain, ‘[c]alls to ban the burqa

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in Australia are unlikely to meet these strict standards'.\(^{47}\) In Australia, the limits of freedom of religion were considered in the Jehovah’s Witnesses Case.\(^{48}\) Chief Justice Latham referred to s 116 of the Constitution as protecting against an ‘undue infringement’, finding that ‘[i]t is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.’\(^{49}\) While such an interpretation necessarily narrows the protection for freedom of religion offered by s 116, it does not nullify it. Proponents of a ban at a Commonwealth level would still need to demonstrate the ban was necessary because the Islamic face veil was ‘inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.’\(^{50}\) This is not a low threshold. Section 116 of the Constitution, however, is usually interpreted narrowly by the High Court with emphasis placed on the purpose of the legislation, rather than its effect. Gray has argued that as a result of this narrow interpretation, a ban on Islamic face veils for the purpose of ‘public safety’, for example, may be found by the High Court to be legitimate.\(^{51}\) So long as the law itself was couched in neutral terms and applied not only to Islamic face veils but also to other forms of facial covering, an argument could be mounted that such a law did not have the purpose of prohibiting the free exercise of religion.

In claiming that the face veil is not part of Islam, supporters of a ban are attempting to get around freedom of religion provisions. If the veil is not a religious practice then it does not attract the protection of either art 18 or s 116. However, it is not the role of the courts or the Parliament in a secular society to be the arbiters of religious orthodoxy. As Murphy J in Church of the New Faith v Commissioner for Payroll Tax (Vic)\(^{52}\) stated:

> If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the numbers of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal.\(^{53}\)

Administrators, judges and legislators must resist the temptation to hold that a practice is not religious because it does not comply with others’ notions of what that religion requires. This position has been endorsed by Courts around the world, including

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\(^{47}\) Zamani and Gerber, above n 6, 234.

\(^{48}\) (1943) 67 CLR 116.

\(^{49}\) Ibid 131.

\(^{50}\) Ibid 126–7, 131.


\(^{52}\) (1982) 154 CLR 120 (‘Scientology Case’).

\(^{53}\) Ibid 150.
the European Court of Human Rights and the House of Lords. For example, in *R v Secretary of State for Education and Employment; Ex parte Williamson*, Lord Bingham of Cornhill asserted that

emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. … [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that ‘in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed.’ … The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.

Variety within a religion should be expected and the existence of debate within a given faith as to the centrality of a particular practice is not an indication that the practice is not religious or is not required by a given religion. As Latham CJ pointed out in the *Jehovah’s Witnesses Case*:

almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual — all of these may become part of religion.

Endless variety is therefore possible in how people practice their faith, both between and within religions. One only has to look at the remarkable variety found within Christianity, from the Southern Baptist snake handlers to the Russian Orthodox Church, from the Quakers to the Roman Catholics. Such variety should also be expected within other religions, including Islam. There are five major schools of thought within Islamic law, four Sunni and one Shia. This only hints at the complex diversity within Islam. Just because one Islamic scholar, cherry-picked by Lambie to support her position, states that the wearing of the face veil is not required, does not mean that another scholar will necessarily adopt the same view.

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54 McGoldrick, above n 42, 8–10.
56 Ibid [22].
57 Bakht, above n 9, 96–7.
58 (1943) 67 CLR 116, 124.
Even if the wearing of the veil is not required by Islam, this does not excuse banning the practice. As the European Court of Human Rights has noted, it is the subjective understanding of individual adherents as to their religious duties and obligations, rather than the views of religious authorities or scholars, that is important in determining whether or not a practice is religious. Religions often contain practices that are optional, not described in the founding religious text or only followed by some adherents. The fact that a practice is not compulsory does not make it any less religious, nor its practice, by those who choose to observe it, any less important.

IV Playing the Feminist Card

Another common argument made in support of a ban on the wearing of Islamic face veils is that they are oppressive to women. Nile has repeated this assertion on each occasion he has sought to enact a ban in New South Wales. France also advanced this argument before the European Court of Human Rights.

Women who wear the niqab and burqa have fervently rejected any suggestion that they are forced to wear the veil or that it is oppressive. The woman at the centre of the European Court of Human Rights case strongly rejected any suggestion that she was forced to wear the Islamic face veil. As the European Court of Human Rights observed:

She argued that, according to a well-established feminist position, the wearing of the veil often denoted women’s emancipation, self-assertion and participation in society, and that, as far as she was concerned, it was not a question of pleasing men but of satisfying herself and her conscience.

The Court therefore rejected France’s argument on this point, noting: ‘The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women …’.

For these women, a ban such as that proposed by Nile, Bernardi and Lambie would ‘force them to make [an] unenviable choice. Obey the law and deny their faith. Obey

60 Leyla Şahin v Turkey (2005) XI Eur Court HR 173, [78]; SAS v France (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 28–9 [55]–[56], 46 [110].

61 The wearing of a cross by some Christians is a good example of a practice of this type: see Eweida v United Kingdom (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).


64 Ibid 35 [77].

65 Ibid 48 [119].
their faith and risk criminal charges. Stay at home and become isolated from the community.\textsuperscript{66}

In interviews conducted with wearers of the Islamic face veil in both France and England, Bouteldja found no evidence of ‘domineering parents, forcing their daughters to wear the face veil.’\textsuperscript{67} While she did find some evidence that a small number of women had been coerced by their husbands to wear the face veil, this was not the experience of the majority. Some women even chose to begin and continue wearing the veil despite the objections of their parents and/or husband.\textsuperscript{68} One interviewee reported that she delayed beginning to wear the face veil until her husband was comfortable with her decision.\textsuperscript{69}

Even if the claim that the Islamic face veil is oppressive to women is correct, a blanket ban is unlikely to have the desired effect. The laws proposed by Nile are premised on the idea that women are forced to wear the burqa and niqab, presumably by male family members. His proposed amendments to the \textit{Summary Offences Act 1988 (NSW)} imposed a penalty both on those who wear full face coverings in public and ‘[a] person who compels another person, by means of a threat that the other person could not reasonably be expected to resist’ to wear a full face covering.\textsuperscript{70} The penalty for the latter was proposed to be twice that for those who simply wear a face covering in public. This would seem to imply that it is the oppressors who are the real target of these laws. France’s law similarly imposes a heavier penalty on those who force another to cover their face than on the person whose face is covered.\textsuperscript{71} However, a blanket ban would not have the desired effect of releasing these women from oppression. As I have argued previously, ‘banning the face veil [would] not result in oppressed women throwing off their veils and revelling in their new-found freedom. Instead, the more likely result is their exclusion from society as their oppressors force them to remain at home.’\textsuperscript{72} A ban would not only be counter-productive but could further oppress these women.\textsuperscript{73}

\textsuperscript{66} Barker, ‘Banning the Burqa Is Not the Answer to Fears About Public Safety’, above n 6.

\textsuperscript{67} Bouteldja, above n 43, 131.

\textsuperscript{68} Ibid 131–40.

\textsuperscript{69} Ibid 133–4.

\textsuperscript{70} Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW).

\textsuperscript{71} \textit{Code Pénal} [Criminal Code] (France) arts 131-35–131-44; \textit{Loi n° 2010-1192 du 11 octobre 2010} [Law No 2010-1192 of 11 October 2010] (France) JO, 11 April 2011, 24 art 225-4-10; \textit{SAS v France} (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 10.

\textsuperscript{72} Barker, ‘Banning the Burqa Is Not the Answer to Fears About Public Safety’, above n 6.

One of the women interviewed by Bouteldja commented on this dichotomous approach to wearers of the Islamic face veil in recounting an incident where she had been abused while in public.

They tell us that we are submissive to our husband and all of that, but I say to myself that if we are really oppressed women then it’s sadness that you should have for us. But in the end it’s pure rage that they have for us. It’s spite, while they should pity us if they think we are being beaten.74

As Bouteldja observed, ‘[the interviewee] couldn’t understand how she could be perceived as an oppressed victim and yet at the same time be constantly treated to verbal assault in public places.’75

Those who oppose the Islamic face veil appear to believe that these Muslim women are oppressed, and therefore unable to exercise a true choice, while simultaneously believing that these women are consciously refusing to conform to social norms.76 It is no wonder the women in Bouteldja’s study were confused.

It must, however, be acknowledged that women’s oppression in the feminist sense is not about individual choices of women but rather about ‘women’s conditions in society to determine their life choices’.77 Feminists argue that simply because women may choose to wear the face veil does not indicate that they are not oppressed, but that their choices have been ‘hetero-designed and serialized’.78 However, even if it is accepted that women who voluntarily choose to wear the veil are oppressed by the limitation on their choices afforded to them by society, it does not necessarily follow that the face veil should be banned. As Taramundi explains:

these bans target a group of women … who would be by law obliged to adopt higher standards of compliance with the principle of sex equality than any other group of women involved in patriarchal or oppressive practices, from top models to battered women who do not make official complaints, from women who marry for money or to secure a social position to fashion victims and surgery addicts, with the possible exception of prostitutes, who are still criminalized in certain countries but certainly not for not being emancipated enough.79

74 Bouteldja, above n 43, 155.
75 Ibid.
76 Pascale Fournier and Erica See, ‘The “Naked Face” of Secular Exclusion: Bill 94 and the Privatization of Belief’ in Solange Lefebvre and Lori G Beaman (eds), Religion in the Public Sphere: Canadian Case Studies (University of Toronto Press, 2014) 275, 284.
78 Morondo Taramundi, above n 77, 223.
79 Ibid 229.
Criminalising the wearing of the face veil is an extreme step that will not benefit Muslim women, oppressed or otherwise. If these women are oppressed, then banning the wearing of the face veil is akin to blaming a victim of domestic violence for their own abuse because they did not leave their abuser.

Another gender-related argument put forward in support of a ban of Islamic face veils is the difficulties in accommodating the need for veiled women to be identified by another woman. Many Muslim women who wear the veil believe that they may only remove the veil in front of their husband, other women and mahram male relatives.80 There are, however, numerous instances where it may be necessary for a person wearing an Islamic face veil to be identified via comparison with photographic identification; for example when passing through immigration, while giving evidence in court, or during a roadside stop by police. Several states already have laws that require a person wearing a full face covering to remove their veil for the purpose of identification by police officers.81 However, only the laws in the Australian Capital Territory provide a right for women who wear the veil for religious reasons to have their identity verified by a person of the same gender.82 A review of the New South Wales laws by the State Ombudsman recommended that the laws be amended to provide such a right, noting that although some police officers already turned their mind to this problem, others had expressed reluctance to accommodate a request for a woman to have her face viewed by someone of the same gender.83 The New South Wales police did not support such a change. They expressed concern that such a requirement would place unnecessary burdens on police resources and may not be practical in all circumstances.84 No change has been made to the legislation in response to the Ombudsman’s recommendations.

It is perhaps understandable in the case of a roadside traffic stop, where there are likely to be only two police officers, that it may not be possible to have a policewoman present in every case. In other circumstances it should be much easier to accommodate such a request. If it is not, this highlights a bigger problem than a few women who wear a piece of cloth over their face. As former Prime Minister Gillard’s infamous misogyny speech highlighted, sexism and inequality between women and men is still alive and well in Australia.85 An argument that it may be difficult to locate a female to accommodate a request by a Muslim woman to have her face viewed by a

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80 Mahram refers to male relatives a woman cannot marry. However, Bouteldja found that many of her interviewees chose to remove the veil in front of non-mahram relatives to minimise family conflict: see Bouteldja, above n 43, 136.

81 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 19B; Criminal Investigation (Identifying People) Act 2002 (WA) s 16; Road Transport (General) Act 1999 (ACT) s 58B.

82 Road Transport (General) Act 1999 (ACT) s 58B(3)(b).


84 Ibid 27.

person of the same gender would only further highlight this problem. The continued inequality faced by all women in Australia is a far more insidious problem than a small group of women who choose, for religious reasons, to wear a veil.

**V But Others Are Doing It**

In July 2014, the European Court of Human Rights handed down its decision in *SAS v France*. In a majority decision, the Court found that France’s ban on the wearing of face coverings in public did not violate art 9 of the *European Convention on Human Rights*. While the Court rejected most of France’s arguments, the majority ultimately found that a ban was permissible on the basis of the minimum requirements of ‘living together’ or *le vivre ensemble*. The decision has been heavily criticised. For example Marshall, in her analysis of the decision, commented that

> [p]ressurizing women, or any one, in ways that may result in them staying at home and away from public places, or telling them what they can and cannot wear is, however, the opposite [of enabling people to make their own choices]. It shows human rights law potentially being used as a restricting tool, preventing certain choices and ways of life through legal prohibition or bans. This is inconsistent with the overall objective of human rights law.

However, this has not stopped those advocating a ban in Australia from placing reliance on the French laws and the decision by the European Court of Human Rights to uphold them. Nile, in particular, has commented that ‘[s]ome members in this

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86 (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014).
88 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 4–5 17, 55, 57.
House must have a very poor opinion of the politicians in the French and Belgian Parliaments if they think that this bill is in some way extreme.91

While there is some attraction in following other countries, Australia should only do so where the relevant law represents world’s best practice. Further, the law under consideration must be compatible with the fundamental principles that underpin Australia’s legal system, such as freedom of religion.92 Bans on the Islamic face veil have not become the norm internationally. Several countries, including the United Kingdom, Canada, New Zealand and the United States, have so far rejected a blanket ban.93

Australia and France have very different societies and laws; laws that are appropriate in France may not be appropriate here. Most notably, the way in which secularism is approached from both a legal and political viewpoint is different. In France, the concept of *laïcité* is enshrined in the Constitution and is seen as an integral part of national identity.94 It is interpreted as requiring a complete separation of church and state. This has been taken to include the promotion of religious beliefs by public officials. As a result, all public officials and children attending government-run schools are prohibited from wearing religious symbols while at work and school.95 By contrast, the *Australian Constitution* does not erect a wall of separation between church and state, although the federal government is prevented from establishing a state church. Consequently, strict secularism is not entrenched in Australia’s *Constitution*.96 Instead, Australia operates under a model of pragmatic pluralism.97 Australia’s approach has resulted in a high level of religious freedom, not only for the majority Christian population but for the vast array of minority faiths and for those of no faith.98 A blanket ban on the wearing of the Islamic face veil in public would be the antithesis of Australia’s multicultural and multi-faith approach to religious issues.

92 *Scientology Case* (1983) 154 CLR 120, 130.
93 For a discussion of the debate surrounding the Islamic face veil in the United Kingdom, see Bouteldja, above n 43, 115–21. For a discussion of Quebec’s proposed ban, see Fournier and See, above n 76, 275–83.
The relationship between states and their minority religious populations should not be a race to the bottom. It should not be a contest to see which country can make life most difficult for their Muslim populations. A ban may not breach the European Convention on Human Rights or, if introduced at a state level, Australia’s own Constitution, but that does not mean Australia should follow France’s lead. Just because something is legally permissible does not mean it is advisable. Instead, Australia should stand as a world leader in finding ways for diverse religious communities to live together, all expressing their diverse religious beliefs and practices as freely as possible. Australia prides itself on its multiculturalism. However, multiculturalism is more than trying a few ‘foreign’ foods. It includes tolerating and even celebrating practices you find ‘confronting’. As I have argued, ‘[r]ather than feeling uncomfortable when seeing a veiled woman, Australians should feel proud. Our society is tolerant and open-minded enough for a diverse range of religious beliefs and practices, which include wearing the burqa and niqab.’

VI Playing the Un-Australian Trump Card

Another argument advanced in support of a blanket ban on the Islamic face veil is that it is un-Australian. Bernardi and Lambie have both used this argument. In a speech to Parliament, Lambie argued that ‘we must act decisively and unite under the one Australian flag, constitution and culture. The terrorists and extremists will win if we further divide and segregate into ethnic and religious groups who reject the Australian law, constitution and culture.’

Former Australian Prime Minister Abbott never himself called for a ban. He has, however, on several occasions referred to the Islamic face veil as ‘confronting’.

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100 Commonwealth, Parliamentary Debates, House of Representatives, 2 October 2014, 11 143–52.


103 Commonwealth, Parliamentary Debates, Senate, 30 September 2014, 7391 (Jacqui Lambie).

His comments, and similar ones by former Prime Minister Howard,\(^{105}\) when combined with Abbott’s call for all Australians to be on ‘Team Australia’ are apt to be interpreted as implying that people who wear the Islamic face veil are somehow not playing for the right team.\(^{106}\) While Abbott perhaps did not intend anything more than a clumsy sports metaphor, such sentiments are unhelpful. It implies that some people are not playing on the same team and are therefore un-Australian. People like Bernardi and Lambie are likely to do just as they have done and link such sentiments to Abbott’s comments that he finds the Islamic face veil confronting.

To argue that the veil is in some way un-Australian is to define what it means to be Australian. As argued above, this should mean multiculturalism, tolerance and the embracing of all cultures and peoples who have chosen to call this country their home.\(^{107}\) During debate in the House of Representatives on 2 October 2014, the same day the parliamentary burqa ban was implemented, a procession of MPs proclaimed their support of multiculturalism and diversity. Some listed the large number of nationalities found in their electorate, others the celebration of multiculturalism at their local schools and others their proud engagement with their local Muslim communities.\(^{108}\) If such sentiments are to have meaning, then any notion that it is un-Australian to dress differently — including in a burqa or niqab — must be rejected.

### VII You Might Have a Bomb Under There

While the arguments addressed so far are predominantly social and relate to issues of Australian identity, more practically based arguments are also given in support of a ban on the Islamic face veil. Nile, Bernardi and Lambie have all argued that the Islamic face veil needs to be banned in the interests of security, either because it can be used as a disguise or because it is a symbol of extremism.

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\(^{107}\) For a discussion of the meaning, history and challenges to multiculturalism in Australia, see Elsa Koleth, ‘Multiculturalism: A Review of Australian Policy Statements and Recent Debates in Australia and Overseas’ (Research Paper No 6, Parliamentary Library, Parliament of Australia, 2010).

It must be acknowledged that the covering of the face and body does pose a small security risk in any setting. As with any enveloping garment, some forms of Islamic dress could, in theory, be used to conceal a weapon or bomb. It must also be acknowledged that, as with other forms of facial covering, such as large sunglasses, surgical face masks and balaclavas, a burqa or niqab impedes the accuracy of facial recognition technology and CCTV cameras. However, the risks actually posed by the burqa and niqab are slight. Muslims make up just 2.2 per cent of the Australian population and the proportion of Muslim women who wear the Islamic face veil is a fraction of that. While exact numbers in Australia are not known, it is likely to be less than in France. While the number of Muslims in Australia is relatively low, much of the concern over both Muslims and the face veil may be attributed to overestimation. A poll conducted in 2014 by IPSOS Mori revealed that Australians believe the number of Muslims in the country to be nine times higher than the reality.

There has only been one recorded incident where an Islamic face veil has been used in Australia as a disguise in the commission of a crime. In May 2010, a person wearing a veil robbed a man in a Sydney car park. Bernardi seized on this incident to call for the banning of the Islamic face veil in Australia. There have been no similar incidents since. The only other public incidents involving the Islamic face veil have all been far less serious. In June 2010, a woman in New South Wales was accused of making a false statement to police after she was stopped for a roadside breath test. She later falsely claimed that the police officer had attempted to forcibly remove her veil. This incident led to the passage of the Identification Legislation Amendment Act 2011 (NSW). In July 2010, a witness in a Western Australian court requested to give evidence while wearing a face veil. Judge Deane denied her request, but permitted other arrangements to be put in place to minimise her discomfort while testifying. Finally, in June 2013, a Queensland Magistrate questioned whether a defendant could wear an Islamic face veil during sentencing. However, the woman

109 Evans, Legal Protection of Religious Freedom in Australia, above n 94.

110 Samina Yasmeen, ‘Australia and the Burqa and Niqab Debate: The Society, the State and Cautious Activism’ (2013) 25 Global Change, Peace & Security 251, 258; in 2009 it was estimated that as few as 1900 women in France and its overseas dominions wore the Islamic face veil: SAS v France (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 55.


113 Ibid 150–1.

114 Ibid 151–5.

115 Ibid 150.
was not required to remove her veil. The existence of a few minor incidents, all of which were satisfactorily resolved, does not warrant a blanket ban. As Evans has argued, there is ‘no evidence of a pressing social need created by criminals making use of Muslim dress to evade detection.’

Bernardi’s link between the burqas found during anti-terrorist raids in Sydney and Brisbane is just as tenuous. While it is perhaps trite to say, it is likely shoes were also found during the raid and no-one is suggesting shoes be banned. In 2001, Richard Reid attempted to detonate an explosive concealed in a shoe while on board American Airlines Flight 63. Just as the wearing of shoes in and of itself did not make Reid a terrorist, nor should it be implied that just because someone is wearing an Islamic face veil they are a terrorist.

Even if Islamic face veils have on occasion been used as a disguise during terrorist attacks, a blanket ban is not necessary to address this threat. The European Court of Human Rights rejected France’s argument that its ban was necessary for public safety. The Court has, in the past, found there to be no problem with laws requiring religious veils to be removed for the purpose of security checks. The Court was of the opinion that ‘a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety.’

In the context of the French ban, the Court held that

the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud.

Australia’s existing laws already give police the power to compel people to remove a facial covering for the purpose of identification. They are proportionate responses to any security threat that may be posed by the wearing of face coverings of any description.

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117 Evans, Legal Protection of Religious Freedom in Australia, above n 94.


119 Phull v France [2005] I Eur Court HR 409.

120 SAS v France (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 54.

121 Ibid 55.
A ban on Islamic face veils may in fact have a negative effect on Australian security. A 2011 Australian Security and Intelligence Office (ASIO) report concluded that ‘[a]ny move in this direction would likely have negative implications, including increased tensions and distrust between communities, and providing further fuel for extremist propaganda, recruitment, and radicalisation efforts.’\(^{122}\) As Evans explains in her book *Legal Protection of Religious Freedom in Australia*:

Tarring people who are merely conservative or traditional as terrorist sympathisers and intervening in the way in which they dress may well have the counterproductive effect of alienating such people from the government and may even radicalise those who come to resent being targeted in this way.\(^{123}\)

An additional consideration in relation to security is the symbolic nature of the Islamic face veil. Lambie has argued that the burqa

is also a powerful cultural symbol, a flag for the Islamic extremists who now wage war on us. If Islamic extremists see women wearing burqas in public, it emboldens them. They feel as if they have won and that their culture of fear and intimidation and their sharia law have prevailed.\(^{124}\)

Symbols can be very powerful. Germany’s criminal code (*Strafgesetzbuch*) prohibits the use of symbols in connection with an unconstitutional organisation. This unsurprisingly includes the use of the swastika in connection with Nazi ideology. However, banning symbols can have unintended consequences, especially if a group feels they are being unfairly targeted.\(^{125}\) The banning of the Islamic face veil could become a rallying cry for extremists and turn these women into martyrs. Bans and suggestions that bans will be introduced may even increase the symbolic significance of the Islamic face veil and encourage more women to take up the practice. As one woman interviewed by Bouteldja recounted, she began wearing the veil after the debate in France began, saying ‘*[t]he minimum that I can do as a Muslim woman is to wear the niqab, given that they are attacking this little bit of my religion*’.\(^{126}\)


\(^{123}\) Evans, *Legal Protection of Religious Freedom in Australia*, above n 94.


\(^{126}\) Bouteldja, above n 43, 151.
VIII You Can See My Face, I Want To See Yours

Those who support a ban on the Islamic face veil often use restrictions on the wearing of motorbike helmets as justification for a ban on the veil. In 2010, Bernardi commented:

As an avid motorcyclist I am required to remove my helmet before entering a bank or petrol station. It’s a security measure for the businesses and no reasonable person objects to this requirement. However, if I cover myself in a black cloth from head to toe, with only my eyes barely visible behind a mesh guard, I am effectively unidentifiable and can waltz into any bank unchallenged in the name of religious freedom.¹²⁷

The anti-burqa group Faceless has attempted to make a similar point via protests where men wearing either Islamic face veils or other face covering garments have attempted to enter public buildings. In 2012, members wearing black Islamic face veils walked through the streets of Sydney and entered a number of buildings including the New South Wales Parliament. They claimed that their ability to move around freely while wearing the face veil was evidence of lax security.¹²⁸ Another interpretation is that their protest demonstrated Sydney-siders’ respect and tolerance of diverse religious and cultural practices.

In 2014, following the lifting of the federal Parliament’s restrictions on face coverings in the public gallery, a group of three men attempted to gain entrance to Parliament while wearing an Islamic face veil, motorbike helmet and Ku Klux Klan outfit.¹²⁹ In response to the incident, the Department of Parliamentary Services released a statement explaining:

The Parliament has a longstanding policy that an assembly or other activity intended to draw attention to a grievance or matter of interest, whether personal, political or otherwise (a protest) is permitted in the Authorised Assembly Area.

‘Protest paraphernalia’ may be used in the Authorised Assembly Area, but not in other areas of the precinct.

People are not permitted to enter Australian Parliament House with motorbike helmets. Helmets have to be removed and cloaked for security reasons. Once again, this is a long standing arrangement.


The policy requiring the temporary removals of facial coverings that came into effect on 20 October 2014 enables security staff to identify a person who may be a security risk. In this instance, the Parliamentary Security Service followed procedures for screening visitors entering Parliament. *The visitors were requested to remove the items obscuring their faces as the items were deemed to be protest paraphernalia.*

The men protested that had they been Muslim women they would have been permitted to re-cover their faces after the initial security screening. However, the reason they were refused entry was not because they wished to wear a face covering, Islamic or otherwise, but because they wanted to carry out a protest.

Those who argue for a blanket ban on Islamic face veils on this basis usually rely on security concerns to justify their position. They argue that if it is necessary to remove a motorbike helmet for security reasons, then it must also be necessary to remove a face veil. However, the existing laws already cater for the need to identify a person wearing a face covering. New South Wales, the Australian Capital Territory and Western Australia have all introduced laws that explicitly give police, and some other public officials, the power to require a person to remove their face covering for the purpose of checking their identity. While other states and territories have not introduced similar laws, police in those states have stated that existing laws are already adequate. It is also important to note that helmets protect the wearers’ head in a way that Islamic face veils do not. As a result, they are not a good comparison; the security implications of allowing a person to wear a helmet are different to other non-protective face coverings.

The real motivation behind the motorbike helmet arguments seems to be an attempt to cast those who oppose the Islamic face veil as victims of discrimination. However, there is no fundamental human right to wear a motorbike helmet, ride a motorbike or to cover your face. Conversely, freedom of religion, including the right to exercise that religion, is recognised as a fundamental human right in multiple international and domestic human rights instruments. It is not the covering or uncovering of the face that is important for considerations of discrimination and breaches of human rights. It is the religious motivation of the wearer that transforms a requirement to remove a face covering into a case of discrimination and a breach of human rights.

Bernardi and those carrying out the protests in Sydney and at the federal Parliament appear to have forgotten that face coverings can take several forms, from large

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sunglasses to Halloween masks, from dressing up at the cricket to Santa costumes at Christmas.\textsuperscript{132} Far from being banned, some of these forms of covering are actively encouraged as part of Australian culture. As a result, a blanket ban on face coverings is likely to have a far wider impact than envisaged by Bernardi and the protestors. During the debate on the New South Wales laws, Liberal MP Bryan Doyle highlighted the range of face coverings worn in Australia when speaking in support of granting police power to require face coverings to be removed for the purpose of checking a person’s identity:

In my former role as a public order policeman I attended many major football games. Sometimes people turn up to those games wearing gorilla masks. I often found that people who turned up at sporting events with their faces concealed felt much freer and more open to engage in antisocial behaviour but once the masks were removed and the person’s identity was revealed it was much easier to apply the process of the law. Madam Acting-Speaker would also be familiar with those hoodlum elements that sometimes slink around shopping centres with their faces concealed.\textsuperscript{133}

While Doyle’s words could also be used to support a blanket ban, as such a ban may solve some of the problems he highlights, it would also have unintended consequences. For example, many brides still choose to wear a veil at their wedding. If a blanket ban were to be introduced in the form suggested by Nile in 2010 and 2014, it would apply equally to the Islamic face veil and to the wedding veil. Both garments cover the wearer’s face. While it could be argued that ‘common sense’ would prevent such an application, common sense is not as common as it should be. It would be a tragedy if an overzealous police officer arrested a bride on her wedding day as she made her way from the car to the church. It would be of little help to her on the day that this was not the intended use of the law. Similarly it would be a tragedy if a Muslim woman wearing the Islamic face veil were arrested as she sought medical attention or the protection of the police. There is great danger that in criminalising the wearing of the veil, these women may be put beyond the protection of the law and other support services, which is ‘cruelly ironic in light of the usual objection to the niqab as oppressing those very same people.’\textsuperscript{134}

\textbf{IX Not in the Seat of Democracy}

While none of the arguments examined above withstand close scrutiny when used in support of a blanket ban on the wearing of Islamic face veils, those relating to security and identity arguably support situational restrictions. Australia already has

\begin{footnotes}
\item[132] New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 12 September 2011, 5459 (Kevin Conolly).
\item[133] New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 13 September 2011, 5510 (Bryan Doyle).
\item[134] Gareth Morley, ‘Veils of Ignorance: How the Supreme Court of Canada Came to Render Muslim Women Outlaws (Sometimes) — and What It Should Have Done Instead’ (2013) 33 \textit{Inroads} 119, 129.
\end{footnotes}
laws that restrict the wearing of face coverings in certain circumstances. However, just because a restriction on the wearing of face coverings is confined to certain places or situations does not necessarily mean it is appropriate or necessary.

In the wake of the hysteria over the Islamic face veil and an increased security threat level, the federal Department of Parliamentary Services announced increased security measures at Parliament House. Two of these related to the Islamic face veil. First, ‘that anyone entering the building covering themselves in such a way they cannot be clearly identified will be asked to be identified and to produce identification that matches their identity’ and second, that ‘people [who] do not wish to be readily identified in the galleries of each chamber … may use the galleries that are fully enclosed in glass’.

On their face, these seemed to be proportionate responses. People wearing Islamic face veils would still be permitted within Parliament House and when it came to identifying people, ‘[i]f people [had] a cultural or religious sensitivity in relation to this, they [would] be given the privacy and sensitivity that is required in relation to that identification.’ This aspect of the new security arrangements is proportionate as it is minimally invasive and sensitive to an individual’s religious and cultural needs. However, it was the second aspect that garnered public attention and was the most problematic.

While it is not entirely clear from the statement by the President of the Senate as to the effect of the security changes, the practical outcome was that people wearing an Islamic face veil who wished to continue to wear it while viewing sessions of parliament were required to do so from behind a screen. These glassed areas are usually used by school children, who presumably cannot be trusted to contain their excitement at being in the nation’s capital and remain silent. The explanation given for relegating these women to sit with the school children was that

> if there is an incident or if someone interjects from the gallery, … they need to be identified quickly and easily so that they can be removed from that interjection.
> Or if they are asked to be removed from the gallery, we need to know who that person is so they cannot return to the gallery, disguised or otherwise.

The difficulty here is the proportionality of the measure. It must be acknowledged there is some risk that a person wearing a face covering may interject and need to be removed. If there are several veiled people, identifying who interjected may be more difficult than it would otherwise be. However, the aim sought to be achieved is far outweighed by the harm this decision has caused.

Parliament is the seat of Australia’s democracy. It is where the nation’s laws are made and public policy debated. In the wake of the terrorist raids in Brisbane and

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136 Ibid.
137 Ibid.
Sydney, the public debate around the Islamic face veil and the proposed changes to anti-terrorism legislation, Muslims were already feeling unfairly targeted and alienated. To add insult to injury and bar some Muslim women from full, adult participation in our democratic process is a step too far. As argued above, symbols are important. Symbolically, this decision says more than ‘we need to identify interjectors’. It says to Muslim women ‘you are not welcome here, you cannot be trusted, like school children you must be kept behind glass’. If those like Nile are right and the burqa is oppressive, this decision to segregate women wearing the face veil only further oppresses them.

A further difficulty with the restrictions imposed is that they were a knee-jerk reaction to a rumour. The President of the Senate, Senator Stephen Parry, later revealed that the measures had been put in place in response to advice that

a group of people, some being male, were going to disrupt question time in the House of Representatives. The advice further indicated that this group would be wearing garments that would prevent recognition of their facial features and possibly their gender.

It also became apparent that the advice was based on the presence of a film crew who had arrived in anticipation of the rumoured protest:

I was informed that there was a film crew at the front of Parliament House on the forecourt and that they were there in anticipation of a group of people wearing burqas attempting to enter Parliament House or something to that effect.

The protest did not eventuate. Given the timing, the suggestion that some of the protesters were likely to be men and the later protest by the three men wearing the Islamic face veil, motorbike helmet and Ku Klux Klan outfit, it is likely the rumoured protest was going to be against the wearing of the Islamic face veil in Australia. In order to prevent a protest against Muslim women’s freedom of religion, the Speaker of the House and President of the Senate curtailed the freedom of these women to participate in our democracy — in effect doing the protestors’ work for them.

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139 Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 20 October 2014, 8 (Stephen Parry).

140 Ibid 15.
X Conclusion

While the parliamentary restrictions on the Islamic face veil were short-lived, they highlighted both the hysteria surrounding the veil and the dangers of responding to that hysteria. Fear, horror and even revulsion are understandable reactions to the actions of IS in Iraq and Syria. However, we must not allow women on the other side of the world to be scapegoats for the actions of IS. Where there are real security concerns posed by facial coverings of any type, these should be addressed. However, a blanket ban is not the way to achieve this. Laws such as those in place in Western Australia, New South Wales and the Australian Capital Territory are adequate to address the miniscule security risk posed by the wearing of face coverings in Australia.

None of the arguments put forward to support a blanket ban on the Islamic face veil stand up to close scrutiny. Even if it is accepted that a ban is necessary to alleviate the oppression of Muslim women and to enhance Australia’s security, a ban will be counterproductive. If these women are oppressed, a ban will only deepen that oppression. Further, rather than enhancing security, a ban is more likely to be detrimental as it becomes a rallying cry for extremists.

Suggesting that a ban is appropriate because the face veil is un-Australian or not a true part of Islam only undermines Australia’s efforts to be an inclusive, multi-cultural and multi-faith society. Claiming that the veil is not part of Islam only highlights ignorance of the rich diversity within Islam. Further, a law based on this premise requires the state to involve itself in questions of religious orthodoxy; something a secular state is not qualified to do. To claim that the veil is un-Australian is equally problematic. It casts veil wearers as playing for the wrong team setting up a false image of what it means to be Australian. As highlighted by so many MPs in the procession of speeches in Parliament on 2 October 2014, Australia has a vibrant, rich mix of cultures and religions expressed in a variety of ways. This is what it means to be Australian.

Instead of a blanket ban, Australia should carefully examine when and where it might be necessary to see a person’s face and then put in place the appropriate laws and procedures. These must be proportionate to the aims they seek to achieve and sensitive to the needs of Muslim women. While the restrictions in Parliament House may have appeared to be appropriate, in reality, they were neither proportionate nor sensitive. Instead, they were an example of where lawmakers can get it wrong by taking action before carefully considering what it is they are seeking to achieve and how that can be achieved in the least invasive way. Instead of enhancing security, the temporary ban on those wearing the Islamic face veil while sitting in the open public gallery excluded an already marginalised group from full adult participation.

in the democratic process. Furthermore, it highlighted the contradictions inherent in the arguments in support of burqa bans. On the one hand, veiled women are cast as oppressed victims who must be rescued, while at the same time they are treated like naughty school children, outspoken and unable to be trusted to observe normal, polite behaviour when visiting Parliament. This contradictory image highlights the lack of cogency in the ban the burqa rhetoric. Far from having a logical, coherent argument, those who support a ban on the Islamic face veil are self-contradictory and promote an outcome that would be counterproductive to the ends they claim to seek.
THE FUTURE OF CHARITY REGULATION IN
AUSTRALIA: COMPLEXITIES OF CHANGE

Abstract

This article analyses the Australian Charities and Not-for-profits Commission (ACNC), established in 2012 by the Labor Government, and its role in charity regulation and guidance for Australia. This analysis is made in light of previous Coalition Government plans, which have since been abandoned, to disband the body. The charitable sector has long called for wholesale regulatory reform, due to the amount of duplicate reporting that exists in Australia’s federal system. The ACNC has undertaken to address this issue, and many positive achievements have already been reached. Drawing on comparisons with both the New Zealand jurisdiction and Australia’s pre-ACNC system, this article presents the case that the ACNC is a vital body for the sector, and presents some suggestions for future improvement in charity regulation.

I Introduction

The last 50 years have seen a significant development in the size and impact of the charitable and not-for-profit sector in Australia. The sector is large and wide-ranging, covering a vast number of activities and missions. In 2010, it was estimated that there were 600,000 not-for-profit organisations in Australia. The Australian Bureau of Statistics has identified 59,000 ‘economically significant’ not-for-profit organisations in Australia, contributing $43 billion to Australia’s gross domestic product, and eight per cent of employment. In January 2010, 4.6 million employees worked in not-for-profit organisations in Australia, with an equivalent wage value of $15 billion. The substantial contribution of the charity and not-for-profit sector alongside the public and private sectors has led to it sometimes being referred to as ‘the third sector’. However, in spite of this, the sector is poorly understood by both the public and the government. Attempts to set up a framework for the regulation of the sector have so far been piecemeal, confusing and disjointed. Against this background of uncertainty, four major government inquiries have

* Lawyer, Mills Oakley, Sydney.
2 Ibid.
3 Ibid.
considered the regulation of the charitable and not-for-profit sector over the last 15 years.\textsuperscript{4}

Despite this plethora of reviews, the sector has been subject to constant change rather than a clear and uniform structure of regulation. Throughout these inquiries, there has been an overarching call for an independent supervisory body that responds to the sector’s needs.\textsuperscript{5} Some of the most prevalent issues leading to this were the lack of public understanding and trust of the sector, the onerous reporting requirements caused by overlap of regulators, and the lack of information available to support charities and not-for-profits, which are often heavily reliant on volunteers.

The Gillard Government’s platform included extensive not-for-profit reform in an attempt to address these issues.\textsuperscript{6} This began with the establishment of the now dissolved Office for the Not-for-Profit Sector in 2010, situated within the Department of the Prime Minister and Cabinet.\textsuperscript{7} This Office facilitated the establishment of the \textit{National Compact}, an agreement for the Australian government to work collaboratively with the not-for-profit sector towards better outcomes.\textsuperscript{8} This broad reform platform also included the establishment of the Council of Australian Governments (COAG) Not-for-profit Reform Working Group, to facilitate co-operation between the state and federal governments.\textsuperscript{9} Following the recurring theme of an independent regulator being required, a scoping study was undertaken, and then an Implementation Taskforce was created to work towards the body’s establishment.\textsuperscript{10} The government drafted a Bill to create such a body, and the House of


\textsuperscript{5} Productivity Commission, ‘Contribution of the Not-for-Profit Sector’, above n 4, 115.


\textsuperscript{7} Ibid.

\textsuperscript{8} Department of the Prime Minister and Cabinet, \textit{National Compact: Working Together} (2011) 5.

\textsuperscript{9} Australian Charities and Not-for-profits Commission, ‘Not-for-profit Reform’, above n 6, 23.

\textsuperscript{10} Ibid 16.
Representatives Standing Committee on Economics indicated its support. This culminated in the groundbreaking step of establishing the Australian Charities and Not-for-profits Commission (ACNC) as an independent regulator of charities on 3 December 2012. The stated objects of the ACNC are:

(a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and

(b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and

(c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

Finally, this reform suite also led to the passing of the Charities Act 2013 (Cth) (‘Charities Act’), which provided a statutory definition of charitable purposes.

The above history suggests that at the time of the ACNC’s introduction, the sector was in need of regulatory restructure. However, the national Coalition Government, elected in September 2013, previously disclosed plans to repeal the body with the introduction of the Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (‘Repeal Bill’). This scheme proposed to disband the ACNC and replace it with a National Centre for Excellence, a non-regulatory body, with regulatory functions returning to the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO). The arguments put forward in the Regulation Impact Statement for this scheme were primarily that charities are subject to further duplicate reporting requirements in the current ACNC model, and that the ACNC’s aims to streamline reporting have not yet eventuated. Another perceived deficiency with the ACNC model among some sector commentators is that the ACNC was not specifically tasked with addressing fundraising legislation, a source of ‘red tape’ for charities. These arguments were met with varying reactions; some in the charitable sector agreed with the proposed repeal, but a large portion of the submissions to the Senate inquiry into the proposed legislation condemned the suggestions and

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12 Australian Charities and Not-for-profits Commission Act 2012 (Cth) § 15-5.
14 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 1.
15 Ibid.
16 Fundraising Institute of Australia, Submission No 120 to Senate Standing Committees on Economics, Parliament of Australia, Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014, 1 May 2014, 1.
arguments. Of the 155 submissions received on the Repeal Bill, only 13 expressly supported the abolition.

Following the Repeal Bill, the Coalition Government’s intentions regarding the ACNC were initially far from decisive or clear. Possibly in response to the critical submissions regarding the Repeal Bill, the then Minister for Social Services Scott Morrison announced in early 2015 that the abolition of the ACNC was not an immediate priority. Subsequently, the Senate passed a motion, led by Labor Senator Penny Wong, recognising Morrison’s comments and calling on the government to withdraw the Repeal Bill. In spite of this, Minister for Social Services Christian Porter then stated in December 2015 that the government was continuing to evaluate the ACNC and its role. Finally, in March 2016, Porter, and Minister for Small Business and Assistant Treasurer, Kelly O’Dwyer, announced that the ACNC is to be retained. This eventual announcement was a welcome step for many in the sector, by providing some certainty regarding what to expect in the future. It is clear that the role of the ACNC has been a contentious issue, and opinion has been divided within Australia as to the best way to regulate the sector.

Other nations have introduced similar systems to the ACNC, with varying degrees of success. For instance, in New Zealand, the Charities Commission — a similar body to the ACNC — was introduced in February 2007. However, it was later subsumed into a pre-existing government department. This was a similar move to that which was previously proposed by the Coalition Government in Australia. In the United Kingdom, the Charity Commission for England and Wales — separate from the government’s revenue raising body — makes determinations of charitable status. It was given its current form in 2006, but it has existed in some form since

20 Commonwealth, Journals of the Senate, Senate, 24 June 2015, 2799.
22 Christian Porter and Kelly O’Dwyer, ‘Retention of the Australian Charities and Not-for-profits Commission’ (Media Release, 4 March 2016).
23 Charities Act 2005 (NZ) s 8, as at 3 September 2007.
24 Charities Amendment Act (No 2) 2012 (NZ) s 9.
the 1800s. It is clear that there is not a unified view regarding what form charity regulation should take, even across the international community.

Against the backdrop of divided opinion on this issue, this paper will analyse the different possible forms of charitable regulation in Australia. It will examine all of the proposed functions of the ACNC and analyse its current shortcomings. Some previous arguments for dismantling the ACNC, including in the Explanatory Memorandum accompanying the Repeal Bill, have used the dismantling of New Zealand’s former Charity Commission as a justification. This paper will conclude by analysing that body’s existence and comparing it to the ACNC’s lifespan to this point.

A Scope of the Paper

The mandate of the ACNC covers the entire not-for-profit sector, which includes organisations that are not within the legal definition of ‘charitable’. A not-for-profit organisation is generally defined as one that applies its assets and income wholly towards its objects and purposes. To date, the ACNC’s focus has been on charities.

This paper will not undertake a close analysis of the definition and scope of charitable purposes in Australia. However, it deserves brief mention in the paper’s overall context. Prior to the recent Labor Government’s not-for-profit reform, there was no uniform statutory definition of ‘charity’ in Australia’s federal law; rather, it depended on the individual statute being relied on, and the concession being sought. Furthermore, the principles of determination were derived largely from the common law, based on the English Statute of Charitable Uses 1601. The introduction of the Charities Act has helped to establish uniformity in determinations of charitable status at the federal level. The Charities Act is one of several pieces of legislation that the ACNC administers. Once the ACNC makes a decision that an organisation is a charity, that determination will apply to that organisation in terms of any Commonwealth legislation that requires a charitable purpose. The Charities Act was enacted in response to the ‘Report of the Inquiry into the Definition of Charities and Related Organisations’, particularly in its interpretation of the requirement of public benefit. The combination of the enactment of the Charities Act and the establishment of the ACNC has led to a more coherent, comprehensive and uniform system of regulation.

26 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 4.
27 Charities Definition Inquiry Committee, above n 4, 283.
28 Charities Act Preamble.
29 Australian Charities and Not-for-profits Commission, ‘Not-for-profit Reform’, above n 6, 11.
The Charities Act commenced on 1 January 2014, but Coalition Minister Kevin Andrews moved an unsuccessful amendment to delay its commencement until 1 September 2014. The Explanatory Memorandum stated that this was to allow ‘further consultation on the legislation in the broader context of the government’s other commitments in relation to the civil sector’. This led to speculation that the Coalition also planned to abolish the Charities Act, but this is now highly unlikely, given the announcement of the ACNC’s retention.

This paper argues that a uniform definition is important to streamlining decision-making processes that affect the sector. Merely using the common law definition leaves too much room for inconsistent decisions, as will be discussed in the section on ATO regulation below (Part V). While the statutory definition of ‘charity’ is broad and can still be open to interpretation, a codified definition that is applied across all legislation is a step towards greater consistency. The Charities Act only applies to federal legislation, and to achieve further harmonisation, state legislation would need to also mirror the federal definitions.

II Uniform Regulation of the Sector

A Background of Regulatory Difficulties

There is a long history of charitable regulation, and some degree of regulation of the sector will always be necessary. It originally derives from two interwoven policies: (i) that it is desirable within the law to provide certain privileges to organisations whose activities benefit civil society; and (ii) that such organisations need to be exposed to a particular regime of state supervision to ensure they are not receiving these privileges undeservedly. Charity regulation is a matter of balance; while there is a benefit in ensuring that only worthy organisations are receiving particular concessions, it is important not to over-regulate and thus stultify the sector.

The complex and varying nature of charity reporting and regulation has been one of the largest issues complained of by the sector to date. The analysis in this paper will begin by examining this issue, and the ACNC’s role in addressing it. Fundraising legislation is a particular cause of complaint, and this will be specifically addressed in a later section.

In the first instance, many charities will decide to adopt a formal legal structure of an incorporated association, in order to gain the benefits of having a legal personality. This can be problematic in itself, in that each state jurisdiction retains differing

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31 Commonwealth, Parliamentary Debates, House of Representatives, 4 December 2013, 1561–2 (Kevin Andrews).
32 Supplementary Explanatory Memorandum, Social Services and Other Legislation Amendment Bill 2013 (Cth) 2.
34 Ibid 7.
requirements in the process of becoming incorporated, maintaining incorporated status, and avoiding fines or even offences for failing to meet required standards of record keeping and other practices. Particular difficulty is encountered by national organisations that have several state branches, each incorporated in a different state, as they cannot keep track of requirements from a central source. Some associations may instead decide to adopt the legal structure of a public company limited by guarantee. A not-for-profit company with this structure generally attracts more significant burdens that come with being subject to the Corporations Act 2001 (Cth) (‘Corporations Act’). If the not-for-profit company is a charity, some of the obligations under the Corporations Act will not apply, however. While it could be argued that not-for-profits choose to take on these regulatory burdens by electing to incorporate, it is becoming less viable in Australia to operate on a large scale while being an unincorporated association.

It has been the case for many years that state jurisdictions have had varied approaches in associations law, and it remains a difficulty in terms of bureaucracy for the sector, especially when operating on a national basis. Australia is somewhat unique in this form of regulation in a federal system; for example, only one province in Canada has legislated in the area. South Australia was the first Australian state to pass associations legislation, with the Associations Incorporation Act 1858 (SA). Although it was influential in four other state jurisdictions, there remained significant differences across states. Queensland’s first associations legislation, the Religious Educational and Charitable Institutions Act 1861 (Qld), only applied to limited types of associations, as its name suggests. Progress in Queensland came largely through case law on the statute, with piecemeal amendments, until it was replaced with the Associations Incorporation Act 1981 (Qld), this being more similar to the original South Australian legislation. It is unclear if each state’s unique attempts during these early stages to legislatively solve problems facing the sector derived from an unfamiliarity with the South Australian model, or from a want for independence. It was not until the 1970s that all Australian states had a model broadly similar to the South Australian one. In contrast, South Australia also passed the influential Real Property Act 1858 (SA) at the same time as its incorporations legislation, and this was adopted throughout Australia comparatively swiftly.

The history behind the legislation in this area helps to understand the differences between jurisdictions that remain today; they were originally conceived independently

36 Corporations Act s 111L.
37 Keith L Fletcher, The Law Relating to Non-Profit Associations in Australia and New Zealand (Lawbook, 1986) 207.
38 Ibid 211.
39 Ibid 207.
40 Ibid 209.
41 Ibid 211.
42 Ibid 215.
43 Ibid 218.
of one another, and although their general models bear similarities, there still seems to be a wish for independence between states. The differences can still cause operational difficulty for charities. Financial and auditing requirements, which are some of the more onerous regulatory requirements for associations, also differ significantly across jurisdictions. This can be demonstrated through a comparison of the requirements in Queensland and South Australia. Under the Queensland legislation, associations with current assets or yearly revenue of more than $100,000 are required to be professionally audited, and ones with current assets or yearly revenue of between $20,000 and $99,999 need their financial records to be annually reviewed by an approved person. Comparatively, in South Australia, an audit is only needed if annual gross receipts are about $200,000, with no level at which a review by an approved person is required. This difference is substantial for charities, with the threshold for auditing being double in South Australia, meaning a significantly larger number of charities would potentially be subject to the audit in Queensland. Audits usually require volunteers to have at least some degree of financial expertise to ensure they are passed satisfactorily, and this has significant practical consequences. Differences also exist between the required accounting standards; the Queensland, South Australian, Tasmanian and Western Australian statutes feature no express requirements for the accounts to be prepared in accordance with accounting standards, but other jurisdictions do require this. These differences create a noteworthy discrepancy across states in relation to the relative time and resources a charity needs to spend on administration, rather than focusing on its mission.

With discrepancies like these, the choice of where to incorporate can become a strategic decision based upon different laws, rather than an optimal decision based on where a not-for-profit wishes to operate. Some not-for-profits with various state branches choose to incorporate each separately; this then creates inequality within an organisation as to the resources dedicated to administration, due to the differing requirements. It is noted above that some not-for-profits choose to adopt or change to the structure of a public company limited by guarantee under the Corporations Act, notwithstanding the apparent regulatory burden imposed by that legislation on the company and its directors. However, quite surprisingly, under that Act companies are not even required to have their financial records reviewed — a much less onerous requirement than an audit — if their annual revenue is less than $250,000, and an audit is only required if their annual revenue exceeds $1 million. When compared

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44 Associations Incorporation Act 1981 (Qld) s 59.
45 Ibid s 59A.
46 Associations Incorporation Act 1985 (SA) s 35.
47 See Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1987 (WA).
48 See Associations Incorporation Act 1991 (ACT) s 76; Associations Act 2003 (NT) s 38; Associations Incorporation Act 2009 (NSW) s 43; Associations Incorporation Reform Act 2012 (Vic) s 95.
49 Corporations Act s 301.
50 Ibid.
with the South Australian and Queensland legislation, there is a threshold level at which a professional audit would be required in both of those jurisdictions, but no review at all would be needed under the Corporations Act. On the other hand, the Victorian legislation mirrors the tiers of the federal legislation. Although the discrepancy between the federal and state legislation can be explained by national corporations generally being larger, that does not account for or justify the inconsistency between states.

These inconsistencies highlight the difficulty created for not-for-profits in decision-making and also in migration of jurisdiction. In the Australian Community Sector Survey of 2013, conducted by the Australian Council of Social Service, 52 per cent of respondents saw the ACNC’s most important role as to align regulatory burdens between the states and territories, and the federal government, highlighting the importance of this issue. Understanding these jurisdictional differences requires research and legal understanding, which is difficult for smaller organisations dependent entirely on volunteers. It is difficult for them to make informed choices on their legal structure when there are so many differences with no clear rationale.

B The ACNC’s Role in Addressing Overlapping Regulation

Following its establishment, the ACNC was proposed to have several functions to achieve its aims. One was to be a ‘one stop shop’ for charity regulation in Australia, juxtaposing with the previous onerous system of providing overlapping information to national departments — including ASIC and the ATO — and state regulators such as offices of fair trading. Inconsistent requirements for government grant applications were also flagged as an issue to be rectified. The 2010 research report ‘Contribution of the Not-for-Profit Sector’ had unequivocally supported the idea of a ‘one stop shop’, referring to that term numerous times throughout. One of the objects of the Act establishing the ACNC is to ‘promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector’, and it states that it achieves that object through ‘establishing a national regulatory framework for not-for-profit entities that reflects the unique structures, funding arrangements and goals of such entities’. It is uncontroversial that these aims were suggested throughout the discussion before the establishment of the ACNC, and welcomed by the sector. However, the significant question, which has led to ongoing debate, is whether it is helping to achieve these goals or if it has actually been a retrograde step. If it is believed that the ACNC has so far failed in its mission to achieve these goals, the next question is whether it is realistic to think it will do so in the future, or whether it is simply a body with de jure but no de facto power.

51 Associations Incorporation Reform Act 2012 (Vic) pt 7.
53 Australian Charities and Not-for-profits Commission, ‘Not-for-profit Reform’, above n 6, 18.
54 Productivity Commission, ‘Contribution of the Not-for-Profit Sector’, above n 4, 113.
55 Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 15-5.
Arguably the major criticism of the ACNC to this point, from both government and also some charities, is that it has actually increased the reporting requirements for charities. On the one hand, the introduction of the ACNC led to the disapplication of several provisions of the *Corporations Act* for charities, whereby some information now needs to be reported to the ACNC (rather than to ASIC as was previously the case), and some other previous obligations no longer apply at all. However, for the large number of charities that are incorporated under state legislation, they are now required to report various changes — such as constitutional amendments or changes to their directors — to both their state regulator and the ACNC. Furthermore, such associations may also be subject to the previously mentioned audits required by their state regulator, as well as the annual statements that must be provided to the ACNC.

From this perspective, it could appear that it has indeed increased, or at best maintained, the amount of red tape for the sector. However, to accept this without further analysis is to look at the issue too simplistically, without considering the reasons for this and the overall background of charity regulation. It was suggested earlier that the states evinced an intention to maintain autonomy since the beginning of associations regulation. The fact that operationally significant differences remain after all states adopted a similar model in the 1970s displays the difficulties in achieving state uniformity in the area. It would seem that in order for bureaucracy to be reduced for charities registered under state governments, state legislatures must have a significant role. Uniformity will only be achieved if states decide to either cede their powers regarding incorporated associations, or if they collaborate towards complete harmonisation of the state legislation. With one of the ACNC’s roles being to strive towards establishing a national framework for not-for-profits, there is a strong argument that the existence of such a commission can facilitate dialogue between states to achieve this eventually.

The ACNC has already created arrangements with ASIC, and this was expedited due to both being federal bodies. Achieving this with the states needs time and more work, and it is unfair to blame the ACNC for failing to achieve state harmonisation at this point. In the ACNC’s relatively short history, it has already achieved some progress towards this, through interactions with state governments. In late 2012, the South Australian government announced an intention to streamline its financial reporting requirements for associations required to be audited under its legislation with the reporting requirements of the ACNC. Furthermore, it also intended to add information-sharing provisions to the statute, allowing the Corporate Affairs Commission of South Australia (now known as Consumer and Business Services) to share information with the ACNC to eliminate dual reporting. Western Australia and Victoria

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56 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 2.
57 *Corporations Act* s 111L.
58 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 2.
60 Ibid.
have also introduced similar Bills\(^61\) and the Australian Capital Territory government announced that it would begin the process of exempting charities from reporting requirements under the *Associations Incorporation Act 1991* (ACT), so they would only need to report to the ACNC.\(^62\) Such processes, when fully completed, could radically streamline the charitable sector and ensure uniform national regulation. It also highlights that the states need to be willing to surrender some of their autonomy for this to be achieved. While the states have an inescapable role in this process, this author argues that the ACNC is uniquely positioned to cultivate the necessary goodwill and to facilitate the necessary discussions.

The ACNC currently uses its annual report to account to the community and the government on its progress in reducing unnecessary regulation, consistent with its statutory purposes. In its inaugural report, the progress outlined in that respect was particularly impressive, particularly given the ACNC’s very short existence at that point. The report demonstrated that memoranda of understanding had been signed with ASIC, the ATO and the Office of the Registrar of Indigenous Corporations, to agree on sharing information and mutually accepting reports provided to different departments.\(^63\) Furthermore, much has been done to address the issue of the lack of consistency between grant applications, and the amount of work that goes into them. Grant applications have long been a drain on resources in the not-for-profit sector, and the sector’s reliance on grant funding means applications are difficult to escape. In a 2007 study of 10 not-for-profit organisations, the average annual number of grant applications completed was 46, with a noteworthy mean of 15.17 hours being spent on preparing each one.\(^64\) The ACNC met with several government departments to begin the process for accepting ACNC reports for grant applications; these included the Department of Education, Employment and Workplace Relations, the Department of Health, and the now defunct Australian Agency for International Development.\(^65\)

These discussions between the ACNC and other government departments also looked at streamlining annual reports that must be supplied to these departments by certain types of organisations, with data also to be provided to the ACNC. The use of the National Standard Chart of Accounts (NSCOA) in such reports and grant acquittals

\(^{61}\) *Associations Incorporation Bill 2014* (WA); *Associations Incorporation Reform Amendment (Electronic Transactions) Bill 2015* (Vic).

\(^{62}\) David Bradbury, Mark Butler and Andrew Barr, ‘ACT Signs Up to New Charities Regulator’ (Media Release, 11 March 2013).


has been previously recommended in inquiries into sector regulation;\(^{66}\) further progress towards its implementation can be made through the ACNC. In its 2013–14 Annual Report, the ACNC reported that the federal, state and territory governments had all agreed to accept the NSCOA for all government reporting purposes,\(^{67}\) after the ACNC had identified this as a priority in its 2012–13 report.

In the most recent annual report (2014–15), the ACNC identified having implemented information-sharing processes between the ACNC and Deductible Gift Recipient registers, maintained by other government departments such as the Department of Foreign Affairs and Trade, and the Department of the Environment, eliminating the need for charities to provide the same information twice.\(^{68}\) This demonstrable progress in every report, and the improvement on long-standing practices, displays the beneficial role that the ACNC has so far provided for the sector.

**C Likely Effect of ACNC Abolition on Overlapping Reporting**

While it is true that the ACNC is currently responsible for some level of duplicate reporting with state regulators, the amount of progress achieved in such a short time, as shown in its annual reports, shows that the ACNC is well on the way to reducing unnecessary reporting across the sector nationwide through promoting dialogue and negotiating with the relevant government bodies.

It is difficult to see how such progress would be made in the future if the ACNC were abolished. For example, the Explanatory Memorandum to the now suspended Bill to repeal the ACNC was very vague on what form the proposed replacement body — the Centre for Excellence — would take.\(^{69}\) The most tangible source of information on this was the Centre for Social Impact’s report on draft models for the form of replacement. In the three possible forms suggested in the report, none mentioned reduction of bureaucracy as a potential role of such a body.\(^{70}\) Furthermore, the report specifically flagged doubt as to whether there would be significant advocacy towards reduction of red tape in the future, in the absence of a commission like the ACNC.\(^{71}\)


\(^{69}\) Explanatory Memorandum, Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth).


\(^{71}\) Ibid 30.
For a significant number of organisations, the abolition of the ACNC would result in an unchanged, or even increased, level of red tape. Charities registered under the *Corporations Act* would have their reporting obligations to ASIC reinstated, after they were removed when the ACNC was established.\(^{72}\) While a financial report is required for charities at the same financial threshold in both systems, the *Corporations Act* requires such charities to also prepare and lodge a director’s report with ASIC, being an increased requirement if the ACNC were dismantled. While the ACNC requires an Annual Information Statement of such charities, it requires significantly less information than a director’s report under the *Corporations Act*. The Annual Information Statement is also a simple online form, whereas a director’s report needs to be written in a certain format, and charities sometimes have to incur the cost of legal advice for the task. In a similar vein, when interacting with the ACNC, changes to office-holders, the constitution or the charity’s address can be easily lodged through an accessible online platform. The consequences for national companies if the ACNC were abolished should be considered in conjunction with the fact that the South Australian, Western Australian, Victorian and Australian Capital Territory governments are moving towards single ACNC reporting. Though it is true that some state incorporated associations could immediately have fewer reporting requirements if the ACNC were abolished, it is unclear for how long this would remain the case. Considering these factors, it is doubtful that dismantling the ACNC would noticeably reduce bureaucracy, and thus cost, for charities, even in the short-term.

In the options paper released by the Department of Social Services about the possible replacement for the ACNC at the time, it was proposed that charities would need to maintain similar records to those previously provided to the ACNC, and these records would be publicly accessible on charities’ websites.\(^{73}\) This means that charities’ information would not all be stored in one central location, as it currently is on the ACNC’s website. It is, therefore, unlikely that the current processes of moving towards a ‘report once, use often’ structure for government grant applications and reports to other government departments would be completed, as there would be no single, accepted national repository of information for these departments to use. Further on this point, the requirement to provide the information to the ACNC would be replaced with the requirement to update it on charities’ websites. Again, this is hardly a reduction in red tape, and also may be more logistically difficult. As already established, the ACNC’s online platform for updating information is quick, easy and user-friendly; not all charities have the resources to update their websites so promptly.

Some may argue that even without the ACNC, the necessary dialogue between states could occur. As previously mentioned, the COAG Not-for-profit Reform Working Group exists to promote co-operation between state and federal governments towards reform. However, it is nevertheless suggested by this author that the ACNC remains

\(^{72}\) Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 3.

a superior body to promote such dialogue. This is illustrated by a comparison of the results that the ACNC has achieved with previous efforts at reform from government. In the past, there have been numerous bodies tasked with analysing the sector and working towards restructure, but few tangible results have been achieved. McGregor-Lowndes has noted that to read all Australian government reports that have been prepared on not-for-profit sector reform since 1995 would take an average person nearly three and a half months, reading eight hours a day.74 In the same vein, in January 2013 COAG produced a 111-page Regulatory Impact Assessment of duplicate reporting requirements,75 whereas the more substantive progress towards harmonisation has been connected with the ACNC, as demonstrated previously. More simply, the increased capacity of the ACNC makes it more likely to achieve reform. The difficulty in so far realising reform, despite the number of government reports suggesting wholesale change, illustrates that the process requires a large amount of effort and resources, which the ACNC is able to provide. Furthermore, government agendas can change with political priorities, meaning objective and consistent consideration of specific issues can be at risk; this is demonstrated by the previous indecisiveness regarding the ACNC’s future. The existence of an independent commission helps to ensure that there will be sustained work towards reform and improvement of charity regulation.

III Fundraising Legislation

Fundraising legislation has been alluded to in an earlier section, but for reasons explained below, it deserves specific attention. This section will begin by outlining Australia’s current legislative structure regarding fundraising, and then discuss the potential role for a commission in addressing it.

A Inconsistent Fundraising Legislation in Australia

The issue of duplicate regulation facing the sector is particularly prominent in the area of charitable fundraising. Funding is often dependent on, in addition to private support and government grants, more general fundraising activities.76 This can include the solicitation of donations, sponsored activities, or social events such as quiz nights that are designed to run at a profit. While these are important for charities in their ability to operate, there is also a policy consideration to be made as to protecting the public from fundraising activities that are misleading, or will solicit funds that will be misappropriated. The legislature has responded to this by passing charitable fundraising laws in each state jurisdiction, requiring charities to gain a licence from the relevant state government before engaging in such activities.77

74 McGregor-Lowndes, above n 4, 370.
76 Industry Commission, above n 4, 221–30.
77 Ibid.
Gaining such a licence is not simply a bureaucratic application, but may also subject charities to audits and reporting requirements to the government.

The primary difficulty with this area of regulation for charities is that, like so many other realms of charity supervision, there is no uniformity across state jurisdictions.\(^7\)8 This inconsistency is quite far-reaching, not only extending to the types of audits and reports that needed to be provided to the government, but also to the types of organisations and events that require a fundraising licence. Despite the introduction of the *Charities Act*, which has given a more uniform definition of charitable purpose across Commonwealth legislation, the state fundraising statutes still define ‘charity’ differently. For example, the South Australian legislation prescribes specific requirements of what constitutes a charity,\(^7\)9 whereas the Australian Capital Territory legislation only defines it broadly as including ‘any benevolent, philanthropic or patriotic purpose’.\(^8\)0

There are several difficulties with this lack of consistency. A significant one is that the ACNC uses the federal *Charities Act* in making its determinations in registering charities, but this is different from the state requirements. It is conceivable, particularly under state legislation that is broad, like the current Australian Capital Territory statute, that an organisation would not be found to be a charity by the ACNC, but actually still be subject to a state charitable fundraising legislation. This potential scenario is concerning, as it is possible for smaller charities to believe, in good faith, that they are not required to obtain a state licence, and later encounter legal difficulties because this was incorrect. Similarly, under state Acts that have more specific definitions, like the current South Australian statute, it is not inconceivable that an organisation would be given charitable status by the ACNC, and then apply for a state fundraising licence unnecessarily. This lack of uniformity creates a need for charities to perform endless research as to their obligations, which may again stretch their resources.

These inconsistent legislative requirements cause particular difficulty for charities with multiple state branches. As a demonstration of the regulatory inconsistency, the Northern Territory’s *Gaming Control Act 1993 (NT)* only requires a licence to be obtained when the fundraising is in the form of a raffle, but not other forms. In the New South Wales statute, the regulated fundraising is ‘the soliciting or receiving by any person of any money, property or other benefit’, if the person has represented either the purpose the money is going towards, or the event associated with that purpose.\(^8\)1 The differences between the types of appeals that are regulated are particularly problematic for larger charities, which have some activities conducted by lower level volunteers. Monitoring and ensuring compliance across the fundraising activities of different branches of an organisation, subject to different laws, is impractical and increases the risk of non-compliance. As another illustration, in Western Australia,

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\(^7\)9 *Collections for Charitable Purposes Act 1939 (SA)* s 4.

\(^8\)0 *Charitable Collections Act 2003 (ACT)* Dictionary.

\(^8\)1 *Charitable Fundraising Act 1991 (NSW)* s 5(1).
fundraising by way of street collections comes under completely different legislation — the Street Collections (Regulation) Act 1940 (WA) — and requires a separate licence from that granted by the Charitable Collections Act 1946 (WA). Increasing uniformity in this area would be a significant step towards allowing charities to monitor exactly which appeals are subject to a fundraising licence.

The number of hurdles that charities in possession of fundraising licences must jump at the end of a financial year is particularly onerous. Audits and reports are required, specifically relating to funds collected from that state’s definition of a ‘fundraising appeal’. This means that specific data must be kept in each state jurisdiction to later provide for these reports, but the requirements of such reports vary so much between states, making it operationally draining for charities to conduct national appeals. A study of not-for-profit reporting demonstrated that it is significantly difficult for organisations to keep separate financial records for each project, and when there are varying reporting requirements, the strain on resources is even greater. The cost of these numerous inconsistencies for charities is huge. World Vision has stated that the differing state fundraising requirements costs the organisation at least $1 million per year in extra administration fees. Alternatively, there have been reports of national organisations that have simply decided not to fundraise nationally, due to the system of fundraising legislation being seemingly unworkable. With the increasingly ubiquitous role of the internet in today’s fundraising appeals, it is arguably more difficult for charities to track and provide such particulars of appeals. It also increases the likelihood of them needing to complete the burdensome requirement of holding licences in each state.

Beyond these reporting differences, the statutes also bear inconsistencies in terms of how the appeals themselves need to be conducted. Admittedly, these differences relate to matters that are generally quite simple, such as in the Australian Capital Territory, requiring collectors to possess certain identifying tags while collecting, and in Victoria, requiring receptacles to be labelled in a certain way. However, it is the subtlety of these differences that makes them more difficult to manage nationally, and increases the risk of non-compliance. Any greater risk of non-compliance is dangerous to the sector on multiple levels. First, it increases the risk that charities, many of which inevitably run on a tight budget, may be subject to fines or even criminal liability. Second, it negates a sound system of regulation that ensures the original policy considerations underpinning the law are upheld. Third, it also diminishes public confidence in the charitable sector, and more specifically fundraising collections, damaging an area upon which the sector is inextricably reliant.

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82 Dal Pont, Law of Charity, above n 78, 512.
83 Collections for Charitable Purposes Act 1939 (SA) s 15.
84 Dal Pont, Law of Charity, above n 78.
85 McGregor-Lowndes and Ryan, above n 64, 22.
86 Ibid.
87 Productivity Commission, ‘Contribution of the Not-for-Profit Sector’, above n 4, 139.
88 Ibid 138.
89 Charitable Collections Act 2003 (ACT) s 16.
90 Fundraising Act 1998 (Vic) s 10.
B The ACNC’s Role in Addressing Fundraising Legislation

The Fundraising Institute of Australia, in its submission to the inquiry on abolishing the ACNC, argued that a major flaw in the current structure of the ACNC is that it is unable to properly address this key issue of fundraising legislation.91 It argued this firstly, because fundraising activities are currently regulated by state and territory law, and secondly, because the previous government specifically stated the ACNC’s ambit would not include fundraising. It is true that there is certainly room for fundraising legislation to have more of a prominent position on the ACNC’s agenda. Nevertheless, this author argues that the ACNC actually can have a key role in fundraising legislation reform within its current ambit. This area of regulation can be compared with the area of state incorporated association legislation; while the ACNC does not in itself regulate this, it has a vital role in promoting dialogue between the states themselves, and between the states and the Commonwealth. In the ACNC’s 2012–13 Annual Report, it was identified that both the Australian Capital Territory and South Australian governments had, as well as working towards streamlining reporting (as outlined in Section C of Part II of this paper), committed to work towards allowing ACNC-registered charities to fundraise in their jurisdiction, instead of requiring a separate licence.92 The report also mentioned that it is likely that reform proposals regarding fundraising legislation would involve the ACNC. This again demonstrates the necessity of a body to interact with states in order to harmonise legislation eventually, and this author argues that fundraising legislation reform should be a priority of the ACNC.

As was previously argued regarding state associations statutes, there is a need for the states to cede some of their powers in order to harmonise fundraising legislation; again, this takes time to negotiate and implement. The authors of the ‘Contribution of the Not-for-Profit Sector’ report argued that fundraising reform could be achieved by states first harmonising their statutes, and then mutually recognising licences across state borders.93 This option is based on a compelling argument; it seems that it would be most unlikely for either option to be achieved without a commission such as the ACNC in place, due to its role as an advocacy body and in promoting dialogue. Dal Pont identified the flaws in inconsistent fundraising law in his 2000 work Charity Law in Australia and New Zealand,94 and again in his 2010 work Law of Charity,95 yet seemingly very little progress has been achieved in this area since then. It would seem that there has long been identification of the issue, but the fact that very little change has occurred would suggest a specific body is required. COAG has recently undertaken to work towards harmonising fundraising regulation,96 and the issue is

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91 Fundraising Institute of Australia, above n 16.
93 Productivity Commission, ‘Contribution of the Not-for-Profit Sector’, above n 4, 125.
94 Gino Dal Pont, Charity Law in Australia and New Zealand (Oxford University Press, 2000) 388.
95 Dal Pont, Law of Charity, above n 78.
discussed in its Regulation Impact Statement on dual regulation.97 Again, however, tangible steps towards the target seem to have only occurred through the dialogue that the ACNC has been resourced and tasked to promote, with both the South Australian and Australian Capital Territory governments’ reform on fundraising legislation arising from dialogue with the ACNC. It would also seem that the national register administered by a national independent commission is vital to this function.

State legislation tends to have varying exemptions for fundraising licences, meaning the sector is inconsistently covered. This brings into question whether the aims of protecting against fraudulent collections are actually being achieved. For instance, religious organisations are inconsistently treated across the legislation. Religious organisations are given specific exemptions from licensing requirements under the New South Wales, Victorian, Queensland, and Tasmanian legislation,98 but this is not mirrored in the legislation of the other states and territories. In general, state fundraising legislation is arguably outdated, with some legislation not having been reassessed in decades, and featuring provisions that are no longer relevant. The Western Australian legislation, for example, includes offences with a maximum penalty of under $10, and some elements of it derive from British legislation that applied to collecting from stage coaches in London.99 A 2011 study showed that for every 500 fundraising licences in Australia, there are only 0.6 full-time staff employed nationally to administer the legislation.100 This demonstrates that the practical utility of fundraising regulation is miniscule, as with so few government resources in place it is unlikely that there is adequate practical supervision of incompetent collections. It can be seen from analysing the whole context of the law of fundraising that it is currently a cluttered system that puts an unnecessary burden on certain organisations, and that it is vital that a body such as the ACNC is in place to address it.

IV National Register of Charities

A statutory function of the ACNC is maintaining a public register of information on charities, such as the details of a charity’s board of directors, its governing documents, and its yearly statements.101 This section will now analyse this function of the ACNC, and whether it has been successful.

As a sector that is so heavily dependent on public support, particularly in the form of donations, there is a high demand for transparency and accountability of charities. The ACNC’s role in providing and maintaining a national, searchable register of charities is a vital function on many levels. As explained above, much of the policy

97 Council of Australian Governments, above n 75.
98 *Charitable Fundraising Act 1991* (NSW) s 7; *Fundraising Act 1998* (Vic) s 16(d); *Collections Act 1966* (Old) s 6(2); *Collections For Charities Act 2001* (Tas) ss 4(d), (j); *Collections For Charities Regulations 2001* (Tas) reg 4.
99 McGregor-Lowndes, above n 4, 370.
100 Ibid 372.
101 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) div 40.
behind charity law comes from protecting the public from dishonest charities, as well as maintaining public confidence in the sector. This has been a driving force behind what is at times arguably draconian regulation, including associations and fundraising legislation. The ACNC’s public register of charities serves to keep charities accountable to the public. Prior to the ACNC’s establishment, very few legal requirements were in place as to the information charities had to display publicly, other than requirements under the Corporations Act and incorporated associations legislation to provide certain information to members upon request. The ACNC’s website contains a ‘find a charity’ feature, whereby potential donors can search for charities they are interested in, and access information such as their financial reports, annual information statements and governing documents. The simple step of making this information public is an effective way of striking a balance between accountability and over-regulation.

It is true that the proposed replacement model also required charities to publicise some information on their websites, namely the names of responsible persons, details of all funding received from government, as well as financial reports. However, there are several disadvantages of this more limited approach to accountability, when compared to the ACNC system. Only financial reports would need to be published online, and not governing documents or directors’ reports. The ACNC search function allows 11 different criteria to be used to find a charity, including their beneficiaries, geographical area and date registered. This illustrates that the register can be used to find a charity to support, as well as to find information on one the potential donor already knows about.

In terms of regulation, the question also arises as to how well the publication of details could be policed in the proposed replacement model. With a centralised register in place, the government will immediately be aware if charities have failed to file their requisite reports. On 12 November 2015, the ACNC announced in a media release that it revoked the charitable status of 169 charities that had made no contact with the ACNC or had failed to complete their reporting requirements since originally registering as charities. This is a routine consequence of the ACNC’s monitoring role, which ensures that confidence is maintained in charitable status. It is doubtful whether this non-compliance would be so easily detected by the proposed alternative reporting system, where the reports are not accessible in one location, thereby decreasing confidence in the sector.

V ATO Regulation

Before the ACNC was established, there had long been criticism of the ATO’s de facto role as the body that decided charitable status; indeed, this was one of the

102 Department of Social Services, above n 73, 4.
103 Ibid 3.
catalysts towards recommendations for an independent commission.\textsuperscript{105} This section will compare the current system, whereby the ACNC makes determinations, with the previous system.

The most common argument in this area is that it is inappropriate for the public body chiefly responsible for revenue raising to make decisions regarding tax concessions, as there is then a bias and vested interest in not awarding charitable status.\textsuperscript{106} As well as this policy argument, it was also commonly argued that the ATO was inefficient in this respect and at times lacked resources to perform the role. For instance, some previous submissions to government inquiries on the sector have described the inconsistency in ATO rulings between different regional offices.\textsuperscript{107} This led to situations where applications to a particular regional office were nearly invariably approved, whereas the opposite was the case for another regional office. It has also been argued more generally that the ATO previously made inconsistent decisions on charities that had identical objects, purposes and structures.\textsuperscript{108} During the previous system, the ATO was involved in repeated litigation, challenging the charitable status of certain organisations. In several of these cases it has lost, such as in the high-profile cases of \textit{Federal Commissioner of Taxation v Word Investments Ltd}\textsuperscript{109} and \textit{Aid/Watch Inc v Federal Commissioner of Taxation}.\textsuperscript{110} Arguments have been raised that through co-operation between the ACNC and state regulators, government money will be saved when compared with the ATO system, as there will eventually be less overlap, and this will in turn ease the burden on the sector itself.\textsuperscript{111}

Weight must also be given to the opinion of the ATO on this issue, expressed before the establishment of the ACNC. In its submission to the ‘Report of the Inquiry into the Definition of Charities and Related Organisations’, the ATO itself conceded that the system was disjointed.\textsuperscript{112} It further recommended that the decision-making process would be more effective if an independent body, similar to the Charity Commission for England and Wales, made determinations that would be the measure for charitable concessions. It did not make a submission to the Senate inquiry into the \textit{Repeal Bill}.\textsuperscript{113} If determinations of charitable status ever returned to the ATO, its own submissions on the difficulty and ineffectiveness of the previous system raise strong and valid concerns as to its capacity to properly perform this role in the future.

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\item Productivity Commission, ‘Contribution of the Not-for-Profit Sector’, above n 4, 144.
\item Industry Commission, above n 4, 306.
\item Ibid.
\item (2008) 236 CLR 204.
\item (2010) 241 CLR 539.
\item Andrew Barr MLA, Submission No 109 to Senate Standing Committees on Economics, Parliament of Australia, \textit{Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014}, 2 May 2014, 3.
\item Charities Definition Inquiry Committee, above n 4, 282.
\item Senate Economics Legislation Committee, above n 17.
\end{enumerate}
\end{footnotesize}
Before the retention of the ACNC was announced, two government proposals were made as to how the regulatory function of the ATO could operate if the ACNC were abolished; there were differences in both methods from the pre-commission system, in terms of decision review. In one proposal, a specific area within the ATO would be formed for hearing reviews on decisions of charitable status. It was suggested in this proposal that the officers responsible for the original determinations would not be part of the review process, and that this would eliminate bias. However, there are flaws in this approach. While it would be a separate department of the office, the entire process would still occur within the ATO, so it is difficult to see how the original problem of at least perceived bias would be rectified. It was then proposed that merits review would be allowed in the Administrative Appeals Tribunal if the decision were further disputed, again assisting in preventing bias. While this is true, and likely would eventually provide for an unbiased decision, this would arguably be a backwards step in a reform schedule based on eliminating bureaucracy.

With the amount of red tape charities are already subjected to in the sector, providing a system where a decision would potentially need to be reviewed twice before an ostensibly unbiased decision was made is inferior to reform where the original decision-making process was objective from the outset. The latter is arguably achieved by the ACNC; many smaller charities would simply lack the resources and time to go through so many reviews, and could possibly decide not to go through with the entire process. McKenna, when discussing a specific Charity Tribunal in the United Kingdom, argues that it is difficult to make a charity tribunal decidedly simplistic, inexpensive and accessible, as charities will often still choose to be legally represented, and they cannot legally be prevented from doing this. While that discussion concerned a judicial body, it nonetheless emphasises the point that it is difficult to simplify review of charitable status. In particular, it raises flaws in the previous proposal as a way of streamlining the process. It is unclear how improving the appeals process would rectify the previously documented cases of different ATO offices making inconsistent decisions; the establishment of the ACNC seems to have been the only step taken to improve the original process of charitable determinations.

The second option proposed as to how the ATO could operate was that an independent panel would be created, made up of external experts, to advise applicants who disagreed with the initial determination. It was proposed that the experts would have the power to make recommendations to the Commissioner of Taxation, and again that applicants would have merits review rights in the Administrative Appeals Tribunal. The same difficulties with the first proposal would apply, in that again, only the steps after the decision-making process would be addressed; it seems that it would also lead to an increasingly bureaucratic procedure for organisations in gaining charitable status.

114 Department of Social Services (Cth), above n 73, 6.
115 Alison McKenna, ‘Appealing the Regulator: Experience from the Charity Tribunal for England and Wales’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), Not-for-Profit Law: Theoretical and Comparative Perspectives (Cambridge University Press, 2014) 342.
116 Ibid.
VI Educational Role of the ACNC

The ACNC was given a statutory task to educate and support the sector on what is best practice in not-for-profit management, as well as on the legal requirements that are placed on both the directors of a charitable organisation and the organisation as a whole.\textsuperscript{117} This section will consider this function, and whether the ACNC has been successful in it.

Although reduction of bureaucracy should always be a key focus in charity reform, providing information as to what exactly a charity’s responsibilities are, and how to follow them, may in itself reduce red tape. The Governance Institute of Australia suggested in its submission to the Senate inquiry into the Repeal Bill that the role of the ACNC is to provide a wide range of support and educational resources to the sector, and that its philosophy should be to use direct intervention as a last resort.\textsuperscript{118} The number of powers conferred to the ACNC Commissioner under its Act reflects this approach,\textsuperscript{119} whereby intervention can be discretionally used in more extreme cases. This is a prudent suggestion, in line with the balance between providing adequate oversight and ensuring the sector is not overly regulated in minor areas. By focusing more on providing education, fewer borderline compliance cases will arise. In the report of draft models for the previously proposed Centre for Excellence, it was suggested that a replacement should provide a portal to educational content, and provide this in collaboration with partners.\textsuperscript{120}

This author argues that this is an absolutely vital element of any charitable regulation in Australia, and there should always remain a government body that is the primary provider of this educational role to the sector. This was not previously provided by the ATO in the pre-ACNC era. It is true that within the sector, there are peak bodies that are able to provide advice. Queensland University of Technology runs the Australian Centre for Philanthropy and Non-profit Studies, which provides publications and resources to the sector. However, a dedicated government body will likely be better resourced in this role.

The ACNC strikes an appropriate balance in its degree of connectedness with the sector; while it consults with stakeholders in the sector in its policies and answers the needs of the sector, it is independent enough to prevent certain charities and not-for-profits having greater influence than others, arguably more so than a peak body could. O’Halloran identifies that peak bodies have difficulties in negotiating with government: often being reliant on government funding, peak bodies can face a dilemma between representing their members, and having to compromise with

\begin{itemize}
  \item \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) s 15-5(2)(b)(iii).
  \item Governance Institute of Australia, Submission No 61 to Senate Standing Committees on Economics, Parliament of Australia, \textit{Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014}, 1 May 2014, 4.
  \item \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) pt 4-2.
  \item Civil Society, above n 70, 10.
\end{itemize}
government to avoid the loss of funding, especially in terms of media comment.\textsuperscript{121} While the ACNC also needs to have the support of the government to survive, the fact that it was created with the intention of achieving reform demonstrates its greater ability to powerfully advocate for the sector.

One role of charity regulation that is not often acknowledged as significant is promoting research in the sector. Before the ACNC, it was sometimes argued that there was inherent difficulty in making comparisons across the sector, due to the lack of a central location for reporting.\textsuperscript{122} The previous proposal for the Centre for Excellence did seem to recommend that it would continue the educational function that the ACNC currently provides. However, it failed to recognise that the data that the national register currently offers gives charity practitioners the ability to learn about principles of good governance and compliance.\textsuperscript{123} This information is also beneficial for researchers and academics looking to provide further support to the sector; the ACNC provides datasets on the charities registered with it, and the annual information statements submitted, to the government’s data.gov.au website.\textsuperscript{124} This allows for easier and sounder data analysis and comparison, for use in studies and reports. Both this increased research, and also the ability for charities to look at other examples of best practice, are likely to minimise the instances of non-compliance. This in turn reduces strain on government resources and leads to fewer instances of action needing to be taken against non-complying charities, which in turn improves public faith.

\textbf{VII Submissions Supporting the ACNC’s Abolition}

In evaluating the ACNC, it is relevant to analyse the nature of arguments against it within the sector itself. In the submissions on the proposed Bill to abolish the ACNC, of the 13 submissions specifically supporting the abolition, only eight were from organisations that were charities themselves. Of that eight, seven were specific types of charities with unique reporting requirements: four were bodies representing schools, two submitted specifically on behalf of medical research institutes, and one was on behalf of a religious organisation.\textsuperscript{125} It must be considered that the separate reporting requirements faced by these bodies are largely an issue beyond the ACNC’s role and ambit. In the Independent Schools Council of Australia’s submission, it stated:

\textsuperscript{121} Kerry O’Halloran, \textit{The Profits of Charity} (Oxford University Press, 2012) 350.
\textsuperscript{122} Fundraising Institute of Australia, Submission No 76 to Productivity Commission, \textit{Contribution of the Not-for-Profit Sector}, 28 May 2009, 4.
\textsuperscript{123} Australian and New Zealand Third Sector Research Inc, Submission No 50 to Senate Standing Committees on Economics, Parliament of Australia, \textit{Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014}, 29 April 2014, 1.
\textsuperscript{125} Senate Economics Legislation Committee, above n 17.
it is far from clear that an agreement can be reached with all states, territories and government agencies to remove any of the operational requirements for non-government schools that were already in existence prior to the establishment of the ACNC.126

The argument that the ACNC has failed to address the issues faced specifically by one type of charity, as illustrated in this quotation, is common amid these submissions. While it is understandable that such organisations, under industry-specific regulations, perceive the ACNC to have only increased the regulatory burden, this does not undermine the effectiveness of the body as a whole. Rather, reform for these specific types of organisations is more of a matter for specific working groups, but the ACNC is still overwhelmingly supported by the sector as a whole. The relatively recent book Modernising Charity Law identifies that a difficulty in achieving a unified voice in the Australian charitable sector is the number of special interest groups, including specific industry umbrella groups.127 While meeting the needs of numerous special interest groups at one time is a difficulty, doing so arguably goes beyond the ACNC’s role. The fact that there were only a small number of submissions supporting the ACNC’s abolition illustrates its positive effect on the sector as a whole.

IX Analysis of New Zealand’s Charity Commission

At this time of reform in the Australian charitable sector, it is prudent to make an analysis of nearby New Zealand’s system of charity regulation, which has undergone similar changes in the last decade. In fact, Australia’s recent charitable reform, including the previous steps to abolish the ACNC, has been quite contemporaneous with New Zealand’s changes in the charitable sector, and New Zealand’s changes have been used in arguments regarding whether the ACNC should be abolished.

New Zealand’s situation was similar to Australia’s, in that a large number of studies were conducted and reports written on the charitable sector before any real substantive change occurred. In 1979, an 11-year study into New Zealand charity law was completed, making particular comparison and analysis with the United Kingdom’s structures; this study concluded that an independent charities regulator was not required in New Zealand.128 Even after this report, studies into the New Zealand sector continued to be conducted, similarly to Australia’s continued reports into the area. In 1989, a working party into charities wrote a report that this time did suggest the creation of an objective charities commission.129 However, it was still some time until

129 Donald Poirier, Charity Law in New Zealand (Department of Internal Affairs, 2013) 95.
this suggestion was acted upon by the legislature. One of the more influential reports was a 2001 government discussion paper entitled ‘Tax and Charities’, which looked at how the taxation of charities can be better managed in New Zealand.130 Thousands of submissions were given from the sector in preparation of that report, and it led to a working party being formed to make recommendations to the government. In 2002, the working group produced a report on the registration, reporting and monitoring of charities, which suggested that an independent charities commission would be the most efficient way to manage the sector.131 This was received with generally positive feedback by the sector in New Zealand, and it eventually led to the introduction of a Bill to establish a Charities Commission; the structure of the proposed commission was quite similar to that in the United Kingdom.132

The statute that finally set up the Charities Commission (NZCC) was the Charities Act 2005 (NZ).133 Many of the listed functions of the NZCC were similar to those of the ACNC. Some of the most similar functions were registering charities, promoting public confidence in the sector, educating and assisting charities with respect to good governance and management, processing annual returns, and ensuring charities uphold their obligations once registered.134 Interestingly, these purposes did not mention any form of reduction of bureaucracy, whereas this was a significant focus and statutory function of the ACNC.

However, in a move similar to the Coalition’s previous plans in Australia, the NZCC was abolished through the Charities Amendment Act (No 2) 2012 (NZ).135 It replaced the NZCC with a board, which makes determinations on charitable status.136 This board is, however, subsumed within another government department, the Department of Internal Affairs,137 taking away the independence of a commission. This New Zealand precedent was at times used to justify previous steps to dismantle the ACNC, including within the statement accompanying the now suspended Repeal Bill.138 This was unwarranted; such comparisons failed to properly recognise the differing motivations behind establishing and dismantling each commission, as well as the functions of the commissions themselves.

130 Ibid.
132 Poirier, above n 129.
133 Charities Act 2005 (NZ) s 8, as at 3 September 2007.
134 Ibid s 10.
135 Charities Amendment Act (No 2) 2012 (NZ) s 9.
136 Ibid.
137 Ibid s 5.
138 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 4.
When the abolition of the NZCC was announced, the primary reason for doing so was monetary; the government estimated that by incorporating the functions of the NZCC into an already existing government department, over $2 million would be saved.\textsuperscript{139} It must at the outset be remembered that finances were not a strong focus of arguments to abolish the ACNC; discussions almost completely focused on its role in red tape reduction. Looking at the working party report that led to the establishment of the NZCC, reduction of bureaucracy was not one of the primary arguments — rather, it focused on more consistent determinations as to charitable status, having a unified register of charities, as well as improving public confidence in the sector.\textsuperscript{140}

In the report’s list of advantages of the proposed new regime, reduction of unnecessary regulation was not mentioned once.\textsuperscript{141} As previously argued, Australia is somewhat unique in the amount of duplicate regulation of charities, largely due to its system of federalism.\textsuperscript{142} With New Zealand being a unitary state, it already does not face Australia’s issue of duplication of associations and fundraising legislation across jurisdictions. These distinctions bare the different reasoning for establishing the commissions, yet they would also suggest that the required purpose of a commission may differ in Australia from in New Zealand. It can be argued that due to these different purposes, their success should be evaluated against different factors, and the ACNC has already made positive steps in promoting co-operation towards reducing bureaucracy for the sector.

Whether or not it is believed that the NZCC’s abolition was a prudent move, its discrepancy with the previously proposed model to replace the ACNC negates any genuine comparisons. The difficulties caused by the government’s chief revenue raising department determining charitable status have already been outlined in this paper. In the New Zealand reform, these functions were taken away from a stand-alone commission, but handed to a pre-existing department that had no role in revenue raising or tax collection, unlike what was previously suggested by the Coalition in Australia. Furthermore, arguably, the NZCC was not wholly abolished. The reform to the NZCC largely involved removing its independence and moving it to another department with another leadership structure, but its functions have remained largely the same.\textsuperscript{143} This includes still maintaining a public, searchable register of charities. The previous Australian proposal, on the other hand, was to split the functions of the ACNC between at least three other government bodies, completely ceasing some of its current functions in the process, including that of operating a public register.

Some arguments regarding the ACNC have focused too heavily on the role of charitable commissions generally. It must be considered that they have different

\textsuperscript{139} Helen Rittelmeyer, ‘Independent Charities, Independent Regulators: The Future of Not-for-Profit Regulation’ (Issue Analysis No 143, Centre for Independent Studies, 6 February 2014) 1, 8.

\textsuperscript{140} Working Party on Registration, Reporting and Monitoring of Charities, above n 131.

\textsuperscript{141} Ibid.

\textsuperscript{142} Fletcher, above n 37, 207.

\textsuperscript{143} Queensland Law Society, Submission No 7 to Senate Standing Committees on Economics, Parliament of Australia, Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014, 9 April 2014, 3.
functions, depending on the particular nation’s needs. For the Coalition Government to cite the dismantling of the NZCC as a reason for abolishing the ACNC is a false attribution when no specific account is taken of the different surrounding circumstances. The Centre for Independent Studies published an analytical paper on the ACNC debate, which was heavily critical of the ACNC and called for its abolition. The particular article placed emphasis on the decline in public confidence in charity commissions abroad, drawing strongly upon the New Zealand reform.144 This is again an irrelevant comparison, as it purely considered whether other charity commissions were effective in their regulatory roles, while failing to consider the wider background of Australia’s not-for-profit sector. Considering Australia’s unique need to achieve regulatory harmonisation, it is irrelevant to argue whether overseas commissions have garnered sufficient public faith.

This author does not argue that the NZCC was an incompetent body, or even that it did not have important functions. Many of its tasks, including educating the sector, and providing a national register, were important in the same way they are to Australia. Parliamentary debates on the NZCC abolition showed opinions were divided, with several Labour politicians arguing that the step would undermine the independence and integrity of the sector.145 Furthermore, some commentators have labelled it a retrograde step, as the sector will now have less confidence in the independence of regulation. They also suggested that in the future the government may reconsider its decision.146 However, the differences between the two bodies illustrate that the functions of the NZCC were able to be transferred to another government department and still function effectively, whereas in Australia this would be unlikely. This difference is also influenced by New Zealand being a unitary state, as noted earlier, eliminating the issue of state inconsistency. The ACNC’s function of reducing duplicate reporting would unlikely be as effectively achieved if it were dismantled, and this is a role that was more vital in Australia than in New Zealand.

A significant discrepancy between the New Zealand and Australian reform history is the amount of time given to the commission to achieve its goals. The Centre for Independent Studies article specifically mentioned that the ACNC was given a five-year review period (2012–17),147 yet failed to recognise that this negates arguments for its immediate termination. Considering that the NZCC existed for seven years further supports the view that it is an irrelevant comparison with the ACNC. The ACNC has only operated since December 2012, and the progress it has made so far would suggest that it will make a significant impact by December 2017.

144 Rittelmeyer, above n 139, 8–9.
145 New Zealand, Parliamentary Debates, House of Representatives, 22 May 2012, 2242 (Trevor Mallard).
146 O’Halloran, above n 121, 407–8.
147 Rittelmeyer, above n 139, 5.
X Conclusion

In the process of analysing many of the arguments and issues regarding the role of the ACNC, the overall case has been presented that it is a vital body for the sector, the functions of which would be difficult to parallel in a replacement. The overwhelming number of studies and opinions presented about the sector in the last two decades clearly demonstrates that some type of reform was necessary, and the creation of an independent charity commission was a common theme in this discourse. The ACNC has proposed and planned to address the sector’s needs in numerous ways, and although there remains work to do to complete its goals, it has already displayed some impressive progress. Moreover, this paper has argued that despite the ACNC’s perceived shortcomings to this point, the previously proposed alternatives by the Coalition Government would have created difficulties of their own. In the absence of the ACNC, although the status quo may have been restored, it is difficult to see how any long-term progress would be made without there being a body to promote dialogue and harmonisation on the issues affecting the sector. Simply establishing working groups is insufficient, as these have existed in numerous forms for the last two decades. In this sense, the abolition of the ACNC would have prioritised immediate, seemingly political, goals while compromising the long-term. General arguments against independent commissions, particularly by means of comparison with other nations’ shortcomings, are not strictly relevant to discussions of the ACNC as they do not take account of the different circumstances in each jurisdiction.

Although this paper has focused upon the previously suggested abolition of the ACNC in its analysis of charitable regulation, it is hoped that its relevance does not only extend to that particular policy discussion. The case has been presented that the regulation of the charitable sector in Australia is generally in need of reform. The policy behind charitable regulation will always be one of balance, weighing the interests in protecting the public from wrongdoing and incompetent organisations, against that of not overburdening the sector with regulation, and not deterring philanthropy and participation in the sector. The balance in Australia is currently tilted in favour of the former, largely due to the amount of duplicate regulation. Much of this is due to federalism, and this author argues that state governments will need to cede some of their powers in order truly to reduce red tape. This does not need to be achieved through giving powers to the Commonwealth, but at least by harmonising requirements across state borders.

The evidence of how few government resources are used on the regulation of areas such as fundraising shows the harmful nature of such an overly bureaucratic and outdated system, with the costs borne by the sector and its contributors. For too long, concerns regarding the charitable sector have been merely stated and debated, without effective action. It is now time that these concerns are acted upon, and for the charitable sector to benefit from a coherent and modern system.
Mohammed Al Bhadily* and Peter Hosie**

AUSTRALIAN EMPLOYEE ENTITLEMENTS IN THE EVENT OF INSOLVENCY: IS AN INSURANCE SCHEME AN EFFECTIVE PROTECTIVE MEASURE?

Abstract

In 2001, the Howard Government established the General Employee Entitlements and Redundancy Scheme, funded by taxpayers to provide a limited level of protection for employee entitlements in the event of corporate insolvency. The effectiveness of the scheme has been questioned as it involved taxpayers bailing out insolvent companies, and because government support has the potential to discourage employers from being fully accountable for employee entitlements. Government subsidising of employee entitlements may encourage misconduct or possibly lead to illegal activities by directors and corporate officers. A system where taxpayers bear the main cost of corporate failure is arguably inequitable. In 2012, the General Employee Entitlements and Redundancy Scheme was replaced by the Fair Entitlements Guarantee Act 2012 (Cth), also funded by the taxpayer, prompting the same concerns. This paper explores the potential for a joint employer and federal government-funded insurance scheme to provide an alternative solution for protecting employee entitlements when corporations collapse. An insurance scheme is proposed as a protective measure for employee entitlements. Such a scheme could provide sustainable and effective protective measures for employee entitlements.

I Introduction

It would be almost impossible to find anyone who is completely immune to the consequences of the 2007–8 global financial crisis. Employees are particularly vulnerable to such economic catastrophes. Corporate collapses often result in massive job losses and unmet employee entitlements. The Australian federal government has taken initiatives to protect employee interests in the event of insolvency. Such measures include preferential treatment provided by the Corporations Act 2001 (Cth) ('Corporations Act') through to prioritising employee entitlements when insolvency occurs.1 However, priority in the event of insolvency has not effectively protected employee entitlements because there are invariably

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1 Corporations Act 2001 (Cth) ss 556(1)(e)–(h), 560, 561.
insufficient assets available for distribution after secured creditors have recovered their entitlements.

After a series of high profile corporate collapses in 2000, the Howard Government came under political pressure to establish an effective protective measure for employee entitlements. This prompted the establishment of the Employee Entitlements Support Scheme (‘EESS’), which was replaced in 2001 by the General Employee Entitlements and Redundancy Scheme (‘GEERS’). This scheme was funded by taxpayers to provide limited protection for employee entitlements in the event of corporate insolvency. However, the effectiveness of GEERS as a protective measure has been questioned by some commentators. In part, this is because GEERS involved taxpayers paying insolvent companies’ employee entitlements, and also because such government support might discourage employers and their officers from being more accountable for employee entitlements. Employers should account for their employee entitlements because employees provide significant financial contributions through deferred entitlements, such as annual and long service leave. In some cases, it may be argued that government subsidisation of employee entitlements might lead to misconduct or, in some cases, to illegal activities by directors and corporate officers. Another important issue centres on the fairness of a system where taxpayers bear the cost of corporate failure.

The Gillard Government replaced GEERS with the Fair Entitlements Guarantee Act 2012 (Cth) (‘FEG’) in an effort to address concerns about GEERS. An important feature of FEG concerns providing more coverage for employee entitlements than was available from GEERS. But since the FEG is a taxpayer-funded scheme, the

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3 As an example, for the financial year 2012–13, the Commonwealth Bank owed employee entitlements to the value of $445 million as long service leave: Commonwealth Bank of Australia, Annual Report 2013 (19 August 2013) <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/annual-reports/2013_CBA_Annual_Report_19_August_2013.pdf>; Westpac owed $340 million as long service leave and other benefits to its employees: Westpac Banking Corporation, 2013 Annual Report <http://www.westpac.com.au/docs/pdf/aw/ic/2013_WBC_Annual_Report.pdf>. The total owed in the form of employee entitlements by these banks would be over $785 million, if these banks decided to lend this amount, and the interest that could be charged would be over $39 million annually. On this issue, Davis and Burrows assert that these funds should be considered as loans to the employer and they should be recognised as a form of capital accrued through involuntary lending by employees: Kevin Davis and Geoff Burrows, ‘Protecting Employee Entitlements: Corporate Governance and Industrial Democracy in Australia’ (2003) 36 Australian Economic Review 173, 175.
same concerns held for the GEERS fund remain unresolved. Anderson suggests that the establishment of a government-funded scheme has eased the call for the federal government to revisit other alternatives, such as a proposal for an employer-funded scheme.4 Nevertheless, Anderson agrees that FEG continues GEERS’s financial burden on the Australian federal government and solutions for protecting employee entitlements should be sought.5 The Abbott Government announced some major proposed changes to the FEG in the 2014 Federal Budget.6

This paper explores the potential for a joint employer/federal government-funded insurance scheme as an alternative solution for protecting employee entitlements in the event of corporate failure. A critical analysis is undertaken of the strengths and weaknesses of such a scheme to determine whether it would provide the necessary sustainable and effective protective measures for employee entitlements. Later in this paper, the effectiveness of an insurance option as a protective measure is closely examined in relation to the proposed scheme’s ability to provide fairness in terms of effectively recouping employee entitlements when insolvency occurs.

Another important issue to consider is whether businesses are able to bear the financial burden of providing such protection for employee entitlements from insolvent trading without adversely affecting everyday commercial operations. Also, there is the question of how ‘exempted’ small businesses will fit within the protective measures of such an insurance scheme. In addition, issues of moral hazard in relation to such schemes need to be addressed. Before discussing these issues, the recently introduced FEG is briefly examined.

II FAIR ENTITLEMENTS GUARANTEE

After GEERS had been in operation for more than 10 years, FEG was enacted to replace it in order to provide protection for employee entitlements in case of insolvencies occurring on or after 5 December 2012. As part of the Protecting Workers’ Entitlements package, FEG was one of the 2010 Labor Government’s election commitments.7 Two components were introduced. The first component was intended to enhance the protection of employees’ entitlements by ensuring that entitlements would be protected in case of insolvency. The second component aimed to strengthen corporate law by providing the Australian Securities and Investments Commission

5 Ibid 227.
6 See generally Fair Entitlements Guarantee Amendment Bill 2014. This Bill was introduced into Parliament in September 2014. The Bill was passed by the House of Representatives and introduced in the Senate in October 2014. However, the Bill was not debated in the Senate, and subsequently lapsed at the prorogation of the Parliament in April 2016.
(‘ASIC’) with more power to investigate and prosecute corporate mismanagement that results in insolvency and is intended to avoid the payment of employee entitlements.\(^8\) This paper considers the protection of employee entitlements after corporate insolvency; therefore it focuses on the first component of FEG.

FEG and its predecessor GEERS were both administrated by the then Department of Education and the Department of Employment (now the Department of Employment). Both GEERS and FEG provided advance Commonwealth payments to employees who lost their jobs due to insolvency. Subsequently, the Commonwealth is given priority in recovering paid entitlements from the assets of the insolvent firms concerned.\(^9\)

As explained in the following section, FEG is more effective in its coverage and protection of employee entitlements than was GEERS,\(^10\) even though both major Australian political parties — Labor and Liberal — agree on the principle of providing protection for employee entitlements in the event of insolvency. Nevertheless, it is technically evident that the sustainability of FEG has been enhanced by its legislative framework.\(^11\) By contrast, GEERS was an administrative mechanism, not a legislative scheme. As it was not mandated by statute, employees had no right to enforce their entitlements through a court process. A clear statement to this effect appeared in the GEERS Operational Arrangement document which stated that there was no ‘express or implied undertaking that the Commonwealth will provide funds in circumstances covered by GEERS’ and that ‘while the Commonwealth will normally provide funds, they are not bound to do so either generally or in any individual case’.\(^12\) Furthermore, as an administrative scheme it could be amended or cancelled at any time without recourse to legislative processes.\(^13\) That said, the administrative nature of GEERS was flexible and easy to modify. According to Symes,\(^14\) the flexibility of the GEERS administration could work in two ways: it might lead to a reduction in the amount and level of remuneration made available to pay employee entitlements in the event of insolvency, or it might lead to an increase in the coverage of employee entitlements.\(^15\)

The coverage of redundancy entitlements was not increased under FEG, which provides up to four weeks’ severance pay per year of service that was an increase

\(^8\) Ibid.
\(^10\) Department of Finance and Deregulation (Cth), above n 7.
\(^11\) Ibid.
\(^12\) Department of Employment and Workplace Relations, General Employee Entitlements and Redundancy Scheme: Operational Arrangements for 2001–2005 [16.1]–[16.2]. It must be noted that the Operational Arrangements for 2005, 2006, 2007 and 2008, 2009, 2010 and 2011 do not include the same quotation, however, they include a statement that indicates the same meaning.
\(^13\) Symes, above n 2, 151; Creighton and Stewart, above n 2, 375; Al Bhadily, above n 2, 36.
\(^14\) Ibid.
\(^15\) Ibid.
from the original version of GEERS.\textsuperscript{16} Claimants under FEG have the right to an external review by the Administrative Appeals Tribunal; a right that was not provided under GEERS.\textsuperscript{17} The Commonwealth allocated $55.63 million to FEG, an increase of $248.93 million over what was allocated to GEERS. In 2012–13 a total of $304 million was provided for both GEERS and FEG.\textsuperscript{18}

In summary, FEG protects the following employee entitlements:

1. Up to 13 weeks’ unpaid wages;
2. Unpaid annual leave;
3. Unpaid long service leave;
4. Up to five weeks’ unpaid payment in lieu of notice; and
5. Up to four weeks’ unpaid redundancy entitlement per year.

However, there are still outstanding and unresolved concerns about both GEERS and FEG. First is the consideration of taxpayers; neither of these protective measures has addressed the liability of employers to pay their employee entitlements. As noted earlier, this has increased the potential for abuse by encouraging illegal activities such as the use of phoenix companies, which shifts the burden of fulfilling employee entitlements from employers to taxpayers who fund FEG.\textsuperscript{19} The second concern is that FEG does not cover all employee entitlements.

Third, company directors, principals of insolvent employers and their relatives have been excluded from the assistance provided by FEG. Anderson argues that this limitation in FEG coverage is considered unfair to those directors and their relatives, especially where, as in most of the cases, the collapse of the company has not been caused by them.\textsuperscript{20}

Furthermore, FEG has excluded important protection for foreign employees, such as those on 457 visas. In May 2013, Sawn Services, a cleaning company, collapsed and 2500 employees lost their jobs and entitlements. Of these, some 1700 foreign employees

\textsuperscript{16} Department of Finance and Deregulation (Cth), above n 7. On 1 January 2011, the Gillard Government introduced a change in redundancy coverage from 16 weeks to four weeks per year; the same redundancy protection has been retained under FEG.

\textsuperscript{17} Ibid.


were not protected by FEG. The federal government argued that those employees were able to pursue a civil action to recover their entitlements. However, it would be futile to pursue such an action due to the time and costs involved in achieving a fruitful result. Clearly, this is not a viable option for the employees who urgently need their entitlements to survive.

It could be argued that these foreign employees have priority under s 556 of the Corporations Act, and that in due course they will be paid by the liquidator. However, this option takes time and involves a long process before being finalised. Also, in most cases there are not enough assets left to pay outstanding employee entitlements. As the data indicates, only $171,416,261 has been recovered compared to the $1,235,584,054 paid as entitlements since GEERS was established as indicated in Table 1.

Table 1: Advanced and recovered payments under GEERS for employee entitlements in the event of insolvency

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount Paid (AUD)</th>
<th>Number of Recipients</th>
<th>Number of Insolvencies</th>
<th>Amount Recovered</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002–03</td>
<td>$63,124,520</td>
<td>8700</td>
<td>923</td>
<td>Nil</td>
</tr>
<tr>
<td>2003–04</td>
<td>$60,307,473</td>
<td>9243</td>
<td>1219</td>
<td>$5,191,391</td>
</tr>
<tr>
<td>2004–05</td>
<td>$66,659,194</td>
<td>9329</td>
<td>568</td>
<td>$12,053,589</td>
</tr>
<tr>
<td>2005–06</td>
<td>$49,242,592</td>
<td>7790</td>
<td>912</td>
<td>$26,015,352</td>
</tr>
<tr>
<td>2006–07</td>
<td>$72,972,489</td>
<td>8624</td>
<td>1097</td>
<td>$9,487,140</td>
</tr>
<tr>
<td>2007–08</td>
<td>$60,779,791</td>
<td>7808</td>
<td>972</td>
<td>$16,787,789</td>
</tr>
<tr>
<td>2008–09</td>
<td>$99,756,911</td>
<td>11,027</td>
<td>1350</td>
<td>$8,790,000</td>
</tr>
<tr>
<td>2009–10</td>
<td>$154,058,670</td>
<td>15,565</td>
<td>1617</td>
<td>$18,000,000</td>
</tr>
<tr>
<td>2010–11</td>
<td>$151,497,218</td>
<td>15,412</td>
<td>NA</td>
<td>$16,861,000</td>
</tr>
<tr>
<td>2011–12</td>
<td>$195,534,647</td>
<td>13,929</td>
<td>NA</td>
<td>$21,000,000</td>
</tr>
<tr>
<td>2012–13</td>
<td>$261,650,549</td>
<td>16,023</td>
<td>2111</td>
<td>$37,230,000</td>
</tr>
<tr>
<td>Total</td>
<td>$1,235,584,054</td>
<td>123,450</td>
<td>10,769</td>
<td>$171,416,261</td>
</tr>
</tbody>
</table>


23 Ibid.

Obviously, this is one of the reasons that successive Liberal and Labor federal
governments introduced GEERS and FEG. Excluding foreign employees from these
entitlements could be considered a breach of art 9 of the *International Covenant
on Economic, Social and Cultural Rights*, which provides that ‘the State Parties to
the present Covenant recognise the right of everyone to social security, including
social insurance’. There are 8 375 700 employees working for the Australian private
sector.

Furthermore, FEG, like its predecessor GEERS, is administrated by the Department
of Employment, making it more likely that FEG will inherit the same long processing
time experienced with GEERS. Under GEERS, it took up to 13 weeks in some cases
for claimants to receive payment. On humanitarian grounds, such delays are too
long, especially for people who have just lost their jobs and entitlements and may
have no other financial means to support themselves and their families.

As discussed previously, both GEERS and FEG are inequitable to taxpayers,
resulting in limited protection coverage to employee entitlements. Both encourage
corporate mismanagement and in some cases might lead to illegal activities by those
attempting to shift responsibility from the employer to taxpayers. These issues are
discussed in the next section.

### III FEG and Shifting Responsibility

As noted earlier, entitled employees access FEG via the Department of Employment,
which is a federal government agency and therefore funded by taxpayers. Uncon-
scionable action by company directors can compromise employee entitlements. In
these circumstances employees require more protection. A number of commenta-
tors assert that the payment by government of entitlements, otherwise payable by
an employer, may serve to encourage shifts of responsibility and accountability
from directors and managers to the taxpayer. For example, Bottomley and Forsyth’s
assertion that the availability of GEERS discouraged directors from ensuring that
the corporation had sufficient assets to cover employee entitlements in the event of
insolvency is also applicable to FEG.

Moreover, a safety net is seen as a social cost that provides protection for employee
entitlements in the event of insolvency. Such an attitude has contributed to ignoring
the fundamental legal issue of the liability of directors and employers to provide
protection for their employees’ entitlements in the event of insolvency. Stewart
believes that GEERS did not send the right message to employers and directors about

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25 *International Covenant on Economic, Social and Cultural Rights* opened for signature


27 Bottomley and Forsyth, above n 2.
being responsible for their employee entitlements.\textsuperscript{28} In addition, the Noakes study found that 73.3\% of respondents considered employers to be responsible for employee entitlements, and 66.7\% of respondents perceived that directors were responsible for their employees’ entitlements.\textsuperscript{29} Consequently, a share-funded proposal would be expected to improve managerial style and good governance (see Table 2).

Evidence supporting Bottomley and Forsyth’s argument is provided by the amount recovered under GEERS from insolvent assets since 2002; only $171 416 261 out of $1 235 584 054 was recouped over that period (see Table 1). In effect, the responsibility for about $1 064 167 793 of paid entitlements was shifted from employers to taxpayers through GEERS. The federal government has only recovered, on average, 13.8\% of advances provided by EESS, GEERS and FEG. This indicates the extent that employees would have suffered without recourse to the scheme.\textsuperscript{30} Such low recovery rate may also indicate a lack of motivation or incapacity of the federal government to recover these funds. Murray argues that the assumption that employee entitlements will be covered through FEG,\textsuperscript{31} has encouraged employers to engage in excessive risk-taking with the entitlements of employees, which in itself may lead to insolvency. Of course, risk-taking is a feature of business and is often needed to develop business and stimulate innovation. But the larger question of whether the introduction of GEERS and then FEG has encouraged directors and managers to take added risks is difficult to substantiate, although the argument has some logical attraction.

Furthermore, directors are required to work towards the increased profitability of their business. Keay suggests that the level of risk-taking activity by directors depends on the actual level of the financial difficulty of managing a firm.\textsuperscript{32} There are times where calculated risks need to be taken where, for example, a new product has been launched, or directors may sometimes take risks to enhance business potential. However, excessive risk-taking by directors has the potential to contribute to the collapse of a business.\textsuperscript{33}


\textsuperscript{29} David Noakes, ‘Measuring the Impact of Strategic Insolvency on Employees’ (2003) 11 \textit{Insolvency Law Journal} 91, 103. In late 2001, a survey conducted by David Noakes examined the loss of employee entitlements in the event of insolvency, and reforms that might address the issue of protecting employee entitlements. The participants in the survey were members of the Australian insolvency institutions.

\textsuperscript{30} Anderson, \textit{The Protection of Employee Entitlements in Insolvency}, above n 4, 224–9.


\textsuperscript{33} Ibid.
In this same vein, Miller argues that GEERS may have encouraged shareholders and investors to accept greater risk-taking by the directors of the business in the hope of gaining higher returns.\textsuperscript{34} Concrete examples of these propositions are, however, hard to find, given that corporate collapses are often a consequence of a combination or convergence of factors. Global market forces may play a significant role in commercial failure, as do the behaviours of the managers and officers of a company. A similarly attractive proposition, which is equally as hard to substantiate, is the notion that because FEG underwrites most employee entitlements, the steps to corporate insolvency might be accelerated. This is because administrators can shed some of the immediate losses to the administration of FEG knowing that recovery by this mechanism is limited to the priority normally allocated to employees, as a privileged but nevertheless unsecured creditor. All unsecured creditors, including employees, are behind categories of administrative claims related to liquidating a company.

IV GEERS/FEG and Phoenix Company Activities

It has also been argued that GEERS might have encouraged some illegal activities, such as the use of phoenix companies.\textsuperscript{35} This is because there was no financial liability on the part of the employer to contribute to GEERS or similar funds or schemes to protect employee entitlements. The operations of a phoenix company have been described as being where a company intentionally denies and fails to pay its debts to its creditors, and after a while another business commences under the same management using some or part of the previous assets.\textsuperscript{36} Phoenix activities often breach various provisions of the \textit{Corporations Act}. Such activities might result in directors breaching the duty of good faith,\textsuperscript{37} or the insolvent trading provision.\textsuperscript{38} That said, some directors continue to use phoenix activities to transfer assets from an entity before insolvency occurs. An example of this is discussed later in this section.

In 1996, ASIC conducted a study of phoenix activities and insolvent trading focussing on the how phoenix activities affected small to medium enterprises, and found that:

1. 18% of respondents had been affected by phoenix activities;
2. 45% of phoenix activities took place in the building/construction industry;
3. 80% of respondents had experienced phoenix activities but did not make reports to the authorities; and

\textsuperscript{35} Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, above n 19.
\textsuperscript{36} Ibid.
\textsuperscript{37} \textit{Corporations Act 2001} (Cth) s 181(1).
\textsuperscript{38} Ibid s 588G.
4. Respondents had experienced phoenix activities 2.6 times during the life of their businesses.

Clearly, there is a substantial incidence of insolvent trading in phoenix activities related to small to medium enterprises, especially in the building and construction industry. In its submission to the Royal Commission into the Building and Construction Industry, the Australian Taxation Office raised serious concerns in relation to lost revenue due to phoenix activities, disclosing that from 1998–2002 an Australian Taxation Office team had finalised 400 phoenix company cases, 85% of which related to the building and construction industry, with consequent revenue losses related to this industry amounting to $110 million. Likewise, the Australian Manufacturing Workers’ Union, in its submission to the inquiry into corporate insolvency laws, stated that phoenix companies have been a common phenomenon in the construction industry, but are not limited to a particular industry, as this activity could occur in different industries. Such practices undermine the rights of employees by leaving a company insolvent with no assets to cover employee entitlements.

The AFMEPKIU, New South Wales Branch v David case is an example of phoenix company activity in Australia that demonstrates the inclination of employers to transfer assets (in this case unsuccessfully) from one existing company to another, and then move to make the predecessor company insolvent. The facts of this case were that Mr David was the director and a substantial shareholder of David Graphics Ltd. In October 2003, David Graphics went into administration and consequently all employees’ contracts of employment were terminated. About two years prior to insolvency, Mr David stopped advancing payments on behalf of his employees into their superannuation funds. He also ceased paying employee entitlements. Even though they were aware of the company’s financial status, the employees continued their employment until the company became insolvent. However, Mr David had advised his employees that their entitlements would be paid. Upon liquidation of the assets, including equipment, telephone numbers and intellectual property, David Graphics was sold to Digital Graphics for an amount of $30,000. Digital Graphics had been established just a few weeks after David Graphics was placed under administration. Two of the directors of Digital Graphics were Mr David’s children, and the third director had a long personal relationship with Mr David. The three of them were secured creditors of David Graphics. Mr David was employed as a consultant by Digital Graphics.

In this case, the New South Wales Industrial Relations Commission had to address the issue of whether Digital Graphics was responsible for the employee entitlements of David Graphics. In order for the former David Graphics employee entitlements to

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40 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, above n 19, 136 [8.22].
be paid by Digital Graphics, a connection between these companies had to be established. Moreover, it would be necessary to find that David Graphics had been sold with the intention of denying employee entitlements. Under these circumstances, the New South Wales Industrial Relations Commission found that Digital Graphics was a phoenix company, and was responsible for the payment of the previous employees’ entitlements. The Commission concluded that:

There was available a conclusion (taking the evidence at its highest) that there existed a clear linkage between the two companies. The whole of the business of David Graphics was apparently transferred to Digital Graphics, which appears, at one level, to have a personal connection with the Managing Director of David Graphics, a company that could not comply with its statutory obligations to make superannuation payments on behalf of its employees but whose business was sufficient to generate $30 000 per week to pay the vendor. The approval of the arrangement rested in the hands of secured creditors, who, only some weeks before, happened to be the same persons who later became directors of Digital.42

As a precursor to considering the issue of unreasonable director-related transaction it is useful to examine an attempt by the Patrick Group to avoid paying employee entitlements by financially restructuring a company.43 Patrick sought to restructure its operations by attempting to increase the productivity of its employees. However, this reorganisation was likely initiated with the intention to divide the functions of the predominantly Maritime Union of Australia stevedoring workforce into smaller discrete entities. This financial restructure was achieved through a complex sharing of the entity and the ownership of the Patrick workforce giving rise a conspiracy to injure by unlawful means.44 Despite assurances that Patrick had taken steps to ensure all displaced employees would receive their full leave and redundancy entitlements, North J found that Patrick was in breach of s 298K(1) of the Workplace Relations Act 1996 (Cth). Justice North’s statement is crucial:

The Court should take into account as favouring the grant of interim relief that the context of the claims is not a commercial dispute about money but an attempt to vindicate the rights of employees to earn a living free of victimisation.45

Patrick was found to have intentionally restructured the company in order to dismiss employees who were members of the Maritime Union of Australia.

In these circumstances, insolvency of the employer would probably have jeopardised the entitlements of the employees. On appeal, with the support of the Liberal Government, the matter reached the Full Bench of the High Court who again found in favour of the Maritime Union of Australia. The Full Bench unanimously followed

42 Ibid 301 [13].
44 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3] (1998) 77 FCR 456, 460 (‘North J’s decision’).
North J’s judgement on whether the balance of convenience should support granting the orders. Anderson observes, this dispute was primarily intended to deprive workers of employment rather than their entitlements.\(^{46}\) However, it is worth speculating that if this dispute had become protracted, employees may well have lost their entitlements. As Gaudron J stated, ‘[i]t follows that they [Patrick] did not have sufficient funds in hand to cover liability for accrued leave and severance entitlements if MUA employees were dismissed.’\(^{47}\)

To address these concerns in relation to employee entitlements, in 2003 the Howard Government amended the *Corporations Act* to include unreasonable director-related transactions of a company. This enables a liquidator to avoid a company entering into unreasonable transactions, which include the payment, transfer or disposition made or right granted for a director of a company or a close associate or a third party on behalf of, or for the benefit of, a director or close associate. Unreasonable director-related transaction provisions in s 588FDA have far reaching consequences. For example, transactions entered into four years before the appointment of a liquidator are able to be set aside.

The first case to test the unreasonable director-related transactions under s 588FDA was *Ziade Investments Pty Ltd v Welcome Homes Real Estate Pty Ltd*.\(^{48}\) On appeal, a director of Ziade Investments executed mortgages to secure existing loans on behalf of the company. As the sole shareholder for these loans, the director benefitted from two related companies. Under s 588FDA, a benefit received by the director as a sole shareholder of a company was not found to constitute a direct or indirect benefit. Justice Gzell reasoned that the legal identity of a company is different from its shareholders. Further, to be caught under s 588FDA, Gzell J reasoned that a transaction must be for the *direct benefit* of a director or close associate of the director. Indirect benefits are insufficient and the financial interests of shareholder are an indirect benefit.\(^{49}\)

Case principles emerging from *Ziade* and *Welcome* were adopted by the New South Wales Supreme Court in *Re Great Wall Resources Pty Ltd (in liq)*.\(^{50}\) This decision served to constrain the usefulness of s 588FDA. Justice Brereton reasoned that payments to companies could not be undone, even if an unprincipled director was the sole shareholder of company that had wrongfully received funds. It was held that


\(^{47}\) *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1, 57; Re Italiano Family Fruit Company Pty Ltd (in liq) (2010) 190 FCR 474*. This case was followed in *Cartier; Re Damilock (in liq) [2012] FCA 1445* (17 December 2012).


\(^{50}\) [2013] NSWSC 354 (5 March 2013) [40].
'only a direct benefit will suffice and a benefit to a company of which the director is a shareholder, even the sole shareholder, will not'.\textsuperscript{51} Neither case assists unscrupulous directors deriving an indirect benefit denied to employee entitlements.\textsuperscript{52}

However, a recent case in the Victorian Court of Appeal (‘VCA’) in \textit{Vasudevan v Becon Constructions (Australia) Pty Ltd}\textsuperscript{53} did not follow the general proposition, provided in \textit{Great Wall} and \textit{Ziade Investments}, regarding ‘direct benefit’. Potentially this decision could significantly broaden the capacity for liquidators to pursue company transactions under s 588FDA, where there are ‘indirect benefits’ to a director or close associate of a director of the company. In this case a broad scope of natural and ordinary meaning is given to the phrase ‘on behalf of’ and ‘for the benefit of’. As a consequence, s 588FDA has been restored as a more effective remedy generally for liquidators and specifically for third parties deriving a benefit from such transactions. This includes a company where a director has a financial interest.

In all, the VCA decision in \textit{Vasudevan v Becon Constructions} has broadened the definition of the benefit obtained by a director, to include indirect benefits resulting from such transactions. Catching indirect benefits may provide liquidators with a greater access to company transactions where a director has a financial interest that ‘accords to the objective of the section of preventing directors stripping benefits from companies to their own advantage’.\textsuperscript{54} Strengthening and clarifying s 588FDA has the potential to hold company directors personally liable for transactions such as phoenix transactions where a director and/or a close associate is a shareholder company receiving an economic benefit. This also reduces the capacity of directors to strip and move assets between entities.

The following proposal aims to address the unresolved issues that have not been provided to protect employee entitlements in the event of insolvency. Insurance might be an option worth considering as a way to provide protection for employee entitlements in the event of corporate insolvency.

\textbf{V \textit{Insurance Models Proposed by Political Parties}}

As stated earlier, some concerns were raised in relation to the effectiveness of GEERS that are applicable to FEG, with regard to insufficient protection of employee entitlements. In particular, this criticism relates to the manner in which FEG has been funded and raises considerable concern, due to the financial burden being transferred from the employer to the taxpayers whenever there is a corporate collapse, resulting in the inability of employee entitlements to be met. All of the earlier concerns have led some government sectors and commentators to consider a specific form of insolvency insurance, which would apply to corporations as an alternative

\textsuperscript{51} Ibid.
\textsuperscript{52} \textit{Re Great Wall Resources Pty Ltd (in liq)} [2013] NSWSC 354 (5 March 2013).
\textsuperscript{53} (2014) 41 VR 445.
\textsuperscript{54} Ibid 452.
to the existing protection measures. The drive to consider alternatives to EESS was emphasised by the then Minister for Workplace Relations and Small Business, the Hon Peter Reith, who spoke in 2000 on the establishment of an insurance-based scheme:

The Government also announced that it would continue to actively consider a compulsory insurance scheme, noting the precondition that small business would be exempt from any additional costs. The Government has always recognised that there are other possible approaches to the protection of employee entitlements. While it has been committed to fully exploring these other options, it did not believe that the existence of other options should be an excuse to continue the policy paralysis that previous federal governments have shown on this issue.\(^{55}\)

Three insurance-based models were proposed as alternative protective measures for employee entitlements. These were 1) the Howard Government model considered in 2000 by Peter Reith, 2) another model proposed by the Labor Party, and 3) a series of Employee Entitlements Guarantee Private Members’ Bills introduced to the Federal Parliament between 1998 and 2005. These models are explained briefly in the following section.

\(\textbf{A \ The \ Howard \ Government \ Insolvency \ Insurance \ Proposal}\)

In 2000, the Howard Government insolvency insurance model was considered together with the EESS. Even though the EESS was chosen over the insolvency insurance proposal, there was a strong case for considering such an insurance scheme as an alternative protective measure for employee entitlements, as was expressed clearly by the then Minister for Employment, Workplace Relations and Small Business (see earlier).\(^{56}\) According to this model, an insurance policy would be taken out by any business with more than 20 employees. Smaller businesses would be exempt and EESS/GEERS would provide protection for those employees’ entitlements. In addition to this form of coverage there were two proposed scenarios for premiums.\(^{57}\) The first was referred to as a risk-related ‘variable’ premium and the second could be referred to as a ‘flat’ premium.\(^{58}\) Both forms of premium setting are discussed further in the section dealing with the fairness of proposed insurance-based insolvency schemes.

\(\textbf{B \ The \ Labor \ Party \ Insolvency \ Insurance \ Proposal}\)

In 2000, the Labor Party proposed a form of compulsory insurance, the National Employee Entitlements Guarantee Model that was to be subscribed to by businesses employing more than 20 employees as an alternative to the Howard Government

\(^{55}\) Peter Reith Minister for Employment, Workplace Relations and Small Business Leader of the House of Representatives, ‘Federal Government Confirms Employee Entitlements Support Scheme and not Compulsory Insurance’ (Media Release, 64/00, 27 April 2000).

\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) Ibid.
insurance proposal. The Labor Party proposal was intended to guarantee payment for employee entitlements where businesses became insolvent. To minimise the costs that might be involved in such a scheme, the Labor Party proposed that it should utilise the existing Superannuation Guarantee Funds administration. Under the Labor proposal, the trustee of the Superannuation Guarantee Funds would be able to negotiate with insurers to obtain the most competitive premiums for employers. It was noted that insurance schemes of this kind were already in operation under existing superannuation providers, who offered death and disability insurance as part of superannuation coverage for employees.

The Labor proposal combined the operation of a superannuation fund with insurance coverage; the administrative costs of maintaining insolvency coverage would be restricted to only a small additional payment into superannuation funds. In the event of insolvency, employees would make claims for outstanding entitlements directly against the appropriate insurer and after assessment of the employee’s claim, the insurer would make payment out of the combined insolvency and superannuation fund. In relation to part-time and casual employees, Labor proposed that the premium would be paid for these employees by the federal government. It was estimated that the cost involved in introducing the Labor insolvency insurance scheme would require employers to pay a premium of not more than a 0.1% levy of wages/salaries of all employers. This fund would have cost industry approximately $174 million in 2000 to provide 100% protection for employee entitlements.

C The Employee Entitlements Guarantee Private Members’ Bills

Several Private Members’ Bills introduced into Federal Parliament between 1998 and 2005 attempted to legislate for the Commonwealth Government to adopt insolvency insurance schemes as an alternative measure to GEERS. All of these Bills were introduced to the House of Representatives by the Labor member for Prospect, the Hon Janice Crosio; all were rejected by the Howard Government, which had the majority in the lower house. Following all of these moves, the Employee Protection (Employee Entitlements Guarantee) Bill 2005 (Cth) (‘EEG Bill’) was reintroduced with minor amendments. It is worthwhile examining the objectives and main provisions of these Bills as they provide some background to how insolvency insurance-based options

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60 Ibid.
61 Ibid.
62 Ibid.
63 Employee Protection (Wage Guarantee) Bill 1998 (Cth); Employee Protection (Employee Entitlements Guarantee) Bill 2000 (Cth); Employee Protection (Employee Entitlements Guarantee) Bill 2002 (Cth); Employee Protection (Employee Entitlements Guarantee) Bill 2003 (Cth); Employee Protection (Employee Entitlements Guarantee) Bill 2004 (Cth); Employee Protection (Employee Entitlements Guarantee) Bill 2005 (Cth).
might prove to be an effective protective measure for employees. The EEG Bill is referred to throughout this section as a typical example of the group of Bills that were introduced on this topic between 1998 and 2005.

First, under the EEG Bill an insurance policy was defined as: ‘A policy of insurance under which an approved insurer insures an employer’s workforce against loss resulting from the employer’s insolvency.’ The definition is consistent with the objective of the EEG Bill in seeking to establish a scheme to provide protection for employee entitlements in the event of insolvency. However, under the EEG Bill, employers with less than 20 employees were exempted from taking out an insurance policy. In the case of smaller businesses, the existing taxpayer-funded GEERS would provide the necessary protection. The EEG Bill provided that failure by the employer to obtain insurance would attract a penalty.

Adopting any of the proposed insolvency insurance models as a measure to provide protection for employee entitlements would not be without consequences. The following section considers some of the issues that may arise by establishing such a scheme.

D The Effectiveness of the Insurance-Based Insolvency Protection Models

As noted earlier, the issues in relation to insurance-based insolvency schemes include consideration of the following:

1. Coverage of employee entitlements;
2. Constitutional concerns;
3. Fairness of such a scheme;
4. Small business funding;
5. Insurance-based schemes;
6. Costs of introducing such schemes to businesses; and

These issues are discussed in turn.

1 Coverage of Employee Entitlements

Both the Howard Government and the Labor Party insolvency insurance proposals provided insufficient detail as to their coverage of employee entitlements, except

64 Employee Protection (Employee Entitlements Guarantee) Bill 2005 (Cth) cl 8.
65 Ibid cl 3.
66 Ibid cl 11.
for an indication in the Labor proposal that it would cover 100% of employee entitlements. This is in contrast to the EEG where enough detail is available to make a comparison with GEERS. Ergo, the approach under the EEG Bill contrasts with GEERS by making insolvency insurance schemes applicable to a broader range of insolvency issues, as indicated in ‘D’ above, and below. The EEG Bill proposed prompter access to funds for employees, suggesting, for example, that 14 days be allowed before an employee could commence proceedings to recover funds. After this, employees would be entitled to make claims under the employer’s insurance policy to recover unpaid entitlements. The EEG Bill proposed that the insurer would be required to respond to employees’ claims within a month of receipt of the claim. Notably, under GEERS, and now also under FEG, the experience was that up to four months might elapse before the finalisation of claims. The EEG Bill proposed that the following entitlements should be paid under insurance schemes in cases of insolvency:

1. Unpaid wages;
2. Entitlements for termination of employment without notice;
3. Entitlements for annual leave or long service leave;
4. Repayment of a premium or other amount paid by the employee to the employer for training in a particular trade or profession;
5. Redundancy entitlements; and
6. Outstanding superannuation entitlements.

As can be seen, the EEG Bill would have provided coverage for all outstanding entitlements owed to employees in the event of insolvency. In this regard, the scheme proposed by the EEG Bill would be more comprehensive in its coverage for employee entitlements than GEERS. As noted previously, GEERS provided for payment of:

1. Unpaid wages in the three-month period prior to the appointment of an insolvency practitioner;
2. All unpaid annual leave;
3. Unpaid pay in lieu of notice up to a maximum period of five weeks;

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67 Ibid cl 7.
68 Ibid cl 23.
69 Ibid cl 26.
71 Employee Protection (Employee Entitlements Guarantee) Bill 2005 (Cth) cl 9.
4. Up to four weeks’ unpaid redundancy entitlement per year; and

5. All long service leave.

There were also restrictions based on the salary cap, excluding some employees from the protection of GEERS. By contrast, the proposed EEG would have included all employees under its protection, regardless of their income. On this basis, the proposed coverage under EEG would appear to be superior to that offered under GEERS.

2 Constitutional Concerns

There is some doubt as to the ability of the Commonwealth to enact an insolvency insurance scheme under which all employers would be required to obtain a policy protecting employee entitlements in the event of insolvency. The *Australian Constitution* confers the power to make bankruptcy and insolvency laws to the Commonwealth Parliament. Section 51(xvii) of the *Constitution* gives the Commonwealth Parliament power to legislate with respect to bankruptcy and insolvency. The *Bankruptcy Act 1966* (Cth) and the *Corporations Act* are supported by: *Bankruptcy Regulations 1996* (Cth), *Corporations Regulations 2001* (Cth), ASIC (Australian Securities and Investment Commission), ITSA (Insolvency and Trustee Service Australia), Bankruptcy Federal Court and the Federal Magistrates Courts, Corporations Federal Courts and the State and Territory Supreme Courts, Professional standards are also relevant, such as the IPA (Insolvency Practitioners Association), and APES (Accounting Professional and Ethical Standards Board). Commonwealth powers specified in the *Constitution* can override State laws. As a consequence, legislative power in relation to bankruptcy is regulated almost entirely by Commonwealth law.

However, it is likely that any reservations in relation to the Commonwealth’s capacity to utilise the corporation’s powers legislation upon the activities of corporations have been diminished due to the decision of the High Court in *New South Wales v Commonwealth* (2006) 229 CLR 1 (*WorkChoices*). This aspect is discussed in the following section, which considers the general issue of the Commonwealth’s powers to implement an insurance scheme to protect employee entitlements when insolvency occurs. To begin with, in 1998, Field asserted that the federal government would be restricted to s 51(xx) of the *Australian Constitution* when enacting the insurance scheme legislation. Field stated that:

> the [constitutional] power appears to be currently restricted to the ability to regulate insurance offerers rather than extend to the requirement that a person take out compulsory insurance (compulsory third-party traffic insurance is imposed

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72 Australian Constitution s 51(xvii).
73 Australian Constitution s 109.
74 (2006) 229 CLR 1 (*WorkChoices*).
75 Department of the Parliamentary Library (Cth), *Bills Digest*, No 182 of 1997–98, 22 April 1998. However, the view that was expressed in the *Bills Digest* was prior to *WorkChoices* (2006) 229 CLR 1.
76 Ibid.
under State/Territory laws and do not rely on this power). Against this view it may be argued that the full extent of the insurance power has yet to be tested and may extend to the requirement of employers making compulsory contributions to insurance for their employees.77

However, Dunstan observed that pt II of the International Labour Organisation’s Convention (No 173) Concerning the Protection of Workers’ Claims in the Event of the Insolvency of their Employer78 (‘the Convention’),79 ratified by Australia in 1994, recommends protection for employee entitlements in the event of insolvency. Part III, art 9 of the Convention provides general principles in relation to the claims by employees who lose their entitlements due to insolvency. This article states: ‘The payment of workers’ claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency.’

As a consequence, Dunstan argued that the Commonwealth is able to enact legislation establishing an insolvency insurance scheme as a protective measure for employee entitlements, based upon the Convention. Ratification of pt III of the Convention, in concert with the external affairs power,80 allows the Commonwealth to apply this constitutional power to legislate and to give effect to those conventions within Australia.81 Thus, it follows that under both the insurance powers and the external affairs powers of the Constitution, there is likely to be sufficient power residing in the Commonwealth to implement an insolvency insurance scheme. In addition, it is noteworthy that existing superannuation schemes are similar in nature to the insolvency proposals that have already been declared constitutional.

In 1985, the Australian Council of Trade Unions, in a National Wage Case claim before the Conciliation and Arbitration Commission, proposed that industrial agreements and awards should provide for employers to contribute 3% to an industry superannuation fund. The Commission approved the increase demanded. However, the decision of the Commission was challenged in the High Court on the basis that the payment of superannuation benefits could not be an element of an industrial dispute for the purposes of the Conciliation and Arbitration power under s 51(xxxv) of the Constitution. In this case, the High Court held that under the power provided by s 51 (xxxv), the Commission had jurisdiction to arbitrate on superannuation matters.82 Given the similarity between superannuation and insurance schemes, in relation to imposing payments on employers to provide protection for employee entitlements and the

77 Ibid 3.
80 Australian Constitution s 51(xxix).
81 Part III of the earlier Convention has still not been ratified by the Australian Government.
82 Re Manufacturing Grocers’ Employees Federation (Aust); Ex parte Australian Chamber of Manufacturers (1986) 160 CLR 341.
constitutional obstacles involved, this case might be used as grounds to introduce legislation that imposes premiums on employers to secure employee entitlements in the event of insolvency. This could be the case particularly after the enactment of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

If there is any doubt about the Commonwealth’s powers, this has probably been put to rest by the decision of the High Court in *WorkChoices*.

In this case, the states and territories challenged the validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘*WorkChoices Act*’) as being beyond the Commonwealth’s power. The states and territories argued that s 51(xxxv) of the *Constitution* (the corporations power) did not give the Commonwealth power to directly regulate the relationship between corporations and their employees. It was argued for the states and territories that only in exceptional cases has Parliament been allowed to regulate such a relationship, specifically only in those cases relating to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.’

The High Court held by a 5-2 majority that the Commonwealth’s reliance on the corporations power to regulate the relationship between corporations and their employees was valid.

Based on the outcome of the *WorkChoices* case, there appears to be little constitutional limitation on the Commonwealth government to legislate in a manner that would require corporate employers to insure for insolvency. Findings in the *WorkChoices* decision would not allow the Commonwealth government to legislate directly in relation to sole traders and partnerships, which are beyond the reach of the corporations powers. However, the combination of the insurance and corporations powers, in addition to the external affairs powers relying on the ILO *Convention*, would arguably have sufficient influence to allow coverage of all employers. Additionally, the states and territories could refer such powers to the Commonwealth, as Victoria has done in relation to industrial relations matters.

The following matters have been referred by Victoria to the Commonwealth power:

1. Conciliation and arbitration for dealing with disputes in Victoria;
2. Agreement-making in Victoria;
3. Minimum terms and conditions of employment for employees, including minimum wage;
4. Termination of employment; and
5. Freedom of association.

84 Ibid.
86 Ibid s 4.
Victoria remains the only state to refer its industrial powers to the Commonwealth. These powers have been referred through the passage of the *Fair Work (Commonwealth Powers) Act 2009* (Vic), which mainly deals with the corporation's power.\(^87\) In contrast, the *Workplace Relations Act 1996* (Cth) was primarily predicated on the conciliation and arbitration power which provides the Commonwealth with the authority to legislate with respect to the states private sector workforce.\(^88\)

### 3 Fairness of Proposed Insurance-Based Insolvency Schemes

Some commentators and interest groups argue that establishing a national insolvency insurance scheme would be unfair to some employers. This view has been highlighted by the *National Insurance Scheme to Protect Employee Entitlements: Preliminary Feasibility Study* (‘Benfield Greig study’) commissioned by the New South Wales Government in 1999.\(^89\) Benfield Greig’s brief, as risk and reinsurance experts, was to investigate the feasibility of developing a national insurance scheme. Adopting such a scheme might contribute to the transfer of risks from badly managed business to well established business. The report noted that:

> We would strongly recommend that any scheme to protect employee entitlements should make it compulsory for employers to insure. In saying this it is recognised that ‘good’ employers will, in one sense, be cross-subsidising ‘bad’ employers but the categorisation of which employer is solvent or insolvent is a concept valid only at a single point in time.\(^90\)

However Mr Stephen Smith, of the Australian Industry Group considered that cross-subsidising would be unfair:

> If all companies are forced to insure for entitlements, even assuming for a moment that it just covered the entitlements that GEERS covers, so you have a consistent standard, you are then forcing successful companies to pay for the entitlements of employees of unsuccessful companies. That, in our view, is unfair. Why should a successful company that has done everything right and has protected the entitlements of its own employees pay the entitlements of some other company’s employees? That is just as unfair…\(^91\)

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90. Ibid.

91. Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Melbourne, 8 August 2003, 155 (Stephen Thomas Smith).
These views are consistent with the previous statement by the then Minister for Employment, Workplace Relations and Small Business, advocating the government’s choice of EESS, instead of an insurance scheme, as a protective measure for employee entitlements. These concerns probably reflect the attitudes of sound business operators towards introducing an insurance scheme to cover employee entitlements. Directors of these businesses are uneasy with the idea that they are obliged to adopt an insurance scheme that may never be used by them. This is because they believe that their financial status and business practices enable them to guarantee all their employee entitlements. However, as a range of global and market forces may affect the business world, it is hard to argue that there are ‘good’ and ‘bad’ businesses when it comes to a downturn in the economy, and in such an environment it is more likely that insolvency would occur across all sectors of the economy.

Insolvency may be the product of a range of factors, some of which relate to poor business practices, whilst other factors, such as global influence, might be unforeseeable. Further the argument against cross-subsidisation could be made in respect of universally accepted compulsory insurances such as motor vehicle and employee compensation insurances. With regard to these examples, there is long-held community acceptance of the need to provide adequate compensation for incidents that might be the result of poor business practices, and might also be the result of unforeseeable unfortunate events. Moreover, the earlier concerns might apply if the insolvency insurance scheme was introduced on the basis of a flat premium. In the case of flat premiums, the so-called high-risk businesses would be charged the same as the so-called low risk businesses.

The latter comment warrants consideration of the possible types of premium that could be levied under a proposed insolvency insurance scheme. Essentially, as mentioned earlier, there are two types of premiums that could be imposed by the insurer to provide protection for employee entitlements in the event of insolvency: flat or risk-related variable premiums. The Benfield Greig study notes that in the situation under consideration, all businesses would be charged the same premium regardless of the risks involved. It is simpler for this type of premium to be administered by insurance companies. Peter Reith asserted that a flat premium would be affordable even for high-risk businesses. On the other hand, flat premiums are not favourable for low risk businesses because they effectively cross subsidise high risk businesses due to the assumption that all businesses will have similar risk outcomes.

By contrast, risk-related variable premiums are based on an assessment of the risk-taking behaviour and business of each enterprise. Therefore, businesses that are able to demonstrate that they are in a low risk business category would be charged

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92 Reith, above n 55.
93 Ibid.
94 Benfield Greig, above n 89.
95 Reith, above n 55.
96 Ibid.
a lower premium, and a higher premium would be applied to high-risk businesses. To assess premiums, the insurer would examine the likelihood that a claim would be made against the policy and accordingly, predict a price that may insure the risk involved. Such assessments would be based on data and information used by insurance companies to quantify risks in order that premiums appropriately reflect the risks.

There are a number of factors that influence the variable premium setting, including the size, the assets, and the financial status of the business. A variable premium might be charged and adjusted periodically to assist the insurer in assessing the risk factors involved. Bickerdyke, Lattimore and Madge assert that risk-related or variable premiums are a more productive form of protection for employee entitlements than a flat premium. This proposition is based on the theory that variable risk-related premiums result from a risk management style and business financial planning that discourages risk-taking behaviours, and consequently reducing the likelihood of insolvent trading. There is certainly some evidence that this is the case in relation to other insurance schemes, such as compulsory employee compensation. However, under those schemes, the parameters of risk are more easily prescribed, whereas in relation to the risk of insolvency, the calculation of premiums based on certain financial parameters are based on:

1. Number of employees;
2. Industry type (which kind of risk is involved?);
3. Considering individual claims experience for a three-year to five-year period;
4. Financial position of the employer;
5. Position of the employer in the insurance market cycle.

However, these parameters may not give a true picture of the risk profile of a business. The proposed insurance models discussed earlier exempted small businesses from obtaining insurance policies principally on the grounds of fairness, namely that small businesses would be disproportionately affected by the imposition of premiums that might have the counterintuitive effect of increasing the likelihood of financial distress.

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98 Reith, above n 55.
99 Benfield Greig, above n 89.
100 Bickerdyke, Lattimore and Madge, above n 97.
101 Reith, above n 55.
103 Ibid.
The next section provides an examination of the rationale and some of the implications of such an exemption for small business.

4 Application of the Insurance-Based Models to Small Business

Small business employees constitute the majority of Australian employees but are defined differently by regulators depending on the laws they administer. Such businesses are typically independently owned and operated by owner-managers who are invariably the principal decision-makers and contribute all or most of the firm’s operating capital.

ASIC regulates ‘small proprietary companies’, with two out of these three characteristics:

- an annual revenue of less than $25 million
- fewer than 50 employees at the end of the financial year, and
- consolidated gross assets of less than $12.5 million at the end of the financial year.

The 2013 Banking Code of Practice defines small business as a business with:

a) less than 100 full-time (or equivalent) people if the business is or includes the manufacture of goods; or

b) in any other case, less than 20 full-time (or equivalent) people, unless the banking service is provided for use in connection with a business that does not meet the elements of (a) or (b) above.

A definition similar to the Banking Code of Practice has been adopted by the Financial Ombudsman Service Terms of Reference.

Determinations of how many employees constitutes a ‘small business’, can affect employee entitlements in insolvency. For example, where businesses manufacture goods

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and have less than 100 employees, compared with less than 20 full-time employees, will impact on employee entitlements. According to the Australian Bureau of Statistics, a small business has an annual revenue turnover (excluding GST) of more than $2 million and employs more than 20 people.108 According to ASIC, regulators have informally adopted the definition of ‘small business’ used by the Australian Bureau of Statistics. The Fair Work Ombudsman defines any business with fewer than 15 employees as a small business. A simple headcount is used to calculate all employees (including casual staff) employed on a ‘regular and systematic basis’.109 The Corporations Act defines small business as fewer than 50 employees,110 but the proposed EEG Bill has defined small business as fewer than 20 employees.

For the purposes of employment, the Fair Work Act 2009 (Cth) provides statutory protection for small businesses with 15 or fewer employees.111

In disputes over how many employees constitutes a ‘small business’, the corporations powers under Fair Work will usually prevail. Small business is defined by the Fair Work Act 2009 (Cth) as a business with fewer than 15 employees.112 Federal industrial relations legislation is derived from the corporations powers in the Constitution, since 27 March 2006.113 From 1 January 2010, complimentary federal and state legislation has extended federal coverage to non-incorporated private employers. As such, businesses that operate as constitutional corporations (including employees) are covered by the federal industrial relations system. There are some inconsistencies between the Corporations Act and the EEG Bill in relation to the definition of small business, which reflects the differing approaches between corporations and industrial laws.114

Under the proposed insolvency insurance models discussed above, small businesses — namely those businesses that employ fewer than 15 employees and with less than $2 million turnover — would be exempt from the need to obtain an insurance policy and consequently the employees of a small business would have their entitlements protected by the existing FEG system. In a ministerial statement, Peter Reith asserted the fairness of this arrangement, saying that employers and the federal government would share the responsibility of providing protection for employee entitlements and the government would shoulder the responsibility of protecting those least able to do so.115

110 Corporations Act 2001 (Cth) s 45A(c).
111 Fair Work Act 2009 (Cth) ss 23(1), 119, 385, 388, 596, 768BM.
112 Fair Work Ombudsman, above n 109.
113 Australian Constitution s 51(xvii).
115 Reith, above n 55.
Nevertheless, the exemption of small business employees from the protection of the insurance scheme indicates that only 20% of full-time Australian workers would be protected by this insurance scheme. According to the ASIC Report on external administration statistics, 65.2% of companies had less than five full-time employees, and 15.6% employed 5–19 full-time employees.116

This leads to the question of why small business should be exempt from the coverage of the proposed insurance models. According to comments made in 2000 by Peter Reith,117 small businesses operate under different circumstances to medium and large businesses, because most small businesses fail within five years of commencement of operations and consequently employees in those businesses would be unlikely to have large leave and other entitlements due to them. That said, some commentators argue that an exemption for small businesses might be misused by big businesses to avoid engaging in such an insurance scheme. For example, Symes suggested in 2000 that some large businesses might be divided into smaller entities which would allow them to fall within the small business category and therefore to be exempt from taking out an insurance policy, as attempted by Patrick.118

In addition, some corporations might manipulate the exemption by using subsidiaries of small companies to protect their interests. A similar claim was made in relation to the WorkChoices Act mentioned earlier.119 There is however a shortage of data to support these claims. Whilst such manipulation might appear to be theoretically attractive from the perspective of avoiding liability for insolvency insurance, the creation of a group of small companies might simply manifest additional burdens for employers in other areas, such as obligations for each of those small businesses to be separately audited, managed, insured and staffed.

5 Cost of Introducing an Insolvency Insurance Scheme

Apart from the concerns in relation to determining appropriate premiums for the insurance of employee entitlements in the event of insolvency, and the constitutional issues involved in establishing a federal scheme, there is another critical issue. This concerns the imposition of insurance premiums to protect employees in the case of business failure being seen as an additional burden on businesses. In August 2003, Peter Anderson, CEO of the Australian Chamber of Commerce and Industry, commenting on the proposal to introduce such an insurance scheme, stated:

We have not been convinced that an insurance scheme is an appropriate policy response. Our concerns with the insurance scheme mirror some of the concerns I mentioned earlier about the trust funds — that is, whether it is a proportionate response; whether you are imposing an obligation across the whole of an

117 Reith, above n 55.
118 Symes, above n 114.
119 Workplace Relations Amendment (Work Choices) Act 2005 (Cth).
industry, or across the profile of employers generally, to make payments or pay compulsory levies on the basis of seeking to protect entitlements, which the overwhelming bulk of companies would be paying and would not be giving rise to circumstances where claims on the insurance were actually required. We do not think it is a proportionate response. It is a compulsory levy and, in that sense, it is a compulsory tax. We do not think that is good for the economy or for job creation. It is effectively another compulsory tax on jobs.120

Bickerdyke, Lattimore and Madge argue that theoretically an insurance-based scheme would provide desirable outcomes for all parties involved if accurate insurance premiums could be applied. In such a case, businesses would not be paying premiums higher than required and creditors would have greater recovery in the event of insolvency.121 The latter benefit derives from the fact that if an employer was fully insured for outstanding employee entitlements, there would be no requirement for administrators to make allowances for those entitlements and more funds would be available to other unsecured creditors. Ideally, employees would be paid appropriate entitlements and the insurer would charge premiums matching the likelihood of insolvency; matching the potential risks under which a business operates.

A variety of approaches enable an insurance company to manage risks involved in providing protection for employee entitlements. One such approach is to set premiums so that they match the risks involved. However, this might be a difficult approach to take since there is a lack of data available to assess risks. No data has been collected by any government agency to help develop an insurance scheme based on an industry insolvency risk assessment.122 A lack of data may prevent an insurer reaching a reliable assessment of risk, at least in the short term.

As the ministerial statement referred to earlier states, insurers are either unwilling to enter into the market or if they do, they are inclined to charge a high premium to cover their risk.123 As discussed earlier, increased premiums for high-risk companies may ironically cause insolvency. However, as has been shown by a range of other insurance such as employees’ compensation insurance, charging high premiums for business with high risks may actually contribute to improved management of the business, which ultimately leads to a decrease in risks and consequently the level of premiums.124 Insurance companies may also manage risk by taking security over assets against potential risks. However, this approach is not favoured by either business or lenders; banks and financial institutions who are reluctant to grant credit to businesses without enough security. As such, this approach limits the ability for businesses to operate.

Administration costs would also add to the costs of insurance premiums. This concern has been highlighted by the Benfield Greig study, which noted:

120 Parliamentary Joint Committee on Corporations and Financial Services, above n 19, [10.83].
121 Bickerdyke, Lattimore and Madge, above n 97.
122 Reith, above n 55.
123 Ibid.
124 Bickerdyke, Lattimore and Madge, above n 97; Symes, above n 114.
This additional expense would be incurred prior to the commencement of the scheme (in collating segmented historical data) and in managing the ongoing scheme (in actuarial pricing adjustment and decision making regarding the appropriate classification for each policyholder).\textsuperscript{125}

As can be seen, the projection of the likely costs to establish an insurance scheme is clearly difficult. This aspect is discussed in the following section.

6 The Costs of an Insolvency-Based Insurance Scheme

There have been some attempts to estimate the costs of an insurance-based scheme as a protective measure for employee entitlements against insolvency. In a speech made in 2000, Peter Reith referred to estimates by a leading insurance broker (who was not named) who had estimated the annual cost of providing protection for employee entitlements through an insurance scheme as being around $170 million.\textsuperscript{126} However, a second estimate done by an unnamed insurance company was also referred to in the same speech, as follows:

Another insurance company provided an alternative analysis in an attempt to get a better feel for how premiums might vary between firms of different sizes. The analysis concluded that an insurance scheme would probably only be viable for the top few thousand firms, covering only around 30\% of all employees and less than 0.5\% of companies. It suggested that premiums could vary from an average of $20 per employee for the top 100 firms, to $150 per employee for the next few thousand largest firms and $800 or more per employee for the remaining 830 000 firms. But again, there was no way of assessing what the premiums might be for individual firms within each of these categories.\textsuperscript{127}

There are other costs involved, such as the cost of accessing the financial status of businesses to assess the risk involved. This issue also sparks uneasiness within businesses because there is no desire to share financial data of the kind required with an insurer, although of course this is frequently shared with other similar institutions such as banks. It is also important to note that even though the employer would pay the premiums, under the insurance scheme it is likely the cost would be transferred to consumers by increasing the price of products and services.\textsuperscript{128}

Based on a 0.1\% contribution of employees’ wages, the cost to insure 8,375,700 employees (which is the ABS estimate of the Australian workforce in August 2013)\textsuperscript{129} on an average annual wage of $58,500 is $489,978,450.\textsuperscript{130} In contrast, the advanced

\begin{thebibliography}{9}
\bibitem{125} Benfield Greig, above n 89, 11.
\bibitem{126} Reith, above n 55.
\bibitem{127} Ibid 3.
\bibitem{128} Bickerdyke, Lattimore and Madge, above n 97.
\bibitem{130} Ibid. Based on average annual earning per employee (AUD1175. 50 x 52 weeks).
\end{thebibliography}
payment under GEERS/FEG for 2012–13 was $261 650 549. Obviously, from the earlier figures (see Table 1), the cost of the insurance option is considerably higher than GEERS/FEG.\textsuperscript{131} This is especially of concern during a financial crisis, where it would be unwise to put any extra burden on employers to contribute to such a fund. However, in contrast to GEERS/FEG, the proposed insurance scheme would be fully funded by employers; GEERS/FEG is funded by taxpayers.

Of course, there are additional concerns with the adoption of an insurance-based scheme, such as the exploitation of such an entity. Some employers may illegally fail to contribute to superannuation funds and employees’ compensation insurance on behalf of their employees, leading to additional losses for employees in the case of insolvency. The same might apply in relation to insurance premiums unless strong enforcement procedures are in place. Moreover, the Benfield Greig study argued that imposing insurance premium costs on the private sector to protect their employees against insolvency,\textsuperscript{132} as suggested by the proposed insurance-based models, may disadvantage those businesses in terms of competitiveness. For example, businesses owned wholly or partly by the public sector, such as Telstra, would not be required to undertake insurance schemes to protect their employee entitlements, as they are not technically privately owned business.

7 Moral Hazard as an Element of Insurance-Based Schemes

The principle of moral hazard is seminal to any consideration of insurance schemes. Moral hazard may been defined as the ‘effect of insurance coverage on individuals’ decisions to undertake activities that may change the likelihood of incurring losses.’\textsuperscript{133} Moral hazard has been divided into \textit{ex ante} and \textit{ex post} effects.\textsuperscript{134} An \textit{ex ante} moral hazard effect may encourage insured persons to behave in a risky manner on the basis that they can recover losses through insurance. An example might be motor vehicle insurance that arguably could encourage a driver to drive in a manner that might increase the possibility of accidents. In contrast, an \textit{ex post} moral hazard effect encourages the insured to act in ways calculated to take advantage of the protection provided by the insurance. For example, a health-insured person might not seek some forms of health treatment if they did not have health insurance coverage.

\textsuperscript{131} Comparing the costs involved in an insurance scheme, as presented earlier, and the costs of GEERS/FEG, is difficult because GEERS/FEG only relates to payments to employees who have lost their entitlements due to insolvency, and the data available does not include the administrative costs of GEERS/FEG. In contrast, the insurance model noted earlier is intended to cover all employees in Australia for all entitlements covered by the insurance scheme together with various administrative costs.

\textsuperscript{132} Benfield Greig, above n 89, 7.

\textsuperscript{133} Walter Nicholson and Christopher Snyder, \textit{Microeconomic Theory: Basic Principles and Extensions} (South-Western College, 10th ed, 2007).

Bottomley and Forsyth suggest in effect that programs such as GEERS and FEG may invoke the operation of moral hazard,\(^{135}\) which in this context exists when directors or owners of the business take risks because they feel they are underwritten (by GEERS/FEG) against some financial losses in the form of employee entitlements. Related to the issue of moral hazard is the notion that such a scheme might encourage company directors to take undue risks that may contribute to insolvency and burden the government insurer with the consequences of such actions. Arguments in relation to the moral hazard involved in putting life and limb at risk are usually less valid than examples in relation to the manner in which a person might put at risk another person’s assets, such as might take place in a business environment. In this regard, Benfield Greig stated, ‘[a]ll parties to any employee entitlement insurance scheme should expect that certain employers will seek to exploit the system, regardless of the nature and extent of the supporting legislation.’\(^{136}\)

Davis has suggested that guaranteed protection in the event of insolvency may arguably invoke the notion of moral hazard.\(^{137}\) Risky activities may be further encouraged by a mechanism that allows insurance premiums to be tax deductible. As discussed earlier, the effect of adopting a flat rate premium is for higher risk businesses to transfer, at least in part, their insolvency risk burdens to the well-managed firms through the process of cross-subsidisation.

Any consideration of risk-related variable premiums would need to be derived from an assessment of the risk-taking behaviour inherent in an enterprise. This approach is relevant when consideration is given to the issue of moral hazard. In relation to the risk of insolvency, the calculation of premiums should be based on identified financial parameters. Using this approach, risk-related variable premiums become a viable form of protection for employee entitlements compared to flat rate premiums.\(^{138}\) This approach is based on the view that variable risk-related premiums discourage risk-taking behaviours that reduces the possibility of insolvent trading.\(^{139}\)

Of course, there is also the issue of businesses not paying premiums at all. Legislation could be enacted to prevent such abuse from occurring. Symes suggests that an insurer might be allowed to recover unpaid entitlements from insolvent assets,\(^{140}\) which might reduce the cost of insurance premiums. In addition, it might reduce the risk of employee entitlements being used by employers to meet other debts. In this regard, Symes stated:

> The government should consider taking a statutory charge in its favour if there is a non-complying business. It would then have some chance of recovering the entitlement. If there were a statutory charge, the financiers of the business

\(^{135}\) Bottomley and Forsyth, above n 2.
\(^{136}\) Benfield Greig, above n 89, 7.
\(^{137}\) Davis, above n 34; Murray, above n 31.
\(^{138}\) Bickerdyke, Lattimore and Madge, above n 97.
\(^{139}\) Reith, above n 55.
\(^{140}\) Symes, above n 114.
would also have some incentive to ensure compliance by their customers. They
could, for example, require sighting the insurance premium receipt as a condition
precedent to lending and at various periods throughout the loan.141

Finally, another issue arises as to the effectiveness of insurance-based schemes as a
protective measure for employee entitlements for employee entitlements. This relates
to the viability of insurers themselves. In the well-known example of CE Heath Interna-
tional Holdings Ltd (HIH), the consequence of the collapse of that insurer was
that the state, territory and federal governments were forced to step in to pick up the
liabilities of the insurer. It follows that the practices and performance of insurers also
need to be considered.

VI AN INSURANCE-BASED SCHEME — A PROPOSED SOLUTION

Following a comprehensive international review of legal treatment of employee entitle-
ments in the case of insolvency, Johnson was unable to find support for a definitive model
to recommend.142 Four basic international approaches (Pro-employee, Bankruptcy
priority-No insurance approach, Bankruptcy priority-Guarantee fund, No priority-
Guarantee fund) were identified by two prominent international bodies (the International
Labour Organisation and the European Union).143 Entitlement insurance protection
schemes were found to be the most common and widely used in the ‘developed world’,
which offers employees the most comprehensive protection. Entitlements derived from
these schemes also interfere the least with the efficient distribution of market credit.144
Johnson provides a detailed discussion of some of the elements incorporated into the
development of an insolvency social protection system.145

To address earlier concerns, and to establish variable solutions to protect employee
entitlements in the event of insolvency, a proposal could be established on a 50/50
employer and federal government-funded legislative scheme. The same entitlements
could be covered under FEG to save money on administration fees. Such a scheme
could be administered as per the EEG Bill discussed earlier proposed by a superan-
nuation fund, where both the federal government and the employer would contribute
directly. In relation to the costs involved in funding this proposal, again GEERS and
FEG (see Table 1 for details) should be used to estimate how much employers and
employees should contribute.

The benefit to employees of this arrangement would be a sustainable system
provided by legislation, with coverage for most employee entitlements, and fairness

141 Ibid 17.
142 Gordon W Johnson, ‘Insolvency and Social Protection: Employee Entitlements in the
Event of Employer Insolvency’ in OECD (ed), Asian Insolvency Systems: Closing
144 Ibid 228.
145 Ibid.
to taxpayers by imposing financial liability on employers to contribute to the scheme. One could argue that a paying a levy could discourage businesses from investment and could have a negative effect on the cash flow. In counterpoint, the German Wage Guarantee Fund imposes on businesses a levy of 0.5% of employees’ salaries to provide a full coverage of employee wages for three months. The employers’ contribution is not deducted from the employee wages.\textsuperscript{146} It is arguable that a modest contribution is unlikely to have an adverse effect, especially given that under this proposal the contribution of employers would be half of this levy on the basis that the Federal Government would be contributing a like amount.\textsuperscript{147} It is important to note that the German economy is one of the leading economies in Europe and was also the world’s top exporter until recently; a position now occupied by China.\textsuperscript{148}

Imposing a levy on business might arguably increase employer costs that could be transferred to employees by reducing their wages.\textsuperscript{149} This position was examined by the Centre for Independent Studies in relation to employer-funded maternity leave scheme, ‘[w]hile the relationship between wages and employment conditions is complex, this may suggest that universal employer-funded maternity leave would push women’s wages down and increase the gender wage gap.’\textsuperscript{150} Furthermore, to mitigate the effect of inequitable work conditions, the \textit{Fair Work Act 2009} (Cth) permits the Fair Work Commission to conduct an annual wage review and make a national minimum wage order.\textsuperscript{151}

Additionally, the imposition of the levy on employers has other positive effects such as encouraging sound corporate governance and reducing the potential for the kind of mismanagement and inappropriate risk-taking by directors that might lead to financial distress and insolvency, with the consequent loss of jobs and entitlements. In this respect, one of the aims of the abovementioned study by Noakes was to investigate the reasons behind business failures. Poor management was perceived as the most important contributor to insolvency for both small and large businesses.\textsuperscript{152} Murray argued that the assumption that employee entitlements were protected through GEERS encouraged employers to engage in excessive risk-taking, which in itself may have led to the collapse of the business.\textsuperscript{153}

\begin{itemize}
  \item[147] Al Bhadily, above n 22, 304.
  \item[149] Al Bhadily, above n 22, 304.
  \item[151] Al Bhadily, above n 22, 304.
  \item[152] Noakes, above n 29.
  \item[153] Murray, above n 31.
\end{itemize}
Moreover, business contributions could be reduced by adopting a rollover provision, where undistributed contributions are added to the following year’s fund as well as the investments that are made with contributions.\textsuperscript{154} This provides a financial incentive to help to improve managerial style and reduce moral hazard, meaning that the money would be well spent, and employers would become accountable for their employees’ entitlements. Therefore, any unused funds would reduce the amount required to be paid by businesses and the federal government for future contributions to this proposal (see Table 2).

This proposal is fairer to all parties involved; employees, employers and the community. It recognises the vulnerability of the employees in case of insolvency by providing them full coverage to their entitlements.\textsuperscript{155} Also, this proposal is fairer to the employers as it addresses their liability to pay employee entitlements in the event of insolvency. Full coverage to employee entitlements would be provided. In addition, a sense of fairness to the community would be conveyed if a levy was imposed on employers to fund half of the required cost of the scheme. Furthermore, the proposed insurance legislation imposes liability on companies to contribute to the scheme; failure to do so would expose directors to financial and criminal liability.

Table 2: Comparison between proposed Labor and Liberal insurance schemes and the alternative

<table>
<thead>
<tr>
<th>Effect</th>
<th>Proposed insurance schemes</th>
<th>The alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Administration costs</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Paid for by</td>
<td>Business</td>
<td>Business/government</td>
</tr>
<tr>
<td>Investment</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Exemption</td>
<td>Small business</td>
<td>None</td>
</tr>
<tr>
<td>Cash flow</td>
<td>Yes</td>
<td>Partially</td>
</tr>
<tr>
<td>Incentive to improve managerial style</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Deterrence of risky activities</td>
<td>None</td>
<td>Yes</td>
</tr>
</tbody>
</table>

\textsuperscript{154} Mohammed Al Bhadily and Robert Guthrie, ‘Can Unions Protect Workers from Employer Insolvency?’ [2009] Journal of Applied Law and Policy 1; National Entitlement Security Trust, Information Guide <http://www.nest.net.au/page/NEST%20EmployerGuide.pdf>; National Entitlement Security Trust, Investment of NEST contributions <http://www.nest.net.au/page/investment.asp>. The contributions investment has also been used in some employee entitlements protection funds such as Manusafe, which is a union-based trust fund. It was established in 2000 and was subsequently renamed the National Entitlements Security Trust (NEST), and was intended to provide protection for employee entitlements: annual leave, long service leave, sick leave, redundancy, productivity payments and redundancy. These funds are invested on behalf of the members, namely the employers. See;

\textsuperscript{155} Al Bhadily, above n 22, 304.
VII Conclusion

This paper began by exploring the potential for a joint employer and federal government-funded insurance scheme. An alternative solution for protecting employee entitlements in the event of corporate failure was proposed. This was followed by a critique on the pros and cons of the scheme to decide if it would provide a suitable and sustainable protective measures for employee entitlements. Finally, the effectiveness of an insurance option as a viable protective measure is scrutinised and the proposed scheme’s capacity to provide fairness in terms of effectively guaranteeing employee entitlements is proposed in the event of insolvency.

Insolvency and the protection of employee entitlements are very delicate issues, especially during periods of financial crisis when thousands of employees are losing their jobs and entitlements, which should be part of employer’s liability. The Corporations Act provides protection for employee entitlements through the distribution of insolvent assets. However, in most insolvency cases there are insufficient assets available for distribution after secured creditors have enforced their securities. In this situation, employees cannot receive their entitlements. This has led both major Australian political parties to create alternative protective measures for employees; resulting in the establishment of GEERS by the Howard Government in 2002, which was replaced in 2012 by FEG, established by the Gillard Government. Both GEERS and FEG provide/d limited coverage for employee entitlements, funded by taxpayers. Overall, FEG provides more coverage than GEERS. The way both schemes were funded shifted the liability from employers to taxpayers, which in some circumstances, encourages the mismanagement and illegal activities of enterprises.

In all, the administrative and legislative schemes both proposed and introduced by political parties are not able to provide effective protective measures for all employee entitlements in the event of insolvency. In particular, few insurance initiatives proposed by either major political party are viable alternatives to the current measures that are intended to provide protection for businesses employing more than 20 workers. Small businesses in Australia are vulnerable to failure in the initial years of trading. Failures of government sponsored schemes, such as FEG, have the potential to lead to more businesses taking greater risks that in turn lead to potential increases in insolvency. This is attributed to the high cost involved and the failure to address issues, such as moral hazard and the lack of coverage afforded to small business employees.

Such proposals have been criticised as being too costly, as insurance companies are likely to charge high premiums resulting in an increased incidence of moral hazard. These concerns have led to the consideration of another alternative that could provide viable protective measures that are capable of satisfactorily addressing these concerns. The insurance scheme proposed in this paper provides fairer protective measures to all employees that are capable of covering and protecting employee entitlements by imposing a shared funding liability on employers and the federal government. This would help to minimise the incidences of employee entitlements being adversely affected by employer insolvency.
Alternative solutions for protecting employee entitlements in the event of corporate failure are worth considering. In all, the Australian legal system for recovering employee entitlements could be more effective. Even though employees have priority in the event of insolvency, there is often inadequate funds available once secured creditors have recovered their assets. A proposed solution, in the form of an insurance-based scheme, has merit in an Australian context.
‘PAPERLESS ARRESTS’: NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LTD v NORTHERN TERRITORY (2015) 326 ALR 16

I Introduction

In North Australian Aboriginal Justice Agency Ltd v Northern Territory, an unsuccessful challenge was mounted to the constitutional validity of div 4AA of pt VII of the Police Administration Act 1978 (NT) (‘PA Act’).

The principal provision in div 4AA is s 133AB. It applies where a person is arrested without warrant on the basis of a reasonable belief that he or she has committed, was committing, or was about to commit an ‘infringement notice offence’. It provides that a person arrested in these circumstances may be held in custody for a period of up to four hours, or, if the person is intoxicated, until such time as the arresting officer reasonably believes the person no longer to be intoxicated.

Miranda Maria Bowden, the second plaintiff in the proceedings, was arrested in Katherine early in the evening of 19 March 2015. She was taken into custody under s 133AB and held for nearly 12 hours. Upon her release she was issued with an infringement notice which alleged the commission of two offences.

The North Australian Aboriginal Justice Agency Ltd and Ms Bowden (the first and second plaintiffs respectively) commenced proceedings in the original jurisdiction of the High Court, contending that div 4AA was invalid and sought a declaration...
The second plaintiff also sought to make out an action in false imprisonment.8

The plaintiffs contended that div 4AA was invalid on two alternative bases. First, it was argued that div 4AA purports to confer on the Northern Territory executive a power of detention which is punitive in character, and which therefore offends the constitutionally-mandated separation of powers which the plaintiffs contended operates in the Northern Territory.9 In advancing this argument, the plaintiffs relied upon the well-settled principle that, subject to certain limited exceptions, ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’.10

The plaintiffs further argued that in purporting to confer on the Northern Territory executive a power of detention which is punitive in character, div 4AA interferes with the institutional integrity of the courts of the Northern Territory in a manner which offends the principle in Kable v Director of Public Prosecutions (NSW).11

II Construing the Impugned Provisions

A The Competing Constructions

Division 4AA of the PA Act was introduced by the Police Administration Amendment Act 2014 (NT). The principal provision in div 4AA, s 133AB, is engaged where a person is arrested without warrant (under PA Act s 123) on the basis of a reasonable belief that he or she has committed, was committing, or was about to commit an infringement notice offence. It provides, in s 133AB(2), that a person arrested in these circumstances may be held in custody for a period of up to four hours, or, if the person is intoxicated, until such time as the arresting officer reasonably believes the person no longer to be intoxicated. Section 133AB(3) provides that the arresting officer, or any other member of the Northern Territory Police Force, may ‘on the expiry of the period mentioned in subsection (2)’:  

(a) release the person unconditionally; or

(b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or

(c) release the person on bail; or

7 Ibid 18 [4].
8 Ibid 18 [5].
9 Ibid 18−19 [8].
10 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 27 (‘Chu Kheng Lim v Minister for Immigration’).
(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

The parties advanced competing constructions of s 133AB. The plaintiffs contended that the period of detention authorised by s 133AB(2) served simply to delay, for up to four hours, the making of a decision in respect of how a person taken into custody ought to be dealt with. The plaintiffs described this as amounting to a ‘superadded four hour period of detention’, and argued that the detention authorised by s 133AB was thus punitive in character.

The Northern Territory submitted that s 133AB, properly construed, did not authorise the detention for four hours of every person taken into custody without warrant in connection with the commission of an infringement notice offence. In the Northern Territory’s submission, the power of detention conferred by s 133AB was subject to a number of limitations which were not made explicit in div 4AA.

In this connection, the defendant argued that s 133AB was subject to the PA Act s 137. Section 137(1), which mirrors an equivalent requirement at common law, provides that a person taken into custody under a provision of the PA Act or any other Act must be brought before a justice or court as soon as is reasonably practicable. This provision is itself subject to ss 137(2) and 137(3), which provide that a person may, in some circumstances, be held for a reasonable period for the purposes of questioning and investigation. The defendant contended that the ‘overarching’ requirement provided for in s 137(1) operated where a person was detained under s 133AB(2).

Further, the defendant contended that div 4AA was confined in its operation to those circumstances in which arrest under s 123 was appropriate, in order to:

(a) ensure the person is available to be dealt with in respect of an offence if considered appropriate;

(b) preserve public order;

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13 Ibid 15.
14 Northern Territory, ‘Defendant’s Submissions’, Submission in NAAJA v NT, M45/2015, 6 August 2015, 13.
17 Northern Territory, ‘Defendant’s Submissions’, Submission in NAAJA v NT, M45/2015, 6 August 2015, 11.
(c) prevent the completion, continuation or repetition of the offence or the commission of another offence;

(d) prevent the concealment, loss or destruction of evidence relating to the offence;

(e) prevent the harassment of, or interference with, persons in the vicinity;

(f) prevent the fabrication of evidence in respect of the offence; and/or

(g) preserve the safety or welfare of the public or the person detained.18

B The Court’s Approach

Chief Justice French and Justices Kiefel and Bell commenced their analysis of the provisions by affirming the centrality of the common law principle of legality.19 Though the scope and rationale of the principle of legality is a matter of some debate,20 it is at least well-settled that the principle requires legislation to be construed, so far as is possible, in a manner which minimises its intrusion upon fundamental common law rights.21

Upon this footing, French CJ, Kiefel and Bell JJ accepted the defendant’s construction. However, their Honours did not offer a concluded view as to whether div 4AA was subject to s 137(1), as they were of the view that ‘[e]ven if s 137(1) did not apply, the common law obligations, which operate in the absence of clear words to the contrary, would require the police officer taking a person into custody under s 133AB to bring that person before a justice of the peace or a court as soon as practicable’.22 Their Honours explicitly accepted the defendant’s argument that the

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18 Ibid 13−14 (citations omitted).


22 NAAJA v NT (2015) 326 ALR 16, 26 [28].
operation of div 4AA was confined to the circumstances set out in (a)–(g) of the
defendant’s written submission (though some doubt was expressed as to the applic-
ability of paragraphs (d) and (f) in respect of an infringement notice offence).23 Their
Honours concluded that ‘thus confined in its operation … Div 4AA does not disclose
a punitive purpose’.24

Justice Keane did not offer a view as to the proper construction of div 4AA. His
Honour was of the opinion that the manner in which the matter was argued made it
an inappropriate vehicle for the resolution of the difficult questions of construction
presented by div 4AA.25 As will be observed below, his Honour was also of the view
that the answers to the constitutional questions did not turn upon the resolution of the
differences between the parties as to the construction of div 4AA, and were ‘readily
resolved in the light of existing authority’.26

Like French CJ, Kiefel and Bell JJ, Nettle and Gordon JJ rested their conclusion in
favour of the defendant’s construction in part upon the common law principle of
legality.27 Their Honours also noted the desirability of giving div 4AA an operation
which is consonant with s 137 and with s 16(2) of the *Bail Act 1982* (NT),28 and
cited the object of preferring a construction which would avoid giving div 4AA an
‘irrational and capricious’ operation.29

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23 Ibid 28 [35]. The circumstances are set out above: see above n 18 and accompanying
text.
24 Ibid 28 [36].
25 Ibid 54–6 [149]–[154]. See also the observation of Gageler J (at 37 [75]):
The arguments divide along battlelines not unfamiliar where questions about the con-
stitutional validity of a law are abstracted from questions about the concrete application
of that law to determine the rights and liabilities of the parties. The party seeking
to challenge validity advances a literal and draconian construction, even though the
construction would be detrimental to that party were the law to be held valid. The party
seeking to support validity advances a strained but benign construction, even though
the construction is less efficacious from the perspective of that party than the literal
construction embraced by the challenger. The constructions advanced reflect forensic
choices: one designed to maximise the prospect of constitutional invalidity; the other to
sidestep, or at least minimise, the prospect of constitutional invalidity. A court should
be wary.
26 Ibid 54 [149].
27 Ibid 70–1 [222].
28 Ibid 69 [215], 71 [225].
29 Ibid 70 [221]. In this respect, Nettle and Gordon JJ observed:
[If] the stipulation of a period of up to four hours were to override the duty in s 137(1), it
would have the irrational and capricious consequence that a person arrested under s 123
on suspicion of committing, having committed or being about to commit a very serious
offence … must be brought before a justice or court under s 137(1) as soon as practicable
unless sooner granted bail or released, but a person arrested under s 123 for a relatively
trivial infringement notice offence … could be detained for longer than the time when it
becomes practicable to grant the person bail, release the person unconditionally or with
an infringement notice, or bring the person before a justice or court.
Justice Gageler alone accepted the plaintiffs’ construction of div 4AA. Though Gageler J rested his conclusion upon a number of considerations,30 his Honour was plainly influenced by the extrinsic materials upon which the plaintiffs relied.31 In particular, his Honour quoted a passage of Hansard in which the Attorney-General for the Northern Territory described div 4AA as effecting a scheme of ‘catch and release’,32 and described the provisions as:

restor[ing] a simple idea that when a police officer arrests a person for a street offence, they have taken that person out of commission. They bring them to the watch house, drop them off at the watch house, write out the summary infringement notice – so it is not entirely paperless – which goes into the property bag of the person who is then placed in the cells for the next four hours. In four hours’ time, they come out, collect their property, collect their summary infringement notice, and if they wish to contest the allegations in the summary infringement notice, then there are processes for that to occur. Those processes are explained on the back of the summary infringement notice.33

Justice Gageler concluded that the detention authorised by div 4AA was neither ‘reasonably necessary to effectuate a purpose which is identified in the statute’ nor of a duration which ‘is capable of objective determination by a court at any time and from time to time’, and was therefore punitive.34


31 It is worth noting that Gageler J dismissed the common law principle of legality as being of ‘little assistance given that the evident statutory object is to authorise a deprivation of liberty and that the statutory language in question is squarely addressed to the duration of that deprivation of liberty’: NAAJA v NT (2015) 326 ALR 16, 38–9 [81]. Apparently in response to this observation, French CJ and Kiefel and Bell JJ quoted (at 20 [11]) T R S Allan’s observation that

[I] liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.


32 Northern Territory, Parliamentary Debates, Legislative Assembly, 26 November 2014 (Johan Elferink).

33 Ibid.

III Separation of Powers

Only Gageler and Keane JJ found it necessary to engage with the question of whether a constitutionally-mandated separation of powers operates in the Northern Territory.

In this connection, Gageler J first observed that the plaintiffs’ argument that div 4AA offended the doctrine of separation of powers depended upon the proposition ‘that the judicial power which is conferred by a law enacted in the exercise of a distinct legislative power conferred by the Parliament under s 122 is judicial power of the Commonwealth’.35

Justice Gageler then observed that making good this proposition would require disturbing the holdings in North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 and Kruger v Commonwealth (1997) 190 CLR 1. His Honour concluded that the length of time for which these decisions have stood, along with the far-reaching implications which would flow from the acceptance of the plaintiffs’ submissions, compelled the conclusion that a constitutionally-mandated separation of powers does not operate in the Northern Territory.36 The conclusion of Gageler J in respect of the plaintiffs’ separation of powers arguments thus appears to rest principally upon an acknowledgment of the undesirability of defeating settled expectations and disturbing settled understandings.

The judgment of Keane J took up these points, but also engaged with the substantive merits of the plaintiffs’ contentions and found them wanting.37 His Honour observed:

[C]onclusions of constitutional text and structure securely undergird the Court’s decision in Kruger. In contrast, the arguments of the plaintiffs appeal to a vague notion of symmetry as requiring that the power exercised by the courts of the Northern Territory be subject to the same limits as that exercised by the courts of the Commonwealth; but this line of argument fails to recognise that the governmental institutions of the Territories have never been thought to be miniature versions of their Commonwealth counterparts … The Territories are dependencies of the Commonwealth, not small-scale versions of it, or participants in the federal compact between the Commonwealth and the States. A wide range of Territories may be administered by the Commonwealth under s 122. No distinction is made between Territories which are internal and those which are external. They may be remote and sparsely populated island communities, or regions of uncertain political stability. The notion that the arrangements for the government of each of such disparate dependencies must mirror those applicable to the Commonwealth has nothing to commend it.38

35 NAAJA v NT (2015) 326 ALR 16, 44 [106].
36 Ibid 47 [117].
37 Ibid 57 [162], 59 [169], 61 [175].
38 Ibid 58 [166]–[167].
Justice Keane then proceeded to observe that, given the settled understanding that a separation of powers does not operate at State level, the plaintiffs’ argument ‘did not explain why residents of the Territories should be in a better position in relation to immunity against executive detention than residents of the States’.

Finally, Keane J considered and rejected the plaintiffs’ contention that ‘territory courts always and only exercise federal jurisdiction … because all matters which territory courts adjudicate arise under a Commonwealth law either immediately (where the applicable law is a Commonwealth statute) or mediately (where the applicable law is a Territory statute supported ultimately by s 122)’. Indeed, Keane J stated unequivocally that if ‘the Northern Territory Legislative Assembly had purported to vest the judicial power of the Commonwealth in the courts and tribunals of the Territory, the attempt would have been futile’.

IV Kable

Given div 4AA does not, in terms, confer any power or function upon the courts of the Northern Territory, nor explicitly interfere with their functions, the plaintiffs’ argument in respect of the Kable principle was attended by difficulty from the outset. The plaintiffs’ Kable argument consisted of two propositions. First, the plaintiffs contended that a person detained under div 4AA has no ‘real possibility of … approaching a court during the period of detention’. Second, ‘even if a person were able to approach a court, the court would be limited to reviewing the legislative criteria’ and would be precluded from ‘taking into account the factors it would ordinarily consider when a person detained in custody and not yet convicted of any crime is brought before it’.

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40 NAAJA v NT (2015) 326 ALR 16, 59 [168].


42 NAAJA v NT (2015) 326 ALR 16, 62 [178].


44 Ibid.
Chief Justice French and Justices Kiefel and Bell did not engage with the plaintiffs’ Kable argument at length. Indeed, after observing that the plaintiffs’ argument ‘seemed to proceed on the premise that div 4AA did not impose any duty to bring a person arrested before a justice of the peace or a court as soon as practicable after arrest’, their Honours simply referred to their earlier conclusions in respect of the relationship between div 4AA and s 137(1).

Justice Keane disposed of the plaintiffs’ Kable argument in almost as small a space. After making the point that div 4AA was directed to the executive of the Northern Territory, rather than its courts, Keane J characterised the plaintiffs’ Kable argument as ‘in truth, a complaint that functions which ought to be performed by the judiciary are being performed by the executive’. His Honour thus concluded that ‘the plaintiffs’ argument confuses the Kable principle with the requirements of the constitutional separation of powers at the level of the Commonwealth.’

Justices Nettle and Gordon approached the Kable issue in much the same manner as in the leading judgment. After referring to their conclusion that, as a matter of construction, ‘Div 4AA does not grant police a power to detain for a period longer than provided for by ss 123 and 137’, their Honours concluded that the provisions ‘cannot be regarded as usurping or otherwise interfering with the exercise of judicial power by a court of the Territory once a person who has been arrested is brought before the court’.

The conclusion of Gageler J stands in stark contrast to those of the other members of the Court. As already noted, his Honour approached the Kable principle having already concluded that div 4AA purported to confer on the executive of the Northern Territory a power of detention which is punitive in character.

Critically, however, Gageler J was of the view that div 4AA offended the Kable principle not in consequence of the Northern Territory courts ‘being kept out of the

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45 It is worth noting that their Honours did observe that ‘[i]t has not been established, and the plaintiffs did not argue, that public confidence in the courts is a touchstone of invalidity’: NAAJA v NT (2015) 326 ALR 16, 30 [40]. The notion that an apprehended undermining of ‘public confidence’ ought to serve as a ‘touchstone of invalidity’ in this context has been the subject of considerable criticism: see, eg, Jeffrey Goldsworthy, ‘Kable, Kirk, and Judicial Statesmanship’ (2014) 40 Monash University Law Review 75, 79–81; Elisabeth Handsley, ‘Do Hard Laws Make Bad Cases? The High Court’s Decision in Kable v Director of Public Prosecutions (NSW)’ (1997) 25 Federal Law Review 171, 175–7; Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Geoffrey Lindell (ed), The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason (Federation Press, 2007) 144, 157.

47 Ibid.
48 Ibid 63–4 [186].
49 Ibid 64 [187].
50 Ibid.
51 Ibid 74 [239].
52 Ibid.
process of punitive detention for which s 133AB(2)(a) provides’, but instead by their being ‘brought into the further processes which Div 4AA contemplates will occur after that period of punitive detention is over’. As his Honour explained:

Courts of the Northern Territory are ... made support players in a scheme the purpose of which is to facilitate punitive executive detention. They are made to stand in the wings during a period when arbitrary executive detention is being played out. They are then ushered onstage to act out the next scene. That role is antithetical to their status as institutions established for the administration of justice.

V Conclusion

The human rights concerns which arise in connection with the scheme effected by div 4AA means NAAJA v NT will likely be the subject of considerable analysis. But if that commentary takes as its principal focus the constitutional dimensions of the matter, a troubling concern which emerges from the Court’s approach to the construction of div 4AA may escape notice.

The construction of div 4AA adopted by the majority leaves the provisions with a very limited operation. As noted above, the provisions were described in Parliament as effecting a scheme of ‘catch and release’, under which the executive are at liberty to detain a person for up to four hours before making a decision as to how they ought to be further dealt with. The majority, however, concluded that a person detained under div 4AA must be brought before a court as soon as is reasonably practicable (if not sooner released), with the four-hour limit operating as merely a cap upon what amounts to a reasonable time. Once construed in this way, it is difficult to see what object div 4AA is intended to achieve: it appears merely to confirm the availability of a course of action which very likely existed prior to the division’s introduction. Indeed, the Northern Territory sought to explain div 4AA as having the object of

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53 Ibid 50 [132].
54 Ibid.
55 Ibid 50 [134]. His Honour added (at 50–1 [135]):

[I]est it be thought incongruous that the constitutional defect in a legislative scheme of punitive executive detention is to be found at the periphery of that detention [that it] is important to recognise that a constitutional doctrine which limits legislative design has flow-on effects for political accountability. Were the provisions which contemplate a role for courts to be removed, the legislative scheme of Div 4AA would appear to be quite different. The legislative scheme would be starkly one of catch and release. The scheme would be reduced so as to appear on the face of the legislation implementing it to be one which authorises police to detain, and then release, persons arrested without warrant on belief of having committed or having been about to commit an offence. The political choice for the Legislative Assembly would be whether or not to enact a scheme providing for deprivation of liberty in that stark form.

56 In fact, the matter was the subject of commentary even prior to its being decided. See, eg, Anna Rienstra, ‘The “Paperless Arrest”: Chapter III and Police Detention Powers in the Northern Territory’ on AUSPUBLAW (9 November 2015) <http://auspublaw.org/2015/11/the-paperless-arrest/>. 
confirming the existence of a power to issue infringement notices upon release to persons arrested in respect of infringement notice offences.\textsuperscript{57} It may well be that the narrowness of this object casts doubt upon the correctness of the majority’s approach to the provisions’ construction.

Yet whatever may be the relative merits of the conclusions of the majority and Gageler J as to the proper construction of div 4AA, it seems highly probable in light of the extrinsic materials quoted above that it is the construction adopted by Gageler J that is consonant with the understanding of the division held by those responsible for its enactment. Furthermore, the structure and operation of executive government means that those responsible for administering div 4AA have likely derived their understanding of its meaning from those who were responsible for its introduction.

It follows that while the construction adopted by the majority in \textit{NAAJA v NT} appears to resolve the constitutional concerns which were before the Court, there is good reason to be concerned about the extent to which those responsible for administering the division will heed and give effect to what amounts in practice to a new understanding of its meaning.\textsuperscript{58}

There is, of course, an obvious rejoinder to this concern: if the executive were to continue to implement the provisions according to their original understanding, any person who was as a result wrongfully detained could seek curial relief in respect of that detention. Though this is perfectly correct as an abstract proposition, it is predicated upon an assumption that the victims of such wrongful detention could avail themselves of access to courts and to legal assistance. When, as in the present case, the persons in question are likely to be residents of remote and disadvantaged communities, the soundness of this assumption is questionable.

Indeed, it is unfortunate that these practical considerations — of administrative responsiveness and inertia on the one hand, and of racial, economic, and geographic disadvantage on the other — did not figure prominently in the Court’s reasoning. Far from being irrelevant, they go to the heart of the question of whether the remedial construction adopted by the Court will adequately protect the interests of those whom the provisions will affect.

It is therefore important that the decision in \textit{NAAJA v NT} be scrutinised not only with a view to throwing light upon constitutional doctrine, but for the purpose of measuring the Court’s construction of div 4AA against its real-world implementation in remote communities. If, in the wake of \textit{NAAJA v NT}, the operation of the division, as elucidated by the majority, is at odds with the manner in which the provisions are executed, it will be difficult to escape the conclusion that the human rights concerns which animated the plaintiffs’ contentions have yet to be meaningfully addressed.

\textsuperscript{57} Northern Territory, ‘Defendant’s Submissions’, Submission in \textit{NAAJA v NT}, M45/2015, 6 August 2015, 13.

\textsuperscript{58} This concern was adverted to in passing by Gageler J, where his Honour cited \textit{International Finance Trust Co Ltd v New South Wales Crime Commission} (2009) 240 CLR 319, 349: \textit{NAAJA v NT} (2015) 326 ALR 16, 38 [77].
MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZARH (2015) 326 ALR 1

I Introduction

In Minister for Immigration and Border Protection v WZARH,1 the High Court considered whether WZARH, a Sri Lankan Tamil who arrived by boat on Christmas Island in 2010, had been denied procedural fairness in the Independent Merits Review of his Refugee Status Assessment. The Minister was granted special leave to appeal after two judges of the Federal Court invoked the concept of ‘legitimate expectations’ to find in favour of WZARH. The High Court dismissed the appeal, but, usefully, provided a succinct statement of the current principles on procedural fairness. This case note analyses the implications of the decision on the role of ‘legitimate expectations’ at both the threshold- and content-stage of the inquiry.

II The Decision in WZARH

A The Facts

The respondent, WZARH, was a Sri Lankan national of Tamil ethnicity. Upon arriving by boat at Christmas Island in November 2010, WZARH became an ‘offshore entry person’ within the meaning of s 5(1) of the Migration Act 1958 (Cth) (‘the Act’), and was taken into detention.

As it then stood, s 46A of the Act prevented an offshore entry person from making a valid application for Protection (Class XA) visa. The only way WZARH could make a valid application for a visa was if the Minister exercised his or her power under s 46A(2) to ‘lift the bar.’2 Thus, on 21 January 2011 WZARH requested a Refugee Status Assessment (‘RSA’), claiming that he was a person to whom Australia owed protection obligations under the Refugees Convention.3 WZARH argued that he had a well-founded fear of persecution due to his Tamil ethnicity, and both his perceived

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1 (2015) 326 ALR 1 (‘WZARH’).
3 For an overview of the RSA and IMR processes see Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319, 343 [41]–[49]. This description was approved by the High Court in WZARH (2015) 326 ALR 1, 3 [2] (Kiefel, Bell and Keane JJ), 11 [51] (Gageler and Gordon JJ).
and actual political activities. The Minister’s delegate made an adverse assessment of WZARH’s claim to refugee status.

WZARH then sought an Independent Merits Review (‘IMR’), and was interviewed by a reviewer (‘the First Reviewer’), who explained that she would ‘undertake a fresh re-hearing’ and then make a recommendation to the Minister. The First Reviewer subsequently became unavailable for undisclosed reasons, and without notification to WZARH, a second person (‘the Second Reviewer’) became responsible for completing the IMR.

The Second Reviewer considered the written materials, such as WZARH’s original application, a transcript of an interview with an officer on Christmas Island, submissions made on his behalf, country information, and the audio recording and transcript of his interview with the First Reviewer, but did not undertake a second oral hearing. The Second Reviewer formed an adverse view as to WZARH’s credibility due to ‘inconsistencies’ in the factual evidence on his political activities, and recommended to the Minister that WZARH not be recognised as a person to whom Australia owed protection obligations.

WZARH applied for judicial review of the decision in the Federal Circuit Court, arguing that he had been denied procedural fairness.

B The Lower Court Decisions

The primary judge dismissed WZARH’s application, holding that it was not procedurally unfair for the Second Reviewer to make his recommendation to the Minister based on the written material and audio recordings.

On appeal, the Full Federal Court (Flick and Gleeson JJ, Nicholas J in a separate concurring judgment) overturned the decision of the primary judge and declared that WZARH had been denied procedural fairness. Justices Flick and Gleeson observed that WZARH had a ‘legitimate expectation’ that the reviewer who interviewed him would be the same person to make the recommendation to the Minister, and, as such, he would be given the opportunity to personally ‘impress upon the person … the merits and genuineness of his claims’. Procedural fairness thus required that WZARH at least be afforded an opportunity to make submissions on how the IMR should proceed. Justice Nicholas reached the same conclusion, but without recourse to the concept of ‘legitimate expectations’.

The Minister appealed this decision to the High Court.

5 Ibid [16].
6 (2014) 230 FCR 130.
7 Ibid 142 [28].
8 Ibid 142 [29].
9 Ibid 146 [48], 148–9 [57].
C The High Court Decision

The High Court unanimously dismissed the appeal, delivering two judgments: the plurality of Kiefel, Bell and Keane JJ, and a concurring joint judgment of Gageler and Gordon JJ.

It was not contentious that WZARH was entitled to procedural fairness in the IMR. The key issue on appeal was whether the Federal Court majority had erred by relying on WZARH’s ‘legitimate expectation’ to reach the conclusion that he had been denied procedural fairness.

The plurality considered the significant criticisms levelled against the concept of ‘legitimate expectations’ by the High Court in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam and Plaintiff S10/2011v Minister for Immigration and Citizenship. The plurality considered that these cases made the position ‘sufficiently clear’: legitimate expectations do not provide a basis for determining to whom procedural fairness applies, and nor do they provide a basis for determining the content of such procedural fairness. The plurality were critical of the reliance on the concept by Flick and Gleeson JJ, and preferred the reasoning of Nicholas J, who reached the correct conclusion without engaging in a ‘distract[ing]’ discussion of legitimate expectations. According to the plurality, the content of procedural fairness is simply what is required ‘in order to ensure that the decision is made fairly in the circumstances’.

Justices Gageler and Gordon were less dismissive of the concept of ‘legitimate expectations’ but confined its role to a supplementary function. Their Honours held that it was relevant only to the extent it informs the opportunity a reasonable administrator ought fairly have given in the totality of the circumstances, and is not a basis for determining the content of procedural fairness in itself.

Both judgments acknowledged that the ‘practical requirements’ of procedural fairness did not require an administrative decision-maker to afford a person affected by a decision an oral hearing in every case. However, an oral hearing was particularly important in the circumstances because the IMR process raised potential issues of

10 Minister for Immigration and Border Protection, Submission in Minister for Immigration and Border Protection v WZARH, S85/2015, 22 May 2015, 10 [37]; WZARH (2015) 326 ALR 1, 8 [33] (Kiefel, Bell and Keane JJ), 11–12 [51] (Gageler and Gordon JJ).
11 Ibid 6 [23].
12 (2003) 214 CLR 1 (‘Lam’).
14 WZARH (2015) 326 ALR 1, 7 [30].
15 Ibid 8 [30].
16 Ibid.
17 Ibid.
18 Ibid 13 [61].
19 Ibid 8 [33] (Kiefel, Bell and Keane JJ), 14 [63] (Gageler and Gordon JJ).
WZARH’s credibility and his subjective state of mind. The plurality emphasised that the ability of the decision-maker to directly question the applicant, clarify areas of confusion or misunderstanding, and personally observe the applicant’s demeanour, was especially valuable where the applicant could only communicate through an interpreter. Given these benefits, the plurality concluded that WZARH had suffered a ‘practical injustice’, in the sense that it could not be said that he lost no opportunity to advance his case.

Similarly, Gageler and Gordon JJ considered that unfairness lay in the fact that the variation of procedure changed the ‘nature’ of WZARH’s opportunity to be heard, from the opportunity to personally convince an identified reviewer who would make the assessment, to the opportunity to present a case through recorded oral evidence and written submissions to an unknown reviewer. The change in procedure would be reasonably expected to impact the ‘coverage, detail and emphasis’ of the submissions and the evidence presented.

Both judgments concluded that in the circumstances, procedural fairness required that WZARH be informed of the change in process, given an opportunity to be heard on how the review process should proceed, and given the chance to at least request a second oral hearing. The plurality approved the obiter remark by Nicholas J that the Minister would have been ‘hard pressed to resist’ an application for a second hearing. Justices Gageler and Gordon were more ambivalent; noting that whether procedural fairness dictated the Minister granting a second hearing would depend on the justifications given for the request and, possibly, other ‘logistical considerations.’ Ultimately, resolving this ‘hypothetical inquiry’ was not required in order to reach the conclusion that WZARH had been denied procedural fairness.

**III Analysis**

The significance of WZARH lies in the Court’s discussion of ‘legitimate expectations’. This analysis seeks to place the decision in the context of the previous case law on legitimate expectations, and then assess how it has altered the law on procedural fairness, at the threshold- and content-stage of the inquiry.

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20 Ibid 10 [41] (Kiefel, Bell and Keane JJ), 14 [65] (Gageler and Gordon JJ).
21 Ibid 14 [65] (Gageler and Gordon JJ).
22 Ibid 10 [41].
23 Ibid 10 [42].
24 Ibid 14 [64].
25 Ibid 14 [66].
26 Ibid 11 [45]–[46] (Kiefel, Bell and Keane JJ), 14 [67] (Gageler and Gordon JJ).
27 Ibid 11 [45].
28 Ibid 15 [68].
29 Ibid.
A Legitimate Expectations: A Troubled Concept

Despite being the subject of judicial discourse for over 45 years, the concept of ‘legitimate expectations’ is poorly understood. Since its ‘invention’ by Lord Denning in *Schmidt v Secretary of State for Home Affairs*, the task of delineating its precise meaning, scope and purpose has frequently troubled the minds of judges.

In Australia, the concept has been restricted to a strictly procedural operation but has been put to various uses within these procedural confines. It was included in Mason J’s seminal statement of the threshold test in *Kioa v West*: that procedural fairness must be accorded ‘in the making of administrative decisions which affect rights, interests and legitimate expectations’. The notion of legitimate expectations has also been deployed on occasion to ascertain the content of the obligation of procedural fairness. The ‘high water mark’ of this use of the concept is in the High Court’s 1995 decision in *Teoh*, where a majority of the High Court held that Australia’s ratification of the *Convention on the Rights of the Child* provided a basis for the existence of a ‘legitimate expectation’ in a father facing deportation, that the government decision-maker would treat the best interests of his children as a ‘primary consideration.’

The High Court’s 2003 decision in *Lam* marked a significant change in direction away from reliance on the concept. The judgments of McHugh and Gummow JJ, Hayne J and Callinan J each doubted the correctness of *Teoh* without expressly overruling it. In this case, the department had requested that an applicant, who was

33 See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 23–4 (Mason CJ), 41 (Brennan J), 60 (Dawson J); *Lam* (2003) 214 CLR 1, 21 [67] (McHugh and Gummow JJ); *WZARH* (2015) 326 ALR 1, 12 [55] (Gageler and Gordon JJ). This is in contrast to the United Kingdom, where the doctrine of ‘legitimate expectations’ has been given substantive operation: *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
35 (1985) 159 CLR 550, 584, endorsed by a majority of the High Court in *Annetts v McCann* (1990) 170 CLR 596, 598.
38 Ibid 291–2 (Mason CJ and Deane J), 301–2 (Toohey J), 305 (Gaudron J).
facing possible visa cancellation, provide the contact details of his children’s carer, so the department could assess his relationship with his children, and the possible effects the visa cancellation would have on them. The applicant provided the details, but the department did not contact the carer before cancelling his visa, and did not notify the applicant of this fact. The High Court held that there was no denial of procedural fairness, as the failure by the department to follow its statement did not affect the fairness of the process.\(^{40}\) Importantly, the concept of legitimate expectations was criticised variously as: ‘an unfortunate one, apt to mislead’,\(^{41}\) as a phrase that ‘poses more questions than it answers’\(^{42}\) and a concept of ‘limited utility’.\(^{43}\)

Almost a decade later, in *Plaintiff S10/2011*, Gummow, Hayne, Crennan and Bell JJ remarked that ‘the phrase … when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.’\(^{44}\) Given this sweeping statement and the abundance of judicial misgivings in prior case law, it is surprising that the Court was compelled to reaffirm the correct principles a mere three years later. Nonetheless, the decision of *WZARH* warrants close analysis to examine whether the Court has imparted any new insights into the law on procedural fairness.

**B The Irrelevance of Legitimate Expectations to the Threshold Test**

The plurality, in obiter, replaced the traditional ‘rights, interests and legitimate expectations’ threshold test as articulated by Mason J in *Kioa v West*,\(^{45}\) with the broad test that administrative decision-makers must accord procedural fairness to those who are affected by their decisions, unless there is clear contrary legislative intention.\(^{46}\)

The plurality’s clear revocation of the ‘rights, interests and legitimate expectations’ test is to be commended. In light of the expansive approach to procedural fairness in modern times, maintainence of this formulation has been at best, unhelpful, and at worst, misleading. As described by Aronson and Groves, Mason J’s formulation continued a ‘paradox’— implicitly maintaining the existence of some logical distinction between the different elements of the phrase.\(^{47}\) The Court had already indicated a shift away from this phrase in *Lam*,\(^{48}\) and *Plaintiff S10/2011*,\(^{49}\) but the absence of a clear statement of the current principle carried the risk that lower courts would


\(^{41}\) Ibid 45 [140] (Callinan J).

\(^{42}\) Ibid 38 [121] (Hayne J).

\(^{43}\) Ibid 16 [47] (McHugh and Gummow JJ).


\(^{45}\) (1985) 159 CLR 550, 584.

\(^{46}\) *WZARH* (2015) 326 ALR 1, 8 [30].


\(^{49}\) (2012) 246 CLR 636, 658 [66].
continue to intermittently apply the *Kioa* formulation. In *WZARH*, the Court appears to have conclusively accepted that whatever assistance ‘legitimate expectations’ may have provided to the evolution and expansion of the circumstances that attract the rules of procedural fairness, the concept has no ongoing utility in this inquiry.\(^{50}\)

However the plurality’s straightforward formulation is vulnerable to the criticism that it achieves simplicity by sacrificing precision. Although a lengthy consideration of the threshold test was clearly beyond the scope of the case, it is undeniable that the plurality’s reformulation leaves a number of issues still unresolved. For example, is the ‘those who are affected’ test to be interpreted as referring to persons whose ‘rights and interests’ are affected, and is there still a distinction between these two elements? Are those persons previously entitled to procedural fairness by their ‘legitimate expectation’ now outside its reach, or has this aspect been subsumed by a broader conception of ‘interest’?\(^{51}\) What is the relationship between the current threshold test and the standing tests for common law writs or equitable remedies, acknowledging that procedural fairness has historically been given a more restricted application?\(^ {52}\)

Ultimately, these questions may be of primarily academic interest given the evident trend towards a near-universal application of the rules of procedural fairness.\(^{53}\) Nonetheless, it will be interesting to observe whether the plurality’s test proves to be a source of confusion in future cases, or whether the declining emphasis on the threshold test will render the reformulation inconsequential.

### C Legitimate Expectations and the Content of Procedural Fairness

The critical question in most cases considering procedural fairness is not whether the duty applies, but what the content of the duty is in the circumstances. Procedural fairness has no fixed content, but rather ‘conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case’.\(^ {54}\) In *WZARH*, the High Court clarified the role of ‘legitimate expectations’ in this inquiry.

As noted previously, both judgments clarified that the ‘legitimate expectation’ of a person affected by an administrative decision does not provide a basis for determining the content of such procedural fairness. The plurality found reference to the concept

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\(^{50}\) Lam (2003) 214 CLR 1, 16 [47] (McHugh and Gummow JJ).


\(^{52}\) See, eg, Elliott Cook, ‘Natural Justice: For Every Man and his Dog’ (2016) 23 *Australian Journal of Administrative Law* 102, 104.


\(^{54}\) *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).
‘both unnecessary and unhelpful.’\textsuperscript{55} Justices Gageler and Gordon were also critical of the concept, noting that ‘focussing on the opportunity expected, or legitimately to have been expected … can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given.’\textsuperscript{56}

However, both judgments left open the possibility that legitimate expectations may have a supplementary role in informing the content of the duty of procedural fairness. Despite their Honours’ dismissive language, the plurality endorsed the statement of Gleson CJ in \textit{Lam} to the effect that the rules of procedural fairness may be breached where a decision-maker resiles from a statement of intention as to the procedure to be followed if this results in unfairness.\textsuperscript{57} Although this reasoning does not expressly invoke the term ‘legitimate expectation’, it is difficult to conceptualise the unfairness other than by reference to the expectation created by the decision-maker. This interpretation is supported by the judgment of Gageler and Gordon JJ, who quoted a later part of Gleson CJ’s judgement in \textit{Lam} which stated that the creation of an expectation may ‘bear on the practical content of the obligation’ without ‘supplant[ing]’ it.\textsuperscript{58}

Several months before the High Court decision in \textit{WZARH}, the Full Federal Court stated that \textit{Lam} had ‘pivot[ed] the underlying analytical jurisprudence away from a doctrinal reliance on legitimate expectation towards an examination of the fairness of the process.’\textsuperscript{59} The High Court’s movement in \textit{WZARH} may be described as more than a ‘pivot’ — to be generous, it may be a full step forward towards conceptual clarity — but the essence of the Full Court’s analysis still rings true.\textsuperscript{60} The common thread between the two judgments in \textit{WZARH} is that a person’s ‘legitimate expectation’ does not provide a basis for the content of procedural fairness in itself, but it may play a subsidiary role by informing considerations of fairness and its practical requirements in the circumstances. In reality, the controversy surrounding the term is likely to deter counsel in future cases from mounting arguments based on ‘legitimate expectations.’ Expectations generated by an administrative decision-maker may still be relevant to identifying what amounts to a fair procedure on the facts of a particular case, but any future judicial engagement with the notion is likely to occur without reference to the ‘technical and loaded’\textsuperscript{61} term that is ‘legitimate expectation’.

\begin{footnotesize}
\textsuperscript{55} \textit{WZARH} (2015) 326 ALR 1, 8 [30] (Kiefel, Bell and Keane JJ), 13 [61] (Gageler and Gordon JJ).
\textsuperscript{56} Ibid 13 [61].
\textsuperscript{57} Ibid 11 [47] citing \textit{Lam} (2003) 214 CLR 1, 9 [25].
\textsuperscript{58} \textit{WZARH} (2015) 326 ALR 1, 13 [61] citing \textit{Lam} (2003) 214 CLR 1, 12–13 [34].
\textsuperscript{59} \textit{SZSSJ v Minister for Immigration and Border Protection} (2015) 234 FCR 1, 27 [92].
\textsuperscript{60} Cf Greg Weeks, ‘What Can We Legitimately Expect From the State?’ in Matthew Groves and Greg Weeks (eds), \textit{Legitimate Expectations in the Common Law World} (Hart Publishing, 2016) (forthcoming).
\textsuperscript{61} Aronson and Groves, above n 47, 425.
\end{footnotesize}
IV Conclusion

The decision of *WZARH* is an important case on the law of procedural fairness. It is now clear that the concept of ‘legitimate expectations’ has no role to play in the threshold test, and has only supplementary relevance at the content-stage to the extent that expectations generated by decision-makers inform the practical requirements of fairness in the circumstances. Ultimately, the Court’s decision has confirmed the trend over the past decade that the doctrine of ‘legitimate expectations’ will not be an enduring feature of Australian administrative law.
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