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# THE 2009 JAMES CRAWFORD BIENNIAL LECTURE ON INTERNATIONAL LAW

*The Hon Michael Kirby AC CMG\**

## THE GROWING IMPACT OF INTERNATIONAL LAW ON THE COMMON LAW\*\*

### I INTRODUCTION

This is the fourth Crawford lecture. The first was given by the Professor James Crawford himself. He was followed by Professors Ivan Shearer and Hilary Charlesworth. Each of the first three lecturers was at one time a member of the Faculty, and a Professor of Law, of the University of Adelaide. I am the first outsider to be entrusted with the responsibility.

Still I am no stranger to the University of Adelaide. During my service in the Australian Law Reform Commission ('ALRC'),<sup>1</sup> and later in the appellate judiciary, I enjoyed a close relationship with this law school. In particular, Adelaide has spawned many fine international lawyers. It has always been an important centre for research and teaching in international law.

Like Caesar's Gaul, this lecture is divided into three parts. The first will offer a tribute to James Crawford, a friend since early days in the ALRC. Secondly, I will describe the conversation that is occurring between the common law and the ever-growing body of international law that is such a powerful force in the contemporary world. I will do so not only by reference to developments that have been occurring in Australia and the United Kingdom (the original source of the common law), but also in Malaysia and Singapore, as well. I include these jurisdictions out of respect for our intellectual links with them and the video link that is established on this lecture as on past occasions, with alumni of the University of Adelaide and other colleagues in Malaysia and Singapore with whom the University of Adelaide enjoys a special relationship. Finally, I will offer some thoughts as to how one might conceptualise the growing use that is being made of

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\* Justice of the High Court of Australia (1996–2009). Member, Eminent Persons Group on the Future of the Commonwealth of Nations (2010–11). The author acknowledges the assistance of Mr Scott Stephenson, Research Officer in the High Court of Australia, and of Mr James Krumrey-Quinn of the University of Adelaide in the preparation of this lecture.

\*\* This was originally delivered as the fourth Crawford Lecture, at the Adelaide Law School, The University of Adelaide, 14 October 2009. Parts of this lecture are adapted from an earlier talk given at the City University of London on 23 April 2009. However, the text has been revised, expanded and updated.

<sup>1</sup> The Australian Law Reform Commission ('ALRC') was, prior to 1996, called the 'Law Reform Commission'. However, for consistency, it will be referred to as the 'ALRC' throughout this article.

international law in expositions of the domestic common law. In doing this, I will also provide some prognostications.

The topic is technical. However, I hope to demonstrate that it is also interesting for the dynamic of change and development that it illustrates in the discipline of law. Clearly, it is important because it concerns the relationship of the law of national jurisdictions with the modern world of global law, technology, trade and other relationships.

## II THE HONORAND: JAMES CRAWFORD

James Crawford was born in Adelaide in 1948. He was educated at Brighton High School and the University of Adelaide. He proceeded to Oxford University where he took his D Phil degree before returning to Adelaide as a lecturer in law in 1974. In fewer than ten years, he had been appointed a Reader and then Professor of Law. It was at that time, in 1982, that I persuaded him to leave leafy Adelaide and to accept appointment in the ALRC, whose foundation commissioners had included two other Adelaide alumni and teachers, Professors Alex Castles and David St L Kelly. I pay a tribute to the contributions that the Adelaide Law School and legal profession made to the creation of the ALRC. It may have been the influence of the early German settlers that rendered Adelaide a special place for reform and critical examination of society and its laws. Adelaide has long been a place open to new ideas about the law.

James Crawford came to Sydney to take charge of a reference that had been given to the ALRC concerning the recognition of Aboriginal customary laws.<sup>2</sup> He steered the Commission to producing an outstanding report. The topic was highly controversial, indeed divisive. Many of the report's proposals have not been translated into positive law. Nevertheless, the conduct of the investigation, under Professor Crawford, materially altered the *Zeitgeist* in Australia concerning the interface of the received law and our indigenous peoples. It promoted the notion, novel for the time, that the Australian legal system had far to go in adjusting to the laws and customs of the indigenes of the continent. It is probably no coincidence that the crucial step of re-stating the common law of Australia to recognise Aboriginal native title took place in the *Mabo* decision of 1992.<sup>3</sup> Moreover, the key that unlocked the door to that ruling, rejecting earlier statements of the common law, was a recognition, given voice by Brennan J (himself earlier an ALRC commissioner), that the universal principles of human rights law were inconsistent with a common law rule based upon discrimination against indigenous citizens by reference to their race. Such a rule had to adjust.<sup>4</sup>

James Crawford was energetic as an ALRC commissioner. He led other projects, including one on sovereign immunity,<sup>5</sup> and another on reform, patriation

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<sup>2</sup> ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

<sup>3</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

<sup>4</sup> (1992) 175 CLR 1, 42 (Brennan J).

<sup>5</sup> ALRC, *Foreign State Immunity*, Report No 24 (1984).

and federalisation of Admiralty law and jurisdiction in Australia.<sup>6</sup> The recommendations made in those projects were, almost without exception, translated into Australian law.<sup>7</sup>

In 1986, whilst still serving as an ALRC commissioner, Professor Crawford was appointed Challis Professor of International Law at the University of Sydney. He became Dean of the Sydney Law School in 1991. He held that post until 1992. He was then elected Whewell Professor of International Law at the University of Cambridge. This is an appointment he still holds; whilst also serving for a time as Chair of the Faculty Board of Law; serving as a member and rapporteur of the United Nations International Law Commission (1991–2001); publishing several respected legal texts; building a large practice as an advocate before international courts and tribunals; and assuming important positions in international bodies, including as a conciliator and arbitrator nominated by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes ('ICSID'). Many of Professor Crawford's recent activities have involved him in international commercial arbitration. This was the subject that he addressed on his return to the University of Sydney in 2009 to deliver an invited lecture to celebrate that University's new institutional home for its law school.<sup>8</sup>

James Crawford's stellar career demonstrates that he is one of the most famous of the alumni of the University of Adelaide. He is certainly one of the world's leaders in scholarly analysis of the directions of international law. In the last year of my service on the High Court of Australia, he inaugurated a lecture series at the Australian National University named after me.<sup>9</sup> Now I repay the compliment. It is not a heavy burden because each of us has had that peculiar and beneficial experience of participating, to some degree, in the creation of international law. In his case, this has been done in the International Law Commission and before international courts and tribunals. In my case, it happened in activities of several of the agencies of the United Nations: UNESCO, the World Health Organisation, the United Nations Development Programme, the International Labour Organisation, UNAIDS, the United Nations Office on Drugs and Crime, and as Special Representative of the Secretary-General for Human Rights in Cambodia.

Engagements in international activities can sometimes dampen the enthusiasm of optimists. However, they also tend to illustrate the dynamism, energy and expansion of international law today. International law grows in harmony with the technology of international flight, shipping, trade, satellites and

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<sup>6</sup> ALRC, *Civil Admiralty Jurisdiction*, Report No 33 (1986).

<sup>7</sup> *Foreign State Immunities Act 1985* (Cth) and *Admiralty Act 1988* (Cth). Some aspects of the report on Aboriginal customary laws were also implemented, eg by the *Crimes and Other Legislation Amendment Act 1994* (Cth) and the *Native Title Act 1993* (Cth).

<sup>8</sup> James Crawford, 'Developments in International Commercial Arbitration: The Regulatory Framework' (Speech delivered at the University of Sydney Distinguished Lecture Series, The University of Sydney, 4 May 2009).

<sup>9</sup> James Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison' (2009) 28 *Australian Year Book of International Law* 1.

telecommunications. It advances under the impetus of global media, trade and problems demanding global solutions. It spreads in response to the needs of human beings to secure, and enforce, laws that reduce the perils of modern warfare and encourage the harmonious accommodation of differences; the alternative to which is unprecedented destruction of the environment, the species, or both.

This is an exciting time to be engaged with international law. James Crawford, educated in Adelaide at this University, is one of the most brilliant legal actors on the scene. We, his students, friends, colleagues, teachers and admirers, are proud of his accomplishments. Especially so because he has always remained distinctively Australian.

### III INTERNATIONAL LAW AND COMMON LAW

#### A *Defining the Issues*

I now intend to explore the influence of international law on the common law. The common law is the body of judge-made law declared in each jurisdiction by superior court judges in the course of resolving disputes brought before them for decision.

I put aside two important, but different, problems, namely the influence of international law on the construction of written constitutional texts and on the interpretation of ordinary legislation. Upon the first of these subjects sharp differences of opinion have been expressed in the High Court of Australia.<sup>10</sup> Similar differences have emerged in the reasoning of the judges in the Supreme Court of the United States of America.<sup>11</sup> Depending upon the view taken concerning the proper approach to interpreting a constitutional text, international law may be regarded as irrelevant because it is outside the ‘original intent’ of those who first adopted and accepted the constitutional text.<sup>12</sup> Interesting although this particular debate undoubtedly is, it is not the subject of this lecture.

Nor am I concerned with the extent to which domestic courts should read contemporaneous statutory provisions so as to be as consistent as possible with universal principles of international law. At the beginning of the Australian Commonwealth, in 1908, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,<sup>13</sup> Justice O'Connor declared that ‘every statute is to be interpreted and

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<sup>10</sup> See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62]; cf at 617 [152].

<sup>11</sup> See, eg, *Atkins v Virginia* 536 US 304 (2002) (US Supreme Court); *Lawrence v Texas* 539 US 558 (2003) (US Supreme Court); *Roper v Simmons* 543 US 551 (2005) (US Supreme Court). See also Michael Kirby, ‘International Law — the Impact on National Constitutions’ (2006) 21 *American University International Law Review* 327.

<sup>12</sup> See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–5 [181]–[182] (Heydon J).

<sup>13</sup> (1908) 6 CLR 309. See also *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Plaintiff S157/2000 v Commonwealth* (2002) 211 CLR 476, 492 (Gleeson CJ).

applied so far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.<sup>14</sup>

This is another very interesting question, highly relevant to the discovery of the law applicable in a number of instances, given that statute law has now overtaken common law as the source of most of the law of modern nations. The influence of international law on the interpretation of statutes, at least where such statutes are not specifically enacted to give effect to international legal obligations, is also a matter of debate, at least in Australia.<sup>15</sup> I explored this question in an earlier lecture at the University of Adelaide, published in this *Review*.<sup>16</sup> The topic has also been the subject of debate in the courts of the United Kingdom. However, both by the common law,<sup>17</sup> and now by provisions of the *Human Rights Act 1998* (UK),<sup>18</sup> it is generally regarded in that country as proper for courts to resolve any ambiguity by interpreting the statute, so far as this is possible, to conform with the applicable principles of international law, especially if those principles express the law of universal human rights. This is another interesting and important controversy. However, this lecture is not the occasion to explore it.<sup>19</sup>

Instead, I intend to concentrate on the interface between the common law and international law, as expressed in customary law and in treaties, by examining how international law has come to influence judicial declarations as to the content of the common law. I will do this by reference to case law and academic analysis (including some observations by James Crawford himself). I will mention cases arising in the United Kingdom, Australia, Malaysia and Singapore. My survey will afford a number of pointers as to emerging trends.

In earlier times, before the establishment of the United Nations Organisation in 1945, international law was much more modest in its content and applications. However, since at least the mid-1970s, both in Europe and in countries of the Asia-Pacific region, international law has begun to cover a much wider range of subjects. Lord Denning in 1974 expressed the opinion that, in Britain, the influx of cases with a European element, as he put it, was like ‘an incoming tide [which] cannot be held back’.<sup>20</sup> Undoubtedly, the close ties with European institutions forged

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<sup>14</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

<sup>15</sup> See, eg, *Coleman v Power* (2004) 220 CLR 1, 93–9 [243]–[257]. Similar issues have arisen in the United Kingdom: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; Francis Bennion, *Statutory Interpretation — A Code* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) 779.

<sup>16</sup> Michael Kirby, ‘A Century of *Jumbunna*: Interpretive Principles and International Law’ (2010) 31 *Adelaide Law Review* 1.

<sup>17</sup> See *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 (Lord Diplock); *R v Secretary of State for the Home Department; Ex parte Brind* [1991] AC 696, 747–8 (Lord Bridge), 760 (Lord Ackner).

<sup>18</sup> *Human Rights Act 1998* (UK) s 6 (‘*Human Rights Act*’).

<sup>19</sup> See Kirby, above n 16.

<sup>20</sup> *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

by the United Kingdom in the past thirty years have proved a catalyst for legal change and for bringing international law more directly into the legal system of the United Kingdom. The same dynamic has not been present in the cases of Australia, Malaysia or Singapore.

The *Human Rights Act*, which came into domestic effect in the United Kingdom as from 2000, has had a large impact on the reasoning of British lawyers and judges. When a body of law becomes an element in the daily concerns of a lawyer, it is inevitable that its provisions will influence the way other parts of the law will be viewed and interpreted. A new habit of mind develops which cannot but influence the way lawyers and judges approach problems. And how they discover and apply the law that is needed for the resolution of legal contests.

### B UK Customary International Law

It is useful at the outset to consider the influence of customary international law on the development of the common law of England. This requires examination of the incorporation/transformation debate.<sup>21</sup> Is international law *incorporated*, as such, into the domestic legal system or must it first be *transformed* into domestic law in order to be recognised? The extensive discussion of these concepts in academic literature has attracted sharp divisions of opinion.<sup>22</sup> With a few exceptions,<sup>23</sup> however, the courts in common law countries have ‘generally eschewed analysis

<sup>21</sup> For a discussion of the two concepts, see *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529, 553 (Lord Denning MR) (*‘Trendtex’*).

<sup>22</sup> See, eg, the discussions in Malcolm N Shaw, *International Law* (Cambridge University Press, 5<sup>th</sup> ed, 2003) 128; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6<sup>th</sup> ed, 2003) 41; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 131; Rebecca M M Wallace, *International Law* (Sweet & Maxwell, 5<sup>th</sup> ed, 2005) 40; J G Collier, ‘Is International Law Really Part of the Law of England?’ (1989) 38 *International and Comparative Law Quarterly* 924; Daniel P O’Connell, ‘The Relationship between International Law and Municipal Law’ (1960) 48 *Georgetown Law Journal* 431, 444; Andrew J Cunningham, ‘The European Convention on Human Rights, Customary International Law and the Constitution’ (1994) 43 *International and Comparative Law Quarterly* 537, 547; Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, 1997) 11–2; Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 451; Felice Morgenstern, ‘Judicial Practice and the Supremacy of International Law’ (1950) 27 *British Year Book of International Law* 42; Hersch Lauterpacht, ‘Is International Law a Part of the Law of England?’ (1939) 25 *Transactions of the Grotius Society* 51; Kristen Walker, ‘Treaties and the Internationalisation of Australian Law’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204, 227; Sir Anthony Mason, ‘International Law as a Source of Domestic Law’ in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 210, 212.

<sup>23</sup> See, eg, *Trendtex* [1977] QB 529, 553 (Lord Denning MR). In the Australian context, see *Nulyarimma v Thompson* (1999) 96 FCR 153, 178–91 (Merkel J) (Federal Court of Australia).

of the role of custom by reference to the distinction between incorporation and transformation'.<sup>24</sup> Many judges have treated the controversy as substantially esoteric. Lord Justice Stephenson, for example, remarked 30 years ago that 'the differences between the two schools of thought are more apparent than real'.<sup>25</sup>

Impatience with the supposed distinction is not confined to the judiciary.<sup>26</sup> The somewhat illusory nature of the incorporation/transformation debate has encouraged academic commentators to look for alternative taxonomies, or to abandon such rigid classifications altogether. Professor Crawford, for example, has urged lawyers to focus not on the labels 'incorporation' and 'transformation' but on how, in practical terms, customary international law has actually influenced the decisions of courts in individual cases.<sup>27</sup> Writing with W. R. Edeson, Professor Crawford noted that '[t]he difficulty with slogans in the present context is that they fail to give guidance in particular cases'.<sup>28</sup>

A lack of enthusiasm for the terms 'incorporation' and 'transformation' does not mean that these words serve no useful purpose. On the contrary, the practical distinction that the words imply may occasionally provide a valuable insight when assessing, on a case-by-case basis, the changing attitudes towards the use of international law in common law elaboration by the judiciary in the United Kingdom.

If a decision is said to stand for the proposition that customary international law is automatically *incorporated* into domestic law, one can say that the judiciary has adopted a generally favourable stance towards international law. *Incorporation* suggests that customary international law is a distinctive source of law, closely connected with municipal sources. On the other hand, if a decision is said to stand for the proposition that international law must first be *transformed* before it can become part of domestic or national law, the court will be viewed as exhibiting a more cautious attitude towards the use of international law. *Transformation* treats customary international law as distinct and separate from domestic law. Even if, in practice, the technical distinction between the terms is usually more apparent than real, the two expressions tend to reflect differing levels of sympathy for treating customary international law as a legitimate and influential body of legal principles, apt for domestic use by the national judiciary.

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<sup>24</sup> Triggs, above n 22, 132.

<sup>25</sup> *Trendtex* [1977] QB 529, 569 (Stephenson LJ). See also *Nulyarimma v Thompson* (1999) 96 FCR 153, 184 (Merkel J) (Federal Court of Australia).

<sup>26</sup> Walker, above n 22, 228.

<sup>27</sup> Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', above n 9. See also James Crawford, 'General International Law and the Common Law: A Decade of Developments' (1982) 76 *American Society of International Law Proceedings* 232, 232.

<sup>28</sup> James Crawford and William Edeson, 'International Law and Australian Law' in Kevin William Ryan (ed), *International Law in Australia* (Lawbook, 2<sup>nd</sup> ed, 1984) 71, 78.

At the least, the two labels can be deployed to help plot a pattern of fluctuating judicial attitudes towards the effect of customary international law on the common law of England. A starting point for analysis of the case law is usually taken to be the judicial statements written in the eighteenth century in *Buvot v Barbut*<sup>29</sup> and *Triquet v Bath*.<sup>30</sup> Those decisions are said to exemplify an approach to international law more closely reflecting the *incorporation* doctrine,<sup>31</sup> particularly after Lord Talbot declared in *Buvot v Barbut* that ‘the law of nations in its full extent [is] part of the law of England’.<sup>32</sup>

This early British enthusiasm for incorporation was, however, qualified by judicial decisions written in the late nineteenth and early twentieth century. Thus, the decisions in *The Queen v Keyn*,<sup>33</sup> and arguably in *West Rand Central Gold Mining Co Ltd v The King*,<sup>34</sup> were viewed as signalling the emergence of the *transformation* doctrine.<sup>35</sup> If this understanding is correct, the cases suggested that isolationist tendencies and scepticism about the assistance offered by international law were on the rise in the courts of the United Kingdom at that time.

Such a view was not, however, shared by all observers. A number regarded the cases that considered the incorporation/transformation question as ‘ambiguous’.<sup>36</sup> Thus, Sir Hersch Lauterpacht thought that the ‘relevance [of *Keyn*’s case] to the question of the relation of international law to municipal law has been exaggerated’.<sup>37</sup> Professor Ian Brownlie was likewise of the opinion that the *West Rand* case was fully consistent with the incorporation doctrine. He argued that the oft-cited opinion of Chief Justice Cockburn in that case had been focused on proving the *existence* of rules of customary international law in domestic courts, not on examining whether those rules were in some way *incorporated* in, or had first to be *transformed* into, local law.<sup>38</sup>

Statements on this issue in the context of customary international law continued to appear in judicial decisions of the English courts throughout the twentieth century. However, many of the decisions tended to obscure the dividing line between the

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<sup>29</sup> (1736) Cas Temp Talbot 281; 25 ER 777.

<sup>30</sup> (1764) 3 Burr 1478; 97 ER 936.

<sup>31</sup> Brownlie, above n 22, 41; Shaw, above n 22, 129.

<sup>32</sup> *Buvot v Barbut* (1736) Cas Temp Talbot 281, 283; 25 ER 777, 778.

<sup>33</sup> (1876) 2 Ex D 63.

<sup>34</sup> [1905] 2 KB 391.

<sup>35</sup> Sir William S Holdsworth, *Essays in Law and History* (Clarendon Press, 1946) 263–6. See also Ivan Shearer, ‘The Relationship between International Law and Domestic Law’ in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 40; Wallace, above n 22, 41.

<sup>36</sup> Shaw, above n 22, 131.

<sup>37</sup> Lauterpacht, above n 22, 60.

<sup>38</sup> Brownlie, above n 22, 43. See also Mason ‘International Law as a Source of Domestic Law’, above n 22, 210, 214; Collier, above n 22, 929; *Trendtex* [1977] QB 529, 569 (Stephenson LJ); Crawford and Edeson, above n 28, 71, 73.

theories of incorporation and transformation. Thus, in *Chung Chi Cheung v The King*, Lord Atkin said:

[I]nternational law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.<sup>39</sup>

A few commentators expressed concern about this comment because it appeared to advocate the incorporation and transformation doctrines simultaneously.<sup>40</sup> Indeed, the quotation from Lord Atkin illustrates the problems of trying to classify judicial statements as falling into either the *incorporation* or the *transformation* camp: treating them as rigidly differentiated alternatives. At an attitudinal level, if labels are left to one side, Lord Atkin's statement spoke relatively clearly. It suggested that customary international law could, and should, influence domestic law. Although the precise impact of international custom remained unclear and the subject of debate, it was obvious that, by the mid-twentieth century, the judiciary in the United Kingdom was moving to an opinion that, at the very least, international law could be a legitimate and valuable *source* of local law in certain cases.

That broadly positive attitude towards international law was affirmed in 1977. In *Trendtex*, Lord Denning held that 'the rules of international law, as existing from time to time, do form part of our English law'.<sup>41</sup> Cases such as *Trendtex*, and later *Maclaine Watson & Co Ltd v International Tin Council (No 2)*,<sup>42</sup> led many observers of this controversy to conclude that the doctrine of incorporation had finally prevailed in the United Kingdom.<sup>43</sup> Such decisions were viewed as confirming the willingness of courts in the United Kingdom to refer to international law when developing and declaring the municipal common law of that jurisdiction.

To avoid becoming enmeshed in the incorporation/transformation debate, several commentators came to refer to customary international law simply as 'a *source* of English law'.<sup>44</sup> This 'source' formulation resonates closely with the Australian

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<sup>39</sup> *Chung Chi Cheung v The King* [1939] AC 160, 167–8.

<sup>40</sup> Triggs, above n 22, 34; Collier, above n 22, 931; O'Connell, above n 22, 446.

<sup>41</sup> [1977] QB 529, 554 (Lord Denning MR), see also 578–9 (Shaw LJ).

<sup>42</sup> [1989] 1 Ch 286.

<sup>43</sup> Shaw, above n 22, 129; Brownlie, above n 22, 44; Triggs, above n 22, 135; Wallace, above n 22, 40; Hunt, above n 22, 11.

<sup>44</sup> Collier, above n 22, 935. See also O'Connell, above n 22, 445; *R v Jones (Margaret)* [2006] 2 All ER 741, 751 (Lord Bingham). Note, however, the criticisms of this formulation by Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', above n 9; Rosalyn Higgins, 'The

approach to customary international law. However, in the courts of the United Kingdom, the twentieth century witnessed a gradual rise in the familiarity with, and positive attitude towards, customary international law. This was to prove different from the more hesitant judicial approach that had gone before.

### C *UK Impact of Treaties on the Common Law*

When the role of treaties in the development of the common law in the United Kingdom is considered, the *European Convention on Human Rights* ('ECHR')<sup>45</sup> is now paramount in its importance and influence. International human rights law began to exert a far-reaching influence on British courts even before its domestic incorporation by the *Human Rights Act 1998* (UK) commencing in 2000.<sup>46</sup> By the late 1970s, United Kingdom courts were regularly turning to human rights treaties, particularly the *ECHR*, to help resolve common law issues.<sup>47</sup> A review of some of the more significant decisions illustrates the growing acceptance of international law as a useful guide for local judges when expressing the local common law for their own jurisdictions.

In 1976 in *R v Chief Immigration Officer, Heathrow Airport; Ex parte Salamat Bibi*,<sup>48</sup> a Pakistani woman and her children were refused admission to the United Kingdom for the declared purpose of visiting her husband. Article 8(1) of the *ECHR*, which refers to the right to respect for a person's private and family life, was invoked on the woman's behalf. In response, Lord Denning stated:

The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it.<sup>49</sup>

This was an influential statement on how the United Kingdom judiciary should approach the use of international law in common law elaboration.

Two years later, in 1978, a case arose involving a claim of unfair dismissal. The *ECHR* was once again relied upon. Lord Justice Scarman said:

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Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18 *Commonwealth Law Bulletin* 1268, 1273.

<sup>45</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>46</sup> *Human Rights Act 1998* (UK) sch 1; see Anthony Lester, David Pannick and Javan Herberg (eds), *Human Rights Law and Practice* (Lexis Nexis, 3<sup>rd</sup> ed, 2009) 914.

<sup>47</sup> Brownlie, above n 22, 47.

<sup>48</sup> [1976] 1 WLR 979; [1976] 3 All ER 843.

<sup>49</sup> *Ibid* [1976] 1 WLR 979, 984; All ER 843, 847.

[I]t is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.<sup>50</sup>

Although in dissent as to the result in that case, with the passage of time, this statement by Lord Justice Scarman was also to prove highly influential for later judicial thinking in the United Kingdom.

By the 1970s, a shift in judicial attitudes was unquestionably taking place. Still, the courts remained careful not to overstep the mark. In particular, the judges were conscious of the line between the respective responsibilities of the judiciary and of the legislature and executive with respect to international law. Thus, in *Malone v Metropolitan Police Commissioner*,<sup>51</sup> the plaintiff asked the Court to hold that a right to immunity from telephonic interception existed based, in part, on article 8 of the *ECHR*. Although Sir Robert Megarry V-C said that he had given 'due consideration [to the Convention] in discussing the relevant English law on the point',<sup>52</sup> he cautioned that courts in the United Kingdom could not implement treaties through the back door:

It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.<sup>53</sup>

In the light of statements such as this, it was clear that the United Kingdom courts were not going to use the Convention to create new substantive legal rights, particularly where these might have widespread consequences, and where the English common law had previously been silent on the subject.

Nevertheless, such caution did not spell an end to the *ECHR* as an influence on the common law in the United Kingdom. The *Malone* case may be contrasted with the decision in *Gleaves v Deakin*,<sup>54</sup> decided just one year later. In that case, a private prosecution was brought against the authors and publishers of a book, charging them with criminal libel. In its decision, the House of Lords refused to allow the authors and publishers to call evidence before the committal proceedings concerning the generally bad reputation of the prosecutor. Lord Diplock (with Lord Keith of Kinkel agreeing) made a significant suggestion for reform of the common

<sup>50</sup> *Ahmad v Inner London Education Authority* [1978] QB 36, 48. See also *R v Secretary of State for the Home Department; Ex parte Phansopkar* [1976] QB 606, 626.

<sup>51</sup> [1979] Ch 344.

<sup>52</sup> *Ibid* 366.

<sup>53</sup> *Ibid* 379.

<sup>54</sup> [1980] AC 477.

law offence of libel. In making his suggestion, Lord Diplock referred to the United Kingdom's international treaty obligations:

The law of defamation, civil as well as criminal, has proved an intractable subject for radical reform. There is, however, one relatively simple step that could be taken which would at least avoid the risk of our failing to comply with our international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. That step is to require the consent of the Attorney-General to be obtained for the institution of any prosecution for criminal libel. In deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specific in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent.<sup>55</sup>

By the early 1980s, international treaty law was becoming a prominent part of the judicial 'toolkit' in the United Kingdom where judges were faced with difficult issues of common law interpretation and elaboration. In *Attorney-General v British Broadcasting Corporation*,<sup>56</sup> for example, the Attorney-General had sought an injunction to restrain the BBC from broadcasting a program critical of a Christian religious sect on the ground that the broadcast would prejudice an appeal pending before a local valuation court. An issue for decision in that appeal was whether the local valuation court was a 'court' for the purposes of the High Court's powers governing punishment for contempt of court. Lord Fraser of Tullybelton observed that 'in deciding this appeal the House has to hold a balance between the principle of freedom of expression and the principle that the administration of justice must be kept free from outside interference'.<sup>57</sup> He went on to say:

This House, and other courts in the United Kingdom, should have regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and to the decisions of the Court of Human Rights in cases, of which this is one, where our domestic law is not firmly settled.<sup>58</sup>

Unsurprisingly, in light of his earlier opinions given in the English Court of Appeal, Lord Scarman adopted a similar approach. He also took note of the United Kingdom's obligations under the Convention in expressing his opinion about the content of the English common law.<sup>59</sup>

Additional steps toward a candid and principled approach to the use of international law on the part of United Kingdom courts occurred in the early 1990s in the decisions in *Attorney-General v Guardian Newspapers Ltd (No 2)*<sup>60</sup> and *R v Chief*

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<sup>55</sup> Ibid 483.

<sup>56</sup> [1981] AC 303.

<sup>57</sup> Ibid 352.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid 354.

<sup>60</sup> [1990] 1 AC 109, 283 (Lord Goff).

*Metropolitan Stipendiary Magistrate; Ex parte Choudhury*.<sup>61</sup> However, it was in *Derbyshire County Council v Times Newspapers Ltd*<sup>62</sup> that the strongest statements were expressed regarding the way in which international law could (or even must) be used to interpret and develop the common law where the provisions of international law were relevant to the context of the governing rule.

In issue in *Derbyshire* was whether a local public authority was entitled to bring proceedings at common law for libel to protect its reputation when it was called into question. The authority was a statutory corporation and a legal person. So why should it not be able to sue to vindicate its reputation? The three members of the English Court of Appeal offered different observations on the effect of article 10 of the *ECHR* — at that stage still unincorporated in United Kingdom law — dealing with the right to freedom of expression. The main point of difference between the participating judges concerned the circumstances in which each judge thought it was appropriate to refer to international law.

For Lord Justice Ralph Gibson, reference by a court to such a source could be made when uncertainty existed:

If ... it is not clear by established principles of our law that the council has the right to sue in libel for alleged injury to its reputation, so that this court must decide whether under the common law that right is properly available to the council as a local government authority, then, as is not in dispute, this court must, in so deciding, have regard to the principles stated in the Convention and in particular to article 10.<sup>63</sup>

Going further, Lady Justice Butler-Sloss expressed the opinion that reference to international law was not only preferable, but mandatory, wherever uncertainty or ambiguity existed. Her Ladyship said:

Where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. ... But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10.<sup>64</sup>

Lord Justice Balcombe went further still. He held that it would be appropriate to refer to any relevant principles of international law, even when there was no ambiguity or uncertainty:

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<sup>61</sup> [1991] 1 QB 429, 449.

<sup>62</sup> [1992] QB 770 (*'Derbyshire'*).

<sup>63</sup> *Ibid* 819.

<sup>64</sup> *Ibid* 830.

Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law. ... Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of article 10.<sup>65</sup>

Although all three of these judicial opinions expressed an acceptance of the use of international law to assist in the development of the common law in particular circumstances, the differences in their respective approaches were striking. The law on the point remained unsettled, awaiting a decision on the point from the House of Lords.

An opportunity for the House of Lords to resolve the question arose in *Director of Public Prosecutions v Jones (Margaret)*.<sup>66</sup> Although the differences arising from *Derbyshire* were not fully settled in that appeal, three of the Law Lords affirmed the need for ambiguity or uncertainty in the common law before reference to international law would be justified.<sup>67</sup> However, such a requirement of ambiguity or uncertainty is not one that has been supported by all commentators. For example, Dame Rosalyn Higgins, until recently a Judge and later President of the International Court of Justice, has criticised the prerequisite of ambiguity or uncertainty: ‘If many human rights obligations are indeed part of general international law ... then it surely follows that the old requirement that there be an ambiguity in the domestic law is irrelevant.’<sup>68</sup> The requirement of uncertainty or ambiguity to warrant resort to international law in these circumstances has also been discussed by Australasian commentators.<sup>69</sup>

It might seem unsatisfying to terminate this analysis with cases in the United Kingdom decided between 1992 and 1999. However, as the House of Lords acknowledged in 2001,<sup>70</sup> the passage of the *Human Rights Act 1998* (UK) provides a clear legislative basis, when developing the common law, for considering, at least those international human rights norms expressed in the *ECHR*. The need to rely on judge-made rules in identifying the effect of international law was significantly reduced by force of this legislation, if not completely removed. This

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<sup>65</sup> Ibid 812.

<sup>66</sup> [1999] 2 AC 240.

<sup>67</sup> Ibid 259 (Lord Irvine); 265 (Lord Slynn); 277 (Lord Hope).

<sup>68</sup> Higgins, above n 44, 1273.

<sup>69</sup> See, eg, Walker, above n 22, 217. Ambiguity was originally a pre-requisite for resort to international human rights law under the *Bangalore Principles* of 1988: Michael Kirby, ‘The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms’ (1988) 62 *Australian Law Journal* 514, 531–2. However, that requirement was discarded as these principles were further developed in 1998: cf Kenneth J Keith, ‘Protecting Human Rights in a Time of Terror: The Role of National and International Law’ (2005) 13 *Waikato Law Review* 22, 30–1.

<sup>70</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 207–8 (Lord Steyn); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] 1 QB 728, 759 (Laws LJ).

was so because, by the Act, the specified provisions of international law were given domestic force in the United Kingdom.

Obviously, there are reasons of principle and convenience for adopting this approach. It allows greater certainty and clarity as to when, and to what extent, international law may be resorted to in order to assist judges in the United Kingdom in expressing, developing and applying the common law. As a matter of basic legal principle, once a legislature, acting within its powers, has spoken in a relevant way, its voice supplants earlier opinions of judges. Those opinions continue to apply, if at all, only to provisions of international law not contained in the *Human Rights Act*.

#### D Summarising the UK Experience

From this it follows that courts in the United Kingdom have tended to treat customary international law and treaty law as presenting different categories for which different consequences follow. In accordance with the basic dualist approach followed in English law, treaties, as such, are not a source of direct rights and obligations unless validly incorporated into municipal law.<sup>71</sup> Accordingly, the focus of most meaningful consideration of this topic in the United Kingdom is directed at the extent to which such treaties can influence the development of the common law. On the other hand, with customary international law, some decided cases, such as *Trendtex*,<sup>72</sup> have suggested that such custom, where it expresses universal rules observed by civilised nations, automatically forms a part of domestic law in the United Kingdom. Other cases accept that, whether part of municipal law as such, or not, international customary law may be treated at least as a contextual consideration, relevant to the derivation by national judges of the common law applicable to a particular case.<sup>73</sup>

One can confidently assert that courts in the United Kingdom today generally approach international law without hostility. More recently, they have done so with a broad appreciation so that the rules of international law may be treated as a source of useful analogies and comparisons. It can thus become a source for inspiration and guidance in the derivation of contemporary common law principles.

When arguments about international law have been raised by the parties, the courts in the United Kingdom have commonly acknowledged them and engaged with the issues and arguments they present. When international law has afforded possible guidance upon difficult or undecided common law questions, courts in the United Kingdom have not shied away from treating such international law as a useful source of knowledge and legal principle. As will be demonstrated, this conclusion is confirmed by the fact that statements on the potential utility of international law began to appear in Britain much earlier than, say, in Australia. Moreover, judicial

<sup>71</sup> This principle is long established in the common law. It was stated in *Parlement Belge* (1879) 4 PD 129 (English Court of Appeal), if not earlier.

<sup>72</sup> *Trendtex* [1977] QB 529.

<sup>73</sup> See, generally, *Ahmad v Inner London Education Authority* [1978] QB 36.

attitudes of indifference or hostility to international law in judicial reasoning have been less evident in the United Kingdom than elsewhere in Commonwealth countries. The question is presented: why should this be so?

### *E Australian Approaches to International Law*

The Australian experience with international law as an influence on the development of its common law has, so far, reflected a somewhat different history. For two countries with such a long shared legal experience, particularly in respect of the common law, it is striking to notice that the developments in this area have often been so markedly distinct. While each jurisdiction now appears to be moving on a generally similar path towards ultimately similar outcomes, the paths travelled to get there have by no means been identical.

Generally speaking, the Australian judiciary has displayed a much greater hesitation towards treating international law as a legitimate and useful source of legal ideas, reasoning and principles. Commentators have noted that ‘anxieties’ appear to exist in the attitudes of many Australian judges (and other decision-makers) so far as international law is concerned. It has been argued that such ‘anxieties’ may stem from some or all of the following sources:

[T]he preservation of the separation of powers through maintaining the distinctiveness of the judicial from the political sphere; the fear of opening the floodgates to litigation; the sense that the use of international norms will cause instability in the Australian legal system; and the idea that international law is essentially un-Australian.<sup>74</sup>

Whilst courts must act with due respect to the separation of constitutional powers, the Australian judiciary has occasionally appeared ambivalent on this rule.<sup>75</sup> It has acted with substantial hesitation, when it came to considering international law. Every now and then, the scepticism and even hostility towards international law has been expressed. Thus, in *Western Australia v Ward*,<sup>76</sup> Justice Callinan, in the High Court of Australia, remarked:

There is no requirement for the common law to develop in accordance with international law. While international law may occasionally, perhaps very occasionally, assist in determining the content of the common law, that is the limit of its use.<sup>77</sup>

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<sup>74</sup> Charlesworth, above n 22, 446.

<sup>75</sup> See, eg, *Combet v Commonwealth* (2005) 224 CLR 494, 594; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 134; *White v Director of Military Prosecutions* (2007) 231 CLR 570, 602–3.

<sup>76</sup> (2002) 213 CLR 1.

<sup>77</sup> *Ibid* 389 [958] (Callinan J).

Justice Callinan's attitude to international law in the Australian judiciary — by no means an isolated one — has proved rather difficult to change. Chief Justice Mason and Justice Deane in the 1980s and early 1990s, were supporters of the contextual use of international law as an aid to the development of the Australian common law.<sup>78</sup> However, even they advocated a generally 'cautious approach' to its use.<sup>79</sup> Their successors have, for the most part, been still more hesitant and some quite hostile.

The caution on the part of Australian judges has led to an absence of any sharp distinction in the Australian cases between customary international law and treaty law. Australian courts have, in general, not sought to apply different rules to international law, according to its origins. Instead, they have tended to view the distinct sources as constituent parts of a single body of international law. I will highlight, chronologically, rather than analytically, some important elements of Australian decisional law as it has emerged. I will take this course because judicial developments in Australia on this topic have occurred in identifiable phases.

#### F *Chow Hung Ching's Case*

For most of the twentieth century, international law lay dormant in Australian judicial reasoning. Prospects were particularly unpromising in respect of customary international law after a decision given during the early period: *Chow Hung Ching v The King*.<sup>80</sup> In that case, the response of the High Court of Australia to customary international law evinced a strong sympathy for the transformative approach.<sup>81</sup> Justice Dixon, whose reasons in *Chow Hung Ching* were to prove most influential, wrote:<sup>82</sup>

The theory of Blackstone that 'the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as *without foundation*. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law'.<sup>83</sup>

This statement cannot be viewed as entirely negative, still less hostile, to the use of international law as a source of the Australian common law. The 'source' based view that Justice Dixon mentioned, was apparently based on an article written by J L Brierly.<sup>84</sup> It has come to be accepted as the modern authoritative position

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<sup>78</sup> See, eg, Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20.

<sup>79</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

<sup>80</sup> (1949) 77 CLR 449.

<sup>81</sup> Crawford and Edeson, above n 28, 71, 77.

<sup>82</sup> Charlesworth, above n 22, 453. See also Shearer, above n 35, 34, 49.

<sup>83</sup> *Chow Hung Ching v The King* (1949) 77 CLR 449, 477 (emphasis added).

<sup>84</sup> J L Brierly, 'International Law in England' (1935) 51 *Law Quarterly Review* 24.

on international law and the common law in Australia. The explicit rejection of Blackstone's statement on incorporation, however, reflected a general lack of enthusiasm for international law which would not change until 40 years later.

### *G Impact of Universal Human Rights*

In 1988, a meeting in India of Commonwealth jurists, including myself, adopted the *Bangalore Principles on the Domestic Application of International Human Rights Norms* ('*Bangalore Principles*').<sup>85</sup> The group was chaired by the Hon. P N Bhagwati, former Chief Justice of India. At the time, I was President of the New South Wales Court of Appeal and was the sole participant from Australia. A number of other participants from Commonwealth countries attended, including Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (later Chief Justice of Mauritius), Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Judge Ruth Bader Ginsburg (later a Justice of the Supreme Court of the United States) also participated as the only non-Commonwealth participant.

The *Bangalore Principles* afforded a modest statement about the role that international law might properly play in the judicial decision-making of municipal courts of common law jurisdictions. They acknowledged the reality of the traditional dualist system where firm boundaries are maintained between international law and domestic law. Thus, Principle 4 of the *Bangalore Principles* states:

In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law.

This did not mean, however, that international legal principles were irrelevant to the development of domestic law. The remainder of Principle 4 went on to state:

However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete.

Principle 6 recognised the need for this process of international law recognition to 'take fully into account local laws, traditions, circumstances and needs'. And Principle 7 went on to state:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international

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<sup>85</sup> See Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 69, 531–2, where the *Bangalore Principles* are reproduced.

obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

The *Bangalore Principles* did not suggest the judicial application of international law in the face of clearly inconsistent domestic law. Nor did they suggest that international law was the only, or even the primary, consideration to which reference might be had when ambiguity arose in domestic law. Instead, the *Bangalore Principles* sought to encourage the use of international law as one source of legal principles that, by a process of judicial reasoning from context and by analogy, could assist the development of the local common law where ambiguity or uncertainty arose as to the content of that law.

The *Bangalore Principles* were to prove influential in several countries. For example, with respect to the United Kingdom, Murray Hunt wrote:

At the time of the formulation of the Bangalore Principles, the UK was on the threshold of an important transition as far as the domestic status of international human rights norms was concerned, and the Principles are a useful measure of the worldwide progress towards acceptance of the legitimate use which could be made of such norms by national judges.<sup>86</sup>

#### H *The Mabo Decision in the High Court*

Until the early 1990s, the High Court of Australia, following *Chow Hung Ching*, made little fresh comment on the role of international law. However, the position changed in 1992 in *Mabo*.<sup>87</sup> There the High Court held that the common law of Australia recognised a form of native title in circumstances where that title had not been extinguished. This title reflected the common law entitlement of the indigenous inhabitants of Australia to their traditional lands. The decision re-expressed the common law in Australia in a very significant way.

The leading opinion in *Mabo* was written by Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed. Justice Brennan made a number of important observations about the development of the common law by reference to international law. First, he stressed that the courts in Australia would not alter the common law in an unprincipled fashion. He said:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.<sup>88</sup>

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<sup>86</sup> Hunt, above n 22, 37.

<sup>87</sup> (1992) 175 CLR 1.

<sup>88</sup> Ibid 29.

Secondly, Justice Brennan declared that the common law of Australia was not obliged to reflect the values of a bygone era of discrimination and disrespect for universal human rights:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.<sup>89</sup>

Thirdly, in an oft-quoted passage, Justice Brennan spelt out a role for international law in the judicial development of the Australian common law:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.<sup>90</sup>

This advance in the judicial acceptance of international law was reflected in another important decision delivered the same year: *Dietrich v The Queen*.<sup>91</sup> That case concerned a prisoner who was convicted of an indictable federal statutory offence; the importation into Australia of a trafficable quantity of heroin. Before his trial, the prisoner had made a number of attempts to secure legal representation. However, he was unsuccessful on each occasion. In consequence, he was not legally represented at his trial.

A majority of the High Court of Australia held that, in the circumstances, the accused had been denied his right to a fair trial. While Chief Justice Mason and Justice McHugh did not explicitly invoke international law to sustain the existence and content of the right in question, they assumed, without deciding, that Australian courts should use international law where the common law was ambiguous. They called this a 'common-sense approach'.<sup>92</sup> Although in dissent as to the result, Justice Brennan re-affirmed the position he had expressed in *Mabo*, observing in connection with article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>93</sup> that, '[a]lthough this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development

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<sup>89</sup> Ibid 41–2.

<sup>90</sup> Ibid 42.

<sup>91</sup> (1992) 177 CLR 292.

<sup>92</sup> Ibid 306.

<sup>93</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

of the common law'.<sup>94</sup> Justice Toohey similarly stated: 'Where the common law is unclear, an international instrument may be used by a court as a guide to that law'.<sup>95</sup>

### I *Applying Mabo in Australia*

Later decisions of the High Court of Australia have affirmed the status of international law as a contextual consideration casting light on the municipal common law. Thus, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,<sup>96</sup> Chief Justice Mason and Justice Toohey, in joint reasons, stated:

[I]nternational law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights.<sup>97</sup>

Chief Justice Mason and Justice Deane reiterated the same approach in their joint reasons in *Minister of State for Immigration and Ethnic Affairs v Teoh*.<sup>98</sup> It was in that case that the High Court held that the ratification of a treaty by the executive could, in certain circumstances, give rise to a legitimate expectation that a Minister and administrative decision-makers would comply with the obligations imposed by that treaty. Even Justice McHugh, who dissented in the result in *Teoh*, was of the opinion that international treaties could assist the development of the common law, a position to which he had subscribed in *Mabo*.<sup>99</sup>

With changes to the personnel of the High Court of Australia after 1996, references to international law became less frequent. Other Australian courts have, however, continued to follow the High Court's earlier lead and to refer to international law where ambiguity or uncertainty arose in the interpretation of the common law.<sup>100</sup> The facultative doctrine stated in *Mabo*, has never been overruled, nor formally doubted, by the High Court of Australia.

### J *Summarising the Australian Experience*

Deep-seated judicial attitudes toward international law have proved difficult to dislodge in Australia. The distinction between custom and treaties has

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<sup>94</sup> Ibid 321.

<sup>95</sup> Ibid 360–1.

<sup>96</sup> (1992) 178 CLR 477.

<sup>97</sup> Ibid 499.

<sup>98</sup> (1995) 183 CLR 273, 288 ('*Teoh*').

<sup>99</sup> Ibid 315.

<sup>100</sup> See, eg, *Minogue v Williams* [2000] FCA 125 [24] (Ryan, Merkel and Goldberg JJ) (Federal Court of Australia); *R v Stringer* (2000) 116 A Crim R 198, 217 (Adams J) (New South Wales Criminal Court of Appeal); *R v Granger* (2004) 88 SASR 453, 477 (Perry J) (South Australian Supreme Court; Court of Criminal Appeal); *Tomasevic v Travaglini* (2007) 17 VR 100, 114 (Bell J) (Victorian Supreme Court).

generally been disregarded as an irrelevant consideration in the exposition of this topic in Australian courts. This was perhaps surprising because Australian courts enthusiastically, and frequently, referred to decisions of other legal jurisdictions, notably the United Kingdom and United States, where a different rule was emerging. Arguably, it is but a small step to refer to the jurisprudence of international and regional courts where the content of universal rights is being elaborated and refined. Australia's legal isolationism was not destined to last forever. Neither source is binding. But both can be useful. By the end of the twentieth century, a renewed effort to bring Australia in from the cold occurred at many levels of the judiciary. The decision of the High Court of Australia in *Mabo* was simply the most influential and explicit of these.<sup>101</sup>

### K *Impact of International Law in Malaysia*

International law has received relatively little judicial attention in the courts of Malaysia. In the days of the Federated Malay States, Chief Justice Earnshaw, writing in 1919 in *Public Prosecutor v Wah Ah Jee*,<sup>102</sup> had to determine whether a magistrate had been correct in refusing to exercise jurisdiction where an offence had occurred on the high seas but the defendant had been brought before a local court for the application of Malayan law. Adopting a strictly 'dualist' approach, the Chief Justice held:

The Courts here must take the law as they find it expressed in the Enactments. It is not the duty of a Judge or Magistrate to consider whether the law so set forth is contrary to International Law or not.<sup>103</sup>

Nearly seventy years later in *Public Prosecutor v Narogne Sookpavit & Ors*,<sup>104</sup> a criminal appeal before the Acrj Johore Bahru Court had to consider the liability of a number of Thai fishermen who had been arrested for offences against the *Fisheries Act 1963* (Malaysia). The Thai citizens attempted to rely on Article 14 of the *Geneva Convention on the Territorial Sea and the Contiguous Zone*.<sup>105</sup> That Convention had been ratified by Malaysia but had not been enacted by, nor otherwise incorporated into, domestic law. In the result, the Court considered the provisions of the Convention from the perspective that it helped evidence the requirements of customary international law.

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<sup>101</sup> An interesting recent illustration of resort in the High Court of Australia to international and comparative sources in resolving an Australian legal problem is *Roach v Electoral Commissioner* (2007) 233 CLR 162, 177–9 [13]–[19], 204 [100]–[101]. Cf 220–1 [163]–[164] and 224–5 [181].

<sup>102</sup> *Public Prosecutor v Wah Ah Jee* (1919) 2 FMSLR 193 (F M S Supreme Court).

<sup>103</sup> *Ibid.*

<sup>104</sup> [1987] 2 MLJ 100, 106 (Federal Court of Malaysia).

<sup>105</sup> *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

Still, in the absence of a countervailing statute to replace the provisions of the *Fisheries Act*, the Court concluded that its duty was to apply the domestic statutory law according to its terms:

[E]ven if there was such a right of innocent passage and such a right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation. ... The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or right of innocent passage through these waters.<sup>106</sup>

The dualist approach is also observed in Malaysia in relation to treaty law. Articles 74 and 76 of the Constitution of Malaysia specifically empower the legislature to enact laws implementing treaties. The Malaysian courts have held that the international rules of interpretation of treaties will take precedence over any conflicting domestic rules of interpretation when what is under consideration is the content of a treaty to which Malaysia is a party.<sup>107</sup> This approach is broadly consistent with the approach that has been adopted by the High Court of Australia.<sup>108</sup>

In Malaysia, a highly influential decision affecting the use of international law was one in 1963 holding that ‘the constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia’.<sup>109</sup> This tendency to adopt the ‘four walls’ principle in constitutional adjudication may have spilled over into statutory interpretation and the use of international law to inform the content of the Malaysian common law.

The common law in Malaysia is shaped by the reception of the English common law as it stood immediately prior to independence in 1956.<sup>110</sup> In this respect, the position may be contrasted with that of Singapore where the common law of England continued to apply until November 1993.<sup>111</sup> After these differential dates of reception, the common law is determined by the local judges, necessarily with attention to local cultural and social concerns. Occasionally, with respect to customary international law, the Malaysian courts have treated that body of law as

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<sup>106</sup> *Public Prosecutor v Narogne Sookpavit* [1987] 2 MLJ 100, 106 (Federal Court of Malaysia).

<sup>107</sup> *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355, 358 (Malaysian High Court, Kuala Lumpur).

<sup>108</sup> *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, 251–6 (McHugh J), see also 294–5 (Kirby J).

<sup>109</sup> *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355, 358 (Thomson CJ) (Malaysian High Court, Kuala Lumpur).

<sup>110</sup> *Civil Law Act 1956* (Malaysia) art 3(1).

<sup>111</sup> *Application of English Law Act 1994* (Singapore).

being of persuasive value. Thus in *Mohomad Ezam v Ketua Polis Negara*,<sup>112</sup> in the Federal Court of Malaysia, Siti Norma Yaakob FCJ observed:

If the United Nations wanted these principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law. ... Our laws backed by statutes and precedents ... are sufficient for this court to deal with the issue of access to legal representation [without the necessity of resort to international law].

Without the stimulus of a statute such as the *Human Rights Act* 1998 (UK), or need to urgently reconceptualise an important body of the common law as was presented by the *Mabo* decision in Australia, Malaysian courts appear generally to have adhered to the dualist doctrine. Thus, international customary law can sometimes be a persuasive consideration in elucidating local common law. But where there is clear positive local law — in the Malaysian constitution, a statute or a clearly applicable principle of the local common law — international customary law has not proved a strong influence on the shaping of Malaysia's own law. At least, this appears to be the case to the present time. Nevertheless, the door to influence is not closed by decisional authority.

#### L *The Emerging Position in Singapore*

The Constitution of Singapore is silent on the treatment that is to be given to international law by Singapore's courts. As a matter of practice, those courts have generally followed the United Kingdom's legal approach up to the time of Singapore's independence. Describing the role played by international law in Singapore, Simon Tay has said:

There are a number of reasons why we may now expect that international law will have a larger role in national legal systems such as Singapore's. ... In the case of Singapore there are also reasons why the reverse is ... true: that the national legal system is reaching out to the international system. This is because of governmental policies to encourage the city-state to serve as an international hub and to meet international standards in many fields. There is, correspondingly, a closer interaction between national and international law and policies in Singapore than might be seen in larger nations. This is especially noticeable in the field of economic activity, such as international trade and transport by air and sea. There is also considerable attention and pride in the government on the high international rating that the Singapore system of justice is accorded by a number of international investment analysts.<sup>113</sup>

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<sup>112</sup> [2004] 4 MLJ 449, 512 (Federal Court of Malaysia).

<sup>113</sup> Simon Tay, 'The Singapore Legal System and International Law: Influence or Interference?' in Kevin Y L Tan (ed), *The Singapore Legal System* (NUS Press, 1999) 467, 468–9.

Other commentators in Singapore have drawn a distinction between the utilisation of international law and practice in matters of economics, investment and trade and the position so far as cases concerning the environment and human rights are concerned. Professor Thio Li-An summarises her understanding of the Singaporean approach:

While readily borrowing from foreign commercial case law, Singapore courts display a distinct reticence in cases concerning public law values, where the emphasis is on ‘localizing’ rather than ‘globalizing’ case-law jurisprudence in favour of communitarian or collectivist ‘Singapore’ or ‘Asian’ values, in the name of cultural self-determination.<sup>114</sup>

Attempts to incorporate suggested principles of international human rights law into a case in Singapore challenged capital punishment by hanging failed in *Nguyen Tuong Van v Public Prosecutor*.<sup>115</sup> Much of the court’s reasoning drew upon the old Malayan decisions as to finding the applicable law within the ‘four walls’ of the local express provisions. A measure of support for this approach can be found in the advice of the Privy Council in a Singapore appeal: *Haw Tua Tau v Public Prosecutor*.<sup>116</sup> But that decision was written by the Privy Council before more recent advances in judicial reasoning that have occurred both in the United Kingdom and in Australia.

There is no case law that is definitive on the reception of international customary law into domestic Singaporean common law. Generally speaking, however, the Singaporean courts have followed the traditional dualist approach that was established by colonial judges in the Supreme Court of the Federated Malay States prior to independence.<sup>117</sup>

Simon Tay has suggested that the courts of Singapore are now open to persuasion by reference to international law in the development of the common law where it is not settled.<sup>118</sup> However, if the local law is clear, whether constitutional, statutory or common law, that law will prevail.<sup>119</sup> Thus, even if it were the case that a principle of customary international law had emerged prohibiting execution by hanging, the existence a clearly expressed local statute in Singapore, providing for such punishment, was held to prevail in the event of any inconsistency.<sup>120</sup> The

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<sup>114</sup> Li-Ann Thio, ‘In the Courts: The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court — Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v Nguyen Tuong Van* (2004)’ (2004) *Oxford University Commonwealth Law Journal* 214, 215.

<sup>115</sup> [2005] 1 SLR 103, 127 (Court of Appeal, Singapore).

<sup>116</sup> [1980] 1 SLR 73, 81–2 (Privy Council).

<sup>117</sup> *Public Prosecutor v Wah Ah Jee* (1919) 2 FMSLR 193 (F M S Supreme Court).

<sup>118</sup> Tay, above n 113.

<sup>119</sup> *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103, 112 (Court of Appeal, Singapore).

<sup>120</sup> *Ibid* 128.

conversation between international law and local law, at least in matters touching human rights, is somewhat muted and certainly quite weak.<sup>121</sup>

In the spectrum of national approaches to the use of customary international law in the elaboration of local common law, the judges in the United Kingdom appear to be most comfortable with the approach; those of Australia are selective in its use; and those of Malaysia and Singapore seem content with the earlier approach of English law, based on dualism, as it existed at the moment of independence and separation from the original common law source. For all that, the position is fluid. In a recent decision of the Court of Appeal in Singapore, in a sensitive case involving a defamation action brought by a senior politician, the Court appears not to have ruled out the possibility that the line of authority in the English courts, creating the *Reynolds* test for defamatory publication, might have some part to play in the evolution of Singapore's own common law on the subject.<sup>122</sup>

#### IV THE ADVANCE OF INTERNATIONAL LAW: THE WAY AHEAD

The arguments against the use of international law to inform local judges on their own judicial acts in declaring the municipal common law are easy enough to see. They include the legal tradition of dualism; the absence of a specific democratic underpinning for the creation of most of the rules of international law; the availability of treaties, with local ratification and municipal enactment if it is desired to import directly particular principles of international law; and the suggested adequacy of the more traditional sources for the evolution of the common law.

As against such considerations, there are a number of reasons why judges and other observers, in the United Kingdom, Canada, New Zealand, and even Australia, are increasingly willing to reach for principles of customary international law in expounding the local common law, where it is silent or obscure on a particular point in issue.

The arguments for such a course are based substantially in pragmatic considerations.

First, where the law is uncertain, it is often useful, and sometimes desirable, to reach for developments that have occurred on the international stage. It is preferable that domestic judges should do this rather than simply to appeal to their own limited knowledge and experience and local case law that may not have addressed the issue at all.

Of its nature, the common law is always in a state of development, on a case by case basis. To remain relevant, law must adapt. Where important issues of principle

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<sup>121</sup> *Re Gavin Millar QC* [2008] 1 SLR 297, 313 (Kwang J) (High Court of Singapore).

<sup>122</sup> *Far East Economic Review v Lee Hsien Loong* [2010] 1 SLR 52 referring to *Reynolds v Times Newspapers Ltd.* [2002] 2 LRC 690; [1999] 4 All ER 609.

are at stake, an appeal to fundamental principles of universal justice will often be a helpful guide to the judge uncertain as to what the law provides.<sup>123</sup>

Against this background, Shane Monks has explained why references to international materials require no great departure from the established judicial methods observed in common law countries:

Australian courts have always made reference to case law from other common law jurisdictions, including the United States (with which Australia has never shared membership of a hierarchy of courts). There is no logical reason why international law should be a less acceptable source of comparative law than any other municipal jurisdiction. On the contrary, its acceptance by many different jurisdictions should make it a more acceptable source of comparison.<sup>124</sup>

References to elaborations of any relevant principles of international law can lend a measure of apparent legitimacy and principle to judicial decision-making:

Referring to international law could assist in distancing the judicial law-making role from domestic controversy and party-politics and, as an objective source of law, from any suggestion that judges are simply imposing their own personal political views.<sup>125</sup>

The advances of the common law in the past have occurred as a result of the attempts by judges to express the changing values of society deserving of legal enforcement. One inescapable contemporary influence in the expression of such values is the emerging content of international law. Technology, including contemporary media, affords judges and litigants today a much wider context for the expression of values simply because that is the world that the judges and litigants inhabit and for which the municipal common law must now be expressed. The expansion of the sources is no more than a recognition of the growth of global and regional influences upon the world in which the common law now operates.

Secondly, as originally expressed, the *Bangalore Principles* required ambiguity to justify any reference to international law. If a clear constitutional, statutory or common law rule exists, international law could not be invoked to override that authority. Ambiguity, uncertainty or possibly a gap in the applicable law were originally required before any reference at all could be made to international legal principles. At least so far as the common law is concerned, it is arguably always subject to a legislative override, but in accordance with any applicable constitutional norms.

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<sup>123</sup> *Re Gavin Millar QC* [2008] 1 SLR 297, 138 (High Court of Singapore).

<sup>124</sup> Shane S Monks, 'In Defence of the Use of Public International Law by Australian Courts' (2002) 22 *Australian Yearbook of International Law* 201, 222–3.

<sup>125</sup> *Ibid* 223.

Subsequent versions of the *Bangalore Principles* have deleted the requirement for ambiguity.<sup>126</sup> However, this variation might involve a change that is more apparent than real. If a text is clear, judges and others affected, in every jurisdiction, would normally give the text judicial effect. As a practical matter, this would generally relieve the decision-maker of an obligation to search for different meanings or other sources of law. This is no more than a recognition of the practical pressures under which judges operate and the inclination of the judicial mind to accept the quickest way to decision, as a ‘source’ of reasoning.

Thirdly, affording international human rights law a place in the development of the common law pays appropriate regard to the special status of universal human rights norms in today’s world.<sup>127</sup> Most advanced nations have moved beyond purely majoritarian conceptions of democracy.<sup>128</sup> Respect for the fundamental rights of all people within a jurisdiction, including minorities, is now generally accepted as a prerequisite for a functioning democratic polity.<sup>129</sup>

In developing the common law by reference to human rights principles, the judiciary, far from undermining the democratic system of government, plays a constructive role in upholding that system. In this way, judges contribute to respect for democracy in its fullest sense. By its very nature, international law can assist the municipal judiciary to understand, and more consistently adhere to, fundamental human rights and freedoms. Moreover, it can help stimulate legislative decision-making which may sometimes have neglected, ignored or unduly postponed the protection of minorities and the protection of the legal equality for all citizens.

Fourthly, particularly in ‘an era of increasing international interdependence’,<sup>130</sup> it is impossible today to ignore Lord Denning’s ‘incoming tide’<sup>131</sup> of international law. With many cases coming before the courts already involving disputes having an international flavour — whether it be the identity of the parties, the applicable law or the subject matter of the dispute — litigants and the wider community will now generally expect a country’s laws, including the common law, to be in broad harmony with any relevant provisions of international law.<sup>132</sup>

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<sup>126</sup> Referring to the 1998 re-statement of the *Bangalore Principles*: see Keith, above n 69, 31.

<sup>127</sup> Hunt, above n 22, 35; Walker, above n 22, 233.

<sup>128</sup> Michael Kirby, ‘A Bill of Rights for Australia — But Do We Need It?’ (1995) 21 *Commonwealth Law Bulletin* 276, 282. In the Canadian context, see Armand de Mestral and Evan Fox-Decent, ‘Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law’ in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (Irwin Law, 2006) 31, 60–1.

<sup>129</sup> See, eg, Hilary Charlesworth, ‘Protecting Human Rights’ (1994) 68 *Law Institute Journal* 462, 463.

<sup>130</sup> Walker, above n 22, 233.

<sup>131</sup> *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 (Lord Denning MR).

<sup>132</sup> See, eg, *Mabo* (1992) 175 CLR 1, 41–2 (Brennan J; Mason CJ and McHugh J concurring).

This is not a proposition based on ideological posturing. It flows from the reality of life in what is now an interconnected world. The law is an integral component of modern society. The legal nationalism of the past no longer affords a satisfying boundary in today's world for the sources of common law elaboration and expression. To accept international law as it affects trade and technology, but to exclude international law as it concerns universal human rights, evidences an unstable distinction. By definition, all international law is binding on nation states. Viewed from a dispassionate and specifically *legal* standpoint, selectivity in recognising parts of international law that are thought to be of immediate economic utility is not a very attractive principle.

Fifthly, using international law to influence the development of domestic common law can also help to resolve an inherent tension between two legal theories. On the one hand, it is normally for the legislature to determine whether a treaty will be incorporated into domestic law. On the other, treaty ratification by the executive on behalf of the nations should not be accepted by the courts to be an inconsequential or legally neutral act. As Sir Robin Cooke, then President of the New Zealand Court of Appeal, once remarked, political undertakings to be bound by an international instrument should not lightly be regarded as mere 'window-dressing'.<sup>133</sup> Judges should neither encourage nor condone such an attitude on the part of executive government. Especially so, given the growth of international law in recent decades and its daily importance for most countries.

One means of affording proper recognition to a country's international legal obligations, while still respecting the functions of the domestic legislature to enact any significant body of law so that it is binding on the people, is to seek, where possible, to develop the common law in line with the emerging common international obligations. According to international law itself, treaties, when ratified, bind the country concerned, including all three arms of government. They do not just bind the executive government. When judges pay regard to the content of treaty law they therefore help to ensure that the judiciary, as an arm of government, is not hindering conformity with the international obligations by which the country, in accordance with its own legal processes, has agreed to be bound. Apart from any other consequences, when judges take the ratification of a treaty at face value this tends to restrain purely symbolic or empty political gestures: 'feel-good posturing' not intended by those involved to have any municipal legal effect although they certainly have international legal consequences.

Sixthly, where judges employ international law in such a manner, it is therefore neither novel; nor is it particularly radical. It adopts an incremental approach that places international law on a plane equivalent to other interpretative aids long used by judges in our legal tradition in developing and declaring the common law. The most obvious example is provided by the case of historical and other scholarly materials. Domestic human rights legislation, such as the United Kingdom *Human Rights Act*, affords international human rights principles of far more direct and

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<sup>133</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (Court of Appeal).

immediate applicability. In countries such as India, Canada and South Africa, international human rights law now enjoys a constitutional status and pervades many aspects of their legal systems.

Referring to international law, and especially when there is ambiguity or uncertainty in the common law, is therefore quite a modest step in judicial reasoning. It observes the proper boundaries between the legislature, executive and judiciary. Each of them, within their respective spheres, performs their proper functions in accordance with their own rules and procedures. At the same time, it ensures that a country's legal system does not become isolated from that of the community of nations. This is an even greater danger in the case of a country such as Australia because, as yet, it has no federal human rights charter that affords a direct and express path to access to international human rights law; and jurisprudence that permits these international law to have a more immediate effect upon the nation's domestic law.

Finally, the judicial use of international law does not usually amount to the introduction of rules and principles radically different from the laws with which lawyers of the common law tradition are familiar. Both Australia and the United Kingdom would probably consider that, in their law, they ordinarily observe and respect universal human rights and freedoms. Doubtless, as a general proposition this is true. Perhaps Malaysia does also, although the *Lina Joy*<sup>134</sup> case on apostasy has proved controversial.<sup>135</sup> International human rights law is normally consistent with, and reinforces, such values. This fact is neither surprising nor accidental. Key documents, such as the *Universal Declaration of Human Rights* and the *ICCPR* were profoundly influenced by values substantially derived from the Anglo-American legal tradition. The international law of human rights talks to countries within that tradition in familiar language and in terms of well-recognised legal concepts. It expresses principles that accord very closely with long expressed and familiar legal, moral and cultural traditions.

## V CONCLUSION: AN ONGOING CONVERSATION

From the foregoing analysis, it follows that international law will inevitably continue to enter municipal law in a multitude of ways. The effect is already great. For example, in Canada, commentators have suggested that some 40 percent of statutes are adopted to implement international commitments of some kind or another.<sup>136</sup> However that may be, to attempt to halt the incoming tide of international law as an influence and source of domestic common law is to attempt to prevent the inevitable whilst risking isolation and irrelevance of municipal law in the process.

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<sup>134</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 3 CLJ 557 (Federal Court of Malaysia).

<sup>135</sup> Michael Kirby, 'Fundamental Human Rights and Religious Apostasy' (2008) 17 *Griffith Law Review* 151.

<sup>136</sup> Mestral and Fox-Decent, above n 128, 31, 34.

Sir Anthony Mason, a former Chief Justice of the High Court of Australia, in a statement endorsed by his successor, Sir Gerard Brennan,<sup>137</sup> explained that:

The old culture in which international affairs and national affairs were regarded as disparate and separate elements [is] giving way to the realisation that there is an ongoing interaction between international and national affairs, including law.<sup>138</sup>

In the United Kingdom, Lord Bingham of Cornhill, long the Senior Law Lord, expressed similar sentiments. In 1992 he wrote:

Partly in hope and partly in expectation ... the 1990s will be remembered as the time when England ... ceased to be a legal island.<sup>139</sup>

It was Lord Bingham's hope and expectation that the time had come when England no longer had 'an unquestioning belief in the superiority of the common law and its institutions [that meant there was] very little to be usefully learned from others.'<sup>140</sup>

No country in the world is now outside the reach of the expanding application of international law, including the principles of international customary law. The modern lawyer's imagination needs to adjust to the new paradigm. Jurisdictionalism prevails. Domestic jurisdiction of nation states is still powerful. Ultimately, it may have the last word. But in the age of interplanetary travel, of informatics, of the human genome, of nuclear fission, of global problems such as HIV/AIDS and climate change, and of global challenges to peace, security and justice for all people, international law has an important part to play.

Local judges are often exercising a kind of international jurisdiction when they decide cases. There will never be enough international courts to give effect to international law. Nor should there be an undue proliferation of expensive and new international courts and tribunals. The implementation of international customary law must therefore increasingly be delegated to national courts in much the same way as, in the Australian Commonwealth, state courts may be invested with and exercise federal jurisdiction.<sup>141</sup> Reconciling the rules of domestic jurisdiction and the principles of international law is a great challenge for lawyers of the current age and the age still to come. The challenge is one to which James Crawford has responded repeatedly and eloquently in his writings and in his work as a leading arbitrator and advocate before international and national courts and tribunals.

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<sup>137</sup> Sir Gerard Brennan, 'The Fiftieth Anniversary of the International Court of Justice' (Speech delivered at the Opening of Colloquium, High Court of Australia, Canberra, 18 May 1996).

<sup>138</sup> Mason, 'The Influence of International and Transnational Law on Australian Municipal Law', above n 78, 23.

<sup>139</sup> T H Bingham, "'There Is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41 *International and Comparative Law Quarterly* 513, 514.

<sup>140</sup> Ibid.

<sup>141</sup> *Australian Constitutions* 77(iii).

The recent rise in the global recognition of the excellence of the University of Adelaide rests upon its fine teaching and research in law.<sup>142</sup> And on its focus upon international law as a cutting edge subject for a world of unprecedented change. James Crawford is an example of what this University stands for and why its reputation continues to enlarge.

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<sup>142</sup> D Harrison, 'Unis Do Well in World Rankings', *Sydney Morning Herald* (Sydney), 9 October 2008, 6, referring to the inclusion of The University of Adelaide in the top 100 world universities according to *The Times Higher Education Supplement*.

## REASONABLE ACCOMMODATION, ADVERSE ACTION AND THE CASE OF DEBORAH SCHOU

### ABSTRACT

This article examines three relatively new legal mechanisms designed to assist workers with care responsibilities. These are a claim of discrimination in the form of a failure by an employer to provide reasonable accommodation under the *Equal Opportunity Act 2010* (Vic) and two legal mechanisms under the *Fair Work Act 2009* (Cth). Those federal avenues involve a request for changed work arrangements, and the capacity to make a claim for redress in relation to adverse action. The well-known case of Deborah Schou is used as a hypothetical to explore possible meanings and issues within, and between, the different legal frameworks. Ms Schou sought to be permitted to work at home two days a week whilst her young son recovered from a temporary medical ailment. Ultimately Schou was not successful in her litigation. The article inquires whether she would now be successful under the three new mechanisms. The examination reveals both possibilities for redress, as well as significant complexity and uncertainty in outcome.

### I INTRODUCTION

In 1996 Deborah Schou requested permission from her employer to work at home two days a week. She sought this as a temporary arrangement whilst her young son recovered from recurrent chest infections, childhood asthma and separation anxiety. The medical advice was to the effect that he would likely grow out of these difficulties within a year or so, as indeed he did. Although Ms Schou's employer, the State of Victoria, initially agreed to her request, 11 weeks later the necessary technology in the form of a modem had not been installed, and finding the conflict between her work and care responsibilities at a crisis point, she resigned.

Schou lodged a complaint of discrimination under the *Equal Opportunity Act 1995* (Vic) ('EOA 1995 (Vic)'), alleging discrimination on the basis of parental status and status as a carer.<sup>1</sup> Schou's case turned on the interpretation and application of the

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<sup>1</sup> The original complaint also relied on the *Equal Opportunity Act 1984* (Vic) in respect to earlier incidents. In addition to parenting and carer grounds, the original complaint also alleged discrimination on the ground of 'industrial activity'. All claims under the 1984 Act were dismissed, and all claims relating to 'industrial activity' were also dismissed in an early hearing: *Schou v Victoria* (2000) EOC ¶93-100.

indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend on site for all working days was 'not reasonable' in the circumstances.<sup>2</sup> After two tribunal decisions in her favour,<sup>3</sup> and a Supreme Court decision against her,<sup>4</sup> the Victorian Court of Appeal ultimately dismissed her complaint in its entirety.<sup>5</sup>

The course of the Schou litigation was closely followed over the seven years it ran, with the case coming to occupy a central place in the Australian debate regarding work and care conflict, especially as experienced by women workers with young children.<sup>6</sup> Early writings expressed excitement at the radical potential of the first tribunal decision in Schou's favour, only to have that turn to dismay and exasperation when the decisions of the Victorian Supreme Court and then the Court of Appeal were handed down. At the least the Schou litigation raised doubt about the efficacy of the indirect discrimination provisions as they stood at that time in the *EOA 1995* (Vic). More broadly it may continue to raise doubts about the ability of law to challenge long-held and taken-for-granted understandings of work arrangements, including, as in Schou, the place of work.

Numerous changes to the legislative landscape regulating conflict between work and care have occurred since the final decision in Schou was handed down in 2004. The *EOA 1995* (Vic) was itself amended in 2008 to recognise a new type of discrimination in the form of a failure by an employer to make reasonable accommodation for the responsibilities that an employee has as a parent or carer.<sup>7</sup>

<sup>2</sup> *EOA 1995* (Vic) s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

<sup>3</sup> *Schou v Victoria* (2000) EOC ¶93-100; *Schou v Victoria* (2000) EOC ¶93-101 (decision on relief); *Schou v Victoria* [2002] VCAT 375 (24 May 2002).

<sup>4</sup> *Victoria v Schou* (2001) 3 VR 655.

<sup>5</sup> *Victoria v Schou* (2004) 8 VR 120.

<sup>6</sup> See, eg, Therese MacDermott and Rosemary Owens, 'Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *Australian Journal of Labour Law* 278; K Lee Adams, 'A Step Backwards in Job Protection for Carers' (2002) 15 *Australian Journal of Labour Law* 93; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Marilyn Pittard, 'The Dispersing and Transformed Workplace: Labour Law and the Effect of Electronic Work' (2003) 16 *Australian Journal of Labour Law* 1; Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *Australian Journal of Labour Law* 185; Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

<sup>7</sup> *EOA Act 1995* (Vic) ss 13A, 14A, 15A, 31A. These amendments were made by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic). See generally, Anna Chapman, 'Care Responsibilities and Discrimination in Victoria: The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)' (2008) 21 *Australian Journal of Labour Law* 200.

This amendment may have been prompted by the final decision in Schou.<sup>8</sup> Only a few anti-discrimination statutes in Australia place an obligation of accommodation on employers.<sup>9</sup> These Victorian provisions were re-enacted in substantively identical terms in the *Equal Opportunity Act 2010* (Vic) ('EOA (Vic)').<sup>10</sup> They have moreover been bolstered by new legislative objectives in the 2010 Act which cite 'substantive equality' and refer to 'promoting and facilitating the progressive realisation of equality'.<sup>11</sup> The general trajectory of the *EOA* (Vic) towards a substantive conception of equality is also confirmed in the new and broad positive duty on employers and other duty holders to 'take reasonable and proportionate measures' to eliminate discrimination 'as far as possible'.<sup>12</sup>

In addition to these developments in Victorian anti-discrimination law, the federal *Sex Discrimination Act 1984* (Cth) ('SDA') was amended in June 2011 to extend the protections for 'family responsibilities' to direct discrimination in relation to all aspects of employment.<sup>13</sup> Prior to this, the family responsibilities provisions in

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<sup>8</sup> In the second reading debate on the Equal Opportunity Amendment (Family Responsibilities) Bill some members of Parliament explicitly acknowledged the link between the new provisions and the Schou litigation: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2007, 3676 (Mr Clark); 3684 (Mr Wakeling).

<sup>9</sup> See *Anti-Discrimination Act 1992* (NT) s 24; *Equal Opportunity Act 1984* (SA) s 66(d). On the ground of disability, see *Disability Discrimination Act 1992* (Cth) ('DDA') ss 5(2), 6(2). A positive obligation on employers may be imposed by the *Anti-Discrimination Act 1977* (NSW) ss 49V(4), 49U, although this has not been tested judicially. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

<sup>10</sup> *EOA* (Vic) ss 17, 19, 22, 32. Note also that the *EOA* (Vic) has altered the meaning of indirect discrimination in important respects: see below n 12. The *EOA* (Vic) also imposes an obligation to make reasonable adjustments in relation to disability: s 20.

<sup>11</sup> *Ibid* s 3.

<sup>12</sup> *Ibid* s 15(2), see pt 3. However this duty cannot be enforced through a claim, but such issues may be the subject of an investigation conducted by the Victorian Equal Opportunity and Human Rights Commission ('VEO&HRC'): ss 15(3), (4). The *EOA* (Vic) also amended the meaning of indirect discrimination in important respects. The new provisions refer to the requirement 'disadvantaging persons' with an attribute, in a way 'that is not reasonable'. Notably the employer has the onus of establishing the reasonableness of the requirement. The new rules also provide a greater articulation of relevant factors in determining reasonableness: *EOA* (Vic) s 9.

<sup>13</sup> *SDA* s 7A. New provisions in relation to 'breastfeeding' were also enacted: s 7AA. The amendments were made to the *SDA* by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). Note that the federal government is proposing to consolidate federal anti-discrimination legislation: Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011).

the *SDA* were more narrowly drawn to cover only direct discrimination leading to dismissal from employment.<sup>14</sup>

Federal industrial legislation has also been reshaped around the issues of work, parents and care. The *Fair Work Act 2009* (Cth) (*FW Act*) extended existing protections in the industrial sphere to provide redress in relation to ‘adverse action’ across all stages of employment, from hiring onwards, on various grounds including ‘family or carer’s responsibilities’.<sup>15</sup> In addition, the *FW Act* introduced a new statutory mechanism for parents and carers to request a change in working arrangements in order to accommodate care responsibilities to young children and children with a disability.<sup>16</sup> Although an employer is only entitled to refuse an employee request on ‘reasonable business grounds’,<sup>17</sup> there are limits on the ability to challenge an employer’s decision.

This article investigates the reasonable accommodation provisions in the *EOA* (Vic), and the ability to seek a remedy in relation to ‘adverse action’ under the *FW Act*. These two new grievance avenues are innovative and their scope is uncertain, and for those reasons an exploration is warranted. They are the obvious alternatives to each other. The request mechanism in the *FW Act* is also examined, as it is likely to be considered and utilised by an employee prior to recourse being made to either the *EOA* (Vic) or adverse action under the *FW Act*.<sup>18</sup>

It remains to be seen whether and how the potential of these relatively new mechanisms is realised. It is early days and case decisions under the Victorian accommodation provisions and the federal adverse action rules are only beginning to emerge. For this reason it is useful to use a hypothetical to explore the likely meaning and operation of the new mechanisms. The facts that emerge from the decisions in the Schou litigation are valuable for these purposes, and especially salient for two reasons. First, by today’s standards Schou’s request is a relatively modest one. It is now not unusual for employees to work remotely, including from home for part of the week.<sup>19</sup> In addition, Schou was a full-time, long standing and

<sup>14</sup> *SDA* ss 7A, 14(3A) (now repealed).

<sup>15</sup> *FW Act* s 351(1). These provisions commenced on 1 July 2009. They consolidate and expand upon the previous freedom of association protections and unlawful termination provisions in the previous *Workplace Relations Act 1996* (Cth) (*WR Act*).

<sup>16</sup> *FW Act* pt 2-2 div 4. These provisions commenced on 1 January 2010.

<sup>17</sup> *Ibid* s 65(5).

<sup>18</sup> Other possible legal avenues include a claim of indirect discrimination related to ‘parental status or status of a carer’ under the *EOA* (Vic), unfair dismissal under pt 3-2 of the *FW Act* or, less likely, direct discrimination on the attribute of ‘family responsibilities’ under the *SDA*. In contrast to the reasonable accommodation provisions in the *EOA* (Vic) and adverse action under the *FW Act*, there is nothing particularly new or untested in these other avenues, and for that reason they are not explored in this paper.

<sup>19</sup> Australian Bureau of Statistics, ‘Locations of Work’ (Survey No 6275.0, ABS, 8 May 2009). Although a growing number of public and private sector awards and agreements have provided for home based work from the early 1990s, the provisions

senior employee,<sup>20</sup> and as such her claim for accommodation would be expected to be strong.<sup>21</sup> Her circumstances represent a strong claim for legal protection, and so provide a litmus test. If these new legal mechanisms are not able to provide a modern day Schou<sup>22</sup> with accommodation and assistance, what hope is there for the vast numbers of women parents working in vulnerable sectors of the labour market, who are engaged in the private sector by medium and small businesses, and in insecure part-time and casual work?<sup>23</sup>

The claim under the *EOA* (Vic) for failure to accommodate, and the *FW Act* adverse action framework, provide alternative and distinctive paths for grievances.<sup>24</sup> Time frames in which to lodge a claim vary between the two jurisdictions,<sup>25</sup> as does the range of dispute resolution processes through which a claim potentially proceeds,<sup>26</sup>

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tend to give employers much discretion as to whether to permit working from home in any particular instance. Early award and agreement provisions from the early 1990s often specified that home based work was not a substitute for dependant care. See Pittard, above n 6, 69; Marilyn Pittard, 'Rethinking Place of Work: Federal Labour Law Framework for Contemporary Home-Based Work and Its Prospects in Australia' in Jill Murray (ed), *Work, Family and the Law* (Federation Press, 2005) 148.

<sup>20</sup> As an employee of the Victorian public sector, Schou is covered by the *FW Act*, whereas public sector employees elsewhere in Australia are generally not. See below n 57.

<sup>21</sup> Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123; Sara Charlesworth, 'The Sex Discrimination Act: Advancing Gender Equality and Decent Work?' in Margaret Thornton (ed), *Sex Discrimination In Uncertain Times* (ANU E Press, 2010) 133, 137–8.

<sup>22</sup> Throughout this article the pronoun 'she' is used to refer to a modern day, or contemporary, Schou. This approach is taken for grammatical simplicity; it is not intended to suggest that a modern day Schou will necessarily be a woman, although empirically that person is likely to be.

<sup>23</sup> The first and only decision (at the time of writing) under the *EOA* (Vic) accommodation provisions involved a casual prison officer, and her casual status was a strong factor against her claim that her employer had unreasonably refused to accommodate her needs as a parent and carer. The Victorian Civil and Administrative Tribunal ('VCAT') determined that 'the very nature of casual employment which is what Ms Richold is offered by the State grants the fullest possible flexibility': *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [42].

<sup>24</sup> Both the *FW Act* and the *EOA* (Vic) attempt to prevent multiple claims in relation to the same conduct: *FW Act* pt 6-1 div 3; *EOA* (Vic) s 116. See *Freeman v Ambulance Victoria* [2011] FCA 1141 (6 October 2011). See also *Birch v Wesco Electrics (1966) Pty Ltd* [2012] FMCA 5 (9 January 2012).

<sup>25</sup> The time frame for lodging in relation to discrimination under the *EOA* (Vic) is generally 12 months (*EOA* (Vic) s 116(a)) whereas for adverse action involving a dismissal it is 60 days after the dismissal took effect (*FW Act* s 366), and for adverse action not involving a dismissal it is six years (*FW Act* s 544).

<sup>26</sup> Under the *EOA* (Vic) dispute resolution by the VEO&HRC is now voluntary (*EOA* (Vic) s 112) whilst VCAT conducts processes of 'compulsory conference' and 'mediation' followed by a hearing (*Victorian Civil and Administrative Tribunal*

and the remedies that may be ordered.<sup>27</sup> In addition, a notable difference lies in the potential role of the Fair Work Ombudsman in enforcing the adverse action provisions in the *FW Act*.<sup>28</sup> In contrast, there is no analogous enforcement agency under the *EOA* (Vic), where employees and others pursue their claims without the formal support of a public enforcement body.<sup>29</sup>

Whilst the focus of the exploration in this article is on the legal rules themselves, it is acknowledged that the meaning and utility of all legal rules, including these new mechanisms, is shaped by the context in which they operate. This includes the dynamics of individual work relations and broader cultural understandings and values of work, care and gender. Also relevant and important is the impact of other legal mechanisms such as the contract of employment, and industrial regulation in the form of National Employment Standards, enterprise agreements and modern awards under the *FW Act*. These will all shape the meaning of the grievance mechanisms of discrimination and adverse action as they operate. As there is no full and direct enforcement mechanism attached to the request mechanism under the *FW Act*, the dynamics of individual work contexts and the broader landscapes of normative understandings regarding work and care may play an even greater role in shaping the meaning of the request provisions, as operationalised in work situations.

The paper first sets out the background and circumstances of Schou's case, as revealed through the eight decisions in the litigation. What is remarkable in this material is the proactive and creative efforts of Schou, under very stressful

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*Act 1988* (Vic) pt 4 div 5, *EOA* (Vic) s 122). In relation to an adverse action claim involving dismissal, Fair Work Australia ('FWA') conducts a compulsory 'conference' (*FW Act* s 368) and a voluntary 'conference' where the claim does not involve dismissal (*FW Act* s 374). This may be followed by a hearing in the Federal Court or the Federal Magistrates Court: *FW Act* s 539(2) item 11.

<sup>27</sup> Whilst orders for damages under Victorian anti-discrimination law have 'generally been low' (Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) [11.4.18]), the adverse action provisions provide for a broad range of possible orders, including compensation, monetary penalty orders and importantly interim injunctions (*FW Act* ss 545, 546). Costs have generally been awarded less often in relation to Victorian anti-discrimination matters: Rees, Lindsay and Rice, above n 27, [11.10.3]. Adverse action litigation is expected in most instances to be costs-free (*FW Act* s 570).

<sup>28</sup> *FW Act* pt 5-2. See further, Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) [12.4.2]–[12.4.3]; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) [6.38]–[6.46]. See also Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199; Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34 *University of New South Wales Law Journal* 182, 206–7.

<sup>29</sup> Whilst the *EOA 1995* (Vic) did require the VEO&HRC to assist complainants in formulating their complaints (s 106), that provision has been removed in the current *EOA* (Vic).

circumstances, in trying to find a workable solution for both herself and her employer. Also remarkable is the quite unreceptive and passive approach of her employer. From there the article investigates some main questions that arise under the federal request mechanism. It then moves to consider a claim by a modern day Schou for discrimination in the form of a failure to make reasonable accommodation under the *EOA* (Vic), followed by an argument of adverse action under the *FW Act*.

## II SCHOU AND THE DEPARTMENT

Schou commenced employment with the Department of Victorian Parliamentary Debates, State of Victoria in 1979, working her way up from a trainee parliamentary reporter to a sub-editor.<sup>30</sup> The Department's function was (and remains) to produce Hansard, the record of parliamentary debates.<sup>31</sup> The work of the Department's reporters and sub-editors was described as being 'highly skilled'.<sup>32</sup> Sub-editors such as Schou were responsible to supervise and manage the work of reporters, through editing and liaising with them to produce the final version of Hansard.<sup>33</sup> The Department was relatively small, employing four sub-editors at the relevant time, and around a dozen permanent reporters plus some casual reporters.<sup>34</sup>

The working patterns of Schou and her colleagues reflected the time imperatives involved in producing Hansard. Members of Parliament expected to receive an edited proof of debates within two to three hours of the debate occurring, and Parliament required a hard copy of Hansard by 8.30 am on the day following the debate.<sup>35</sup>

During the relevant period the Victorian Parliament sat in two sessions each calendar year, with each session being between six to ten weeks in duration. From 1994, sitting days were extended from three to four days per week so that in sitting weeks full-time staff in the Department (including Schou) usually worked around 45 hours over four days, although towards the end of the Parliamentary session working hours would reach 60 over the four days.<sup>36</sup> Daily hours were highly

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<sup>30</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 418–9. Although in *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [11] Duggan J stated that Schou commenced employment in 1977.

<sup>31</sup> Hansard is substantially a verbatim record of all parliamentary speeches and debates, and the work of Parliamentary Committees, although with obvious errors corrected and repetitions removed: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [7]–[8].

<sup>32</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [50].

<sup>33</sup> *Ibid* [50]–[51].

<sup>34</sup> Hansard was a relatively small department. In addition to reporters and sub-editors, there were two Assistant Chief Reporters and a Chief Reporter who was the Head of the Department. There were two administrative staff and a clerk: *Victoria v Schou* [No 2] (2004) 8 VR 120 [12].

<sup>35</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [9].

<sup>36</sup> *Ibid* [14].

irregular. Staff did not usually work on Mondays. On Tuesdays and Wednesdays Schou would commence work between 10am to noon, and finish around 1 am or 2 am the following morning. On Thursdays she would commence around 10am and finish at around 8 pm. Parliament did not sit on Fridays, and as a consequence Schou would usually finish for the week by 2 pm or 3 pm.<sup>37</sup> In contrast, during non-sitting weeks employees were required to work between around 10 am – 4 pm on three days of their choice, although on occasion the requirements of Parliamentary Committees would necessitate working particular days.

In 1994, when Parliamentary sitting days increased to four a week, Schou sought to change her employment from full-time to part-time. Her request was met by her supervisor asking her to ‘hold on’ and ‘stick it out’ until the end of the current session, after which sitting days were expected to revert to 3 days per week.<sup>38</sup> Two years later, in a routine interview with her supervisor, Schou spoke of the recurrent illnesses that her pre-school age son was experiencing, and the medical prognosis that he was expected to grow out of those difficulties within a year or so.<sup>39</sup> Schou requested that for this reason she be permitted to work part-time until his health improved. She was told in response to prepare some part-time work options for her supervisor’s consideration. Schou (and two other employees) put together such a proposal, and engaged an industrial negotiator to pursue the matter on their behalf with the Department. After around six months those discussions with the Department stalled.<sup>40</sup> Schou then requested 12 months leave without pay, but this did not proceed.<sup>41</sup>

At this point Schou raised the possibility of a new arrangement. This involved continuing in full-time employment but being permitted to work from home via a modem on Thursdays and Fridays on sitting days when her son was sick.<sup>42</sup> This became known in the various decisions as the modem proposal. In August 1996 Schou’s supervisors agreed that the modem proposal was the best course and

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<sup>37</sup> Ibid [15].

<sup>38</sup> VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC ¶93-100, 74 423.

<sup>39</sup> Ibid 74 423. It appears from the decisions that in 1996 Schou’s son was of pre-school age, as in November 1993 she returned from maternity leave following his birth: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [17].

<sup>40</sup> VCAT took the view that the modem proposal had superseded the part-time work proposal, and that the Department had not as such rejected the part-time work proposal. On this basis Schou’s claim that the Department had rejected her proposal for part-time work was dismissed: *Schou v Victoria* (2000) EOC ¶93-100, 74 425.

<sup>41</sup> VCAT took the view that Schou only floated the idea of leave without pay and did not pursue it when it was not well received by her supervisors. For this reason VCAT dismissed this aspect of the complaint that alleged that the Department had refused to grant her leave without pay: Ibid 74 426.

<sup>42</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 425. The proviso that her son was sick was omitted from the explicit description of the modem proposal recited in later judgments: *Victoria v Schou [No 2]* (2004) 8 VR 120 [20].

would be implemented. This was approved by the Chief Reporter (who was Head of Department). Other staff were advised of the decision and arrangements were made with the IT section for the installation of the necessary technology.<sup>43</sup> Eleven weeks later the modem had not been installed and Schou resigned.<sup>44</sup> The evidence of Schou's supervisors was that they knew that her situation had reached a 'crisis point' and that if the modem was not installed within a reasonable time she would likely resign.<sup>45</sup>

It is hard to imagine that Schou could have done more to explore the options with her employer over the years that were involved. She went to considerable lengths to find a workable solution for herself and the Department. It was she and her colleagues who produced the part-time work proposal, and engaged a professional negotiator to confer with the Department. It was she who initiated the options of 12 months leave without pay, and the modem proposal. The Department showed itself to be highly passive in the management of this issue. It is as if the Department saw this as solely Schou's problem, and not one that the Department might play a role in managing for their mutual benefit. Notably, the Department demanded and received from its employees flexibility to meet its needs, requiring them to work up to 45 (and sometimes 60) hours over four days, whilst largely refusing even to countenance flexibility in terms that would assist employees.

Schou's legal claim rested on the interpretation and application of the indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend Parliament House on all her working days was 'not reasonable' in the circumstances.<sup>46</sup> The Victorian Civil and Administrative Tribunal ('VCAT') determined twice that the employer's attendance requirement was 'not reasonable' within the meaning of the Act. VCAT drew on a number of matters in reaching this decision, including findings of fact that the needs of the Department would be met with Schou working from home part of the week, and that the modem proposal was inexpensive, especially given the financial circumstances of the employer. In response, both the Victorian Supreme Court and the Court of Appeal determined that VCAT had successively fallen into error in its approach to interpreting and applying the meaning of 'not reasonable' in the test of

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<sup>43</sup> In the second VCAT hearing it was determined that there were no technological barriers to putting the modem proposal into effect: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]–[60].

<sup>44</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 426. Some nine months after her resignation Schou applied for a position with the Department as Chief Reporter, her son now being back to good health. Schou was not granted an interview, and challenged that decision as discriminatory. VCAT dismissed this aspect of her complaint, not being satisfied that her parent or carer responsibilities were a substantial reason for the decision not to grant her an interview: at 74 429.

<sup>45</sup> *Ibid* 74 427.

<sup>46</sup> *EOA 1995* (Vic) s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

indirect discrimination. These courts took a narrow and technical approach to the task of statutory interpretation, a methodology strongly critiqued in the literature as undermining the beneficial purposes of anti-discrimination legislation.<sup>47</sup>

### III THE REQUEST MECHANISM IN THE *FW Act*

The request mechanism is part of the National Employment Standards, and is contained in pt 2-2 div 4 of the *FW Act*. The Division enables an employee, who falls within certain closely defined categories, to request a change in ‘working arrangements’<sup>48</sup> in order to accommodate care responsibilities to a child under school age,<sup>49</sup> or a child with a disability under the age of 18.<sup>50</sup> The employee’s request must be in writing and ‘set out details of the change sought and of the reasons for that change’.<sup>51</sup> The employer is required to give the employee a written response within 21 days, stating whether the request is granted or refused.<sup>52</sup> If the employer refuses the request the employer’s written response ‘must include details of the reasons for the refusal’.<sup>53</sup> The employer ‘may refuse the request only on reasonable business grounds’.<sup>54</sup> There is no definition of ‘reasonable business

<sup>47</sup> See, eg, Gaze, above n 6; Adams, above n 6; Knowles, above n 6.

<sup>48</sup> The concept of ‘working arrangements’ is undefined, although a legislative note gives the examples of ‘hours of work’, ‘patterns of work’, and ‘location of work’: *FW Act* s 65(1) note.

<sup>49</sup> *Ibid* ss 65(1)(a), (b). On the meaning of ‘school age’ see at s 12. In Victoria the ‘school age’ is six years of age: *Education and Training Reform Act 2006* (Vic) s 2.1.1.

<sup>50</sup> The *FW Act* does not define or explain the meaning of ‘disability’, and the Explanatory Memorandum, Fair Work Bill 2009 (Cth) is silent on the question of how that concept should be interpreted. This lack of statutory definition or explanation may indicate that the concept should be given its ordinary meaning (*Acts Interpretation Act 1901* (Cth) s 15AB) rather than reference made to technical definitions found in anti-discrimination legislation such as the *DDA*. In two recent decisions the word ‘disability’ in the adverse action provisions has been given its ordinary meaning, and not the extended meaning found in the *DDA*: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]–[146]; *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) (*Stephens*) [86]–[87]. Requests for accommodation under the National Employment Standards mechanism can only be made by a ‘parent’ of a ‘child’, or a ‘national system employee’ who ‘has responsibility for the care’ of a ‘child’: *FW Act* s 65(1). The concept of ‘parent’ is not defined in the Act, but ‘child’ of a person is defined to include a person who is a child of the person within the meaning of the *Family Law Act 1975* (Cth), and an adopted child or step-child of the person: *FW Act* ss 17, 12 definitions of ‘step-child’. These all provide relatively broad definitions.

<sup>51</sup> *FW Act* s 65(3). The Fair Work Ombudsman has formulated a template letter of request for use by employees: [www.fairwork.gov.au/info/workandfamily](http://www.fairwork.gov.au/info/workandfamily).

<sup>52</sup> *Ibid* s 65(4). Note that the legislation does not explicitly identify the time from which the 21 days runs. Presumably time starts to run from when the employer receives the request.

<sup>53</sup> *Ibid* s 65(6).

<sup>54</sup> *Ibid* s 65(5).

grounds' in the Act, or a list of factors that might assist in understanding its meaning.

Not only is the request mechanism narrowly drawn to the care of young children and older children with a disability, it is restrictive in terms of the categories of workers that can use it. It applies only in relation to 'national system employees',<sup>55</sup> and only to those who have completed 12 months 'continuous service' with their employer prior to making the request, or are a 'long term casual employee' with 'a reasonable expectation of continuing employment by the employer on a regular and systematic basis'.<sup>56</sup>

A modern day Schou is entitled to use this request mechanism. Such a person is a 'national system employee',<sup>57</sup> with several years of continuous service.<sup>58</sup> In addition, the care responsibilities are to a pre-school aged child,<sup>59</sup> and the employee's attempts at accommodation relate to 'working arrangements'.<sup>60</sup>

#### A *A Static Legislative Process*

It is interesting to explore how the statutory scheme might operate in practice, and whether the use of the new request mechanism would actually assist a modern day Schou in securing accommodation from her employer. Notably, the legislation establishes a static process comprising of a formal request followed by a written

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<sup>55</sup> Ibid s 60. Generally, only employees in the common law sense of being engaged under contracts of service are included within the concept of 'national system employees': at s 13.

<sup>56</sup> Ibid s 65(2). The concept of 'continuous service' is defined in s 22. The concept of 'long term casual employee' is defined in s 12 to be a casual employee who has been employed by that employer 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months'.

<sup>57</sup> Ibid ss 13, 30B, 30C, 30M. A modern day Schou would be covered as a Victorian public sector employee; the type of matters requested are not excluded subject matters: *Fair Work (Commonwealth Powers) Act 2009* (Vic). Schou's status as a (full-time) employee in the common law sense is not put into contention in any of the decisions. In contrast, were a modern day Schou a public sector employee elsewhere in Australia, she would most likely not be a 'national system employee', due to the more limited referrals of power from those states: Andrew Lynch, 'The Fair Work Act and the Referrals Power — Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1, 16–17.

<sup>58</sup> Deborah Schou took two periods of maternity leave, the last of which occurred a number of years before the modern proposal was raised. Assuming that maternity leave was authorised, which seems most likely, it would count as 'service' for these purposes: *FW Act* s 22(4).

<sup>59</sup> Were Schou's son to be of school age, his care needs would nonetheless be covered if his recurring illnesses and separation anxiety constituted a 'disability'. On the likely meaning of 'disability' see above n 50.

<sup>60</sup> The concept of 'working arrangements' is undefined, although a legislative note gives the examples of 'hours of work', 'patterns of work', and 'location of work': *FW Act* s 65(1) note.

approval or rejection within 21 days. It is not clear how that framework operates in contexts characterised by ongoing discussions between employers and employees, where the settlement of a request for flexibility may emerge over the course of several conversations. Notably, such dynamism appears likely to characterise discussions engaged in by employers who are committed to the legislative objective of flexibility in terms that support employees, and for that reason should be encouraged by the legislative scheme.<sup>61</sup> Schou's situation illustrates how the statutory request mechanism may not align easily with the realities of workplace negotiations over flexibility. For example, would a modern day Schou submit a formal request under the scheme following each occasion on which her supervisor asked her to 'hold on', or discussions stalled, or a proposal put by Schou did not proceed? Alternatively, would she not raise the various options with her supervisor in an informal manner at all, relying instead solely on submitting a formal written request in relation to each of her successive suggestions? A third possibility is that a modern day Schou would only submit a formal request under the scheme once informal discussions with her supervisor or relevant human resource officer had crystallised into an agreement in principle. These different possibilities all point to the need to consider how the federal request mechanism should be operationalised within individual workplaces to best fulfil the legislation's objective of assisting employees with care responsibilities. Desirably, employers would develop their existing policies on discrimination, flexibility and work and care, in order to provide the machinery for the federal request mechanism, and would do so in a way that captures the fluid and sometimes ongoing character of discussions and requests for accommodation. Notably, there is nothing in the legislation that encourages those developments.

### B *Enforceability*

If a modern day Schou did submit a request to the Department under the federal mechanism, would this increase her prospects of being permitted to work from home for part of the week? Notably, the problem for Schou was not simply that her employer refused to grant her request. Rather, it was that her employer changed its mind after initially agreeing to the request. Using the *FW Act* statutory framework centred around a written request and a response within a set time frame may render it more likely that an employer would actually put into place the arrangements that had been requested and that it had agreed to, at least initially. This might be due to the normative force of the federal scheme. It would certainly not be due to the legal

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<sup>61</sup> In its illustrative example the Explanatory Memorandum suggests that processes of negotiation and compromise are desirable: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [270]. Empirical research indicates that negotiations in workplaces around flexible working arrangements are in fact characterised by dynamism: Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65. In the context of the *EOA* (Vic), guidelines encourage employers and employees to engage in discussions to move towards reasonable accommodation: Industrial Relations Victoria and VEO&HRC, *Building eQuality in the Workplace: Family Responsibilities – Guidelines for Employers and Employees* (Guidelines, 2008) ('Commission Guidelines').

reach of the legislation. This is because an employer's inaction after agreeing to an employee's request would itself be irremediable under the *FW Act* scheme.

Although the requirement on the employer to provide a written response within 21 days is directly enforceable as a civil remedy provision, as is the requirement on the employer (where the request is refused) to 'include details of the reasons for the refusal',<sup>62</sup> the central requirement on the employer to refuse the request 'only on reasonable business grounds' is not directly enforceable.<sup>63</sup> The merits of an employer's refusal cannot be challenged directly, as no cause of action arises where an employer refuses a request on unreasonable grounds.<sup>64</sup> Equally, an employer's change of heart after granting a request is also not able to be directly challenged under the request scheme in the *FW Act*.<sup>65</sup>

### C Concluding Thoughts on the Request Mechanism

It is unclear whether the request mechanism in the *FW Act* would assist a modern day Schou. Much depends on the attitude taken by the employer. Indeed it lies wholly within the employer's discretion as to whether to grant flexibility to the employee, regardless of how reasonable is the claim for accommodation. This is because ultimately the legislation provides very little that can be enforced against an unwilling employer.

Difficult questions arise as to whether a retreat by an employer from an initial agreement to a request might be open to challenge as an unreasonable failure to accommodate under the *EOA* (Vic), or as a form of adverse action under the *FW Act*. The intersections between the federal request mechanism and these two

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<sup>62</sup> *FW Act* ss 65(4), (6), 44(1), 539.

<sup>63</sup> *Ibid* s 44(2). See also at ss 739(2), 740(2). Other indirect avenues may exist though for reviewing the merits of an employer's refusal. These include where the employer has consented, under an enterprise agreement or an employment contract, to dispute resolution over a refusal of an employee's request (at ss 739(2), 740(2)), and where an enterprise agreement contains a term that provides a similar request mechanism, a contravention of that term is able to be pursued as a breach of the enterprise agreement (at s 50). See further Anthony Forsyth et al, *Navigating the Fair Work Laws* (Lawbook Co, 2010) 45.

<sup>64</sup> For an exploration of the limited enforcement framework attaching to the right to request mechanism, see Anna Chapman, 'Requests for Flexible Work under the Fair Work Act' (unpublished manuscript, January 2012).

<sup>65</sup> Scholars have argued though that the request mechanism may offer important potential to generate cultural change around work and care: Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116; Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Labour & Industry* 67. These authors draw on the experience of earlier similar developments in the United Kingdom granting a right to request which are said to have led to a cultural change in employer attitudes. On the UK developments, see Sue Himmelweit, 'The Right to Request Flexible Working: A "Very British" Approach to Gender (In)Equality?' (2007) 33 *Australian Bulletin of Labour* 246.

grievance procedures are complex and uncertain, especially in relation to adverse action. Importantly, the request mechanism does not exclude the operation of state law such as the *EOA* (Vic) that provides more beneficial entitlements for employees to flexible work arrangements. Indeed, the *FW Act* contains an explicit direction in that regard,<sup>66</sup> indicating perhaps that the *EOA* (Vic) is the preferred form of redress in relation to a refusal by an employer over a claim under the adverse action provisions.

#### IV UNREASONABLE FAILURE TO ACCOMMODATE UNDER THE *EOA* (VIC)

As noted above the *EOA 1995* (Vic) was amended in 2008 to provide for a new type of discrimination, in the form of a failure by an employer to provide reasonable accommodation for the responsibilities that an employee has as a parent or carer.<sup>67</sup> The central provision in the 2008 package stated that an employer ‘must not, in relation to the work arrangements’ of the complainant, ‘unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer’.<sup>68</sup> This was enacted as a third and separate form of discrimination, in addition to direct discrimination and indirect discrimination.<sup>69</sup> These provisions have been continued in substantively identical terms with the replacement of the *EOA 1995* (Vic) by the *EOA* (Vic).<sup>70</sup>

Schou potentially sought accommodation of her responsibilities to her son through her attempts to negotiate a move to part-time work, her offer to take leave without pay, and her final efforts to gain permission to work at home part of the week. The Department’s rejection in relation to each might singularly (and cumulatively) ground a complaint under the Victorian failure to accommodate provisions. A number of preliminary matters in relation to such a complaint are clearly met. Schou was a current employee of the Department of Victorian Parliamentary Debates.<sup>71</sup> The concepts of ‘parent’ and ‘carer’ are both defined (inclusively) in the Act, and Schou is presented in the decisions unproblematically as a person who falls within both definitions.<sup>72</sup> Indeed, one of the decisions reveals that she took

<sup>66</sup> *FW Act* s 66; Explanatory Memorandum, Fair Work Bill 2009 (Cth) [272].

<sup>67</sup> The new provisions, effected by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), applied in relation to conduct occurring after 1 September 2008.

<sup>68</sup> *EOA 1995* (Vic) ss 13A(1), 14A(1), 15A(1), 31A(1).

<sup>69</sup> *Ibid* s 7(1); Chapman, above n 7, 201–2.

<sup>70</sup> See *EOA* (Vic) ss 7(1), 17, 19, 22, 32. The claimant may be an employee in the common law sense of engaged under a contract of service (whether full-time, part-time or casual), or a worker engaged under a contract for services. Whilst the *EOA 1995* (Vic) explicitly excluded unpaid workers and volunteers, those references have been removed from the 2010 Act. See *EOA* (Vic) s 4(1) definition of ‘employee’. The 2010 Act, like the 1995 Act, continues to cover people paid by commission, contract workers, and firms with five or more partners.

<sup>71</sup> *EOA* (Vic) s 4(1) definition of ‘employee’, s 19.

<sup>72</sup> *Ibid* s 4(1). The inclusive definition of ‘parent’ draws on legal concepts of parenthood and as such the statutory definition may not reflect diverse practices of parenting found in, for example, kinship and friendship networks, and same sex relationships.

‘maternity leave’ in relation to her son’s birth.<sup>73</sup> In addition, her responsibilities in that regard to her son were clearly the reason for her requests for flexibility over the years.

Schou’s ‘work arrangements’ as a current employee are defined to mean ‘arrangements applying to the employee or the workplace’,<sup>74</sup> and this clearly countenances the types of accommodation that Schou sought. Indeed, the legislation provides that working from home is an illustrative example of what might be reasonable accommodation under the new provisions.<sup>75</sup> In addition, guidelines produced by Industrial Relations Victoria and the Victorian Equal Opportunity & Human Rights Commission (‘VEO&HRC’) (‘Commission Guidelines’) also list working from home as an example of a flexible work arrangement that might be granted under the *EOA* (Vic).<sup>76</sup> The Commission Guidelines anticipate the possibility of several changes in work arrangements over time, countenancing and reflecting the dynamic character of the accommodation that many worker-carers, including a modern day Schou, might seek.<sup>77</sup>

### *A Request and Rejection*

The Victorian statutory framework does not explicitly require that there be a request for accommodation by the employee. Notably though, in the first decision under the new rules VCAT has held that the need for a request by the employee ‘is necessarily implicit’ in the legislation, and arises so that the employer is able to fully comprehend the nature of the accommodation sought, and be in a position to consider the request properly.<sup>78</sup> The Commission Guidelines express the view that

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Notably though the VEO&HRC interprets parent to include the ‘domestic partner of a parent’: Commission Guidelines, above n 61, 5. The definition of ‘carer’ requires that there be ‘ongoing care and attention’ in relation to a person who is ‘wholly or substantially dependent’ on the carer (excluding paid care). This may not cover short term care needs towards a person who is not usually dependent on the worker. In its guidelines, the VEO&HRC provides that ‘[c]arers provide care and support to family members and friends with a disability, mental illness or disorder, chronic condition, terminal illness or who are frail. Care giving may occur occasionally, continuously, in the short-term or over the long-term’: Commission Guidelines, above n 61, 5.

<sup>73</sup> *Schou v Victoria* [2002] VCAT 375 [17]. This terminology suggests that she is the birth mother of her son, and not for example a same sex co-parent taking parental leave. It is unclear whether a same sex co-parent would fall within the definition of ‘parent’, although such a parent would in any event be covered as a ‘carer’.

<sup>74</sup> *EOA* (Vic) s 4(1) definition of ‘work arrangements’. The definition covers both legally enforceable terms and conditions of engagement, and other practices and requirements of the work arrangement.

<sup>75</sup> *Ibid* s 19 example.

<sup>76</sup> Commission Guidelines, above n 61, 4.

<sup>77</sup> *Ibid* 6.

<sup>78</sup> *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [38], [40]. The need for a request to have been made under the Victorian provisions was approved in the context of an adverse action claim in *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [144]–[145]. Riley FM considered that a request under the Victorian

a request may be made informally or through a more formal mechanism, whether in writing, or verbally.<sup>79</sup> This appears to assume that a request will have been made by the employee.

Relevantly, the first VCAT decision in Schou provides a strong sense that the more formal a request is, the easier it will be to establish as a factual matter that the employer has rejected the request. This issue arose in relation to Schou's claim that she had applied for 12 months leave without pay, and that her application had been rejected. Schou's evidence was that she raised the idea of leave without pay with her two supervisors on different occasions, and that her suggestion was 'categorically rejected' by them.<sup>80</sup> Schou admitted some ambivalence on her own part in that she was not sure that leave without pay would provide an adequate solution to her situation.<sup>81</sup> The tribunal determined as a matter of fact that Schou had merely 'floated' the idea of 12 months leave without pay, and that she had not made 'an actual formal, albeit oral, application'.<sup>82</sup> For this reason the tribunal was not satisfied as a factual matter that the Department had refused to grant her 12 months leave without pay.<sup>83</sup> This reasoning suggests that were Schou's situation to be pursued under the *EOA* (Vic) accommodation provisions, the Department may not have 'refuse[d] to accommodate' her, at least so far as the proposal for leave without pay goes.

In terms of the idea of part-time work, the evidence as revealed in the decisions indicates strongly that Schou made a formal request, through drawing up (with two colleagues) a proposal for part-time work and engaging an industrial negotiator to pursue the matter with the Department on her behalf. Although a formal request for part-time work is apparent, on the facts VCAT determined that the Department had not actually rejected the part-time work proposal. Rather, for VCAT, the part-time work idea had simply been superseded by the modem proposal. Applying this view of the evidence to the *EOA* (Vic) provisions is likely to lead again to the conclusion that the Department has not 'refuse[d] to accommodate' Schou's responsibilities.<sup>84</sup> This highlights the contrast between the Victorian legislative test of a 'refus[al] to accommodate' and the broader question of whether an employer has failed to reasonably accommodate.

This leaves only the modem proposal as a potential instance of the Department refusing to accommodate Schou's responsibilities. VCAT was 'not satisfied

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legislation 'would have to include a specific proposal for alteration of the existing arrangements': at [144].

<sup>79</sup> Commission Guidelines, above n 61, 8.

<sup>80</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 425.

<sup>81</sup> *Ibid* 74 425–6.

<sup>82</sup> *Ibid* 74 426.

<sup>83</sup> This aspect of Schou's complaint was dismissed: *Schou v Victoria* (2000) EOC ¶93-100, 74 426.

<sup>84</sup> Potentially Schou and her two colleagues could jointly bring a dispute to the VEO&HRC alleging an unreasonable failure to accommodate by the Department: *EOA* (Vic) s 113.

that management's intentions to implement the modem proposal survived past September 1996'.<sup>85</sup> It seems likely that such an abandonment of the modem proposal reflects a rejection of it by the Department. In addition, the evidence seems likely to establish that a request by Schou to work at home was made, leading to a view that the modem proposal may be the only matter that Schou could rely on to show that she had requested accommodation, and that her request was refused by the Department.

This exploration suggests that a too rigid application of the need to find conduct amounting to a request and then a subsequent rejection may fail to capture adequately the character of dynamic negotiations over flexible work arrangements between employers and employees. Those conversations may be ongoing and informal. Schou showed herself to be conciliatory and flexible throughout the years of discussions, initiating conversations and suggesting successive options when a proposal did not find favour with the Department. It would be undesirable if that approach ultimately counted against her claim of discrimination under the *EOA* (Vic). A preparedness to explore options and consider alternatives in a flexible and informal manner appear to be the markers of a desirable process towards accommodation, and one which the legislation ought to encourage. Informality, adaptability and the consideration of different possibilities should likewise not necessarily be interpreted against an employer as a refusal to accommodate a specific request. The challenge is for interpretations of the accommodation provisions in the *EOA* (Vic) to adequately recognise and take account of the realities of workplace discussions between employees, their supervisors, and human resource managers. At its core this challenge is analogous to that faced in relation to the federal request mechanism — how to interpret these provisions in a way that takes adequate account of the realities of work relations.

### B *Reasonableness Factors*

Apart from the possible need to find a request and then a rejection of it on the evidence, the main issue in a claim that a person in Schou's position might bring today under the *EOA* (Vic) is whether the employer has 'unreasonably' refused to accommodate the responsibilities that the employee has as a parent or carer. The relevant sections provide that in determining whether an employer 'unreasonably refuses to accommodate', all relevant facts and circumstances must be considered, including —

- (a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and
- (b) the nature of the employee's role; and
- (c) the nature of the arrangements required to accommodate those responsibilities; and
- (d) the financial circumstances of the employer; and

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<sup>85</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427. In September, no doubt in desperation, Schou requested 12 months' leave without pay. This was not forthcoming: at 74 425.

- (e) the size and nature of the workplace and the employer’s business; and
- (f) the effect on the workplace and the employer’s business of accommodating those responsibilities, including—
  - (i) the financial impact of doing so;
  - (ii) the number of persons who would benefit from or be disadvantaged by doing so;
  - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
- (g) the consequences for the employer of making such accommodation; and
- (h) the consequences for the employee of not making such accommodation.<sup>86</sup>

This provides an inclusive articulation of the concept of reasonableness. None of the listed matters are determinative on their own, and other factors not included in the list may be highly relevant and important in assessing reasonableness in any particular case.<sup>87</sup> The Explanatory Memorandum and second reading speech to the 2008 legislation themselves suggest some additional factors that are apparent in the Schou decisions — how long the proposed work arrangements are to continue; the ability of the employer to reorganise the employee’s work, including whether there are any legal or other constraints that affect the feasibility of accommodating those responsibilities.<sup>88</sup>

There are many factors that point to the Department’s refusal of the modern proposal as being unreasonable in all the circumstances. Schou’s circumstances were that she had (to the knowledge of her supervisors) reached a ‘crisis point’ in managing her responsibilities to her young son and her work commitments.<sup>89</sup> Also, her request was for a limited time, expected to be a year or so until his health improved.<sup>90</sup> The evidence does not directly reveal whether Schou was the sole or main carer of her child, although certainly it seems clear that she had run out of options for his care.

Both VCAT decisions investigated the nature of Schou’s role, the nature of the arrangements required to accommodate her responsibilities to her son, and the

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<sup>86</sup> *EOA* (Vic) ss 17(2), 19(2), 22(2), 32(2).

<sup>87</sup> Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 4–6; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (B Cameron).

<sup>88</sup> Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 5; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (B Cameron). For other similar articulations of factors, see Commission Guidelines, above n 61, 8. The 2008 legislation is the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic).

<sup>89</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427.

<sup>90</sup> In the second hearing VCAT determined this was relevant to the meaning of reasonableness under indirect discrimination: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [44]. Schou’s son’s health issues did resolve themselves less than a year after she resigned: *Schou v Victoria* (2000) EOC ¶93-100, 74 429.

effect of providing the accommodation on the employer's operational interests and concerns. VCAT examined the feasibility of the modem proposal, and explored the impact of the proposal on work flow and the supervision responsibilities of Schou. In addition, concerns over confidentiality and security were examined. VCAT found as matters of fact that security concerns were met, and that the accurate and timely production of Hansard would not be compromised by adoption of the modem proposal.<sup>91</sup> Notably, the Department had itself investigated the work from home proposal including in terms of its health and safety legal obligations, and had not found any legal impediments to it.<sup>92</sup> The initial support for the proposal within the Department was strong evidence that the employer's needs and concerns, including those relating to efficiency and productivity, were able to be met in the work from home proposal.<sup>93</sup> In addition, the Department's own policy documents that promised flexibility to employees were seen by VCAT as relevant in assessing the reasonableness of the Department's refusal.<sup>94</sup>

The modem proposal was described by VCAT as presenting a 'modest cost', and this description is apt regardless of whether the budgetary unit is seen as the Department itself, or the Victorian State public sector as a whole.<sup>95</sup> In either case, the cost of the modem would have very little financial impact on the employer. It is noted in the decisions that Schou's workplace itself was relatively small, in comprising four sub-editors, and around a dozen permanent reporters. It appears that Schou's Department Head (and the Departmental Heads more broadly) were concerned that granting flexibility to Schou would open the floodgates to similar claims by other employees.<sup>96</sup> In the second VCAT hearing, Judge Duggan noted that in any event Schou was at that time the only sub-editor with children, the inference being that she was likely to be the only employee seeking to work from home due to care responsibilities towards children.<sup>97</sup> Importantly though, granting accommodation to Schou would not necessarily tie the Department's hands in relation to subsequent requests to work from home. The Commission Guidelines

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<sup>91</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]–[60].

<sup>92</sup> *Ibid* [21]. Industrial agreements that provide for home based work commonly address occupational health and safety aspects, sometimes prescribing that those requirements be taken into account prior to permission being given by the employer, and sometimes specifying those requirements as a reason to terminate the home based work agreement: Pittard, above n 6, 173.

<sup>93</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [58].

<sup>94</sup> In the second hearing VCAT expressed the view that the Parliamentary Officers' Employment Agreement, which included a promise for the 'adoption of flexible and progressive work practices and reasonable changes in the way work is organised', shaped the meaning of reasonableness in indirect discrimination: *Ibid* [40], [43].

<sup>95</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427. The modem proposal was costed by the Department as being between \$2 000–2 500 in total.

<sup>96</sup> The Chief Reporter's evidence was that he 'took every step to implement the proposal in the face of opposition ... [from his] Departmental Head Colleagues': *Schou v Victoria* (2000) EOC ¶93-100, 74 426.

<sup>97</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [43].

confirm this,<sup>98</sup> and encourage employers to ‘[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances’.<sup>99</sup> This confirms that it may be lawful under the Victorian provisions to grant one request for a particular type of accommodation but not another for the same accommodation, due to the different contexts in which those decisions will inevitably be made. Interestingly though, the approach of treating employees differently in this way may not, at first glance, sit well with the adverse action provisions in the *FW Act* which articulate one form of adverse action as arising where an employer ‘discriminates between the employee and other employees of the employer’.<sup>100</sup> This is discussed further below.

Schou was a senior long-standing and highly specialised employee who her immediate supervisors recognised was ‘for all practical purposes irreplaceable’.<sup>101</sup> Her efforts to find a feasible solution for herself and the Department reveal much good will on her part. So too do her attempts to ‘hold on’ and ‘stick it out’ as she was requested to do in 1994,<sup>102</sup> and this in the face of the unusually onerous working hours regime that operated in the Department during sitting weeks. The consequences for Schou in not being granted accommodation was the loss of her job and moreover the loss of a highly specialised career that she had built over 18 years. For the Department the consequence was the loss of an irreplaceable employee who was one of only four sub-editors working in the Department.

### C Reasonableness as a Legal Standard

Although the facts of Schou as revealed in the decisions do appear to provide a strong case indicating that accommodation in the form of the modem proposal ought to have reasonably been provided by the Department, the use of a reasonableness concept in a legal rule never permits a high level of confidence in the likely outcome of the rule’s application.

The concept of reasonableness in anti-discrimination law has tended to be interpreted by judges in ways that reinforce the status quo. This is seen in the

<sup>98</sup> The Guidelines pose a hypothetical question by an employer: ‘[i]f I have an ongoing flexible work arrangement with one employee with family responsibilities, am I also required to provide the same arrangement to other employees?’ In response the Guidelines provide: ‘[e]ach case should be assessed individually. Depending on the circumstances it may be reasonable to accept one person’s request for a changed work arrangement and refuse another person.’ The Guidelines conclude ‘[e]xplain to employees the reasons behind any decisions, and address any concerns about equity in work arrangements’: Commission Guidelines, above n 61, 14.

<sup>99</sup> Ibid 8.

<sup>100</sup> *FW Act* s 342.

<sup>101</sup> This was the conclusion of her supervisors in their initial agreement with her request to work at home two days per week: *Schou v Victoria* (2000) EOC ¶93-100, 74 427.

<sup>102</sup> VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC ¶93-100, 74 423.

Schou litigation itself where both the Victorian Supreme Court and a majority of the Court of Appeal interpreted the meaning of reasonableness in a way that gave great weight to the Department's interests as identified by it in the hearings, and little (if any) weight to Schou's concerns and position.<sup>103</sup> Considerable deference to managerial authority was reflected in particular in the judgment of Harper J in the Supreme Court.<sup>104</sup> The judgments in both courts reveal a deep focus on the employer's preference for the status quo, and a dismissal of alternatives that might provide a less discriminatory way of meeting the employer's needs.

Although on the face of it such judicial approaches to interpreting reasonableness do not bode well for employees seeking to challenge long standing norms of work organisation, there are good reasons to confine the Supreme Court and Court of Appeal judgments to the indirect discrimination provisions as they existed under the *EOA 1995* (Vic).<sup>105</sup> Importantly, the wording of the new accommodation provisions now in the *EOA* (Vic) focuses the issue of reasonableness on the employer's refusal, and not the reasonableness of the original requirement or condition to work full time on site (as the indirect discrimination provisions in the *EOA 1995* (Vic) did). Clearly a balancing process is envisaged under the *EOA* (Vic), between the interests of the employer and those of the employee.<sup>106</sup> The accommodation provisions are intended to offer an additional entitlement to employees, above the protection afforded by indirect discrimination. As noted above, they are part of a general theme in the *EOA* (Vic) regarding the desirability of moving towards a substantive conception of equality in the workplace. Substantive equality looks beyond an ideal of treating people the same as each other, looking to equality in terms of outcomes and results. In contrast, formal equality sees equality as lying in consistency, or sameness, of treatment

<sup>103</sup> See, eg, *Victoria v Schou* (2001) 3 VR 655 [12], [17], [24]; *Victoria v Schou* (2004) 8 VR 120 [24], [37], [39] (Phillips JA). For example, great weight was given to the contract term identifying parliament house as the location of the position, and little weight was given to the promise regarding flexibility contained in the Parliamentary Officers' Employment Agreement: *Victoria v Schou* (2001) 3 VR 655 [20]–[22]; *Victoria v Schou* (2004) 8 VR 120 [24] (Phillips JA). In contrast, VCAT gave considerably more weight to the promise of flexibility: *Schou v Victoria* (2000) EOC ¶93-100, 74 428; *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [66]–[72].

<sup>104</sup> *Victoria v Schou* (2001) 3 VR 655 [30] where Harper J cautioned that courts and tribunals 'must act with an appropriate degree of diffidence. The expertise of judges and tribunal members does not generally extend to the management of a business enterprise or the reporting of parliamentary debates'. '[C]ourts and tribunals concerned with equal opportunity legislation should resist the temptation unnecessarily to dictate to persons who manage, and work on, the shop floor.' See also at [17] where great deference is shown to employment law, awards and agreements. For a contrasting approach of VCAT, see *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [76]–[79].

<sup>105</sup> Notably, there is much force in the argument that in various respects the decisions of the Supreme Court and Court of Appeal are not in line with earlier High Court authority on these matters, and for that reason are not sound: Knowles, above n 6, 192–3.

<sup>106</sup> Such an approach was taken in *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [41]–[45].

of employees. The accommodation provisions in the *EOA* (Vic) evidence a clear attempt to move beyond a formal equality understanding of discrimination, an approach that has plagued the interpretation of both direct discrimination and indirect discrimination across Australia. It is this formal equality framework of understanding that appeared to underlie much of the thinking of Harper J and the Court of Appeal.<sup>107</sup> For example, Harper J described that Schou had ‘sought a favour; one which (it would seem) had not been granted by her employer to any other employee’. His honour went on to say that Schou’s situation was not discrimination within the meaning of the Act as ‘Schou was simply treated as all other sub-editors were and are treated: not better, but certainly not worse’.<sup>108</sup> In furthering substantive equality, this third form of discrimination is of a different character to the indirect discrimination provisions that were before the Supreme Court and the Court of Appeal, and for that reason those judgments should not be seen as applicable in interpreting these new provisions on reasonable accommodation.

#### D *The Victorian Charter*

Victoria has enacted a human rights statute since the final decision in the Schou litigation.<sup>109</sup> The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*‘Charter’*) is likely to take effect to strengthen the claim of a modern day Schou. The *Charter* requires that all Victorian legislation, including the *EOA* (Vic) must, so far as is possible consistently with its purpose, be interpreted ‘in a way that is compatible with human rights’.<sup>110</sup> In addition, the *Charter* provides that it is unlawful for a ‘public authority’ ‘to act in a way that is incompatible with a human right’ or ‘to fail to give proper consideration to a relevant human right.’<sup>111</sup> The Department of Parliamentary Debates and its officers are within the definition of a ‘public authority’.<sup>112</sup>

<sup>107</sup> *Victoria v Schou* (2001) 3 VR 655 [12], [13]–[15], [17], [24]; *Victoria v Schou* (2004) 8 VR 120 [27], [30]–[32] (Phillips JA). See also Buchanan J (concurring with Phillips JA): [47]–[48]. Anti-discrimination cases at the Commonwealth level regarding work and care conflict also evidence the strong normative pull of formal equality. See, eg, *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003); *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186.

<sup>108</sup> *Victoria v Schou* (2001) 3 VR 655 [24]. Harper J continued that ‘the Act forbids discrimination. It does not compel the bestowing of special advantage. The unreasonable refusal to extend a benefit to an individual or individuals where that benefit is, with good reason, not available to others, is not discrimination’: at [24]. Contrast the Commission Guidelines on the reasonable accommodation provisions which encourage employers to ‘[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances’: Commission Guidelines, above n 61, 8.

<sup>109</sup> The ACT is the only other state or territory in Australia to have a human rights statute requiring that legislation be interpreted in a way that respects certain rights recognised under international law: *Human Rights Act 2004* (ACT).

<sup>110</sup> *Charter* s 32(1).

<sup>111</sup> *Ibid* s 38. Section 4 contains a definition of ‘public authority’.

<sup>112</sup> Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008) [1.59]–[1.62]. In

The human rights that are possibly engaged in a complaint brought by a contemporary Schou are several, including the ‘right to enjoy human rights without discrimination’, and the right to ‘effective protection against discrimination’.<sup>113</sup> In addition, every eligible person ‘has the right, and is to have the opportunity, without discrimination’, ‘to have access, on general terms of equality, to the Victorian public service’.<sup>114</sup> Importantly, the human right to equality in the *Charter* has been interpreted to mean a substantive conception of equality, and not merely equality in a formal sense.<sup>115</sup> In addition to non-discrimination, the *Charter* provides 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.’<sup>116</sup>

In ensuring that the refusal to accommodate provisions in the *EOA* (Vic) are interpreted in a human rights-compatible way, a person in Schou’s position today would be strengthened in her claim that her employer unreasonably refused to accommodate her request to work at home for two days each week. In addition, because Schou’s employer was a ‘public authority’, a modern day Schou has additional options arising out of a breach by the public authority of its direct responsibilities regarding human rights.<sup>117</sup>

### E *Concluding Thoughts on Reasonable Accommodation*

It seems most likely that a person in Schou’s position would have a strong claim today under the *EOA* (Vic) for discrimination in the form of an unreasonable failure to accommodate her parenting and care responsibilities. No exemptions or exceptions appear to be relevant to such a claim.<sup>118</sup> Two points though remain

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*Richold v Victoria* [2010] VCAT 433 (14 April 2010) [47], VCAT determined that the Department of Justice, and its officers that made the impugned decision are within the definition of ‘public authority’ in s 4 of the *Charter*.

<sup>113</sup> *Charter* ss 8(2), (3), (4). Section 3 defines ‘human rights’ as the civil and political rights set out in Part 2 of the *Charter*.

<sup>114</sup> *Charter* s 18(2)(b).

<sup>115</sup> *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [107], [290]. This understanding of equality and non-discrimination is in keeping with international law, which can be used in construing the human rights in the *Charter*. See *Charter* s 32(2); *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [105]–[303].

<sup>116</sup> *Charter* s 17.

<sup>117</sup> *Ibid* s 39. Section 39(3) provides that remedies for breach of s 38 of the *Charter* by a public authority cannot include damages. Evans and Evans argue that breach of s 38 does not give rise to a new cause of action. Rather it may play a role in supplementing existing legal claims. See Evans and Evans, above n 112, [4.22]–[4.28].

<sup>118</sup> The *EOA* (Vic) contains some exemptions and exceptions that may be potentially relevant to a failure to reasonably accommodate, including hiring for personal or

to be made. First, a claimant broadly bears the evidentiary onus of establishing all aspects of the claim are made out, including that the employer's refusal of accommodation was unreasonable within the meaning of the legislation. It has proven to be particularly difficult for claimants under anti-discrimination law to establish discrimination, including unreasonableness, as claimants are not generally privy to the employer's reasons for its decisions, policies and requirements, and especially at the outset of a claim. For this reason there have been many calls, and subsequent legislative amendments in some jurisdictions, to shift the onus — in the context of indirect discrimination — so that the employer is obliged to justify the reasonableness of its own requirements.<sup>119</sup> Notably, although the *EOA* (Vic) does shift the onus on reasonableness in the new indirect discrimination provisions,<sup>120</sup> an analogous shift of onus in relation to an unreasonable failure to accommodate has not occurred. This will mean that a claimant relying on discrimination in the form of a failure to accommodate will continue to face a difficult task in identifying and then establishing the factual basis of the claim, especially as it relates to unreasonableness. Where a claimant has earlier used the request mechanism under the *FW Act*, the employer ought to have provided a written response rejecting the request that included 'details of the reasons for the refusal'.<sup>121</sup> This statement by the employer will be relevant in an evidentiary sense and may provide assistance to a modern day Schou in factually establishing her claim for an unreasonable failure to accommodate under the *EOA* (Vic).

The second point to be made is that the individual grievance framework typical of anti-discrimination law across Australia has posed many challenges and difficulties for claimants, including disparities in resources and knowledge between employee and employer.<sup>122</sup> The *EOA* (Vic) contains a number of innovations in dispute resolution, including direct access to VCAT and early dispute resolution services by the VEO&HRC. These will apply in relation to claims regarding an unreasonable failure to accommodate. It remains to be seen how these new mechanisms will shape dispute resolution processes. The reactive and largely individual grievance

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domestic services in the employer's own home (s 24) and religious conduct and beliefs (ss 81–84).

<sup>119</sup> See, eg, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) [5.32]–[5.43]. The onus has been shifted to the employer under the *SDA* s 7C; *Age Discrimination Act 2004* (Cth) s 15(2); *Anti-Discrimination Act 1991* (Qld) s 205.

<sup>120</sup> *EOA* (Vic) s 9(2). The Explanatory Memorandum suggests that the reason for this shift is that the employer has access to the relevant information: Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 13.

<sup>121</sup> *FW Act* s 65(6).

<sup>122</sup> Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010); Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

path, albeit with these new and as yet untested innovations,<sup>123</sup> remains the mode of enforcement for the reasonable accommodation provisions.

## V ADVERSE ACTION UNDER THE *FW ACT*

The adverse action provisions, contained as part of the General Protections in pt 3-1 of the *FW Act*, enable certain employees to seek a remedy in relation to adverse treatment they experience at work. The interaction of the adverse action rules with the federal request mechanism gives rise to a number of questions. Although prior unsuccessful use of the request mechanism does not on the face of the *FW Act* exclude a subsequent claim under the adverse action provisions, it is possible that attempting to use the adverse action rules to indirectly enforce a request against an employer may be seen to run counter to Parliamentary intention.<sup>124</sup> The argument would be that Parliament decided against including a direct enforcement mechanism by which an employee can challenge the merits of an employer's refusal of their request.<sup>125</sup> It is unclear how an indirect challenge to those merits under the adverse action provisions would be received by a court.

Leaving aside that issue of interaction, the adverse action protections are themselves complex and uncertain in scope. As a starting point, a modern day Schou is a worker who is entitled to lodge a claim under the adverse action provisions.<sup>126</sup> Her rights under the provisions will centre around whether it is established that she experienced 'adverse action' within the meaning of the legislation, and whether such conduct was 'because' of one of the prescribed grounds. These matters all give rise to much doubt.

### A *Grounds of Adverse Action*

The *FW Act* provides that an employer must not take 'adverse action' against an employee on a range of grounds.<sup>127</sup> There are two main grounds of potential relevance to Schou's situation. The first is that Schou has, or proposes to exercise, a 'workplace right'.<sup>128</sup> A person has a 'workplace right' where the person:

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<sup>123</sup> Those innovations include the ability of the VEO&HRC to undertake an investigation under *EOA* (Vic) pt 9.

<sup>124</sup> Given this, might it be better for a modern day Schou to go directly to initiating an adverse action claim, and not use the request mechanism first? The potential downside of that approach is that an employer may then credibly argue that it was not aware of her request and was not given an opportunity to respond to the issue.

<sup>125</sup> As noted above, arguably the *FW Act* indicates that state legislation (such as the *EOA* (Vic)) may be the preferable form of redress in relation to a refusal by an employer under the request mechanism, over an application under the adverse action provisions: *FW Act* s 66.

<sup>126</sup> *FW Act* ss 15, 30G, 335. Note that Inspectors of the Fair Work Ombudsman also have power to initiate a court application: *FW Act* s 539(2) item 11.

<sup>127</sup> *FW Act* ss 340(1), 351(1).

<sup>128</sup> *Ibid* s 340. The provisions also cover not exercising, and not proposing to exercise, a 'workplace right'.

- is entitled to the benefit of ‘a workplace law’;
- is able to initiate, or participate in a process or proceeding under a ‘workplace law’;
- is able to make a complaint to a body having the capacity under a ‘workplace law’ to seek compliance with that law; or
- ‘is able to make a complaint or inquiry’ ‘in relation to his or her employment’.<sup>129</sup>

The *FW Act* explicitly provides that when a parent or carer makes a request to alter working arrangements under that statute’s request mechanism, this amounts to initiating a process or proceeding under a ‘workplace law’.<sup>130</sup> The concept of ‘workplace law’ is defined more broadly to include the *FW Act*, and any ‘law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees’.<sup>131</sup> Even though the *EOA* (Vic) is not solely concerned with the relationships between ‘employers and employees’ in the common law sense, and regulates broader work contexts, in addition to the commercial provision of goods, services and accommodation for example, the *EOA* (Vic) appears to be a ‘workplace law’ in that it is a statute that directly impacts on the legal rights and obligations between employers and employees.<sup>132</sup> Accordingly, Schou has a ‘workplace right’ in the form of being entitled to initiate a grievance under the *EOA* (Vic) in relation to an unreasonable refusal to accommodate her care responsibilities. Finally, she also has a ‘workplace right’ in the form of being ‘able to make a complaint or inquiry’ ‘in relation to ... her employment’.<sup>133</sup> Schou clearly did make inquiries with her employer in relation to flexibility and her employment, and this appears sufficient to constitute this last type of ‘workplace right’.<sup>134</sup>

The second prohibited reason potentially relevant to a claim made by a modern day Schou is ‘family or carer’s responsibilities’.<sup>135</sup> The *FW Act* does not define

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<sup>129</sup> Ibid s 341.

<sup>130</sup> Ibid s 341(2)(i).

<sup>131</sup> Ibid s 12. In this context ‘employee’ and ‘employer’ have their ordinary meanings: at s 11.

<sup>132</sup> It has been determined that the *EOA 1995* (Vic) is a ‘workplace law’ within the *FW Act* meaning: *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [141]. Occupational health and safety legislation has also been determined to be a ‘workplace law’: *Stephens* [2011] FMCA 448 (8 July 2011) [16]; *AFMEPKIU v Visy Packaging Pty Ltd (No 2)* [2011] FCA 953 (31 August 2011) [10]. See also *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) [234].

<sup>133</sup> *FW Act* s 341(1)(c)(ii).

<sup>134</sup> It is sufficient that the inquiry or complaint was made to the employer: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1370]; *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) [347]; *George v Northern Health (No 3)* [2011] FMCA 894 (28 November 2011) [50]–[55].

<sup>135</sup> The full list is: the ‘person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin’: *FW Act* s 351. The

or explain the meaning of that concept, and the Explanatory Memorandum does not assist in this regard. While the ground of ‘family responsibilities’ has been part of industrial law since 1993, it has never been defined, and cases have not explored its parameters. The insertion of the reference to carer into the statutory formula indicates that Parliament intended to broaden the ground beyond ‘family responsibilities’. Two main interpretative options present themselves for understanding ‘family or carer’s responsibilities’ - the ordinary meaning of the words,<sup>136</sup> or anti-discrimination law’s understanding of similar family and carer grounds.<sup>137</sup> Regardless of which approach is adopted or emphasised, it seems that Schou’s situation would fit comfortably within the concept of family or carer’s responsibilities.

### B *Causal Link and Onus*

In order for a modern day Schou to succeed, it would need to be established that a causal link existed between at least one of the grounds discussed above, and the Department’s ‘adverse action’ (discussed below). In short, was any ‘adverse action’ taken by the Department ‘because of’ her ‘family or carer’s responsibilities’ or ‘because’ she has, or proposes to exercise, a ‘workplace right’?

The legislation does not require that the identified reason be the sole or dominant reason for the employer’s adverse conduct. It must however be an operative reason.<sup>138</sup> In addition, and importantly, a reversed onus of proof applies so that once

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decisions do not reveal whether any of these subjectivities are also relevant to Schou. None of these concepts is defined or explained in the *FW Act*.

<sup>136</sup> To date there has been little exploration of the meaning of ‘family or carer’s responsibilities’: See, eg, *Uchino v Acorp Pty Ltd* [2012] FMCA 9 (27 January 2012). Decisions of the Federal Magistrates Court have however given the word ‘disability’, as it appears in the adverse action provisions, its ordinary meaning: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]–[146]; *Stephens* [2011] FMCA 448 (8 July 2011) [86]–[87]; *Cugura v Frankston City Council* [2012] FMCA 340 (24 April 2012) [163]. Disability is also not defined and its meaning is not explained in the *FW Act*. See above n 50.

<sup>137</sup> ‘[F]amily responsibilities’ is defined in the *SDA* around the concept of a two adult couple: Anna Chapman, ‘Industrial Law, Working Hours, and Work, Care and Family’ (2010) 36 *Monash University Law Review* 190; Anna Chapman, ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (2009) 18 *Griffith Law Review* 453, 464–5. Anti-discrimination statutes of some states and territories, including the *EOA* (Vic) provide for a broader recognition of care responsibilities per se, and do not require that the care take place in any particular setting, other than it not be provided for commercial reward: *EOA* (Vic) ss 6(i) (status of being a ‘carer’), 4(1) (definition of ‘carer’).

<sup>138</sup> *FW Act* s 360. In contrast, the *EOA* (Vic) s 8(1)(2)(b) provides that the prohibited ground must be ‘a substantial reason’ for the direct discrimination. This aspect of the adverse action provisions is a factor in favour of claimants opting to lodge under the *FW Act*: Carol Andrades, ‘Intersections Between “General Protections” under the *Fair Work Act 2009* (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries’ (Working Paper No 47, Centre for Employment and Labour Relations Law, University of Melbourne, December 2009) 11.

Schou establishes her factual case, in that she possessed a relevant ground and that ‘adverse action’ within the meaning of the legislation factually occurred, the onus shifts to the Department to show, on the balance of probabilities, that the ground was not a reason for its conduct.<sup>139</sup> This placement of the onus on the employer stands in stark contrast to the provisions on discrimination in the form of an unreasonable failure to accommodate in the *EOA* (Vic), and is a strategic attraction for employees to use the adverse action provisions rather than the *EOA* (Vic).<sup>140</sup>

In the first, and to date only, appellate decision dealing with adverse action, the Full Federal Court (by majority) held that in determining whether the conduct of the employer was ‘because’ of a prohibited reason, the subjective intention of the employer is ‘centrally relevant, but it is not decisive’. The search is for the ‘real reason’ for the employer’s conduct, which is a search for ‘what actuated the conduct’ of the employer, and not a search for what the employer thinks its conduct was actuated by. The ‘real reason’ may be conscious or unconscious.<sup>141</sup> In order to exonerate itself of liability, the employer must show that the real reason is ‘disassociated from the circumstances’ that the applicant had the prohibited reason.<sup>142</sup> The majority of the court came to this interpretation by drawing on the purpose and protective objective of the adverse action provisions, the ordinary or usual meaning of the word ‘because’, and the approach taken to the causal nexus in anti-discrimination cases.<sup>143</sup>

<sup>139</sup> *FW Act* s 361. A reverse onus of proof has been a long-standing feature of the freedom of association and unlawful termination protections in industrial law. The Explanatory Memorandum acknowledges that in the absence of such a reverse onus, ‘it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason’: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1461]. The reversed onus in relation to adverse action still requires an applicant to prove the factual case that adverse action occurred and that they possessed a relevant ground: *Ramos v Good Samaritan Industries [No 2]* [2011] FMCA 341 (24 August 2011) [44] (*Ramos*); *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [130]; *Jones v Queensland Tertiary Admissions Centre Ltd [No 2]* (2010) 186 FCR 22.

<sup>140</sup> Creighton and Stewart, above n 28, [17.39]; Andrades, above n 138, 11; Simon Rice and Cameron Roles, “‘It’s a Discrimination Law Julia, But Not as We Know It’”: Part 3-1 of the *Fair Work Act*’ (2010) 21(1) *The Economic and Labour Relations Review* 13, 20. The lack of a reverse onus of proof presents difficult challenges for complainants in anti-discrimination law: Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ (2009) 31 *Sydney Law Review* 579.

<sup>141</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 [28] (Gray and Bromberg JJ) (*Barclay*) (contra Lander J) [197]–[199], [208]. Note that an appeal has been heard by the High Court: Transcript of Proceedings, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCATrans 83 (29 March 2012).

<sup>142</sup> *Barclay* (2011) 191 FCR 212 [32] (Gray and Bromberg JJ), citing *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197, 617 (Mason J).

<sup>143</sup> *Barclay* (2011) 191 FCR 212 [29] (Gray and Bromberg JJ), citing *Purvis v New South Wales* (2003) 217 CLR 92 and *Toben v Jones* (2003) 129 FCR 515. Lander J in dissent also cited *Purvis v New South Wales* (2003) 217 CLR 92 as authority: [199].

*C Adverse Action and Dismissal, Injury, Prejudice and Discrimination*

The concept of ‘adverse action’ is articulated to mean a number of matters, namely, that the employer:

- ‘dismisses the employee’;
- ‘injures the employee in his or her employment’;
- ‘alters the position of the employee to the employee’s prejudice’; or
- ‘discriminates between the employee and other employees of the employer’.<sup>144</sup>

Threatening to do any of those things, and organising to that end are also included within the concept of ‘adverse action’.<sup>145</sup>

The concept of ‘dismisses’ is not defined in pt 3-1, although ‘dismissed’ in the general definitions section of the *FW Act* references the unfair dismissal meaning of dismissal to include a situation where although a person resigned from their employment, they were ‘forced to do so because of conduct’ of the employer.<sup>146</sup> This definition has been applied in the adverse action context.<sup>147</sup> The Explanatory Memorandum explains that this description includes a situation ‘where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign’.<sup>148</sup> It does seem that factually a modern day Schou faced, in the words of the Explanatory Memorandum, ‘no reasonable choice but to resign’.<sup>149</sup> The evidence is clear that, to the knowledge of her supervisors, Schou’s situation had reached a ‘crisis point’ and that if the modem was not installed within a reasonable time she would likely resign.<sup>150</sup> There is no evidence that the employer intended that Schou resign, but such an intention is not, in any event, required.<sup>151</sup> The Department’s omission in its failure to install the modem constitutes ‘conduct’ under the *FW Act*,<sup>152</sup> and it can be credibly claimed that omission was such that ‘resignation was the probable result or that the ...

<sup>144</sup> *FW Act* s 342.

<sup>145</sup> *Ibid* s 342(2). Adverse action does not however include action that is authorised by the *FW Act* or any other law of the Commonwealth, or a law of a state or territory prescribed by the Regulations: s 342(3). At the time of writing no such laws have been prescribed.

<sup>146</sup> *Ibid* ss 12 definition of ‘dismissed’, s 386(1)(b).

<sup>147</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [47]–[54].

<sup>148</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1530]. The Explanatory Memorandum states that s 386(1)(b) is designed to reflect the common law concept of constructive dismissal: [1530].

<sup>149</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1530].

<sup>150</sup> *Schou v Victoria* (2000) EOC ¶¶93-100, 74 427.

<sup>151</sup> *Australian Hearing v Peary* (2009) 185 IR 359 [30]; *O’Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [9], [46].

<sup>152</sup> *FW Act* s 12 definition of ‘conduct’.

[employee] had no effective or real choice but to resign.<sup>153</sup> Importantly though, decisions emphasise that the employer's conduct must be weighed objectively, and that all the circumstances and not only the action of the employer must be considered in determining whether the employer's conduct 'forced' the resignation of the employee.<sup>154</sup> That involves a consideration of all 'the circumstances giving rise to the termination, the seriousness of the issues involved, and the respective conduct of the employer and the employee.'<sup>155</sup> The argument is likely to be made by the Department that it was Schou's own pressing responsibilities to her son that was the primary factor accounting for her lack of choice leading to her resignation, and not the Department's conduct in withdrawing agreement to the modem proposal.<sup>156</sup> It is unclear whether that argument would succeed. Notably, recent decisions under the *FW Act* indicate that a high level of misconduct by an employer may be required in order to conclude that a resignation was 'forced' by the employer's conduct. For example, in one case involving close supervision of an employee which was alleged by the applicant to constitute bullying, it was asked whether the employer's conduct was 'oppressive' or 'repugnant' such that it 'could not reasonably be endured.'<sup>157</sup>

Finally, even if it were able to be said that Schou's situation amounted to adverse action in the form of dismissal, it would still need to be established that the dismissal was causally linked to one of the grounds identified above, namely, her 'workplace right' or her 'family or carer's responsibilities', and not for example, the business needs of the Department.

Leaving aside the issue of whether Schou was dismissed within the meaning of the adverse action provisions, the Department may have 'injure[d]' her in her employment, or, altered her position to her 'prejudice'. These two items have been part of industrial law for some time, in the form of freedom of association,

<sup>153</sup> *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23].

<sup>154</sup> *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999); *Australian Hearing v Peary* (2009) 185 IR 359 [36]; *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Ramos* [2011] FMCA 341 (24 August 2011) [50].

<sup>155</sup> *Pawel v Advanced Precast Pty Ltd* (unreported AIRCFB, 12 May 2000, Print S5904) [13].

<sup>156</sup> The AIRC Full Bench has used the example of an employee who sought a pay rise and then resigned when that was not forthcoming to illustrate the point that not all terminations of employment which can be said to result from the act of the employer are accurately described as terminations at the initiative of the employer: *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, 12 May 2000, Print S5904) [13]. In a similar vein, the AIRC Full Bench has stated that '[w]here the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary': *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999) 12. Both these quotations have been cited with approval in a recent decision: *Ramos* [2011] FMCA 341 (24 August 2011) [50].

<sup>157</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [53]. See also *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [10], [52], [64], [66] on unfair dismissal law.

and both have been interpreted in a relatively broad manner.<sup>158</sup> There is no reason to suppose that these concepts in the adverse action provisions will be interpreted more narrowly than their history in industrial law suggests.<sup>159</sup> Whilst injury in employment has been interpreted to mean harm of ‘any compensable kind’, the concept of altering a person’s position to their prejudice is a ‘broad additional category’ that covers both ‘legal injury’ and ‘any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.’<sup>160</sup> The Department’s conduct was its failure to install the modem. This might be recognised as a harm of a ‘compensable kind’ in the sense of giving rise to a claim of discrimination in the failure to reasonably accommodate under the *EOA* (Vic). In addition, the withdrawal or abandonment by the Department of its earlier promise to provide this form of accommodation to Schou clearly caused deterioration in her position. Prior to the change of mind Schou was the beneficiary of an agreement or at least a promise by her employer that she would be permitted to work from home once the modem was installed. After the Department’s conduct she no longer had the benefit of that promise. From there it would need to be assessed whether that injury in employment or prejudicial altering of her position (through the abandonment of the promise by the Department) were linked in terms of causation to Schou’s ‘workplace right’, or her ‘family or carer’s responsibilities’. As with dismissal, the Department is likely to credibly assert that the reason for its change of mind was solely operational need, and that Schou’s ‘workplace right’ and her family and carer responsibilities played no role at all in the change of mind.

There is in addition the complex and difficult question of whether the Department has engaged in adverse action by ‘discriminat[ing] between ... [Schou] and other employees of the employer’.<sup>161</sup> The concept of ‘discrimination’ (and its derivatives) is not defined in the *FW Act*. Nor has that concept been defined in federal industrial legislation since it first appeared some thirty years ago. It has however been interpreted from the early days to include both direct and indirect discrimination, articulated in ways that broadly captured the meanings of anti-discrimination law.<sup>162</sup> Anti-discrimination law meanings of discrimination have continued to be adopted by Fair Work Australia (‘FWA’) in a number of recent decisions across

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<sup>158</sup> Creighton and Stewart, above n 28, [17.78].

<sup>159</sup> The Explanatory Memorandum appears to confirm this: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1384]. Case decisions under the adverse action provisions confirm this: *ALAEA v International Aviations Service Assessment Pty Ltd* [2011] FCA 333 (8 April 2011) [289]–[301]; *Qantas Airways Ltd v ALEA* [2012] FCAFC 63 (4 May 2012) [30]–[40].

<sup>160</sup> *Patrick Stevedores Operations No 2 Pty Ltd v MUA* (1998) 195 CLR 1, [4]. This case was cited in *Automotive, Food, Metals, Engineering, Printing and Kindred Union v Visy Packaging Pty Ltd* [2011] FCA 1001 (12 August 2011) [46].

<sup>161</sup> *FW Act* s 342(1) item 1.

<sup>162</sup> See, eg, *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 282 (10 May 2006) [36]–[52]; *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 537 (1 September 2006) [11]–[15]; *Sapevski v Katies Fashions (Australia) Pty Ltd* (1997) IRCA 219 (8 July 1997). Direct and indirect discrimination have also been used in interpreting the equal remuneration principles in federal industrial law: Meg Smith, ‘Gender Pay Equity Reform in

different provisions in the *FW Act*.<sup>163</sup> In contrast, another recent decision used a dictionary to ascertain the ordinary meaning of the concept of discriminate in terms of adverse action.<sup>164</sup> Importantly though, none of these recent decisions were directly on the adverse action provisions themselves. In contrast, in two decisions directly on point, the Federal Magistrates used a combination of a dictionary meaning and the Federal Magistrates' understandings of direct discrimination.<sup>165</sup>

One of the main exceptions to the listed grounds of race, sex and so on requires reference to anti-discrimination law and so there is a clear linking between the adverse action concept and anti-discrimination law in this regard.<sup>166</sup> Some

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Australia: What is the Way Forward?' (2009) 35 *Australian Bulletin of Labour* 652, 659–60.

<sup>163</sup> See, eg, *Deng v Inghams Enterprises Pty Ltd* [2010] FWA 8797 (23 November 2010) [55]–[56] where in the context of an unfair dismissal hearing, FWA interpreted the concept of discrimination in the pt 3-1 General Protections as involving direct and indirect discrimination; *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]–[14] where 'discriminatory term' under the *FW Act* s 195 was interpreted to mean both direct and indirect discrimination; *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 (14 September 2011) [30] where the prohibition in the *FW Act* s 153 on modern awards containing terms 'that discriminate' was assumed (without a firm view being expressed) to include indirect discrimination.

<sup>164</sup> *D H Gibson Pty Limited* [2011] FWA 911 (10 February 2011) [27] where in the context of an application for approval of an agreement, FWA relied on the *Macquarie Dictionary* definition of 'discriminate' to interpret the meaning of s 342 adverse action. Section 15AB of the *Acts Interpretation Act 1901* (Cth) indicates that words are to be given their ordinary meaning. The *Macquarie Dictionary* provides (in part) that 'discriminate' means 'to make a distinction, as in favour of or against a person or thing: to discriminate against a minority', 'to note or observe a difference; distinguish accurately: to discriminate between things': *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009). In *Street v Queensland Bar Association* (1989) 168 CLR 461, 570 Gaudron J stated that in its ordinary meaning discrimination 'refers to the process of differentiating between persons or things'. See further Rice and Roles, above n 140, 22.

<sup>165</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [59]–[62]. The Federal Magistrate determined that as the claimant alleged direct discrimination, he was required to prove that the employer 'deliberately treated him less favourably than its other employees': at [62]. With respect this appears to misunderstand the role of the reverse onus of proof, and the decision of the majority in *Barclay* (2011) 191 FCR 212 on intention and consciousness. In *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [178] the Federal Magistrate concluded that discrimination in s 342 'involves an employer deliberately treating an employee, or a group of employees, less favourably than others of its employees'.

<sup>166</sup> Interestingly, the Fair Work Ombudsman appears to use anti-discrimination law to understand the meaning of discrimination, interpreting the adverse action provisions as prohibiting both direct and indirect discrimination: Fair Work Ombudsman, *Guidance Note No 6 — Discrimination Policy* (2009) [5.4]. Notably the *Guidance Note* also refers to 'systemic discrimination', which is not a term used in anti-discrimination statutes themselves. The *Note* does not refer to the 2008 Victorian developments, or the post 2009 meaning of discrimination under the *DDA* as a

commentators have suggested that the legislative formula of discrimination as ‘between the employee and other employees of the employer’ is quite narrowly drawn and may indicate that only the idea of direct discrimination is covered.<sup>167</sup> The suggestion is that the formula ‘between the employee and other employees’ invokes a methodology of comparison, examining how the claimant was treated in comparison to other employees.<sup>168</sup> Support for this approach is found in the main decision to date on adverse action, although the decision was not on the discrimination provisions. The Full Federal Court (by majority) indicated that the adverse action discrimination provisions involve a comparator test of the kind applied in direct discrimination in anti-discrimination law.<sup>169</sup> Adopting such an approach leads to the view that so long as the employer treats the claimant the same as its other employees, as the Department did with Schou, there will be no adverse action in the form of ‘discriminat[ing] between’ within the meaning of the legislation.<sup>170</sup>

In addition, or alternatively to referencing domestic anti-discrimination law, international conventions may be used to flesh out the bare framework of the *FW Act* on discrimination. Although the adverse action provisions do not rely on the external affairs head of power in the Australian Constitution for their support, ‘taking into account Australia’s international labour obligations’ is an objective of the *FW Act*.<sup>171</sup> The Discrimination (Employment and Occupation) Convention 1958 (No 111) of the International Labour Organisation (‘ILO’) has been, and remains, directly relevant in understanding the meaning of the unlawful termination provisions in the former *WR Act* and the current *FW Act*.<sup>172</sup> ILO Convention 111 defines discrimination broadly to include ‘any distinction, exclusion or preference

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failure to make reasonable adjustments in relation to a disability. Assertions that there are conventional or standard meanings of direct and indirect discrimination in Australian anti-discrimination law are becoming more problematic, perhaps especially since the enactment of the 2008 Victorian amendments. In reality there are now many variations in the definitions and meanings of discrimination throughout Australian anti-discrimination law: See generally, Rees, Lindsay and Rice, above n 27, [4.1.3]–[4.1.5].

<sup>167</sup> The formula is contained in *FW Act* s 342(1) item 1(d). See Owens, Riley and Murray, above n 28, 464.

<sup>168</sup> It is unclear how the adverse action discrimination prohibition operates in situations where the employer has only one or two employees: Andrades, above n 138, 7; Rice and Roles, above n 140, 23.

<sup>169</sup> *Barclay* (2011) 191 FCR 212 [35]–[36] (Gray and Bromberg JJ). That understanding has been echoed in *Ramos* [2011] FMCA 341 (24 August 2011) [64]–[66]; *Stephens* [2011] FMCA 448 (8 July 2011) [83]–[84]; *Farah v Ahn* [2012] FMCA 44 (3 February 2012) [75].

<sup>170</sup> Andrades, above n 138, 7–8.

<sup>171</sup> *FW Act* s 3(a). Note that extrinsic material can be used to aid interpretation: *Acts Interpretation Act 1901* (Cth) s 15AB.

<sup>172</sup> *WR Act* s 659(2); *FW Act* s 772(1)(f). These provisions rely on the external affairs head of power in the Australian Constitution. A person is not entitled to lodge a claim under the unlawful termination provisions where they are entitled to challenge the dismissal as adverse action: *FW Act* s 723.

made on the basis of’ a number of grounds, and ‘such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.<sup>173</sup> Some commentators draw on ILO Convention 111 (as well as other material) to support an argument that the adverse action discrimination provisions may cover the broad idea of indirect discrimination as it is known in anti-discrimination law.<sup>174</sup>

In addition, the ILO Workers with Family Responsibilities Convention 1981 (No 156) is potentially relevant to understanding the meaning of discrimination and equality in relation to a modern day Schou. This Convention acknowledges the desirability of taking into account the special needs of workers with family responsibilities in terms and conditions of employment.<sup>175</sup> ILO Convention No 156 speaks of ‘creating effective equality of opportunity’ for workers with family responsibilities.<sup>176</sup> Each member state under this Convention, including Australia, has undertaken to:

make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.<sup>177</sup>

Recourse to such broad understandings of discrimination and the need to provide accommodation to workers with family responsibilities will take effect to strengthen the claim of a modern day Schou under the *FW Act*.

The lack of a legislative definition of discrimination in the *FW Act* opens up the possibility for the development of a more nuanced understanding of that concept in the context of adverse action. The Explanatory Memorandum may acknowledge this prospect by recognising that the adverse action provisions are not merely a consolidation of previous understandings of freedom of association and unlawful termination, and that they do expand the scope of unlawful conduct by employers.<sup>178</sup> In choosing not to define or specify a meaning of discrimination, Parliament deliberately left this field open, leaving the task of assigning meaning to claimants and employers, their representatives, FWA, and ultimately the courts. Principles of statutory interpretation indicate that the new rules ought to

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<sup>173</sup> Art 1(a), (b). It has been determined that this form of words (which appeared in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) includes anti-discrimination law meanings of both direct discrimination and indirect discrimination: *Commonwealth v Human Rights and Equal Opportunity Commission* (2000) 108 FCR 378 [53].

<sup>174</sup> Rice and Roles, above n 140, 24–7.

<sup>175</sup> ILO Convention 156 arts 3.2, 4.

<sup>176</sup> *Ibid* art 3.1. See also Preamble.

<sup>177</sup> *Ibid* art 3.1. In Convention 156 ‘discrimination’ is defined to have the same meaning as in ILO Convention 111: ILO Convention 156 art 3.2.

<sup>178</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1336].

be interpreted in a way that promotes the objects of the legislation, and the Full Federal Court has reminded us of the importance of this approach in the context of interpreting pt 3-1 of the *FW Act*.<sup>179</sup> The objects of the Act include advancing the ‘social inclusion of all Australians’, to assist employees ‘to balance their work and family responsibilities by providing for flexible working arrangements’ and to prevent discrimination. In addition, the objects of pt 3-1 refer to providing protection from workplace discrimination, and providing ‘effective relief’ from discriminatory harms.<sup>180</sup>

The factual context of Schou illustrates the potential impact of different interpretations of the phrase ‘discriminates between the employee and other employees of the employer’. If that formula countenances the ILO Convention 100 meaning of discrimination, then Schou may be able to successfully argue that she experienced ‘exclusion’ by reason of her forced resignation, which had the ‘effect of nullifying or impairing equality of opportunity ...in [her] employment or occupation’. ILO Convention 156 supports such an interpretation. Schou might also be successful if the adverse action provisions are interpreted to encompass a broad understanding of indirect discrimination, as some commentators argue it might. She may be able to establish that the policy of her employer — that all employees must work on site all sitting days — substantially disadvantages parents and carers and does so unreasonably.

Alternatively, if the *FW Act* formula countenances only direct discrimination in the form of less favourable treatment, as others predict, then Schou was not treated differently to, or less favourably than, her co-workers. Indeed, that Schou was treated the same as her colleagues in the sense that the Department required all sub-editors to work on site all sitting days, was noted by both the Supreme Court and the Court of Appeal.<sup>181</sup> None of the employees in the Department were provided with flexibility as they were all expected to conform to the normative work arrangement of working on site. This may also be the outcome if the ordinary meaning of discrimination is adopted.<sup>182</sup> Such a narrow interpretation of the legislative phrase ‘discriminates between the employee and other employees’ provides very little potential to challenge status quo work arrangements and understandings that detrimentally impact on workers such as mothers, and more broadly workers with family or carer’s responsibilities.

#### D *Exceptions*

A number of exceptions apply in relation to the adverse action protections. These exceptions appear to be potentially applicable in relation to all four forms

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<sup>179</sup> *Acts Interpretation Act 1901* (Cth) s 15AA; *Barclay* (2011) 191 FCR 212 [18].

<sup>180</sup> *FW Act* ss 3, 336(c), (d).

<sup>181</sup> *Victoria v Schou* (2001) 3 VR 655 [12], [24]; *Victoria v Schou* (2004) 8 VR 120 [39] (Phillips JA).

<sup>182</sup> Some articulations of the ordinary meaning of discriminate emphasise differentiating *between* employees, or treating a person differently: see above n 165. See further Rice and Roles, above n 140, 22.

of adverse action, and not merely adverse action in the form of discrimination, although that context might be their more obvious application.<sup>183</sup> One exception covers action that is taken because of the ‘inherent requirements of the particular position’.<sup>184</sup> This exception applied in the past in relation to the unlawful termination provisions, and in that context was interpreted to refer to the essential requirements of the position in question, rather than an aspect of the position that is non-essential or peripheral.<sup>185</sup> A similar exception exists in anti-discrimination law, although in that context it is frequently paired with a requirement on the employer to make reasonable adjustments to assist the employee to fulfil the inherent requirements of the job.<sup>186</sup> No such obligation on the employer appears in the *FW Act* ‘inherent requirements’ exception. Drawing on the findings of VCAT, it seems that this exception would not be applicable in relation to the case of a modern day Schou. Working on site all sitting days was not an essential requirement of the position, and Schou clearly could continue to perform the essential requirements of the position whilst working at home.<sup>187</sup>

Another exception applies in relation to action that is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’.<sup>188</sup> The concept of ‘anti-discrimination law’ in this last exception is defined for this purpose, and includes predictably Commonwealth statutes such as the *SDA*, and relevant state and territory anti-discrimination statutes such as the *EOA* (Vic).<sup>189</sup> Much uncertainty attaches to the scope of this exception.<sup>190</sup> Two alternative interpretations of this *FW Act* exception are possible.<sup>191</sup> The *FW Act* formula might mean that conduct that is covered by a specific exemption or exception in a relevant

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<sup>183</sup> *FW Act* s 351(2).

<sup>184</sup> *Ibid* s 351(2)(b).

<sup>185</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 295 (Gaudron J), 305 (McHugh J), 318–19 (Gummow J), 340–1 (Kirby J). See also *X v Commonwealth* (1999) 200 CLR 177 on the similar inherent requirements exemption in the *DDA*.

<sup>186</sup> See, eg, *DDA* s 21A(1)(b); *EOA* (Vic) ss 20, 23.

<sup>187</sup> There is also an exception in relation to religious institutions, which again also applied in relation to the previous unlawful termination provisions: *FW Act* s 351(2)(c). Like the inherent requirements exception, this religious institutions exception has no relevance to Schou’s employment.

<sup>188</sup> *FW Act* s 351(2)(a). Note also the separate exception that an employer’s conduct will not constitute ‘adverse action’ where it ‘is authorized by or under’ the *FW Act*, a Commonwealth law, or a prescribed state or territory law: at s 342(3).

<sup>189</sup> *FW Act* s 351(3). Although s 351(3) refers to the repealed *EOA 1995* (Vic), s 10A of the *Acts Interpretation Act 1901* (Cth) provides in effect that the reference to the 1995 Act should be taken to include a reference to the *EOA* (Vic).

<sup>190</sup> Owens, Riley and Murray, above n 28, 463; Creighton and Stewart, above n 28, [17.38]; Rice and Roles, above n 140, 27–9; Smith, above n 28, 215–6. Commentators have noted that the need to inquire into and determine the applicability of the ‘not unlawful’ exception is likely to produce significant implications in terms of legal cost and delay: Rice and Roles, above n 140, 29.

<sup>191</sup> Notably both interpretations concede that the protection offered by adverse action varies from state to state and territory, as each jurisdiction’s anti-discrimination legislation varies in important respects. That outcome sits uneasily with Parliament’s

anti-discrimination statute (such as a positive measure or temporary measures exemption)<sup>192</sup> will not constitute ‘adverse action’ under the *FW Act* provisions.<sup>193</sup> Alternatively, it might exempt from the adverse action provisions additional broader conduct, such as that which falls outside the scope of anti-discrimination law (perhaps because discrimination on that ground and in those circumstances is not rendered unlawful,<sup>194</sup> or that the evidence does not establish that the ground was ‘a substantial reason’ for the conduct).<sup>195</sup>

Unfortunately the passage of this provision through Parliament does not shine much light on the correct interpretation. As introduced into Parliament, the Bill worded the exemption as action that is ‘authorised by, or under, a State or Territory anti-discrimination law’.<sup>196</sup> As enacted, the provision exempts action that is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’. The Supplementary Explanatory Memorandum explained the change in wording as follows:

This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word ‘authorised’ may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorize the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.<sup>197</sup>

This passage is ambiguous. On the one hand the deletion of the word ‘authorised’, suggests a conscious decision to broaden the exemption to cover conduct that, for whatever reason, is not rendered unlawful under anti-discrimination law.<sup>198</sup> On

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intention that the *FW Act* provide a national approach: Owens, Riley and Murray, above n 28, 463.

<sup>192</sup> See, eg, *SDA* ss 7D, 44; *EOA* (Vic) ss 12, 89.

<sup>193</sup> It has been aptly written that ‘[i]n cross-referencing to exemptions and exceptions the *FW Act* has unwittingly stumbled into the most incoherent corner of Australia’s anti-discrimination laws’: Rice and Roles, above n 140, 28. As these authors note, there is little consistency across Australian anti-discrimination statutes regarding exemptions and exceptions.

<sup>194</sup> For example, discrimination on the ground of sexuality or gender identity that takes place within the Commonwealth public sector and Commonwealth statutory agencies is not rendered unlawful under either Commonwealth or state anti-discrimination law: *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85.

<sup>195</sup> See, eg, *EOA* (Vic) s 8(2)(b). Under the *SDA* the prohibited reason need be only one of the operative reasons: *SDA* s 8.

<sup>196</sup> Fair Work Bill 2008 (Cth) (as presented and read a first time in the House of Representatives on 25 November 2008) cl 351(2)(a).

<sup>197</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [220].

<sup>198</sup> Interestingly, the word ‘authorised’ was unaltered in the Bill in the context of the exception that applies to action that is ‘authorised by or under’ the *FW Act* or other law of the Commonwealth (*FW Act* s 342(3)(a)). The Explanatory Memorandum provides an illustration of this exception as being where an employer is authorised to

the other hand, the first sentence in the passage seems to reinforce the narrower interpretation of this *FW Act* exception. That is, that conduct that is not unlawful under anti-discrimination law because it falls within a relevant statutory exemption cannot be challenged under the *FW Act* as adverse action. On balance it seems that the broader interpretation is more likely to be correct.<sup>199</sup> That outcome seems to best represent the thinking behind the decision to remove the word ‘authorised’ from the Bill’s provision. Notably, the wide wording of the legislative provision itself suggests such a broader interpretation.<sup>200</sup>

This provision that exempts conduct that is ‘not unlawful under any anti-discrimination law’ will clearly be of relevance to a claim by Schou of adverse action on the ground of ‘family or carer’s responsibilities’, as it is likely to be under any claim on a ground covered by anti-discrimination law. Schou’s situation does not fall within any of the specific exceptions in the *EOA* (Vic) or the *SDA*, therefore on the narrower interpretation the *FW Act* exception will not apply. If the broader interpretation of the *FW Act* exception is adopted, it must be noted that the Department’s conduct was determined to be ‘not unlawful’ under the direct and indirect discrimination provisions in the *EOA 1995* (Vic), as they stood at that time. Notably though a relatively strong argument can be made that the Department’s conduct would be unlawful under the current provisions regarding discrimination in the form of an unreasonable failure to accommodate the responsibilities of a parent or carer. This argument has been explored above, and if it is correct, the Department’s conduct cannot be described as ‘not unlawful’ under anti-discrimination law, with the result that the *FW Act* exception will not apply.<sup>201</sup>

### E Concluding Thoughts on Adverse Action

A person in Schou’s position today faces much uncertainty in pursuing a remedy under the adverse action provisions in the *FW Act*. Even if it is established that she did experience ‘adverse action’ within the meaning of the legislation, was that ‘adverse action’ ‘because’ she had a ‘workplace right’, or ‘because of’ her ‘family or carer’s responsibilities’, or was it unrelated to those matters? Would the

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stand down an employee under s 524(1): Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1388]. This provides support for the view that the broader interpretation should be given to the exception in s 351(2)(a).

<sup>199</sup> For a support of this view, see Rice and Roles, above n 140, 27–9. Contra Smith, above n 28, 215–16.

<sup>200</sup> If the more expansive interpretation is correct, it means that the *FW Act* provisions add nothing substantively new to the overall legal framework, albeit that the Act establishes a new forum for existing discrimination grievances: Owens, Riley and Murray, above n 28, 463–4.

<sup>201</sup> Notably, were Schou located in a state or territory where the anti-discrimination statute does not impose an obligation on employers to accommodate the care responsibilities of an employee, such as Queensland, Tasmania, Western Australia, and perhaps New South Wales, the employer’s conduct would most likely be ‘not unlawful’ under anti-discrimination law, with the result that the *FW Act* exception would apply and the employer would not be liable under the adverse action provisions.

Department be able to discharge the reverse onus of proof in this regard by showing that its change of mind on the modern proposal was solely prompted by business concerns, with Schou's 'workplace right' or 'family or carer's responsibilities' playing no operative role at all?

Clearly much about these new provisions remains to be mapped through future cases. The examination above illustrates the many questions and uncertainties a potential litigant and their legal advisor faces in the adverse action framework.<sup>202</sup> Nonetheless, the advantages for claimants of the *FW Act* framework of adverse action over the *EOA* (Vic) mechanism of discrimination, in the form of a failure to accommodate, are pronounced and attractive. These include the reversed onus of proof, a need for the prohibited ground to be only a reason for the adverse action, whether or not the dominant or a substantial reason, and the potentially pro-active enforcement role of Inspectors of the Fair Work Ombudsman. Whether these attractions outweigh the considerable uncertainty attaching to key concepts in the jurisdiction remain to be assessed on an individual basis.

## VI CONCLUSION

This article has shed light on three new legal mechanisms designed to assist workers with care responsibilities. The well known case of Deborah Schou, with her relatively modest request to work from home two days a week, was used as a vehicle to explore the legal frameworks. Being located in Victoria and so now covered by the accommodation provisions in the *EOA* (Vic), the situation of a modern day Schou represents the best case scenario in favour of accommodation. As a Victorian public sector employee, a contemporary Schou has recourse to both the request provisions and the adverse action protections in the *FW Act*, whereas employees of other state public sectors most likely do not.<sup>203</sup> Given these matters it is surprising and of concern that the legal rights of a modern day Schou are not both more straightforward, and clearly in her favour.

Ultimately the investigation conducted in the article reveals that it is uncertain whether a person with care responsibilities such as Schou could successfully use these legal rights in order to claim accommodation in the form of different treatment to those without care responsibilities. The ability to request a change in working arrangements under the *FW Act* provides a limited enforcement mechanism, and is silent on the situation where, as here, an employer initially agreed to a request and then later changed its mind. Potential sources of legal uncertainty were uncovered in both the Victorian discrimination jurisdiction and in the federal adverse action framework. The Victorian discrimination provisions on reasonable accommodation raise questions regarding the degree

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<sup>202</sup> Smith explores how the institutional structures of Australian industrial relations, and the tradition of separation of industrial claims from discrimination claims will shape how the adverse action provisions are interpreted: Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35 *Melbourne University Law Review* 545.

<sup>203</sup> See above n 57.

of formality required in relation to the employee's request for accommodation. The legal standard of reasonableness in the Victorian provisions also generates methodological questions regarding how different factors should be weighed. It has been shown that vague rules in anti-discrimination law tend to strengthen the hand of those employers who resist the policy objectives of the rules.<sup>204</sup> This does not bode well for the fuzzy reasonableness standard of the accommodation provisions in the *EOA* (Vic). The adverse action jurisdiction under the *FW Act* also contains several grey areas. A notable instance is the use of the concept of discrimination in the *FW Act* framework without definition or explication. The exception for conduct that is 'not unlawful under any anti-discrimination law' also gives rise to many questions.

This article reveals the complexity of the issues and choices confronting both employees and their legal advisors, flagging and exploring main issues of contestation under the *EOA* (Vic) framework and the *FW Act*. One clear message emerges from the examination conducted in this article. It is that there is not an obviously preferable course of action for a modern day Schou. All three avenues present different challenges and risks for an employee.

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<sup>204</sup> Gaze, above n 6, 90.

## GOING BEYOND MITIGATION: THE URGENT NEED TO INCLUDE ADAPTATION MEASURES TO COMBAT CLIMATE CHANGE IN CHINA

### I INTRODUCTION

With the release of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change ('IPCC'),<sup>1</sup> it is clearer that global climate change is already a reality, and future warming caused by the emission of greenhouse gases ('GHGs') is probably unavoidable. As a developing country with a large population, low level of economic development, and a fragile ecological environment, China is vulnerable to the impacts of climate change. Changes within China include increased average temperatures, rising sea-levels, glacial retreat, reduced annual precipitation in north and northeast China, and significant increases in southern and north-west China. Extreme climatic events and hydrological events such as floods and droughts are projected to become more frequent in the future, and water resource scarcity will continue across the country. These threats are particularly pressing in agriculture and animal husbandry, forestry, natural ecological systems and water resources, and in coastal and ecologically fragile zones.<sup>2</sup>

Mitigation and adaptation are widely recognised as two related but distinct methods designed to address climate change.<sup>3</sup> However, until recently the focus of debate about global climate change has been on the mitigation of GHG emissions,<sup>4</sup> while adaptation was put aside. In these circumstances China has put a lot effort into mitigation by the way of energy reforms, GHG emission reduction, industry improvement and development of mode transformation. This article will particularly focus on climate change adaptation brought to the foreground as a result of the international community's abject failure to resolve a number of

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<sup>1</sup> Intergovernmental Panel on Climate Change, 'Climate Change 2007: The Physical Science Basis' in S Solomon et al (eds), *Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007).

<sup>2</sup> «中国应对气候变化的政策与行动» [China's Policies and Actions for Addressing Climate Change, 2008] (People's Republic of China) Information Office of the State Council, October 2008, 2.

<sup>3</sup> Ian Burton et al, 'From Impacts Assessment to Adaptation Priorities: The Shaping of Adaptation Policy' (2002) 2 *Climate Policy* 145, 145–59.

<sup>4</sup> Tim Bonyhady, Andrew Macintosh and Jan McDonald, *Adaptation to Climate Change: Law and Policy* (The Federation Press, 2010) I.

critical issues at the United Nations Framework Convention on Climate Change ('UNFCCC') meeting of world leaders in Copenhagen, Denmark in December 2009.<sup>5</sup> The failure of the Copenhagen summit together with the failure by negotiators at the subsequent Conference of the Parties' meeting at Cancún, Mexico<sup>6</sup> and the recently concluded meeting in Durban, South Africa to reach a binding agreement on the reduction of GHG emissions has dashed any realistic hope of meeting the target of limiting global warming to a rise in temperature of two degrees Celsius above pre-industrial levels by 2050.<sup>7</sup> Given the physical attributes of GHG, which will remain in the atmosphere long after they were emitted, the warming phenomenon will not be reversed for at least one century even if we stop emitting GHG immediately. Therefore, the critical issue here is how to adapt to this unchangeable situation.

In the past few years extreme and frequent climatic events, such as floods and droughts, compounded with low adaptive capacity forced China to become increasingly aware of the urgency to adapt to climate change. Though China has proposed that adaptation should be paid equal attention with mitigation, adaptation research and practice is still in its infancy in China, compared to the existing research outcomes on mitigation. In this context this article will discuss China's current environmental policy, law, and practice on adaptation, and to what extent adaptation theories and lessons developed primarily in western countries can be applied in China.

## II PART I

### *A China's Relevant Policy and Law on Adaptation*

Policy and law are characterised in many ways. They are formulated by different agencies, employed using different procedures and implemented by means of different tools. However, policy and law will be discussed together in this article,

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<sup>5</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 — Addendum — Part 2: Action taken by the Conference of the Parties at Its Fifteenth Session*, UN Doc FCCC/CP/2009/L.1 (18 December 2009); Geoffrey Lean, 'Copenhagen Climate Summit: World Leaders Miss Best Chance', *The Telegraph* (online), 19 December 2009 <<http://www.telegraph.co.uk/earth/copenhagen-climate-change-confe/6841883/Copenhagen-climate-summit-world-leaders-miss-best-chance.html>>.

<sup>6</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancún from 29 November to 10 December 2010 — Addendum — Part 2: Action taken by the Conference of the Parties at Its Sixteenth Session*, UN Doc FCCC/CP2010/7 (15 March 2011).

<sup>7</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 9 December 2011 — Addendum — Part 2: Action taken by the Conference of the Parties at Its Seventeenth Session*, UN Doc FCCC/2011/9 (15 March 2012).

for policy and law usually are seen as a collective commitment to a predetermined objective. In addition to that, under an authoritarian regime, policy in China usually has a mandatory effect on subordinate bodies, while law is not always effective except in particular circumstances as the rule of law is still developing and does not yet occupy a dominant position within the Chinese legal consciousness and tradition.

## 1 *Policies and environmental laws related to climate change adaptation in China*

### (a) *National Level*

In accordance with the requirements of the UNFCCC to establish national programs to cope with climate change and influenced by international negotiation progress on adaptation,<sup>8</sup> China's National Climate Change Program ('CNCCP') was released in 2007, which is regarded as the starting point for China to take adaptation seriously.<sup>9</sup> CNCCP sets out the guidelines, principles and objectives to deal with climate change, and also identifies the key areas for adaptation and key measures to enhance adaptive capacity, providing policy guidance and impetus for climate change adaptation.<sup>10</sup> Since then, annual reports titled China's Policies and Actions for Addressing Climate Change were released to estimate the progress of CNCCP. In addition to this, a series of policies and plans to address climate change have been implemented in the overall context of national sustainable development strategies, such as the Outline of Medium and Long-term Energy Development (2004–2020), and the Special Plan on Medium and Long-term Energy Conservation, which mainly contribute to economic restructure, energy efficiency improvements, development and utilisation of hydropower and other renewable energies, ecological restoration, and protection.<sup>11</sup> Since 2009 departments concerned with vulnerable areas such as agriculture, water resources, forestry and coastal zones, initiated some plans and policies to adapt to climate change, such as the Climate Change Plan on Agriculture, the Comprehensive Plan of National Water Resources, the Climate Change Plan on Forestry and the National Emergency Plan for Meteorological Disaster enhancing adaptive capacity in each area.<sup>12</sup> With a call to build a resource-saving and environment-friendly society, these policies relevant to climate change in general and adaptation in particular,

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<sup>8</sup> The UNFCCC Secretariat, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries* (10 September 2010) <<http://unfccc.int/resource/docs/publications/impacts.pdf>>.

<sup>9</sup> 曹格丽, 姜彤 [Cao Geli and Jiang Tong], «中国适应气候变化的政策、行动与进展» [The Policy, Action and Progress of Climate Change Adaptation in China] in 王伟光, 郑国光 [Wang Weiguang, and Zheng Guoguang] (eds), «应对气候变化报告» [Annual Report on Actions to Address Climate Change] (Social Science Academic Press, 2010) 195–216.

<sup>10</sup> «中国应对气候变化国家方案» [China's National Climate Change Program] (People's Republic of China) National Development and Reform Commission, Order No 17, June 2007, 23–5.

<sup>11</sup> Ibid 11.

<sup>12</sup> 曹格丽, 姜彤 [Cao Geli and Jiang Tong], above n 9.

are usually combined with energy policy, reflecting China's current core and urgent need to develop sustainably.<sup>13</sup> A western scholar suggested that China's policy on climate change is best understood as a collection of policies calculated to pursue other interests, such as economic development and social stability, but which have co-benefits for the reduction of GHG emissions.<sup>14</sup>

*(b) Provincial Level*

In June 2008 China initiated the development of provincial level climate change programs. As of November 2011 all the 31 provinces (this includes autonomous regions and municipalities) have released provincial level climate change programs and have proceeded to implement them.<sup>15</sup> These programs or action plans usually identify the key areas of mitigation and adaptation, promote the process of institutional resetting, and enhance regional adaptive capacity.<sup>16</sup> However, unlike mitigation, adaptation is a new topic for most local government officials and requires additional funds to manage climate change risks and adaptive capacity.<sup>17</sup> Unlike western local governments, which are elected by their constituents, China's local governments are not and are beholden to their superior governments. Hence there is little surprise that they place a great deal of emphasis on economic development to enhance growth rates in GDP and leadership abilities are often judged and regarded as a factor in career advancement. In most instances the effectiveness of these programs and action plans has not been assessed.<sup>18</sup>

<sup>13</sup> Qiu Zhong and Guoqing Shi, 'Environmental Consciousness Change: A Comparative Study of the United States and China (1950–2008)' in Sujian Guo, Joel J Kassiola, and Zhang Jijiao (eds) *Environmental Protection Policy and Experience in the US and China's Western Regions* (Lexington Books, 2010) 85, 85–107.

<sup>14</sup> Scott Moore, 'Strategic Imperative? Reading China's climate policy in terms of core interests' (2011) 23(2) *Global Change, Peace & Security*, 147–57.

<sup>15</sup> «中国应对气候变化的政策与行动» [China's Policies and Actions for Addressing Climate Change, 2011] (People's Republic of China) Information Office of the State Council, 22 November 2011.

<sup>16</sup> 曹格丽, 姜彤 [Cao Geli and Jiang Tong], above n 9, 206.

<sup>17</sup> 潘家华, 郑艳 [Pan Jiahua and Zheng Yan], «适应气候变化的分析框架及政策含义» [Adaptation Approaches to Climate Change in China: An Operational Framework] in 王伟光, 郑国光 [Wang Weiguang and Zheng Guoguang] (eds), «应对气候变化报告» [Annual Report on Climate Change Actions, 2010] (Social Science Academic Press, 2010) 300, 300–10.

<sup>18</sup> Xiangbai He, Interview with Interviewee One, National Development Reform Commission of Jiangxi Province (Nanchang, China, 24 October 2011). This paper is based in part on semi-structured interviews conducted by the second author in China from September to October 2011. Interviewees include governmental officials from the national climate change centre, water resource agency, meteorological agency and environment protection agency at central level and local levels. Interviews of some scholars from research institutes and universities contribute to this paper as well. Names of these interviewees will be anonymous for their benefit and will use numbers instead.

Environmental law in China mainly refers to laws and regulations regulating the activities of exploiting, utilising, and protecting the environment and natural resources. These can be categorised into three types: laws to prevent environmental disruption when utilising natural resources, eg water law; laws to prevent environmental pollution and other public hazards, eg water pollution prevention law; and laws to prevent natural disasters and reduce their adverse effects, eg flood control law. In addition to these laws, there are also the environmental protection law, the renewable energy law, the forest law, the grassland law, the land administration law, the law on energy conservation, and the cleaner production promotion law etc, all of which are, in part, relevant to climate change mitigation. It is understandable that there is no reference to climate change in these environmental laws, since these laws were enacted in the 1980s, 1990s and some more recently. It is only in the last few years that climate change has become a hot topic in China. It is through the objectives and substantive provisions of these laws, that we can observe how they contribute significantly to energy conservation, energy efficiency improvement and new and renewable energy development which are the most common methods employed for mitigation. Unlike mitigation, which has the great potential to facilitate sustainable economic development, adaptation has not yet been given serious consideration in the context of China's environmental laws.

## 2 *Institutions: Who is in Charge of Implementation and Enforcement?*

Climate change is characterised by the Chinese government as both 'an environmental issue and development issue, but ultimately, a development issue'.<sup>19</sup> As a result the National Development and Reform Commission ('NDRC') assumed overall responsibility. However, in 2008, a new Department of Climate Change within the NDRC, was established to deal specifically with climate change.<sup>20</sup> Its responsibility is described as:<sup>21</sup>

analysing the economic and social impacts of climate change; drawing up strategies to address climate change; participating in international climate change negotiations; launching international cooperation on addressing climate change and capacity-building; administering Clean Development Mechanism projects and undertaking related energy saving and emission reduction.

Several bureaus share these responsibilities, including mitigation and adaptation activities, as set out in the following schematic diagram.

<sup>19</sup> 庄贵阳 [Zhuang Guiyang] «气候变化挑战与中国经济低碳发展» [The Challenges of Climate Change and the Low Carbon Economy Development in China] (2007) 9–10 国际经济评论 [International Economy Review] 1, 6.

<sup>20</sup> 发展与改革委员会应对气候变化司 [Department of Climate Change, National Development and Reform Commission, China], 工作职责 [Working Responsibilities] <<http://qhs.ndrc.gov.cn/jgsz/default.htm>>.

<sup>21</sup> Ibid.

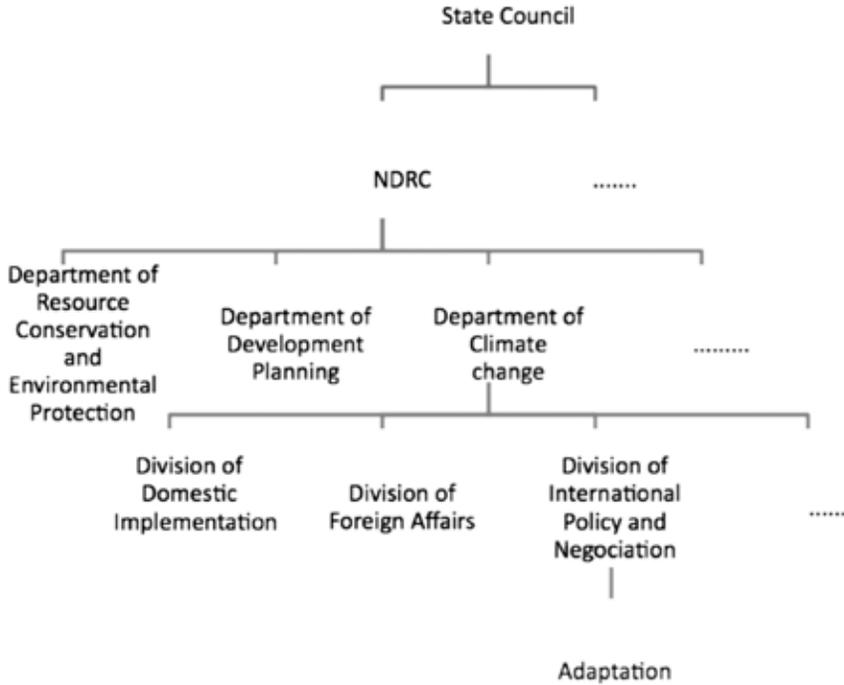


Figure 1: ‘The Structure of Ministries, Departments and Divisions Involved in Climate Change’

It is worth noting that work on climate change adaptation is regulated by the Division of Foreign Affairs rather than the Division of Domestic Implementation. This is partly because much of the emphasis on adaptation in international negotiations has been placed on firstly who should contribute money to help developing countries to adapt and secondly the equity issue associated with adaptation, ie which country should be funded to adapt.<sup>22</sup> The key point is the availability of adaptation funds. It is not surprising then that the first priority for the Adaptation Department is to secure adaptation funding from the international community rather than developing domestic adaptation strategies and measures.

In accordance with central level institutional reconstruction, some sub-national level Development and Reform Commissions (‘DRC’) established new departments to administer climate change issues (including mitigation and adaptation) while some provinces work to address climate change within the current administrative and institutional structures.<sup>23</sup> At the city and county level, climate change issues

<sup>22</sup> 李玉娥 [Li Yu’e], «气候变化适应行动及谈判进展» [Climate Change Adaptation Actions and Negotiation Process] in 王伟光, 郑国光 [Wang Weiguang and Zheng Guoguang] (eds), «应对气候变化报告» [Annual Report on Actions to Address Climate Change, 2009] (Social Science Academics Press, 2009) 92.

<sup>23</sup> For instance, Jiangxi, Qinghai and Hubei Province are the former case while Shandong and Henan Province are the latter.

are usually found within environmental departments.<sup>24</sup> To some extent, this institutional realignment where it occurs is dependent on the central government's mandatory requirements rather than the need to address and properly administer climate change concerns.<sup>25</sup>

According to CNCCP, specific fields such as agriculture, water resources, forestry, the coastal zone, and health are identified as more vulnerable areas, and need to promote adaptive capacity as a priority.<sup>26</sup> Under the policy-making model 'fragmented authoritarianism',<sup>27</sup> different departments divide their responsibility in accordance with environment media or sectors, which is also reflected in climate change adaptation. Motivated and supported by various levels of DRCs within their own territory, detailed and diverse adaptation measures are initiated and implemented by different departments, such as the departments of agriculture, forestry, water resources, etc.

### B *The General Theories/Lessons of Adaptation*

A number of different adaptation definitions appear in the literature. In the Third and Fourth IPCC Assessment Reports, adaptation was defined, focusing on vulnerability and adaptive capacity, as follows:

Adaptation to climate change is the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.<sup>28</sup>

Likewise, the United Nations Development Program offers a very similar definition — 'adaptation is a process by which strategies to moderate, cope with and take advantage of the consequences of climatic events are enhanced, developed, and implemented' stressing that it consists of strategies in response to climate change.<sup>29</sup> The UNFCCC at its Cancún Meeting in 2010 set up the Cancún Adaptation Framework, which stressed the need for action in this area based on international cooperation, 'to reduce vulnerability and build resilience in developing country parties, taking into account the urgent and immediate needs of those developing countries that are particularly vulnerable.'<sup>30</sup>

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<sup>24</sup> There are four levels of government which set-up the Development and Reform Commission: central, provincial, city, and county level.

<sup>25</sup> Xiangbai He, Interview with Interviewee Two (Nanchang, 24 October 2011).

<sup>26</sup> «中国应对气候变化国家方案» [China's National Climate Change Program], above n 10.

<sup>27</sup> Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures and Processes* (Princeton University Press, 1988) 137.

<sup>28</sup> IPCC, above n 1, 6.

<sup>29</sup> Ian Burton, Elizabeth Malone and Saleemul Huq, *Adaptation Policy Frameworks for Climate Change: Developing Strategies, Policies and Measures* (Cambridge University Press, 2005) 1.

<sup>30</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 — Addendum — Part 2: Action*

Given these different definitions, adaptation at least should signify: natural and human system adjustment, vulnerability reduction and adaptive capacity enhancement, harm moderation, and opportunity exploitation.

The academic and policy research on adaptation has increased sharply in the past decade and presented various thematic theories and lessons. This article will discuss some basic theories which are closely aligned with China's present adaptation research and experience.

### 1. *The Interaction Between Adaptation and Sustainable Development*

To rely on adaptation does not mean to exempt mitigation or to weaken society's willingness to mitigate climate change.<sup>31</sup> The enhancement of adaptive capacity is necessary to reduce the impacts caused by GHG emissions, and vice versa, mitigation could reduce both the pace and extent of future climate change impacts, slowing down the need to adapt to climate change. Therefore, it is no longer a question of whether to mitigate climate change or adapt to it, but a question of how to take effective win-win response measures to balance adaptation and mitigation.<sup>32</sup> Under the UNFCCC, a significant number of the world's governments have committed to address climate change in an integrated and holistic manner by taking climate change considerations into account,<sup>33</sup> to the extent feasible, in their relevant social, economic, and environmental policies and actions.<sup>34</sup> In some specific areas, mitigation and adaptation are synergised, such as the planting of trees which contributes to both sequestering CO<sub>2</sub> and reducing ecosystem vulnerability. However, the scope of these synergies is quite limited because of the differences between mitigation and adaptation.<sup>35</sup> Due to finite resources and funding, compounded with the severe challenges facing developing countries in alleviating poverty, developing their economies and providing health care and equal education, it is increasingly difficult to develop and fund optimal adaptation measures.

Climate change is, to a large extent, riddled with inherent scientific uncertainty which implies that current technologies, tools or scenarios are unable to formulate

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Taken by the Conference of the Parties at Its Sixteenth Session, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011).

<sup>31</sup> Richard J T Klein, E Lisa F Schipper and Suraje Dessai, 'Integrating Mitigation and Adaptation into Climate and Development Policy: Three Research Questions' (2005) 8 *Environmental Science and Policy* 579, 579–88.

<sup>32</sup> Yangfan Li et al, 'Integrating Climate Change Factors into China's Development Policy: Adaptation Strategies and Mitigation to Environmental Change' (2011) 8(4) *Ecological Complexity* 294–9.

<sup>33</sup> *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) 3.

<sup>34</sup> Jamie Pittock, 'National Climate Change Policies and Sustainable Water Management: Conflicts and Synergies' (2011) 16(2) *Ecology and Society* 25.

<sup>35</sup> *Ibid.*

clear and constructive projections of future climate change risks.<sup>36</sup> Not only does scientific uncertainty exist, but also epistemological uncertainty (who should be involved in decision-making and whose values count) and ethical uncertainty (who is responsible) must also be considered.<sup>37</sup> In that sense, any attempt to map the potential impacts associated with climate change and make policy, legal and institutional changes is inherently speculative because of the cumulative effect of these uncertainties.<sup>38</sup>

In the context of adaptation, almost all researchers agree that uncertainty pervades the whole process of adaptation — from decision-making to implementation, and we will have to live with and embrace uncertainty for a long time.<sup>39</sup> As a consequence a ‘no-regrets’ or ‘low-regrets’ principle must be employed to reduce the risk of failure with respect to policy or law or both. The no-regrets principle requires that adaptation strategies and measures should have the ability to deliver and resolve other economic, social or environmental concerns rather than depending primarily on climate change projections, thus reducing the possibility of wasted investment.<sup>40</sup> With this principle, adaptation is best mainstreamed in conjunction with routine sustainable development outcomes, such as poverty alleviation, sustainable economic development and political reform and so on.

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<sup>36</sup> Gabriel Eckstein, ‘Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy’ (2010) 27(3) *Wisconsin International Law Journal* 410–60.

<sup>37</sup> Anne Leitch, Ben Harman and Marcus B Lane, ‘From Blueprint to Footprint: Climate Change and the Challenge for Planning’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 63, 69–71.

<sup>38</sup> Fulco Ludwig and Marcus Moench, ‘The Impacts of Climate Change on Water’ in Fulco Ludwig et al (eds), *Climate Change Adaptation in the Water Sector* (Earthscan, 2009) 44.

<sup>39</sup> Jan McDonald, ‘Mapping the Legal Landscape of Climate Change Adaptation’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 1 1–37; Bernie J O’Brien and Mark J Sculpher, ‘Building Uncertainty into Cost-Effectiveness Rankings, Portfolio Risk-return Tradeoffs and Implications for Decision Rules’ (2000) 38 *Medical Care* 460, 460; John H Matthews and A J Wickel, ‘Embracing Uncertainty in Freshwater Climate Change Adaptation: A Natural History Approach’ (2009) 1(3) *Climate and Development* 269–79; John Reilly and David Schimmelpennin, ‘Irreversibility, Uncertainty and Learning: Portraits of Adaptation to Long-term Climate Change’ (2000) 45 *Climate Change* 253–78; 夏军, 刘春葵, 任国玉 [Xia Jun, Liu Chunzhen and Ren Guoyu], «气候变化对我国水资源影响研究面临的机遇与挑战» [‘Opportunity and Challenges of the Climate Change Impact on the Water Resource’] (2011) 26(1) *地球科学进展* [*Advances in Earth Research*] 1, 1–12.

<sup>40</sup> Janet Abramovitz et al, ‘Adapting to Climate Change: Natural Resource Management and Vulnerability Reduction’ (Background Paper, Task Force on Climate Change, Adaptation and Vulnerable Communities, World Conservation Union, Worldwatch Institute International Institute for Sustainable Development, Stockholm Environment Institute, Boston, 2001) 10; McDonald, above n 39, 31.

However, adequate attention must be given to two issues. Firstly, a no-regrets principle of adaptation is valid and effective when there is no scientific and certain knowledge of future climate change and/or impacts of adaptation measures, and thus should only be employed for a short term. However, this uncertainty should not be used as an excuse to delay longer-term plans and strategies, which should be based on a greater understanding of the actual climate change impacts to particular social-ecological systems than we currently possess.<sup>41</sup> Secondly, even with a no-regrets principle, it is necessary to increase investment to implement adaptation measures, especially in developing countries which often lack basic adaptation infrastructure, information and systems. In this case governments must be very careful to keep a balance between adaptation needs and other sustainable development requirements.

## 2. Context Specific Nature of Adaptation Measures

Unlike mitigation, whose planning and measures are generally designed and implemented uniformly at the international and national level, adaptation strategies and responses are context specific, i.e. they are often developed and employed at a state, regional, local, and community or individual level.<sup>42</sup> That means there are no panaceas for climate change adaptation and effective adaptation measures are highly dependent on specific geographical and climate risk factors as well as institutional, political, legal and financial constraints. It is context specific because climate change has different impacts in different places due to climate variation and a range of other factors.<sup>43</sup> An example of how climate change affects different places in different ways calling for different adaptation strategies is that in the coming years there will be more droughts in the north and northeast of China while flood frequency in the southern area will increase.<sup>44</sup>

Another important aspect of the context specific nature of adaptation is that climate change disproportionately affects various social groups (differentiated by attributes such as gender, minority and age) with existing social, economic or physical vulnerabilities on a local and national scale.<sup>45</sup> Usually the most vulnerable groups and those with lower adaptive capacity are more severely affected by climate

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<sup>41</sup> Robin Kundis Craig, ‘“Stationarity Is Dead” — Long Live Transformation: Five Principles for Climate Change Adaptation Law’ (2010) 34 *Harvard Environmental Law Review* 9, 10–73.

<sup>42</sup> Andrew Macintosh, ‘A Theoretical Framework for Adaptation Policy’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 41.

<sup>43</sup> Barry Smit and Johanna Wandel, ‘Adaptation, Adaptive Capacity and Vulnerability’ (2006) 16(3) *Global Environmental Change* 282, 282–92.

<sup>44</sup> 夏军, 刘春臻, 任国玉 [Xia Jun, Liu Chunzhen and Ren Guoyu], above n 39, 2–3.

<sup>45</sup> Kirstin Dow, Roger E Kasperson and Maria Bohn, ‘Exploring the Social Justice Implications of Adaptation and Vulnerability’ in W Neil Adger et al (eds), *Fairness in Adaptation to Climate Change* (MIT Press, 2006) 76–97.

change.<sup>46</sup> This further exacerbates social justice issues, which are already a serious problem under current economic, social, and environmental pressures, but to date have been largely neglected in a mitigation context. Given this circumstance, social justice should be the central pursuit of adaptation strategies and measures aiming at reducing risks or uncertainties in these areas. A focus on building the adaptive capacity of disadvantaged and vulnerable groups could help to address social justice inequities in the long run. Providing proper and efficient relief when they are affected and facing severe loss is also indispensable. Equity and justice thus can be vital criteria to assess the efficacy of adaptive laws and institutional arrangements.

Not only are the impacts of climate change often context specific, the adaptation capacity (or lack thereof) of governments in various regions frequently confirm that response actions would be better left to local governments. Local government is best positioned in the context of delivering local government functions including the responsibility for laws and regulations that can influence adaptation and mitigation; and the ability to demonstrate leadership and innovative solutions in this area.<sup>47</sup> There is a growing awareness in some countries that it is better to leave local governments with power and resources to design and implement adaptation strategies. This allows them to tailor adaptation responses to local specific impacts and adaptation capacity.

### 3. *Vulnerability-Reduction Approach*

Two significantly different adaptation approaches are in widespread use today: the impacts-driven approach and the relatively new vulnerability-reduction approach.<sup>48</sup> The former approach is modelling the impact of climate change on natural and human systems using simulations or scenarios produced by global climate models ('GCMs'), followed by debate over adaptation options to reduce exposure to predicted impacts. This reliance on models is explained partially by the preponderance of physical scientists in the adaptation research community.<sup>49</sup> This approach provides vital information on potential climate change impacts for policy or decision-making processes through scientific modelling and is the basis for further response. To date, the impacts-driven approach is applied in the context of most adaptation research and policy discussion undertaken pursuant to the UNFCCC, and by national governments.<sup>50</sup> However, putting too much emphasis on impacts simplifies the context, decision-making processes and

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<sup>46</sup> See IPCC, above n 1. Adaptive capacity refers to the: 'ability or potential to respond successfully to climate variability and change, including adjustments in behaviour, resources and technologies, and accessibility to needed information, resources and financial or social support'.

<sup>47</sup> See, eg, Conference of the Parties, Durban Local Government Convention, *Durban Adaptation Charter for Local Governments*, Durban, South Africa, (4 December 2011) <<http://www.iclei.org/?id=12503>>.

<sup>48</sup> James Ford, 'Emerging Trends in Climate Change Policy: The Role of Adaptation' (2008) 3(2) *International Public Policy Review* 9, 9.

<sup>49</sup> Ibid.

<sup>50</sup> Poh-Ling Tan, 'Adaptation Measures for Water Security in a Changing Climate: Policy, Planning and Law' in Tim Bonyhady, Andrew Macintosh and Jan McDonald

relevant elements of adaptation and neglects the complexity of social and economic dynamics which shape vulnerability to climate change.<sup>51</sup> Furthermore, while climate change scenarios are prevalent with uncertainty, predicting future impacts precisely becomes impossible. There appears to be an increasing need to develop a vulnerability-reduction approach, which can be regarded as a preventative method to be employed alongside the impacts-driven approach, more akin to an end-of-pipe treatment method.

The vulnerability-reduction approach is a process-based approach which will direct the focus of adaptation policy and research to address the root causes of climate vulnerability, and which highlights measures that reduce both climate exposure and human sensitivity, and increase adaptive capacity.<sup>52</sup> Due to the changing and uncertain attributes of climate change and its impacts, it is necessary to monitor and evaluate the dynamic changes to shape forthcoming decision-making processes. This approach does not exclude the impacts-driven approach whose techno-engineering response can play an important role in reducing exposure to climate change impacts, but attempts to facilitate adaptation from various aspects with diversified mechanisms. Rather than focusing on impacts in the mitigation context, this new approach broadens the debate to include improved institutional arrangements and other mainstream concerns such as economic development, information publication, education, public health, poverty alleviation and equitable distribution of resources.<sup>53</sup> This extended range of issues corresponds to the requirement of the no-regrets principle, which delivers significant benefits in the form of enhanced ecosystem, social or economic resilience or adaptive capacity, regardless of the precise impacts of climate change.<sup>54</sup>

#### *4. New Governance – a Collaborative Decision-Making Structure and Process*

In a risk-adverse society, decision-making must often rely on affected people's opinion, definition and evaluation of risk, which implies a democratic decision-making process. Moreover, the impacts of climate change are widespread and adaptation is not normally in the realm of governments' experience or expertise, hence the government by itself is not competent to solve all dilemmas or risks. Adaptation calls for all members of society, from individual citizens to local and national governments to learn to cope with the changes and enhance their adaptive capacity to face both present and future climate change impacts well beyond their existing empirical knowledge, understanding and experience.<sup>55</sup>

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(eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 135,137.

<sup>51</sup> Ford, above n 48, 10.

<sup>52</sup> Ibid 11.

<sup>53</sup> Tan, above n 50, 138.

<sup>54</sup> Abramovitz et al, above n 37; IPCC, above n 1, 246.

<sup>55</sup> W Neil Adger et al, 'Adaptation to Climate Change in the Developing World' (2003) 3 *Progress in Development Studies* 179, 179–80.

Current decision-making structures and processes, whether in the context of Western democracies or in developing authoritative or totalitarian countries are not open and comprehensive enough to adequately reflect affected peoples' interests and aspirations. In recent years a theory referred to as the 'New Governance' theory has been championed by a growing number of scholars in environmental law and other legal disciplines.<sup>56</sup> New Governance turns away from the familiar model of command-and-control style, fixed-rule regulation by administrative fiat, and moves towards a new model of collaborative, multi-party, multi-level, adaptive, and problem-solving governance.<sup>57</sup> This signals a shift away from the top-down governmental structure, that by and large make decisions independently, to a governance regime that incorporates communities and non-governmental actors, away from prescribing, regulating and implementing towards facilitating, providing incentives, coordinating and empowering.<sup>58</sup> Under the New Governance theory elements, such as the decentralisation of decision-making structures, public participation, flexibility, combination of 'hard' and 'soft' approaches, learning while doing, empowerment, facilitation and providing incentives, collaboration and coordination among different medias, sectors and interests, lie at its core.

### III PART II

#### A *The Application of Adaptation Theories in China*

Most of the above theories and lessons of adaptation are derived from western scholars, who base their research on Western developed markets and democratic forms of government. On the one hand, there is approximately a 10-year gap between western research on adaptation and Chinese research which implies that there is lack of a systematic knowledge base to assimilate and transform western developed theories and lessons.<sup>59</sup> On the other hand, it must be acknowledged that China has a poorly developed legal tradition under a centralised, undemocratic political system.<sup>60</sup> Hence, it is problematic as to whether western developed theories and lessons can take root and flourish in China. It is important to be aware of the Chinese maxim and potential risk of the 'curse to the later comer', which holds that if the background, social and political context, institutional arrangements

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<sup>56</sup> Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342; Cristie L Ford, 'New Governance, Compliance, and Principles-Based Securities Regulation' (2008) 45(1) *American Business Law Journal* 1, 1–60; Alana Klein, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights' (2008) 39 *Columbia Human Rights Law Review* 351.

<sup>57</sup> Bradley C Karkkainen, "'New Governance' in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 *Minnesota Law Review* 471, 473.

<sup>58</sup> Leitch, Harman and Lane, above n 37, 73.

<sup>59</sup> While Chinese scholars began research on adaptation from the scientific perspective at the beginning of the 21<sup>st</sup> century, the research on legal and social adaptation only initiated recently, in the late 2000s.

<sup>60</sup> Joseph W Dellapenna, 'Few Words on Law and the Environment in China' (2005) 24 *Temple Journal of Science, Technology & Environmental Law* 367, 367.

of technologies, theories and experienced are not carefully investigated when learning from others, it will become a disadvantage ('a curse') to the learner countries.<sup>61</sup>

Therefore, this section of this paper will examine in further detail some of the difficulties facing policy makers responsible for ensuring that China's response to climate change is both adequate and capable of being integrated with other key policy objectives. In addition, the likelihood of China employing more aggressive measures will be discussed and recommendations for future actions will be suggested.

### 1. *The Interaction Between Adaptation and Sustainable Development*

Because climate change in China is primarily identified as a development issue, China has invested a significant amount of time and effort on establishing and refining mitigation measures through resource conservation, emission reduction, renewable energy exploitation and industry structure adjustment, that are directly related with and contribute to future sustainable development. With a huge population, vulnerable ecosystems and low adaptive capacity, the impacts of climate change on China's economic, social and environmentally unsustainable development underline the absolute necessity for China to quickly learn how to adapt to climate change.<sup>62</sup> Furthermore, because China has placed economic development, poverty alleviation and improvement of peoples' living standards as essential, urgent and core tasks of government, adaptation to climate change must be mainstreamed in China's sustainable development agenda.<sup>63</sup> It is no accident that China is working assiduously to combine adaptation with sustainable development, especially economic development.

Firstly, in the new twelfth five-year plan (2011–15),<sup>64</sup> there is a clear requirement that climate change should be taken into account when pursuing economic development, constructing basic infrastructure and formulating important plans or programs.<sup>65</sup> This requirement facilitates adaptation from a policy-based level and provides the potential of adaptation consideration on various sub-national levels. Secondly, in the CNCCP, agriculture, water resources, forestry and coastal zones

<sup>61</sup> 杨小凯 [Yang Xiaokai], «后发劣势» ['Curse to the Later Comer'] [2004] 8 *新财经* *New Finance and Economy* 120, 120–2.

<sup>62</sup> 王守荣 [Wang Shourong], «气候变化对中国可持续发展的影响与应对» [*The Impacts of Climate Change on China's Economic and Social Sustainable Development and Response Actions*] (科学出版社) [China Science Press] (2011) 182.

<sup>63</sup> Ibid.

<sup>64</sup> A five-year plan is China's important national economic and social development plan starting from 1953. It provides blueprints and targets for coming years' economic, social and environmental development on national, regional, provincial and local levels.

<sup>65</sup> «中华人民共和国国民经济和社会发展第十二个五年规划纲要» [The Twelfth National Economic and Social Development Five-Year Plan] (People's Republic of China) National People's Congress, 16 March 2011, ch 6.

are identified as the vulnerable areas for adaptation to climate change. Since then, in order to enhance their adaptive capacity, action plans in those areas covered by, the Climate Change Action Plan on Agriculture, the Climate Change Action Plan on Forestry, and the Comprehensive Plan of National Water Resources have been formulated and implemented.<sup>66</sup> In addition, measures such as infrastructure construction; the introduction of agriculture insurance; programs to promote the ability to react to emergent disasters and steps to improve the certainty of scientific projection etc. have also been introduced to enhance adaptive capacity.<sup>67</sup> Guided by the no-regrets principle, these activities can and should be used to facilitate other aspects of sustainable development when contributing to adaptive capacity building.

As a developing country, China has a more urgent need than Western countries to mainstream adaptation in sustainable development processes in order to avoid additional cost and investment. Over the next few years, there will undoubtedly be considerably more discussion about how to optimise adaptation choices to promote sustainable development.

At present the Chinese government needs to put much more emphasis on social and environmentally sustainable development rather than focusing primarily on economic development utilising a suite of comprehensive and innovative tools rather than relying, for the most part, on mainly administrative ones. Theoretically, adaptive capacity is determined by society's economic wealth, information and knowledge, technology, infrastructure, institutions, equity, and natural and social capital.<sup>68</sup> This means that if China employs a comprehensive approach to facilitating social sustainable development (for example, promoting democratic processes, reducing social injustice, facilitating information access and public participation, and recognising basic rights such as the freedom to organise), the adaptive capacity will be improved in a more balanced, sustainable way and the economy will develop more sustainably.<sup>69</sup> Secondly, although there has long been a requirement for environmental concerns to be synthesised and synchronised with economic development,<sup>70</sup> the environmental status quo has resulted in virtually no significant improvement in pollution levels after many years' experience with both the implementation and enforcement of environmental policy and law.<sup>71</sup> Reforms to insure that there is a significant improvement in environmental quality in a range of areas are long overdue and it is apparent that continued reliance on the current environmental regulatory regime, particularly in large urban centres will

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<sup>66</sup> 曹格丽, 姜彤 [Geli and Tong], above n 9.

<sup>67</sup> Ibid.

<sup>68</sup> McDonald, above n 39; Klein, Schipper and Dessai, above n 31, 580.

<sup>69</sup> 蔡定剑 [Cai Dingjian], «民主是一种现代生活» [*Democracy is a Modern Life Style*] (社会科学文献出版社 [China Social Science Academic Press], 2011) 23–30.

<sup>70</sup> Zhong and Shi, above n 13, 85–107.

<sup>71</sup> Zunxan Chen, 'Tackling China's Water Pollution Problem: A Legal and Institutional Perspective from Taihu Lake Water Pollution Control' (2005) 24 *Temple Journal Science Technology & Environmental Law* 325, 325–50.

not lead to a significant improvement without re-calibrating the balance between development and environmental sustainability.

## 2. *The Context Specific Nature of Adaptation*

China does quite well in putting this theory into practice. The context specific nature of climate change impacts and the specific counter measures that may be taken to reduce or alleviate these impacts are relatively well understood by both scholars and practitioners. Firstly, although all sub-national DRCs are required to establish corresponding departments to deal with climate change impacts, their respective attitude and reactions vary depending on the severity of climate change impacts on that particular region and the relevant government officers' attitude to climate change.<sup>72</sup> For example, Hubei Province and Jiangxi Province take adaptation more seriously than Shandong Province because of their more vulnerable ecosystems.<sup>73</sup> Secondly, after the CNCCP was released, each province is now responsible to initiate the process to formulate its own provincial program. As of November 2011, all provinces have issued their own programs and have started to implement them. Thirdly, the climate change impacts on eight regions, including Northern China, Southern China, North-eastern China and Xinjiang Province have been assessed and reports issued.<sup>74</sup> Fourthly, different river basins and regions have taken various measures to adapt to climate change. For example, in the Three Gorges Dam area, where extreme events, soil erosion and geological disaster occur quite often in the context of climate change, measures like improving the predictive ability for extreme events, launching ecosystem protection projects and developing natural disaster response mechanisms have been formulated to enhance adaptive capacity.<sup>75</sup> For Poyang Lake, which overlaps parts of Jiangxi territory and connects with the Yangtze River, including areas containing natural wetlands and high biodiversity values, a Mountain-Yangtze River-Poyang Lake Program has been launched to develop a sustainable lake basin.<sup>76</sup> Under this program, adaptation strategies covering water resources, agriculture, ecosystems, transportation and human health are being used to promote adaptive capacity.<sup>77</sup> Finally, a program named Gender Equality in Social Adaptation to Climate Change in Poyang

<sup>72</sup> Xiangbai He, Interview with Interviewee One from the National Development and Reform Commission of Jiangxi Province (Nanchang, 24 October 2011).

<sup>73</sup> Xiangbai He, Interview with Interviewee Two from Meteorological Bureau, Jiangxi Province (Nanchang, 24 October 2011).

<sup>74</sup> Xiangbai He, Interview with Interviewee Three from National Climate Centre (Beijing, 22 September 2011).

<sup>75</sup> 曹格丽, 姜彤 [Geli and Tong], above n 9; 徐明, 马超德 [Xu Ming and Ma Chaode], «长江流域气候变化脆弱性与适应性研究» [*Yangtze River Basin Climate Change Vulnerability and Adaptation Report*] (中国水利水电出版社 [China Waterpower Press], 2009) 61–3.

<sup>76</sup> Ibid.

<sup>77</sup> 殷剑敏, 陈晓玲等 [Jianmin Yin], «鄱阳湖流域气候变化影响评估报告» [*China Climate Change Impact Assessment Report: Poyang Lake Basin*] (气象出版社 [China Meteorological Press], 2011) 162–72.

Lake Community, initiated and funded by UNWOMEN, is being carried out to investigate the impacts of climate disaster on women in poverty areas.<sup>78</sup>

With a broad territory, complex ecosystems and diversified economic and social levels of development, the context specific nature of adaptation cannot be more important than in a country like China. Unfortunately, it is still uncertain whether the less-developed research targeting vulnerable groups will receive the attention it deserves in the near-future.

It is appropriate and necessary to formulate provincial level programs because of context specific attributes of climate change. However, when reviewing these provincial programs, it is obvious that much of the content is simply duplicated from the 2007 NCCP and does not provide effective guidance taking into account particular province situations and concerns. Furthermore, is it necessary and effective to require every province to do so regardless of the provincial impacts of climate change? Furthermore, is it more effective to initiate and implement a program on the provincial level or on the regional level? Impacts of climate change are usually assessed at regional or basin level, while implementation of programs is based on the provincial level.<sup>79</sup> In such instances, efficient and effective adaptation needs collaboration and information-sharing among provinces in the same region. In addition, conflicts should be resolved when designing and implementing adaptation strategies between provinces and river basin commissions. Mal-adaptation risks should also be assessed and prevented in cases where adaptation measures effective in one area may cause adverse impacts in other areas. Additionally, the impacts of climate change on different groups and recommended adaptation measures should be researched and assessed for implementation in the future, which is highly relevant to the one of the government's core interests, namely, societal stability.<sup>80</sup>

### 3. *Vulnerability-Reduction Approach*

Among the various ways to address the adverse impacts of climate change too much attention is focussed on the mitigation of GHGs emissions and this results in too much reliance on science and technology. Governed by a group of scientists and engineers,<sup>81</sup> and underpinned by 'science and technology as the primary productive

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<sup>78</sup> UNTGG China Gender Facility, UN Women China, *Adopting a Participatory Gender-Integrated Approach (PGIA) for Climate Change Adaptation Actions to Enhance Biodiversity Conservation in Poyang Lake (PYL) Region* (20–22 June 2012).

<sup>79</sup> See, eg, «中国应对气候变化国家方案» [China's National Climate Change Program], above n 10, 48–59. Impacts of climate change are identified and classified in different regions; serious reports of climate change impacts funded by China Meteorological Commission are carried out on a regional and basin level.

<sup>80</sup> Moore, above n 14, 147–57; 蔡定剑 [Cai Dingjian], above n 66, 17–23.

<sup>81</sup> Among nine members of the CPC's (Communist Party of China) Political Bureau — China's central committee to select the nation's top leaders, such as the President, Primary Minister and the Committee of the People's Congress — most of them have an education and working background in science, technology and engineering.

forces',<sup>82</sup> it is little wonder that various levels of Chinese governments, both central government and local governments, tend to resort to science and technology for the solutions when confronting problems. In CNCCP and other climate change plans formulated at local levels, most recommendations for adaptation in the water sector, for example, comprise technology adoption, infrastructure construction and the use of economic instruments.<sup>83</sup> 'Softer' adaptation methods, such as enhancing knowledge, providing information, managing changes and legal instruments, which provide greater benefits to nature and human livelihoods and long-term flexibility in addressing negative impacts from anthropogenic climate change, are taken lightly.<sup>84</sup> This approach can also be seen in the context of the adaptation measures put forward in China's environmental law, such as improving the accuracy of monitoring systems, constructing dams, dikes and other facilities, replacing farming systems with more adaptive ones, land use planning, transforming water management approaches and other 'hard' solutions. In most instances the reason given for a failure of an effective response in extreme events such as floods and droughts is attributed to 'insufficient infrastructure', without investigating the ecosystem vulnerability and explaining the root cause of this vulnerability.<sup>85</sup> This simplified causality leads to simplified solutions: building more and more infrastructure which, in turn, may disturb the delicate balance upon which the ecosystem depends and consequently lead to more frequent extreme events. Therefore, a vicious circle is evident in China's adaptation responses due in large part to an entrenched reluctance to go beyond an impacts-driven approach.

In the short term, there appears no realistic possibility to change the leadership structure, which implies that science and technology will still play a leading role over the next few years. Adoption of a vulnerability-reduction approach mainly relies on Governors' (central and local) individual predisposition to embrace progressive change. As mentioned earlier, adaptation research is still in its infancy in China, especially in the areas of social and legal research. Although the NDRC has initiated a program Climate Change Legislation,<sup>86</sup> it is still unsure to what

<sup>82</sup> Xiaoping Deng brought out this catchphrase during China's Reform and 'open-up' period in 1988, and then it became the guideline of China's economic development.

<sup>83</sup> «中国应对气候变化国家方案» [China's National Climate Change Program], above n 10; «湖北省应对气候变化行动方案» [Hubei Province's Climate Change Plan] (Hubei Province) National Development and Reform Commission, January 2011.

<sup>84</sup> Suzanne Ebert, Orieta Hulea and David Strobel, 'Floodplain Restoration along the Lower Danube: A Climate Change Adaptation Case Study' (2009) 1(3) *Climate and Development*; «中国应对气候变化国家方案及试点省份应对气候变化方案建议报告汇编» [China's National Climate Change Program and Report of Experimental Provinces' Advice on Dealing with Climate Change] (People's Republic of China) National Development and Reform Commission, June 2007.

<sup>85</sup> See, eg, 杨万国 [Yang Wanguo] «四川水利官员: 西南大旱背后凸显“水利欠账» [Sichuan Irrigational Governmental Official: Drought in Southwest Demonstrates lack of Water Facilities] (24 March 2010) <<http://city.sina.com.cn/2010-03-24/2038.html>>.

<sup>86</sup> 发展与改革委员会 [National Development and Reform Commission], «发展与改革委员会气候变化司就应对气候变化立法公开征询意见» [The Department of Climate

degree this program can narrow the current gap between environmental law and environmental implementation.

The vulnerability-reduction approach can coexist with a preventative approach, which has been recognised an effective method in tackling environmental pollution in China's environmental laws.<sup>87</sup> Incorporating other approaches as part of a comprehensive, preventative approach does not whittle away the power and effectiveness of science and technology, but attempts to resolve problems at source through a more comprehensive and sustainable approach. The Chinese government should encourage and facilitate research on adaptation from a legal, social, ethic and even cultural perspective to find out an effective strategy. Moreover, the focus of any government adaptation response should be directed at the underlying causes of adverse climate change impacts rather than dealing only with the impacts themselves.

#### 4. *Adopting Collaborative Decision-Making Structures and Processes*

In China, various levels of DRCs take responsibility of climate change issues from a policy guidance, strategy formulating and action promotion perspective. As discussed earlier detailed adaptation strategies and measures are taken by various departments within the context of their own responsibilities. Here, the Department of Environment Protection will be taken as an example to illustrate how decisions on adaptation are made under China's present decision-making structure.

Under China's environmental protection law decisions are made by administrative departments;<sup>88</sup> secondly, responsibility for supervision and management for a range of environmental affairs is divided according to different sectors. With this regime structure and based on China's environmental law regime, which rigidly relies on fixed, uniform regulatory instruments, such as technology standards and regulatory prescriptions, most environmental decisions are designed and implemented according to the will of decision-makers and relevant experts. However, when confronting climate change, which cuts across economic, social, environmental, technical and cultural areas, this management regime faces great challenges.<sup>89</sup> This

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*Change, NDRC is Consulting on Climate Change Legislation Publicly*] (3 October 2011) <[http://www.sdpc.gov.cn/yjzq/t20110310\\_399080.htm](http://www.sdpc.gov.cn/yjzq/t20110310_399080.htm)>.

<sup>87</sup> «中华人民共和国环境保护法» [Environmental Protection Law of People's Republic of China] (People's Republic of China) National People's Congress, Order No 22, 26 December 1989, arts 16, 24, 25, 27, 30; «中华人民共和国大气污染防治法» [Air Pollution Prevention Law of People's Republic of China] (People's Republic of China) National People's Congress, Order No 32, 29 April 2000, art 15; «中华人民共和国水污染防治法» [Water Pollution Prevention Law of People's Republic of China] (People's Republic of China) National People's Congress Water Pollution Prevention Law, Order No 87, 28 February 2008, art 22.

<sup>88</sup> «中华人民共和国环境保护法» [Environmental Protection Law of People's Republic of China] (People's Republic of China) National People's Congress, Order No 22, 26 December 1989, art 7.

<sup>89</sup> 曲格平 [Qu Geping] «中国的环境管理: 改革与创新» ['Environmental Management in China: Reform and Innovation'] (Paper presented at China-EU Environmental

top-down policy-making structure and program design preferring a command-and-control style of management can result in poor coordination among agencies, weak links among pre-event and post-event actions and other institutional problems.<sup>90</sup> In addition, the institutional landscape is highly fragmented and sectoral policies and laws are developed in isolation, preventing the implementation of integrative solutions.

In the context of the environment law, public participation is set out as a principle, however the public is charged with protecting the environment rather than contributing to the making of environmental decisions.<sup>91</sup> In the current decision-making structure, scientists are not given a chance to share their professional knowledge or provide independent recommendations; stakeholders are unable to articulate their interests or exercise their legal rights, and communities do not have the opportunity to transfer their indigenous knowledge on adaptation to decision-makers. This arbitrary decision-making structure not only lacks essential communication and interaction among the three connected but irreplaceable parts (government, scientists and the public) but also leads to a dilemma: the requirement of a more democratic and legitimate decision-making procedure and the inclusion of non-government actors.

The Environment Impact Assessment Law and the Interim Ordinance for Environment Impact Assessment Public Participation were initially regarded as positive and promising regulations in the context of public participation.<sup>92</sup> Nonetheless, there is a significant gap between the regulations and practical implementation,<sup>93</sup> not because the public's lack of environment knowledge and consciousness, but because they are not provided an opportunity to express their

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Management Innovation and Sustainable Development Conference, Qinhuangdao, China, 27 June 2005).

<sup>90</sup> 邱秋 [Qiu Qiu], «制度变迁与环境行政手段的变革» [‘Institutional Changes and Ways of Environmental Administration’] 2005 3(3) 湖北经济学院学报 [*Journal of Hubei University of Economics*] 116, 116–20; Louis Lebel et al, ‘Adaptation to Climate Change and Social Justice: Challenges for Flood and Disaster Management in Thailand’ in Fulco Ludwig et al (eds), *Climate Change Adaptation in the Water Sector* (Earthscan, 2009) 125, 125.

<sup>91</sup> «中华人民共和国环境保护法» [Environmental Protection Law of People’s Republic of China] (People’s Republic of China) National People’s Congress, 26 December 1989, ch 1 art 6: ‘All units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment.’

<sup>92</sup> «中华人民共和国环境影响评价法» [Environmental Impact Assessment Law of People’s Republic of China] (People’s Republic of China) National People’s Congress, Order No 77, 28 October 2002; «环境影响评价公众参与暂行办法» [Interim Ordinance for Environment Impact Assessment Public Participation] (People’s Republic of China) State Environmental Protection Administration, Order 28, 22 February 2006.

<sup>93</sup> Xiangbai He, Interview with Interviewee Four from Changjiang Water Resources Committee, (Wuhan, 11 October 2011).

opinions.<sup>94</sup> Public participation in China is government-led participation, i.e. an option of the government rather than legal right to participate. It is the same case with respect to access to information and mandatory publication requirements. Secondly, because government does not bear the responsibility of initiating public participation, it often prefers to substitute ‘certain experts’ for actual members of the public.

It will require considerable time for China to transform from its current command-and-control regime to a more collaborative decision-making structure and process. However, the pressures associated with climate change and the need to collect information, knowledge and experience of adaptation hopefully may serve as a catalyst to encourage the Chinese government to adopt greater flexibility.

Climate change is creating massive new challenges and demands on China’s present decision-making regime amid unprecedented levels of complexity and uncertainty. These challenges also bring a welcome opportunity to rethink and redesign decision-making structures and processes. Given the early developmental stage of democracy in China, the Chinese government can begin this reform or transformation by allowing more transparent climate change information to be made available to the public built on the free flow of information. In addition, leaving more room for meaningful public participation is an urgent need for Chinese citizens, who have already developed a strong will and ability to participate.<sup>95</sup> The publication of transparent climate change information and the reform of the environmental decision-making process could provide the public with the confidence that the best positive adaptation choices are being made to benefit them. Meaningful public participation can provide the public a legal way to express opinions and concerns, reducing the risk of social instability. It is expected that, if governments at all levels can muster the political will for reform, it will be towards a more democratic, transparent and accountable decision-making regime.

#### IV CONCLUDING COMMENTS

China has found itself in recent years at the centre of a complicated transformation involving economic and social development and environment protection, all of which are greatly exacerbated by the challenges posed by climate change. The urgent need to seriously consider viable adaptation options brings unprecedented challenges but also provides an opportunity to review and evaluate present practices and to look at how other countries are approaching an equally uncertain future. Not all the adaptation theories referred to in this paper can be assimilated and implemented in China and nor should they, as reform, particularly political and social reform, is often a slow process that must go hand in hand with the development of institutional capacity to properly manage a reform agenda.

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<sup>94</sup> 蔡定剑 [Dingjian], above n 69, 36–7.

<sup>95</sup> 竺效 [Xiao Zhu], «环境保护: 公众参与最广阔的战场» [‘Environmental Protection: an active area of public participation’] in 蔡定剑 [Cai Dingjian (ed)] «公众参与: 风险社会的制度参与» [*Public Participation: Constructing a Framework for the ‘Risk Society’*] (China Law Press, 2009) 76, 76–106.



## THE EVOLUTION OF INDIGENOUS CORPORATIONS: WHERE TO NOW?

### ABSTRACT

Since 1976, Indigenous Australians have been able to provide for the constitution of Aboriginal councils and the incorporation of associations of Aboriginals under the *Aboriginal Councils and Associations Act 1976* (Cth). The introduction of these business structures sought to provide Indigenous Australians with the power to adopt and pursue culturally appropriate businesses structures and practices. While the legislation marked a step forward in the empowerment of Indigenous Australians, the criticism of the Act led to its eventual repeal and the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). In light of Australia's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, this article considers the evolution of Indigenous corporations in Australia and assesses the extent to which Indigenous business structures have enabled Indigenous Australians to operate their businesses in a manner commensurate with their culture and traditions.

### I INTRODUCTION

After decades of negotiations, on 13 September 2007 the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* ('UN Declaration') by an overwhelming majority.<sup>1</sup> Even though the UN Declaration is non-binding and aspirational, it presents, for the first

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<sup>1</sup> *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup>, plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). The UN Declaration was adopted by a majority of 144 votes in favour of the declaration, 4 against it and 11 abstentions: United Nations, 'General Assembly Adopts Declaration on the Rights of Indigenous Peoples: Major Step Forward Towards Human Rights For All, Says President' (Press Release, 13 September 2007) <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>>. The States who voted against the UN Declaration were the United States, Canada, Australia and New Zealand. However, each of these nations has subsequently reversed its position: United Nations Permanent Forum on Indigenous Issues, 'Declaration on the Rights of Indigenous Peoples' <<http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>>.

time, a comprehensive list of rights of Indigenous peoples.<sup>2</sup> These rights cover a range of matters such as the vocational and educational needs,<sup>3</sup> spiritual<sup>4</sup> and social<sup>5</sup> concerns, and economic<sup>6</sup> and land<sup>7</sup> rights of Indigenous peoples. The *UN Declaration* also acknowledges the right to self-determination of Indigenous peoples.<sup>8</sup> This right is the pillar on which all other rights in the *UN Declaration* rest as it allows Indigenous people to take control of their future.<sup>9</sup> However, in order to placate States' concerns about issues of 'sovereignty and territorial integrity',<sup>10</sup> it is important to note that the right of Indigenous peoples to self-determination in the *UN Declaration* was limited to aspects of self-determination internal to a state.<sup>11</sup>

Australia initially voted against the adoption of the *UN Declaration*, but on 3 April 2009 the Australian Federal Government endorsed the *UN Declaration*.<sup>12</sup> Jenny Macklin, Minister of Families, Housing, Community Services and Indigenous Affairs, asserted that this endorsement was a step towards closing the gap between Indigenous and non-Indigenous Australians as it acknowledges the need to nurture a new relationship with Indigenous Australians based on trust and respect.<sup>13</sup> Since the European colonisation of Terra Australis, Indigenous Australians have been subject to various degrees of political, economic and legislative disenfranchisement. For example, in 2009 the rate of unemployment for Indigenous Australians was three times higher than the rate of unemployment for all

<sup>2</sup> Viniyanka Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008–09) 9 *Chicago Journal of International Law* 297, 297.

<sup>3</sup> See, eg, *UN Declaration*, UN Doc A/RES/ 61/295, art 14.

<sup>4</sup> *Ibid* art 12.

<sup>5</sup> *Ibid* art 9.

<sup>6</sup> *Ibid* art 20.

<sup>7</sup> *Ibid* art 10.

<sup>8</sup> *Ibid* art 3.

<sup>9</sup> Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9 *Melbourne Journal of International Law* 439, 458; Michael Dodson, 'Voices of the Peoples — Voices of the Earth: Indigenous Peoples — Subjugation or Self-Determination' in Robert Gottlieb (ed) *Liberating Faith: Religious Voices for Justice, Peace, and Ecological Wisdom* (Rowman & Littlefield, 2003) 296, 299.

<sup>10</sup> Davis, above n 9, 460.

<sup>11</sup> See, eg, *UN Declaration*, UN Doc A/RES/61/295, art 14.

<sup>12</sup> Australian Government, *International Indigenous Issues — Declaration on the Rights of Indigenous Peoples* (27 October 2010) <<http://www.fahcsia.gov.au/sa/Indigenous/progserv/engagement/Pages/InternationalIssues.aspx>>; Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (2 April 2009) <[http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un\\_declaration\\_03apr09.aspx](http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx)>.

<sup>13</sup> Jenny Macklin, *Closing the Gap Between Indigenous and Non-Indigenous Australians* (12 May 2009) <[http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09\\_10/Indigenous/Documents/ClosingTheGap/closingthegap.pdf](http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/Indigenous/Documents/ClosingTheGap/closingthegap.pdf)>.

Australians<sup>14</sup> and, in 2006, the median individual income of Indigenous Australians was 59 per cent of the median individual income of non-Indigenous Australians.<sup>15</sup>

One way to improve the position of Indigenous Australians is to allow them to take control of their economic futures.<sup>16</sup> In 1991 the Royal Commission into Aboriginal Deaths in Custody recommended that Indigenous organisations should be the vehicle of policies aimed toward benefiting Indigenous Australians.<sup>17</sup> The endorsement of this recommendation may assist to fulfil one of the aspirational rights — the economic right — of Indigenous peoples as recognised by the *UN Declaration*. Allowing Indigenous Australians to take control of their economic futures could be achieved by providing Indigenous people with the opportunity to run, in their communities, their own businesses based on their culture and traditions. Steps in this direction have already been taken as Indigenous Australians are able to manage their own businesses either in the form of mainstream corporations<sup>18</sup> or in the form of Indigenous corporations.<sup>19</sup> Indigenous corporations, in particular, have played an integral role in Indigenous social, political and economic action in a number of instances.<sup>20</sup> Ultimately, encouraging

<sup>14</sup> Creative Spirits, '*Aboriginal Economy*' <<http://www.creativespirits.info/aboriginalculture/economy/>>.

<sup>15</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, (28 July 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8E4A1018AFC6332DCA2578DB00283CCE?opendocument>>. For more complete data regarding the ratio of Indigenous to non-Indigenous socioeconomic outcomes from 1971–2006, see John Altman, Nicholas Biddle and Boyd Hunter, 'Prospects for "Closing the Gap" in Socioeconomic Outcomes for Indigenous Australians?' (2009) 49 *Australian Economic History Review* 225.

<sup>16</sup> Janet Hunt, 'Looking After Country in New South Wales: Two Case Studies of Socioeconomic Benefits for Aboriginal People' (Working Paper No 75/2010, Centre for Aboriginal Economic Policy Research, 2010) 1.

<sup>17</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 26 [27.4.31].

<sup>18</sup> The term 'mainstream corporations' refers to corporations registered under the *Corporations Act 2001* (Cth) or the Associations Incorporation Acts in each of the states and territories.

<sup>19</sup> These Indigenous corporations were initially registered under the *Aboriginal Councils and Associations Act 1976* (Cth) ('*ACA Act*'); this legislation has now been replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('*CATSI Act*').

<sup>20</sup> Corrs Chambers Westgarth Lawyers, 'Review of the *Aboriginal Councils and Associations Act 1976*: Policy Options' (Discussion Paper, October 2001) 63. For instance, Maari Ma Health Aboriginal Corporation provides primary health care services in the far west of New South Wales. One of its objectives is 'to improve the physical and mental health and well being of Aboriginals at the individual, family and community level'. In seeking to achieve this objective Maari Ma Health Aboriginal Corporation works closely with a number of government and non-government agencies to close the gap between Indigenous and non-Indigenous children in its region: Maari Ma Health Aboriginal Corporation, *Maari Ma Welcomes Document Launch by Federal Minister* (September 2009) <<http://www.maarima.com.au/>>; Office of the Registrar of Indigenous Corporations, *Maari Ma*

the development of viable Indigenous corporations in Indigenous communities may lead to greater employment opportunities for Indigenous Australians.<sup>21</sup>

In light of Australia's endorsement of the *UN Declaration*, this article considers the evolution of Indigenous corporations in Australia and assesses whether this business structure enables Indigenous Australians to run their businesses in a manner commensurate with their culture and traditions. Part II of this paper discusses the reasons behind the introduction of Indigenous corporations in Australia. Parts III and IV trace the evolution of the *ACA Act* from its beginnings as legislation empowering Indigenous Australians to its end as a rigid and unbending piece of legislation. Part V of this paper discusses the introduction of the *CATSI Act* to replace the *ACA Act* in 2007. Lastly, Part VI assesses the extent to which this latest legislation allows Indigenous Australians to engage freely in 'all their traditional and other economic activities' for the benefit of their communities.<sup>22</sup>

## II MOTIVATIONS BEHIND THE ADOPTION OF INDIGENOUS CORPORATIONS BY THE *ACA ACT*

Well before the adoption of the *UN Declaration* by the United Nations General Assembly in 2007 the need to permit Indigenous Australians to run businesses based on their own traditions and culture had been recognised in Australia. For example, in 1973 Justice Woodward stated:

Since unincorporated associations, co-operatives and trustee arrangements all have clear defects in the Aboriginal situation, there is an obvious need for provisions for incorporation. Further, laws relating to incorporation under the Companies Acts are inappropriate for most Aboriginal purposes.<sup>23</sup>

### A *The Origin of the ACA Act*

Discussion regarding the creation of Indigenous corporations in Australia is historically linked to the discussion of traditional land rights. The origin of the first Indigenous corporations legislation, the *ACA Act*, can be traced to the 1971 release of the *Report of the Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory*.<sup>24</sup> This report was silent on the

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*Health Aboriginal Corporation: Consolidated Rule Book* (3 May 2010) [3.1] <<http://www.oric.gov.au/document.aspx?concernID=102570>>.

<sup>21</sup> Boyd Hunter, 'Revisiting the Relationship Between the Macroeconomy and Indigenous Labour Forces Status' (2010) 29 *Economic Papers* 320, 331.

<sup>22</sup> *UN Declaration*, UN Doc A/RES/61/295, art 20.

<sup>23</sup> Aboriginal Land Rights Commission, *First Report July 1973* (1973) [166] ('*First Report*').

<sup>24</sup> Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory, *The Report of the Committee to Review the Situation of Aborigines in Pastoral Properties in the Northern Territory* (Government Press, 1971) 75.

abuses surrounding the reservation system,<sup>25</sup> but it recommended the adoption of legislation designed to allow for the incorporation of an Indigenous business structure.<sup>26</sup> Following this report, Prime Minister William McMahon, while rejecting traditional ownership of land rights,<sup>27</sup> declared that his government would propose to ‘investigate ways of providing a simple, flexible form of incorporation for Aboriginal communities’.<sup>28</sup>

In protest against the Prime Minister’s denial of Indigenous land rights, an Indigenous delegation travelled to Canberra and set up the Aboriginal Tent Embassy on the parliamentary lawn.<sup>29</sup> Unlike the Prime Minister, the leader of the opposition, Mr Gough Whitlam, visited the Embassy and pledged that, if elected, the Labor Government would support ‘community ownership of land in the Northern Territory by identifiable communities or tribes by way of freehold title’.<sup>30</sup>

When the Whitlam Labor Government was subsequently elected in December 1972, it suspended the granting of leases and mineral licences on Indigenous reserves in the Northern Territory.<sup>31</sup> Further, Prime Minister Gough Whitlam announced his government’s intention to establish a judicial inquiry into Aboriginal land rights.<sup>32</sup> Accordingly, on 8 February 1973, Governor-General Paul Hasluck commissioned Justice Edward Woodward to report upon ‘the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land’.<sup>33</sup> This report was fundamental to the adoption of Indigenous corporations legislation.

### B *The Woodward Reports*

In the first report of the Aboriginal Land Rights Commission published in July 1973, Justice Woodward highlighted the need for the introduction of a special

<sup>25</sup> Coral Dow and John Gardiner-Garden, *Background Note: Overview of Indigenous Affairs: Part 1: 1901 to 1991* (10 May 2011) Parliament of Australia, 12 <<http://www.aph.gov.au/library/pubs/bn/sp/IndigenousAffairs1.htm>>.

<sup>26</sup> Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory, above n 24, 75.

<sup>27</sup> William McMahon, *Australian Aborigines: Commonwealth Policy and Achievements* (26 January 1972) National Museum of Australia, 6, 9 <<http://Indigenoustrights.net.au/files/f61.pdf>>; Philip Chartrand, ‘The Status of Aboriginal Land Rights in Australia’ (1981) 19 *Alberta Law Review* 436, 439.

<sup>28</sup> McMahon, above n 27, 9.

<sup>29</sup> Scott Robinson, ‘The Aboriginal Embassy: An Account of the Protests of 1972’ (1994) 18 *Aboriginal History* 49.

<sup>30</sup> Peter Rhodes, ‘The Report of the Australian Aboriginal Land Rights Commission’ (1974–75) 39 *Saskatchewan Law Review* 199, 205.

<sup>31</sup> *Ibid.*

<sup>32</sup> Robert Trumbull, ‘Australia Acts on Tribal Lands: Names Judge to Clear Way for Ownership Transfer’, *New York Times* (New York City), 17 December 1972, 5; Robert Trumbull, ‘Australia Acts to Save Aboriginal Culture’, *New York Times* (New York City), 15 December 1972, 5.

<sup>33</sup> *First Report*, above n 23, iii.

system of incorporation for Indigenous groups,<sup>34</sup> and recommended that a new system of incorporation for Aboriginal communities and groups be implemented immediately.<sup>35</sup> This recommendation was confirmed by the second report published by the Aboriginal Land Rights Commission in April 1974, where Justice Woodward stated that ‘no existing legal provisions [relating to business structures] are really satisfactory for Aboriginal purposes’.<sup>36</sup> Significantly, Justice Woodward recommended that any legislation relating to Aboriginal corporations should be simple, flexible, and make provision for Indigenous methods of decision-making.<sup>37</sup> Such legislation should also contain contingency planning in the event of corruption, inefficiency, or outside influences, and should be framed to avoid the taxation of any income allocated to community purposes.<sup>38</sup>

### C *The Move towards the ACA Act*

As a result of the recommendations of Justice Woodward’s 1974 report, the Aboriginal Councils and Associations Bill 1975 (Cth) was introduced in the Federal Parliament by the Honourable Les Johnson, then Minister for Aboriginal Affairs, on 30 September 1975.<sup>39</sup> However, the Bill lapsed as a result of the double dissolution of the Parliament in November 1975. The Bill was then tabled in front of the newly elected Parliament.<sup>40</sup> In his second reading speech on the Aboriginal Councils and Associations Bill 1976 (Cth), the Honourable Ian Viner, then Minister for Aboriginal Affairs, stressed that the proposed legislation would allow for Indigenous Australians to establish a recognised body corporate without the complexities of other legislation available. For example, he stated that:

One can well imagine the bewilderment of Aboriginal elders in remote tradition-oriented communities, who simply want to get on with their own projects, when faced by the immense amount of documentation necessary to enable them to act as a legally recognised corporate body.<sup>41</sup>

To deal with this problem he noted that the proposed new legislation would take Indigenous values and practices into account<sup>42</sup> and would make it simpler for Indigenous groups to ‘adopt structures relevant to their needs and to incorporate in an appropriate manner’.<sup>43</sup> In particular, Minister Viner made it clear that the

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<sup>34</sup> Ibid [166].

<sup>35</sup> Ibid [280].

<sup>36</sup> Aboriginal Land Rights Commission, *Second Report April 1974* (1974) [330].

<sup>37</sup> Ibid [332].

<sup>38</sup> Ibid [332].

<sup>39</sup> David Dalrymple, ‘The Forgotten Option—Part III of the Aboriginal Councils and Associations Act 1976’ [1988] *Aboriginal Law Bulletin* 32, 32.

<sup>40</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No 82 of 2006, 31 January 2006, 4.

<sup>41</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1976, 2946 (Ian Viner).

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 2947.

new incorporation procedure would assist Indigenous bodies to form an acceptable legal personality for the purpose of receiving government grants. The *ACA Act* was enacted in December 1976 and commenced operation on 14 July 1978 following amendments assented to on 22 June 1978.<sup>44</sup>

### III THE *ACA ACT*

Two types of Indigenous corporate bodies could be created pursuant to the *ACA Act*: Aboriginal councils and Aboriginal associations.

#### A *Aboriginal Councils*

Part III of the *ACA Act* permitted Aboriginal councils to be established as bodies corporate<sup>45</sup> that would be entitled to own property<sup>46</sup> and to sue and be sued.<sup>47</sup>

##### 1 *Positives*

The establishment of Aboriginal councils under the *ACA Act* aimed to meet the incorporation needs of Indigenous communities which provided government-type essential services.<sup>48</sup> Consequently, an Aboriginal council could do ‘all things necessary or convenient to be done for or in connection with the performance of its functions’.<sup>49</sup> Minister Viner stated in his second reading speech to the 1976 Bill that:

Councils are geographically-based bodies which may undertake a variety of functions on behalf of an Aboriginal community of the area, provided that these include the provision of at least one of the kinds of services listed in clause 11(3) such as housing, health, municipal and related services.<sup>50</sup>

This type of organisation was a step towards enhancing Indigenous Australians’ right to self-determination, as Part III of the *ACA Act* allowed ‘Aboriginal communities to incorporate without requiring registration of community membership, as in the case of associations. A council is in the nature of a community corporation based on a local Aboriginal social structure serving the special interests of that community’.<sup>51</sup> It was envisaged that such councils may, like their state and territory counterparts, carry out activities increasingly ‘para-

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<sup>44</sup> *Aboriginal Councils and Associations Amendment Act 1978* (Cth).

<sup>45</sup> *ACA Act* s 19(3)(a).

<sup>46</sup> *ACA Act* s 19(3)(c).

<sup>47</sup> *ACA Act* s 19(3)(e).

<sup>48</sup> Dalrymple, above n 39.

<sup>49</sup> *ACA Act* s 29.

<sup>50</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1976, 2947 (Ian Viner).

<sup>51</sup> *Ibid.*

governmental in nature'.<sup>52</sup> This would, in turn, empower Indigenous Australians to take control of their futures.

## 2 Negatives

Although a number of applications were made for the establishment of Aboriginal councils under pt III of the *ACA Act*, no Aboriginal council was ever created under this legislation. Table 1 lists the outcome of all applications made under pt III of the *ACA Act* between 1978 and 1989.

Date of application	Application	State/ Territory in which application made	Outcome
3 October 1978	Maningrida	Northern Territory	Application withdrawn due to opposition of the Northern Territory government. The organisation was incorporated in 1982 under the <i>Associations Incorporation Act</i> (NT).
13 March 1979	Jay Creek	Northern Territory	Application withdrawn due to opposition of the Northern Territory government.
10 September 1979	Warburton	Western Australia	Application withdrawn.
28 April 1987	Charters Towers	Queensland	Application withdrawn.
15 August 1988	Borroloola	Northern Territory	Application rejected with recommendation to register under the <i>Local Government Act</i> (NT).
22 April 1988	Belying	Northern Territory	Application withdrawn. The organisation subsequently registered under the <i>Local Government Act</i> (NT).
11 November 1988	Port Keats	Northern Territory	Application withdrawn with applicants advising Registrar of their decision that it was better to register under the <i>Local Government Act</i> (NT).
11 November 1988	Minjilang	Northern Territory	Application withdrawn.

Table 1: Applications for registration under Part III of the *ACA Act*<sup>53</sup>

<sup>52</sup> For example, Jon Altman and Mike Dillon observed that the Northern Territory Land Council's activities were 'increasingly para-governmental in nature': Jon Altman and Mike Dillon, 'Aboriginal Land Rights, Land Councils and the Development of the Northern Territory' in Deborah Wade-Marshall and Peter Lovedays (eds), *Contemporary Issues in Development* (Northern Australia Research Unit, 1988) 126, 126.

<sup>53</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Review of the Aboriginal Councils and Associations Act 1976*, Final Report (1996) 97–110 ('*Review of the ACA Act 1976* (1996)').

Due to the strong opposition of state and territory governments to the establishment of Aboriginal councils, none of the applications lodged with the Registrar of Aboriginal Corporations<sup>54</sup> led to the creation of Aboriginal councils. In 1996, the then Registrar of Aboriginal Corporations observed that ‘no action was taken by any of my predecessors to process the applications. ... [T]he Northern Territory Government is strongly opposed to the incorporation of Aboriginal Councils’.<sup>55</sup>

The state and territory governments feared that the establishment of Aboriginal councils would allow the Commonwealth to encroach on state and territory responsibilities for dealing with proposed or existing local government. This was exacerbated by the fact that an Aboriginal council registered under pt III of the *ACA Act* would be answerable to the Registrar of Aboriginal Corporations and not to the state or territory government. Further, since they would be established under Commonwealth legislation, Aboriginal councils may have been exempt from local and state or territory governments’ control.<sup>56</sup> In view of the states and territory governments’ opposition toward such provisions, pt III of the legislation was not used to establish Aboriginal councils.<sup>57</sup> Accordingly, the very reason that led to the introduction of pt III of the *ACA Act* — the empowering of Indigenous Australians — resulted in the disuse and the eventual abolition of these provisions.

### B *Aboriginal Associations*

Part IV of the *ACA Act* allowed for the incorporation of Aboriginal associations. These associations were conceived to be convenient legal entities that could be used by Indigenous people to achieve different objectives. For instance, when the *ACA Act* was enacted, Minister Viner observed that ‘Aboriginal associations may be formed by a group of Aboriginals for any special or economic purpose, including the conduct of a business enterprise to obtain profit for its members’.<sup>58</sup>

On 14 September 1978, Minister Viner issued a statement encouraging the incorporation of Aboriginal associations.<sup>59</sup> However, it was not until 1980 that the first Aboriginal association was registered under the *ACA Act*. As Diagram 1 shows the number of associations incorporated under pt IV of the *ACA Act* steadily increased over the following decades.

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<sup>54</sup> Since 2007, the Registrar of Aboriginal Corporations has been referred to as the Registrar of Indigenous Corporations.

<sup>55</sup> *Review of the ACA Act 1976* (1996), above n 53, 102.

<sup>56</sup> *Ibid* 91, 94.

<sup>57</sup> *Ibid* 95.

<sup>58</sup> As cited in Graeme Neate, *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976* (Freehill, Hollingdale and Page, 1989) 11.

<sup>59</sup> *Ibid*.

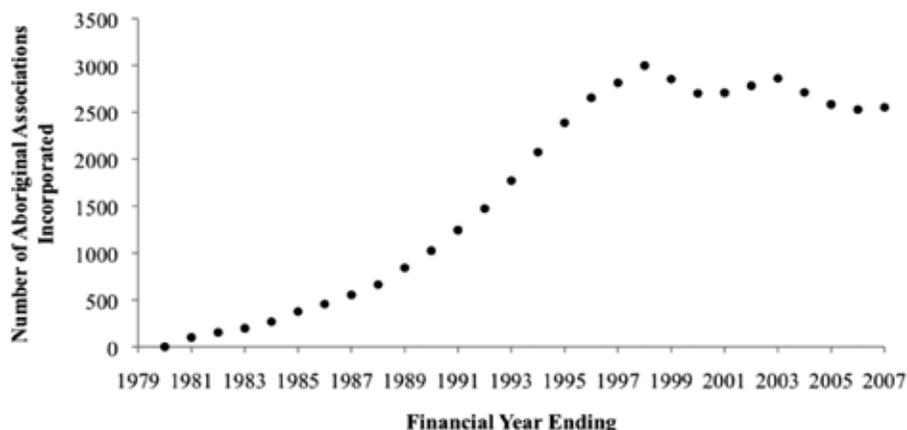


Diagram 1: Aboriginal associations incorporated under the *ACA Act* from 1978 to 2007

By 30 June 1989, the number of Aboriginal associations incorporated under Part IV of the *ACA Act* had risen to 843.

### C Recognition of Indigenous Culture

One of the main features of the *ACA Act* in its original form was that it was very flexible and non-prescriptive. This allowed Indigenous Australians to create their businesses in a culturally appropriate manner. The *ACA Act* allowed for Indigenous culture in the management of organisations incorporated under it by providing that the rules of an Aboriginal council or Aboriginal association could be based upon Aboriginal custom.<sup>60</sup> For example, s 43(4) of the *ACA Act* stated that ‘[t]he Rules of an association with respect to any matter may be based on Aboriginal custom.’

The incorporation of these rules in the legislation was a significant step towards the legal recognition and acceptance of Indigenous culture and values in the running of Indigenous corporations. From this perspective, even though the *ACA Act* predates the *UN Declaration*, the legislation achieved one of the aspirational goals of the *UN Declaration* as it recognised Indigenous customs as playing a role in the running of Indigenous associations. However, the *ACA Act* was subject to a number of criticisms that led to a shift in the way the legislation was administered.

## IV CRITICISMS AND ALTERATION OF THE *ACA ACT*

Although the number of Indigenous corporations registered under Part IV of the *ACA Act* continued to rise after the introduction of the legislation, as was illustrated in Diagram 1, concerns were raised regarding the application of a number of provisions in the legislation. This led to the alteration of the Act in 1992.

<sup>60</sup> *ACA Act* ss 23(3), 43(4).

## A *Criticisms of the ACA Act*

### 1 *Lack of Compliance: Issues Relating to Accountability*

One of the major concerns regarding the application of the *ACA Act* in its original form related to the fact that a number of Aboriginal associations failed to meet the statutory requirements.<sup>61</sup> For example, s 59(4) of the *ACA Act* required the public officer of an Aboriginal association to file with the Registrar of Aboriginal Corporations an annual balance sheet setting out the assets and liability of the organisation and an audited report of this balance sheet. The Department of Aboriginal Affairs observed that, as of 31 December 1988, 58 per cent of incorporated Indigenous associations had not filed the required financial reports for the 1986–87 financial year.<sup>62</sup>

Similarly, s 57 of the *ACA Act* required the governing committee of an Aboriginal association to provide the Registrar with written notice of the name and address of the association's public officer.<sup>63</sup> As of 31 December 1988, 16.4 per cent of incorporated Indigenous associations had not complied with this requirement.<sup>64</sup> Further, in 1992 a taskforce carried out a broad examination of the compliance of Indigenous corporations with the provisions of the *ACA Act*, examining 706 out of 1550 of the Registrar's files on Indigenous corporations registered in 1992. The taskforce found a 67.5 per cent non-compliance rate in the files examined.<sup>65</sup>

### 2 *Vague Provisions*

In addition to issues of accountability, some requirements in the *ACA Act* had not been clearly expressed and, as a consequence, it was difficult for the administrators of the Act to determine when a breach of the legislation had occurred.<sup>66</sup> For example, s 53(3) of the *ACA Act* provided that where an incorporated Aboriginal association changed its name to a new name approved by the Registrar of Aboriginal Corporations, the public officer of the association must serve on the Registrar a notice in writing of the change. However, the statute did not specify a time period during which this statutory obligation had to be fulfilled. As a result, it was not easy to determine if or when a breach of s 53(3) had occurred. Table 2 summarises the provisions of the *ACA Act* as originally enacted that did not specify a time limit for compliance.

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<sup>61</sup> Neate, above n 58, 5.

<sup>62</sup> Ibid.

<sup>63</sup> Referred to in the *CATSI Act* as the board of directors of an Indigenous corporation.

<sup>64</sup> Neate, above n 58, 6.

<sup>65</sup> *Review of the ACA Act 1976* (1996), above n 53, 22–3.

<sup>66</sup> Neate, above n 58, 5.

Sections in the <i>ACA Act</i> that do not have a time limit on compliance	Content of the section
53(1)	Governing committee to apply to Registrar for approval of proposed new name of association.
53(3)	Public officer of an Aboriginal association to serve on Registrar a notice of a change of name which has been approved by the Registrar.
56(4)	Governing committee to terminate the appointment of public officer if he/she becomes bankrupt or applies to take benefit of a law for the relief of bankruptcy or insolvent debtors or compounds with his/her creditors.
56(5)	Governing committee to obey the Registrar's directive to change official address or to notify the Registrar of a change of address.
59A(2)	Association to comply with Registrar's requirements as to the keeping of accounts and records, and the filing of reports and statements prepared from those accounts and records.
60(3)	Governing committee to ensure access to relevant statements by auditors appointed under s 60(1) of the <i>ACA Act</i> .

Table 2: Sections in the *ACA Act* that do not have a time limit on compliance<sup>67</sup>

As may be seen from Table 2, Aboriginal associations that had not filed the required financial reports at the end of the financial year could not be found liable for breaching s 59A(2) as there was no specification in the legislation as to when the report had to be lodged. Other sections of the *ACA Act*, such as s 59(3), required Indigenous corporations' compliance with reporting requirements 'as soon as practicable' after a balance sheet and expenditure statement had been prepared — but there was no clarification in the Act as to what was meant by 'as soon as practicable'. As such there was no clear time limit set on when the reporting obligation had to be met. This was problematic as it was then not clearly apparent when a corporation was in breach of the statute.

### 3 Low Penalties

Another criticism directed towards the *ACA Act* related to the penalties, or lack of substantial penalties, imposed by the legislation. To illustrate this point, Table 3 summarises the obligations imposed by the *ACA Act* as originally enacted on the governing committees and public officers of Aboriginal associations and the penalties, if any, that were to apply for breach of these provisions.

<sup>67</sup> These provisions are from pt IV of the *ACA Act*. Sections from pt III of the *ACA Act* are not listed here because no Aboriginal council was ever created under pt III of the *ACA Act*.

<b>Sections</b>	<b>Obligations</b>	<b>Penalties</b>
52(1)	Public officer to file a copy of the amendment to the objects of the association with the Registrar	\$50
53(1)	Governing committee to apply to Registrar for approval of proposed new name of association	No penalties*
53(3)	Public officer to serve on Registrar notice of a change of name which has been approved by the Registrar	\$50
54(1)	Public officer to file a copy of the amendment of the rules of the association with the Registrar	\$50
56(1)	Governing committee to appoint a public officer	No penalties*
56(4)	Governing committee to terminate the appointment of public officer if he/she becomes bankrupt or applies to take benefit of a law for the relief of bankruptcy or insolvent debtors or compounds with his/her creditors	No penalties*
56(5)	Governing committee to obey the Registrar's directive to change official address or to notify the Registrar of a change of address	No penalties*
57(1)	Governing committee to notify the Registrar of the appointment of a public officer	No penalties*
57(2)	Governing committee to notify a change of official address of the public officer to the Registrar	No penalties*
58(1)	Public officer to keep a register of members at the official address	No penalties
58(2)	Public officer to ensure register of members open for inspection by members of public	\$50
59(1)	Governing committee to keep proper financial records	No penalties
59(2)	Governing committee to prepare a balance sheet and income and expenditure statement for each financial year	No penalties
59(3)	Governing committee to have financial statements of the association examined by person authorised by Registrar	No penalties
59(4)	Public officer to file a copy of the balance sheet, income and expenditure statement and examiner's report with the Registrar	\$50
59A(2)	Association to comply with Registrar's requirements as to the keeping of accounts and records, and the filing of reports and statements prepared from those accounts and records	\$50
60(3)	Governing committee to ensure access to relevant statements by auditors appointed under s 60(1) of the <i>ACA Act</i>	No penalties
61(1)	Governing committee to provide the Registrar with a written explanation of failure to comply with obligations	No penalties*
61(2)	Governing committee to follow recommendations of Registrar to remedy a breach of the law	No penalties*
64(2)	Public officer to lodge with the Registrar a notice for voluntary winding up	\$50

Table 3: Penalties in the *ACA Act* applying for breach of obligations of governing committees and public officers<sup>68</sup>

<sup>68</sup> Although no penalties are specified in ss 56, 57 and 61, a breach of the sections could lead to the Registrar petitioning the Court for the winding up of the Aboriginal association: *ACA Act* ss 61(3), 61(4). Sections from pt III of the *ACA Act* are not listed here because no Aboriginal councils were created under pt III of the *ACA Act*.

In examining Table 3, it becomes apparent that the penalties imposed under the *ACA Act* prior to the 1992 reforms to deal with contraventions of the statute were either grossly inadequate — the standard penalty not exceeding \$50 — or non-existent.

### B *The 1989 Review and 1992 Reforms*

Due to the criticisms of the *ACA Act* outlined above, a review of the legislation was undertaken in 1989.<sup>69</sup> The 1989 review was centred on finding ways to ensure that the standards of accountability were in place, without necessarily assessing the cultural appropriateness of such standards.

#### 1 *The 1989 Review*

The summary of the 1989 report noted that ‘most of the options for amending the *ACA Act* are intended to provide clear ways of determining whether the requirements of the Act have been met and ensuring that the interests of the members of associations and others who have dealings with associations are satisfied’.<sup>70</sup> The main reforms proposed by the 1989 review were the following:<sup>71</sup>

- specifying the matters required to be included in the Rules of an Aboriginal association;<sup>72</sup>
- clarifying the requirements concerning the preparation and lodgement of financial reports;
- specifying time limits during which the obligations under the statute have to be complied with;
- increasing the penalties that will be imposed if a breach of the legislation occurs; and
- expanding the role of the Registrar so as to give the Registrar more powers regarding the investigation of Indigenous corporations registered under the Act and the enforcement of the provisions of the legislation.

Based on the 1989 report, amendments to the Act were passed by the Federal Parliament in 1992.

#### 2 *The 1992 Reforms*

The 1992 amendments increased the accountability required of Aboriginal associations. As a consequence of all the new changes, the number of sections in the *ACA Act* rose from 83 to 99 sections. However, the main structure of the Act remained the same as the amended legislation retained its six constituent parts.

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<sup>69</sup> Neate, above n 58.

<sup>70</sup> Ibid 2.

<sup>71</sup> Ibid.

<sup>72</sup> The Rules of an Aboriginal association play a crucial part in the management of the business, as these rules determine the principles on which the Aboriginal association is going to be run.

<b>Parts in the <i>ACA Act</i></b>	<b>1992 amendments</b>	<b>Implication</b>
Part I: Preliminary	Section 3A introduced, providing that Chapter 2 of the Criminal Code applies to all breaches of the <i>ACA Act</i> .	The legislation became criminal in nature. This led to a change in certain penalties imposed under the Act and the introduction of strict liability offences such as the s 54(1A) penalty.
Part II: Registrar of Aboriginal Corporations	No change.	Not applicable
Part III: Aboriginal Council Areas and Aboriginal Councils	Changed reporting requirements: ss 38, 39 and 40.	This amendment dealt with criticisms of the <i>ACA Act</i> 's reporting requirements, and imposed more accountability on Aboriginal councils.
Part IV: Incorporated Aboriginal Associations	Provided Registrar with more power regarding the registration of Aboriginal associations: see s 45;	This amendment allowed greater interference by the Registrar in the affairs of an association
	Imposed more duties and regulation on members of governing committees: see ss 49B, 49C, 49D and 49E;	These amendments imposed a higher burden of accountability on the people running an association;
	Noted that the Registrar may settle disputes relating to an association: see s 58A;	More power was provided to the Registrar to interfere in affairs of an association;
	Established rules regarding members' meetings: see s 58B.	The section provided more rules regarding the running of an association;
	Changed regarding reporting requirements: see ss 59 to 61A.	These amendments deal with criticisms regarding non-compliance with the provisions of the <i>ACA Act</i> and impose a higher degree of accountability.
Part V: Investigation and Administration of Aboriginal Corporations (before the reform the part was entitled: Investigation and Judicial Management of Aboriginal Corporations)	This part changed drastically, with the Registrar given more power to interfere in the affairs of associations. The Registrar can now not only alter the rules of an association at his or her own initiative, but also appoint an administrator to take control of the affairs of an association when appropriate.	The expansion of the Registrar's powers related directly to the desire to impose higher accountability standards on Indigenous corporations.
Part VI Miscellaneous	No change.	Not applicable

Table 4: Changes to the *ACA Act* as a result of the 1992 reforms

As may be seen from Table 4, even though the structure of the *ACA Act* was subject to only minor changes, the reform consisted of amendments to the legislation that greatly altered the manner in which Aboriginal associations functioned. Because of the ‘one size fits all’ approach taken by the reform, a major characteristic of the legislation as amended was that it retained very little flexibility. For example, new proscriptive rules regarding the conduct of members meetings were imposed by the 1992 amendments on all types and sizes of corporations.<sup>73</sup> These rules regarding the conduct of meetings diminished the freedom of members to run the affairs of their associations in the manner of their choosing — and, rather than satisfying Indigenous cultural needs, may instead have restrained them by preventing members from running their associations in accordance with cultural practices. As Terry Libesman and Christopher Cunneen observed, ‘while obvious and taken for granted by many non-Aboriginal people, representative democracy has not been a part of traditional or in most cases contemporary Aboriginal culture’.<sup>74</sup> This meant that the amended *ACA Act* failed to fulfil the diverse needs of Indigenous groups and communities around Australia.<sup>75</sup>

In addition, to strengthen accountability in the *ACA Act* as amended, the reporting requirements imposed were the same for all Aboriginal associations, with an option for small Aboriginal associations to apply for an exemption from the requirements in certain circumstances.<sup>76</sup> Further amendments imposed new obligations on members of the governing committee of an association, for example, the requirement to act honestly and with due care.<sup>77</sup> The legislation also required the members of governing committees to avoid any conflict between their own interests and the interests of the organisations they manage.<sup>78</sup> The Registrar was given new powers to ensure the compliance of Aboriginal associations with the requirements of the *ACA Act*.<sup>79</sup> As a consequence, it may be said that the theme of the 1992 reforms was to enhance accountability under the *ACA Act*.

### *3 Reception of the 1992 Reforms: Two Opposite Perspectives*

From 1989 to 1996, the number of Aboriginal associations incorporated under the *ACA Act* continued to rise as illustrated in Diagram 1. It cannot be said that the 1992 amendments led to any drop in the number of Aboriginal associations.

However, the fact that the numbers of Aboriginal associations continued to increase may be deceptive.<sup>80</sup> It has been noted that that the main reason many Indigenous Australians relied on the *ACA Act* was to enable them to seek funding from the

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<sup>73</sup> See, eg, *ACA Act* s 58B.

<sup>74</sup> *Review of the ACA Act 1976* (1996), above n 53.

<sup>75</sup> *Ibid* 13–14.

<sup>76</sup> Neate, above n 58. See *ACA Act* s 59A.

<sup>77</sup> *ACA Act* s 49C.

<sup>78</sup> *Ibid* s 49D.

<sup>79</sup> See, eg, *ACA Act* s 60A.

<sup>80</sup> *Review of the ACA Act 1976* (1996), above n 53, 12.

Aboriginal and Torres Strait Islander Commission.<sup>81</sup> However, the Aboriginal and Torres Strait Islander Commission reported in 1996 that about half of the Indigenous organisations in Australia had used other legislation to meet their incorporation needs and, further, more than half of the Indigenous entities funded by the Aboriginal and Torres Strait Islander Commission at that time were not incorporated under the *ACA Act*.<sup>82</sup> The fact that such a large number of Indigenous corporations were not registered under the *ACA Act* must raise questions about whether the legislation was fulfilling the needs of Indigenous Australians. As a consequence, the 1992 reforms were criticised. While the government had wished to introduce more rules and regulations to ensure accountability, the general perception in the Indigenous community was that the *ACA Act* had become too prescriptive and rigid.<sup>83</sup>

(a) *The Move towards More Regulation*

The 1989 report,<sup>84</sup> the findings of internal audit reports,<sup>85</sup> and the experience of the Registrar of Aboriginal Corporations in administering the *ACA Act*, led in 1994 to the proposed introduction of still further amendments to the statute. The proposed amendments again sought to improve accountability, due to fears that serious deficiencies ‘in the operation, administration, and legislative framework within which the Registrar operates and a high level of non-compliance with the Act’ still existed.<sup>86</sup>

The proposed amendments aimed to establish, for example, an Australian Indigenous Corporations Commission to replace the existing Registrar of Aboriginal Corporations. In her second reading speech to the Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth), Senator Rosemary Crowley, then Minister for Family Services, noted that ‘[t]he new Commission will continue to improve the efficiency of the processes of incorporation, administration and regulatory procedures to ensure the public accountability of Aboriginal and Torres Strait Islander Corporations.’<sup>87</sup>

The Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth) also proposed to streamline and strengthen the powers available to the Commission

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81 Ibid.

82 Ibid.

83 Ibid 1, 12.

84 Office of the Registrar of Aboriginal Corporations, *Yearbook 1992–1993* (Office of the Registrar of Aboriginal Corporations, 1993) 23.

85 Office of the Registrar of Aboriginal Corporations, Submission to the Joint Committee of Public Account, *Review of the Auditor-General’s Reports Tabled during the 26<sup>th</sup> Parliament* (December 1992); Walter and Turnbull (Consultants) for ATSIC/OEA, *Internal Audit — Office of the Registrar of Aboriginal Corporations* (March 1993).

86 Explanatory Memorandum, Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth) 4.

87 Commonwealth, *Parliamentary Debates*, Senate, 30 June 1994, 2377 (Rosemary Crowley).

to arbitrate disputes between Indigenous corporations and their members, and to take action to ensure the compliance of such corporations with their obligations under the legislation.<sup>88</sup>

After the Bill was tabled in the Senate, the Honourable Robert Tickner, then Minister for Aboriginal and Torres Strait Islander Affairs, began a further round of consultations with Indigenous bodies about the proposed changes. The response highlighted the concerns of the Indigenous community over the proposed amendments. For example, Peter Daffen, a management consultant engaged to review the *ACA Act* in 1994, indicated that implementation of the Bill would require major additional funds.<sup>89</sup> A number of other criticisms were directed at the nature of the Act and the way it was administered.<sup>90</sup> For example, the Tasmanian Aboriginal Centre observed that:

The other major concern that we have with the Draft Bill is that it does not recognise nor allow rights of self-management by Aboriginal communities ... We strongly believe that Aboriginal organisations should be permitted to determine their own constitution membership requirements and procedures.<sup>91</sup>

As a result, the Board of Commissioners of the Aboriginal and Torres Strait Islander Commission advised Minister Tickner to defer the Bill until a review assessing the future of the *ACA Act* could be carried out. Minister Tickner announced in 1995 that he was commissioning the Australian Institute of Aboriginal and Torres Strait Islander Studies to conduct a review of the entire *ACA Act*. The 1996 review headed by Dr Jim Fingleton subsequently took place.

(b) *The Move towards Less Regulation*

The 1996 review of the *ACA Act* found that the excessive regulatory requirements mandated by the 1992 amendments had resulted in considerable expense being exhausted in their implementation.<sup>92</sup> For instance, it was estimated that the annual cost of complying with the audit requirements under the *ACA Act* was around \$20 million.<sup>93</sup>

The 1996 review further noted that over-regulation was a significant contributor to the high levels of regulatory breach.<sup>94</sup> As a result, it recommended ‘changing the

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<sup>88</sup> Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth).

<sup>89</sup> Peter Daffen, *Registrar of Aboriginal Corporations: Review of Human and Financial Resources Required for the New Australian Indigenous Corporations Commission* (Cooldari Pty Ltd, 1994).

<sup>90</sup> *Review of the ACA Act 1976* (1996), above n 53.

<sup>91</sup> Tasmanian Aboriginal Centre, Submission No 9 to the Aboriginal Councils and Associations Legislation Amendment Bill 1994, 1994, 2.

<sup>92</sup> *Review of the ACA Act 1976* (1996), above n 53, 16.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* 15.

basic thrust of the Act, back to the direction proposed for it in 1976'.<sup>95</sup> For example, it recommended that the requirements of membership of Indigenous corporations be more flexible. Similarly, it proposed that the accountability regime should be increasingly reliant upon the conditions and review mechanisms imposed by the funding agencies, rather than on the corporate governance model imposed by the 1992 amendments. Additionally, it called for the restriction and reduction of the role of Registrar of Aboriginal Corporations to one that was largely procedural. The 1996 review also stated that the Act should allow for greater freedom of constitutional adoption to encourage the increased provision of rules based upon customary law.<sup>96</sup>

Lastly, as the *ACA Act* was deemed to be 'far more demanding in its requirements for a group's incorporation and ongoing operation than mainstream legislation',<sup>97</sup> the 1996 review was in favour of remodelling the *ACA Act* to make it 'a federal version of an *Associations Incorporation Act*'.<sup>98</sup> It was believed that such a move would enhance the flexibility of the *ACA Act*, and allow it to meet the needs of Indigenous corporations since the *Associations Incorporation Act* of each state and territory was based upon a careful balance of the rights of members and those of third parties.<sup>99</sup>

### (c) *The End Result*

The 1996 review was considered by some as committing the reverse error of the 1992 amendments for its emphasis upon 'culturally appropriate incorporation' at the expense of accountability and good corporate governance.<sup>100</sup> It could be said that a schism arose between proponents of the 1992 reforms and the 1996 review, with the former deeming accountability to be crucial to the success of Indigenous corporations and the latter advocating increased freedom for Indigenous Australians in running their organisations so as to allow greater account to be taken of Indigenous culture and values.

The 1996 review was based on a number of case studies conducted by members of the review panel and undoubtedly has its merits — but its recommendation that the *ACA Act* become or be replaced by a federal version of an *Associations Incorporation Act* is problematic, since there is very little consistency between the associations incorporation legislation of the states and territories. Further, associations created under this legislation are to be non-profit organisations, while the *ACA Act* clearly states that an Indigenous corporation may 'be carried on wholly or partly for the purpose of securing pecuniary profit to its members'.<sup>101</sup> In such

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<sup>95</sup> Ibid 141.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 142.

<sup>98</sup> Ibid 143.

<sup>99</sup> Ibid.

<sup>100</sup> Christos Mantziaris, 'Beyond the Aboriginal Councils and Associations Act? Part I' [1997] 4 *Indigenous Law Bulletin* 7.

<sup>101</sup> *ACA Act* s 44.

instances, the rules of the corporation are required to make provision as to the manner in which the distribution of profits to its members will occur.<sup>102</sup>

The 1996 review coincided with a change in the political landscape of Australia with the election of the Howard Coalition Government. With the election of the new government, many institutional developments in Indigenous affairs over the previous years came under intense scrutiny, and the budget of the Aboriginal and Torres Strait Islander Commission was cut. The end result was that, despite all the issues raised by the 1996 review, reforms to the *ACA Act* were not introduced.<sup>103</sup>

## V THE MOVE TO NEW LEGISLATION

As the law remained unchanged, the concerns raised by the 1994 proposed amendments and the 1996 review of the *ACA Act* remained.

### A Accountability Still an Issue

As Diagram 2 illustrates, the 1992 reforms did not necessarily achieve their purpose in improving accountability, since the majority of Aboriginal associations remained non-compliant with the provisions of the *ACA Act*.

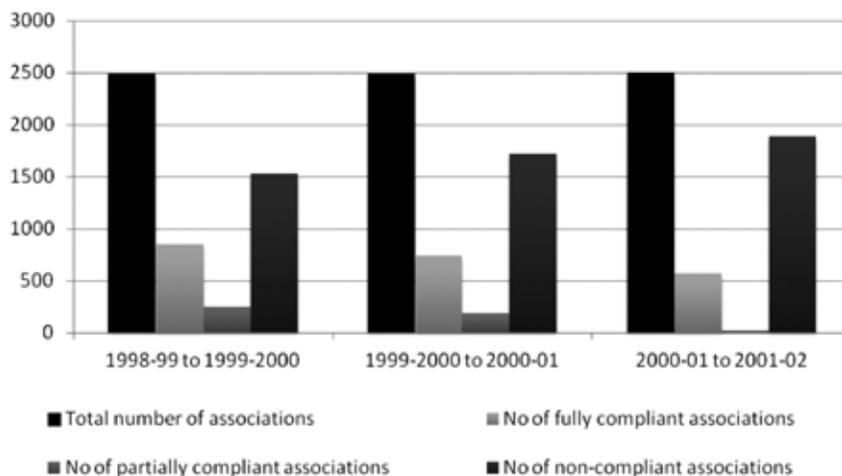


Diagram 2: Compliance of corporations by number of Aboriginal associations from 1998–2002<sup>104</sup>

<sup>102</sup> Ibid.

<sup>103</sup> Nicole Watson, 'The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth): Coming Soon to a Community Organisation Near You' [2006] 6 *Indigenous Law Bulletin* 32.

<sup>104</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 2002–03* (Office of the Registrar of Indigenous Corporations, 2003) 44.

The accountability of Aboriginal associations remained a major issue for the Registrar of Aboriginal Corporations as the number of non-compliant organisations continued to rise.

## B *Rigid and Out-of-Date Legislation*

### 1 *Rigid Legislation*

Since 1996, the *ACA Act* has been perceived to be very rigid legislation.<sup>105</sup> One reason for this was the fact that the Registrar had discretion in relation to determining how Aboriginal associations should be run. In 1996–97, the Registrar suggested that the *ACA Act* had changed its purpose from that of providing a means by which Indigenous Australians could run their businesses to a new purpose focused on the protection of minority rights.<sup>106</sup> The Registrar noted, for example, that:

Aside from its restriction on non-Aboriginal membership, the Act's most notable and valuable feature is the degree of protection it affords to minority rights. This protection is reinforced by the powers of intervention vested in the Registrar, powers which are readily made use of. In practice therefore, the Act is now operating to protect Aboriginal minorities from oppression and exploitation by other Aboriginals.<sup>107</sup>

Consequently, the Registrar took an active role in monitoring the way Aboriginal associations were run. This resulted in the Registrar restricting the right of Indigenous Australians to alter the Rules according to which their organisations were to function.<sup>108</sup> For example, Napranum Aboriginal Corporation sought to amend its Rules to allow its governing committee members three-year terms. The proposed amendment was rejected by the Registrar, who insisted on annual elections even though these were not required by the *ACA Act*.<sup>109</sup> As a result the organisation complained that 'the Registrar is inflexible and unwilling to change the Rules, even when this is in the interest of the corporation's efficiency'.<sup>110</sup>

In another example, Cape York Land Council wished to alter its Rules to achieve the following three objectives:<sup>111</sup>

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<sup>105</sup> *Review of the ACA Act 1976* (1996), above n 53, 12. Corrs Chambers Westgarth Lawyers and Anthropos Consulting Services, 'A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act (Final Report of the Review of the Aboriginal Councils and Associations Act 1976' (Cth), November 2002) 157 ('A Modern Statute for Indigenous Corporations').

<sup>106</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 1996–97* (Office of the Registrar of Indigenous Corporations, 1997) 1–2.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Review of the ACA Act 1976* (1996), above n 53, 58.

<sup>109</sup> *Ibid.* 59.

<sup>110</sup> As cited in *Review of the ACA Act 1976* (1996), above n 53, 59.

<sup>111</sup> *Ibid.* 59.

1. to enable the Council to have both a chairman and a chairwoman;
2. to enable the Council to have a working executive whose functions and powers would be delegated by the governing committee; and
3. to include a clause guaranteeing representation on its governing committee of the 18 Aboriginal communities on Cape York Peninsula.

While these objectives seem reasonable, and do not appear to contradict the *ACA Act*, the Registrar failed to approve the proposed changes. The proposal seeking to guarantee representation of all Aboriginal communities on Cape York Peninsula was rejected as being ‘inconsistent with the intention of the Act’.<sup>112</sup> The Registrar’s reasoning is unclear, however, as such representation would give members ‘effective control over the running of the association’, which is a statutory requirement under s 45(3A) of the Act. The Registrar rejected the proposal to allow the Council to have both a chairman and a chairwoman, as it considered that the relevant clause ‘may promote significant uncertainty’.<sup>113</sup> As for the proposal to have a working executive, the Registrar stated that ‘the notion of an executive operating within the committee is unacceptable’.<sup>114</sup> Although the Registrar did not point to any inconsistency between the two last-mentioned proposals and the Act, the proposed changes were nevertheless deemed to be unreasonable and were rejected as a consequence.

As may be seen from these examples, the *ACA Act* did not appear to provide a flexible system under which Indigenous Australians may create and run their organisations. It did not ‘address the “special incorporation needs” of [Aboriginal associations]’.<sup>115</sup>

## 2 *Out-of-Date Legislation*

When the *ACA Act* was enacted in 1976, the structure of mainstream corporations law in Australia had not yet fully developed.<sup>116</sup> The *ACA Act* did not reflect — and continued not to take account of — key changes that have taken place since 1976 in the area of company law. This fact put Aboriginal associations incorporated under the *ACA Act*, their directors and members at a significant disadvantage.<sup>117</sup>

Nor was the *Native Title Act 1993* (Cth) yet enacted in 1976. As a consequence, certain provisions in the *ACA Act* were not compatible with the *Native Title Act*

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<sup>112</sup> Ibid 60.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 110.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

1993 (Cth).<sup>118</sup> In 1998 this led Beaumont J to call for legislative changes to the *ACA Act* to take into account the requirements of the *Native Title Act 1993* (Cth).<sup>119</sup>

### C *The 2002 Review and its Aftermath*

To remedy the above concerns, in February 2001, the Registrar of Aboriginal Corporations appointed a team led by Corrs Chambers Westgarth lawyers to review the *ACA Act*. The review team included Senator Brennan Rashid, Mr Mick Dodson, Mr Christos Mantziaris and Anthropos Consulting.<sup>120</sup> In appointing the review team the Registrar noted that the purpose of the review was, taking ‘into account the original purpose of the Act as a simplified regime of incorporation and corporate governance for Indigenous bodies, and how that purpose has been implemented over time, [to] consider whether the Act remains an appropriate mechanism for this purpose’.<sup>121</sup>

The final report of the review team was published in December 2002. The review found that the *ACA Act* failed to address the needs of the Indigenous community.<sup>122</sup> It recommended that the *ACA Act* be replaced by legislation that would provide Indigenous Australians with the ‘key facilities of a modern incorporation statute such as the *Corporations Act [2001 (Cth)]*’ but that was tailored to meet the specific incorporation needs of Indigenous Australians.<sup>123</sup> The 2002 review also recommended that the role of the Registrar of Aboriginal Corporations should shift from focusing on compliance and enforcement to assisting Indigenous corporations to achieve good corporate governance through ‘special regulatory assistance’.<sup>124</sup>

As a result of the 2002 review, the Coalition Government announced on 15 January 2004 that it intended to introduce new legislation to reform the *ACA Act*.<sup>125</sup> The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth) was subsequently introduced into the Australian Parliament on 23 June 2005. Consistent with the key recommendation of the 2002 review, in allowing for the creation of Indigenous corporations the Bill took into account the special incorporation needs

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<sup>118</sup> Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 108, 197.

<sup>119</sup> *Deeral (on behalf of herself and the Gamaay Peoples) v Charlie* [1998] FCA 723 (1 June 1998).

<sup>120</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 32.

<sup>121</sup> *Ibid* 1.

<sup>122</sup> *Ibid* 110.

<sup>123</sup> *Ibid* 2.

<sup>124</sup> *Ibid* 121.

<sup>125</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 2002–03* (Office of the Registrar of Indigenous Corporations, 2003) 60–1.

of Indigenous people.<sup>126</sup> The 2002 review had determined there were four main factors causing Indigenous corporations to have special incorporation needs:<sup>127</sup>

- *The general socioeconomic characteristics of the managers of Indigenous corporations had to be taken into account.* The review found that the business skills required to successfully manage a corporation were frequently found to be lacking in Indigenous organisations; and that members of Indigenous corporations were often unaware of their rights.<sup>128</sup>
- *Indigenous values and practices may impact the manner in which an organisation is run.* The review found that struggles between Indigenous groups and the emphasis certain Indigenous societies placed on individual autonomy may hinder the manner in which Indigenous corporations are managed. The review noted that such struggles may leave Indigenous corporations vulnerable to bad corporate governance practices.<sup>129</sup>
- *While corporations registered under the Corporations Act 2001 (Cth) and the state and territory Associations Incorporation Acts are voluntarily formed, the formation of Indigenous corporations may be involuntary.* For example, in order to hold land under the *Native Title Act 1993* (Cth), Indigenous groups were required to be registered under the *ACA Act*.<sup>130</sup>
- *Indigenous corporations may have an abundance of social, economic and political objectives to fulfil.* The review noted that the diversity of these functions may create some difficulties in accommodating the needs of Indigenous corporations. For example, measures established to accommodate one of a corporation's functions (such as exempting corporations engaged in passive landholding from financial reporting) may be inappropriate when dealing with the same corporation in a different context (such as imposing financial reporting on corporations providing medical services to a number of people in the community).<sup>131</sup>

In announcing the Bill, the then Minister for Indigenous Affairs, Senator Amanda Vanstone, observed that the Bill was 'an important part of the government's

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<sup>126</sup> Standing Committee on Legal and Constitution Affairs, Parliament of Australia, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005 [Provisions] and Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 [Provisions]*, *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006 [Provisions]* (October 2006) 6.

<sup>127</sup> 'A Modern Statute for Indigenous Corporations', above n 105, 4.

<sup>128</sup> Ibid 4–5.

<sup>129</sup> Ibid 5.

<sup>130</sup> Ibid 6.

<sup>131</sup> Ibid 6–7.

reforms and will ensure that Aboriginal people get a better deal and a better value for money'.<sup>132</sup>

## VI THE *CATSI ACT*

The *CATSI Act* was passed by the Australian Parliament in October 2006 and replaced the *ACA Act*. The new legislation commenced on 1 July 2007,<sup>133</sup> which coincided with the start of the financial year 2007–08. Existing Indigenous corporations were given a transition period of two years in which to comply with the new legislation.<sup>134</sup>

### A *Incorporation*

Like its predecessor, the *CATSI Act* allows Indigenous Australians to create Indigenous corporations.<sup>135</sup>

#### 1 *Aboriginal and Torres Strait Islander Corporations*

Unlike the *ACA Act*, the *CATSI Act* does not allow Indigenous Australians to incorporate in the form of Aboriginal councils. Although the 2002 review found that pt III of the *ACA Act* was superseded, impractical and no longer needed,<sup>136</sup> the removal of this option was criticised by some. For example, David Dalrymple stated that:

The absence from [the *CATSI Act*] of a statutory option of establishing an Indigenous self-governing body at the local level with features more akin to a local government council than to an incorporated association deprives Aboriginal communities of a choice which should have been retained in legislation.<sup>137</sup>

However, Indigenous Australians remain able to create Indigenous councils at the state and territory level.<sup>138</sup> Further, the inclusion of Indigenous councils in the *CATSI Act* may not have improved the legislation, as any such provision may have

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<sup>132</sup> Amanda Vanstone, 'New Bill to Benefit Thousands of Aboriginal Corporations' (Press Release, 23 June 2005).

<sup>133</sup> *CATSI Act* s 1-5.

<sup>134</sup> Office of the Registrar of Indigenous Corporations, *Yearbook 2006–2007* (Office of the Registrar of Indigenous Corporations, 2007) 2.

<sup>135</sup> *CATSI Act* s 42-1.

<sup>136</sup> Corrs Chambers Westgarth Lawyers, 'Part III of the ACA Act: Appendix G', x-xi.

<sup>137</sup> David Dalrymple, Submission No 2 to Senate Legal and Constitutional Legislation Committee, *Corporations (Aboriginal and Torres Strait Islander) Bill- Submission to Senate Legal and Constitutional Legislation Committee*, 10 October 2006, 1.

<sup>138</sup> See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

met similar problems to those arising from applications under Part III of the *ACA Act*.<sup>139</sup>

The *CATSI Act* allows only for the incorporation of Aboriginal and Torres Strait Islander corporations which are referred to in this article as ‘Indigenous corporations’. As these indigenous corporations were legislatively constituted prior to the Australia’s endorsement of the *UN Declaration*, it is essential to assess whether the *CATSI Act* is synchronous with the objectives of the *UN Declaration*. Where disparities in intent become too pronounced, a re-examination of the legislation may again be required. Like its predecessors, the Indigenous corporation aims to empower Indigenous Australians, and seems to fit with the objectives of the *UN Declaration* as it allows for corporations to be controlled by Indigenous Australians.

Under the previous legislation, control by Indigenous people over the affairs of Indigenous corporations was achieved by restricting membership of such corporations to persons who were Aboriginal or the spouse of an Aboriginal.<sup>140</sup> Although it was further provided that, if more than 75 per cent of the members of an Aboriginal association agreed, the Rules of the association could provide for the conferring of specified rights of membership on persons who were not otherwise entitled to become members of the association, such persons could not be entitled to vote or to be elected as directors of the Aboriginal association.<sup>141</sup> This meant that any such membership would be largely inert. It was intended that control of the association would remain in the hands of Indigenous Australians.

To ensure that no abuse of the above provisions occurred, the 2002 review recommended that the new legislation restrict membership of Indigenous corporations to Indigenous people. This recommendation aimed to ensure that Indigenous members were the ones in control of Indigenous corporations.<sup>142</sup> When enacted, the *CATSI Act* partially acted on this recommendation, providing that the majority of members of such corporations must be Indigenous. Under the *CATSI Act* non-Indigenous people are still able to be involved in an Indigenous corporation.<sup>143</sup> The Explanatory Memorandum to the legislation deemed that such involvement was important because some Indigenous corporations are the only providers of essential services in rural communities. To allow the representation of non-Indigenous people in Indigenous corporations thus ensures that non-Indigenous

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<sup>139</sup> As noted previously, Aboriginal councils were never created under the *ACA Act* due to the opposition of the States and Territories to such organisations.

<sup>140</sup> *ACA Act* s 49. A ‘spouse’ is defined under s 3 of the *ACA Act* as including ‘a person who, although not legally married to the Aboriginal, is living with the Aboriginal as the Aboriginal’s spouse on a permanent and bona fide domestic basis’.

<sup>141</sup> *ACA Act* s 49A.

<sup>142</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 230, 232.

<sup>143</sup> *CATSI Act* s 29-5.

people living in these communities are not disadvantaged.<sup>144</sup> This approach was supported by the then Registrar of Aboriginal Corporations, Laura Beacroft.<sup>145</sup>

The move to permit the involvement of non-Indigenous Australians was still controversial, and attracted criticism. For example, the Central Land Council argued that ‘permitting minority membership of non-Aboriginal people will not be sufficient to ensure Aboriginal control’.<sup>146</sup> This is especially relevant because while s 49A of the *ACA Act* limited the powers of non-Indigenous members of Aboriginal associations, the *CATSI Act* allows non-Indigenous people to be involved in running Indigenous corporations.<sup>147</sup> This fact led David Dalrymple to state that ‘the opening up of membership eligibility to allow for non-Indigenous members will have the result that there is no appreciable substantive difference between incorporation under’ the *CATSI Act* and other federal, state and territory laws.<sup>148</sup> He further argued that:

The one point of difference between [the *ACA Act*] and equivalent “mainstream” legislation was the restrictions on voting membership contained in the [*ACA Act*] itself. It was possible under “mainstream” legislation to restrict membership to Aboriginal people by drafting the body’s constitution in a particular way, but that constitution could always be changed and undone. The attraction to the Aboriginal clients I dealt with was always that the [*ACA Act*] itself contained the restriction and therefore the protection and security. [The *CATSI Act*] in its present form has abandoned that feature of [the *ACA Act*], which is going to engender grave concerns for the many bodies that incorporated as associations under [the *ACA Act*] ...<sup>149</sup>

The new legislation may be viewed, rather, as providing more flexibility to Indigenous Australians in running their organisations — as they may choose either to limit membership of their organisation to Indigenous Australians, or to broaden the scope of membership of the organisation to include non-Indigenous people. However, as the concept of incorporation is a Western concept, a closer look at the legislation is required to determine whether the indigeneity requirement of members is the only Indigenous characteristic of corporations registered under the *CATSI Act*.

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<sup>144</sup> Revised Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) 11.

<sup>145</sup> Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Legislation Committee, 4 October 2005, 2 (Laura Beacroft).

<sup>146</sup> Central Land Council, Submission to the Senate Legal and Constitutional Committee, *Inquiry into the Provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, 5.

<sup>147</sup> *Corporations (Aboriginal and Torres Strait Islander) Regulations 2007* (Cth) reg 29–5.01.

<sup>148</sup> Dalrymple, above n 137, 1.

<sup>149</sup> *Ibid* 2.

## 2 *The Notion of Incorporation*

The desire to recognise the right of Indigenous Australians to a measure of self-determination was a major reason behind the introduction of Indigenous corporate legislation in Australia. However, although Indigenous self-determination was one of the aims underpinning the enactment of the *ACA Act* and the *CATSI Act*, the notion of incorporation, which is the basis of both these Acts, is itself foreign to Indigenous culture. This has raised a debate concerning the appropriateness of imposing such a business structure on Indigenous Australians. Basil Sansom, for instance, has observed that the fact that incorporation is a mandatory requirement for an Indigenous organisation to be recognised by the state as a legal entity constitutes a form of cultural coercion.<sup>150</sup> He stated that Indigenous people ‘who would make representations are coerced by a persuasive and perturbing imperative of Western political culture: the requirement that to have discourse with the state, an assembly of men must be made over into an entity’.<sup>151</sup>

Similarly, Tim Rowse has referred to this as a paradox, since the concept of Indigenous corporations aims to empower Indigenous Australians by imposing Western notions upon them.<sup>152</sup> The House of Representatives Standing Committee on Aboriginal Affairs also referred to this reality in its final report, *Our Future Our Selves*, observing that ‘it is ironic that Aboriginal communities are being asked to accept non-Aboriginal structures in order to have greater control over their own affairs’.<sup>153</sup>

Charles Rowley, however, argued that the incorporation of Indigenous organisations provides a means by which Indigenous Australians could negotiate with the government.<sup>154</sup> He further observed that incorporation offers advantages, as it establishes ‘a formally and legally uniform institutional model which meets the requirements of a single national strategy while offering the security of familiar community membership’.<sup>155</sup> David Martin, too, was also in support of the incorporation of Indigenous organisations, as he viewed Indigenous organisations as being ‘intercultural phenomena ... sites of the engagement and transformation of

<sup>150</sup> Basil Sansom, ‘Aborigines, Anthropologist and Leviathan’ in Noel Dyck (ed), *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (Institute of Social and Economic Research Memorial, University of Newfoundland, 1985) 67, 70.

<sup>151</sup> Ibid.

<sup>152</sup> Tim Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination* (North Australia Research Unit, Australian National University, 1992) 98.

<sup>153</sup> Commonwealth, *Our Future Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*, Parl Paper No 137/90 (1990) 25.

<sup>154</sup> Charles Rowley, *The Remote Aborigines: Aboriginal Policy and Practice- Volume III* (Australian National University Press, 1971) 169.

<sup>155</sup> Charles Rowley, *Outcasts in White Australia: Volume 2 of Aboriginal Policy and Practice* (Australian National University Press, 1971) 423.

values and practices drawn from both Aboriginal worlds and the general Australian society rather than as institutions within an autonomous Aboriginal domain'.<sup>156</sup>

For the incorporation of Indigenous organisations to lead to the empowerment of Indigenous Australians, therefore, it must reflect a compromise between Indigenous and Western concepts; that is, the incorporation must be an intermediate system acting as a conduit between the Indigenous and Western European cultures. As a consequence, the mere fact that the concept of incorporation is itself foreign to Indigenous culture does not automatically mean that the socioeconomic aims of the *UN Declaration* can not be fulfilled to a certain extent by the *CATSI Act*. Everything depends on the type of rules that must be complied with when running an Indigenous corporation.

### B *Flexibility of the Legislation?*

One of the main features of the *ACA Act* was that the legislation in its original form attempted to bridge the schism between Western notions, such as incorporation, and Indigenous notions. For instance, the legislation acknowledged that Aboriginal associations may be run based on Indigenous culture and traditions.<sup>157</sup> An examination of the *CATSI Act* reveals there are no equivalent references to Indigenous custom: the current legislation has moved away from this approach as the concept of 'cultural appropriateness' was deemed to be problematic. For example, attempts to write down Indigenous practices may have led to distortion of those practices.<sup>158</sup> It has also been observed that the concept of cultural appropriateness could be viewed a 'ticket-of-leave from a more rigorous analysis of the facilities that a [corporation] requires to operate within the Australian legal system'.<sup>159</sup> Further, this concept may be regarded as inappropriately assuming the existence of a domain where Indigenous corporations are independent from the legal, political and economic fields in which they are necessarily situated.<sup>160</sup> While this rejection of the concept of cultural appropriateness may be justified, the question of whether Indigenous corporations are flexible enough to represent a compromise between Indigenous and non-Indigenous cultures still remains.

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<sup>156</sup> David Martin, 'Rethinking Aboriginal Community Governance', in Paul Smyth, Tim Reddel and Andrew Jones (eds), *Community and Local Governance in Australia* (UNSW Press, 2005) 108, 118.

<sup>157</sup> *ACA Act* s 43(4).

<sup>158</sup> 'A Modern Statute for Indigenous Corporations', above n 105, 161.

<sup>159</sup> Mantziaris and Martin, above n 118, 293.

<sup>160</sup> David Martin, 'Governance, Cultural Appropriateness and Accountability' in Diane Austin-Broos and Gaynor MacDonald (eds), *Culture, Economy and Governance in Aboriginal Australia* (Sydney University Press, 2005) 189, 192.

### 1 *The Objectives of the CATSI Act*

The objects of the *CATSI Act* are akin to a streamlined *Corporations Act 2001* (Cth), and to a certain extent the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>161</sup> Section 1–25 states that the objects of the *CATSI Act* are to:

- (a) provide for the Registrar of Aboriginal and Torres Strait Islander Corporations; and
- (b) provide for the Registrar’s functions and powers; and
- (c) provide for the incorporation, operation and regulation of those bodies that it is appropriate for this Act to cover; and
- (d) without limiting paragraph (c)—provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate; and
- (e) provide for the duties of officers of Aboriginal and Torres Strait Islander corporations and regulate those officers in the performance of those duties.

While this section refers to ‘Aboriginal and Torres Strait Islander corporations’ and ‘native title body corporate’, it appears that ensuring such corporations take Indigenous culture, customs and traditions into account is not one of the objects of the Act. Rather, the section is modelled on the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>162</sup>

Due to the fact that the legislation is based on mainstream legislation, concerns may be raised that the new legislation is just window dressing, simply providing Indigenous Australians with the means to run Indigenous corporations along the same lines as mainstream corporations under rules based on those of the mainstream legislation. From this perspective, the legislation would fall short of a vehicle that could assist in delivering the socioeconomic goals of the *UN Declaration*.

However, the Explanatory Memorandum to the Act states that ‘these objects are designed to recognise that Aboriginal and Torres Strait Islander peoples in some circumstances have special needs for incorporation, assistance, monitoring and regulation which the *Corporations Act* is unable to adequately meet as it exists primarily to provide uniform incorporation and regulation of trading corporations’.<sup>163</sup> As such the success of the amalgamation of Western and Indigenous cultures will all depend on the manner in which the legislation itself influences the management of Indigenous corporations. Consequently, if the *CATSI Act* is to meet the needs of Australia’s Indigenous people, it is crucial that it differs

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<sup>161</sup> Office of the Registrar of Indigenous Corporations, *About the CATSI Act* <<http://www.orac.gov.au/Content.aspx?content=CATSI-Act/default.htm&menu=catsi&class=catsi&selected>About%20the%20CATSI%20Act>>.

<sup>162</sup> Revised Explanatory Memorandum, above n 144, 34.

<sup>163</sup> *Ibid* 21.

from the *Corporations Act 2001* (Cth) so as to allow Indigenous Australians to run their organisations based on their own cultural values and practices, rather than on Western European legal values and practices.

A general overview of the *CATSI Act*, however, indicates that its corporate governance model is firmly based on that in the *Corporations Act 2001* (Cth), as in both instances the two decision-making bodies within a corporation registered under the legislation are the general members' meeting and the board of directors.

## 2 *Members' Meetings*

Although the 1996 review found that for Indigenous people general members' meetings are not usually a good forum for making informed decisions and setting policies,<sup>164</sup> the members' meeting was adopted by the *CATSI Act*. This fact not only appears to ignore the recommendation of the 1996 review, it also contradicts art 18 of the *UN Declaration*, which states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

Consequently, in imposing the type of representation that must be relied on within an Indigenous corporation, the *CATSI Act* is limiting the right to self-determination of Indigenous Australians to run their businesses in accordance with their own procedures. Further, reliance on democratic processes at members' meetings may be considered to be culturally inappropriate.<sup>165</sup>

However, a closer look at the provisions regarding members' meetings in the legislation reveals that the majority of the rules regarding members' meetings are replaceable rules.<sup>166</sup> This means that the constitution of an Indigenous corporation may alter the provisions regarding members' meetings so as to adapt them to the needs of the corporation. For example, the constitution of an Indigenous corporation may specify the manner in which a resolution is put to the vote at a members' meeting.<sup>167</sup> It may state whether a resolution at a general meeting should be decided through a simple majority,<sup>168</sup> or through consensus.<sup>169</sup> Further, the

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<sup>164</sup> *Review of the ACA Act 1976* (1996), above n 53, 51.

<sup>165</sup> *Ibid* 52.

<sup>166</sup> *CATSI Act* s 57-5.

<sup>167</sup> The provision in the *CATSI Act* relating to how voting is carried out is s 201–125, and it is a replaceable rule.

<sup>168</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Capital Development Aboriginal Corporation: Consolidated Rule Book* (2 July 2009), [4.10] <<http://www.oric.gov.au/document.aspx?concernID=393841>>.

<sup>169</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Women Beyond Today Aboriginal Corporation: Consolidated Rule Book* (8 July 2010), [4.10] <<http://www.oric.gov.au/document.aspx?concernID=536586>>.

provision relating to who may appoint a proxy is also a replaceable rule.<sup>170</sup> This means that if an Indigenous corporation does not consider proxies to be culturally appropriate, its constitution may provide that a member of the corporation may not appoint a person as the member's proxy to attend and vote for the member at a general meeting of the corporation.

Other provisions regarding members' meetings are partially replaceable. For example, the provision relating to the quorum for a meeting of the members of an Indigenous corporation is s 201–70. The section provides:

- (1) If an Aboriginal and Torres Strait Islander corporation has 11 or more members, the quorum for a meeting of the corporation's members is the lesser of:
  - (a) 10 members; or
  - (b) the greater of:
    - (i) the number of members holding 10% of the voting rights; or
    - (ii) 2 members.
- (2) If an Aboriginal and Torres Strait Islander corporation has 10 members or less, the quorum for a meeting of the corporation's members is 2 members.
- (3) The quorum must be present at all times during the meeting.
- (4) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.
- (5) A meeting of the corporation's members that does not have a quorum present within 1 hour after the time for the meeting set out in the notice of meeting is adjourned to the same time of the same day in the next week, and to the same place, unless the directors specify otherwise.
- (6) If no quorum is present at the resumed meeting within 1 hour after the time for the meeting, the meeting is dissolved.

Subsections (1), (2), (5) and (6) of s 201–70 are replaceable rules,<sup>171</sup> which means that an Indigenous corporation can tailor the quorum requirement in the *CATSI Act* to suit its own individual circumstances.<sup>172</sup> However, sub-ss (3) and (4) of s 201–70, requiring a quorum to be present at all times during a meeting and specifying how to determine if a quorum is present, are not replaceable.<sup>173</sup> Such provisions limit

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<sup>170</sup> *CATSI Act* s 201-90.

<sup>171</sup> *CATSI Act* ss 57-5, 60-1.

<sup>172</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Acacia Larrakia Aboriginal Corporation: Registrar Initiated Rule Book: ICN 1470* (25 June 2009), [4.7] (quorum shall be five members) <<http://www.oric.gov.au/document.aspx?concernID=101470>>.

<sup>173</sup> *CATSI Act* ss 201-70(3), 201-70(4).

the extent to which a corporation may alter the way a meeting of its members is run.

In addition, in some instances problems may arise when an Indigenous corporation has decided to adopt the condensed rule book published by the Office of the Registrar of Indigenous Corporations without necessarily adapting it fully to suit its situation.<sup>174</sup> In such instances, the constitution of the organisation may contain internal contradictions. For example, in the context of members' meetings, a number of provisions in the constitution of Gold Coast Aboriginal and Torres Strait Islander Corporation for Community Consultation envisage the use of proxies,<sup>175</sup> while another provision in its constitution clearly states that proxies are not permitted.<sup>176</sup> Such contradictions are problematic, particularly as constitutions are enforceable.<sup>177</sup> They also illustrate the difficulty faced in the application of rigid legal principles to Indigenous corporations.

Consequently, the *CATSI Act* does not strip Indigenous Australians of their right to run members' meetings in line with their own values and traditions in certain instances while, in others, it does. All depends on whether the rule is replaceable or not.<sup>178</sup>

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<sup>174</sup> While the term 'rule book' does not appear in the *CATSI Act*, on its website the Office of the Registrar of Indigenous Corporations refers to 'all the relevant parts of the law that affect how an Indigenous corporation is run' as the rule book of the corporation: Office of the Registrar of Indigenous Corporations, *Rule Book*, <<http://www.oric.gov.au/Content.aspx?content=ruleBook/ruleBook.htm&menu=start&class=start&selected=Rule%20book>>. A corporation's rule book, therefore, includes law under the *CATSI Act* that the Indigenous corporation cannot change, any replaceable rules under the *CATSI Act* that the corporation has not changed, and the constitution of the corporation. Among other tools developed to assist Indigenous corporations to make a rule book which both complies with the *CATSI Act* and suits their needs, Office of the Registrar of Indigenous Corporations published a *Rule Book — Condensed* containing a set of rules it recommends for corporations with a small number of members or straightforward business. This condensed rule book covers the minimum required topics and incorporates rules Office of the Registrar of Indigenous Corporations considers will achieve good governance practice. It was promoted as requiring minimal tailoring, and does not point to all the options for tailoring existing under the *CATSI Act*. However, the condensed rule book does not always clearly state which rules are replaceable and so may be altered by an Indigenous corporation.

<sup>175</sup> Office of The Registrar of Indigenous Corporations, *Gold Coast Aboriginal and Torres Strait Islander Corporation for Community Consultation: Consolidated Rule Book* (18 May 2010), [7.4.4], [7.7.2], [7.14.2] <<http://www.oric.gov.au/document.aspx?concernID=393782>>.

<sup>176</sup> *Ibid* [7.14.1].

<sup>177</sup> *CATSI Act* s 60-10(1).

<sup>178</sup> For comment on meetings in Indigenous culture see Fred Myers, 'Reflections on a Meeting: Structure, Language, and the Polity in a Small-Scale Society' (1986) 13 *American Ethnologist* 430, 430–47.

### 3 Management

One of the issues raised by the 1996 review was that the management of Aboriginal associations registered under the *ACA Act* by a governing committee did not reflect the decision-making structure within the Indigenous community.<sup>179</sup> This issue was not addressed when the *ACA Act* was replaced by the *CATSI Act*. For instance, the board of directors of an Indigenous corporation registered under the *CATSI Act* may make decisions that go against the wishes of the majority of the members of that corporation. The majority of members are not in control of the board.<sup>180</sup> In *Nyul Nyul Aboriginal Corporation v Dann*,<sup>181</sup> a decision under the *ACA Act*, the court noted that the fact that a corporation is created to serve the interests of its Indigenous members does not change the fact that the members of the governing committee — under the *CATSI Act* now the board of directors — are in charge of the running of the organisation.<sup>182</sup> Consequently, even though an Indigenous corporation is created to serve the interests of the Indigenous Australians who are its members, members of the corporation may not have a say in its management.<sup>183</sup>

This provision is tempered by the fact that it is a replaceable rule.<sup>184</sup> The constitution of an Indigenous corporation may limit the power of the board of directors and empower members to have a say in the management of the business. For such a clause to be introduced successfully into the constitution of an Indigenous corporation, however, it must be approved by the Registrar of Indigenous Corporations.<sup>185</sup> The degree of flexibility in the application of this provision thus depends on whether the Registrar will approve or reject corporations' attempts to include alterations of the provision in their constitutions.

Further, like its predecessor, the *CATSI Act* imposes a number of directors' duties (akin to those in the *Corporations Act 2001* (Cth)) which are unknown in or inconsistent with Indigenous culture and practice. As a result, these duties have not been well understood by Indigenous office holders.<sup>186</sup>

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<sup>179</sup> *Review of the ACA Act 1976* (1996), above n 53, 53.

<sup>180</sup> Section 274-1 of the *CATSI Act* provides that the business of an Indigenous corporation is to be managed by or under the direction of the directors, who may exercise all the powers of the corporation except any powers that are required by the Act or the corporation's constitution to be exercised in general meeting.

<sup>181</sup> (1996) 133 FLR 359.

<sup>182</sup> *Ibid* 373.

<sup>183</sup> Mantziaris and Martin, above n 118, 202.

<sup>184</sup> *CATSI Act* ss 274-1, 60-1.

<sup>185</sup> *Ibid* ss 26-1 (new constitution), 69-30 (change to existing constitution). Here the *CATSI Act* differs from the *Corporations Act 2001* (Cth), which allows the members of a corporation to decide upon the internal governance rules that will apply to the corporation without requiring these to be approved by the Australian Securities and Investments Commission ('ASIC'), the corporate and financial services regulator under that Act.

<sup>186</sup> Mantziaris and Martin, above n 118, 206.

Through its introduction of the concept of replaceable rules, the *CATSI Act* has gone some way towards recognising that internal accountability in Indigenous corporations may be best achieved when members are permitted to incorporate their own concepts of membership, leadership and decision-making into the corporation. However, time will reveal whether in its application of the provisions of the *CATSI Act* Australia has achieved an appropriate compromise between Indigenous and Western cultures.

## VII CONCLUSION

Closing the socioeconomic gap between Indigenous and non-Indigenous Australians is crucial. Australian's endorsement of the *UN Declaration* is one step towards achieving this goal. However, the next step is to ensure that the themes of the *UN Declaration* are reflected in our laws.

The *CATSI Act* and its predecessor the *ACA Act* have both attempted to empower Indigenous Australians by providing them with a business structure specifically applying to Indigenous people. However, the two pieces of legislation have had different aims. While the objective of the *ACA Act* was to provide Indigenous Australians with a quick and flexible mode of incorporation, the *CATSI Act* has sought to modernise Indigenous corporations while continuing to take into account the specific needs of Australia's Indigenous people.<sup>187</sup> The Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) noted that the new legislation endeavours 'to improve governance and capacity in the Indigenous corporate sector'.<sup>188</sup> To achieve this, the new legislative framework maximises its alignment with the *Corporations Act 2001* (Cth) where possible while accommodating the specific cultural practices of Indigenous people.<sup>189</sup>

This approach has ensured the subordination of the Indigenous legal system to the Western legal system. The ongoing determination of what constitutes good governance within the Indigenous culture will necessitate continuing debate on values and cultural norms and desired social and economic outcomes. Where the differing values and traditions of Indigenous communities may be duly recognised and given expression within the constitutions of their Indigenous corporations, good governance should be accommodated in a fashion that does not undermine Indigenous cultural beliefs. Consequently, the *CATSI Act* should be reviewed to ensure that the legislation takes into account the principal aims of the *UN Declaration*.

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<sup>187</sup> Office of the Registrar of Indigenous Corporations, above n 161.

<sup>188</sup> Revised Explanatory Memorandum, above n 144, ii.

<sup>189</sup> *Ibid* [1.7].



## **WHY PARTIES ENTER INTO UNFAIR DEALS: THE RESENTMENT FACTOR**

### ABSTRACT

Unfair deals, which are prevalent, do not serve the interests of the harmed party to a deal nor society more generally. This article proposes a theory — here coined ‘deal theory’ — to explain ‘dealer’ behaviours and motivations for offering unfair deals. The theory builds on insights offered by relational contract theory, the ultimatum bargaining game and behavioural economics, as well as making its own theoretical claims.

It is here claimed that the dealer makes 3Rs cost benefit calculations — regulation, reputation and resentment costs — before deciding whether or not to offer an unfair deal. A dealer might seek to mitigate these costs by deploying cheat and bully strategies. The policy and legislative challenge is to harness the 3Rs costs to provide disincentives for unfair deals. This article pays particular attention to the resentment cost because its potential effectiveness in constraining unfair behaviour has generally been underestimated.

It is claimed in this article that a heightened understanding of the strong party’s incentives and motivations for offering and performing unfair deals, by using the insights offered by deal theory, can help improve legal, administrative, economic and other measures that can promote the interests of the harmed party and society more generally.

### I INTRODUCTION

**W**e are well aware that some deals are inherently unfair. A deal, for instance, might contain unfair terms or be performed in a way that leads to unfair outcomes. In regulating unfair deals attention tends to focus on protecting the weak party from the consequences of the deal. The focus on the consequences for the weak party of unfair deals tends to draw our attention away from considering the reasons why a strong party offers an unfair deal in the first place. Although there is considerable value in taking a morals based approach to the law and policy, doing so tends to draw our attention to the harm done to the ‘victim’ and away from providing adequate attention to the motivations and incentives for the strong party to insist on unfair terms in the first place. A heightened understanding of the strong party’s incentives and motivations for offering and performing unfair deals can help improve the legal, administrative,

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economic and other measures that could be taken to promote the interests of the weak party.

To advance our understanding of why a strong party might impose unfair terms on a weak party — via a contract, or an international treaty, or by some other means — this article makes a number of postulations about the cost-benefit calculations made by the strong party before she proposes an unfair deal.<sup>1</sup> The postulations are collected under a general theory, which is here coined as ‘deal theory’.

The reasons why unfair deals are worthy of attention is because they have a negative impact on the interests of one or both the parties, and are economically and socially sub-optimal. Just as fair deals, for instance, can be said to be optimal in that they maximise the joint welfare of the parties to the deal and maximise social welfare more generally, unfair deals can be said to be sub-optimal and lead to the inefficient allocation of resources. In the international sphere, unfair treaties can provoke the resentment of the weaker party, leading it to perform its treaty obligations grudgingly, if at all. At worst, unfair treaties can promote national resentment, social unrest and poverty in the weak country, and international instability. It makes sense therefore for policy-makers, legislators, regulators and diplomats to promote laws, policies and practices that promote fair deals between parties. Attaining the correct policy settings requires in part a more sophisticated understanding of the incentives and motivations for a strong party to propose and perform unfair deals — which is what deal theory seeks to provide a means for doing.

The account given in this article of deal theory will necessarily be incomplete, in part because its scope is large and evolving. Part II of the article does, however, sketch the theory in outline. For ease of terminology, contracts, international treaties and various other arrangements between parties are referred to as ‘deals’. This term is used because it is broader than the technically defined term ‘contract’, ‘treaty’ or other inter-party arrangement. ‘Deal’ refers, for instance, to pre-contractual offers as well as to contracts themselves and other less formal arrangements between parties. The party offering the deal is referred to as the ‘dealor’, which in the context of this article, is the initiator of the deal offer, and will often (although not necessarily) be the strong party. The other party to the deal is referred to as the ‘dealee’, which in relation to unfair deals is generally (although not necessarily) the weak party. The theory only has relevance where there is party imbalance — that is to say, one party (the dealor) has much greater bargaining power or information than the other party (the dealee).

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<sup>1</sup> For a discussion on unfair international treaties see Justin Malbon, ‘TRIPS-plus Treaty Terms: Dealing with Coercion’ in Justin Malbon and Charles Lawson (eds), *Interpreting and Implementing the TRIPS Agreement: Is it fair?* (Edward Elgar, 2008) 159; Frank J Garcia, ‘Is Free Trade “Free?” Is It Even “Trade?” Oppression and Consent in Hemispheric Trade Agreements’ (Research Paper No 117, Boston College Law School, 17 January 2007).

Deal theory, as postulated here, claims that prior to offering a deal, a dealor will make an often crude cost-benefit calculation about the gains to be made from offering an unfair as compared to a fair deal. If the dealor calculates that the financial and other returns of an unfair deal will exceed those that could be expected under a fair deal — at least in the short to immediate term — she will be inclined to offer an unfair deal, and vice versa. She might not be so inclined towards an unfair deal if she calculates that any short or medium term gains will be eroded or obliterated in the medium to longer term by the latent costs of an unfair deal. These latent (and actual) costs on the dealor of an unfair deal are postulated in this article to be ‘3Rs costs’; namely the regulation, reputation and resentment costs to the dealor of offering and entering into an unfair deal. The 3Rs costs are elaborated upon in Part III(C).

In considering whether to offer an unfair deal, a dealor might make a further calculation. If she calculates that an unfair deal could lead to 3Rs costs, the dealor might decide to employ a cheat or bully strategy to mitigate those costs. Under the cheat strategy the dealor calculates that the dealee, and indeed any regulator, will be unaware of the inherent unfairness of the deal, or at least will discover the unfairness when it is too late to be able to inflict 3Rs costs upon the dealor. An alternative that might be available in some circumstances is a bully strategy. Here the dealor believes that offering and engaging in an unfair deal might, for example, provoke the dealee’s resentment (a 3Rs cost), and could give the dealor a bad reputation (another 3Rs cost), but the dealor calculates that this will not inflict any damage upon her because the dealee has no choice but to enter into the deal. This might arise, for instance, where the dealor is a monopolist. These strategies are briefly discussed in Part III(E).

One of the 3Rs costs is the cost to the dealor of the dealee’s resentment. If the dealee believes that she is being treated unfairly under the deal, she will resent it and seek some kind of retribution. The resentful response can be visceral. Indeed, the depth of emotion it can provoke is evident in our vernacular: if a person inflicts an unfair deal on us we say we have been conned, shafted, screwed, played for a sucker, and so on. Imagine, then, the additional armoury available to the legislature or a regulator if it could harness the collective resentment of dealees to a particular type of unfair deal to gain retribution against unfair dealors. This would add to mechanisms for responding to unfair deals beyond the traditional legal measures such as awards for damages, fines, injunctions and other standard legal and regulatory responses to unfair behaviour. This is not to propose over-exuberant dealee vigilantism, rather the proposal is for consideration to be given to broader strategies for reducing the incidence of unfair deals. That is to say, a more sophisticated understanding of the 3Rs costs and the cheat and bully strategies that can be used to mitigate these costs can help improve legislative and regulatory responses for promoting an environment for fair dealing. These propositions are briefly elaborated upon in Parts IV and V.

In some cases the 3Rs costs overlap so that, for instance, a dealee’s resentment may lead her to inflict reputation damage on the dealor — which is to say that there can be an overlapping of, and iteration between, resentment and reputation costs.

In other cases a regulator upon discovering that the dealor has breached a law requiring the dealor, in effect, to behave fairly, might require the dealor to publish an admission of wrongdoing and a public apology. This would enhance regulation and reputation costs.

This article pays particular attention to the resentment cost, in part because of the potential significance of its impact on dealees. The resentment cost is discussed at Part II(C). The discussion relies heavily upon the insights offered by the ultimatum bargaining game, which was first developed by Güth, Schmittberger, and Schwarze.<sup>2</sup> The game challenges the assumptions of rational choice theory, upon which much of neo-economic theory is based. Under rational choice theory, if I were offered a deal that would leave me, say, \$1 better off than if I did not enter the deal, then I would accept the deal, all other things being equal. The ultimatum bargaining game shows that if I am offered such a deal, but it would leave the dealor considerably better off than me, I might well reject the deal even if I leave myself worse off than if I had accepted the deal. It appears that under some conditions a party will refuse to accept a deal if she believes that the other party will make undue (unfair) gains from the deal.

The observations of the ultimatum bargaining game also suggest that a dealor will often be aware (consciously or otherwise) of the potential risks he or she faces in provoking a dealee's resentment by proposing a deal the dealee will perceive as unfair. Game theory experiments reveal that dealors tend to make proposals close to an equal split of the proceeds of the deal. Experiments also reveal that dealees are prepared to accept proposals that fall some distance short of an equal split. So, for example, under experimental conditions in which a dealor is required to make an offer to the dealee of a share of the stake, dealors tend to offer somewhere between 50–40 per cent. Dealees, on the other hand, tend to reject the offer when the share of the stake drops below 20–30 per cent.<sup>3</sup>

The insight offered in this article is that the game's experimental results imply that dealees have an unfairness tolerance. That is, assuming a 50–50 per cent split is the optimum point of fairness, and that dealees tend to reject offers below an average 25 per cent share in the stake, the average unfairness tolerance is the proportion between 50 per cent and 25 per cent; which is a 25 per cent unfairness tolerance. The point at which the dealee will reject is described here as the dealee's tipping point, or line of resentment.

The difficulty a dealor faces is accurately assessing where the dealee's line of resentment lies. At what point, for instance, will the dealee assess that the deal on offer is exploitative, and will reject? Worse still, what if the dealee accepts the

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<sup>2</sup> Werner Güth, Rolf Schmittberger and Bernd Schwarze, 'An Experimental Analysis of Ultimatum Bargaining' (1982) 3 *Journal of Economic Behavior and Organization* 367.

<sup>3</sup> Kent Greenfield and Peter C Kostant, 'An Experimental Test of Fairness under Agency and Profit-Maximization Constraints (With Notes on Implications for Corporate Governance)' (2003) 71 *George Washington Law Review* 983, 989.

deal, but feels exploited and takes revenge by inflicting ongoing reputation and resentment costs on the dealor? The dealee might enter a deal originally thinking it is fair, and later discover it is not. Or she may feel that she will do herself more harm than good by refusing the deal, but nevertheless seek to punish the dealor for taking unfair advantage of the dealee's weak bargaining position. The dealee will often punish covertly, so as not to raise the ire of the dealor. She may well fear a tit for tat response if the dealor discovers that she is inflicting 3Rs costs.

To avoid crossing the resentment line, the dealor will tend to act conservatively and make an offer that is well short of the resentment line. This explains why the experimental results show that dealors tend to make offers close to the equal split, despite the fact that other experimental data reveals that dealees will often accept offers as low as a 35–25 per cent share. The better the dealor understands the character and values of the dealee, however, the better able the dealor becomes in offering a deal that approaches the tipping point, or line of resentment. If the dealor discovers that the dealee has a high unfairness tolerance, she will be inclined to make an offer that unduly benefits the dealor, relative to theoretical optimum point of fairness. Where an equal split is feasible, this is the theoretical optimum point of fairness. If the dealee is well informed about the deal and has reasonable alternatives to the deal on offer, she will likely have a low unfairness tolerance. Either way, the more the dealor is able to accurately calculate where the dealee's line of resentment lays, the more value the dealor can extract from the deal without risking 3Rs costs. This explains why in large one-off and relational deals the dealor will spend a considerable amount of time and effort getting to know the dealee before making firm proposals to the dealee.

Deal theory makes a number of postulations — or hypotheses — as to why parties enter into 'unfair' deals. This raises the question as to what precisely is meant by the term 'unfair' in this context. This question is examined in Part III.

This article adopts two broad approaches to elucidating deal theory. First, it posits that a dealor will make 3Rs costs calculations, and that she will also weigh up whether she can adopt a cheat or bully strategy to mitigate the 3Rs costs. If after making those calculations the dealor assesses that she will make greater gains from an unfair deal, she will proceed on that basis. Conversely, if she assesses that she will make greater gains from a fair deal, she will proceed on that basis. These are general theoretical postulates, which is to say that it is not claimed that all dealors proceed in this way, merely that in many, if not most, instances this occurs where there are party imbalance preconditions. Some dealors may find that offering an unfair deal is morally repugnant, no matter how much she may gain from an unfair deal even after allowing for the 3Rs costs. However, for analytical purposes we assume that parties act self-interestedly rather than altruistically. The basis for this assumption is outlined in Part III.

The second proposition in this article is that dealors can miscalculate their own best interests. That is, they may discount the 3Rs costs by unduly preferencing the short-term gains of an unfair deal over any longer term potential losses. This has

parallels to hyperbolic discounting by consumers. Another countervailing effect is the agency effect. These conditions for miscalculation are outlined in Part V.

The third aspect of this article is essentially normative. Here it is argued that if the legislative or regulatory objective is to promote fair deals, then the insights gained from deal theory can be harnessed to obtain that objective.

Leading on from the examination of unfairness is the claim made in this article that legal systems, in essence, define unacceptable (that is to say, unfair) conduct, and provide a means of redress, sometimes in the form of compensation, for the unfair conduct. Much the same process occurs inside the minds of each of us. We will, for our own purposes, define certain conduct impacting upon us as unacceptable and unfair. We will often seek our own means of retribution — sometimes covertly, other times overtly and symbolically — to make redress for the unfairness. In this way a mini-legal system is operating inside our head — one that identifies the behaviour of others that is unfair and seeks some kind of retribution or compensation for that behaviour. So here we have two systems: the legal system (which is described in this article as the ‘macro-system’) and our personal systems of fairness (described as the ‘micro-system’). The postulation made in Parts III, B and IV is that the macro-system works most effectively if it operates in reasonable harmony with our collective micro-systems of justice. That is to say, generally speaking, the more the macro-system harmonises with our collective micro-systems, the more optimal the macro-system’s performance and effectiveness in enforcing its standards becomes. In other words, the more the macro-system reflects the deeper assessments of fairness by our collective micro-systems, the more effective the macro-system becomes in enforcing its own laws and rules. A further, and related, claim made in this article is that the two systems do not operate independently of each other. The macro-system informs the understandings of fairness of our collective micro-systems, and vice versa.

Resentment can therefore play a role in two contexts: first, in moderating the behaviour of the dealer in relation to a specific deal, and second, as a force to be harnessed by the legislature or a regulator to moderate the behaviour of dealers more generally.

This article, then, attempts some counterbalance to the essentially morals-based focus on the interests of the weak party by directing attention to the incentives for and calculations by the strong party in offering unfair deals. Deal theory, as expounded here, incorporates insights offered by relational contract theory, behavioural economics, and as mentioned, the ultimatum bargaining game, as well as offering insights of its own.

In offering a grand theory (and hopefully not a grandiose theory) in this article, I, the proponent, run the constant danger of mixing descriptive accounts with normative claims. That is to say, a postulate about party behaviour attempts a best fit explanation or theory as to what a party is doing, and why. At times a postulation can double as a proposal about what the party ought to be doing — which

invariably introduces (an often unspoken) moral dimension to what is supposedly a (quasi)-scientific endeavour. The ‘is’ and the ‘ought’ can have a magnetic attraction to each other so strong that it can be hard to tear them apart. That is to say, a descriptive account of what *is* can be coloured by a proponent’s view of what *ought* to be. A forensic examination of the account given in this article is bound to reveal a smudging of the *is* and the *ought*. I have pondered whether at every opportunity I should clearly signal whether a descriptive or normative claim is about to be made. On further reflection I believe that doing so is somewhat futile. The reason is this: although the account given in this article attempts to side-step questions of morality (that is, an essentially normative account), no account of law and justice can, or indeed should, be free of such questions. Normative concerns about the morality of the law should at least be standing there somewhere in the low-lit background. Descriptive accounts of law are necessarily (and should necessarily) be framed within some kind of normative dimension — whether explicitly considered or not. A rigorously ‘scientific’ and apparently value free (descriptive) analysis, on the other hand, is in constant danger of arriving at reasonings that can be meaningless, or at worse truly horrific, if used to comprehend and direct real world practice. That is, to analyse and theorise upon the law in a rigorously value-free way runs the risk of inviting or justifying legal systems that lead to perverse outcomes.<sup>4</sup> Nevertheless, I will attempt where appropriate to signal whether a descriptive or normative claim is about to be made.

## II DEAL THEORY IN OUTLINE

### *A Introduction*

Parties who negotiate and settle fair deals maximise their own joint welfare whilst enhancing overall social welfare,<sup>5</sup> yet parties often enter into unfair deals. Why is this? The reasons can vary from deal to deal, with a wide range of factors influencing party behaviour. Various psychological, cultural and behavioural factors may come into play, many of which are peculiar to the parties and their specific circumstances. The particularity of many of the factors leading to unfair deals leaves the observer unable to gain useful insights into why parties more generally are inclined to enter unfair deals, and what we should do to avoid unfair

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<sup>4</sup> The standard example of this is a strict value-free positivist account of the law. There are unlikely to be many proponents of this hardcore form of positivism. Nevertheless, it comprehends that the unique characteristic of the law is its capacity to enforce obedience to its edicts. The validity of its edicts is determined solely by asking whether the legislature followed the proper form in enacting laws (ie a majority of legislators voted for the edict). Thus, all edicts (ie laws) that are created using the proper form are necessarily valid, regardless of the fact, for example, that the laws might be arbitrary and might inflict great harm without any apparent justification upon a minority of the citizenship.

<sup>5</sup> See Alan Schwartz and Robert E Scott, ‘Contract Theory and the Limits of Contract Law’ (2003–04) 113 *Yale Law Journal* 541, 543 who propose that as far as contracts between firms are concerned, ‘contract law should facilitate the efforts of contracting parties to maximize the joint gains (the “contractual surplus”) from transactions’. They claim that contract law should do nothing else.

deals in the future. Human behaviour and motivations are enormously complex rendering attempts at analysing and predicting party behaviour incredibly fraught.

One way of responding to this is to make more generalised and somewhat abstract theoretical claims about party behaviour. Generalised claims can sometimes be more accurate than specific claims. By way of analogy, the generalised claim (or prediction) that average winter temperatures will be lower than average summer temperatures is highly accurate, at least in temperate and polar zones. Despite being a generalised prediction, it is extremely useful. Fashion houses can design and prepare clothing for the next season, sports are played in seasons in which they can be more comfortably played, medicines are manufactured in anticipation of seasonal diseases and holidays are had in the most appropriate season.

Highly specific predictions (for example that next February 21 will be a clear sunny day with a 32 degree maximum temperature) might offer us even more utility, but cannot yet be accurately predicted if the relevant day is some months away. No doubt the capacity to make highly specific long term weather predictions would also be extremely useful, but this is not to deny the accuracy and utility of generalised predictions and claims. Generalised theories are also useful in that they offer a means for laying bare hidden assumptions and potential limitations in existing ways of doing things.<sup>6</sup> For the purposes of analysis then, the claims made in this article will necessarily be generalised and simplified.

### B *The Assumptions*

As a starting point, it will be assumed that dealors generally act self-interestedly rather than altruistically. This is not to suggest that a dealor's self-interested behaviour is necessarily antithetical to the self-interests of both parties. Nor does it necessarily imply unfair or unethical behaviour or outcomes. Being self-interested is not necessarily synonymous with being unduly selfish, as we will see in the discussion in Part III dealing with fairness.

If we assume for the moment that self-interest is a fundamental driver, it allows us to ignore some of the confusing 'noise' of psychological, cultural, behavioural and other drivers that are specific to a particular dealor and dealee, and a particular deal. Some people may in certain circumstances not offer a deal that would extract the greatest gain for them because they are motivated by altruism, generosity or cultural mores. For purposes of analysis, the wider the range of drivers or motivations behind a dealor's deal offer that are taken into consideration, the more complex the analysis becomes and the more difficult it becomes to make useful (generalised) claims about deals. That is, if we allow ourselves to be submerged in a sea of detail and specificity we will be paralysed by the resulting complexities. There would be little chance of gaining insight into party behaviour.

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<sup>6</sup> Kathleen M Carley, 'Computational Organization Science: A New Frontier' (2002) 99 (Supplement 3) *Proceedings of the National Academy of Sciences of the United States of America* 7257, 7257–62, 7267.

For the purposes of deal theory it is also assumed that the self-interested dealor will make calculations about whether to offer a fair or an unfair deal. A dealor, it is posited, calculates before proposing a deal the potential benefits and costs of offering a fair as opposed to an unfair deal. The calculation might be made in a split-second or may be measured and quantified in the dealor's mind over time. That is to say, the calculations might be consciously weighed and measured, or take place in the dark recesses of the sub-conscious mind. It might be a considered calculation, or barely considered at all. For our purposes it is assumed the calculation is made nonetheless. It is assumed, then, that a rather crude cost-benefit analysis is made in which the dealor assesses that if the potential gains to the dealor in offering an unfair deal outweigh the potential costs, an unfair deal should be proposed. These calculations may in some circumstances be prone to error — for example, unduly preferencing short term gains over longer term losses. In any event, if the dealor calculates that the benefits of an unfair deal compared with a fair deal outweigh the costs of an unfair deal, a rational (although not necessarily 'ethical') dealor will pursue the unfair deal. The regulatory challenge, as will be discussed later, is to introduce factors that will weight the cost-benefit analysis in favour of a fair deal.

The term 'unfair' is loaded, and suggests assessments of morality and ethics. That is, it might be said a deal is unfair because it is 'immoral' or 'unethical'. Moral and ethical concerns lie at the heart of a healthy system of law and justice. Deal theory does not suggest any displacement of these concerns. It seeks instead to complement and enhance these concerns, paradoxically enough, by suspending our attention to those moral and ethical concerns. This is because ethical and moral concerns direct our attention almost solely towards the harm done to the weak party and to the remedy that should be provided to her, and distract adequate attention from the reasons and motivations for the strong party to engage in the unfair conduct in the first place. Insights into these reasons and motivations can inform policies and laws to provide disincentives for unfair conduct.

An additional problem with morality and ethics is their relative vagueness and contestability, which invite interminable debates about whether it can truly be said the deal is unfair, and whose moral compass we should use to navigate our way to drawing conclusions on the question. This article bypasses these questions for the moment, not because they lack significance or centrality, but because the article attempts to reduce indeterminacy by removing as much complexity, or 'noise', from our considerations as reasonably possible to enable more generalised claims to be made.

### *C The 3Rs Costs*

This article posits that the self-interested dealor faces a number of potential costs in offering an unfair deal. These potential costs, which beset all deals, are described as the 3Rs costs; regulation, reputation and resentment costs. These are potential and actual costs to the dealor of offering and undertaking an unfair deal; more specifically these are the regulation, reputation and resentment costs of an unfair

deal. A dealer will decide (however fleetingly or carefully considered) to offer a fair deal or an unfair deal to a dealee. In making that decision, she will consciously or subconsciously consider three potential costs of offering an unfair deal, which now will be considered in turn.

### 1 *Regulation costs*

Regulation costs are the costs of being successfully sued by the dealee, or being pursued by regulatory authorities, and the risk of laws and regulations being made more stringent in the future in response to unfair dealer behaviour. ‘Regulation’ in this context broadly includes the law of contract and any other laws and regulations that regulate the deal between the dealer and dealee. The regulatory cost of an unfair deal include, for example, any loss sustained from being sued for breach of contract, or from any other civil law action taken by the dealee; or action taken by a regulator in relation to the deal (for example, for breaching competition laws or regulations), and the potential costs of future stricter regulatory oversight.

Regulation costs are often the least concerning of the 3Rs costs for the dealer. Krawiec claims, for instance, that a growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms and may largely serve as window-dressing to provide market legitimacy and reduced legal liability. She concludes, rather pessimistically, that present regulatory structures do not sufficiently deter corporate misconduct and simply lead to a proliferation of costly, and arguably ineffective, internal compliance processes.<sup>7</sup> Parker and Nielsen are not quite so pessimistic.<sup>8</sup> Their study of 999 large Australian firms suggests that although business implementation of competition law requirements are partial, symbolic and half-hearted, regulatory enforcement action does improve compliance system implementation.<sup>9</sup>

Although regulation costs might not be considered particularly significant, there are exceptional cases where the costs in fact turn out to be extremely high, at least in the medium to long term. The collapse of Enron led to the jailing of its CEO and federal indictments against its executives for devising complex financial schemes to defraud the company. Gross regulatory breaches leading to sharp regulatory responses were not confined to Enron around the time of its collapse:

The SEC in June 2002 charged WorldCom with massive accounting fraud [the company had wrongly listed over US\$3 billion of its 2001 expenses and US\$797 million of its first quarter 2002 expenses as capital expenses]. In January 2002, Global Crossing filed for Chapter 11 bankruptcy protection, listing assets of 22.4 billion and debts totalling 12.4 billion dollars, the

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<sup>7</sup> Kimberly D Krawiec, ‘Cosmetic Compliance and the Failure of Negotiated Governance’ (2003) 81 *Washington University Law Quarterly* 487, 487.

<sup>8</sup> Christine Parker and Vibeke Lehmann Nielsen, ‘Do Businesses Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia’ (2006) 30 *Melbourne University Law Review* 441.

<sup>9</sup> *Ibid* 442–4.

fourth largest bankruptcy in US history. The company was accused of employing misleading transactions and accounting methods, which gave the appearance that the company was generating hundreds of millions of dollars in sales and cash revenues that did not actually exist. At Adelphia Communications, the former CEO John Rigas, two of his sons, and two other former executives were charged with conspiracy, securities fraud and wire fraud and with looting the company of hundreds of millions of dollars. At Tyco, tens of millions of dollars in fraudulent bonuses were uncovered, and \$13.5 million dollars in unauthorised loans to key Tyco managers. This was an unprecedented display of accounting fraud, regulatory failure, executive excess and avoidable bankruptcy, with resulting widespread disastrous losses incurred by employees, pension funds and investors.<sup>10</sup>

This corporate behaviour led the US Congress in July 2002 to enact the *Sarbanes-Oxley Act*,<sup>11</sup> which imposed considerably more regulatory requirements and oversight, the ultimate effectiveness of which is debatable.<sup>12</sup>

These collapses involved the extensive use of unfair deals. Enron, for example, manipulated the Californian energy market to illegally extract profits exceeding US\$500 million during 2000 and 2001.<sup>13</sup> Extensive use was made of cheat and bully strategies, the apparent success of which only emboldened key players into promoting and entering into larger and nastier unfair deals. A Staff Report of the US Federal Energy Regulatory Commission concluded that Enron had proprietary knowledge of market conditions through its online trading system that was unavailable to other market participants.<sup>14</sup> This enabled it to engage in ‘wash trading’, an illegal stock trading practice where an investor simultaneously buys and sells through different brokers. This gave other players the false impression of market liquidity, causing artificial volatility allowing Enron to take advantage and gain massive profits at the expense of other traders and ultimately the consumers of energy in California.<sup>15</sup> What can be seen here is that the key players within the

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<sup>10</sup> Thomas Clarke, ‘Cycles of Crisis and Regulation: the enduring agency and stewardship problems of corporate governance’ (2004) 12 *Corporate Governance* 153, 158.

<sup>11</sup> 18 USC §1514A (2002), also known as the ‘Public Company Accounting Reform and Investor Protection Act’ in the US Senate and the ‘Corporate and Auditing Accountability and Responsibility Act’ in the US House of Representatives.

<sup>12</sup> Larry E Ribstein, ‘Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002’ (2002) 28 *Journal of Corporation Law* 1; Ivy Xiyang Zhang, ‘Economic consequences of the Sarbanes-Oxley Act of 2002’ (2007) 44 *Journal of Accounting and Economics* 74.

<sup>13</sup> Federal Energy Regulatory Commission, United States Congress, *Staff Report, Price Manipulation in Western Markets, Findings at a Glance* (2003) Docket No. PA02-2-000, 1.

<sup>14</sup> *Ibid.*

<sup>15</sup> See Konstantinos Metaxoglou and Aaron Smith, ‘Efficiency of the California Electricity Reserves Market’ (2007) 22 *Journal of Applied Econometrics* 1127, 1130, where they say:

offending corporations miscalculated 3Rs costs, more specifically the regulatory costs, and miscalculated the longer term success of their cheat and bully strategies.

Generally, however, firms that have dealings with consumers, for instance, are unlikely to be too concerned about them suing the firm for breach of contract or for other alleged breaches because of the disproportionate cost and financial risks of litigation to a consumer relative to the firm. There is, therefore, a financial disincentive facing consumers seeking to enforce their legal rights.<sup>16</sup> These effects might be mitigated to some extent if a regulator has standing to sue on the consumer's behalf, or if there is an industry run independent disputes settlements scheme which is of no financial cost to the consumer.

## 2 Reputation costs

Driving an unfair bargain can also lead to the second 3Rs cost — namely, reputation cost. The dealer may, for example, gain a reputation for being ruthless, underhanded or having a propensity to unduly gain benefits for herself at the expense of the dealee. This might cause the dealee, and other potential dealees to avoid entering into deals with the dealer in the future, or to exercise excessive caution when dealing with the dealer during the course of the deal or in bargaining for future deals.

There is a considerable amount of literature regarding the costs of a firm attaining a bad reputation, and conversely the financial and other benefits of having a good reputation.<sup>17</sup>

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Among those who took advantage of systematically higher DA [day ahead] prices were Enron traders, by means of their now infamous 'Get Shorty' strategy. Violating market rules and acting as pure speculators, they sold DA at a high price expecting to buy back HA [hour ahead] for a low price, thus gaining the difference. According to taped discussions available from the web site of the Snohomish Public Utility District, Enron traders were so allured by this 'sweet margin' in their buybacks that they did not hesitate to engage into illegitimate business practices, having learned well how to game the market rules. Under the directions of their chief executives, Enron traders repeatedly submitted false information regarding the physical availability of reserve resources that they did not have.

<sup>16</sup> Relying on this bias can backfire, as it did spectacularly so in the 'McLibel' case of *McDonald's Corporation v Steel* [1997] EWHC QB 336 in which McDonald's sued the defendants for libel, presumably thinking this would intimidate the defendants so they would not hand out anti-McDonald's literature. The company won a Pyrrhic victory as a result of the court ordering the defendants to pay damages of £40,000. The case was considered a public relations disaster for the company, and is thought to have cost the company at least £10 million: Mark Oliver, 'McLibel Two Win Legal Aid Case', *The Guardian* (online), 15 February 2005 <<http://www.guardian.co.uk/uk/2005/feb/15/foodanddrink>>.

<sup>17</sup> See, eg, Heski Bar-Isaac, 'Imperfect Competition And Reputational Commitment' (2005) 89 *Economics Letters* (2005) 167; Gary E Bolton, Elena Katok and Axel Ockenfels, 'How Effective are Online Reputation Mechanisms? An Experimental Investigation' (2004) 50 *Management Science* 1587; Ernst Fehr and Klaus M Schmidt, 'A Theory of Fairness, Competition, and Cooperation' (1999) 114 *Quarterly*

From a dealee's perspective, a dealer's reputation turns on questions of how much the dealee can trust the dealer and how careful she needs to be in dealing with the dealer, and how much confidence she can have in any representations the dealer makes about the deal. If the dealee is in a weak bargaining position relative to the dealer, she is highly dependent on the dealer doing the right thing and not unfairly exploiting her strong position. A dealee in a weak position invariably has an informational disadvantage to the dealer about the deal. Again, the dealee is reliant on the dealer not unfairly exploiting this advantage. One factor that can moderate dealer behaviour is fear of the potential reputation damage that can be caused by an unfair deal. It can be posited that dealees, sensing their weaker position, are likely to attach considerable (and possibly exaggerated) significance to any reputation news they receive about a potential dealee. Any good news (ie that the dealee can be trusted and will treat the dealee fairly) will be read by the dealee as highly encouraging and comforting. Bad news will cause financial damage related to the number of potential customers who hear about and believe the bad news.

In some instances a whole marketplace may gain a bad reputation. Akerlof noted some time ago in a famous paper on the market for 'lemons' (the colloquial term for cars that suffer from numerous mechanical and other failings) the problems of a marketplace where there is little trust in the quality of the products on offer.<sup>18</sup> He questioned why second hand cars (in the 1960s) sold for considerably less than new cars, even when the second hand car was relatively new and unused. He speculated that the reason was because potential buyers realised they were at an informational disadvantage to the seller. The seller had the opportunity of using the car for a sufficient period to become aware of whether or not it was a lemon. Because of this potential buyers become suspicious about the car's quality and will therefore only be prepared to pay a relatively low price. Thus, the risk of purchasing a lemon is factored into the price of second hand cars. Because buyers are only prepared to pay relatively low prices, this drives out the quality products (because the market price is so low quality products would sell at a loss), which in turn only confirms the market's reputation for low quality, which can further drive down prices leading to the potential collapse of the market.

One way of overcoming a lemons problem is to establish some kind of reputation system. If the dealer is a stranger to the dealee, about whom she knows very little, she is likely to exercise considerable caution. If, however, there are a series of interactions between the parties, their history of past interactions will inform the dealee about the dealer's trustworthiness.<sup>19</sup> The past dealings raise expectations and assumptions by the parties about their future dealings, and the likely

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*Journal of Economics* 817; Johannes Hörner, 'Reputation and Competition' (2002) 92 *American Economic Review* 644.

<sup>18</sup> George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

<sup>19</sup> Paul Resnick et al, 'Reputation Systems' (2000) 43 *Communications of the ACM* 45, 46.

opportunities for future reciprocity or retaliation if one of the parties misbehaves. Axelrod described these expectations as the ‘shadow of the future’.<sup>20</sup>

A first dealing with a stranger presents a situation where the parties have no history of past dealings, and therefore no basis for anticipation of future dealings. Here there is a lack of a shadow of the future for constraining present behaviour. We can see from Akerlof’s insights that this serves neither the interests of the dealee nor a fair dealor. The dealee’s information disadvantage may well prompt her to only be prepared to pay a relatively low price for the goods or services on offer because of the perceived risk of buying a lemon. It is therefore in the interests of both parties to establish a reputation system. Resnick et al propose that an effective reputation system requires at least three properties:

- Long-lived entities that inspire an expectation of future interaction;
- Capture and distribution of feedback about current interactions (such information must be visible in the future); and
- Use of feedback to guide trust decisions.<sup>21</sup>

There are a number of studies that confirm that considerable value can be gained for a seller who develops a good reputation, and is trusted by the marketplace.<sup>22</sup> To put it categorically, there can be considerable value attained by having a good reputation, and a considerable loss of value if a seller has a bad reputation. It is therefore often in the interests of dealors to develop and maintain a good reputation. That is to say, a bad reputation can be very costly.

### 3 *Resentment costs*

We turn now to the focus of this article: resentment costs.

There is a burgeoning field of research dealing with resentment. Experimental evidence suggests that parties do not always undertake contract negotiations and performance in a narrowly self-interested way. Instead, parties often act according to their sense of reciprocal fairness. This behaviour is contrary to predictions of rational choice theory.<sup>23</sup>

Attention was drawn to reciprocal fairness by the ultimatum bargaining game, which was first developed in 1982 by three German economists, Güth, Schmittberger, and Schwarze.<sup>24</sup> The game at its simplest involves two parties, A and B. A is offered a sum of money, say \$100, on the condition that A makes one

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<sup>20</sup> Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 1984) 126–30.

<sup>21</sup> Resnick et al, above n 19, 47.

<sup>22</sup> Peter W Roberts and Grahame R Dowling, ‘Corporate Reputation And Sustained Superior Financial Performance’ (2002) 23 *Strategic Management Journal* 1077.

<sup>23</sup> Robert E Scott and Paul B Stephan, ‘Self-Enforcing International Agreements and the Limits of Coercion’ (2004) *Wisconsin Law Review* 551, 556.

<sup>24</sup> Güth, Schmittberger and Schwarze, above n 2.

offer to B for a share in the stake. B has one opportunity to either accept or reject the offer. B is aware of all these factors. If B accepts, the stake is shared as agreed, if B rejects both parties receive nothing.

Rational choice theory predicts that on the whole parties will choose the alternative that is likely to give them the greatest satisfaction. On that basis we would expect that B will accept any share of the stake offered by A as she will be better off than before she accepted the offer. Rejecting any offer by A would leave B in a worse position than if she had accepted, no matter how small A's offer. We would expect, for example, that if A offered B a \$1 share, she would accept because she would be \$1 better off. Repeated experiments using the ultimatum bargaining game, however, demonstrate that B is likely to reject a \$1 offer (if, say, the stake is \$100), so that both A and B will receive nothing. The evidence shows not only that responders reject small offers, it also shows that proposers, perhaps anticipating rejection, usually offer substantially more than the smallest possible amounts.<sup>25</sup>

In the first ultimatum game undertaken by Güth et al, proposers made average offers of 36.7 per cent of the stake, while one offer of 30 per cent was rejected.<sup>26</sup> The results of subsequent ultimatum game experiments are variable, but on average the minimum amount that responders will accept is between 20–30 per cent of the total stake.<sup>27</sup> That is, responders prefer no deal to one they consider to be unfair, despite the fact they would be better off by accepting the unfair deal. Proposers, perhaps anticipating the possibility of rejection of low offers, tend to offer between 40–50 per cent of the stake.<sup>28</sup> Taking the position of the proposer, it would appear she is either acting altruistically or she is calculating that her self-interest is best served by not inviting a rejection by the responder. Recall that under the rules of the game the dealee is aware of the amount of the stake, the proposer has only one shot at making an offer for a specified share of the stake, and rejection by the responder will leave her (as well as the responder) with nothing.

As a note of caution, when observing deals taking place in the marketplace more generally we need to be careful about our assessments of how the parties perceive unfairness in relation to a particular deal they are negotiating or performing. For instance, the parties may perceive a deal to be fair (or at least, not unfair) even if, say, the price of the goods or services is substantially higher or lower than the going market price (which can be said to be the optimum fairness point). The parties may depart from the market price (if there is one) to make allowances for the fact

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<sup>25</sup> Hessel Oosterbeek, Randolph Sloof and Gijs Van De Kuilen, 'Cultural Differences in Ultimatum Game Experiments: Evidence from a Meta-Analysis' (2004) 7 *Experimental Economics* 171, 171.

<sup>26</sup> Ibid.

<sup>27</sup> Greenfield and Kostant, above n 3, 989; see also Fehr and Schmidt, above n 17, 826, who observe:

When combining the results of a number of research studies, the overall outcome shows that roughly 60–80 per cent of offers fall within the interval 0.4, 0.51, while 3 per cent are below 0.2.

<sup>28</sup> Greenfield and Kostant, above n 3, 989.

that one party is bearing a greater risk burden than the other under a particular deal. The offer price might be lower than the market price to promote a long-term business relationship as part of a strategy to increase market share or to induce the other party to move from an existing supplier. Here we can say that the optimum point of fairness for the parties has shifted from the normal (market) optimum point price.

If the above allowance is not made for any shift from the normal market position in the optimum point of fairness for the parties to a particular deal, it can on occasion mislead an observer into believing a deal is unfair because, for instance, the deal price is higher than the average market price. As Schwartz and Scott observe, deal terms that superficially appear to be one-sided are often mistakenly thought to be the product of unequal bargaining power.<sup>29</sup> However, as they explain, an apparently one-sided deal is very unlikely to be unfair if during bargaining both parties have a next best option, are both patient negotiators (ie one party is not under pressure to conclude the deal whilst the other is, because of financing or other pressures) and are sophisticated. These elements may well not be in play for unfair contracts.<sup>30</sup>

The results of the ultimatum game suggest, somewhat paradoxically, that the selfish thing to do is to act altruistically. That is, if we act too greedily we will be punished by the other party, and consequently end up worse off. One strategy used to minimise the chances of negative responses from the other party is for the dealor to use impression management strategies so as to demonstrate to the dealee that the dealor is acting fairly. This is often done by the dealor proposing an equal division of the outcomes. This strategy is particularly prominent when the dealor knows the dealee is aware of the division.<sup>31</sup>

Trivers suggests that although parties gain mutual benefit through reciprocal altruism, there is a constant temptation to receive more than one provides through subtle cheating.<sup>32</sup> Some analysts posit that there is a contest between two extreme positions; between ‘fairmen’ who divide everything equally and ‘gamesmen’ who behave selfishly and rationally like proper economic agents.<sup>33</sup> In Thaler’s view, most people are not well described by either extreme view:

Rather, most people prefer more money to less, like to be treated fairly, and like to treat others fairly. To the extent that these objectives are contradictory,

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<sup>29</sup> Schwartz and Scott, above n 5, 554.

<sup>30</sup> Ibid 550.

<sup>31</sup> Madan M Pillutla and J Keith Murnighan, ‘Being Fair or Appearing Fair: Strategic Behavior In Ultimatum Bargaining’ (1995) 38 *Academy of Management Journal* 1408, 1409.

<sup>32</sup> Robert L Trivers, ‘The Evolution of Reciprocal Altruism’ (1971) 46 *Quarterly Review of Biology* 35, 37.

<sup>33</sup> Richard H Thaler, ‘Anomalies: The Ultimatum Game’ (1988) 2 *Journal of Economic Perspectives* 195, 205.

subjects make trade-offs. Behavior also appears to depend greatly on context and other subtle features of the environment.<sup>34</sup>

The experimental outcomes leave us, however, with a bewildering array of evidence. Some evidence suggests people are concerned about fairness, other evidence indicates that most of us are selfish, and yet other evidence indicates that we usually seek to deal cooperatively.<sup>35</sup> Various commentators have attempted to explain the reasons for such apparently contradictory results. One explanation is simply that ‘this is a heterogeneous world where some people exhibit reciprocal fairness and others are selfish’.<sup>36</sup> Just as humans are inclined to act fairly, they are also inherently ready to act unjustly and unfairly, or do wrong if they can get away with it.<sup>37</sup> Apparently, this behaviour has roots in our biological evolution. Evolutionary psychologists hypothesise that humans have evolved ‘mental algorithms for identifying and punishing defectors’.<sup>38</sup> Humans apparently adapted to identify cheaters and to be identified as a non-sucker, that is, someone who is not easily exploited. As a result, there is a tendency to act spitefully when treated unfairly.<sup>39</sup> Fehr and Schmidt claim there is an important interaction between a population’s distribution of preferences and its strategic environment.<sup>40</sup> They conclude that:

there are environments in which the behavior of a minority of purely selfish people forces the majority of fair-minded people to behave in a completely selfish manner, too. ... Likewise, in a simultaneous public good game with punishment, even a small minority of selfish players can trigger the unravelling of cooperation. Yet, we have also shown that a minority of fair-minded players can force a big majority of selfish players to cooperate fully in the public good game with punishment.<sup>41</sup>

A significant factor influencing the behaviour of parties in all these environments is their perceptions of whether an outcome of a particular deal is fair. Perceptions appear to be based upon a ‘reference point’ or ‘reference transaction’ from which assessments of fairness are made. If the parties believe that neither is more entitled to the stake than the other, the reference point is typically an even split, assuming an even split is identifiable by the parties.<sup>42</sup> If both parties believe one is more

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<sup>34</sup> Ibid.

<sup>35</sup> Fehr and Schmidt, above n 17, 817–18.

<sup>36</sup> Scott and Stephan, above n 23, 565–6.

<sup>37</sup> Pillutla and Murnighan, above n 31, 1408.

<sup>38</sup> Francesco Parisi and Nita Ghei, ‘The Role of Reciprocity in International Law’ (2003–4) 36 *Cornell International Law Journal* 93, 105.

<sup>39</sup> Owen D Jones, ‘Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology’ (2000) 95 *Northwestern University Law Review* 1141, 1182–3.

<sup>40</sup> Fehr and Schmidt, above n 17, 856.

<sup>41</sup> Ibid.

<sup>42</sup> Greenfield and Kostant, above n 3, 990.

entitled than the other, the reference point shifts more in favour of that party.<sup>43</sup> Evaluations of entitlement in a given situation are ‘the product of complicated social comparison processes’.<sup>44</sup>

The equal split is usually not feasible because most transactions do not involve dividing up the pie, rather they involve exchanging one item (money) for a particular good or service. Many transactions are more complex still. The ultimatum bargaining game, as we have seen, is played out in simplified environment in which the only fairness consideration is the proportion of the split of the money on offer and both parties are fully informed of the total amount at stake. Evidence suggests that fairness concerns may be less pronounced in settings where splitting equally is impossible.<sup>45</sup>

Where the equal split is feasible and no informational asymmetry exists between the parties, the 50–50 per cent split stands as a strong reference point for the parties. For observers and the parties it serves as the optimum point of fairness. For most of us, equal splitting ‘plays an important role in our upbringing and, typically, our first bargaining experiences with siblings and friends are situations where sharing equally is quite common (often enforced by third parties like parents or teachers)’.<sup>46</sup> In the absence of an equal split reference point, the behaviour of the parties can change dramatically. As Güth and Huck noted:

Comparing the equality game with the inequality games we observed that behavior changed dramatically although the inequality games were generated by only slightly altering a single payoff vector. More precisely, proposers choose significantly more often unfair offers when the exactly equal split is not feasible and responders reject unfair offers less often when all offers imply a payoff advantage for the proposer. ... The general message of these results (which seem in line with a focal–point explanation) is that fairness concerns may be less pronounced in settings where splitting equally is impossible. In reality equal splits are quite often not feasible, e.g., because of different enforceable claims.<sup>47</sup>

In summary, parties generally attempt to be perceived by each other as acting fairly. If an optimum point of fairness (eg the equal split) is ascertainable and known to the parties, they will tend to propose and accept deals that have a closer alignment with the optimum fairness point, than if it is not ascertainable or known to the parties. If the dealee does not know the optimum fairness point, this offers a strong temptation to the dealor to act greedily.

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<sup>43</sup> Ibid.

<sup>44</sup> Fehr and Schmidt, above n 17, 822.

<sup>45</sup> Werner Güth, Steffen Huck and Wieland Müller, ‘The Relevance of Equal Splits in Ultimatum Games’ (2001) 37 *Games and Economic Behavior* 161, 166.

<sup>46</sup> Ibid 164.

<sup>47</sup> Ibid 166.

### D *The Unfairness Tipping Point*

Commentary on the ultimatum bargaining game outcomes has naturally focused on the fact that it suggests parties act according to their assessments of fairness. This tends to overlook another very interesting insight that the game provides, and that is the degree to which the responder is prepared to tolerate ‘unfairness’. If an equal split is feasible, the ultimatum bargaining game suggests that most responders will not reject until the offer falls below 20–30 per cent of the stake, and given that our socialisation would suggest that an equal split is the optimum point of fairness it appears that responders have an unfairness tolerance of between 20–30 per cent.<sup>48</sup> Proposers on the other hand tend to make offers closer to the equal split. This suggests that they are uncertain as to what the responder’s unfairness tolerance (or tipping point) is, so they play conservatively and hence make an offer closer to the equal split.

Negotiations are in reality often not undertaken on an accept or reject basis, nevertheless, there is evidence of dealers punishing dealors for perceived unfair deals in real world circumstances.<sup>49</sup> Even in the absence of circumstances in which more pronounced assessments can be made of fairness, sensitivity to unfair treatment subsists:

Behaviorally, humans are reciprocators — in most cases reflecting in their own behavior their perceived treatment by others. If nonshareholders believe that management is not acting fairly toward them — that is, if management is withholding ‘too much’ of the corporate surplus for the shareholders — the other stakeholders will be resentful and will act out their resentment in some way. ... In our experiment, the creation of the agency-maximization duty resulted in a severe drop in the number of deals consummated. ... Even though the duty caused the proposers — our analogue to corporate managers — to act more ‘efficiently’, *the resentment of the other players created an end result that was inefficient.*<sup>50</sup>

So, a resenter will be unduly harsh in punishing the dealor, even if, as we have seen, the punishment will also hurt the dealee. The term ‘punishment’ here is not to be taken in the criminal law sense of punishing a person by, for instance, imprisonment or imposing fines and the like. Rather it is meant in a broader sense of harming, or attempting to harm another’s interests in some way.

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<sup>48</sup> Greenfield and Kostant, above n 3, 989.

<sup>49</sup> See Pillutla and Murnighan, above n 31, 1409–10 where they say:

In ultimatum experiments, offers are absolutely final; both parties (who have no history and no expected future) receive nothing if an offer is rejected. The starkness of these interactions necessarily limits their generality, but they provide a basis for clear tests of theoretical predictions and for evaluating whether fairness can explain actions in competitive negotiations.

<sup>50</sup> Greenfield and Kostant, above n 3, 1005–6 (emphasis in original).

There are some circumstances in which it is difficult for the dealee, or resenter, to punish the dealor — for example where the dealor is a monopolist, and the dealee has no options other than to deal with the dealor. Fehr and Schmidt believe that the resentful party's capacity to punish is substantially limited in monopoly markets, where the dealees cannot punish the monopolist by destroying some of the surplus and enforcing a more equitable outcome. This suggests to them that fairness plays a smaller role in most markets for goods (which presumably are more likely to be beset by monopolists) than in labour markets. Thus:

in addition to the rejection of low wage offers, workers have some discretion over their work effort. By varying their effort, they can exert a direct impact on the relative material payoff of the employer. Consumers, in contrast, have no similar option available. Therefore, a firm may be reluctant to offer a low wage to workers who are competing for a job if the employed worker has the opportunity to respond to a low wage with low effort.<sup>51</sup>

Sometimes a monopolist will not take full advantage of their market power. Empirical evidence suggests that customers have strong feelings about the fairness of a firm's short-run pricing practices, which could explain why some monopoly or oligopoly firms hold their prices below prices they could otherwise gouge as a monopolist or oligopolist.<sup>52</sup>

Thus, an alternative strategy to extracting the maximum gains from a deal through, say, obtaining gouging prices is to be seen to be acting fairly. Such behaviour is generally rewarded, with the dealee performing her obligations beyond the required standards. Fair behaviour can induce a virtuous cycle.<sup>53</sup> There is an increasing body of evidence suggesting that when offered a trust contract

a substantial number of individuals will both pay higher prices and extend higher levels of effort than narrow self-interest would dictate. When offered the same choices plus the possibility of obtaining a monetary sanction if the promisor shirks, the average price offered by buyers and the average effort given by sellers was lower. Without coercive enforcement, reciprocal fairness generates high levels of performance. But once the interaction is backed by coercion, reciprocity declines and overall performance is reduced.<sup>54</sup>

The term 'resentment' suggests the resenter is responding to more than mere non-fair behaviour, but to perceived highly unfair behaviour. In which case, the dealor's behaviour has to be perceived as sufficiently extreme to invoke an extreme response from the dealee. The point at which the dealee will read the dealor's behaviour as being so unfair as to invoke sanctioning or punishing behaviour by the dealee will

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<sup>51</sup> Fehr and Schmidt, above n 17, 834.

<sup>52</sup> See Daniel Kahneman, Jack L Knetsch and Richard Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76 *American Economic Review* 7, 8.

<sup>53</sup> Scott and Stephan, above n 23, 577.

<sup>54</sup> Ibid 579.

depend very much on how the dealee assesses where the optimum fairness line is drawn, and how she will assess the point at which the dealer has gone too far and crossed her resentment line. It will also depend on the alternative options open to the dealee. As the dealee has the power to punish it is wise for the dealer to gain a sense of where lies the dealee's line of resentment. The better the dealer knows about the dealee's character and world view the more accurate the dealer's assessment of the dealee's line of resentment, that is to say, the dealee's tipping point.

It can be speculated that the unfairness tolerance will be higher or lower than, say, the 25 per cent average that can be implied from ultimatum bargaining game outcomes depending on market conditions and other factors that lead to greater or lesser degrees of dealee deference. In competitive markets the tolerance might be quite low because the buyer (dealee) has other purchasing options and because she feels affronted by offers that are substantially above the going market price. Of course, rational choice theory would claim that, generally, purchasers will seek to maximise their own utility by shopping for the lowest price. Transaction theory would add a degree of sophistication to this claim by postulating that a person will not seek the lowest price if the search costs for that price exceed the difference between the price on offer and the likely amount of the lowest price. Deal theory does not necessarily seek to contradict these claims. It does, however, offer the additional insight (prompted by the ultimatum bargaining game) that dealees will also be motivated by the desire not to feel exploited. This in part explains the strange behaviour of tourists from high-income countries haggling at excruciating length in marketplaces in low-income countries over the price of a particular good being sold in a village marketplace. Often the price differences being haggled over are trivial to the tourist. The haggling seems to stem more from the tourist's desire not to feel that they are being played for a sucker than from any real interest in gaining the lowest possible price.

There is another possible way of understanding the way that a dealee's resentment tipping point can vary under differing circumstances. Generally, it might be said that we are hierarchical animals. From this it follows that a person who has a lower standing on the hierarchy will yield to a greater or lesser degree to a person at a higher standing. The greater the hierarchical difference, the greater the degree of unfairness tolerance by the person of lower standing. Assume also that our social structures and interactions reward initiative. That is, human progress is to some degree driven by conscious and unconscious rewarding of the initiator. Admittedly, there are situations, particularly in some organisations and businesses, where taking initiative is severely punished (through loss of face, demotion, or dismissal) if the initiative is perceived to have failed. This can, of course, discourage initiative taking. Putting that to one side, and assuming a general position where initiative is rewarded, it is possible that a deal proposer enjoys a privileged position relative to the responder, and is thus accorded a greater degree of unfairness tolerance than would otherwise apply. As an example, if a potential employer makes the first move by offering a specified wage it can be speculated that the potential employee will accept the offer, providing it is not perceived to be too unfair.

The suggestion here is that there is a relationship between the perceived power balance between the parties and the unfairness tolerance of the perceived weaker party. Further claims can be made on the basis of these assumptions. First, the power balance between the parties during the course of a deal relationship can change. Second, each party may perceive their own, and the other party's, bargaining power differently, relative to the other party. Parties may also overestimate or underestimate their own and the other party's relative bargaining power.

The unfairness tolerance of the weaker party is not merely explained by hierarchical deference and initiator reward; the weaker party is also acting in her own self-interest. There is often a cost to the weaker party of punishing the stronger — as she will often also be punishing herself. Take an example of an employee who believes she is being unfairly underpaid and is considering punishing her employer by failing to undertake some of her assigned tasks. Doing this exposes her to the risk of being caught out and the employer firing her. The employee will therefore weigh up the degree to which she is resentful with the risks of being caught and likely extent of any retaliation by the employer.

The dealee's resentment, however, can be costly to the dealer. As an example, an employer who pays her employee a wage well below the market rate may suffer an employee who punishes her by shirking.<sup>55</sup> The employee may undertake her tasks poorly and become unreliable in the performance of her duties. Similarly, a resentful party to a non-employment contract may well fail to perform her obligations to the standards they would if she were not resentful. The problem the dealer faces is that it is usually difficult to detect whether shirking is actually taking place and the extent of potential losses that are being suffered as a result. Because of the risk of retaliation, dealees rarely announce their unwillingness to perform their promised obligations, instead they 'typically affirm solidarity, protest helplessness in the face of intractable problems, or act in subtle ways that are difficult to evaluate'.<sup>56</sup>

On the basis of insights offered by the ultimatum bargaining game, it can be posited that in the real world a dealer who is sensitive to the risks of being perceived as acting unfairly and consequently being punished by the dealee will, if possible, attempt to assess the dealee's tipping point. The less knowledge the dealer has about the dealee's tipping point, the more conservatively the dealer is required to act to avoid resentment. The more knowledge the dealer has, the closer she can push the deal towards the tipping point. Putting matters more positively, pre-deal negotiations may in part involve the parties getting to know each other better so that they can reach an agreement that both perceive to be fair so that they will be both committed to the full performance of the deals. That is, they may both

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<sup>55</sup> Jedediah Purdy, 'The Promise (And Limits) of Neuroeconomics' (2006) 58 *Alabama Law Review* 1, 26; Mark F Schultz, 'Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law' (2006) 21 *Berkeley Technology Law Journal* 651, 656.

<sup>56</sup> Scott and Stephan, above n 23, 568.

search out how the other is feeling about the proposed deal to ensure there is no resentment.

### E *Cheat and Bully Strategies*

Recall that when proposing a deal, the dealor will make a cost-benefit calculation that takes account of the potential costs of offering, and undertaking, a deal that the dealee perceives to be unfair. The potential costs include the 3Rs costs of regulation costs, reputation costs and resentment costs. A dealor may, however, seek to mitigate these costs by using a cheat or bully strategy. In using a cheat strategy, the dealor assesses she can mitigate 3Rs costs because (she calculates) the dealee and the regulator are unlikely to discover the deal is unfair, or if they discover it to be unfair it will be too late for them to inflict 3Rs costs. Using a bully strategy, the dealor calculates that even if the dealee is aware the deal is unfair, the dealee has nowhere else to go. The dealor calculates that the dealee will decide that the unfair deal is better than no deal at all, and that any potential 3Rs costs will not cause any real damage to the dealor. Bully deals might be an available strategy where the dealor is a monopolist.

Taking a marketplace perspective, markets can be described as clean or dirty; and international treaty negotiations can be described as taking place in clean or dirty international settings. A clean marketplace, for instance, is one in which unfair contracts are the exception rather than the rule. Here there is healthy competition, the 3Rs costs play an important role in disciplining dealor behaviour and the environment for cheat and bully strategies do not exist. In a dirty marketplace unfair deals are commonplace. Any disciplinary effect the 3Rs costs might have are mitigated by the widespread use of cheat and bully strategies. Dealors are able to make effective use of cheat strategies, for example, by charging prices in excess of those they could charge in a clean market. In a dirty marketplace, a vast array of tactics are available for cheat strategies. They include obscuring the visibility of competing prices by heavily using advertising and promotional campaigns to draw attention away from the price competitors. Other tactics involve competing with complex pricing systems that render product and price comparison difficult if not impossible. Cheat terms can appear in consumer contracts, which might include hidden fees, excessive penalty clauses, hidden kick-back arrangements with third parties, and so on. Cheat strategies can include neutralising potential reputation costs by using feel-good advertising campaigns and public relations exercises to enhance the dealor's reputation undeservedly. A bully strategy might involve collusion with potential competitors to avoid competing on price or service and product quality.

In the marketplace, perceptions of unfairness play a central role. In a dirty marketplace the unfair dealor engages in a course of conduct through its standard contracts and other mechanisms to hide the unfair characteristics of the deal from the dealee, or simply disregards what the dealee might think about the fairness or otherwise of the deal.

### III WHAT IS AN UNFAIR DEAL?

#### *A Introduction*

Recall that a central purpose of our analysis is to understand why parties enter into unfair deals. This prompts the question as to what is meant by an unfair deal. Arriving at an answer to this apparently straight forward question is not easy. To begin with, the term has a somewhat chameleon-like quality. At times it refers to a particular dealee's perception of unfairness — and indeed, it also refers to the dealor's perception of what the dealee perceives is unfair. At other times the term 'unfair' has a public meaning — either in the form of the general public perception of unfairness, or in the form of definitions of fairness concepts which are crystallised in laws. In some contexts unfairness is not consciously framed as a moral question — for example, where an innate or visceral response arises from a dealee's perception that she has been screwed by a deal. In other contexts, notions of unfairness are a consciously moral concern. Although these different formulations of unfairness appear to be discrete, in reality these formulations of unfairness bleed into each other. Our innate sense of unfairness, for example, is doubtless informed by moral concerns, whether we are conscious of this or not, and articulated moral concerns about fairness maybe simply narrow self-interest in the guise of higher principle.

Unfairness can be viewed from the perspective of an individual dealee, or from society's perspective. The social perspective may take shape as a generalised conception of unfairness (discoverable, perhaps, by public opinion surveys), or it might be fairness as crystallised by the law. In any event the two general perspectives are not mutually exclusive of each other.

Unfairness can also be viewed internally — from a party's particular perspective, which is to say from a subjective perspective — or externally, from the perspective of an outside observer. When we speak of a cheat strategy to mitigate 3Rs costs regarding an unfair deal, we cannot be speaking of unfairness as perceived by the dealee, because the dealor is deliberately hiding information from the dealee that might provoke her resentment about the deal. So here, unfairness needs to be assessed by an observer external to the deal to assess whether it is unfair. This will require placing a notional dealee in the position of the actual dealee. The notional dealee is taken to be fully informed about the nature and consequences of the deal (that is, the notional dealor is placed in the un-cheat position). If the observer determines that the notional dealee would perceive the deal to be unfair, then it can be said to be unfair. Putting it another way, the deal can be said to be unfair if no rational dealee in the un-cheat position would accept the deal, assuming other reasonable alternatives were available to the dealee.

The term 'unfairness' is also troublesome because although on the surface it suggests a relatively stable meaning, in reality it rests upon a highly unstable substratum. To begin with a dealee, a dealor, an observer and the law may each hold very different assessments of the fairness of a particular deal. The term

can imply a highly subjective assessment by the parties. As mentioned above, a dealee's response to a perceived unfair deal can be visceral if she thinks she has been exploited. 'Unfairness' is a term that also implies that it is not confined to subjective considerations, and that objective criteria can also apply. In both the subjective and objective states moral considerations can be applied. But 'morality', like 'unfairness', has an unstable meaning. It suggests both purely subjective assessments of morality — that might have little or no bearing on socially defined morality (if there is such a thing) — and a more 'objective', socially or externally defined meaning. The term suggests that it is determined by generally accepted conceptions of appropriate social and personal values.

We will side step a morals-based inquiry for a moment to attempt to avoid indeterminate (and possibly interminable) debates. There is no suggestion here that these questions are not central to considerations about unfairness. Nor is it suggested that questions of morality can or should be considered as being in some way independent of questions about unfairness. Rather, morality is seen to be important, but mysterious. We need therefore to suspend questions of morality for a moment for analytical purposes, and not because it is a side issue. Rather it is the reverse — morality so dominates the unfairness discourse that it obscures from view other operatives upon our sense of fairness and our behavioural responses to perceived unfairness.

### B *What is Unfair?*

Our personal sense of fairness (and unfairness) is informed by a limitless range of sources, including our upbringing, friends, associates, parents and school, and by stories, TV shows, the law, and so on. The terms 'fairness' and 'justice' are generally used interchangeably as lay terms. When, for instance, we refer to our 'sense of fairness', we might equally be referring to our 'sense of justice'. The Oxford English dictionary defines 'justice' as having a meaning that includes '3. a. Conformity (of an action or thing) to moral right, or to reason, truth, or fact; rightfulness; fairness; correctness; propriety'.<sup>57</sup> Justice, as generally understood, therefore comprehends notions of fairness. Justice tends to be thought of as establishing principles and rules that are fair (substantive fairness) and applying them in a procedurally fair way (procedural fairness). Procedural fairness is generally thought of in lay terms as applying principles, rules or policies in a way that treats like cases in a like fashion, and not favouring one person or group over another.

The bounds of any particular aspect of justice or fairness appear at first to be something upon which it is impossible to gain consensus. John Stuart Mill noted in 1863 that not only have

different nations and individuals different notions of justice, but in the mind of one and the same individual, justice is not some one rule, principal, or

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<sup>57</sup> John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (Clarendon Press, 2<sup>nd</sup> ed, 1989).

maxim, but many, which do not always coincide in their dictates, and in choosing between which, he is guided either by some extraneous standard or by his own personal predilections.<sup>58</sup>

Henry Sidgwick attempted in the later part of the 19<sup>th</sup> century to develop a system for understanding the contents of ‘justice’ and found it did not furnish a single definite principle but

a whole swarm of principles, which are unfortunately liable to come into conflict with each other; and of which even those, that, when singly contemplated, have the air of being self-evident truths, do not certainly carry with them any intuitively ascertainable definition of their mutual boundaries and relations.<sup>59</sup>

These observations suggest that notions of justice and fairness are hopelessly relativistic and unascertainable. A further problem with nailing down what we mean by fairness (and justice) is that our assessments of fairness tend to be subject to cognitive biases. As Kaplow and Shavell observe, we tend to favour assessing fairness from an *ex post* perspective. That is, from the perspective of events that have happened, rather than from the more abstract *ex ante* perspective. If, say, a student is expelled from a school, we are prone to assess the fairness of the expulsion from the particularities of the expulsion. We tend not to more rigorously assess its fairness against *ex ante* principles. The problem with this is that *ex post* assessments are more likely to take account of factors that would be considered irrelevant from an *ex ante* perspective, and which would invariably lead to longer term unfair outcomes if applied in the same way to future similar circumstances. According to Kaplow and Shavell:

The *ex post* perspective of many notions of fairness helps explain their broad appeal. When policy analysts or members of the public at large consider what rule seems fair in a given situation, we tend to focus ... on what has actually happened, for that is what we see in the case before us. We do not tend to focus on what did *not* happen (even when that may have been, *ex ante*, a much more likely outcome), and we do not directly observe the *ex-ante* choice situation and how behavior may differ in the future as a consequence of the legal rule that we choose to apply to the situation at hand.<sup>60</sup>

Despite the (apparently hopelessly) relativistic and self-serving nature of notions of fairness, recent research into the ways and circumstances in which people defer to authority suggest that there is more commonality about our assessments of fairness than suggested by Mill and Sidgwick. Tyler and Huo undertook a study of encounters with the police and judges by criminal defendants and others in Los Angeles and Oakland during the turn of the 21<sup>st</sup> century. The study found that

<sup>58</sup> John Stuart Mill, *Utilitarianism* (Parker, Son, and Bourn, 1863) 81.

<sup>59</sup> Henry Sidgwick, *The Methods of Ethics* (MacMillan, 2<sup>nd</sup> ed, 1877) 326.

<sup>60</sup> Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press, 2002) 50.

the subjects of official interactions were more inclined to defer to officials if they perceived them to be acting with procedural justice.<sup>61</sup> The study also found that there was a substantial degree of consistency across ethnic groups of perceptions about the fairness and justice of the conduct of authorities.<sup>62</sup> This suggests that notions of fairness are not as relativistic and unascertainable as may first seem to be the case.

Other research shows the significance of the relationships between lay perceptions of fairness (including the degree to which authorities and institutions are perceived as acting justly) and perceptions about the legitimacy of those authorities and institutions. Perceived legitimacy impacts upon the degree to which members of society adhere to the rules and directives of authorities and institutions, which in turn impacts upon social and political, social and economic stability. Rothstein writes that in November 1997 he was invited to Moscow to deliver a lecture to Russian academics, politicians, and bureaucrats about the Swedish civil service.<sup>63</sup> After his lecture, a Russian tax official asked why it was that Swedes paid their taxes and Russians did not. The Swedish government receives 98 per cent of the taxes that Swedish taxpayers are required to pay, while Russians pay 26 per cent. The reason why Russians do not pay their taxes, it seems, is because, although they want publicly funded services such as health care, education, pensions, defence, and so forth, they correctly assess that most other taxpayers do not pay their taxes, and that even if they did, a significant proportion of the money would go to corrupt officials. It would appear, then, that in Russia trust in the system is in short supply. An effective taxing regime therefore depends upon lay assessments of the fairness of the taxing system, and most significantly the procedural fairness of the conduct of its officials. The system simply fails to effectively operate if there is widespread belief that it does not operate fairly.

Studies of employees show that they are motivated by their evaluations of the legitimacy of corporate rules. If employees experience corporate conduct that they perceive to be procedurally just, they are more likely to be viewed as legitimate and will more likely be obeyed.<sup>64</sup> As Tyler observes:

Findings consistently suggest that the legitimacy of authorities and institutions is linked to the fairness of the procedures by which they exercise their authority. These findings link legitimacy to the degree to which institutions are 'just' institutions. Hence, the pursuit of public support requires institutions and authorities to adhere to lay principles of justice. The effort to create and maintain legitimacy, in other words, causes institutions to focus on those who are being led, and their conceptions of procedural justice. It is only when the perspectives of everyday members are enshrined

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<sup>61</sup> Tom R Tyler and Yuen J Huo, *Trust in the Law* (Russell Sage Foundation, 2002).

<sup>62</sup> Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) 278.

<sup>63</sup> Bo Rothstein, 'Trust, Social Dilemmas, and Collected Memories: On the Rise and Decline of the Swedish Model' (2000) 12 *Journal of Theoretical Politics* 477, 478.

<sup>64</sup> Tyler, above n 62, 274.

in institutions and in the actions of authorities that widespread legitimacy will exist.<sup>65</sup>

The general perception that an institution is acting fairly can build it reservoirs of support, which can sustain the institution during times of crisis. Studies of community responses to the politically controversial US Supreme Court decision of *Bush v Gore*,<sup>66</sup> for instance, show that perceptions that the Court generally acts fairly had over time built a reservoir of support for the institution's legitimacy, which played a role in muting public disquiet about the decision.<sup>67</sup> These observations are consistent with Weber's contention that the most significant of several reasons why authority is obeyed in Western societies is because authority is exercised rationally, and in ways consistent with broad principles of procedural justice.<sup>68</sup>

These studies and theories about lay perceptions of justice and fairness usefully inform our understanding of 'fairness' for the purposes of deal theory. They also highlight the significance of the connection between perceptions of fairness and perceptions of legitimacy. Legitimacy, in turn, explains why institutions within society are or are not able to function effectively within society. Deal theory, however, explores these interactions within the context of transactions, or deals, between parties. It explores how we individually and collectively behave in ways that can regularise the conduct of those in a dominant position (whether as the counterparty to an agreement, or as a dominant actor within an institution or other organisation). It is our resentment of perceived unfair conduct that may lead us to 'punish' the offending conduct, thereby under certain circumstances providing a disincentive for dominant parties to act in perceived unfair ways.

For the purposes of analysis of deal theory, a distinction is made between fairness, non-fairness and unfairness. We each tolerate in our daily lives all kinds of slights and minor injustices, and no doubt are daily authors of the same. We can perhaps describe these tolerated breaches of fairness as acts of 'non-fairness'; acts that we consider not to be fair, but not intolerably so. Actions by others that we consider to be intolerable and deserving of some kind of retribution are to our mind unfair. Unfairness is to our minds categorical, and invites a visceral response — the desire to 'punish' the offending party in some way. We each have ways of privately defining unfair conduct and seeking to punish the offending behaviour.

What might become immediately obvious to the reader is that the process by which we each privately categorise the deeds that are intolerably unfair and deserving of punishment is a microscopic playing out of the essential features of our legal and regulatory system (our justice system). We each carry within our heads a micro-system of justice, which defines and seeks to 'punish' unfair behaviour. The micro-

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<sup>65</sup> Ibid 284.

<sup>66</sup> *Bush v Gore*, 531 US 98 (2000).

<sup>67</sup> Tyler, above n 62, 281.

<sup>68</sup> Max Weber, *Economy and Society* (G Roth and C Wittich eds, University of California Press, 1968) 941–55.

system to some degree or other is informed by and interacts with the macro-system of justice. Deal theory is interested in that interaction.

The interaction between the macro- and micro-systems could be described as an interaction between the public sphere and the private, although that distinction is not altogether helpful. We can speak about the micro-system in either the personal or the collective sense. In the collective sense we are not speaking of my private micro-system, or yours, but all our micro-systems collectively. In this sense the micro-systems as a collective are not within the private sphere — they in some sense are a shadow form of the macro-system, but without its institutions and express rules. It is useful, then, for analysis to distinguish between an individual micro-system and the collective sum of our micro-systems. If we speak of a micro-system in an individual sense, we are talking about the micro-systems of the parties to a particular deal.

It can be said that if a macro-system reflects, to a considerable extent, the values and world view of the collective micro-systems of a society, this indicates that there exists in that society an effective legal system (in terms of society's capacity to enforce unfairness prohibitions and remedies). It also suggests that the society is democratic (in the sense of giving legal effect to the general desire and values of the members of that society). We can describe this as a responsive macro-system. Such a system would not (and in making a normative claim, should not) to some degree or another merely reflect the values and world view of the collected micro-systems; it would (and should) influence them as well. In other words there would be an iterative communication between the two systems.<sup>69</sup>

Perhaps this describes precisely how our political system works, although we cannot be sure. Buried in these descriptions is a normative claim. I am imagining that in a modern democratic society our collective micro-systems are inherently 'fair' and 'just'. I do not imagine that we collectively would desire to use the sheer weight of majority sentiment to inflict 'unfair' outcomes on a minority; but I must admit to that possibility. And given that the micro-systems are influenced by the values, perspectives and rules of the macro-system, it is also possible that a harsh and mean-spirited macro-system could well induce the collective micro-systems to harmonise with its nasty world view.

We will assume for a moment that the collective micro-systems are essentially egalitarian. From this it follows that a deal can be said to be unfair without having regard to the social or economic status of the parties. So a deal could be said to be unfair regardless of whether the dealee is rich or poor, or from the upper class or the lower class. This starting assumption needs to be relaxed somewhat to accommodate the proposition put in this article that unfairness tolerances can vary as a result of the perceived or actual power relationship between the parties.

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<sup>69</sup> In a dictatorship, in which the macro-system is unresponsive, the macro-system would be used to influence or force the collective micro-systems to conform to its views of fairness. The macro-system would, to a substantially reduced degree, be influenced by the perceptions of fairness of the collective micro-systems.

A poor person believing she is in a weak bargaining position may tolerate a greater degree of non-fairness before she resents the deal. Thus, for analytical purposes at least, the optimum point of fairness in a deal is determined from an egalitarian perspective. From these propositions, the normative claim can be made that a society that seeks to be egalitarian will or should seek to narrow the unfairness tolerances of deals that take place within that society.

There is another more pragmatic aspect to the ideal of harmonising the macro- and micro-systems. Two of the 3Rs costs, namely reputation and resentment, can inflict serious damage upon a dealer if the audience for the reputation claims is sufficiently large and the resentment response is sufficiently severe. If a regulator were to harmonise its remedial system with the collective micro-systems to trigger a retaliatory response against an unfair dealer, this may well prove more effective in moderating future dealer behaviour than by merely relying on the standard tools for enforcement such as using penalties or entitling parties to sue for compensation. Some regulators do in fact enlist two of the 3Rs, namely the reputation and resentment costs to moderate dealer behaviour. As an example, the regulator who requires a dealer who has breached the law by misrepresenting the virtues of a product to publish a public apology and correct the claims made about the product. Here the regulator is effectively inviting each of our micro-systems to treat the dealer warily or boycott the dealer.

*C Macro and Micro Perceptions of Fairness as a Moderator of  
Selfish and Selfless Behaviour*

Yet another function of the relationship (ideally) between the macro- and micro-systems is to regulate or moderate the moments, and degrees to which, we act or should act either selfishly or selflessly. As a society we benefit from each of our members acting at times either selfishly and selflessly (that is to say, cooperatively). A society that is overly selfish, it can be supposed, becomes mean-spirited, corrupt and brutal. A society that is overly selfless, on the other hand, can be claimed to be one that loiters aimlessly; becalmed upon a windless sea. It lacks direction, vitality and, ironically, cohesion. A selfless society (or group) will however tend to act in a highly cooperative way when it is seriously threatened or suffering privations. Here a high degree of cooperation is required for survival.

Organised selfishness (a process that includes the marketplace), on the other hand, requires a level of cohesiveness amongst self-interested players to function even in good times. That is, 'beneficial' selfishness usually requires a degree of organisation (and paradoxically, cooperation) that may be lacking in a totally selfless society. An overly selfless society operates well below its economic potential, leaving its members more financially impoverished than needs be. In an overly selfish society, on the other hand, the selfish prevail and the selfless are effectively enslaved, to the detriment of the society as a whole.

Ideally, therefore a society needs its members to act to appropriate degrees both selfishly and selflessly. Arguably, a switching or moderating system is needed to

ensure the proper interplay of these general behaviours. The claim here is that our micro and macro characterisations of ‘unfairness’ play a critical role in the operation of that moderating system. The point at which unfairness occurs may well mark the point at which selfish behaviour becomes destructive, or at least counterproductive. So, an ideal society relies upon the effective operation of an unfairness moderator — which, when it works well, helps maintain equilibrium between overall selfish and selfless behaviours. We can see here how central our internalisation of a sense of fairness is in ensuring that we personally are not taken undue advantage of by the selfish behaviour of others, and to ensuring the overall functioning of a well functioning society.

The social benefit that can be gained by selfish behaviour was identified some time ago by Adam Smith. His famous insight is that a society of members pursuing their self-interest magically (as though there was an invisible hand guiding society) leads to the overall benefit of society. As he said, it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.<sup>70</sup> The insight Smith offered is, of course, highly generalised as this magical process does not always work; markets are manipulated, some members of society are excluded from the marketplace or enter on seriously disadvantaged terms, and so on.

John Rawls also offers insights into how selfish behaviour can notionally be attuned to deliver social benefit. He proposes that it is possible to imagine the design of a fair society by placing imagined players in the ‘original position’. Here the players stand behind a veil of ignorance where they design a set of rules for governing an imagined future society. After designing the rules the players enter the society. However, when designing the rules they are unaware of which position they will enter and what status they will hold in the new society. It is therefore in their self-interest to design the rules as fairly and non-discriminatory as possible. The Rawlsian game operates rather like the rule at a birthday party which requires that the child who divides up the cake will take the last remaining portion. In this way self-interest is harnessed so as to attain the general good. It is therefore in the best interests (the selfish interests) of those in the original position to design a society as fair and equal as possible because when they enter the world they have designed they may well end up in the least advantageous position.

Rawls’ (moral) pre-supposition is that society should be egalitarian — which is to say, self-consciously cooperative. What is interesting is the apparently paradoxical

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<sup>70</sup> See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, the Glasgow Edition of the Works and Correspondence of Adam Smith* (Wogan, Gilbert and Hodges, 6<sup>th</sup> ed, 1801) 15. A fuller context for the quote is as follows:

But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them ... It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk of them of our own necessities but of their advantages.

operation of the original position, which harnesses self-interest in the original position to attain an egalitarian society. And in other ways, Smith's invisible hand paradoxically utilises individual self-interest to enhance the economic and social benefits for society more generally.

Returning to the meaning of unfairness, Rawls' perspective on how we come to specify what are fair terms and cooperation is interesting. He asks:

Are they specified by an authority distinct from the persons cooperating, say, by God's law? Or are these terms recognized by everyone as fair by reference to a moral order of values, say, by rational intuition, or by reference to what some have viewed as 'natural law'? Or are they settled by agreement reached by free and equal citizens engaged in cooperation, and made in view of what they regard as their reciprocal advantage, or good?<sup>71</sup>

Rawls responds by saying the best answer is the last; that is where there is an agreement between citizens themselves reached under conditions that will set rules that are fair for all — these conditions exist in the 'original position' posited by Rawls.<sup>72</sup>

There is in the accounts of Smith and Rawls a distinct air of artificiality. In Smith's marketplace the participants are well informed, are of equal means and have equal access to the marketplace. In Rawls' original position the imagined players are free, equal, moral (at a basic level, at least) and rational. Under deal theory, by contrast, the players are hierarchical, constrained by bounded rationality and their 'morality' is largely confined to questions about whether they intuitively consider the deal to be unfair or not. The players in deal theory, for the purposes of analysis, are artificial, but nevertheless are closer in nature to real world players than many other theories permit. Another difference is that under the Rawlsian and Smithsonian systems the outcomes are ultimately fair, whereas under deal theory the possibility of an unfair deal is ever present.

#### *D Analysing Unfairness*

Unfairness, for present purposes, can be analysed from the perspective of a particular deal. It can also be seen from a marketplace, or other sub-societal or societal, perspective. A more particularised analysis might pay particular regard to the micro-systems of the parties to a particular deal. A more contextualised analysis, on the other hand, will attempt to assess the unfairness boundaries as set within the collective minds of the players in the marketplace more generally. Under either form of analysis, unfairness is established by the parties to a deal (or the players in the marketplace), rather than solely by systems or institutions external to the parties themselves. That is, unfairness is not primarily established by the

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<sup>71</sup> John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Belknap Press, 2001) 14–15.

<sup>72</sup> *Ibid* 15.

operation of the law, regulations or externally devised moral or ethical standards. For the purposes of analysis, the micro-system fairness boundaries may well be influenced by external standards, laws and regulations, but are not imposed by them — as we will see in the discussion about folk-law, in the next section.

Superficially, it might be claimed that macro-system fairness standards are more discoverable than micro-system standards because macro-system standards can be found in written laws and regulations and the like, whereas micro-system standards exist within our heads. This claim, however, over-assumes the tangibility of the external standards; that is, their discoverability merely as words on pages or on computer screens. There is endless debate, for example, about the objective meaning of the words in statutes and constitutions. The claim about the more discoverable nature of the macro-system also underestimates the capacity of parties to a deal to be able to make relatively accurate estimates of each other's fairness standards (assuming each has a reasonable knowledge about the other, and there are not distorting factors at play, such as agency problems and hyperbolic discounting).<sup>73</sup> It also underestimates our capacity to interrogate the ways in which our micro-systems define unfairness. We can make generalised assessments and speculations about the workings of our micro-systems of justice, use our intuition to estimate the general standards of fairness held by the majority of players in a marketplace, or divine these standards by using qualitative or quantitative research methodologies.<sup>74</sup> We can also use the ultimatum bargaining game, as we have seen in the discussion above, and also apply behavioural studies, and other forms of social science methodologies to gain insights into the operation of micro-systems.

#### IV THE FOLK-LAW

The ways in which our individual and collective micro-systems interact with the macro-system — and more specifically the law — is interesting. As mentioned, in setting the optimum point of fairness and our unfairness tipping point for a deal, our micro-systems will have formed a (sometimes hazy) conception of fairness that is in part influenced by, but not determined by, our understanding of what the law says. This understanding is invariably informed by what we might each gather

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<sup>73</sup> See below Part VI.

<sup>74</sup> Macaulay suggests the following approach by lawyers for aligning the law with the true intentions of parties to a contract:

Assuming that cost barriers permit, lawyers may be able to show judges what would be fair in a particular commercial context. The judges and the lawyers involved might never define 'fair' in a precise fashion that would satisfy a critic or offer answers to judges and lawyers in future cases. Nonetheless, all involved might accept that the results seemed to fall within an intuited zone of fairness. This process, however, might be very costly because it could require an exploration of the full commercial context. Of course, there is a risk that the judges might get it wrong, and cost barriers to proving the full context of a transaction would likely increase that risk. However, there is no reason to presume that the process always will be unduly costly or judges will always get it wrong.

Stewart Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 *Modern Law Review* 44, 67.

from TV shows, newspaper reports, stories told by our friends and so forth. All these sources influence our own framing of values, and help us form our imagining of what the law says. The law as we collectively and individually imagine what it says is in essence folkloric — or folk-*law*-ic. Folk-law as we individually and collectively imagine it informs our micro-systemic formulation of unfairness.

The macro- and micro-systems interact in another way. As mentioned, each of our micro-systems has an impressive capacity to punish perceived unfair conduct. The offender's (dealtor's) reputation can be trashed, and the hurt party can underperform her obligations or act in various ways to covertly sabotage the interests of the 'offender'. Sometimes, however, this might not be enough, and the harmed party will seek to enlist the agency of the macro-system to gain appropriate retribution for the other party's unfair behaviour. We each imagine (or at least hope), it can be said, that we can call upon the aid of the macro-system (the law) if we are subjected to relatively serious acts of unfairness. We believe and hope that it has defined unfairness in approximately the same way we have, and that the macro-system will parcel out punishments or provide us remedies on our behalf and provide a means for us to demand compensation.<sup>75</sup>

The folk-law is hazy in outline and is carried in the minds of every citizen. It is the real law as imagined — and the imagined law is a mix of what each citizen thinks the law says and what she would like it to say. The imagined law may at times be harsher and at other times more forgiving than the real law. The folk-law also reflects (at a deep and unarticulated level) each citizen's sense of fairness. Rawls would possibly equate folk-law with what he describes as a 'public conception of justice'.<sup>76</sup> As he sees it, a modern democratic society is based on the idea of citizens as free and equal persons, and the idea of a well ordered society. In his view, the public political culture of a democratic society and its conception of itself as a system of social cooperation are essential to its functioning. And an essential organising idea of social cooperation is the idea of fair terms of cooperation, which in turn specify 'an idea of reciprocity, or mutuality'.<sup>77</sup> He adds that: 'The idea of cooperation also includes the idea of each participant's rational advantage, or good. The idea of rational advantage specifies what it is that those engaged in cooperation are seeking to advance from the standpoint of their own good.'<sup>78</sup>

Folk-law is more egocentric than Rawls' public conception of justice. Under Rawls' system there is a shared public view of rational advantage or good. Folk-law, on the other hand, is in the mind of each person. Folk-law, however, is subject to many and varied influences, including by what people believe the real law claims to be unfair. It is the real law as we imagine it to be — that is, as we think it is and as we would like it to be.

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<sup>75</sup> Punishment here is not limited to punishment in the criminal law sense. It includes compensation or damages for breaches of agreements, and for torts.

<sup>76</sup> Rawls, above n 71, 5.

<sup>77</sup> Ibid 6.

<sup>78</sup> Ibid.

In terms of a particular deal, if the dealee (and possibly the dealer) imagines that the law says that a particular behaviour regarding the deal is impermissible (whether or not the law *actually* states that) then this imagined standard assists with establishing an observable optimum point of fairness for the deal, as well as influencing the dealee's perceptions of unfairness regarding the deal and her unfairness tipping point. This line will often be a hazy, contingent and shifting. But if the dealer crosses the line, she risks retribution by the dealee.

The ultimate aims of society should not necessarily be to engineer the folk-law and the real law into lock-step conformity; there can be a creative and dynamic engagement between the two. Each can moderate and inspire the other. If, however, there is constant disharmony and miscommunication between two systems, this would suggest an unproductive relationship, and possibly indicate the existence of a dysfunctional or autocratic society. The challenge for lawmakers and regulators is to gain relative synchronicity between the two systems.<sup>79</sup> This is not simply a task of ensuring the players fully understand and internalise the (legal and regulatory) rules of the game, but to also ensure the laws and regulations make sense to the parties and reflect their deeper sense of fair play. Likewise, the real law would need to reflect to some reasonable degree the aspirations of fairness and justice of the holders of the folk-law.

In an ideal case, the relationship between the two systems, including the agency role of the macro-system for our individual micro-system, does not amount to a social contract in which we trade our birthright freedoms with the state in return for the state protecting and defending us. Rather, it is a joint enterprise in which both the micro- (individual and collective) and macro-systems operate to constrain unfair behaviour.

## V DEALOR MISCALCULATIONS OF HER OWN SELF-INTEREST

For completeness, we can turn briefly to the ways in which deal theory can provide insights into the ways in which the dealer can miscalculate her own self-interest by pursuing an unfair deal. As has been said, a dealer will either fleetingly, or in a more considered fashion, decide whether to propose a fair or unfair deal, and whether the 3Rs costs of an unfair deal could be mitigated by a cheat or bully strategy. We assume for the purposes of analysis that the parties to a deal will be acting self-interestedly and not altruistically. Dealers, it is suggested, are prone to

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<sup>79</sup> The problems that arise if the macro-system does not align with the micro-system can be illustrated by the following commentary by Macaulay regarding contract law:

We might decide that there is a high cost in legitimacy if the legal system comes to symbolise that contract rests on manipulations of forms and courts reject the substance of the real deal of the parties. At the very least, if our courts allow those who draft written contracts to impose terms inconsistent with expectations and the implicit dimensions of contract, we can expect reformers to demand that the law police those bits of private legislation that masquerade as contracts so that they are fair.

Macaulay, above n 74, 79.

making a number of miscalculations about their self-interest in relation to assessing 3Rs costs.

As mentioned, the more unfamiliar a dealor is about the dealee's world view and value set, the greater her risks of miscalculating the dealee's line of resentment. In addition, a dealor is prone to cognitive biases and behavioural effects that may lead to miscalculations. As an example, it would seem likely that she might be as equally liable to engage in the types of hyperbolic discounting assessments that consumers have been found to make when engaging in longer-term transactions, such as borrowing to buy a car or a house, or entering a pension scheme. It appears from a number of studies that humans have a tendency to place less weight on the future than on the present, so that we in effect discount future payoffs (this is the hyperbolic discounting effect).<sup>80</sup> As an illustration, people tend to prefer one apple today than two apples tomorrow.<sup>81</sup> On this basis it can be extrapolated that a dealor in proposing an unfair deal is likely to preference the short-term benefits the deal will deliver and discount the longer-term 3Rs. This may well explain in part the behaviour of the key Enron players. It is possible that they heavily discounted any likely future 3Rs costs, or simply assumed that the cheat and bully strategy they were using would be fully effective, forever.

In any event, the regulatory challenge is to work out ways of overcoming the effects of any hyperbolic discounting.

A dealor might also miscalculate because of agency effects. An 'agent' could be the dealor's employee. Adverse agency effects might arise where the agent's self-interest does not properly align with the dealor's self-interest. The agent might aggressively pursue an unfair deal on the dealor's behalf, realising that the dealor will probably suffer 3Rs costs eventually. The agent might, despite this realisation, pursue the deal because she will be rewarded by receiving staff bonuses for closing a deal, or will receive peer approval by her work colleagues, or will simply not care what impact an unfair deal will have on her employer (possibly because she resents the way she is treated by the employer and seeks to punish him).

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<sup>80</sup> Partha Dasgupta and Eric Maskin, 'Uncertainty and Hyperbolic Discounting' (2005) 95 *American Economic Review* 1290.

<sup>81</sup> See Ariel Rubinstein, 'Economics And Psychology? The Case of Hyperbolic Discounting' (2003) 44 *International Economic Review* 1207, 1209, who cites Thaler's experiments reported in Richard Thaler, 'Some Empirical Evidence on Dynamic Inconsistency' (1981) 8 *Economic Letters* 201. Rubinstein is dubious of claims that research data supports the hyperbolic discounting theory, he nevertheless offers a succinct description of the theory at 1209:

Ainslie and Haslam (1992) report that 'a majority of subjects say they would prefer to have a prize of a \$100 certified check available immediately over a \$200 certified check that could not be cashed before 2 years; the same people do not prefer a \$100 certified check that could be cashed in 6 years to a \$200 certified check that could be cashed in 8 years'. Findings of this type have been replicated with choices involving a wide range of goods (eg, real cash, hypothetical cash, food, and access to video games) and a wide range of subject populations. Most importantly, the results seem to be confirmed by our intuition.

## VI CONCLUSION

Deal theory, as proposed in this article offers an additional and alternative way of considering unfair or wrongful behaviour regarding 'deals'. Deals include contracting, negotiating and entering international treaties, as well as other forms of transactional behaviour between individuals, firms, agencies and national governments. Laws, policies and (to a lesser degree) analysis tend to consider unfairness and wrong-doing from the perspective of the harmed party, and the harm caused to them. In contract law, for instance, actions for breach of contract or concerning vitiating of consent are focused on whether the plaintiff has suffered injury and the nature, cause and extent of the injury. In considering vitiating factors, the focus is on any suppression or interference with the plaintiff's freely informed consent to the agreement. Of course, it is completely appropriate for the law to take this course. Deal theory, however, views transactions from the perspective of the initiator of a deal, and why she offers an unfair deal in the first place. Understanding the motivations and calculations made by the dealer can inform the development of public policy to lessen the incidence of unfair deals.

An unfair deal is often the result of vitiating factors. That is to say, a deal is unfair if (to some reasonably substantial degree) a fully informed dealee would consider it to be against her interests to accept the deal, assuming she had other reasonable alternative deals available to her that could be costlessly identified and negotiated. Unfair deals, in neo-classical economic theory terms, are sub-optimal and lead to the misallocation of economic resources. The costs of an unfair deal are not confined to the economy, it may also cause loss to the dealer from 'punishments' inflicted by the dealer in the form of one or more 3Rs costs. An employee believing she is being underpaid, for instance, may underperform her employment duties, causing losses that exceed the savings gained by underpayment.

The downside of unfair deals goes beyond the general economic and the individual dealer costs. Political and legal systems that tolerate the prevalence of unfair deals may suffer a lack of public support and legitimacy. This can impact upon social and economic stability. It is therefore in the interests of good governance and a well functioning society for there to be a rule making and enforcement environment that hardens the conditions for unfair deals to thrive. Developing the appropriate rules and policies to create those conditions requires deeper insight into the motivations for dealers to offer and enter into unfair deals.

For the purposes of analysis, it is posited that in general the person initiating a deal will make a rather crude cost-benefit analysis about offering an unfair deal. The costs, rationally understood and calculated, include the 3Rs costs of regulation, reputation and resentment. This article focused on the last of these three costs. A dealer, aware of the potential costs of an unfair deal, may seek to mitigate them by using a cheat or bully strategy. The cheat strategy attempts to hide the unfair aspects of the deal from the dealee. Under a bully strategy, the dealer is indifferent to the dealee's reaction to the unfair deal, and indeed seeks to reinforce the message

to the dealee that she has no other option but to accept the unfair terms and that any punishing behaviour will rebound upon her, causing her substantial loss.

How, then, can a particular deal be said to be unfair? An assessment can be made from the perspective of the parties to a particular deal or from the perspective of a notional well informed and disinterested observer. In making the assessment it cannot be assumed, for instance, that, just because a deal departs from the prices and terms of other similar deals in the marketplace, it is necessarily unfair. There maybe trade-offs taking place that render the deal fair. For example concessions may exist so as to encourage a longer term relationship between the parties. Also, deal theory posits that unfairness is conduct that is likely to invoke a serious negative reaction from the dealee — namely, the desire to punish by inflicting 3Rs costs on the dealer in response to the perceived unfairness of the deal. A dealee will tolerate some measure of ‘non-fairness’ for various reasons explained in this article. However, the dealee has a tipping point, or line of resentment, beyond which otherwise tolerated non-fairness becomes intolerable unfairness. It is at this point that the dealee is prepared to punish, even if doing so will, to some degree, harm her own self-interest.

Assessments made by a dealee about the unfairness of a deal are informed by fairness benchmarks. Under the conditions of the ultimatum bargaining game where both parties are aware of the amount of the stake, the optimum point of fairness is a 50–50 per cent split. In real life, however, these conditions rarely apply. Unfairness is therefore generally measured against a variety of factors including those which, it is thought, the law proclaims to be actionable. Misleading and deceptive conduct provides an example. Parties to contracts are usually not lawyers, or informed in any detailed way about the content of the law, and so for them assessments are made against what they think the law says. In this case, assessments are made against a folk-lawric standard. The folk-law is not a fantasy or simply the product of a self-serving imagination, rather it reflects to some degree an intuitive sense of fairness and justice. The content of folk-law is informed by the real law, and in a good society, the real law is informed by the folk-law’s intuitive sense of fairness.

A dealee’s desire to punish a dealer by imposing one or more 3Rs costs is triggered by a sense that an injustice or act of unfairness has been inflicted upon the dealee. Her desire to punish — because the dealer has played her for a sucker etc — can be quite visceral. It therefore makes sense, in a policy and legal setting, to harness the dealee’s desire and means for inflicting sanctions upon the dealer so as to promote fair dealings between parties. This might involve imposing transparency measures so that dealees can easily become fully informed of the nature of a deal, thereby reducing the opportunity for cheat strategies.

In conclusion, unfair deals are not good for the dealee, or society more generally. Hence our individual and collective aversion to such deals, and our instinctive desire to moderate dealer behaviour by punishing detected incidences of unfair conduct by inflicting 3Rs costs on the dealer. We have both a personal interest

in reducing and eliminating the possibility that we will be the victims of an unfair deal, and a social interest in the establishment of formal (macro-system) mechanisms, enhanced by the power of informal (micro-system) mechanisms, for discouraging the incidence of unfair deals. Healthy macro- and micro-systems have a mutual interest to rid society of unfair deals. Corrupt macro-systems may be less interested.

The challenge for legislators and regulators is to gain a more elaborated understanding of the motives and incentives for unfair deals, and to devise mechanisms to remove those incentives.



## **HUMANISING NEGLIGENCE: DAMAGED BODIES, BIOGRAPHICAL LIVES AND THE LIMITS OF LAW**

### ABSTRACT

The central query of this article is the extent to which the law of negligence should expand to better accommodate our human experience of personal harm and injury. As the following discussion explores in the context of human harms, negligence illustrates a continued preference for physical bodily harm in determinations of actionability. In the face of an emerging set of 'hybrid' claims which present hair-splitting scenarios, in having the look and feel of a conventional personal injury case but lacking the physical bodily damage strictly demanded, what is becoming increasingly apparent is the absence of a robust normative justification to guide the courts as to what, for the purposes of negligence, should count as actionable harm and what should not. The author argues that an analysis of the tensions around this issue reveals a pressing need to return to far more foundational questions around negligence and the role it plays for society. Providing an illustration of what this foundational approach might consist of, the author questions one of the most significant pillars of the reparative ideal in negligence: that physical bodily harm is experienced as universally and especially harmful and causative of serious loss. Viewing the assumptions which inform this ideal with the benefit of insights from behavioural science and litigation practice not only raises serious questions which go to the core of what negligence *is*, but ultimately raises doubts as to the potential of negligence to *ever* operate as an egalitarian system.

### I INTRODUCTION

**T**he central query of this article is the extent to which the law of negligence should expand to better accommodate our human experience of personal harm and injury. It is well recognised that the law of negligence falls far short of offering universal coverage in responding to harm. As Conaghan and Mansell note, '[w]hile some kinds of harms are easily assimilated within the traditional corpus of law, others do not lend themselves so easily to tortious characterisation'.<sup>1</sup> In social life, while it may seem obvious that a serious harm has been sustained, in negligence some claims quickly fall between the floorboards. This may be owing to the absence of fault, or the inability to show a causal link. However, of interest here are those kinds of harms which negligence struggles to

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admit, and those which it treats as thoroughly unproblematic. As the following discussion explores in the context of human harms, negligence illustrates a continued preference for physical bodily harm in determinations of actionability. Only on rare occasions does the damage concept acknowledge harms which flow from anything other than a physical bodily injury. On one hand, this seems to accord with commonsense given that many of us might think of a physical injury such as a fractured skull as evidently harmful. But where the *preference* for physical bodily harms in negligence operates perniciously is by virtue of what is generally excluded: harms, which though often just as serious and potentially corrosive of life, fail to manifest themselves principally through the physical body, but rather admit of a psycho-social nature.

That the damage concept operates so exclusively has attracted an extensive critical commentary across several decades. While negligence has been subject to widespread criticism for being unprincipled, inegalitarian and capricious, as well as embracing archaic views of humanity which smack of unreality, on the specific question of what harms negligence picks up (or does not), the concentration of literature comes not from mainstream torts theory, but feminist legal scholarship.<sup>2</sup> For some, it may be that questions of harm or damage were viewed as more derivative issues as to how negligence generally operates and the interests it generally protects,<sup>3</sup> but in feminist quarters, such questions have been central. Attention to what kinds of harms negligence embraces tells us much about the general operation of law, and in particular, to whom negligence speaks and whose interests it protects. Insofar as negligence has operated to *generally* exclude harms of a psycho-social character (an exclusion which in terms of formal equality applies to all), once we scratch below the formal surface of that policy, we find a less than universal impact or distribution. For example, an analysis of the damage concept illustrates a long-standing neglect of harms which women suffer as women. Tort law, as Conaghan argues, ‘while quick to defend and protect interests traditionally valued by men, is slow to respond to concerns which typically involve women, for example, sexual harassment or sexual abuse.’<sup>4</sup> In this respect then, if the aim is for a fair system, any reform agenda will need to pay close attention to the general and the particular operation of legal policy.

How negligence should develop to address these weighty concerns presents an enormous jurisprudential challenge. Negligence cannot accommodate all ‘harms’ so a choice must be made as to which are accommodated. As this article seeks to demonstrate, using case law developments in the UK as an example of a broader

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<sup>2</sup> See, eg, Martha Chamallas and Linda K Kerber, ‘Women, Mothers and the Law of Fright: A History’ (1990) 88 *Michigan Law Review* 814; Regina Graycar, ‘Damaged Awards: The Vicissitudes of Life as a Woman’ (1995) 3 *Torts Law Journal* 1; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002).

<sup>3</sup> See, eg, William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007) 223.

<sup>4</sup> Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’ (1996) 16 *Oxford Journal of Legal Studies* 407, 408.

phenomena, there is a real need for us to scrutinise far more deeply than we have before what kinds of injuries our legal frameworks address, and in particular, why. In light of an emerging set of claims which present hair-splitting scenarios, in having the look and feel of a conventional personal injury case but lacking the physical bodily damage strictly demanded, what is becoming increasingly apparent is the absence of a robust normative justification to guide the courts as to where those lines should be drawn. Commentators are also divided on the question of line-drawing and generally fall into two broad camps. The first consists of those who advocate that negligence *extends* to accommodate broader harms, these being every bit as real and harmful as physical ones. By contrast, the second camp consists of those who argue that the boundaries of negligence should be preserved by *restricting* its remit to address only the repercussions of physical bodily harms — irrespective of whether that produces arbitrary and unfair results, negligence must have limits. These two positions leave us with quite a stark choice — between incrementally bolting on new forms of harm to existing kinds of damage recognised, or restricting it to a narrow range of harms which fail to speak to the experiences and life dialogues of many which tort ought to speak to.

Neither position presents a genuine solution once we consider the broader operation of negligence law. What both positions overlook are quite foundational questions concerning how negligence operates in practice, and the thorny question as to what we hope to achieve through providing reparation for harm via negligence. This is the ‘endgame’ question which I suggest that we now need to address: why do we provide redress at all? It is now critical that reformers return to ask foundational questions of torts and to more closely scrutinise taken-for-granted ideas that have shaped not only the damage concept but the reparative ideal itself. To illustrate the kind of foundational thinking the author has in mind, the focus here is upon what she regards as constituting the most critical but under-theorised pillar of negligence: physical bodily harm. The issue here is *not* the extent to which psycho-social harms have suffered comparative neglect within negligence, for there is already a rich and extensive literature addressing such themes. Rather, here I aim for a fresh approach. In this respect, this article seeks to critically explore the ‘common sense’ behind the taken-for-granted notion that physical bodily harm is experienced as universally and especially harmful and causative of serious loss. Embracing insights from behavioural science and litigation practice to inform this analysis not only raises serious questions which go to the core of what negligence *is*, but ultimately raises doubts as to the potential of negligence to *ever* operate as an egalitarian system.

## II CHALLENGING THE PREFERENCE FOR CORPOREAL HARM

In the law of negligence, ‘damage’ holds a central role and is said to form the ‘gist of the action.’<sup>5</sup> Therefore, a claimant will not only need to establish a duty of care, a breach of that duty, and that the breach has caused the damage complained of — she must also show that the type of harm she has suffered is one that is accepted by the law as ‘actionable’. Though the concept of ‘damage’ is poorly defined in negligence, the suffering of a ‘plain and obvious physical injury’ presents no

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<sup>5</sup> Jane Stapleton, ‘The Gist of Negligence’ (1988) 104 *Law Quarterly Review* 213, 213.

problem.<sup>6</sup> Therefore, gastroenteritis suffered through swallowing parts of a snail in a bottle of ginger beer or cancer or lung diseases suffered through exposure to asbestos in the workplace, will most certainly constitute physical harms for the purposes of negligence.<sup>7</sup> Beyond these so-called ‘obvious’ injuries things become more complex. As defined in English law under s 38(1) of the *Limitation Act 1980* (UK), ‘personal injury’ ‘includes any disease and any impairment of a person’s physical or mental condition’. Yet while that definition of personal injury seems to allow for a more expansive reading in also addressing mental harms, in terms of what kind of injury may trigger an actionable claim in negligence, it is well known that emotional harm, which falls short of psychiatric illness (such as mere anxiety, inconvenience or discomfort) is never actionable, while a medically verified psychiatric illness is only actionable under limited circumstances.<sup>8</sup> As such, the concept of damage as it relates to human harm, constitutes a remarkably narrow category; as Lord Hoffmann noted in *Rothwell v Chemical and Insulating Co Ltd*:

Damage in this sense is an abstract concept of *being worse off*, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a change in physical condition, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capacity.<sup>9</sup>

No reference is made to emotional harm as a form of damage; such harm is treated as a category of consequential loss for which one must first establish prior physical damage. Other than the narrowly circumscribed situations where claimants can demonstrate that a duty of care exists to protect them from purely psychological harm, claimants must demonstrate the prior existence of a physical injury ‘hook’ for emotional harms to be recoverable.<sup>10</sup>

It is at this point — the boundary between actionability and non-actionability — that the operation of the damage concept becomes objectionable. It is an exclusive category that acts as the gatekeeper for financial reparation. As such, while there is no problem in saying that generally a duty of care will be owed for a more than negligible physical injury which results from a positive act of a defendant, in

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<sup>6</sup> P S Atiyah, *The Damages Lottery* (Hart Publishing, 1997) 94.

<sup>7</sup> Christian Witting, ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189.

<sup>8</sup> Providing damage has been established (notably, of the physical sort) negligence has no problem in addressing intangible harms, such as psychological or emotional harms as items of consequential loss for the purposes of damages. The distinction, though muddied at times, is that ‘damage’ concerns liability and is a crucial factor for an actionable claim, whereas items of consequential loss are only relevant for the assessment of damages, once liability has been established. With one exception in the field of human harms, notably the restrictive category of purely psychological damage cases which are only cognisable (and for which a duty is owed only) under highly circumscribed conditions, consequential loss cannot frame the damage itself.

<sup>9</sup> [2008] 1 AC 281, 289 [7] (emphasis added).

<sup>10</sup> Stapleton, above n 5.

relation to psycho-social harms the same cannot be said. The kind of harm matters, and insofar as the law has general anxieties about the character of psycho-social harms and holding defendants liable for these, no matter how serious or disabling the harm that results and how careless the defendant, claimants will struggle to gain reparation for their loss. While there are established instances where psychological harm is treated as damage,<sup>11</sup> the courts restrict the liability situations via the concept of duty. As such, if psychological harm is a kind of damage, it is tenaciously guarded and ring-fenced. Though conceptually capable of embracing a broader understanding of what ‘damage’ means, far beyond physical bodily trauma, the law of negligence eyes with suspicion harms which manifest themselves not as bodily abnormalities, but as psycho-social tragedies.

That the damage concept works to offer minimal recognition of harms of a purely psycho-social nature has been the subject matter of a lengthy and voluminous critique. The modern-day consensus tends to point to the absence of justification for drawing distinctions between physical harm and psycho-social harm. The thrust of commentary suggests that if one searches for a robust justification as to *why* or *how* lines can be drawn between such harms, one will struggle to find it. As Conaghan and Mansell comment, ‘physical injury is often accompanied by emotional distress while psychiatric harm is regularly exhibited through an array of physical symptoms (such as vomiting, insomnia, weight loss and other ‘stress related’ illnesses)’.<sup>12</sup> While medicine and science illustrate the ‘close and symbiotic relationship between mental and physical health’, the distinction between these categories nevertheless remains ‘deeply embedded in the doctrinal substance of negligence law’.<sup>13</sup> Much of what can be said to be deleterious about a physical state, *is* psychological and subjective. Pain, for example, while having physiological dimensions has psycho-somatic ones too; it is also a ‘social and cultural phenomenon’.<sup>14</sup>

The arbitrariness inherent in such line drawing becomes more evident once we contemplate our own subjective experience. In view of how *we* feel, the assumption that physical harm makes us especially ‘worse off’ or provides an objective means of assessing when serious harm has occurred, rather crumbles. If we consider the impact of different events that we could experience, from breaking a leg, to events which are not strictly-speaking, *physical*, such as losing a loved one, to caring for a sick and elderly parent — all of these events are mediated through persons possessing bodies with remarkably similar effects. Whilst these experiences

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<sup>11</sup> See for example the purely psychological damage claims, formerly known as ‘nervous shock’, ranging from the recognition of primary victims in cases such as *Page v Smith* [1996] AC 155, through to the more restrictive category of secondary victims as demonstrated in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. See further, Kirsty Horsey and Erika Rackley, *Tort Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011); Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, 2009).

<sup>12</sup> Conaghan and Mansell, above n 1, 35.

<sup>13</sup> *Ibid.*

<sup>14</sup> Myriam Winance, ‘Pain, Disability and Rehabilitation Practices: A Phenomenological Perspective’ (2006) 28 *Disability and Rehabilitation* 1109, 1110.

continue they can prove to be psychologically and socially corrosive in their impact. They relate to our emotional being in the world, and our connections with, and responsibilities to others. They possess physical and emotional dimensions in so far as they can result in declines in physical and mental health, but often imperceptibly and gradually; they often entail hard work, both physically and emotionally in supporting others. Many of these can be regarded as chosen situations, but structurally they will feel unavoidable. These kinds of experiences may be part of the package of life, but for as long as they endure they keep us standing in the same spot. They can disable us. It is in this important sense that these experiences fail to differ from the experience of injuring oneself skiing in terms of the impact on our lives and interference with the things we most value. If one considers the effects of dealing with that broken leg — that one suffers pain, has to reorganise how to get around, cannot play football for the time being and must endure the hassle of frequent hospital visits, we start to see how the assumption that physical harms are different in nature from other kinds of harms, looks rather artificial indeed. On this analysis at least, if we think about the precise way that any of these events might interfere with our lives, our hopes and aspirations, when destabilising events are the product of negligence, there seems to be no sound theoretical basis for calling one set of experiences ‘life’, and another ‘injury’.

For some, however, the events which harm them may quickly be deemed ‘life’ by virtue of the line drawn between physical and psycho-social harms. For example, too often the harms that women sustain as women, have fallen into the ‘vicissitudes’ or ‘life’ category as is demonstrated by the slow recognition of mental disturbance as a legally cognisable harm, or through the scaling back of meaningful compensation for parents of unwanted children born as a result of negligence in family planning procedures.<sup>15</sup> That tort fails to ‘see’ many of the injuries that women sustain as women — of reproductivity, pregnancy, childbirth and the emotional and life capital lost through caring for a child that one had planned not to have — is deeply embedded within the analytical categories that control liability and remedies. These categories are not objective but require ‘substantive choices to be made about which claimed injuries it will remedy’.<sup>16</sup> As such, because categories such as damage reflect a choice as to which aspects of human social life should be treated as injurious, we need to be watchful as to which, and more particularly, whose social experiences it picks up. As Conaghan comments,

injury has a social as well as an individual dimension: people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognise

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<sup>15</sup> See, eg, *McFarlane v Tayside Health Board* [2000] 2 AC 59. See also Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, 2007).

<sup>16</sup> Jethro K Lieberman, ‘The Relativity of Injury’ (1977) 7 *Philosophy and Public Affairs* 60, 63.

that social dimension. Consequently, and in the context of gendered harms, it fails to offer proper redress.<sup>17</sup>

In all of these respects then the preference for physical harm over harms of a psycho-social nature not only serves to draw lines between kinds of harm, but entire categories of victim whose biographies express harm in ways that fail to fit the dominant dialogue of negligence law. Under such circumstances, tort will behave as if the experiences which harm and injure us are simply part of the normal (rather than injured) life course. For example, it is only since the late 1970s that sexual harassment has been transformed from behaviour widely regarded as a 'harmless' part of normal human engagement to behaviour constituting sex discrimination, deserving of a legal response.<sup>18</sup> And it is important here to recognise how these analytical categories can march on for decades whilst failing to speak to the innumerable experiences of classes and populations of people to whom they officially purport to apply. In the context of emotional harms, as Chamallas and Wriggins argue, while the traditional justification was that the law was directed at protecting material interests and physical integrity, leaving emotions and relationships beyond legal protection, this 'basic demarcation line had important gender implications for compensation'<sup>19</sup> where:

losses typically suffered by men were often associated with the more highly-valued physical realm, whilst losses typically suffered by women were relegated to the lower-valued realm of the emotional or relational.<sup>20</sup>

And that privileging of physical harm over emotional harm 'persists to this day'.<sup>21</sup> As a vast body of feminist literature powerfully illustrates in making visible the manner by which law has excluded those experiences and risks which either exclusively, or more frequently pertain to the biographical experience of being a woman,<sup>22</sup> the concern for negligence law to reflect psycho-social harms is more than a wish for inclusive symbolism. The question of the kinds of harms picked up has serious repercussions in relation to which injuries, and indeed very often, *whose* injuries are addressed by tort.

The litany of problems attending the preference for physical bodily harm in negligence is not, of course, *news*. What is perhaps most surprising is that negligence *continues* to operate in this way despite long-standing and wide-spread cognisance of the serious problems attending the kinds of harms that negligence addresses and those that it does not. Judges have long recognised that harms of

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<sup>17</sup> Conaghan, above n 4, 408.

<sup>18</sup> Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22 *Legal Studies* 319.

<sup>19</sup> Martha Chamallas and Jennifer Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010) 37–8.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* 38.

<sup>22</sup> See, eg, Joanne Conaghan, above n 4; Graycar and Morgan, above n 2; Robin West, *Caring for Justice* (New York University Press, 1997).

a psycho-social nature ‘may be far more debilitating than physical harm’,<sup>23</sup> yet remain prepared to continue restricting recovery for purely psychological harm. However, an emerging genus of case, the ‘damage hybrid’, seems set to pose the most serious challenge to established boundaries of the damage concept. Such cases make even more transparent the serious shortcomings of the operation of the damage concept, and in the wake of such claims, it will be correspondingly even more difficult for the judiciary to restrict recovery in a principled way.

Arguably, claims for purely psychological damage via ‘nervous shock’ constituted the first serious assault on the damage concept in easing negligence toward admitting harms of a purely psycho-social nature. These cases demanded explicit consideration as to the limits of negligence and its receptiveness to different kinds of harms. While these cases now receive some level of recognition and have required the courts to address the assumptions underpinning the dichotomy between physical injury and harms of a psycho-social nature, these claims continue to be treated restrictively. However, what could be termed ‘damage hybrid’ cases or what Horsey and Rackley refer to as claims for ‘messed up lives’,<sup>24</sup> might well constitute the second assault. Holding strong psycho-social and practical dimensions, these hybrid claims sit somewhere in between two recognised forms of damage in negligence law: firstly, the conventional personal injury case which involves an unproblematic form of physical bodily injury, and secondly, that of the purely psychological damage via ‘nervous shock’ situation, in particular where a primary victim sustains psychiatric trauma as a result of narrowly escaping physical injury.<sup>25</sup> As the next section explores, though meeting with varying levels of success, the ‘hybrid damage’ cases have very clearly revealed the arbitrariness of and lack of principle attending the damage concept because these cases look *so much* like the conventional personal injury case in all but the specific kind of damage sustained. Moreover, and quite critically, what is particularly striking is that the courts have shown an increased willingness to depart from the idea that strictly physical bodily harm is necessary to satisfy damage. Whilst greater acceptance of such claims will be welcomed by some in starting to address the weighty criticism attending the narrow interpretation of the damage concept, for others, this will be one incremental step too far.

### III ON THE LIMITS OF LEGAL INCREMENTALISM

Under the pressure of such non-traditional claims, the views have crystallised in foreign common law jurisdictions that the negligence principle is one that requires tight and effective doctrinal control, and that society simply cannot and should not require the tort system to provide monetary compensation for every harm resulting from carelessness, not even every physical harm.<sup>26</sup>

<sup>23</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 492 (Lord Steyn).

<sup>24</sup> Horsey and Rackley, above n 11, 160.

<sup>25</sup> See, eg, *Page v Smith* [1996] AC 155.

<sup>26</sup> Jane Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 *Vanderbilt Law Review* 941, 946.

Incrementalism, where categories like damage grow in order to encompass a broader range of situations and harms which had not previously been actionable, is part and parcel of the legal enterprise. With a few peaks and troughs en route, the tort of negligence itself has emerged literally out of a case involving alleged snail remains in a bottle of ginger beer<sup>27</sup> into the 'super-size' tort that it is today to cover a broad range of liability situations which a century ago would have been unthinkable.<sup>28</sup> For some palates, its super-size nature is too much to stomach. Patrick Atiyah for example, complained that concepts of fault, causation and harm, the 'very concept of negligence', have been stretched out of all recognition in the 'favour of injured accident victims',<sup>29</sup> with the effect that 'the whole system is shot through with absurdity and unreality'.<sup>30</sup> Central to Atiyah's concern was the increased recognition of harms within negligence. He lamented that, 'at one time damages for injury, especially personal injury, were almost entirely confined to cases where the victim suffered a plain and obvious physical injury'.<sup>31</sup> Also concerned with such expansionist tendencies is Tony Weir, who comments that, 'it is undeniable that the progressive socialisation of harm diminishes the responsibility, indeed the autonomy, of the individual'.<sup>32</sup> For those on the other side of the fence, this talk of stretching is problematic for defending the status quo, which amounts to being content with a system of redress that treats like harms *unlike* and operates to systematically disadvantage individuals whose experiences of harm fail to fit under-socialised legal categories. As Conaghan comments,

from a feminist perspective it is difficult to see how the autonomy of women is diminished by developments which facilitate legal redress in the contexts of acts of sexual violence and abuse, raising a question as to whose autonomy Weir perceives to be threatened.<sup>33</sup>

Crudely speaking, these two sides of the debate typify the arguments around the kinds of harms that the concept of damage in negligence should accommodate and the direction that law should take. As the historical development of negligence shows in relation to the poor recognition of non-physical harms, the law would appear to reflect a strong conservative pull, but challenging times lie ahead. While it is true to say that the damage concept has been typified as the subject-matter of 'academic neglect',<sup>34</sup> as an analytical category, far greater interest can now be discerned in the question as to the boundaries of this concept by both academics

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<sup>27</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>28</sup> For engaging accounts of the development of negligence, see further Tony Weir, *Tort Law* (Oxford University Press, 2002); David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999).

<sup>29</sup> Atiyah, above n 6, 32.

<sup>30</sup> *Ibid* 94.

<sup>31</sup> *Ibid* 52.

<sup>32</sup> Tony Weir, *Casebook on Tort* (Sweet and Maxwell, 2000).

<sup>33</sup> Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56 *Current Legal Problems* 175, 186.

<sup>34</sup> Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 *Modern Law Review* 59, 60.

and *critically*, lawyers. This ‘incremental urge’, notably, to expand categories of negligence in the name of equality and fairness, or indeed to line the pockets of lawyers, seems highly attractive.

The ‘damage hybrid’ looms large here. Suits for wrongful conception,<sup>35</sup> and claims for the careless destruction of sperm samples,<sup>36</sup> are certainly recent and controversial illustrations of legal inventiveness where the factual variants had failed to squarely fit ‘orthodox conceptions’ of personal injury and damage. The success of the educational neglect claims alleging damage in the context of the failure to ameliorate dyslexia, though initially baffling the courts as to whether the damage should be typified as a mental injury sufficient to constitute a personal injury or a form of economic loss,<sup>37</sup> were later accepted as claims for personal injury ‘in a post-Cartesian World’.<sup>38</sup> Even judges themselves can be artful at unwittingly pushing at the boundaries of damage. Though failing to fit what the damage concept in negligence requires, notably physical bodily harm, by a majority the House of Lords in *Rees* created a ‘Conventional Award’ of £15,000 that would apply to all cases of wrongful conception to reflect the loss of autonomy experienced as a result of unsolicited parenthood.<sup>39</sup> In so far as the present author saw this more as a consolation prize in the face of denying a proper remedy,<sup>40</sup> others see the award as representing ‘a significant departure from previous categories of recognised harm’ towards a more ‘rights-based’ conception of damage.<sup>41</sup> While Nolan’s reflection on such cases prompts him to suggest that the expansion of the categories of actionable damage ‘should be welcomed as evidence’ that courts are not privileging interests capable of precision in monetary terms over those which are not, such as the intangible harms,<sup>42</sup> that kind of conclusion seems slightly over-cooked. Nevertheless, these developments undeniably constitute a quite significant shift away from a strict conception of damage as physical bodily harm, and towards a broader conception of harm that is *more* capable of accommodating critical aspects of our humanity.

For the doom-monger, this will surely be the opening of Pandora’s Box, for in the wake of that shift, considerable intellectual challenges potentially lie before

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<sup>35</sup> See *McFarlane v Tayside Health Board* [2000] 2 AC 59 (*McFarlane*); *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (*Rees*). See also *Cattanach v Melchior* (2003) 215 CLR 1 (*Cattanach*) decided in the High Court of Australia. Of note, there is a strong dialogue between the British and Australian treatment of these claims, which also illustrates particular differences in the jurisdictional treatment of the tort of negligence in conceptualising the harm of wrongful conception; note in particular judicial discussion of *McFarlane* in *Cattanach*, and discussion of *Cattanach* in *Rees*.

<sup>36</sup> *Yearworth v North Bristol NHS Trust* [2010] QB 1 (*Yearworth*).

<sup>37</sup> *Phelps v London Borough of Hillingdon* [2001] 2 AC 619 (*Phelps*).

<sup>38</sup> *Adams v Bracknell* [2005] 1 AC 76, 81 [10] (Lord Hoffman).

<sup>39</sup> [2004] 1 AC 309.

<sup>40</sup> Priaulx, above n 15.

<sup>41</sup> Nolan, above n 34, 71.

<sup>42</sup> *Ibid* 87.

the court where lawyers will seek to capitalise upon the shifting boundaries of damage. Hybrid claims deeply challenge these demarcation lines because unlike, for example the bystander claims involving purely psychological injury, these cases look very similar to the contexts in which conventional personal injury claims arise. Where the circumstances look so hair-splittingly similar, courts keen to restrict negligence will be left having to draw flawed distinctions between physical harm and psycho-social harm — a distinction, which as we have noted, seems impossible to do. This will be a major challenge for English law and the common law generally. Cases faring less well in the past for failing to demonstrate an obvious physical injury or satisfy the requirements of primary victim status may be repackaged for success. For example, while the action of claimants suffering distress after being trapped in a lift failed on the grounds of there being no actionable damage in *Reilly v Merseyside Regional Health Authority* (1995) 6 Med LR 246, cases involving negligent imprisonment might more convincingly run in serious instances where claimants have been deprived of their liberty, given the importance of ‘freedom of movement as an interest in its own right’.<sup>43</sup> For some, the educational neglect claims, whilst only intended to apply to cases involving an undiagnosed and untreated learning disorder, constitute the starting point for a range of broader challenges;<sup>44</sup> on compelling facts, the right to education might seem sensibly embraced within the damage concept where it is presented as only a small incremental step away from *Phelps*.<sup>45</sup> From these kinds of cases, to the reproductive torts, it is not difficult to imagine factual variants. While the Court of Appeal in *Yearworth* found that the destruction of cancer survivors’ stored sperm admitted an actionable claim, the principle seems barely stretched by extending this to permit claims for the wrong embryo being implanted, and indeed to all the claimants thereby affected.<sup>46</sup> It is just one small step. These and even farther reaching claims such as sex ratio skewing of an entire community as a result of environmental pollution,<sup>47</sup> suggest that a broader conception of damage at least sends out a wider invitation to ‘have a go’. Meanwhile, the pressure for negligence law to adopt a more generous approach to the highly restricted purely psychological damage-via-shock cases, continues unabated.<sup>48</sup> The point however is this: the greater recognition of the hybrid claim and shift away from an admittedly capricious notion of damage changes the legal landscape.

What has been claimed to constitute a second assault on the damage principle, via these hybrid injuries, may turn out to be the most serious. It is questionable whether the courts have sufficient conceptual resources to cope with such cases. Their resemblance to the conventional personal injury case creates such a strong moral case for extending damage to embrace them, in revealing the arbitrariness

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<sup>43</sup> Ibid 63.

<sup>44</sup> Neville Harris, ‘Liability Under Education Law in the UK — How Much Further Can it Go?’ (2000) 4 *European Journal for Education Law and Policy* 131.

<sup>45</sup> [2001] 2 AC 619.

<sup>46</sup> [2010] QB 1.

<sup>47</sup> Dayna Nadine Scott, ‘Injuries without Remedies: Body Polluted: Questions of Scale, Gender and Remedy’ (2010) 44 *Loyola of Los Angeles Law Review* 121.

<sup>48</sup> Teff, above n 11.

of the lines currently drawn between physical and psycho-social harms. There is, arguably, no real difference that can be discerned as to the circumstances of the case, other than the (physical/non-physical) kind of the damage sustained. Yet to suggest that these individuals are *not* harmed, or that their suffering is less than that which would be sustained by virtue of a physical bodily injury seems absurd. The moment that the courts display a greater inquisitiveness into the psycho-social aspects of these cases, the line between deserving and undeserving cases will fall away. So much of what it means to be injured and harmed is located at psycho-social level. As such, some well-meaning commentators might argue, the appropriate response to this incoherence and unfairness would be for the law to expand so as to encompass them.

At the same time, we should be reflective about the nature of the hybrid claim, about expansionism generally, and what this heralds for the law. Given the variety of situations that have arisen thus far, from frustrated reproductive plans, to deprivations of liberty, it is difficult to conceptualise a sensible ‘endgame’ position here, for two reasons. First, while the courts are open to criticism for their heavy reliance upon the floodgates argument in the context of purely psychological damage — which appears speculative in the absence of evidence or a comparative analysis of jurisdictions who seem far less troubled by the prospect of broader liability in the context of occasional but avoidable catastrophe as to discount it<sup>49</sup> — the hybrid claims nevertheless *do* seem to raise different considerations. The circumstances which shape them are amorphous, unlimited and could arise in virtually any sphere of normal, daily life. For those that would point to the capability of other essential ingredients of negligence concepts to fend off the floodgates to manage a more fluid damage concept, this appears fairly myopic given the extent to which all the concepts of negligence are conceptually linked and quite critically, informed by the damage sustained. As such a loosening of the damage concept beyond physical harms alone may achieve little, or too much, as to constitute a significant if not irreparable breach in the seawall. Arguably, *arbitrariness* in determining which kinds of damage should be the subject matter of redress may be what sustains the negligence tort itself.

The second consideration as to ‘endgame’ is by far the most important; the real question is what might be gained by extending negligence to accommodate broader harms in the sense of what precisely that can do *for humanity*. A striking feature of the debates highlighted here is how disconnected these are from what constitute pretty fundamental weaknesses attending the torts system. Though there are compelling moral and legal grounds for extending negligence, many of the ‘advances’ we perceive ourselves as making within the law start to look somewhat partial when situated in their broader social context. Take for example the efforts of scholars to extend the law of tort to recognise traditionally excluded forms of injuries in the name of ‘equality’<sup>50</sup> — this really boils down to ‘equality’

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<sup>49</sup> Julio Alberto Diaz, *Non-Physical Damage: A Comparative Perspective* (PhD Thesis, The University of Canterbury, 2010).

<sup>50</sup> See, eg, Chamallas and Wriggins, above n 19, in which the authors explore the doctrinal, practical and structural obstacles to gender and race equality, and advocate

*within* tort. Tort law abiding by the principle of equality in the sense of drawing no formal distinctions between individuals on the pure grounds of gender, race or ability must surely be viewed as significant — at least, as gains for those that come before the law. Beyond aspirations for equality *within* negligence, the overall social accomplishment will be a great deal harder to make out. If one takes into account the fact that tort reaches a rather small (and privileged) community of injured beneficiaries, that many injuries are sustained without fault and in ways that tort simply doesn't capture, that many claims are settled and never reach court, and that our response to injury is financial compensation, equality gains start to look far less impressive *outside* of tort. And whatever benefits torts can deliver decline further once we heap on the other known limitations of torts which Patrick Atiyah and others have so ably alerted us to through engagements with how the system works in *practice*.<sup>51</sup>

The point is this: we have been so concerned with making gains *within* the law that we have neglected to *address* the system as a whole. The gains made within the system may serve largely rhetorical ends because of the way that negligence really works. For those committed to using the legal project as an instrument for achieving equality this poses a sizeable dilemma. Extending the damage principle to humanise tort and embrace the kinds of experiences which profoundly harm us may be a laudable aim in theory, but in practice, we are only reaching a limited and privileged range of beneficiaries, in a highly limited way — with money.<sup>52</sup> Hybrid claims strongly compel some reflection as to how we respond to harm, and the limits of our current approach. Though the arguments that financial compensation is not commensurable with harms of an intangible nature and cannot 'restore' tend to be commercially motivated and consciously designed to encourage policymakers to cap or abolish such awards,<sup>53</sup> there is nevertheless something in the claims. There is no doubt that the hybrid cases looked at here can resonate in economic loss, however, like physical harms, most will also possess a significant intangible component too. We would do well to consider whether financial compensation might be a rather lazy and impoverished means of providing account to victims for the non-economic consequences of injury whether stemming from physical injury or indeed, 'messed up lives'. Either way, it looks like something less than a genuine account for the losses victims do sustain.

None of this is to say that no advances have been achieved through, for example, feminist legal activism in extending torts to embrace broader harms, but simply that our efforts may achieve diminishing returns *within* tort. We might have

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reforms that will extend tort law's protection to disadvantaged categories of person.

<sup>51</sup> See, eg, Richard Lewis, 'The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages' (2006) 69 *Modern Law Review* 418.

<sup>52</sup> See further, Donna Benedek, 'Non-Pecuniary Damages: Defined, Assessed and Capped' (1998) 3 *La Revue Juridique Thémis* 67; Joseph H King, 'Pain and Suffering, Noneconomic Damages and the Goals of Tort Law' (2004) 57 *SMU Law Review* 163.

<sup>53</sup> Rachel M Janutis, 'Struggle over Tort Reform and the Overlooked Legacy of the Progressives' (2006) 39 *Akron Law Review* 943.

become a little too addicted to ‘bolting on’ new forms of harm because this seems like the right thing to do, or the legal thing to do, but possibly to the neglect of other tasks which will be every bit as important for achieving equality for all: notably checking to see whether the foundations upon which we build are solid. This should of course compel an analysis of the broader problems ailing the negligence system, but here I wish to concentrate on one specific issue which strikes me as critical in assessing both the boundaries of the damage concept and the efficacy of negligence as a system of redress for human harm and injury: the foundational assumptions attending physical harm. Insofar as a concern has been raised here as to what we are ‘building’ upon, the taken-for-granted nature of physical injuries as being *especially* harmful, is one that tends to get overlooked.

#### IV PHYSICAL HARMS AND SERIOUS EFFECTS

[A] feature of the step-by-step process of common law development is the way in which each case is often felt to be morally indistinguishable from an earlier one; hence the argument for like treatment is overpowering if one moves one step at a time. But eventually it becomes clearer that the last step leads to a result which is quite different from the first step.<sup>54</sup>

Debate around the question of whether psycho-social harms should be recognised as a form of damage has been typically polarised. If one gets drawn into this debate (which is easy to do), the decision is between these positions, or marginal variants lying in between. However, the moment that one endeavours to stand outside of them, one starts to see that the difficulty with the arguments on *both* sides is that they end up reaffirming what negligence is *already* doing. If we consider what is unquestioned throughout, physical harm stands as the assumed common denominator: one restricts damage to that, or *adds* to it. For those seeking to *extend* damage to accommodate psycho-social harm, the argument is typically grounded by showing how *similar* psycho-social injuries are in their effects to physical ones — and that those effects are *just as serious*. It is a perfect analogical argument which makes incremental shifts difficult to resist: if ‘B’ looks like ‘A’, and ‘A’ is well-accepted and established, the law should treat like cases alike by allowing ‘B’ also.

For the time being we will focus on well-established ‘A’ rather than getting bogged down in the question of whether the law should expand to accommodate type ‘B’. The idea that negligence ought to prioritise injuries which result in the *most serious* consequences goes to the heart of all the issues explored thus far. From the perspective of justice to tortfeasors and indeed, claimants, it offers the strongest philosophical and conceptual basis for establishing which negligently-caused injuries the law recognises (those which go beyond what everyone is expected to tolerate in daily life), and those it does not. Both Abraham Maslow and Joel Feinberg, for example, offered lengthy analyses vindicating the notion that physical harms were ones which were the most invasive of our human needs and as such one might surmise that they are deserving of the most vigorous legal

<sup>54</sup> P S Atiyah, *Law and Modern Society* (Oxford University Press, 1983) 117.

protection.<sup>55</sup> To a large degree this would appear to be in line with the law. While the conceptual basis for why the damage concept privileges physical bodily harms is unclear, one may infer that this is based on assumptions that, either these are the *most serious*, and/or are objectively safe determinants of serious effects. We should start reviewing some of these assumptions.

### *A Physical Harm and Hedonic Adaptation*

Though not focused on law, the assumed relationship between injuries and their effects has been the subject of analysis in hedonic psychology, or what to us lawyers might best be labelled ‘happiness studies’ insofar as the dominant measure used in a controversial theory called ‘hedonic adaption’ or more recently, ‘adaptive preferences’, is happiness. In the original theory, Brickman and Campbell proposed that while people react to good and bad events, in a short time they return to a position of neutrality.<sup>56</sup> The authors found that because people are goal-seeking in nature and constantly strive to be happy, happiness and unhappiness merely constituted temporary and short-lived reactions to such events. In what became a classic piece of research, Brickman and his colleagues sought to provide empirical backing to the theory and from this concluded that lottery winners were not happier than non-winners, and that people with paraplegia were not substantially less happy than those who can walk. As Diener et al comment, the appeal of the study lay in it not only offering an explanation ‘for the observation that people appear to be relatively stable in happiness despite changes in fortune’ but also in explaining why ‘people with substantial resources are sometimes no happier than those with few resources and that people with severe problems are sometimes quite happy’.<sup>57</sup>

At an intuitive level, the theory has appeal. If we consider all the good and bad events that have occurred in our lives, our joy at getting a new job, our heartache at the loss of a loved one, we will note that the raw impact of emotions felt at that time later wore off. For many of us, we do indeed get used to things, and they (hopefully) become the background in the context of the events that lie ahead. But to what extent can this observation be useful to law? Of interest here, Bagenstos and Schlanger sought to apply this theory directly to the law of damages.<sup>58</sup> What they claimed was that hedonic damages in the United States should not be awarded based on disability.<sup>59</sup> This head of damages broadly corresponds with aspects of

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<sup>55</sup> Abraham Maslow, *The Farther Reaches of Human Nature* (Viking Press, 1971); Joel Feinberg, *Harm to Others* (Oxford University Press, 1987).

<sup>56</sup> Philip Brickman and Donald T Campbell, ‘Hedonic Relativism and Planning the Good Society’ in Mortimer H Appley (ed), *Adaptation Level Theory: A Symposium* (Academic Press, 1971) 287.

<sup>57</sup> Ed Diener, Richard E Lucas and Christie Napa Schollon, ‘Beyond the Hedonic Treadmill: Revising the Adaption Theory of Well-Being’ (2006) 61 *American Psychologist* 305, 306.

<sup>58</sup> Samuel Bagenstos and Margo Schlanger, ‘Hedonic Damages, Hedonic Adaptation and Disability’ (2007) 60 *Vanderbilt Law Review* 745.

<sup>59</sup> *Ibid* 750.

intangible damages in the UK,<sup>60</sup> insofar as it compensates for the limitations on ‘the injured person’s ability to participate in and derive pleasure from the normal activities of daily life, or for the individual’s inability to pursue his talents, recreational interests, hobbies or vocations’.<sup>61</sup> In something of a double-pronged attack on the practice of awarding hedonic damages, the authors placed strong reliance upon hedonic psychology noting that ‘disability does not inherently limit enjoyment of life to the degree that these courts suggest. Rather, people who experience disabling injuries tend to adapt to their disabilities’.<sup>62</sup> Arguing that such damages and the processes of litigation might also be viewed as discriminatory, the authors claim that the legal process serves to reinforce stigma around disability in presenting disability as ‘a tragedy’.<sup>63</sup>

Of interest here is the promise and the limits of using insights from hedonic psychology to inform our analysis about the link between physical damage, effects and compensability. An important starting point is to note that the body of research around hedonic adaptation is very much work-in-progress and has produced contradictory results. Diametrically opposing findings as to the extent of adaptation can be found elsewhere.<sup>64</sup> Easterlin notes that ‘there is a demonstrable tendency in the psychological literature to overstate the extent of adaptation to life events’, and that the extent of adaptation to a disabling condition may ‘vary depending on the personality or other characteristics of the individual affected’,<sup>65</sup> while Diener, Lucas and Schollon have cautioned against putting adaptation theory into practice given the many questions that necessitate researchers’ attention.<sup>66</sup> For these main reasons, hedonic adaptation theory does not support the kinds of policy action that Bagenstos and Schlanger have proposed.<sup>67</sup> In particular the finding, which seems

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<sup>60</sup> Note however, that this is only a broad correspondence, and in particular with lost amenity. The basis for awarding damages for pain, suffering and loss of amenity (‘PSLA’) has been identified as conceptually questionable (see A I Ogus, ‘Damages for Lost Amenities: Damages for a Foot, a Feeling or a Function?’ (1972) 35 *Modern Law Review* 1) and continues to be so. Nevertheless, while there is no explicit reference to ‘happiness’ in PSLA awards, the motivation for awarding such damages appears fairly similar if seeking to restore the intangible effects of injury.

<sup>61</sup> Bagenstos and Schlanger, above n 58, 748.

<sup>62</sup> Ibid 749.

<sup>63</sup> Ibid.

<sup>64</sup> See, eg, Sharanjit Uppal, ‘Impact of the Timing, Type and Severity of Disability on the Subjective Well-Being of Individuals with Disabilities’ (2006) 63 *Social Science and Medicine* 525; Marcus J Fuhrer et al, ‘Relationship of Life Satisfaction to Impairment, Disability and Handicap Among Persons with Spinal Cord Injury Living in the Community’ (1992) 73 *Archives of Physical Medicine and Rehabilitation* 552.

<sup>65</sup> Richard Easterlin, ‘Explaining Happiness’ (2003) 100 *Proceedings of the National Academy of Sciences of the United States of America* 11176, 11177.

<sup>66</sup> Diener, Lucas and Schollon, above n 57, 312.

<sup>67</sup> Problematically, the authors (who are lawyers, not psychologists) not only prove to be highly selective in the studies they include (those highlighting a high level of adaptation) but overlook all of the serious concerns attending hedonic psychology (from hedonic psychologists). See Bagenstos and Schlanger, above n 58, 747.

to be repeated throughout the literature subsequent to Brickman's study, is that the central assumption of the hedonic treadmill theory, notably that adaption to circumstances occurs in similar ways for all individuals, is false. As Diener, Lucas and Schollon found in their longitudinal studies, 'the size and even the direction of the change in life satisfaction varied considerably across individuals'.<sup>68</sup>

There is good reason to be open to some of the (provisional) insights that hedonic psychology can offer, although a more measured analysis of the theory underpinning Bagenstos and Schlanger's proposals actually supports quite a different conclusion to the one they arrived at. Rather than limiting one's attention to damages, they compel a far more extensive review of the assumptions underpinning *damage*. Even if there is no evidence that all people adapt to the experience of disability, there is evidence that some do, and that the extent of adaptation will be variable, depending on a potentially wide range of factors relating to an individual's social, psychological and economic situation. Moreover, given that we should be alert to what assumptions are being made about disability, for these appear troublingly to equate disability with the living of a tragic life — an image of impairment which disability rights activists have fought so hard to combat — so too should we be alert to the assumptions which are being made by the law. Overall, the analysis highlights some really fundamental questions: the extent to which the damage concept in negligence accepts physical injury as a universally and especially harmful event causative of serious loss, and quite critically, what it is about the human experience of injury that compels redress.

### B *The Seriousness Dilemma*

Our analysis so far has been premised on the basis of what look like serious physical injuries. Yet to what extent does this parody the kinds of injuries that negligence addresses? In so far as the hedonic adaptation literature typically relates to serious injuries that would amount to a disability, our concerns around the assumptions attending physical harm are amplified further when we consider that very often the kinds of injuries compensated for in negligence fall far short of that. As Bell notes, whiplash injuries constitute a major source of claim, generating around 200 000 claims for compensation per annum, and costing insurers over £750 million per year.<sup>69</sup> This is not to diminish the harmful impact of whiplash, but to note that not only do the majority of sufferers make very speedy recoveries, but it is 'rare for claimants to develop chronic symptoms or disability'.<sup>70</sup> As a general matter, 'the condition is one of temporary discomfort and the award is for the 'pain and suffering' of the claimant'.<sup>71</sup> Such factors, which point to a significant disparity between the 'theory' of torts and what actually occurs in practice, also drives a cutting critique by Lewis where he notes that

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<sup>68</sup> Diener, Lucas and Schollon, above n 57, 310.

<sup>69</sup> Phil Bell, 'The Social Construction of Bodily Injury' (2006) 31 *The Geneva Papers* 340, 350.

<sup>70</sup> *Ibid* 350.

<sup>71</sup> *Ibid*.

the main function of the tort system is not to provide for the future loss of income and care needs of those seriously disabled by accident or disease. Such especially needy claimants are relatively rare. Instead the system overwhelmingly deals with small claims ... In these cases claimants suffer very little, if any, financial loss. They make a full recovery from their bodily injury and have no continuing ill effects. They make no claim for any social security benefit as a result of their accident. ... [I]n a few cases the damages claim, in effect, is being made only for the non-pecuniary loss. In settlements in general the largest component by far is the payment for pain and suffering. The stereotypical injury is the minor whiplash which follows a low speed car 'shunt'. It is these types of cases which account for the extraordinarily high costs of the system compared to the damages it pays out.<sup>72</sup>

From the perspective of 'seriousness' then, while some have suggested that 'much distress is the psychiatric equivalent of a cold or flu' and 'even when severe, much distress reflects threatening or discouraging circumstances that most individuals can resolve',<sup>73</sup> so too, it might seem, can the same kind of considerations apply to physical harm. While negligence affords priority to physical harm, which holds an unproblematic status in law, we find the same inherent variability with physical harms as has been argued as constituting a problem with psycho-social ones. Some physical harms as they are suffered do not look terribly serious, and we also find that something of a practice is developing so that these less deleterious effects are being taken seriously. This is *not* to say that negligence does not deal with serious injuries, but rather that the 'fairy tale' version of negligence (or at least one that would provide some justification *for* negligence) is that this is what happens all the time. And in line with the thesis running here, that variability in the experience of harm is precisely what we would expect to find. Whether we are addressing a physical injury or not, it is the psycho-social *effects* that harm us.

An alternative basis for determining actionability has been suggested by Harvey Teff in his analysis of liability for negligently caused psychiatric and emotional harms.<sup>74</sup> Amongst his suggestions of how to address the problem of where 'the law places its marker as representing damage deserving of compensation' he proposes that there should be a 'uniform monetary threshold that excludes minor, transient harm, whether physical, psychiatric or emotional'.<sup>75</sup> Noting that such a monetary threshold would 'admittedly introduce a new element of arbitrariness into the existing legal framework for mental harm', he comments that it would mean that the law could 'relinquish the many other arbitrary elements which have made that framework so unsatisfactory'.<sup>76</sup> While his proposals merit lengthier analysis than can be provided here, in so far as they appear to offer a fairer basis

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<sup>72</sup> Richard Lewis, 'Increasing the Price of Pain: Damages, The Law Commission and *Heil v Rankin*' (2001) 64 *Modern Law Review* 100, 103.

<sup>73</sup> John Mirowsky and Catherine E Ross, *Social Causes of Psychological Distress* (Aldine de Gruyter, 2003) 29.

<sup>74</sup> Teff, above n 11.

<sup>75</sup> *Ibid* 183–4.

<sup>76</sup> *Ibid* 184.

for compensating victims in relating to injurious effects rather than distinguishing between different kinds of damage, the key issue for our focus is on how precisely we evaluate seriousness.

If the assumption underlying the priority afforded to physical injuries is based on the notion that this constitutes the most objective evaluation of the kinds of injuries that are likely to result in serious effects, our analysis casts quite some doubt upon this. But what it also casts doubt upon is the process of evaluating seriousness too: who decides, and from whose perspective? If *fairness* is at issue, evaluations of seriousness cannot be made at an objective level, though arguably this is what the ‘damage’ concept was geared up to do. This is still what would be required under Teff’s proposals, for one still has to draw lines between compensable and non-compensable kinds of harm. Despite his remark that ‘there will always be hard cases at the margins’,<sup>77</sup> one has to suspect that enterprising lawyers will press hard against those margins. Moreover, we could expect to see a fresh form of arbitrariness emerging under such proposals. Two individuals can suffer the same event, yet manage the consequences in dramatically different ways. Beyond the trite remark that our personalities and managing capabilities are different, much of this will depend upon the social contexts in which we are embedded; a person of reasonable means with a supportive web of relations is probably better situated to cope with the effects of injury. In this sense, while the fairest means of establishing the effects of injury and its consequential psycho-social effects will be from the subjective perspective of the victim, and as such will be variable, this creates an enormous challenge for the law, jurisprudentially and practically.

Assessing which injuries should be compensated based on the effects, removes a significant control mechanism of negligence where liability depends on the nature of the harm wrongfully caused. In its absence, however, because of the variability that would be inherent in determining actionable claims it is not so clear that the law would be well equipped to maintain the boundaries of negligence, or indeed which essential ingredients become key indicators of how we ‘treat like cases alike’.

## V CONCLUSION

Inescapably the state must sort out from the frenetic bustle of the world what amounts to a compensable or remediable injury and what does not. The dominant protective association cannot restrict itself to selecting the fairest rules — that is, those most calculated to be accurate — for the determination of who *committed* a complained of injury. The reason is easy to see. In a world of even minimal complexity, a client will come forward one day and complain that he has been injured in a new way — for example, “My neighbour wore her skirt above her ankles in plain sight of me and my family.” All concerned will agree that the neighbour really did do so, but there will be the bitterest dispute whether or not such a display of flesh was wrongful — that is, whether or not the action had unlawfully injurious consequences. (It is the unlawfulness of the injury that is at issue, not merely

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Ibid.

the injury. For we can hypothesise that the plaintiff really did suffer mental distress from observing the neighbourly limbs. The question is whether, nevertheless, the neighbour had a right to exhibit herself).<sup>78</sup>

For the time being then, we have quite a sizeable dilemma. An analysis of psycho-social harm suggests that there is no good reason for distinguishing between physical bodily injuries and other kinds of harm, at least if the seriousness of damage (which must surely lie in its effects) is at issue.<sup>79</sup> If seriousness is not at issue, this does not dispose of our critique, for then negligence is left without any justification for determining what is recognised as damage and what is not (and arguably, this might be *the* problem). All that remains is the argument that we need to maintain limits — yet that is a justification which fails as a justification. Yet an analysis of the same factors, and practical issues of how tort works, suggests that the current preference for physical harms in negligence is every bit as variable and unstable as harms of an intangible nature. What this tells us is that the *kind* of injury is an incredibly poor indicator for determinations of loss. Because loss is essentially felt at psycho-social level and this is highly variable, there will be no means of objectively determining seriousness. The manner and extent to which events prove harmful to us depend upon the biographical detail of our individual lives. So what this leaves us with is a choice: putting up with capricious lines which make fallacious assumptions about seriousness, harm and harming conditions, or of drawing no lines at all.

And it is a pretty stark choice. When we enquire about the extent to which negligence should reflect our human experience of injury we end up in what appears to be a no-win situation in attempting to establish a fair and inclusive means of providing redress for harm. The damage concept operates so as to be unfair, incoherent and serves to systematically exclude a range of claims that are every bit as deserving (often more so) as the majority of situations to which negligence affords priority, but here lies the rub: even if we make the damage concept *more* accommodating, these problems of unfairness, incoherence, and systematic exclusion simply do *not* go away. Not only would a failure to draw lines between different kinds of harm (as well as stipulating the other circumstances by which tortious liability will occur) result in there being ‘no realistic limit on the amount of liability that injurers would face’,<sup>80</sup> but more broadly, negligence would not then be negligence. This is a critical point. Any system which falls short of

<sup>78</sup> Lieberman, above n 16, 63.

<sup>79</sup> In relation to asymptomatic pleural plaques, discussions around the damage concept very clearly intimate that seriousness (at least for Lord Hope in that particular case) is at issue:

an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless.

*Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281, 299–300, [47] (Lord Hope).

<sup>80</sup> Kenneth S Abraham, ‘The Trouble with Negligence’ (2001) 54 *Vanderbilt Law Review* 1187, 1209.

universal application, insofar as it distributes in an exclusive way, will and must draw lines. As such this inevitably involves making arbitrary choices between cases where it would be splitting hairs to determine the difference.

What this analysis supports is the need to think about negligence in a far more foundational way, given that the problems attending the reparation of human harm seem inescapable. While critical engagements with the concept of negligence, and in particular ideas of personal injury and damage have strongly focused on the question of whether we should more broadly accommodate harms of a psycho-social nature, what this article has sought to encourage is a broader review of harm as an analytical and indeed, practical category. The concerns which have encouraged negligence to cautiously develop in relation to psycho-social ills, ironically seem to squarely apply to physical harm despite being taken-for-granted as an inevitably loss-generating category of harm. As such, the critique offered here arguably casts some measure of doubt on the availability of justifications for redress for *any* kind of injury. Indeed, what we find is that irrespective of the nature of the harm involved, negligence suffers from a striking absence of a clear and conceptually convincing basis for what harms we do include, why we include them and what we hope to do by responding to harm. But what is clear is that if the aim is fairness, and we wish to locate an equitable way of distributing the effects of harm and loss, negligence will not and cannot provide it.



## NEW PERSPECTIVES ON AUSTRALIAN CONSTITUTIONAL CITIZENSHIP AND CONSTITUTIONAL IDENTITY

### ABSTRACT

‘Citizenship’ can be used in a number of different senses. It can refer to the legal status of citizenship and the rights that attach to that status, or more generally to identification as a member of society. This article investigates recent developments relating to these dimensions of citizenship. First, it examines the implications of *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 for the debate on whether a constitutional concept of citizenship exists despite the omission of Australian citizenship from the *Constitution*. Secondly, it draws on the scholarship of Gary Jacobsohn and Michel Rosenfeld on ‘constitutional identity’ to examine the dynamic and constructed nature of what it means to be a member of the Australian community.

### I INTRODUCTION

The Australian *Constitution* makes no reference to Australian citizenship. Whether a constitutional concept of citizenship exists as a limitation on power remains an open question.<sup>1</sup> The debate is partly motivated by a hope that constitutional citizenship will precipitate further rights and protections, and partly by a concern that it is anachronistic in current times (albeit explicable in 1900<sup>2</sup>) that Australia’s constituting document does not establish expressly the legal status and collective identity of the people constituting the body politic. The first matter is primarily a question of legal doctrine, whereas the second implicates broader concerns. Ultimately, they reflect different senses in which the word ‘citizenship’ is used. The first concerns citizenship as a legal status, whereas the second concerns citizenship as a form of identity.<sup>3</sup> This article considers constitutional citizenship, in both these dimensions, in the light of *Roach v*

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\* Thanks to Glyn Ayres, Olaf Ciolek, Vee Vien Tan and an anonymous referee. All views expressed, and any errors, are my own.

<sup>1</sup> The power to establish statutory citizenship is not considered in this article. See *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4] (Gleeson CJ); *Hwang v Commonwealth* (2005) 80 ALJR 125.

<sup>2</sup> See Helen Irving, ‘Still Call Australia Home: The *Constitution* and the Citizen’s Right to Abode’ (2008) 30 *Sydney Law Review* 133, 133–4.

<sup>3</sup> See Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 *Indiana Journal of Global Legal Studies* 447; Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 4–5.

*Electoral Commissioner* ('Roach'),<sup>4</sup> *Rowe v Electoral Commissioner* ('Rowe')<sup>5</sup> and recent scholarship on 'constitutional identity'.

In *Roach*, a majority of the High Court of Australia held that the words 'directly chosen by the people' in ss 7 and 24 of the *Constitution* guarantee 'the people' a right to vote subject only to disqualifications imposed for a substantial reason, and that what constitutes a 'substantial reason' can change from time to time. Their Honours went on to find invalid a law purporting to disenfranchise all people who were imprisoned at the date of an election. A majority in *Rowe* then invalidated a law purporting to prevent new or transferred electoral enrolments from the date of the writ for an election. Part II of this article teases out the implications of these cases for citizenship as a constitutional status and as a basis for further rights.

This article then changes tack. It explores citizenship in its identity dimension through the scholarship of Michel Rosenfeld and Gary Jacobsohn. Rosenfeld and Jacobsohn have independently advanced the concept of 'constitutional identity' as an analytical tool for understanding identity in constitutional systems.<sup>6</sup> Their work is particularly valuable because they direct attention to why and how constitutional identities can change, rather than simply describe the particular identity of different systems. Part III examines their work in detail, focusing on *what* is constitutional identity and *how* it is constructed, and Part IV then applies their framework of constitutional identity to Australia. Part V then reflects on the links and common themes between Australian constitutional citizenship as a possible legal status and Australian constitutional identity.

Until the High Court deals decisively with constitutional citizenship, the concept will lie ready to be used by litigants at the first opportunity. There is thus practical utility in reviewing recent cases for indications that constitutional citizenship will find favour. But constitutional citizenship has significance beyond its potential use in litigation. At least on one view, a role of a constitution is to express and shape national identity,<sup>7</sup> and so whether a *constitutional* concept of citizenship exists speaks to Australia's national identity. But the *Constitution* is not an exhaustive determinant of national identity, just as a written constitution is not exhaustive of constitutionalism. At a minimum, judicial decisions expounding the written constitution must be considered. Rosenfeld and Jacobsohn's accounts of constitutional identity are particularly helpful then because they focus upon the role of judicial decisions in shaping identity. By investigating constitutional citizenship together with judicial decisions that more indirectly shape our understanding of community membership, it is hoped that a fuller appreciation of what it means to be a member of the Australian community will result.

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<sup>4</sup> (2007) 233 CLR 162.

<sup>5</sup> (2010) 243 CLR 1.

<sup>6</sup> See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010); Gary Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010).

<sup>7</sup> See Vicki C Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319, 325.

## II AUSTRALIAN CONSTITUTIONAL CITIZENSHIP

A *Constitutional Citizenship before Roach and Rowe*

The story of Australian citizenship has been well told by several writers,<sup>8</sup> and it is sufficient to recount only the most significant parts of its history here. The starting point is that the *Constitution* does not mention Australian citizenship at all, either to confer or to limit power. Other formulations — ‘the people’,<sup>9</sup> ‘subjects of the Queen’,<sup>10</sup> ‘the electors’,<sup>11</sup> and aliens<sup>12</sup> (and by negative implication non-alien) — are used in constitutional provisions directed to other matters. The Convention Debates reveal that this omission was deliberate, for reasons that are now well-known.<sup>13</sup> As a matter of history and constitutional text, there is therefore no constitutional concept of Australian citizenship. Instead, citizenship was established via statute in 1948.<sup>14</sup>

The statutory basis of citizenship raises the question whether Parliament can tamper with the incidents of citizenship and if so the extent to which it can validly do so. That question has been litigated in several cases, and a number of principles have emerged. First, possession of Australian statutory citizenship is a necessary,<sup>15</sup> but not sufficient,<sup>16</sup> condition to avoid characterisation as an ‘alien’ under the *Constitution*. Secondly, statutory citizenship will be necessary *and* sufficient only where ‘real’ statutory citizenship is conferred, as evidenced by, for example, possessing the right to enter Australia.<sup>17</sup> Thirdly, although non-alien status is linked to the possession of *statutory* citizenship, Parliament cannot define as an ‘alien’ someone who does not properly meet that description.<sup>18</sup> Fourthly, mere birth in

<sup>8</sup> See, eg, Rubenstein, *Australian Citizenship Law*, above n 3; Kim Rubenstein (ed), *Individual Community Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000).

<sup>9</sup> See *Constitution* preamble, ss 3, 5, 7, 15, 24, 25, 53, 89, 105.

<sup>10</sup> See *ibid* ss 34(ii), 117.

<sup>11</sup> See *ibid* s 128.

<sup>12</sup> See *ibid* s 51(xix).

<sup>13</sup> See Rubenstein, *Australian Citizenship Law*, above n 3, 29–38, who identifies four themes from the Convention Debates: disagreements about the definition of citizenship, concerns about dual citizenship, disagreements about the rights and duties of citizenship, and concerns to exclude certain groups of people from citizenship. See also Helen Irving, ‘Citizenship before 1949’ in Kim Rubenstein (ed), *Individual Community Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 9, 13–16.

<sup>14</sup> See *Nationality and Citizenship Act 1948* (Cth), now the *Australian Citizenship Act 2007* (Cth).

<sup>15</sup> See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

<sup>16</sup> See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

<sup>17</sup> See *ibid*.

<sup>18</sup> See *Pochi v McPhee* (1982) 151 CLR 101, 109 (Gibbs CJ).

Australia does not render a person a non-alien.<sup>19</sup> Finally, an alien is someone who owes allegiance to no state or to a foreign state.<sup>20</sup>

In this series of cases, a number of High Court justices expressly affirmed constitutional citizenship.<sup>21</sup> In *Singh v Commonwealth* (*'Singh'*), McHugh J (with Callinan J adopting similar reasoning<sup>22</sup>) in dissent held that Ms Singh was born in Australia and was thus not an alien. The law attempting to impose further requirements for obtaining citizenship was seen as 'seek[ing] to deprive her of her membership of the Australian community and her constitutional citizenship. It is beyond the power of the Parliament to do so.'<sup>23</sup> McHugh J thus tied constitutional citizenship to the constitutional term 'alien' and its opposite, non-alien. He elaborated on these views in *Hwang v Commonwealth*.<sup>24</sup> McHugh J stated that references to 'the people of the Commonwealth' were intentionally synonymous with Australian citizenship. That phrase recognises 'that there is an Australian community of people'<sup>25</sup> who are 'critical to the operation of the *Constitution*.'<sup>26</sup> He added:

No doubt the Parliament does not have unlimited power to declare the conditions on which citizenship or membership of the Australian community depends. It could not declare that persons who were among 'the people of the Commonwealth' were not 'people of the Commonwealth' for any legal purpose. ... And, as long as it does not exclude from citizenship, those persons who are undoubtedly among 'the people of the Commonwealth', nothing in the *Constitution* prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the Constitutional expression, 'people of the Commonwealth'.<sup>27</sup>

<sup>19</sup> See *Singh v Commonwealth* (2004) 222 CLR 322 (*'Singh'*); *Koroitamana v Commonwealth* (2006) 227 CLR 31.

<sup>20</sup> See *Singh* (2004) 222 CLR 322; *Koroitamana v Commonwealth* (2006) 227 CLR 31.

<sup>21</sup> In particular, Justices McHugh, Kirby and Callinan. On Justice McHugh, see Elisa Arcioni, 'That Vague but Powerful Abstraction: The Concept of "the People" in the *Constitution*' (Paper presented at the 2009 Constitutional Law Conference, Sydney, 20 February 2009). On Justice Kirby, see Kim Rubenstein and Niamh Lenagh-Maguire, 'Citizenship Law' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook, 2009) 105. Justice Gaudron appears also to have envisaged limits on the extent to which the Parliament can alter the incidents of citizenship: see Kim Rubenstein, 'Meanings of Membership: Mary Gaudron's Contributions to Australian Citizenship' (2004) 15 *Public Law Review* 305.

<sup>22</sup> See *Singh* (2004) 222 CLR 322, 433 [317], 437 [322].

<sup>23</sup> *Ibid* 380.

<sup>24</sup> (2005) 80 ALJR 125. In *Roach*, Gleeson CJ cited *Hwang v Commonwealth* in support of the proposition that '[t]he concept of citizenship has itself evolved in Australian law', although his Honour did not elaborate this point further: see (2007) 233 CLR 162, 177 [12].

<sup>25</sup> *Hwang v Commonwealth* (2005) 80 ALJR 125, 128 [11] (McHugh J).

<sup>26</sup> *Ibid* 130 [17].

<sup>27</sup> *Ibid* 130 [18].

Justice Kirby articulated his views on constitutional citizenship (using the term ‘constitutional nationality’) most fully in *Koroitamana v Commonwealth*.<sup>28</sup> His Honour distinguished between statutory citizenship and ‘the constitutional status of nationality.’<sup>29</sup> The latter was said to be ‘reflected expressly’ in provisions referring to ‘the people’, ‘electors’, ‘subjects of the Queen’, and in s 44(i), which disqualifies from Parliament any ‘subject or citizen of a foreign power’.<sup>30</sup>

The commentators who favour constitutional citizenship as a limitation on power<sup>31</sup> have fixed on the textual references to ‘the people’ (and similar terms),<sup>32</sup> the proposition that the *Constitution* is binding because of its acceptance by the people,<sup>33</sup> and the observation that a constitution assumes a constitutional community.<sup>34</sup> In contrast, others have doubted whether the terms ‘the people’, ‘the electors’ and ‘subjects’ can ever mean ‘citizen’ primarily on the basis that ‘citizen’ connotes a rights-bearing status whereas the others do not.<sup>35</sup> They have also doubted whether citizenship can be implied given that it was deliberately left out during the Convention Debates. Gaudron J’s statement that citizenship is ‘entirely statutory, originating as recently as 1948’ and that ‘it is not a concept which is constitutionally necessary’<sup>36</sup> has been used to support this position, and

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<sup>28</sup> (2006) 227 CLR 31.

<sup>29</sup> *Ibid* 47 [56] (emphasis in original).

<sup>30</sup> *Ibid* 47–8 [56].

<sup>31</sup> Professor Helen Irving has recently argued that constitutional citizenship can be discerned not as a limitation on power but as the space left over once the proper scope of the immigration and aliens powers is observed. Only certain people can be deported as an immigrant or an alien, and all others are thus in a sense constitutional citizens with a right of abode in Australia. See Irving, ‘Still Call Australia Home’, above n 2.

<sup>32</sup> See, eg, Genevieve Ebbeck, ‘A Constitutional Concept of Australian Citizenship’ (2004) 25 *Adelaide Law Review* 137; Daniel Guttman, ‘Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?’ (2007) 29 *Sydney Law Review* 297, 302–4; Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 345. See also Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2010) 27.

<sup>33</sup> That the authority of the *Constitution* rests on its acceptance by the people, see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); G J Lindell, ‘Why Is Australia’s *Constitution* Binding? — The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29. That popular sovereignty might support a concept of constitutional citizenship, see, eg, Ebbeck, above n 32, 140; Arcioni, above n 21, 5. That popular sovereignty might support citizenship rights, see, eg, Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 100–1.

<sup>34</sup> See Ebbeck, above n 32, 138, 140. See also Saunders, *The Constitution of Australia*, above n 32, 27.

<sup>35</sup> See Greg Taylor, ‘Citizenship Rights and the Australian Constitution’ (2001) 12 *Public Law Review* 205, 209–10.

<sup>36</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) (‘Chu Kheng Lim’). See, eg, *ibid* 211; Rubenstein,

it also draws considerable strength from the High Court’s direction that terms can only be implied from the ‘text and structure’<sup>37</sup> of the *Constitution*. The *Constitution* does not use the term Australian citizen, and its structure, as illuminated by the Convention Debates, focuses on the institutions of government rather than the members of the body politic.

Yet the arguments against constitutional citizenship are contestable. The argument that the term ‘citizen’ is more evocative of rights than ‘subject’ or ‘people’ assumes that only citizens can bear rights. Yet there is no reason why ‘people’ and ‘subjects’ cannot have rights and protections. The principle of legality, which requires that the legislature expressly face up to the abrogation of fundamental common law rights and protections,<sup>38</sup> tends to suggest that there is no necessary illogicality in saying that subjects have rights and protections.<sup>39</sup> All three terms (people, subject and citizen) are simply variations on a theme of membership or community. Moreover, reliance on the deliberate omission of citizenship by the framers incorrectly assumes that the rejection of citizenship entails a rejection of any concept of membership. This false assumption also animates reliance upon Gaudron J’s statement in *Chu Kheng Lim*. The reason why citizenship in its statutory iteration is unnecessary may well be because Australian membership (which for convenience may be called constitutional citizenship) already existed within the *Constitution*. Indeed, the full passage from *Chu Kheng Lim* suggests as much. The conclusion that Gaudron J draws from citizenship’s statutory basis is that ‘it cannot control the meaning of “alien”’.<sup>40</sup> Finally, to the extent that the argument against constitutional citizenship depends on the ‘text and structure’ of the *Constitution*, that argument must be reassessed in the light of *Roach* and *Rowe*.

### B *Limitations on the Franchise: Roach and Rowe*

A majority in both *Roach* and *Rowe* concluded that the words ‘chosen by the people’ guaranteed a right to vote subject only to disqualifications made for a substantial reason, and that what constitutes a ‘substantial reason’ has changed

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*Australian Citizenship Law*, above n 8, 257. But see more recently Kim Rubenstein and Niamh Lenagh-Maguire, ‘Citizenship and the Boundaries of the Constitution’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 143, 144–5.

<sup>37</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>38</sup> See *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ). See generally James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

<sup>39</sup> The analogy to the principle of legality cannot be pressed too far, given the uncertainty that surrounds the process by which rights become ‘fundamental’ for the purposes of that principle. Whereas rights associated with citizenship may be viewed as having their conceptual basis in membership of the community, the conceptual basis for characterising those rights held by subjects and protected by the principle of legality is unclear. See Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 456–9.

<sup>40</sup> *Chu Kheng Lim* (1992) 176 CLR 1, 54.

since Federation.<sup>41</sup> This conclusion recognised some change in the meaning of the *Constitution*, and can be contrasted with originalist approaches to interpretation that give primacy to the meaning of the text as it stood at Federation. The question is whether the majority's reasoning can be applied to overcome the primarily originalist arguments against a constitutional concept of citizenship. To answer that question, it is necessary to consider whether a general interpretative approach can be extracted from *Roach* and *Rowe*.

In *Roach*, the plurality asserted that 'the *Constitution* makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution.'<sup>42</sup> Professor Jeffrey Goldsworthy has complained that their Honours 'made no attempt to explain the nature of this evolutionary process, or why other constitutional expressions do not also have an "evolutionary" meaning.'<sup>43</sup> Their Honours simply cited a passage from Gummow J's judgment in *McGinty v Western Australia* ('*McGinty*')<sup>44</sup> and another case quoting the same.<sup>45</sup> These citations certainly do not explain why there are limits upon the legislature's capacity to restrict the franchise, which seems to be the point of Goldsworthy's criticism. Gummow J referred to the evolution of representative government *at the option* of the legislature; that is, his Honour was discussing legislative power rather than any restriction upon power. However, the best reading of the plurality is that they cited *McGinty* for exactly that proposition — that the legislature has the *power* to develop the franchise. Their Honours sourced *restrictions* upon that power elsewhere. They stated that '[v]oting in elections for the Parliament lies at the very heart of the system of government for which the *Constitution* provides'.<sup>46</sup> It is a 'central concept'.<sup>47</sup> They continued:

representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. Further, in the federal system established and maintained by the *Constitution*, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the

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<sup>41</sup> This article uses the term 'right to vote' for convenience. Whether or not this 'right' is properly to be characterised as a personal right or as a limited freedom from legislative restriction is unimportant for present purposes.

<sup>42</sup> (2007) 233 CLR 162, 186–7 [45] (Gummow, Kirby and Crennan JJ).

<sup>43</sup> Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 245, 268 (citations omitted).

<sup>44</sup> See *Roach* (2007) 233 CLR 162, 186–7 [45] (Gummow, Kirby and Crennan JJ), citing *McGinty* (1996) 186 CLR 140, 279–80 (Gummow J).

<sup>45</sup> (2004) 220 CLR 181, 213–14 [78] (McHugh J), quoting *McGinty* (1996) 186 CLR 140, 279–80 (Gummow J).

<sup>46</sup> *Roach* (2007) 233 CLR 162, 198 [81] (Gummow, Kirby and Crennan JJ).

<sup>47</sup> *Ibid.*

relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.<sup>48</sup>

Therefore, the restriction upon the legislature's power to tamper with the franchise was said to inhere in the system of representative government itself. Their reference to a 'constitutional bedrock'<sup>49</sup> suggests that this restriction is akin to an assumption upon which the *Constitution* is based.<sup>50</sup> To then apply this constitutional restriction on power to the present facts, their Honours relied on the history of disenfranchisement at Federation. The core of this reasoning is thus not 'evolutionary', at least as that term is used in contradistinction to originalism. Instead, restrictions on Parliament's ability to disenfranchise voters were sourced in an assumption or bedrock of the constitutional system, and colonial history was used to give determinate meaning to that assumption.<sup>51</sup>

Gleeson CJ's reasoning is more evolutionary in orientation and so presents itself as a larger target for originalist criticism. First, he approved McTiernan and Jacobs JJ's statement in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* ('*McKinlay*') that 'the long established universal adult suffrage may now be recognised as a fact'.<sup>52</sup> According to Gleeson CJ, 'fact' refers to 'an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*'.<sup>53</sup> Gleeson CJ then analogised from *Sue v Hill*, where it was said that the concept of 'foreign power' fell to be applied to different circumstances at different times, to the present case and the meaning of 'chosen by the people of the Commonwealth'. With respect, his Honour's reliance upon *Sue v Hill* is unsatisfactory. As Professor Leslie Zines has observed, *Sue v Hill* involved a change in external facts, whereas *Roach* simply involved 'a change in our perception and values as to what "the people" encompasses'.<sup>54</sup> And even accepting that what is and what is not a 'fact' is contestable, *Sue v Hill* is distinguishable in so far as there was much more evidence of a change in circumstances in that case than there was in *Roach*. In *Roach*, Gleeson CJ only referred specifically to the 'legislative history' of the statutory franchise in Australia.<sup>55</sup> Secondly, Gleeson CJ

<sup>48</sup> Ibid 198–9 [83].

<sup>49</sup> Ibid 198 [82].

<sup>50</sup> See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

<sup>51</sup> See also Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45, 67–8.

<sup>52</sup> (1975) 135 CLR 1, 36.

<sup>53</sup> *Roach* (2007) 233 CLR 162, 174 [7]. See *Sue v Hill* (1999) 199 CLR 462.

<sup>54</sup> Leslie Zines, 'Chief Justice Gleeson and the *Constitution*' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 269, 273. See also Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 562. Cf Patrick Emerton, 'Political Freedoms and Entitlements in the Australian Constitution — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169, 189–90, 198–9.

<sup>55</sup> *Roach* (2007) 233 CLR 162, 174 [7].

cited Gummow J's statement in *McGinty* that whether a difference in voting power revealed 'gross disproportion' 'is to be determined by reference to the particular stage which then has been reached in the evolution of representative government.'<sup>56</sup> This citation does not progress matters far, because Gummow J was simply agreeing with McTiernan and Jacobs JJ in *McKinlay*, and elsewhere in his judgment Gummow J was clearly concerned with the power of the legislature to develop the franchise rather than any restriction upon that power.

Although Gleeson CJ's evolutionary justifications are problematic, his Honour also appeared to base his conclusion on the additional ground that the right to vote inheres in Australia's constitutional system:

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.<sup>57</sup>

In *Rowe*, French CJ explicitly adopted an evolutionary approach. His Honour quoted the passages from Gleeson CJ's judgment discussed above, and added that implicit in ss 8, 30 and 51(xxxvi) 'was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at Federation.'<sup>58</sup> However, those provisions envisage the legislative *power* to develop the franchise rather than any *restriction* upon power. Keeping this distinction in mind, French CJ's conclusion does not necessarily follow: 'That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished.'<sup>59</sup> If this were correct as a general proposition, it might be arguable that Parliament could not achieve a repeal of legislation intended to benefit indigenous people, as upheld in *Kartinyeri v Commonwealth* ('*Kartinyeri*').<sup>60</sup>

Gummow and Bell JJ noted that Quick and Garran's emphasis 'upon the progressive instincts and tendencies of modern political thought retains deep significance for an understanding of the text and structure of the *Constitution*.'<sup>61</sup> They reasoned that one such 'traditional conception' is the rule of law, which 'posits legality as an essential presupposition for political liberty and the involvement of electors in the enactment of law.'<sup>62</sup> The framers of the *Constitution* had expected that these progressive instincts 'would animate members of legislative

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<sup>56</sup> *McGinty* (1996) 186 CLR 140, 286–7.

<sup>57</sup> *Roach* (2007) 233 CLR 162, 174 [7] (citations omitted).

<sup>58</sup> *Rowe* (2010) 243 CLR 1, 18 [18].

<sup>59</sup> *Ibid* 18 [18].

<sup>60</sup> (1998) 195 CLR 337.

<sup>61</sup> *Rowe* (2010) 85 ALJR 213, 238 [119], quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 418.

<sup>62</sup> *Rowe* (2010) 243 CLR 1, 47 [120].

chambers which were chosen by the people. By this means the body politic would embrace the popular will and bind it to the processes of legislative and executive decision making.<sup>63</sup> Their Honours also agreed with the reasons of Crennan J, and ultimately her conclusion that ‘the term “chosen by the people” had come to signify the share of individual citizens in political power by the means of a democratic franchise.’<sup>64</sup>

Crennan J quoted Isaacs J’s statement that ‘in interpreting the *Australian Constitution*, [one should have regard to] every fundamental constitutional doctrine existing and fully recognised at the time the *Constitution* was passed’.<sup>65</sup> Her examination of the British history of voting pre-Federation, the electoral history in the colonies before Federation, the Convention Debates and contemporary commentary revealed that in 1900, one such doctrine was the distinction between oligarchy and democracy and a firm preference for the latter. Sections 7 and 24 therefore have always ‘constrain[ed] the Parliament from instituting a franchise which will result in an oligarchic representative government and mandate[d] a franchise which will result in a democratic representative government’.<sup>66</sup> Moreover, ‘[w]hat is sufficient to constitute democratic representative government has changed over time, as conceptions of democracy have changed, to require a fully inclusive franchise’.<sup>67</sup> Her Honour concluded that ‘[t]o recognise that ss 7 and 24 mandate a democratic franchise ... is to recognise the embedding of the right to vote’ in the *Constitution*.<sup>68</sup>

Gummow and Bell JJ and Crennan J go to great lengths to explain how their specific formulation of the right to vote exists now when it did not do so at Federation. Their reasoning can be broken down into four steps. First, the *Constitution* must be interpreted in the light of fundamental constitutional doctrines existing at the time of Federation. Secondly, such doctrines include a democratic franchise and the rule of law (understood to mean the people voting for representatives who then enact legislation). Thirdly, the content of these fundamental doctrines falls to be determined at the date of the litigation. Fourthly, the content of those doctrines has always included a right to vote, but the restrictions that can be placed on that right are more limited today than at Federation.

This reasoning differs from a purely evolutionary approach because it attempts to give the right to vote an historical basis. Their Honours relied on fundamental constitutional doctrines at Federation in order to determine the meaning of the constitutional phrase ‘directly chosen by the people’. Having identified the concepts (democratic franchise and the rule of law), their Honours kept the concepts constant

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid 48 [121].

<sup>65</sup> Ibid 105 [324], quoting *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 411–12.

<sup>66</sup> *Rowe* (2010) 243 CLR 1, 281 [367] (Crennan J).

<sup>67</sup> Ibid 117 [367].

<sup>68</sup> Ibid 117 [368].

while recognising that the conceptions meeting the description of those concepts could change over time. Whether or not this explanation is really any different from a purely evolutionary approach,<sup>69</sup> it resonates with a number of interpretative techniques that are thought to allow for legitimate evolution in the meaning of constitutional terms while still remaining faithful to the text and intentions of the framers. These techniques include the distinctions between connotation and denotation, concepts and conceptions, and the essence and inessential elements of a term.<sup>70</sup> Their Honours' approach also finds academic support,<sup>71</sup> most recently in the work of Patrick Emerton.<sup>72</sup> His thesis is that speakers assume that their words refer to a particular kind of thing, and that the nature of the kinds of things at the end of these referential chains might change as modern facts change. Similarly, the plurality in *Roach* explicitly refers to an historical investigation into 'the common assumptions about the subject to which the chosen words might refer over time'.<sup>73</sup>

One way to assess their Honours' approach is to consider whether it blazes a new trail or whether it simply builds upon principles from earlier cases. Their Honours' chain of reasoning is better read in the second, more benign, fashion. The first step was foreshadowed in *Roach*, where the plurality considered colonial history 'to explain the common assumptions about the subject to which the chosen words might refer over time',<sup>74</sup> and in *South Australia v Totani* where French CJ applied this same interpretational approach.<sup>75</sup> It may be of course that these cases collectively represent a new direction in terms of how the Court justifies the use of historical materials in interpreting the *Constitution*. However, such a new direction does not appear to result in a break from the Court's usual historically attentive approach to constitutional interpretation. Fundamental constitutional doctrines are in a sense one historical source amongst several that can be used to interpret the *Constitution*. Additionally, the first step might also be regarded as explaining Dixon J's statement that the *Constitution* is 'framed in accordance with many traditional conceptions'.<sup>76</sup>

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<sup>69</sup> See Graeme Hill, "'Originalist" vs "Progressive" Interpretations of the Constitution — Does It Matter?' (2000) 11 *Public Law Review* 159.

<sup>70</sup> See Sir Anthony Mason, 'Justice Windeyer on the *Engineers Case*: Commentary on the Paper Delivered by Professor Jeffrey Goldsworthy, "Justice Windeyer on the *Engineers Case*", published in (2009) *Federal Law Review* 364' (2010) 12 *Constitutional Law and Policy Review* 41, 42.

<sup>71</sup> See Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323 ('evolutionary originalism'); Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1996) (concept/conception); Michael Stokes, 'Contested Concepts, General Terms and Constitutional Evolution' (2007) 29 *Sydney Law Review* 683 (concept/conception). See also Mason, 'Justice Windeyer', above n 70.

<sup>72</sup> See Emerton, above n 54.

<sup>73</sup> (2007) 233 CLR 162, 188–9 [53] (Gummow, Kirby and Crennan JJ) (emphasis added).

<sup>74</sup> *Ibid.*

<sup>75</sup> (2010) 242 CLR 1, 49 [72].

<sup>76</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

Shades of both the first and the second step appear in Gummow J's judgment in *McGinty*. His Honour stated that '[t]he architects of the Australian federation shared an expectation that the federal Parliament would embrace what were then advanced ideas of political representation.'<sup>77</sup> He discussed John Stuart Mill, whose concept of representative government revolved around institutions that 'had as their essence the placing of ultimate controlling power with the people, to be exercised by representatives of the people elected periodically in free elections'.<sup>78</sup> Although the views of any one scholar did not carry the day at Federation, Gummow J noted that the Convention Debates and later legislative debates on electoral laws 'manifest a familiarity on the part of significant figures in the federal movement' with these scholarly works.<sup>79</sup>

The third step, which essentially assimilates the constitutional expression to an 'always speaking' statute,<sup>80</sup> has a precursor in *Cheatle v The Queen*, at least on one interpretation of that case. The High Court held that at federation, an 'essential feature or requirement' of a 'jury' was that it be 'representative of the wider community'.<sup>81</sup> Whether a particular jury is sufficiently 'representative' will 'vary with contemporary standards and perceptions'.<sup>82</sup> Likewise, a democratic franchise and the rule of law require involvement by the people, and the extent of the involvement that is required will vary from time to time.

Finally, the fourth step — what constitutes a 'substantial reason' for disenfranchisement — builds upon the case law concerning the legitimate limits on the implied freedom of political communication. In *Roach*, the plurality expressly observed that '[t]he affinity to what is called the second question in *Lange* will be apparent'.<sup>83</sup>

There are, however, some difficulties with this reasoning, such that one must not simply assume that it will be taken up in later cases. First, the approach comes perilously close to incorporating into the *Constitution* extra-constitutional theories that do not find explicit reflection in its text and structure.<sup>84</sup> This criticism is

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<sup>77</sup> *McGinty* (1996) 186 CLR 140, 271.

<sup>78</sup> *Ibid* 273.

<sup>79</sup> *Ibid*.

<sup>80</sup> See Sir Anthony Mason, 'Constitutional Advancement — Some Reflections' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 283, 289. On 'always speaking' statutes, see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 123–4.

<sup>81</sup> *Cheatle v The Queen* (1993) 177 CLR 541, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>82</sup> *Ibid*.

<sup>83</sup> *Roach* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ) (citations omitted).

<sup>84</sup> A point that Crennan J appears to disclaim: see *Rowe* (2010) 243 CLR 1, 112 [347].

diverted if one accepts that such incorporation is inevitable,<sup>85</sup> but the High Court has steadfastly distanced itself from such extra-constitutional theorising.<sup>86</sup> Secondly, and relatedly, the fundamental constitutional doctrines identified at step two may have been known to the framers, but it is equally plausible to conclude that the framers did not give effect to them if they are not otherwise evident in the *Constitution*.<sup>87</sup> It becomes a matter of judicial impression whether a doctrine is sufficiently evident as to be an assumption underpinning the *Constitution* (and thus relevant to constitutional interpretation) or whether it is merely an ‘unexpressed assumption[] upon which the framers of the instrument supposedly proceeded’<sup>88</sup> (and thus irrelevant to constitutional interpretation). Thirdly, it might prove to be difficult to distinguish ‘fundamental constitutional doctrines’ from non-fundamental constitutional doctrines or fundamental non-constitutional doctrines, if such distinctions even exist. The difficulty in drawing distinctions — between legitimate and illegitimate assumptions and between fundamental constitutional doctrines and other doctrines — is not itself a reason for rejecting the interpretational method completely. However, it prompts caution before extracting a more general interpretative approach from *Rowe* to be applied in future cases.

### C *Constitutional Citizenship after Roach and Rowe*

Although not without their analytical difficulties, which await future clarification, *Roach* and *Rowe* clearly establish three rationales for a right to vote where such a right did not exist at federation. First, according to Gleeson CJ and French CJ, the meaning of representative government has evolved to include a right to vote, as revealed by ‘[d]urable legislative development[s]’.<sup>89</sup> Secondly, according to the plurality in *Roach*, the right to vote is an assumption or constitutional bedrock beneath the very constitutional system itself. Thirdly, according to Gummow and Bell JJ and Crennan J in *Rowe*, the constitutional words embody a democratic representative government and the rule of law. On both the second and third approaches, applying the constitutional terms today, it can be said that there is a right to vote subject to certain limited restrictions. These rationales breathe new life into the argument for a constitutional concept of citizenship.

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<sup>85</sup> See Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842.

<sup>86</sup> See, eg, *McGinty* (1996) 186 CLR 140, 231–2 (McHugh J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).

<sup>87</sup> See *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 130 [419] (Kiefel J).

<sup>88</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

<sup>89</sup> *Rowe* (2010) 243 CLR 1, 18 [19] (French CJ); *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

First, the evolution of statutory citizenship and the proliferation of legislation that differentiates between citizens and non-citizens may represent ‘[d]urable legislative development’ of a constitutional concept of citizenship.<sup>90</sup> Laws providing for local naturalisation or endenisation existed as early as 1828.<sup>91</sup> After federation, the first statute to deal with nationality was the *Naturalization Act 1903* (Cth). Naturalisation under that Act conveyed a de facto Australian status notwithstanding that the Act was framed in terms of ‘British subjects’ — in the *Markwald* litigation it was held that a person naturalised in Australia was an alien in the United Kingdom.<sup>92</sup> Australian citizenship was finally established by the *Nationality and Citizenship Act 1948* (Cth) and continues to exist today pursuant to the *Australian Citizenship Act 2007* (Cth). A large body of other statutes have also picked up Australian citizenship in their operation.

This web of legislation demonstrates legislative development of citizenship in a general sense, but it is doubtful whether it is truly analogous to the legislative extension of the franchise relied upon by the Chief Justices in *Roach* and *Rowe*. Significantly, French CJ adopted durable legislative development as a touchstone because it was said to reflect ‘a persistent view by the elected representatives of the people of what the term “chosen by the people” requires.’<sup>93</sup> The citizenship legislation, and legislation using citizenship as a criterion of operation, cannot as easily be regarded as explaining what any particular constitutional term means or requires. Indeed, statutory citizenship would be a particularly inapt candidate for guiding the meaning of constitutional terms. Statutory citizenship is a very minimal construct. Although the Act’s preamble refers to Australian citizenship as ‘a common bond, involving reciprocal rights and obligations’, the legislation is not intended to, nor does it, assign rights or duties by its own operation. Its only purpose is to define who citizens are for the purposes of other legislation.<sup>94</sup>

The second and third rationales provide more stable ground for a constitutional concept of citizenship. The franchise, which is ‘constitutional bedrock’, itself assumes the existence of a community of people able to vote. Accordingly, the existence of a constitutional people or community is also an assumption underpinning the *Constitution*. Alternatively, both the democracy argument and the rule of law argument in *Rowe* clear the way for a constitutional concept of citizenship. A democratic franchise and the rule of law (understood to mean the people voting for representatives who then enact legislation) not only assume a right to vote but also, again, the existence of a community of people. This constitutional bedrock of membership can be referred to in any number of ways, be it a constitutional people, constitutional membership or constitutional citizenship.

<sup>90</sup> See generally Rubenstein, *Australian Citizenship Law*, above n 8, ch 5.

<sup>91</sup> See Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens & Sons, 1957) 523–9.

<sup>92</sup> *R v Francis; Ex parte Markwald* [1918] 1 KB 617; *Markwald v A-G (UK)* [1920] 1 Ch 348. See generally *ibid* 530.

<sup>93</sup> *Rowe* (2010) 243 CLR 1, 18 [19] (emphasis added).

<sup>94</sup> Sir Ninian Stephen, ‘Australian Citizenship: Past, Present and Future’ (2000) 26 *Monash University Law Review* 333, 336.

It is thoroughly unsurprising that a constitution should envisage a community to which it applies. The immediate and more practical question raised is whether any rights attach to this constitutional citizenship. One way to answer that question is to examine whether any ‘fundamental constitutional doctrine existing and fully recognised’ at Federation provides for such rights. One candidate might be the common law principle that the Crown owes its subjects a ‘duty of protection’ in return for their allegiance, but the content of that duty was at Federation, and remains today, nebulous.<sup>95</sup> The catalogue of rights protected by the principle of legality, most of which can be traced to historical legal sources,<sup>96</sup> might help to identify such fundamental doctrines, but this also is unlikely. Constitutionalising that catalogue would sit uneasily with the very premise of the principle of legality as it is presently understood in Australia, which is that the legislature *can* abrogate those rights so long as it does so expressly. More generally, reasoning from ‘fundamental constitutional doctrine[s]’ in this context appears to be the same as asking whether rights are so deeply rooted in the constitutional system and common law that they cannot be abrogated by the legislature, a question that remains unresolved to date.<sup>97</sup>

A more orthodox way to answer this question would be to examine the text and structure of the *Constitution* to infuse constitutional citizenship with meaning and significance. On this approach, constitutional citizenship might anchor the implied freedom of political communication and the right to vote. However, it is difficult to identify any other rights that could spring forth, because the *Constitution* has so little to do with personal rights and protections.<sup>98</sup> Identifying a constitutional concept of citizenship might thus prove to be an anti-climax for those aspiring to a comprehensive catalogue of rights. The role of constitutional citizenship may primarily be to shore up and rationalise the foundations of other legal doctrines.

If a constitutional concept of citizenship is only minimally effective in advancing our understanding of citizenship as a basis for rights, a question remains whether the concept might shed light on what it means to be an Australian constitutional citizen. *Roach* and *Rowe* illuminate this identity dimension of citizenship in the course of considering whether there was a ‘substantial reason’ for the impact of the impugned legislation on the franchise. The majority in *Roach* linked ‘the people’ who are entitled to vote to those who manifest a sense of civic responsibility.<sup>99</sup> The class of persons designated by ‘the people’ ordinarily includes those of any

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<sup>95</sup> See Christopher Tran, ‘Revisiting Allegiance and Diplomatic Protection’ [2012] *Public Law* 197.

<sup>96</sup> See Meagher, above n 39, 456–8.

<sup>97</sup> See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ); *Momcilovic v The Queen* (2011) 85 AJLR 957, 1089 [562] (Crennan and Kiefel JJ). See also George Winterton, ‘Justice Kirby’s Coda in Durham’ (2002) 13 *Public Law Review* 165.

<sup>98</sup> For the same conclusion, see Taylor, above n 35, 210; Kirk, above n 32, 345.

<sup>99</sup> See especially *Roach* (2007) 233 CLR 162, 175 [8], 176–7 [12] (Gleeson CJ), 199 [84]–[85], 202 [95] (Gummow, Kirby and Crennan JJ). See also Emerton, above n 54, 199.

religious belief,<sup>100</sup> those who leave their legal obligations to the last moment,<sup>101</sup> and those of any race,<sup>102</sup> and it does not necessarily exclude those who are imprisoned.<sup>103</sup> These insights shed only limited light on what it means to be a member of the Australian constitutional community because the Court was constrained to decide only the specific issues raised in the cases before it. Rosenfeld and Jacobsohn's respective accounts of constitutional identity, considered next, offer a fuller framework to consider the identity dimension of citizenship.

### III ROSENFELD AND JACOBSON'S ACCOUNTS OF CONSTITUTIONAL IDENTITY

Concrete events and issues such as Australia's treatment of asylum seekers, the national human rights consultation, and proposals for an Australian republic and the recognition of indigenous people in the *Constitution* can focus attention on what it means to be a member of the Australian constitutional community. They also raise a broader question about the nature of Australia's constitutional system. This issue has attracted sporadic academic attention, and the terminology used varies between authors and contexts.<sup>104</sup>

'Constitutional identity', as developed by Jacobsohn and Rosenfeld, can shed light on these issues. Jacobsohn treats 'constitutional identity' as the features and attributes characteristic of a particular constitutional system, whereas Rosenfeld's focus is narrower, taking the identity of the individuals bound by the system as his core concern. Their work does not directly engage with what it means to be a citizen in terms of the standard questions of who is a citizen and what rights and obligations do they have. Instead, their views of constitutional identity go beyond these concerns, although the identity of the individuals within the system is a central concern of Rosenfeld's account. Their work is particularly useful for present purposes because they address more obscure questions about *why* identities change and *how* identity is constructed. The following sections are devoted to explaining their separate accounts of constitutional identity in detail. Jacobsohn's work is a useful starting point before launching into Rosenfeld's more particular version that focuses on the individuals within constitutional systems.

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<sup>100</sup> See *Roach* (2007) 233 CLR 162, 174 [8] (Gleeson CJ).

<sup>101</sup> See *Rowe* (2010) 243 CLR 1.

<sup>102</sup> See *Kartinyeri* (1998) 195 CLR 337, 366 [40] (Gaudron J).

<sup>103</sup> See *Roach* (2007) 233 CLR 162.

<sup>104</sup> See, eg, Jeremy Webber, 'Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260 (symbolic/functional); Stone, 'Comparativism in Constitutional Interpretation', above n 51 (localism); Cheryl Saunders, 'Legacies of Luck: Australia's Constitution and National Identity in the 1990s' (1999) 15 *South African Journal on Human Rights* 328 (national identity).

### A Jacobsohn's Constitutional Identity

According to Jacobsohn, constitutional identity is the 'blend of characteristics revealing what is particular to the constitutional culture'.<sup>105</sup> Just as we know that an object is a table when that object has certain attributes that identify it as a table, we know a constitution, and a constitutional identity, when we see its defining characteristics.<sup>106</sup> Those characteristics can be sourced from constitutional and extra-constitutional principles,<sup>107</sup> but the difficulty is to identify which principles are to take priority in the event of disagreement. As Jeremy Waldron and others remind us,<sup>108</sup> there is pervasive disagreement within society. Jacobsohn sits within this tradition. He argues that all constitutional orders (and also constitutional identity) are riven with disharmony and dissonance.<sup>109</sup> Consequently, constitutional identity is dynamic rather than static.<sup>110</sup> Dynamism can manifest at three 'thematic focal points' in particular.<sup>111</sup> First, the 'aspirational content' of a constitutional system<sup>112</sup> may be contested. Secondly, constitutional identity will develop through interactions between actors within the legal system and between the legal system and extra-legal domains.<sup>113</sup> Thirdly, general goals will have to be balanced with the 'particularistic commitments of local traditions and practices'.<sup>114</sup>

Jacobsohn draws upon Edmund Burke and Alasdair MacIntyre to understand the limits upon this dynamism. Burke stated that a nation is 'an idea of continuity',<sup>115</sup> and MacIntyre observed that '[w]e enter upon a stage which we did not design and we find ourselves part of an action that was not of our making'.<sup>116</sup> Thus, for Jacobsohn, the change brought about by disharmony is bounded by historical identities and cannot completely be cut adrift from them.<sup>117</sup> 'the past cannot be excised from the developmental path of constitutional identity, but it need not establish its precise direction'.<sup>118</sup>

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<sup>105</sup> Jacobsohn, above n 6, 22.

<sup>106</sup> See *ibid* 5–7.

<sup>107</sup> See *ibid* 13.

<sup>108</sup> See Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999).

<sup>109</sup> See Jacobsohn, above n 6, 15, 86–7.

<sup>110</sup> See *ibid* 88.

<sup>111</sup> *Ibid* 103.

<sup>112</sup> See *ibid* 104–17.

<sup>113</sup> *Ibid* 107–12.

<sup>114</sup> *Ibid* 113. See further at 112–17.

<sup>115</sup> Edmund Burke, 'Speech on a Motion Made in the House of Commons, the 7th of May 1782, for a Committee to Inquire into the State of the Representation of the Commons in Parliament' in David Bromwich (ed), *On Empire, Liberty, and Reform* (Yale University Press, 2000) 274, quoted in Jacobsohn, above n 6, 96.

<sup>116</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame University Press, 1981) 199, quoted in Jacobsohn, above n 6, 93.

<sup>117</sup> See, eg, Jacobsohn, above n 6, 81, 97, 103–4, 111.

<sup>118</sup> *Ibid* 103–4.

Within these limits, Jacobsohn identifies two tools used to construct identity: formal constitutional amendments, and the use of foreign precedents in constitutional interpretation. As to the former, Jacobsohn concludes that an amendment cannot radically alter constitutional identity lest it fracture the link to the past that he considers to be a necessary element of constitutional identity.<sup>119</sup> It is not, however, possible to say definitively what is so important as to be immune from amendment.<sup>120</sup> As to the latter, Jacobsohn argues that comparativism is not objectionable in principle. Rather, the use of foreign cases should be assessed on a case-by-case basis, paying close attention to the broad constitutional identity of both the target and the comparator jurisdiction to ensure sufficient commonality between them to justify the use to be made of those foreign cases. This argument is not new, but Jacobsohn usefully highlights the depth and breadth of understanding needed before using foreign cases to assist in constitutional interpretation.

Jacobsohn's work emphasises that all constitutional disputes (in the courts and elsewhere in society) are connected to a broader vision of the constitutional system. This observation may reflect what many already thought to be the case. Jacobsohn's tools for modifying identity — amendments and the use of foreign precedents — are also familiar. His original contribution is tracking how constitutional identity has been used in a number of less-discussed jurisdictions to answer particular doctrinal issues, for example the possibility of unconstitutional constitutional amendments and the use of comparative constitutional law. By doing so, he demonstrates that constitutional identity has relevance to most if not all constitutional systems. What his account lacks, and what Rosenfeld provides, is a sophisticated account of *how* identity is constructed.

### B Rosenfeld's Identity of the Constitutional Subject

Rosenfeld's starting point is Benedict Anderson's well-known thesis that nations are 'imagined communities' of strangers most of whom will never meet each other.<sup>121</sup> A constitutional order is a 'collectivity of strangers' that 'must also construct an "imagined community"'. That latter community produces a constitutional identity that though related to, must remain distinct from, its corresponding national identity.<sup>122</sup> Constitutional identity is particularly important for Rosenfeld because of his pluralist outlook.<sup>123</sup> In his view, '[c]onstitutions and constitutionalism only make sense under conditions of pluralism.'<sup>124</sup> On the one hand, an entirely homogenous society would not require constitutional order because there would

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<sup>119</sup> See *ibid* 77.

<sup>120</sup> *Ibid* 332.

<sup>121</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

<sup>122</sup> Rosenfeld, above n 6, 18.

<sup>123</sup> See also Neil Walker, 'Rosenfeld's Plural Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 677.

<sup>124</sup> Rosenfeld, above n 6, 21.

be no disagreement.<sup>125</sup> On the other hand, modern societies are characterised not only by communal pluralism (ethnic, religious and linguistic divides) but by individualistic pluralism (reasonable disagreement between individuals).<sup>126</sup> Federal systems create additional space for disagreement between national and sub-national perspectives. Construction of a constitutional identity, built on ‘projections of sameness and images of selfhood’,<sup>127</sup> is a necessary glue to bind together these different individuals to establish an imagined constitutional community. The constitutional subject (and its identity) is thus a discourse constructed by fragments of constitutional norms, rather than any particular personification.<sup>128</sup> That is, it is not possible, or at least not profitable, to equate the constitutional subject with any particular group of people, be they the constitution makers, interpreters, or those bound by the constitutional order.<sup>129</sup>

Like Jacobsohn, Rosenfeld conceives of constitutional identity as dynamic.<sup>130</sup> It is dynamic because communal and individual identities, and past, present and future identities, will always be in conflict. Those identities must be balanced to produce a constitutional subject with an identity that can bind together the community of strangers. This dynamism manifests at particular moments. A constitutional identity is constructed when a constitution is made. It is then deconstructed by judicial decisions,<sup>131</sup> and reconstructed to assimilate those decisions.<sup>132</sup> Like Jacobsohn, Rosenfeld also identifies a number of limits upon this dynamism. First, constitutional identity must remain different from other identities (including national identity). Otherwise, it would not be possible for the strangers in the constitutional order to come together to form that same order. Secondly, and on the other hand, the constitutional identity must draw on these extra-constitutional identities. Constitutional identity cannot ‘veer so far off from [those other identities] as to become non-viable and hence incapable of genuine implementation.’<sup>133</sup>

Within these boundaries, Rosenfeld identifies three particular tools for constructing constitutional identity, drawing on philosophical (Hegel) and psychoanalytical

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<sup>125</sup> Although a constitution may still be useful, rather than required, in such a society, in order to achieve other purposes, for example the creation of an authoritative rule notwithstanding the absence of disagreement upon the matter.

<sup>126</sup> See Rosenfeld, above n 6, 21.

<sup>127</sup> Ibid 27.

<sup>128</sup> See *ibid* 41.

<sup>129</sup> *Ibid*. See also Martin Loughlin and Neil Walker, ‘Introduction’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 1, 3.

<sup>130</sup> See Rosenfeld, above n 6, 33. See also Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 9, 20–1, discussing the ‘questionability’ of collective selfhood.

<sup>131</sup> Rosenfeld, above n 6, 44.

<sup>132</sup> *Ibid* 41–5.

<sup>133</sup> *Ibid* 11. For the same conclusion from a different theoretical perspective, see Loughlin and Walker, above n 129, 2.

(Freud and Lacan) theories of subjecthood. These are negation, metaphor (condensation) and metonymy (displacement). Negation involves the rejection of other identities in order to create space for a constitutional identity.<sup>134</sup> Metaphor (in Freudian psychoanalysis, ‘condensation’) emphasises the similarities between the strangers within a constitutional order while ignoring their differences in order ‘to forge links of identity.’<sup>135</sup> An example of metaphor is the proposition that ‘the [United States] Constitution is colorblind’. This emphasises the shared humanity of different races while simultaneously disregarding any racial differences that might exist.<sup>136</sup> Metonymy has a strong and a weak form. At the weak end, it involves contextualisation to highlight differences.<sup>137</sup> Such contextualisation is necessary to give effect to Rosenfeld’s pluralist assumption that imbedded within any constitutional order is a state of disagreement and multiple selves. An example of contextualisation is the application of the right to equality, which in some jurisdictions might recognise that equality in fact requires differential treatment for some sectors of society.<sup>138</sup> At the strong end, metonymy becomes what Freud called ‘displacement’.<sup>139</sup> Freud gives the example of a person’s unconscious hatred of an uncle who uses a cane. Where it is taboo to hate the uncle, that hatred will be displaced to a hatred of canes. In terms of constitutional identity, certain aspects of the current identity may be too important to be confronted, and so contextualisation gives way to a complete focus upon a contiguous aspect as a substitute for the first aspect.<sup>140</sup> Rosenfeld gives the example of the United States Supreme Court’s decision in *Lynch v Donnelly*,<sup>141</sup> which held that a nativity scene display did not contravene the Establishment Clause of the *United States Constitution*. The Court likened the display to other commercial traditions that have come to be associated with Christmas but which are inherently secular.<sup>142</sup>

Of the three, negation is the central tool because it clears a space for constitutional identity to exist. However, the repudiation of other identities leaves a vacuum that must then be filled via the operation of metaphor and metonymy together in order to create a positive constitutional identity.<sup>143</sup> The latter tools must draw on the available materials to do so, thus reincorporating aspects of those very identities that were rejected through negation.<sup>144</sup> Whether particular elements become incorporated into constitutional identity depends to a large extent on Freud’s concept of ‘overdetermination’.<sup>145</sup> That is, an element is more likely to be incorporated where it can be supported through both metaphor and metonymy.

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<sup>134</sup> See Rosenfeld, above n 6, 46.

<sup>135</sup> Ibid 51.

<sup>136</sup> Ibid 53.

<sup>137</sup> See ibid 55.

<sup>138</sup> See ibid.

<sup>139</sup> See ibid 53–4.

<sup>140</sup> See ibid 56.

<sup>141</sup> 465 US 668 (1984).

<sup>142</sup> See Rosenfeld, above n 6, 57–8.

<sup>143</sup> See ibid 60.

<sup>144</sup> See ibid 63.

<sup>145</sup> See ibid 64–5.

### C *Summary of Constitutional Identity*

The different conceptions of constitutional identity advanced by Jacobsohn and Rosenfeld are compatible and mutually reinforcing. There are five main points to take away for present purposes.

First, a shared constitutional identity is both a commonplace and a necessary condition of any constitutional legal system, without which it would not be possible to bind together a population marked by differences and disharmony.

Secondly, that identity is not preordained but dynamic. This is important, because it downplays any tendency to venerate ‘constitutional identity’.

Thirdly, constitutional identity is bounded by certain limits. It must remain different from other identities within society, but it cannot be separated perfectly from them. Those identities include all past, present and future constitutional and extra-constitutional identities.

Fourthly, constitutional identity is created when the constitution is made, but it is liable to change with each constitutional amendment, extra-constitutional development, and judicial decision.

Fifthly, there are five primary tools for constructing, deconstructing and reconstructing constitutional identity. The bluntest and most obvious tool is a formal constitutional amendment. This tool might also enable constitutional identity to approach other identities, because, in many jurisdictions, constitutional amendments require the agreement of several different groups within society.<sup>146</sup> The second tool is a methodological one: the use of foreign case law in constitutional interpretation. This alters constitutional identity because identity is unique to a system. Therefore, using a comparator’s case law implicates the target’s own identity in much the same way that copying a friend’s mannerisms, no matter how similar they are to one’s own, affects one’s own identity. The last three tools — negation, metaphor and metonymy — are more subtle and must be discerned in the cases, because they will rarely be explicitly mentioned.

The concept of constitutional identity, particularly as explained by Rosenfeld, contributes to our understanding of constitutional systems because it focuses attention on *how* identity is created. It shifts our attention from the question ‘what are we’ to ‘who are we’.<sup>147</sup> The former can be answered by reference to objective criteria, whereas the latter is constructed, and can only be answered by reference to the tools used in the construction. The Australian scholarship has generally focused on the content of Australian constitutional identity. Such observations can be important for various purposes (for example, to decide whether it is appropriate

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<sup>146</sup> Equally, the involvement of many groups might result in a race to the bottom to achieve agreement and so not approximate any particular identity at all.

<sup>147</sup> See Lindahl, above n 130, 14–16.

to rely on the case law of another jurisdiction because its constitutional identity is similar to Australia's). However, a deeper understanding of citizenship as identity requires an investigation into how that identity came to be developed. Rosenfeld and Jacobsohn's work assists in that endeavour.

#### IV THE IDENTITY OF THE AUSTRALIAN CONSTITUTIONAL SUBJECT

This Part examines a small selection of High Court cases and constitutional issues to illustrate the insights of Rosenfeld and Jacobsohn's work for our understanding of citizenship and identity. The first pair of cases relates to the people of the territories. These cases provide straightforward examples of negation and metonymy in action. The third case concerns the race power and demonstrates a more complex interaction between negation, metaphor, metonymy and constitutional amendments. The analysis of these three cases highlights how the courts construct the identity of the constitutional subject. The final illustration focuses on the insights from constitutional identity for a broader legal issue — constitutional amendments — rather than examining the reasoning in a particular case. This survey is not comprehensive and in many ways it oversimplifies constitutional identity. Its purpose is only to provide concrete illustrations of that concept.

##### A *The People of the Territories*

In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* ('Ame'),<sup>148</sup> the High Court upheld legislation that stripped Papua New Guineans of their Australian citizenship upon the independence of Papua New Guinea.<sup>149</sup> The applicant was born in Papua at a time when it was administered by Australia, and he thus acquired statutory citizenship by birth. Under the *Migration Act 1958* (Cth), he was nevertheless required to obtain an entry permit to enter or reside in Australia. Threatened with deportation for overstaying his visa, the applicant claimed that he was not an 'alien' because he was an Australian statutory citizen, and that the Commonwealth lacked the power to unilaterally withdraw his statutory citizenship. The Court disagreed, unanimously concluding that the applicant (and others in his position) did not hold 'real' citizenship and that s 122 of the *Constitution* empowered the Commonwealth legislature to remove his Australian citizenship.<sup>150</sup>

One of the applicant's arguments was metaphoric in nature. He attempted to establish a commonality with the people of the internal territories by arguing that if

<sup>148</sup> (2005) 222 CLR 439.

<sup>149</sup> On Australian citizenship and Papua New Guinea, see generally Peter M McDermott, 'Australian Citizenship and the Independence of Papua New Guinea' (2009) 32 *University of New South Wales Law Journal* 50.

<sup>150</sup> In support of the Court's decision, see David Bennett, "'Dammit, Let 'Em Do It!'" The High Court and Constitutional Law: The 2005 Term' (2006) 29 *University of New South Wales Law Journal* 167, 169–70.

he could be stripped of citizenship then they too could lose their citizenship.<sup>151</sup> The Court rejected this argument. The Court emphasised that the external territories stand outside the constitutional community established by the *Constitution* (negation)<sup>152</sup> and that the external territories are different from the internal territories (metonymy).<sup>153</sup>

The rights of the people of the external territories arose again in *Bennett v Commonwealth* ('*Bennett*'),<sup>154</sup> where the High Court upheld the validity of legislation that would require those standing for election to the Legislative Assembly of Norfolk Island and those enrolling to vote to be Australian citizens. The plaintiffs conceded that the Commonwealth had no duty to provide for self-government for Norfolk Island, but they submitted that if the Commonwealth chose to do so (as it had in 1979), it could not pass a law that 'divide[d] the community by a criterion that has nothing to do with membership of that community'.<sup>155</sup> In their submission, Australian citizenship was such a criterion because many in the Norfolk Island community were not of Australian descent.

The plurality rejected the plaintiffs' submission. First, they rejected the existence of any Island community separate from the Australian constitutional community. Their Honours stated that '[h]owever distinct and separate the people, or some of the people, of the island may have wanted to be, for more than a century ... they have been linked, first to New South Wales, then to the Commonwealth'.<sup>156</sup> The first negation, then, is of any separate Norfolk Island identity. The plurality then rejected the plaintiffs' submission that the system of representative government established by the *Constitution* requires the Legislative Assembly to be chosen by the Territory's people. Their Honours cited *Ame* for the proposition that the *Constitution* 'do[es] not bind Australia to any particular form of relationship with all inhabitants of all external territories acquired by the Commonwealth'.<sup>157</sup> Therefore, the people of the external territories are not part of the constitutional community (and constitutional identity) delineated by the terms 'the people of the State[s]' and 'the people of the Commonwealth', except for the purposes of negating their identity as part of the permanent population of Norfolk Island. This reasoning — the people of Norfolk Island are not the constitutional 'people' — partially acknowledges their separate identity as Norfolk Islanders that was earlier negated, illustrating Rosenfeld's point that a positive identity can only be established by reintegrating elements of previously discarded identities.

The metonymic aspect of these cases — that the people of the external (as opposed to the internal) territories are not part of the 'people of the States' or the 'people of

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<sup>151</sup> See *Ame* (2005) 222 CLR 439 461–2 [47] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 478 [100] (Kirby J).

<sup>152</sup> *Ibid* 457 [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

<sup>153</sup> *Ibid* 478–9 [101]–[103] (Kirby J).

<sup>154</sup> (2007) 231 CLR 91.

<sup>155</sup> *Ibid* 107 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>156</sup> *Ibid* 108 [34].

<sup>157</sup> *Ibid* 110 [40].

the Commonwealth’ — is important in terms of the possibility of a constitutional concept of citizenship. Metonymy in this instance involves diverting attention from the category under consideration (the people of the external territories) to a contiguous category (the people of the States and Commonwealth) and emphasising the differences between them. In doing so, this reasoning implies that the contiguous category has some constitutional significance.<sup>158</sup> That is, the term ‘the people’ has a constitutional essence such that it is possible to say ‘the people’ of the external territories are not relevantly the constitutional ‘people’. Similarly, in *Roach*, the right to vote was said to reflect representative government and membership of the community and for that reason there were constitutional limits upon disenfranchisement.<sup>159</sup> This reasoning only works, of course, if membership of the community itself has some sort of constitutional value separate from the right to vote, lest the reasoning break down into circularity.

The metonymy in *Ame* and *Bennett* is also important in terms of constitutional identity. The Court’s conclusion that the people of the external territories (who are undoubtedly ‘persons’) are not part of the constitutional ‘people’ echoes a distinction drawn by the United States Supreme Court between ‘persons’ (for example, unauthorised immigrants) and the constitutional ‘people’.<sup>160</sup> It illustrates how constitutional text (including constitutional status terms as seemingly fundamental as ‘the people’) exists in a state of ‘interpretive controversy’,<sup>161</sup> and so identities tied to such text are not only dynamic (with its positive overtones) but unstable and precarious.

### C Race Power

In *Kartinyeri*,<sup>162</sup> a majority of the Court upheld the validity of the *Hindmarsh Island Bridge Act 1997* (Cth) (*Bridge Act*), which purported to prevent the Minister from making a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in respect of the Hindmarsh Island Bridge area. Such a declaration would have preserved the specified area from desecration. The plaintiffs submitted that the *Bridge Act* was invalid because, amongst other reasons, it had a detrimental impact upon the people of the Aboriginal race whereas s 51(xxvi) only supported laws beneficial to the Aboriginal race. Brennan CJ and McHugh J did not address this issue, and instead upheld the *Bridge Act* on the basis that the Commonwealth can repeal what it has enacted. The other judgments did not adopt this approach and were thus forced to confront the interpretation of s 51(xxvi) directly.

<sup>158</sup> *Contra* Irving, ‘Still Call Australia Home’, above n 2, 151–2.

<sup>159</sup> See especially *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ), 198–9 [83] (Gummow, Kirby and Crennan JJ).

<sup>160</sup> See Linda Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8 *International Journal of Constitutional Law* 9, 21–4, discussing *United States v Verdugo-Urquidez*, 494 US 259 (1990).

<sup>161</sup> See Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29.

<sup>162</sup> (1998) 195 CLR 337.

Section 51(xxvi) was amended by referendum in 1967, and so *Kartinyeri* is particularly interesting for present purposes because Rosenfeld and Jacobsohn both discuss constitutional amendments as a tool for amending identity. The plaintiffs argued that the 1967 referendum was motivated by beneficial intentions with the consequence that s 51(xxvi) was limited to the enactment of beneficial laws (whether for the Aboriginal race or any other race), it being accepted that at Federation, s 51(xxvi) was explicitly intended to support detrimental and discriminatory laws. Three of the four justices to consider the question disagreed. They held that the relevant extrinsic material associated with the 1967 referendum did not establish that s 51(xxvi) should now be limited to beneficial laws. Gaudron J observed that the referendum effected a ‘minimalist amendment’,<sup>163</sup> which simply placed the Aboriginal race on a par with other races. Their Honours were thus unwilling to treat the amendment as substantially altering Australia’s constitutional identity.<sup>164</sup> In doing so, their Honours also employed negation to discard Aboriginal identity and instead emphasised metaphorically the similarities between Aboriginal and other races in Australia. The resulting identity is one that is race-neutral, but imperfectly so because s 51(xxvi) still enables race-specific laws.

Gaudron J’s reasons merit closer attention for the interplay between negation, metaphor and metonymy within her judgment. Her Honour held that the constitutional amendment did not by itself limit s 51(xxvi) to beneficial laws. However, she held that in practice only laws beneficial to the Aboriginal race would be able to be ‘deemed necessary’ as required by the terms of s 51(xxvi). Her reasons for this conclusion can be explained in terms of negation, metaphor and metonymy. Gaudron J assimilated the Aboriginal race into the broader Australian community by concluding that the 1967 referendum did not restrict s 51(xxvi) to beneficial laws, thus negating Aboriginal identity. Moreover, she emphasised that the amendment ‘operated to place them in precisely the same constitutional position as the people of other races’,<sup>165</sup> which runs along metaphoric lines. Finally, Gaudron J stated that in practice, only beneficial laws could be made for the Aboriginal race under s 51(xxvi) given their current circumstances in society. This contextualisation (metonymy) illustrates Rosenfeld and Jacobsohn’s point that identities (here, Aboriginal identity) must be negated to clear the way for a dominant shared constitutional identity, but that these identities are often reincorporated into the constitutional identity that is ultimately constructed.

Stepping back from the detail of the judgments in *Kartinyeri*, the evolution of the race power is instructive. The decision in *Kartinyeri* left a gap between Australia’s purportedly race-neutral *national* identity and its *constitutional* identity that continued to permit racial laws pursuant to s 51(xxvi). Steps are now on foot to buttress this race-neutrality (or indeed, to reverse it in favour of indigenous people) through constitutional amendment to amend or remove s 51(xxvi).<sup>166</sup> This evolution

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<sup>163</sup> Ibid 361 [29] (Gaudron J), 382–3 (Gummow and Hayne JJ).

<sup>164</sup> Cf *ibid* 413 [157] (Kirby J).

<sup>165</sup> Ibid 361.

<sup>166</sup> See Expert Panel on Constitutional Recognition of Indigenous People, *You Me Unity: Equality and Recognition* (2011) <<http://www.youmeunity.org.au/>>.

has been a gradual process. It began with the framers at Federation, through to the people at the 1967 referendum, to the High Court in 1998 and back to the people in a referendum at some point in the future. This process illustrates that constitutional identity is dynamic but it is not necessarily a fast-moving dynamism. Moreover, this evolution of the race power demonstrates that constitutional identity is the product of a collective effort. It does not simply fall to the courts to construct, although the courts necessarily have a powerful position in this regard due to their role in determining what the law is. The power of the people to determine and amend Australia's constitutional identity depends in large part on the extent to which they can amend the *Constitution*, considered next.

### C Constitutional Amendments

Rosenfeld briefly mentions that '[a]mending the constitution involves changing it without threatening its overall unity or identity' because it is constitution-making that involves the creation of a new identity.<sup>167</sup> Jacobsohn similarly concludes that amendments, *as* amendments, cannot achieve revolutionary change due to constitutional identity's essential link with the past. He observes that in some countries 'the amendment process itself encourages, if not guarantees, moderation' due to the difficulty in pushing through a successful referendum.<sup>168</sup> These perspectives are consistent with the majority conclusion in *Kartinyeri* that the 1967 referendum was only a minimalist amendment. Yet to claim that constitutional amendments can only ever achieve moderate alterations of constitutional identity appears at least superficially incongruous with the importance of the constitutional amendment process to Australian constitutional identity. Judicial and academic statements about the significance of s 128 are commonplace,<sup>169</sup> and at a rhetorical level at least, the power of the people to amend the *Constitution*, seemingly without limits beyond the practical ones imposed by s 128 itself,<sup>170</sup> is a central feature of Australian constitutional identity. Rosenfeld and Jacobsohn suggest that in fact this power of amendment is more limited and does not in practice enable radical change to be achieved.

The argument can be pushed further by looking at how the courts have interpreted amended provisions. Rosalind Dixon has observed, with direct reference to *Kartinyeri*, that the courts will only interpret an amendment in a manner that

<sup>167</sup> Rosenfeld, above n 6, 30.

<sup>168</sup> Jacobsohn, above n 6, 82.

<sup>169</sup> See, eg, *McGinty* (1996) 186 CLR 140, 235–6 (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 592 [68] (McHugh J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 300–1 [735] (Callinan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 107, 216 (Gaudron J); Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24 *Melbourne University Law Review* 677, 683–6.

<sup>170</sup> See Stephen Gageler, 'Amending the *Commonwealth Constitution* through Section 128 — A Journey Through Its Scope and Limitations' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic: Essays in Honour of Professor George Winterton* (Federation Press, 2010) 6.

achieves a substantial change to constitutional identity where there is clear evidence of such an intention. However, to produce such clear evidence in the materials accompanying the referendum is to jeopardise the success of that very referendum.<sup>171</sup> The government's unsuccessful attempt to amend the *Constitution* to enable it to ban the Communist party is a good example. Dixon's analysis of *Kartinyeri* shows that the practical treatment of constitutional amendments sits in tension with the rhetorical power of such amendments to effect change.

This argument can be pushed further still by considering what evidence the courts take into account to interpret the amended provision. Usually, the available interpretative materials will be documentary evidence that was available both to the electors and to the legislature. However, in *Wong v Commonwealth*,<sup>172</sup> quite exceptionally, there was a piece of evidence (written advice from the Solicitor-General) that was known to certain members of the legislature but not to the public, and the Court took advice into account in construing the amended provision. By doing so, the Court implicitly gave primacy to the intention of the legislature over the intention of the people. This further limits the power of the people to alter the *Constitution* and constitutional identity via s 128.<sup>173</sup>

It is difficult to know what to make of the apparent inconsistency between ideal and practice.<sup>174</sup> The best reading of this tension may be to recognise that Australian constitutional identity includes both the rhetorical significance of s 128 and also the limits upon the people's ability to effect and dictate change via s 128 after the moment of a referendum. Such dynamism and conflict is, as Rosenfeld and Jacobsohn stress, a feature of constitutional identity, and whether this conflict continues depends on actors tempering their understanding of s 128.

## V AUSTRALIAN MEMBERSHIP: INSIGHTS FROM CONSTITUTIONAL CITIZENSHIP AND CONSTITUTIONAL IDENTITY

So far, this article has approached constitutional citizenship and constitutional identity separately, but the two issues are clearly connected at least insofar as the absence of an express conferral of citizenship in the *Constitution* is both an element of and also a limitation upon Australian constitutional identity. Indeed, some of the themes of constitutional identity appear in *Roach* and *Rowe*, which is unsurprising given that the Court treated voting as central to constitutional membership itself.

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<sup>171</sup> See Rosalind Dixon, 'Amending Constitutional Identity' (2012) 33 *Cardozo Law Review* 1847.

<sup>172</sup> (2009) 236 CLR 573.

<sup>173</sup> See Christopher Tran, 'Wong v Commonwealth: Missed Opportunities, Contemporary Meaning and the People' (2011) 13 *Constitutional Law and Policy Review* 76.

<sup>174</sup> Also noting a tension between the intentions of the people at a referendum and the High Court's jurisprudence on the interpretation of constitutional provisions the subject of a referendum, see John M Williams, 'The Constitutional Amendment Process: Poetry for the Ages' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 1, 2.

For example, the majority approaches reflect competing interests in dynamism and continuity. The Chief Justices' reliance on 'durable legislative developments' emphasises the dynamism of constitutional identity, whereas the fundamental constitutional doctrines approach emphasises the pre-constitutional identities that were only partially negated by Federation and that remain available for re-incorporation into the current identity. Another example is the difference between the majority and the minority reasons, which reflect competing preferences for metaphoric and metonymic reasoning. The majority adopted metaphoric reasoning by extracting a concept of representative government at a sufficiently high level of abstraction that they could identify, at any given stage in the development of the Australian community, sufficient similarities to that underlying concept that they could conclude that the system still fit the description of representative government. The majority thus downplayed the differences of opinion about not only what representative government required at the time of Federation, sweeping those differences together into a 'fundamental constitutional doctrine', but also what representative government requires at any given point in time. In contrast, the minority in *Roach* and *Rowe* adopt a predominantly metonymic approach. They emphasised that representative government was particularised only to the extent of the constitutional terms.<sup>175</sup> Additionally, they were unwilling to downplay the differences of opinion at Federation about the meaning of representative government.<sup>176</sup> In their view, no single doctrine of representative government carried the day in 1900, and it was not appropriate to rely on any apparent similarities between the views to crystallise an abstract concept of representative government. The minority thus emphasised differences over similarities, and took the view that the constitutional text negated any previous extra-constitutional identities except to the extent of that text.

When taken together, the discussion of constitutional citizenship and constitutional identity also illuminates a number of more general points about membership of the Australian community.

First, it is well-known that the Australian constitutional system focuses more on institutions of government than individual rights. Attempting to fill this omission through implication of a constitutional concept of citizenship is unlikely to be effective. The accepted means of constitutional interpretation do not support the implication of a broad catalogue of implied citizenship rights, even if it were possible to imply a constitutional concept of citizenship. Moreover, a constitutional status of citizenship on its own sheds little light on any consequential rights or indeed on what it means to be a member of this community. The cases on the people of the territories, the race power and s 128 all demonstrate that there is nothing immutable about constitutional status terms (whether framed in terms of citizens, subjects, people or otherwise). For example, existing constitutional references to 'the people' have not prevented that status from being used to distinguish and exclude a class of persons said to be separate from 'the people', nor has it prevented the courts from placing limits on the power of 'the people' to alter

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<sup>175</sup> See, eg, *Rowe* (2010) 243 CLR 1, 64 [182], 67 [193] (Hayne J).

<sup>176</sup> See, eg, *ibid* 71–2 [204] (Hayne J), 130 [419] (Kiefel J).

the *Constitution*. Adding ‘constitutional citizenship’ to the mix promises to insert additional terminology into an already crowded space without guaranteeing any more stable basis for what that status really means or achieves.

Secondly, any constitutional amendment to give meaning to Australian membership (whether by expressly providing for constitutional citizenship or otherwise) must specify in detail the rights and obligations attaching to that status to effect a substantial change to Australia’s constitutional identity. If a core feature of Australia’s current constitutional identity is the system’s focus upon institutions and not people, a substantial and substantive amendment will be needed to amend this identity. Simply referring to constitutional citizens in the preamble, for example, is unlikely to have much practical consequence in the absence of a legal tradition that gives substance to that status. As the history of statutory citizenship and the treatment of ‘the people’ and indigenous people in the *Constitution* shows, legal statuses on their own cannot do the heavy lifting when it comes to establishing rights or identities. Instead, they become focal points for distinctions to be drawn between people.

Thirdly, and more generally, it is doubtful whether constitutional status terms can explain much at all about membership of a community. Since they are the obvious starting point for litigants claiming something in the nature of a ‘typical citizenship right’, these terms are often the subject of litigation and thus the object of negation, metaphor and metonymy by the courts. This is by no means a criticism of the courts: this malleability simply reflects the broader dynamism of constitutional identity, of which a constitutional status term is a central element. It does reveal, however, that these terms have no special magic and that they are unstable anchors for identity. Establishing ‘constitutional citizenship’, or any other status, simply invites further distinctions to be drawn between people through the use of negation, metaphor and metonymy.



## IS NEAR ENOUGH GOOD ENOUGH? – IMPLEMENTING AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS TORTURE CRIMINALISATION AND PROHIBITION OBLIGATIONS IN THE *CRIMINAL CODE* (Cth)

### ABSTRACT

The welcome domestic implementation of Australia’s international torture criminalisation and prohibition obligations in the *Criminal Code* (Cth) is important in the creation of general torture offences, but also reflects critical contemporary features of Commonwealth human rights policy and the resetting of Australia’s relationship with the United Nations human rights system. The legislative and policy choices made provide signals for future human rights endeavours. These choices confirm that modest changes to the legislative drafting would have asserted a more exemplary foundation for Australian international human rights advocacy and set a higher standard for the development of a domestic human rights framework.

### I INTRODUCTION

The Commonwealth Parliament, in response to a set of Australia’s international human rights obligations relating to the prohibition of torture and the death penalty, has enacted significant legislation in the form of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) (*Act*), introducing div 274 torture offences into the *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code* (Cth)).<sup>1</sup>

This article focuses upon the torture prohibition and criminalisation reforms in the *Act*,<sup>2</sup> and this is important because a general Commonwealth offence of torture has been enacted for application within Australia for the first time.<sup>3</sup> More broadly,

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<sup>1</sup> Division 274 (Torture) comprises ss 274.1–274.7 inclusively of the *Criminal Code* (Cth) and is enacted by sch 1 of the *Act* (Amendments and repeal relating to offence of torture).

<sup>2</sup> In contrast, sch 2 of the *Act* — dealing with amendments relating to the abolition of the death penalty — amended the *Death Penalty Abolition Act 1973* (Cth) to extend the existing Commonwealth prohibition of reintroduction of the death penalty applying in Commonwealth and territory jurisdictions, to the jurisdictions of the states.

<sup>3</sup> See the discussion of earlier Commonwealth torture offences under Part III(A) below.

the reforms signal distinctive characteristics from contemporary Commonwealth human rights policy, responses to Australia’s international human rights obligations, and raise issues about a renewed engagement with the United Nations human rights system and its institutions.

The article briefly appraises the recent and relevant human rights policy context from which the domestic torture prohibition offences have emerged. This appraisal includes legislative and other responses to the *National Human Rights Consultation Report*,<sup>4</sup> matters indicative of Australia’s re-engagement with the United Nations human rights system and institutions, the complementary Australian commitment to become a party to the *Optional Protocol to the Convention Against Torture*<sup>5</sup> and the influence of the re-emergence of torture in the war on terrorism.

Prior to assessing the criminalisation of torture in Australian domestic law, the article examines previous Commonwealth torture offences, along with contemporary developments from Australian international human rights, procedural and convention obligations under the *Convention Against Torture*<sup>6</sup> and the *International Covenant on Civil and Political Rights*.<sup>7</sup> A series of topical legal analyses of the principal features of the Australian criminalisation of torture, as fulfilling those international obligations, is subsequently pursued.

These individual analyses of the *Act’s* torture criminalisation provisions confirm that various opportunities existed to more expansively engage with and implement Australia’s international human rights obligations under the *Convention* and the *ICCPR*. Instead, on several occasions, the government opted for a narrower legal drafting than either necessary or desirable. Greater legislative detail and reach might have been applied to implement international obligations in a manner both more cogent and exemplary. The contemporary Australian government emphasis in protecting human rights based upon parliamentary sovereignty and executive government responses, translates in the *Act* to a cautious accommodation of the *Convention* international human rights obligations. The legislative content choices made in the *Act* reflect that a fairly narrow template for legislative implementation has been adopted.

This express governmental preference for parliamentary sovereignty and parliamentary processes for the domestic protection of human rights, over a statutory charter of rights, also mean that the *Act’s* present choices hold broader

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<sup>4</sup> National Human Rights Consultation, *National Human Rights Consultation: Report* (Attorney-General’s Department, 2009) (*‘National Human Rights Consultation’*).

<sup>5</sup> *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2373 UNTS 237 (entered into force 22 June 2006) (*‘Optional Protocol’*).

<sup>6</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*‘Convention’*).

<sup>7</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*‘ICCPR’*).

significance. The enacting assumption in the *Act* acknowledges the international human rights *Convention* obligation, but through precise and conservative legislative drafting. The *Act* forms an indicator for both future drafting and processes for implementing other international human rights convention obligations and how the statements of compatibility and the role of the Parliamentary Joint Committee on Human Rights<sup>8</sup> might operate.

This domestic criminalisation of torture affords, from the government's perspective, certain strategic benefits: a conservative, uncontroversial drafting focusing on the instant human rights topic, rather than prompting deliberation about broader human rights implementation; a more straightforward passage of legislation and neutralising points of opposition to that legislation; the ability to positively respond to United Nations treaty committees by pointing to concrete enactments directly linked to the conventions; and a simple compliance with the s 51(xxix) external affairs power constitutionality requirements, providing greater robustness of the legislation in the event of constitutional challenge.

Equally, however, this legislative methodology can be seen as hesitant in implementing Australia's human rights convention obligations, hinting that more could be done, with exemplary opportunities declined. This, in turn, might adversely influence perceptions of the government's claims of re-engagement with United Nations human rights obligations and institutions as being muted by political temperament and calculation.

Conclusions are reached in this article about the legislative and policy choices made in the implementation of Australia's torture criminalisation obligations, as well as providing signals about future endeavours. The *Act* would have been enhanced by adopting the additional measures identified in the article's legislative analyses.<sup>9</sup> Such improvements would have provided a more substantive human rights legislative and policy orientation as a precursor to implementing Australia's Human Rights Framework generally, and, in particular in the operation of the two key elements of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

## II THE AUSTRALIAN NATIONAL AND INTERNATIONAL HUMAN RIGHTS POLICY CONTEXT OF THE DOMESTIC CRIMINALISATION OF TORTURE

The Commonwealth domestic criminalisation of torture is more readily comprehended within recent broader Australian national and international responses to human rights issues. In particular, the domestic criminalisation of torture is best considered within the context of the Rudd/Gillard government's

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<sup>8</sup> Section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires members of parliament, when introducing legislation or creating a disallowable instrument, to table a Statement of Compatibility with Australia's human rights obligations. Section 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) establishes a Parliamentary Joint Committee on Human Rights for the scrutiny of legislative instruments.

<sup>9</sup> See Part III below.

legislative and executive human rights engagement, including re-engagement with United Nations human rights institutions and conventions, along with the potential international influence of an exemplary Australian role in implementing human rights obligations in comparison with the practices of other nations.

The emergence of torture as an interrogative response in the war on terror is also an important background factor to its domestic criminalisation. The salient point is that the Act emerges within a broader, articulated Australian government human rights agenda that is both ambitious and progressive, but that the domestic criminalisation of torture is an example of an international human rights obligation interpreted, responded to, and implemented through modest legislative and policy measures.

#### *A Australia’s National Human Rights Consultation and the Human Rights Framework*

Accordingly, governmental legislative and policy responses to the Brennan Committee report, the *National Human Rights Consultation Committee Report*, provide important attitudinal and practical indications of the Government’s methodology in the protection of human rights, mirrored in characteristics of the Act. The Brennan Committee report was released on 8 October 2009,<sup>10</sup> therefore preceding the passage of the Act.<sup>11</sup> The Australian government response to the Brennan Committee report followed a few weeks after the Act’s enactment and coincided with the launch of Australia’s human rights framework.<sup>12</sup>

The Australian government rejected the Brennan Committee Report recommendation that Australia adopt a federal statutory Human Rights Act.<sup>13</sup> Instead, the government’s response was crafted around the Brennan Committee recommendation that ‘the Federal Government develop a national action plan to implement a comprehensive framework’.<sup>14</sup> That comprehensive framework

<sup>10</sup> See Robert McClelland, ‘The Protection and Promotion of Human Rights In Australia’ (Media Release, 8 October 2009) <[http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_FourthQuarter\\_8October2009-ReleaseofNationalHumanRightsConsultationReport.html](http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_8October2009-ReleaseofNationalHumanRightsConsultationReport.html)>.

<sup>11</sup> The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) was enacted on 11 March 2010.

<sup>12</sup> See Robert McClelland, ‘Australia’s Human Rights Framework’ (Media Release, 21 April 2010) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2010/Secondquarter/21April2010AustraliaHumanRightsFramework.html>>.

<sup>13</sup> The *National Human Rights Consultation*, above n 4, recommended, inter alia, that Australia adopt a federal Human Rights Act, that it be based on a dialogue model, that it should incorporate several non derogable civil and political rights, that it also should include a range of additional civil and political rights, with these additional rights being subject to a limitation clause: at xxix–xxxviii.

<sup>14</sup> Ibid, xxix, Recommendation 2.

emerged as Australia's Human Rights Framework,<sup>15</sup> the launch of which afforded the opportunity for announcing that only limited and selected aspects of the *National Human Rights Consultation Report* would be adopted, reflecting a strong reliance on, and confirmation of, parliamentary practices and parliamentary sovereignty for human rights protection in preference to the judicial articulation of human rights.

In understanding the broader Australian government context of this limited and selected application of human rights principles, contemporaneous with the criminalisation of torture legislation, various insights are available that reflect this reliance upon parliamentary practices and parliamentary sovereignty.

First, there was an acknowledgment of Australia's obligations under the seven core United Nations international human rights treaties to which Australia is a party.<sup>16</sup> Of particular relevance to the criminalisation of torture were the *Convention* and the *ICCPR*. Further, two measures<sup>17</sup> from the *National Human Rights Consultation Report* were adopted, namely a Parliamentary Joint Committee on Human Rights,<sup>18</sup> and the requirement that Parliamentarians, when introducing a Bill into Parliament, present a statement of the human rights compatibility<sup>19</sup> of the legislation against the seven core international human rights treaty obligations.<sup>20</sup>

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<sup>15</sup> Robert McClelland 'Address to National Press Club of Australia — Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club, Canberra, 21 April 2010) <[http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2010\\_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework.html)>.

<sup>16</sup> Namely, the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICECSR*'); *Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'); *Convention for the Elimination of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); *Convention on the Rights of the Child*, opened for signature 20 November 1969, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*'); and *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CROPD*').

<sup>17</sup> *National Human Rights Consultation*, above n 4, made 31 recommendations.

<sup>18</sup> *Ibid*, Recommendation 7.

<sup>19</sup> *Ibid*, Recommendation 6.

<sup>20</sup> See respectively pt 2 and pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act passed the Parliament on 25 November 2011, was assented to on 9 December 2011, for commencement on 4 January 2012. See Robert McClelland, 'Passage of Legislation to Improve the Protection of Human Rights' (Media Release, 25 November 2011) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www>>.

This legislatively focused position displays a clear emphasis upon parliamentary sovereignty and a parliamentary-based assessment of Australia’s compliance with its international human rights obligations. It treats cautiously the introduction of international human rights principles into Australian human rights legislation, insulating that introduction from the judicial interpretive development that would flow from a statutory charter of rights. Instead of a judicial interpretive clause, the function of the courts is limited to determining Parliament’s purpose and intent through the *Acts Interpretation Act 1901* (Cth), now supplemented by a court’s ability, under that legislation,<sup>21</sup> where there is an ambiguity, to refer to the further Parliamentary material in the form of the reports of the Parliamentary Joint Committee on Human Rights.<sup>22</sup> The consequences of this legislative approach in limiting the judicial role means that reference to a body of international and comparative human rights jurisprudence, deriving from articles of the seven core human rights treaties, is made contingent on and susceptible to the political views of the Parliamentary Joint Committee.

Three further prominent commitments in the Human Rights Framework<sup>23</sup> consciously avoid any judicial involvement in expounding human rights. All of these measures indicate a strong emphasis upon parliamentary sovereignty and Parliament’s role in assessing Australia’s human rights obligations and excluding a prominent role for direct judicial interpretive development giving effect to the

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attorneygeneral.gov.au/Mediareleases/Pages/2011/Fourth%20Quarter/25-November-2011---Passage%20of%20legislation%20to%20improve%20the%20protection%20of%20human%20rights.html>; Robert McClelland, ‘Royal Assent for Legislation to Improve the Protection of Human Rights’ (Media Release, 9 December 2011) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2011/Fourth%20Quarter/9-December-2011---Royal-Assent-for-legislation-to-improve-the-protection-of-human-rights.html>>; Nicola Roxon, ‘Human Rights Check for New Laws’ (Media Release, 4 January 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/4-January-2012--Human-Rights-check-for-new-laws.aspx>>. The Parliamentary Joint Committee on Human Rights will be established by a resolution of appointment in the Autumn 2012 Parliamentary sittings.

<sup>21</sup> See *Acts Interpretation Act 1901* (Cth) s 15AB(2)(c). Section 15AB(1)(b) states that:

Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material (b) to determine the meaning of the provision when (i) the provision is ambiguous or obscure.

<sup>22</sup> See the reporting function of the Parliamentary Joint Committee on Human Rights to both House of Parliament under ss 7(a), (b) and (c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>23</sup> Namely investment of \$12 million in education initiatives, combining federal anti-discrimination laws into a single Act and creating an annual NGO Human Rights Forum to enable comprehensive engagement with non government organisations on human rights matters: McClelland, ‘Address to the National Press Club of Australia’, above n 15.

non-derogable right of freedom from torture and cruel, inhuman and degrading treatment or punishment.<sup>24</sup>

The *Act's* domestic criminalisation of torture is therefore grounded within that parliamentary/executive model of the Australian Human Rights Framework for human rights protection and promotion, and the present government's rejection of a statutory charter of rights. The model's reliance on legislative measures and associated policy development and implementation has several features consistent with the present government's re-engagement with international human rights obligations and with the United Nations human rights system.

Legislative enactment enables the Australian government to present itself positively and responsively within the United Nations human rights system of States Parties reports to the *Convention* Committee and the Human Rights Committee, as well as in other human rights forums. In enacting separate pieces of legislation such as the present Act, implementing human rights obligations relating to torture whilst rejecting the more enlarged judicial role afforded by a charter of rights, concrete evidence is provided to United Nations treaty bodies of changed Commonwealth approaches to human rights issues, exceeding aspirational declarations of re-engagement with the United Nations human rights system.<sup>25</sup> This preferred reliance upon specific, precise legislation as in the case of the domestic criminalisation of torture, once enthusiastically anticipated by the Committee Against Torture,<sup>26</sup> has subsequently prompted the Committee Against Torture to raise follow up issues<sup>27</sup> prior to the submission of the fifth periodic report of Australia,<sup>28</sup> regarding the

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<sup>24</sup> See *National Human Rights Consultation*, above n 4, xxxv, Recommendation 24:

The Committee recommends that the following non derogable civil and political rights be included in any Federal Human Rights Act, without limitation: Protection from torture and cruel, inhuman or degrading treatment. A person must not be — subjected to torture or treated or punished in a cruel, inhuman or degrading way or subjected to medical or scientific experimentation without his or her full, free and informed consent.

<sup>25</sup> See Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at the Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <[http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_HumanRightsandEqualOpportunityCommission.html](http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_HumanRightsandEqualOpportunityCommission.html)>; Robert McClelland, 'Human Rights under a Rudd Labor Government — What will be different?' (Speech delivered to the Banks/Barton FEC Regional Forum, Sydney, 17 November 2008) <[http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_17November2008-HumanRightsUnderaRuddLaborGovernment-Whatwillbedifferent.html](http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_17November2008-HumanRightsUnderaRuddLaborGovernment-Whatwillbedifferent.html)>.

<sup>26</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 2 [8].

<sup>27</sup> Committee against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of Australia*, UN Doc CAT/C/AUS/Q/5 (15 February 2011).

<sup>28</sup> Australia's Fifth Periodic Report under the Convention Against Torture is due in 2012: see Human Rights Council Working Group on Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights in*

adoption of a federal human rights act including a prohibition against torture.<sup>29</sup> Minimal legislative drafting for implementation may also prompt questions about the sincerity and commitment of the government’s human rights agenda, including whether there is a full commitment to the principles of the *Convention*.

In translating those obligations into legislation, given the notorious character of torture, the government is placed in a politically advantageous position which makes its criminalisation of torture difficult to criticise. Furthermore, attention is focused on the instant subject matter of torture, in place of the broader and more contentious issue of the role of international human rights law — in the form here of implementation of *Convention* articles — and re-engagement with the United Nations human rights treaty system.

The conservative legislative drafting technique in the domestic criminalisation of torture is further tailored in response to the legal parameters set by the High Court of Australia’s treaty implementation aspect of the s 51(xxix) *Commonwealth Constitution* external affairs power.<sup>30</sup> Its drafting avoids an extended scope of the torture criminalisation provisions which would have been constitutionally underpinned by the more contentious non-treaty aspects of the s 51(xxix) external affairs power.<sup>31</sup>

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*accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 Australia*, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) 5.

<sup>29</sup> The Committee Against Torture ‘noted that the State Party does not have a constitutional or legislative protection of human rights at the Federal level ie a Federal Bill or Charter of Rights protecting, *inter alia*, the rights contained in the Convention’. It recommended that ‘The State party should continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the Federal level’: Committee against Torture, *Concluding Observations: Australia*, above n 26, 2 [9].

<sup>30</sup> This comprises *first* the existence of a sufficiently specific treaty obligation which directs the general course of action to be taken by signatory states, in contrast to aspirational, recommendatory and hortatory statements in treaties: *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*‘Industrial Relations Case’*). The requirement of an identifiable treaty obligation was more recently confirmed by three judges who discussed the external affairs power issue in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 95 126–8 (Hayne and Kiefel JJ) (especially at 127) and 157–68 (Heydon J) (especially at 162). *Secondly*, a proportionality test is applied so that the enacting measures are reasonably capable of being considered appropriate and adapted to give effect to Australia’s obligations under the *Convention*: *Industrial Relations Case* (1996) 187 CLR 416, 486–8 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *R v Tang* (2008) 237 CLR 1, 21 (Gleeson CJ), 27 (Gummow J), 54 (Hayne J), 64 (Heydon J) (Crennan and Kiefel JJ agreed with Gleeson CJ).

<sup>31</sup> Namely, (i) relations with other countries and international organisations: *R v Sharkey* (1949) 79 CLR 121; *New South Wales v Commonwealth* (1975) 135 CLR 337 (*‘Seas and Submerged Lands Case’*); *XYZ v Commonwealth* (2006) 227 CLR 532; *Thomas v Mowbray* (2007) 233 CLR 307; (ii) matters physically external to Australia: *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Horta*

*B Renewing Australia's Relationship with the United Nations and its Human Rights Institutions*

The domestic criminalisation of torture is properly considered as enacted within the context of the Rudd/Gillard government's desired renewal of Australia's relationship with the United Nations and its human rights institutions. In publicly articulated terms, this includes matters such as re-engagement with United Nations human rights institutions<sup>32</sup> and adopting other formal United Nations human rights mechanisms,<sup>33</sup> to deliberately distinguishing the present government's international human rights based policies from those of the predecessor Howard government.<sup>34</sup> The domestic criminalisation of torture can also be presented by the government as comprehensively fulfilling Australia's obligations under the *Convention*,<sup>35</sup> and as a positive response to Concluding Observation recommendations made

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*v Commonwealth* (1994) 181 CLR 183; *Industrial Relations Case* (1996) 187 CLR 416; *XYZ v Commonwealth* (2006) 227 CLR 532; *Pape v Commissioner of Taxation* (2009) 238 CLR 1; and (iii) matters of international concern: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *XYZ v Commonwealth* (2006) 227 CLR 532.

<sup>32</sup> See McClelland, 'Australia and International Human Rights: Coming in from the Cold', above n 25; McClelland 'Human Rights under a Rudd Labor Government — What will be different?', above n 25; Robert McClelland, 'Invitation to United Nations Human Rights Experts' (Media Release, 7 August 2008) <[http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_ThirdQuarter\\_7August2008-InvitationtoUnitedNationshumanrightsexperts.html](http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_7August2008-InvitationtoUnitedNationshumanrightsexperts.html)>; Kevin Rudd, 'Australia's Engagement in Improving Global Human Rights' (Speech delivered to the Australian Government NGO Forum on Human Rights, Parliament House, Canberra, 22 June 2011) <[http://www.foreignminister.gov.au/speeches/2011/kr\\_sp\\_110622.html](http://www.foreignminister.gov.au/speeches/2011/kr_sp_110622.html)>. Re-engagement with the United Nations human rights system involved becoming a party to some international instruments opposed by the previous government, an open invitation made to Special Rapporteurs and Working Groups under the Human Rights Council to visit Australia, and the nature of Australia's participation in, and responses made to Universal Periodic Review, before the UN Human Rights Council.

<sup>33</sup> These activities include ratifying the *CROPD* and acceding to the Optional Protocol to the *CROPD*; acceding to the Optional Protocol to the *CEDAW* and signing the Optional Protocol to the *CAT*.

<sup>34</sup> See, eg, McClelland, 'Human Rights under a Rudd Labor Government — What will be different?' above n 25; Alexander Downer, Daryl Williams and Philip Ruddock 'Improving the Effectiveness of United Nations Committees' (Media Release, 29 August 2000) <[http://www.foreignminister.gov.au/releases/2000/fa097\\_2000.html](http://www.foreignminister.gov.au/releases/2000/fa097_2000.html)>; Alexander Downer and Daryl Williams, 'Progress Made to Reform UN Treaty Bodies' (Media Release, 9 March 2006) with attachment, 'Reform of the United Nations Human Rights Treaty Body System: Australian Initiatives' <[http://www.foreignminister.gov.au/releases/2006/joint\\_ruddock\\_un\\_treaty\\_bodies\\_090306.html](http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un_treaty_bodies_090306.html)>.

<sup>35</sup> See Robert McClelland, 'Passage of Legislation to Prohibit Torture and the Death Penalty' (Media Release, 11 March 2010) <[http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_FirstQuarter\\_11March2010-PassageofLegislationtoProhibitTortureandtheDeathPenalty.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FirstQuarter_11March2010-PassageofLegislationtoProhibitTortureandtheDeathPenalty.html)>.

in relation to the art 19 State Party reporting process under the *Convention*.<sup>36</sup> In turn, the domestic criminalisation of torture has prompted the Committee Against Torture to seek further specific information on the adequacy of the definition and criminalisation of torture and application of the *Convention* within Australia and extraterritorially.<sup>37</sup>

An important engagement with United Nations human rights institutions was the Universal Periodic Review of Australia before the Human Rights Council in the first months of 2011. Australia’s participation in this Universal Periodic Review was noticeable for the particular commitments and undertakings made during the review, both in the opening statement<sup>38</sup> and in the closing remarks.<sup>39</sup> The content of Australia’s report<sup>40</sup> for Universal Periodic Review included commentary upon

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Introducing a specific Commonwealth offence of torture will fulfil Australia’s obligations under the United Nations Convention Against Torture to ban all acts of torture, wherever they occur.

<sup>36</sup> See Committee against Torture, *Concluding Observations: Australia*, above n 26, 2 [8]–[9]:

The State party should ensure that torture is adequately defined and specifically criminalized both at the Federal and States/Territories levels, in accordance with article 1 of the Convention. ... The State party should fully incorporate the Convention into domestic law, including by speeding up the process to enact a specific offence of torture at the Federal level.

<sup>37</sup> Committee against Torture, *List of Issues*, above n 27, 1 [1].

<sup>38</sup> These new commitments were the establishment of a full time Race Discrimination Commissioner in the Australian Human Rights Commission; the tabling in Parliament of concluding observations made by UN treaty bodies to Australia, as well as recommendations made to Australia in the UPR; establishing a systematic process for the regular review of Australia’s reservations to international human rights treaties; and providing a contribution of \$2.35 million to the UN Office of High Commissioner for Human Rights in 2011 to help promote and protect human rights, particularly in the Asia Pacific region: Kate Lundy, ‘Opening and Closing Remarks at the United Nations Human Rights Council for Universal Periodic Review 28 January 2011’ (Speech delivered to the UN Human Rights Council UPR Review Panel, Geneva, 28 January 2011) <[http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2011\\_FirstQuarter\\_28January2011-OpeningandclosingremarksattheUnitedNationsHumanRightsCouncilfortheUniversalPeriodicReview.html](http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_28January2011-OpeningandclosingremarksattheUnitedNationsHumanRightsCouncilfortheUniversalPeriodicReview.html)>.

<sup>39</sup> The further commitments made were an intention ‘to consult extensively with the Australian Human Rights Commission and non-government organisations, reflecting on the UPR process and considering how recommendations can best be addressed’; ‘to establish a publicly accessible, online database of recommendations from the UN human rights system, including recommendations made by UN human rights treaty bodies to Australia as well as recommendations made to Australia in the UPR’; and ‘the Australian Government will use the recommendations made during UPR and accepted by Australia to inform the development of Australia’s new National Human Rights Act Plan’: Lundy, above n 38.

<sup>40</sup> Human Rights Council, Working Group on Universal Periodic Review, 10<sup>th</sup> sess, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 — Australia*, UN Doc A/HRC/ WG.6/10/AUS/1 (5 November 2010).

Australian government action in relation to the enactment of the torture offences.<sup>41</sup> The inclusion of this information in the Australian report under the discussion of ‘[r]ight to life, liberty and security of the person,’<sup>42</sup> prefacing various other measures outlining the development of civil and political rights, gave prominence to the criminalisation of torture in Australia’s first Universal Periodic Review report to the Human Rights Council. Domestic compliance of Australia’s laws with its international obligations under the *Convention* was also raised in other documentation associated with Universal Periodic Review, but without specific reference to the domestic criminalisation of torture.<sup>43</sup>

In relation to further engagement with United Nations institutions, the most significant contemporary factor is Australia’s bid for a non permanent elected seat on the United Nations Security Council for 2013–14. Within this bid, emphasis has been made of the human rights related aspects that Australian elected membership of the Security Council would provide,<sup>44</sup> as well as the constructive role that Australian membership would occasion.<sup>45</sup> Consequently, the domestic criminalisation of torture in response to *Convention* obligations, and any positive Convention Against Torture Committee Concluding Observations, are amongst many human rights developments that bolster credibility in the Australian bid for a non permanent Security Council seat.

### C *Australia and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

A further important contextual matter relating to the domestic criminalisation of torture is the related development of Australia’s signature to<sup>46</sup> and prospective

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<sup>41</sup> Ibid [101]:

In addition, the *Criminal Code Act 1995* was amended to include a specific torture offence at the Commonwealth level. This is intended to better fulfil Australia’s obligations under the CAT to ban all acts of torture, wherever they occur.

<sup>42</sup> Ibid.

<sup>43</sup> See Human Rights Council Working Group on Universal Periodic Review, above n 28, [51] item 12.

<sup>44</sup> Rudd, ‘Australia’s Engagement in Improving Global Human Rights’, above n 32; Kevin Rudd, ‘Australia’s Foreign Policy Priorities and Our Candidature for the UN Security Council’ (Speech delivered at the National Press Club Canberra, 1 June 2011) <[http://www.foreignminister.gov.au/speeches/2011/kr\\_sp\\_110601.html](http://www.foreignminister.gov.au/speeches/2011/kr_sp_110601.html)>; Stephen Smith, ‘A Modern Australia For a New Era’ (Speech delivered at the Australian Strategic Policy Institute National Security Dinner, Sydney, 9 April 2008) <[http://www.foreignminister.gov.au/speeches/2008/080309\\_nsd.html](http://www.foreignminister.gov.au/speeches/2008/080309_nsd.html)>.

<sup>45</sup> Smith, ‘A Modern Australia for a New Era’, above n 44; Rudd, ‘Australia’s Foreign Policy Priorities and Our Candidature for the UN Security Council’, above n 44; Rudd, ‘Australia’s Engagement in Improving Global Human Rights’, above n 32.

<sup>46</sup> See Robert McClelland and Stephen Smith, ‘Australia Takes Action Against Torture’ (Media Release, 22 May 2009) <<http://www.foreignminister.gov.au/releases/2009/joint-torture-090522.html>>; Robert McClelland, ‘Human Rights: A Moral Compass’ (Speech delivered to The Lowy Institute For International Policy, Sydney, 22 May 2009) <<http://pandora.nla.gov.au/pan/21248/20091120-0012/www>>.

ratification of the *Optional Protocol*.<sup>47</sup> The *Optional Protocol* establishes a Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>48</sup> It also ‘obliges parties to allow periodic international inspections of its places of detention, and to establish formal mechanisms to enable regular examination of the treatment of persons in places of detention’.<sup>49</sup> States are also required under art 17 of the *Optional Protocol* to establish National Preventive mechanisms, as ‘independent national bodies for the prevention of torture and ill-treatment at the domestic level’.<sup>50</sup> Obligations exist under *Optional Protocol* for states parties to grant to National Preventive mechanisms minimum powers<sup>51</sup> and access rights.<sup>52</sup> The Commonwealth government is presently engaged in consultations and negotiations with the states

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attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\_2009\_SecondQuarter\_22May2009-HumanRights-AMoralCompass.html>; Robert McClelland and Stephen Smith, ‘Reaffirming Our Commitment to International Human Rights Obligations’ (Media Release, 21 April 2010) <[http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_SecondQuarter\\_21April2010-ReaffirmingOurCommitmenttoInternationalHumanRightsObligations.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReaffirmingOurCommitmenttoInternationalHumanRightsObligations.html)>; *Australia UPR National Report*, above n 40, [39]: ‘Australia signed the Optional Protocol to the CAT in 2009 and is proceeding towards ratification’. See also *Concluding Observations: Australia*, above n 26, [6], where the CAT Committee ‘notes with appreciation the State party’s commitment to become a party to the Optional Protocol to the Convention’.

<sup>47</sup> *Optional Protocol to CAT*.

<sup>48</sup> See *Optional Protocol to CAT*, pt II. The subcommittee has an operational function of visiting all places of detention in States Parties, and an advisory function which consists in providing assistance and advice to both States Parties and National Preventive Mechanisms: Office of the High Commissioner for Human Rights Information Document ‘Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on the Prevention of Torture’ <<http://www2.ohchr.org/english/bodies/cat/opcat/index.htm>>.

<sup>49</sup> McClelland, ‘Human Rights: A Moral Compass’, above n 46.

<sup>50</sup> Office of the High Commissioner for Human Rights Information Document, above n 48.

<sup>51</sup> Article 19 of the *OPCAT* states:

The National preventive mechanisms shall be granted at a minimum the power

- (a) to regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) to submit proposals and observations concerning existing or draft legislation.

<sup>52</sup> Article 20 of the *OPCAT* states:

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them

and territories for the establishment of National Preventive mechanisms,<sup>53</sup> and ‘is committed to ratifying the *Optional Protocol* as a matter of priority’.<sup>54</sup> A number of countries participating in the Universal Periodic Review in 2011 for Australia recommended early ratification by Australia of the *Optional Protocol*.<sup>55</sup>

#### D *The Influence and Impact of the Emergence of Torture in the War on Terrorism*

A further influence over the domestic criminalisation of torture has been the international prominence of the practice of torture in the ‘war on terrorism’, following the terrorist attacks on the United States in September 2001. Evidence is found in the statements of the Commonwealth Attorney General about the absolute prohibition on torture in international law<sup>56</sup> and the practice of torture in response to terrorism<sup>57</sup> as informing both the decision to enact a specific domestic offence of torture, and as informing and influencing the government’s actions to sign the *Optional Protocol*.<sup>58</sup>

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- (a) access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
  - (b) access to all information referring to the treatment of those persons as well as their conditions of detention
  - (c) access to all places of detention and their installations and facilities
  - (d) the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information
  - (e) the liberty to choose the places they want to visit and the persons they want to interview; and
  - (f) the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

<sup>53</sup> McClelland, ‘Human Rights: A Moral Compass’, above n 46.

<sup>54</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (24 March 2011) [31]. See also Craig Emerson, Acting Minister for Foreign Affairs and Nicola Roxon, ‘Gillard Government Moves to Ratify *OPCAT*’ (Media Release, 28 February 2012) <[http://foreignminister.gov.au/releases/2012/kr\\_mr\\_120228.html](http://foreignminister.gov.au/releases/2012/kr_mr_120228.html)>.

<sup>55</sup> Human Rights Council, *Australia UPR National Report 2011*, above n 54, [86.1]–[86.6]. These states include Denmark, New Zealand and Mexico.

<sup>56</sup> McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Convention Against Torture’.

<sup>57</sup> McClelland, ‘Human Rights: A Moral Compass’, above n 46:

Not least, the international community has faced the challenges of combating a resurgent threat of terrorism since the attacks of 11 September 2001 ... The prohibition of torture must remain a constant point on the moral compass that guides any civilized nation state. On this basis, Australia’s commitment to the prohibition of torture must remain clear, even as we face new and emerging challenges. Torture compromises a nation’s moral leadership and this jeopardizes a nation’s capacity to combat terrorism and counter-terrorism ... It destroys exactly what countries are claiming to defend — the dignity and freedom of human beings.

<sup>58</sup> McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Optional Protocol to the Convention Against Torture’; McClelland and Smith ‘Australia Takes Action

Consequently, the creation of the div 274 *Criminal Code* (Cth) torture offences emerges particularly against the background of the infliction of torture and cruel, inhuman and degrading treatment of detainees at Abu Ghraib and Guantanamo Bay,<sup>59</sup> as well as the United States rendition of detainees to other states in order to gain terrorism intelligence.<sup>60</sup> The treatment afforded in United States custody to Australian nationals David Hicks and Mamdouh Habib provides examples of the use of such practices.<sup>61</sup> These examples and practices bear no lineal link to the introduction of the Commonwealth legislation.<sup>62</sup> However, statements made by the Commonwealth Attorney General about the absolute prohibition on torture in international law<sup>63</sup> and the practice of torture in response to terrorism<sup>64</sup> clearly inform the decision to enact a specific domestic offence of torture and further influenced the government’s actions to sign the *Optional Protocol*.<sup>65</sup> The emergence of torture in the war on terror is an important background influence not only upon Australian legislators but also on the functions of the UN Committee Against Torture<sup>66</sup> in its activities and deliberations.

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Against Torture’, above n 46.

<sup>59</sup> See Philippe Sands, *Lawless World America and the Making and Breaking of Global Rules* (Allen Lane, 2005) ch 9; Michael Ratner and Ellen Ray, *Guantanamo What the World Should Know* (Scribe Publications, 2004); Seymour Hersch, *Chain of Command: The Road From 9/11 to Abu Ghraib* (Allen Lane, 2004); Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005); Philippe Sands, *Torture Team: Deception, Cruelty and Compromise of Law* (Palgrave Macmillan, 2008).

<sup>60</sup> See Stephen Grey, *Ghost Plane the Untold Story of the CIA’s Torture Programme* (Scribe Publications, 2007); John Parry ‘The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees’ (2005) 6 *Melbourne Journal of International Law* 516.

<sup>61</sup> See Greg Carne ‘Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government’ (2008) 27 *Australian Yearbook of International Law* 11, 24–31.

<sup>62</sup> Indeed, the type of abuses committed by United States personnel, if committed by Australians, would have been caught by the *Crimes (Torture) Act 1988* (Cth). Reference to such examples is made in the course of parliamentary debate: see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 36 (Ms Vamvakinou), 40 (Dr Kelly).

<sup>63</sup> See McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Convention Against Torture’.

<sup>64</sup> Ibid ‘Changing Environment’:

Not least, the international community has faced the challenges of combating a resurgent threat of terrorism since the attacks of 11 September 2001 ... The prohibition of torture must remain a constant point on the moral compass that guides any civilized nation state. On this basis, Australia’s commitment to the prohibition of torture must remain clear, even as we face new and emerging challenges. Torture compromises a nation’s moral leadership and this jeopardizes a nation’s capacity to combat terrorism and counter-terrorism ... It destroys exactly what countries are claiming to defend — the dignity and freedom of human beings.

<sup>65</sup> Ibid ‘Optional Protocol to the Convention Against Torture’; McClelland and Smith, ‘Australia Takes Action Against Torture’, above n 46.

<sup>66</sup> For example, as reflected in the drafting of *General Comment 2 on Implementation of article 2 by States Parties of the Convention Against Torture and Other Cruel,*

Of greatest notoriety in the United States legal framework purporting to authorise the use of ‘enhanced interrogation techniques’<sup>67</sup> was the memorandum of 1 August 2002,<sup>68</sup> approved by Jay S Bybee, Assistant Attorney General, who was later appointed to the US Court of Appeals for the 9<sup>th</sup> Circuit. The most distinctive characteristic of the Bybee Memorandum of 1 August 2002 is its overarching creative license of justifying as permissible interrogation techniques under United States law, by strictly confining the legal definition of torture.<sup>69</sup> The memorandum identifies the requirement of a high threshold of suffering under that definition of torture<sup>70</sup> in order to satisfy the requirements of the United States Code offence:<sup>71</sup>

The *Convention*,<sup>72</sup> by using the words ‘severe pain or suffering’ in the art 1 definition, is considered by Bybee as ‘reinforcing our reading of Section 2340 that torture must be an extreme act’.<sup>73</sup> Likewise, the distinction in the *Convention*

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*Inhuman Or Degrading Treatment Or Punishment* (UN Doc CAT/C/GC/2/CRP.1/Rev.4) (24 January 2008); and that on 22 November 2001, the Committee adopted a statement in connection with the events of 11 September which was sent to each State Party to the Convention (UN Doc A/57/44, paras 17–18).

<sup>67</sup> The term used by United States authorities to describe interrogation practices which inevitably called into question their compliance with the prohibitions on torture and on cruel, inhuman or degrading treatment or punishment.

<sup>68</sup> Memorandum from Jay S Bybee to Alberto R Gonzales (Counsel to the President), 1 August 2002 (*Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A*) (*Bybee Memorandum of 1 August 2002*) in Greenberg and Dratel, above n 59, 172. For analysis of the *Bybee Memorandum of 1 August 2002*, see Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681. Bybee also provided other important memoranda providing a broader framework for the detention, transfer and interrogation of persons in the war on terror: see Memorandum from Jay S Bybee to Alberto R Gonzales (Counsel to the President) and William J Haynes II (General Counsel of the Department of Defense), 22 January 2002 (*Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*) <<http://www.torturingdemocracy.org/documents/20020122.pdf>> (regarding application of the Geneva Conventions in Afghanistan to members of al Qaeda and the Taliban militia); Memorandum from Jay S Bybee to William J Haynes II (General Counsel, Department of Defense), 13 March 2002 (*Re: The President’s power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations*) <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020313.pdf>>.

<sup>69</sup> As Waldron observes, ‘[t]he fifty pages of the Bybee memorandum give what some have described as the most lenient interpretation conceivable to the Convention and other antitorture provisions’: Waldron, above n 68, 1704.

<sup>70</sup> Physically causing organ failure, impairment of bodily functions or death, or causing significant psychological harm of significant duration: *Bybee Memorandum of 1 August 2002*, above n 68.

<sup>71</sup> 18 USC § 2340 (1994) makes it a criminal offence for any person outside the United States to commit or attempt to commit torture.

<sup>72</sup> Bybee, above n 68, 184:

Because Congress enacted the criminal prohibition against torture to implement CAT, we also examine the treaty’s text and history to develop a fuller understanding of the context of Sections 2340–2340A.

<sup>73</sup> *Ibid.*

between torture and other acts of cruel, inhuman and degrading treatment or punishment<sup>74</sup> is leveraged in the Bybee memorandum to support the necessity of an exceptional conduct threshold to constitute torture.<sup>75</sup>

Consistent with this emphasis given to the distinction between torture and cruel, inhuman and degrading treatment or punishment, the memorandum then claims that both the US Executive and Congressional branches acted on the basis that ‘torture included only the most extreme forms of physical or mental harm’.<sup>76</sup> The Bybee memorandum also restrictively cites the Reagan administration understanding that the art 16 term ‘cruel, inhuman or degrading treatment’ means ‘the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.’<sup>77</sup> This has the effect of restricting the reach of art 16.

The Bybee memorandum consistently and tendentiously confines the legal meaning of torture to extreme acts, differentiating cruel, inhuman and degrading treatment or punishment as being at the opposite end of the spectrum, thus not forming any binding international obligation and being merely consistent with similar words in the United States *Constitution*. Waldron describes this framework as permitting interrogators to

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<sup>74</sup> Article 16 of the *CAT* establishes a states party obligation to ‘prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1’.

<sup>75</sup> Bybee manipulates this distinction to claim that the extreme circumstance of torture is ‘at the farthest end of impermissible actions’ and that states are only obliged to prevent, but not criminalize, lesser acts, leaving ‘those acts without the stigma of criminal penalties’: Bybee, above n 68, 185.

<sup>76</sup> *Ibid* 187. Upon ratification of the Convention, the US Senate’s advice and consent was made subject to the understanding

(1)(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict *severe* physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm. Bybee states that this understanding’s use of ‘severe’, made at the time of the first Bush administration, supports the view that there is no substantive difference in this understanding with the understanding proposed by the Reagan administration, that the pain be ‘excruciating and agonizing’: at 188.

<sup>77</sup> *Ibid* 187. Upon actual ratification of CAT, the United States entered the reservation That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

A similar reservation was entered by the United States upon its ratification of the *ICCPR*, in relation to the non derogable obligation of art 7 of the *ICCPR*: ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. United States Reservation 3 to the *ICCPR* states:

(3) That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

[w]ork somewhere along the continuum of the deliberate infliction of pain, and the question is: Where is the bright line along the continuum where the specific prohibition on torture kicks in? If we cannot answer this, Bybee fears, our interrogators may be chilled from any sort of deliberate infliction of pain on detainees.<sup>78</sup>

Waldron identifies Bybee<sup>79</sup> as ultimately settling upon the extreme, severe level of physical or mental pain, as identified in the discussion above. In establishing the level of physical or mental pain and suffering, Waldron criticises Bybee's analysis as inherently problematic,<sup>80</sup> distorting the application of the pain threshold in the comparisons used.<sup>81</sup> The enabling character of the Bybee memorandum's interpretation of the interaction of *Convention* obligations with the United States Code offence, to legally support the enhanced interrogation techniques of the Bush administration, is succinctly summarised towards the end of the opinion and in its conclusion<sup>82</sup>

Shortly after taking office, the Obama administration issued Executive Order 13491 Ensuring Lawful Interrogations,<sup>83</sup> which followed a 2009 Department of Justice memorandum<sup>84</sup> notifying the withdrawal or suspension of a number

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<sup>78</sup> Waldron, above n 68, 1705.

<sup>79</sup> Ibid 1705–6.

<sup>80</sup> The severity and extremity of pain as identified by Bybee as constituting torture is arrived at by drawing upon the words of a medical administration statute — something of entirely different purposes (namely defining an emergency medical condition for the purpose of providing medical attention in the reasonable expectation that the absence of immediate medical attention that level of pain and its consequences would be produced) and context to a torture offence statute: *ibid* 1707.

<sup>81</sup> 'To sum up: Bybee takes a definition of 'emergency condition' (in which severe pain happens to be mentioned), reverses the causal relationship required between the emergency condition and organ failure, and concludes — on a matter as important as the proper definition of torture — that the law does not prohibit anything as torture unless it causes the same sort of pain as organ failure': *ibid* 1708.

<sup>82</sup> Bybee, above n 68, 191. The Conclusion to the Memorandum reiterates the earlier claims about torture being at the extreme end of the spectrum, involving severe pain and suffering — points said to be corroborated by the negotiating and ratification history — and then adds the facilitative findings that under

the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander in Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self defense could provide justifications that would eliminate any criminal liability: at 214.

<sup>83</sup> Executive Order 13491 of 22 January 2009. Section 1 of the Order stated that

All executive directives, orders and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001 to January 30 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.

<sup>84</sup> Memorandum for the Files from Stephen G Bradbury (Principal Deputy Assistant Attorney-General), 15 January 2009 (*Status of Certain OLC Opinions Issued in*

of legal opinions issued after 9/11.<sup>85</sup> Amongst these legal opinions was the Bybee Memorandum of 1 August 2002, which was also recorded as having been previously withdrawn,<sup>86</sup> as were previous disagreements with specific assertions in the Bybee memorandum of 1 August 2002.<sup>87</sup>

### E *Australian Support for Legalising Torture in the War on Terror*

Significantly, the issue of torture in the contemporary terrorism law context also emerged in Australian public debate through two Deakin University law academics and a former head of the National Crime authority advocating the legalisation of torture as a response to terrorism.<sup>88</sup> Whilst the legislative debates about Australian

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*the Aftermath of the Terrorist Attacks of September 11, 2001* <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf>>.

<sup>85</sup> ‘We nevertheless believe it appropriate and necessary to confirm that the following propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC. This Office has not relied upon the propositions addressed herein in providing legal advice since 2003, and on several occasions we have already acknowledged the doubtful nature of these propositions’: *ibid*.

<sup>86</sup> ‘OLC has already withdrawn ... the 8/1/02 Interrogation Opinion’. See Memorandum to the Deputy Attorney General from Daniel B Levin (Acting Assistant Attorney General, Office of Legal Counsel), 30 December 2004 (*Re: Legal Standards Applicable under 18 USC §§ 2340–2340A*) <<http://www.justice.gov/olc/18usc23402340a2.htm>>.

<sup>87</sup> Namely ‘The August 1, 2002, memorandum reasoned that “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander in Chief authority in the President.” I disagree with that view’: *Responses of Steven G Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Edward M Kennedy* (24 October 2005) cited in Bradbury, *Re: Status of Certain OLC Opinions Issued in the aftermath of the Terrorist Attacks of September 11, 2001*, above n 84, 3. *Responses of Steven G Bradbury, nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Richard J Durbin* (24 October 2005) cited in Bradbury, *Re: Status of Certain OLC Opinions Issued in the aftermath of the Terrorist Attacks of September 11, 2001*, above n 84, 3–4:

The federal prohibition on torture ... is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President’s Commander in Chief authority. The statement to the contrary from the August 1, 2002 memorandum ... has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find the statement persuasive.

<sup>88</sup> Mirko Bagaric and Julie Clarke, ‘Not Enough Torture in the World? The Circumstances in Which Torture Is Morally Justifiable’ (2005) 39 *University of San Francisco Law Review* 581; Mirko Bagaric, ‘A Case for Torture’, *The Age* (Melbourne), 17 May 2005, 13; Mirko Bagaric and Julie Clarke, ‘Tortured Responses: Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered’ (2006) 40 *University of San Francisco Law Review* 703. Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is Morally Permissible* (State University of New York Press, 2007). See also ‘Torture

domestic criminalisation of torture omit reference to these opinions, strong opposition emerged in the then Federal Opposition Leader's rebuke of a Liberal backbencher who expressed similar views suggesting the acceptability of torture in exceptional circumstances.<sup>89</sup>

### III CRIMINALISING TORTURE IN AUSTRALIAN DOMESTIC LAW

#### A *The Relationship of the Act to Earlier Commonwealth Torture Offences*

The Commonwealth's earlier offences relating to torture<sup>90</sup> were significant for their narrow application and specificity of circumstances. That restricted legislative approach was reflected in the former Australian government position that 'it was clear from consultations between state and federal governments that Australian laws were already consistent with obligations under the Convention'.<sup>91</sup> This statement referred to the belief that the general criminal laws of the states, territories and the Commonwealth fulfilled Australia's obligations under the *Convention*.

A plausible argument existed that the existing legislative provisions failed to fully implement the international human rights obligations of arts 2 and 4 of the *Convention*. Indeed, that argument was supported by the Concluding Observations of the CAT Committee on Australia's third state party report,<sup>92</sup> which recommended more extensive legislative prohibitions against torture and against cruel, inhuman and degrading treatment.

The narrow scope of the then existing torture offences was commented upon in the Parliamentary debates leading to the passage of the present legislation.<sup>93</sup>

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Acceptable, Says Former NCA Chief', *Sydney Morning Herald* (Sydney), 22 May 2005, describing Peter Faris QC's support of torture in some circumstances.

<sup>89</sup> The backbencher was Michael Johnson MHR who then partly retracted earlier comments: see Max Blenkin and Stephen Johnson, 'Govt Urges Turnbull to Reject Torture', *Sydney Morning Herald* (Place of Publication), 25 August 2009. See also academic opposition to the Bagaric and Clarke proposals: Rodney Allen, 'Torture Criminality and the War On Terror' (2005) 30 *Alternative Law Journal* 214, 216–17; Desmond Manderson, 'Another Modest Proposal' (2005) 10 *Deakin Law Review* 640.

<sup>90</sup> *Crimes (Torture) Act 1988* (Cth); *Criminal Code* (Cth) ss 268.13, 268.25, 268.73.

<sup>91</sup> Committee Against Torture, *Consideration of Reports submitted by States Parties Under Article 19 of the Convention: Second Periodic Report of Australia* (UN Doc CAT/C/25/Add.11) (19 October 1999) [8] (heading B). A list of criminal offences and civil wrongs in all Australian jurisdictions for acts constituting torture and other cruel, inhuman or degrading treatment or punishment is contained in Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Third Periodic Report of Australia*, UN Doc CAT/C/67/Add.7 (7 April 2005) appendix 1.

<sup>92</sup> *Concluding Observations: Australia*, above n 26, [8] (on art 1 obligations), [9] (on art 2 obligations), [18] (on art 4 obligations).

<sup>93</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); see also an identical statement in Commonwealth,

The *Crimes (Torture) Act 1988* was repealed by pt 3 of the *Act*<sup>94</sup> as the extended geographical reach of Category D jurisdiction,<sup>95</sup> applying to the torture offence in the Act, rendered its limited geographical coverage redundant. Amendments to the *Criminal Code* in 2002<sup>96</sup> implementing the *Rome Statute of the International Criminal Court*<sup>97</sup> had earlier created Commonwealth offences of torture applicable as a crime against humanity<sup>98</sup> and in two situations of armed conflict- international

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*Parliamentary Debates*, Senate, 24 February 2010, 82 (Penny Wong). The *Crimes (Torture) Act 1988* (Cth) offences were restricted to acts of torture committed outside Australia by Australian citizens or persons subsequently within Australia. The *Criminal Code 1995* (Cth) criminalized torture committed as a crime against humanity or during an armed conflict.

<sup>94</sup> See *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) pt 3. Section 6 of the *Crimes (Torture) Act 1988* (Cth) formed the basis of allegations by Mamdouh Habib that in aiding, abetting, counseling and procuring acts of torture committed by Pakistani, Egyptian and United States personnel outside Australia, officers of the Commonwealth in turn committed the torts of misfeasance in public office and intentional but indirect infliction of harm: *Habib v Commonwealth* (2010) 113 ALD 469.

<sup>95</sup> Discussed under K *Extending The Geographical Reach and Ancillary Offence Application of The Crime of Torture* below.

<sup>96</sup> See *International Criminal Court (Consequential Amendments) Act 2002* (Cth). Schedule 3 of this Act repealed pt II of the *Geneva Conventions Act 1957* (Cth). The predecessor provisions to the *Criminal Code* provisions — namely s 7 of the *Geneva Conventions Act 1957* (Cth) — were also used to argue that acts of torture had been committed by or at the behest of agents of foreign states (Pakistani, Egyptian and United States personnel outside of Australia), forming the basis that in aiding, abetting, counseling and procuring these acts, officers of the Commonwealth in turn committed the torts of misfeasance in public office and intentional but indirect infliction of harm: *Habib v Commonwealth* (2010) 113 ALD 469.

<sup>97</sup> The *Rome Statute of the International Criminal Court*, under art 5, limits jurisdiction of the Court to four most serious crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Article 7, para 1(f) of the *Rome Statute of the International Criminal Court* includes torture as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

<sup>98</sup> *Criminal Code* (Cth) s 268.13. Division 268 is prefaced with the heading ‘Genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court’, and sub-div C of div 268 is prefaced with the heading ‘Subdivision C — Crimes against humanity’ and directly implements, as separate offences, the contents of art 7, para 1(a)–(k) of the *Rome Statute for the International Criminal Court* as ss 268.8–268.23 of the *Criminal Code* (Cth), including the torture offence under s 268.13.

armed conflict<sup>99</sup> and non international armed conflict.<sup>100</sup> These torture offences derived from the international humanitarian law *Geneva Convention* foundations.<sup>101</sup>

This origin is distinct from the international human rights foundation of the *Convention* for the *Act*,<sup>102</sup> and its implementation in div 274 of the *Criminal Code* (Cth). The earlier, and more specific offences of torture of div 268 of the *Criminal Code* (Cth), with a heavier penalty of 25 years imprisonment, now exist alongside the new torture offences of div 274 of the *Criminal Code* (Cth) introduced by the *Act*, implementing the *Convention* which provide for a penalty of 20 years imprisonment. The criminalisation of torture is expanded in the new legislation, but in implementing Australia's international obligations under the *Convention* a fairly conservative drafting approach is adopted in extending the range of *Criminal Code* (Cth) torture offences beyond the existing offences with their international humanitarian law foundations.

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<sup>99</sup> *Criminal Code* (Cth) s 268.25. Section 268.25, the war crime–torture offence, falls under the heading of sub-div D of div 268 — War crimes that are grave breaches of the Geneva Conventions and of Protocol 1 to the Geneva Conventions (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June 1977. Torture is established as a grave breach of the Geneva Conventions: see art 50 (Convention I), art 51 (Convention II), art 130 (Convention III), art 147 (Convention IV).

<sup>100</sup> *Criminal Code* (Cth) s 268.73. Section 268.73, the war crime–torture offence, falls under the heading of sub-div F of div 268 — War crimes that are serious violations of the common Art 3 of the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict. Common Art 3 of Geneva Conventions (I), (II), (III) and (IV), states, *inter alia*, that ‘the following acts are and shall remain prohibited at any time and in any place whatsoever ... (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’.

<sup>101</sup> This origin is evident in the Subdivision headings of div 268, as mentioned under footnotes 101 and 102 above, and in the distinctions made in the respective s 268.25 and s 268.73 offences between international armed conflict and non international armed conflict. Geneva Conventions I, II, III and IV (see Common Art 2) and Protocol I of 1977 apply to situations of international armed conflict; Common Art 3 of Geneva Conventions I, II, III and IV and Protocol II of 1977 apply to situations of non international armed conflict.

<sup>102</sup> In the sense that the *CAT* falls within the taxonomy of the United Nations treaty based human rights system, and the associated treaty based bodies, associated with the other human rights treaties — the *ICCPR*, the *ICECSR*, the *CERD*, the *CEDAW*, the *CROC*, the *CROPD*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 September 1990, 2220 UNTS 3 (entered into force 1 July 2003) and the *International Convention for the Protection of All Persons from Enforced Disappearance* opened for signature 20 September 2006, Doc A/61/488 CN 737.2008 (entry into force 23 December 2010).

*B Interpreting and Articulating the Obligations Under the Convention and the General Comment of the Committee Against Torture*

Australia is a party to the United Nations *Convention*<sup>103</sup> — for present purposes, the principal legal obligations arise under art 2<sup>104</sup> and art 4<sup>105</sup> of the *Convention*, drawing upon the definition of torture in art 1 of the *Convention*.<sup>106</sup>

Several commonly understood preventative obligations exist under art 2 of the *Convention*. The effective prevention of torture extends beyond a formal legal prohibition.<sup>107</sup> Prevention must extend to territory under the jurisdiction of the State, including its territorial sea, ‘ships flying its flag, aircraft registered in the State concerned as well as platforms and other installations on its continental shelf’.<sup>108</sup> The torture prohibition is absolute — that is non derogable<sup>109</sup> — highlighting the seriousness of the activity and the customary international law recognition of torture as a *jus cogens*.

The Committee’s views about the requirements for compliance with art 2 of the Convention have strengthened over time. The Committee’s *General Comment No 2*,<sup>110</sup> details basic requirements for domestic legislative<sup>111</sup> implementation — ‘States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in art 1 of the Convention, and the requirements of art 4’.<sup>112</sup>

<sup>103</sup> Above n 6. Australia ratified the *CAT* on 8 August 1989. For a broad overview of the *Convention* at the time of its coming into force, see Maxime Tardu, ‘The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (1987) 56 *Nordic Journal of International Law* 303.

<sup>104</sup> Article 2(1) states that ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.

<sup>105</sup> Article 4(1) states that ‘[e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture’. Article 4(2) states that ‘[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature’.

<sup>106</sup> Article 1 of the *Convention* is extracted Part III(E) below. The presence of a definition of torture in the *CAT* is to be contrasted with the absence of such a definition in the *ICCPR* and in the *European Convention of Human Rights*.

<sup>107</sup> Herman Burgers and Hans Danelius, *The United Nations Convention against Torture — A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988) 123.

<sup>108</sup> *Ibid* 123–4.

<sup>109</sup> *Ibid* 124.

<sup>110</sup> *CAT General Comment No 2*, above n 66.

<sup>111</sup> Article 2(1) of the *CAT* states ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’ (emphasis added?).

<sup>112</sup> *CAT General Comment No 2*, above n 66, [8].

Particular caveats arise in *General Comment 2* about implementation of the preventive legislative measures of art 2 by States Parties — the risk of legislative gaps, falling short of proper implementation of Convention obligations;<sup>113</sup> the seriousness of the nature of torture demanding that prosecution as torture rather than for ill treatment;<sup>114</sup> and that a distinct offence of torture should be created in domestic law as a method advancing Convention objectives of prohibition, deterrence and culpability,<sup>115</sup> as well as underlining the special gravity of such conduct.<sup>116</sup> It is further mentioned that ‘the Committee recognizes that broader domestic definitions also advance the object and purpose of the Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum,’<sup>117</sup> confirming that Convention arts 1 and 4 provide a non-exhaustive starting point for the domestic criminalisation of torture.

Some of the issues relating to domestic implementation mentioned in *General Comment 2* are further reinforced by the international experience of States parties of art 4, again providing a perspective on the Australian legislative drafting. Particular focus on art 4 relates to the requirement to amend domestic criminal laws,<sup>118</sup> the requirement of adoption of the art 1 definition of torture<sup>119</sup> and the recommendation of a distinct, separately defined offence of torture.<sup>120</sup> This last mentioned aspect has been variously responded to, including states parties claims that the obligation is satisfied by existing legislation, that a separately defined offence of torture has been introduced, and that offences of torture have been partly implemented on the basis of externality of application or implementation of relevant obligations under the *Rome Statute for the International Criminal Court* or under the *European Convention on Human Rights*.<sup>121</sup>

Other points confirm and reflect how torture should be criminalised. The obligation to criminalise in domestic law all acts of torture must be in accordance with the

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<sup>113</sup> ‘Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity ... the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State’: *ibid* [9].

<sup>114</sup> *Ibid* [10].

<sup>115</sup> *Ibid* [11].

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* [9].

<sup>118</sup> Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008) 233.

<sup>119</sup> Nigel Rodley and Matt Pollard, ‘Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2006) 2 *European Human Rights Law Review* 1, 4; Nowak and McArthur, above n 118.

<sup>120</sup> Antonio Marchesi, ‘Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)’ (2008) 6 *Journal of International Criminal Justice* 195, 196, 197; Nowak and McArthur, above n 118.

<sup>121</sup> See these points mentioned by Marchesi, above n 120, 198–9.

requirements of art 4 of the *Convention*. Such criminalisation must follow the art 1 definition of torture.<sup>122</sup> The obligation to domestically criminalise torture extends to the criminalisation of activities of attempt, participation and complicity related to torture, as these matters are circumstances conducive to torture.<sup>123</sup> These associations mirror an aspect of the art 1 definition, namely the intentional infliction of severe pain or suffering, whether physical or mental, ‘at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity’.<sup>124</sup> The serious, non derogable nature of the torture prohibition is reinforced by the obligation to make all of these torture offences punishable by ‘appropriate penalties which take into account their grave nature’,<sup>125</sup> in turn reflecting ‘similar articles in the *Conventions* regarding hijacking, sabotage against aircraft, attacks on diplomats and the taking of hostages’.<sup>126</sup>

These identified characteristics from *General Comment 2*, international experience of states parties and academic commentary confirm, by contrast, the more restricted and conservative legislative drafting of the Australian government in the criminalisation of torture. Opportunities existed for the Australian government to more substantively fulfil the *Convention* obligation to take effective *legislative* measures to prevent acts of torture in any territory under its jurisdiction — but the present legislation adheres closely to a straightforward textual implementation of the relevant *Convention* provisions, instead of a more extensive domestic definition and application as raised in the General Comment.<sup>127</sup> The *Act* takes a clinical approach to the implementation of the art 2 and art 4 obligations, with legislative

<sup>122</sup> Burgers and Danelius, above n 107, 129. This reinforces and particularises the legislative obligation in art 2.

<sup>123</sup> Ibid 129–30. The aspects of attempt, complicity and participation in torture, also requiring criminalisation under art 4 of the *Convention Against Torture* are respectively criminalised by the generic provisions of pt 2.4 of the *Criminal Code* —

s 11.1(1) Attempt

A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed;

s 11.2(1) Complicity and common purpose

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly;

s 11.2 A (1) Joint commission

If:

(a) a person and at least one other party enter into an agreement to commit an offence; and

(b) either

(i) an offence is committed in accordance with the agreement ... or

(ii) an offence is committed in the course of carrying out the agreement ...

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

<sup>124</sup> *CAT* art 1.

<sup>125</sup> *CAT* art 4, para 2.

<sup>126</sup> Burgers and Danelius, above n 109, 130.

<sup>127</sup> *CAT General Comment No 2*, above n 66, [9].

drafting closely replicating the textual provisions of the *Convention*. This approach will be discussed under the several more specific headings which follow.

*C The Influence of the States Party Reporting Process and the Concluding Observations Under the Convention in the Australian Criminalisation of Torture*

The states party reporting process under the *Convention* can be seen as *prompting* minimal legislative reforms *directly in response to* Convention Committee Concluding Observations in relation to Australia. Bearing in mind the formal states party obligations under arts 2 and 4 of the *Convention*, Australia's states party reports to the *Convention* Committee<sup>128</sup> and its Concluding Observations directly informed both the decision to enact Commonwealth torture offence legislation and the content of that legislation.

Under art 19 of the *Convention*, states parties to the *Convention*, such as Australia are obliged to submit periodic reports to the CAT Committee<sup>129</sup> on the measures they have taken to give effect to their undertakings under the *Convention*.<sup>130</sup> These reports are 'considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned'.<sup>131</sup>

In Australia's second periodical report to the CAT Committee,<sup>132</sup> it was submitted that it was not necessary to introduce domestic legislation implementing torture offences.<sup>133</sup> In its Concluding Observations on Australia's second periodical report,<sup>134</sup> the CAT Committee merely recommended that 'The State party ensure

<sup>128</sup> Subsequently referred to as the CAT Committee.

<sup>129</sup> The CAT Committee is established under art 17 of the *Convention*.

<sup>130</sup> Article 19(1) states that

States Parties shall submit to the Committee ... reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken.

<sup>131</sup> *CAT* art 19(3).

<sup>132</sup> Committee Against Torture, *Second Periodic Report Australia*, above n 91.

<sup>133</sup> *Ibid* [8] — this was on the basis that state and federal laws 'were already consistent with obligations under the Convention'. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); Commonwealth, *Parliamentary Debates*, Senate, 24 February 2010, 82 (Penny Wong):

In previous periodic reports to the UN Committee against Torture, Australia has stated that it meets its obligations under the convention on the basis that acts falling within the convention's definition of torture are offences under state and territory criminal laws. These acts include, for example, the infliction of bodily harm, murder, manslaughter, assault and other offences against the person.

<sup>134</sup> Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations on Second Periodic Report Australia*, UN Doc A/56/44 (21 November 2000).

that all States and territories are at all times in compliance with its obligations under the Convention’.<sup>135</sup>

In Australia’s third periodical report to the CAT Committee in 2005,<sup>136</sup> following on from the 1999 claim of state party compliance with the domestic torture prohibition obligations,<sup>137</sup> it was asserted, in response to earlier Committee recommendations, that criminal offences, civil wrongs and statutory investigation mechanisms ensured compliance with *Convention* obligations.<sup>138</sup> The CAT Committee is then referred to Part One of Australia’s Second and Third Report for further background information on the implementation and adoption of the *Convention* in Australia.<sup>139</sup>

The Concluding Observations of the Committee against Torture to the Third Periodic Report of Australia<sup>140</sup> are noticeable for their more detailed appraisal and requests for conformity with the *Convention* obligations for Australia to create domestic criminal offences for torture and to protect against torture as part of formalised rights protection.<sup>141</sup> The fact that these issues were highlighted by the Committee in 2008 was a primary reason for drafting and introducing the torture offences,<sup>142</sup> aside from the textual obligation contained in the *Convention*<sup>143</sup> itself under arts 1, 2 and 5.

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<sup>135</sup> Ibid [53(a)].

<sup>136</sup> Committee Against Torture, *Third Periodic Report of Australia*, above n 91.

<sup>137</sup> Committee Against Torture, *Second Periodic Report of Australia*, above n 91, [8] (heading B).

<sup>138</sup> Committee Against Torture, *Third Periodic Report of Australia*, above n 91, [11].

<sup>139</sup> Ibid [11]–[12] under the heading ‘Implementation of the Convention — Legal status and implementation of the Convention in Australia.’ An extensive Appendix, detailing Offences and Penalties by State, Territory and Commonwealth jurisdictions, encompassing torture type behaviour, was attached to the report.

<sup>140</sup> Committee Against Torture, *Concluding Observations: Australia*, above n 26.

<sup>141</sup> Ibid [8] Observation and recommendation: the Committee expressed its concern about the lack of a federal torture offence and gaps in criminalisation in State and Territory laws, [9] Observation and recommendation: the Committee expressed its concern about the lack of a constitutional or legislative federal Bill or Charter of Rights protecting, inter alia, rights contained in the Convention.

<sup>142</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 30 (Robert McClelland); Commonwealth, *Parliamentary Debates*, Senate, 24 February 2010, 82 (Penny Wong); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2010, 1186 (Michael Keenan); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 47 (Slipper).

<sup>143</sup> See Robert McClelland, ‘Australia Takes Action Against Torture And The Death Penalty’ (Media Release, 19 November 2009) <[http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_FourthQuarter\\_19November2009-AustraliaTakesActionAgainstTortureandtheDeathPenalty.html](http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_19November2009-AustraliaTakesActionAgainstTortureandtheDeathPenalty.html)>; ‘Passage of Legislation to Prohibit Torture and the Death Penalty’, above n 35.

What is striking about each of the Australian government responses is that they are reactions to higher standards of *Convention* obligations interpreted by the Committee over time — indicating a reactive and minimal legislative approach, rather than a pro-active or exemplary approach, to ensure conformity with *Convention* obligations. The Australian legislative changes emerged primarily as functional responses to a changed pattern of interpretation of *Convention* obligations by the Committee, which also affected other States parties to the *Convention*.

D *Parallel International Torture Prohibition Obligations for Australia* —  
The International Covenant of Civil and Political Rights

The *Convention* acknowledges the existence and operation of other international instruments on torture.<sup>144</sup> This inclusive approach permits other international obligations Australia has relating to the prohibition of torture, as providing an alternative or supplementary foundation for domestic legislation, and inviting wider and more extensive legislation.

Australia is also a party to the *International Covenant of Civil and Political Rights*<sup>145</sup> and the *First Optional Protocol to the ICCPR*,<sup>146</sup> the latter allowing individual communications regarding claimed breaches of *ICCPR* rights to be made to the Human Rights Committee. art 7 of the *ICCPR*, a non-derogable article,<sup>147</sup> states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The non-derogable character of art 7 again reflects the seriousness of torture as a breach of international human rights law, and its *jus cogens* status in customary international law.

There are some important definitional characteristics for art 7 of the *ICCPR*. Whilst guidance as to the meaning of torture under art 7 of the *ICCPR* may be obtained from art 1 of the *Convention*,<sup>148</sup> two important distinguishing characteristics exist in art 7 of the *ICCPR*. Its prohibition against torture is not confined to

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<sup>144</sup> See *CAT* art 1(2): ‘This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’ (following on from the definition of torture), art 16(2): ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion’.

<sup>145</sup> Australia ratified the *ICCPR* on 13 August 1980.

<sup>146</sup> Australia acceded to the First Optional Protocol to the *ICCPR* on 25 September 1991.

<sup>147</sup> Article 4(1) of the *ICCPR* permits derogation from *ICCPR* articles in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed from, other than those articles listed in art 4(2). Article 7 of the *ICCPR* is a non-derogable article listed in art 4(2) of the *ICCPR*.

<sup>148</sup> See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 196.

circumstances of public official or official capacity involvement.<sup>149</sup> Furthermore, cruel, inhuman or degrading treatment or punishment is included within the art 7 prohibition,<sup>150</sup> of particular significance given art 7’s non-derogable status,<sup>151</sup> and its protections fall within the instruments contemplated by art 16(2) of the *Convention*.<sup>152</sup>

The formal states parties obligations under art 7 are several. In particular, General Comment 20 on art 7 of the *ICCPR* makes a number of points about domestic legislative arrangements and obligations of states parties.<sup>153</sup> Further, in its Concluding Observations on the fifth periodic report of Australia under the *ICCPR*,<sup>154</sup> the Committee noted the lack of protection of *Covenant* rights at the

<sup>149</sup> That is, art 7 of the *ICCPR* does not include the art 1 *CAT* requirement that the pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. See Manfred Nowak, *The UN Covenant on Civil and Political Rights CCPR Commentary* (N P Engel, 2<sup>nd</sup> ed, 2007) 161–2, describing the omission of official capacity as constituting a horizontal effect in the protection against torture.

<sup>150</sup> The omission from the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) of a further offence of engaging in cruel, inhuman and degrading treatment or punishment is discussed under *J Failing To Legislate About Conduct Conducive Towards Torture — Cruel, Inhuman And Degrading Treatment Or Punishment* below. Cruel and inhuman treatment is differentiated from the art 1 *CAT* definition of torture through either a lack of one of the essential elements of torture or a falling short of the requisite severity or intensity of inflicted suffering: see Nowak, above n 149, 162–3. Degrading treatment is associated with the humiliation of the victim, from either the victim’s perspective or the perspective of others: *ibid* 165.

<sup>151</sup> The non-derogable articles of the *ICCPR*, including art 7, are found in art 4 of the *ICCPR*.

<sup>152</sup> Article 16(2) of *CAT* states, ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment which relates to extradition or expulsion’.

<sup>153</sup> Paragraphs 2 and 8 of *ICCPR General Comment 20* highlight the duty to provide legislative and other preventative and punitive measures against prohibited art 7 acts, whether in an official or private capacity, and noting that these obligations are supplemented by the positive humane treatment obligations of art 10 of the *ICCPR*. Article 2 para 2 of the *ICCPR* further states that

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

<sup>154</sup> Human Rights Committee Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee of Australia Fifth Periodic Report* (UN Doc CCPR/C/AUS/CO/5) (2 April 2009).

Federal level and a lack of comprehensive legislative protection of the *Covenant* across all jurisdictions in the Federation.<sup>155</sup>

The precise drafting of the legislation,<sup>156</sup> and the Parliamentary debates surrounding passage of the legislation, confirm that reliance was placed upon implementation of the *Convention* articles rather than art 7 of the *ICCPR*.

Nonetheless, art 7 of the *ICCPR* provides an alternative foundation to support domestic legislation and indeed more broadly drafted legislation than was presently enacted through reliance upon the treaty implementation aspect of the s 51(xxix) external affairs power.

Again, by declining to invoke a more general international obligation in the form of the *ICCPR*, the Government has conservatively criminalised torture by reference to more limited public based circumstances.<sup>157</sup> It also excluded a separate criminalisation of cruel, inhuman and degrading treatment, conduct frequently conducive of and preparatory to torture. The omission in the legislation of an offence of engaging in cruel, inhuman or degrading treatment or punishment strongly indicates a failure to more comprehensively draft the legislation to capture actions of a lesser nature conducive to, or preparatory towards, torture, and for which an adequate treaty basis in both the *ICCPR* and the *Convention* exists for domestic implementation.<sup>158</sup>

#### E *The Nature of the Torture Offences Created in the Criminal Code (Cth)*

As indicated, the div 274 *Criminal Code (Cth)* offence closely implements the articles of the *Convention*, with particular reliance upon the meaning of torture in art 1 of the *Convention*.<sup>159</sup> The definition of torture in art 1 of the *Convention* has been recognised as comprising several characteristics. These include the fact that the concept of torture requires a certain threshold of suffering,<sup>160</sup> that mental as

<sup>155</sup> Ibid para 8. See also ibid para 21, raising issues directly concerning art 7 of the *ICCPR*. The opportunity to domestically implement *ICCPR* articles in Commonwealth law in the form of a Commonwealth statutory charter of rights, following the National Human Rights Consultation Committee report, was rejected by the Federal Government in April 2010: see McClelland, above n 15.

<sup>156</sup> In particular, the use of the categories public official, acting in an official capacity, acting at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity, and for any reason based on discrimination of any kind, derive directly from the language of art 1 of the *Convention*.

<sup>157</sup> Adhering to the art 1 *Convention* criterion that ‘such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

<sup>158</sup> This aspect is examined in detail in Part III(J) below.

<sup>159</sup> Refer to the various elements of the art 1 definition of torture in the *Convention*.

<sup>160</sup> Described by Joseph, Schultz and Castan, above n 148, 196 as ‘a certain severity in pain and suffering’; by Burgers and Danelius, above n 107, 117 as ‘the infliction of severe pain or suffering’; Nowak, above n 149, 161.

well as physical suffering is included,<sup>161</sup> that the act of torture has to be inflicted intentionally,<sup>162</sup> that the torture must be inflicted for a prescribed purpose<sup>163</sup> and that the infliction of pain and suffering be done by or at the instigation of, or with the consent of, a public official or other person acting in an official capacity.<sup>164</sup>

That the *Convention’s* definition of torture is very closely implemented in the two offences respectively created under ss 274.2(1) and (2) of the *Criminal Code* (Cth) is evident from the text of those provisions which incorporate the distinctive definitional elements mentioned immediately above.<sup>165</sup>

The close adherence to the language of art 1 of the *Convention* fulfils the basic criminalisation obligations set out in art 4 and elaborated in the *Convention* General Comment 2, including avoiding gaps or omissions — in that sense, the scope of the *Criminal Code* offences is the *minimum Convention* standard presently required and is confirmation of the conservative drafting approach adopted by the Commonwealth.

#### F Defences

The application of absolute liability to the physical status of the three categories of person<sup>166</sup> who engage in the proscribed conduct in paras 1(c) and 2(c)<sup>167</sup> of section 274 of the *Criminal Code* (Cth), makes incontrovertible that factual status aspect *in the belief of the alleged perpetrator*, by excluding the availability of a mistake of fact defence from that physical element.

Section 6.2 of the *Criminal Code* (Cth) states:

<sup>161</sup> Joseph, Schultz and Castan, above n 148, 196; Burgers and Danelius, above n 107, 117.

<sup>162</sup> Joseph, Schultz and Castan, above n 148, 196; Burgers and Danelius, above n 107, 118.

<sup>163</sup> Joseph, Schultz and Castan above n 148, 197; Burgers and Danelius, above n 107, 119; Nowak, above n 149, 161. The purposes listed in art 1 of *CAT* are illustrative and indicative, but not exhaustive.

<sup>164</sup> Joseph, Schultz and Castan, above n 148, 198; Burgers and Danelius, above n 107, 119; Nowak above n 149, 161; Nigel Rodley, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 467, 484–5; Rodley and Pollard, above n 119, 6.

<sup>165</sup> Refer to the text of the s 274.2 (1) and s 274.2 (2) *Criminal Code* (Cth) torture offences.

<sup>166</sup> Namely, a perpetrator engaging in conduct (i) in the capacity of a public official; or (ii) acting in an official capacity; or (iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity: *Criminal Code* (Cth) ss 274.2(1)(c), (2)(c).

<sup>167</sup> See *Criminal Code* (Cth) s 274.2(3): ‘Absolute liability applies to paras (1)(c) and (2)(c)’.

- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element

In addition, the non-derogable nature of the prohibition against torture<sup>168</sup> is highlighted in arts 2(2) and 2(3) of the *Convention*:

- (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture
- (3) An order from a superior officer or a public authority may not be invoked as a justification of torture

Articles 2(2) and 2(3) of the *Convention* is implemented by sub-ss 274.4(a) and (b) of the *Criminal Code*, which prohibit the availability of necessity<sup>169</sup> and superior orders as defences to the torture offences, and merely allow those matters to be taken into account in determining sentencing.<sup>170</sup>

Significantly, the words ‘or any other exceptional circumstance’ have been included in s 274.4(a) of the *Criminal Code*, these words being outside of the precise wording of art 2(2) of the *Convention*. This represents a rare legislative implementation exceeding minimal requirements. The inclusion of necessity and superior orders merely as mitigating circumstances for sentence has been argued as offending the non derogable prohibition against torture, because mitigation only occurs at sentencing, after a finding of guilt, and does not therefore justify the torture inflicted.<sup>171</sup>

### G *Limiting the Range of Purposes for Torture in the New Offences?*

Paragraph (iv) of s 274.2 of the *Criminal Code* (Cth), stating ‘for a purpose related to a purpose mentioned in subparas (i), (ii) or (iii)’,<sup>172</sup> in providing an extension

<sup>168</sup> See Nowak and McArthur, above n 118, 120:

Article 2(2) CAT was primarily meant to stress the non derogable nature of the prohibition against torture ... States parties are not permitted to derogate from their obligation to respect and ensure the absolute prohibition against torture ... Article 2(3) is primarily directed at criminal courts not to accept any defence by the accused based on a superior order (no justification of torture by the judicial branch in individual cases).

<sup>169</sup> Arising from the existence of a state of war, threat of war, internal political instability, public emergency or any other exceptional circumstance: *Criminal Code* (Cth) s 274.4(a).

<sup>170</sup> Article 2 of CAT is considered to reinforce the absolute, non-derogable character of the prohibition of torture: Burgers and Danelius, above n 107, 124.

<sup>171</sup> Nowak and McArthur, above n 118, 125.

<sup>172</sup> These purposes being ‘obtaining from the victim or from a third person information or a confession’ (s 274.2 (1)(b)(i)); ‘punishing the victim for an act which the victim

of purposes, reflects the *indicative*, rather than conclusive,<sup>173</sup> listing of torture purposes in art 1 of the *Convention*. The legislative drafting of the Commonwealth offence has not gone further in specifically indicating *other types of purpose*, an opportunity clearly open under the *Convention*.

The question then arises as to the scope of the other types of purpose which were open for inclusion as prohibited purposes in the *Criminal Code* (Cth). Academic commentary,<sup>174</sup> based on an assessment of the 1975 UN Declaration and the *Convention travaux préparatoires*, suggests that the types of purpose are not indeterminate. Instead, the *Convention* phrase ‘such purposes’ only includes those purposes which have common characteristics with the four listed purposes in art 1 of the *Convention*.<sup>175</sup>

Within these parameters, it may have been possible to include further general prohibited purposes within the new *Criminal Code* (Cth) offences — for example, to broadly cover situations where severe pain and suffering is inflicted in circumstances connected to the pursuit of state interests and where direct or indirect control is being exercised over the victim. Such purposes would be consistent with a domestic implementation of a sufficiently specific *Convention* obligation. This omission is again reflected in its conservative drafting approach, relying on the words ‘for a purpose related to a purpose mentioned in subparas (i), (ii) or (iii)’<sup>176</sup> rather than broader words reflecting the more general purposes identified in the academic commentary.

The distinguishing characteristic of the three specific purposes for which torture is perpetrated in the s 274.2(1) *Criminal Code* (Cth) torture offence is contrasted with the distinguishing feature of ‘any reason based on discrimination of any kind’ in the s 274.2(2) *Criminal Code* (Cth) torture offence. The latter offence focuses on the activity of torture for any possible reason sourced in a distinguishing characteristic, such as race, colour, sex, language, religion, political or other opinion, national or

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or a third person has committed or is suspected of having committed’ (s 274.2(1)(b)(ii)); ‘intimidating or coercing the victim or a third person’ (s 274.2 (1)(b)(iii)).

<sup>173</sup> Article 1 — ‘the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as* obtaining from him’ (emphasis added); Joseph, Schultz and Castan, above n 148, 197.

<sup>174</sup> Burgers and Danelius, above n 107, 118–19; Nowak and McArthur, above n 118, 74–7.

<sup>175</sup> It has been stated that such purposes ‘should ... be understood to be the existence of some — even remote — connection with the interests of the policies of the State and its organs’ or refer to a situation in which the victim of torture is a detainee or a person ‘at least under the factual power or control of the person inflicting the pain or suffering and where the perpetrator uses this unequal and powerful situation to achieve a certain effect’: Burgers and Danelius, above n 107, 118–19; Nowak and McArthur, above n 118, 74–7.

<sup>176</sup> *Criminal Code* (Cth) s 274.2(1)(b)(iv).

social origin, property, birth or other status.<sup>177</sup> As such, the offence is directed to circumstances of the application of torture — that is severe mental or physical pain or suffering — with a discriminatory reason, rather than an identified consequence or objective. This legislative drafting methodology is effective, as the reason for the engaging in torture, namely discrimination, remains as constituting *any discrimination*, not confined to common discrimination identifying phrases in UN Human Rights documents. However, the rationale for including two distinct offences, one omitting discrimination<sup>178</sup> and the other including discrimination,<sup>179</sup> has been questioned by the Committee.<sup>180</sup>

#### H *Penalty Reflecting the Seriousness of the Activity of Torture*

The seriousness of the activity of torture — as reflected in the non derogable status of the crime,<sup>181</sup> its *jus cogens* character<sup>182</sup> and in the *Convention* obligation to create penalties proportionately appropriate to such gravity,<sup>183</sup> is confirmed in the penalty of imprisonment for 20 years applied to both s 274.2 *Criminal Code* (Cth) offences.

This penalty for the s 274.2 *Criminal Code* torture offences is the same as a range of other serious offences in the *Criminal Code* (Cth), such as intentionally causing

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<sup>177</sup> See the common discrimination identifying phrases in the *Universal Declaration of Human Rights* art 2 and in art 2 of the *ICCPR*. This terminology is commonly used in United Nations human rights documentation.

<sup>178</sup> *Criminal Code* (Cth) s 274.2(1).

<sup>179</sup> *Criminal Code* (Cth) s 274.2(2).

<sup>180</sup> Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of Australia*, above n 27, ‘Specific Information on the implantation of articles 1 to 16 of the Convention, including with regard to the Committee’s previous recommendations’.

<sup>181</sup> Article 2(2) of *CAT*: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency.’; *ICCPR* art 4(2).

<sup>182</sup> For discussion of the unqualified, peremptory norm status of torture see Malcolm Evans, ‘Torture’ (2006) 2 *European Human Rights Law Review* 101, 103; Malcolm Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press, 1998), 63–4.

<sup>183</sup> Article 4 (2) of *CAT*: ‘Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature’. Burgers and Danelius, above n 107, 129 state that ‘In applying article 4 it seems reasonable to require, however, that the punishment for torture should be close to the penalties applied to the most serious offences under the domestic legal system’.

serious harm to an Australian citizen or resident of Australia,<sup>184</sup> aggravated robbery,<sup>185</sup> various war crimes,<sup>186</sup> and offences of trafficking in persons.<sup>187</sup>

### I *Conduct Exempted from the Criminalisation of Torture*

Paragraph 4 of s 274.2 of the *Criminal Code* (Cth) provides greater specificity in relation to circumstances exempted from the torture offence in the phrase ‘conduct arising only from, inherent in, or incidental to lawful sanctions’<sup>188</sup> by including the phrase; ‘that are not inconsistent with the articles of the International Covenant on Civil and Political Rights’.<sup>189</sup> The offence accordingly recognises that Australia’s domestic implementation of the *Convention* obligations properly exists alongside other international human rights law obligations, as recognised in para 2 of art 1 of the *Convention*.<sup>190</sup>

In addition, the inclusion of the reference to the articles of the *ICCPR* in s 274.2(4) of the *Criminal Code* (Cth) indicates that the interpretation adopted for the meaning of the art 1 ‘lawful sanctions’ requires that sanctions must comply with both national law and international law.<sup>191</sup> This interpretation of the requirement of compliance with national and international law is consistent with the position of prominent Western nations in the drafting stages of the *Convention* and subsequently in declarations of interpretation.<sup>192</sup>

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<sup>184</sup> *Criminal Code* (Cth) s 115.3.

<sup>185</sup> *Criminal Code* (Cth) s 132.3.

<sup>186</sup> *Criminal Code* (Cth) s 268.46 (attacking protected objects), s 268.66 (attacking persons or objects using the distinctive emblems of the Geneva Conventions), s 268.79 (attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission), s 268.80 (attacking protected objects), s 268.81 (pillaging).

<sup>187</sup> *Criminal Code* (Cth) s 271.3 (Aggravated offence of trafficking in persons), s 271.6 (aggravated offence of domestic trafficking in persons).

<sup>188</sup> See *Criminal Code* (Cth) s 274.2 (4), which implements directly the final sentence of the art 1 CAT excluding some circumstances from definition of torture: ‘It does not include pain or suffering arising only from, or inherent in or incidental to lawful sanctions’.

<sup>189</sup> *Criminal Code* (Cth) s 274.2 (4).

<sup>190</sup> Article 1(2) of *CAT*: ‘This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’. See also art 16(2) regarding conduct falling short of torture:

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

<sup>191</sup> See Rodley and Pollard, above n 119, 5; Nowak and McArthur, above n 118, 84.

<sup>192</sup> Nowak and McArthur, above n 118, 84:

interpretation which has been advocated by a number of predominately Western governments during the drafting process and by means of declarations of interpretation ... the word ‘lawful’ refers to both domestic and international law. In other words, a government may only invoke the lawful sanctions clause if a certain sanction is in conformity with its own domestic law and with international law.

Even on this interpretation, however, the question arises as to the scope of the international law requiring conformity.<sup>193</sup> The legislation, in restricting itself in the international lawful aspect to the *ICCPR*, omits inclusion of any of the other five core human rights instruments to which Australia is a party,<sup>194</sup> as highlighted at the release of the Government's *Human Rights Framework*.<sup>195</sup> This is another example of a restrictive approach in drafting implementing legislation.

The reference to the articles of the *ICCPR* in s 274.2(4) clearly facilitates the importation of the jurisprudence of the Human Rights Committee on *First Optional Protocol* communications, *Second Optional Protocol* communications, the Human Rights Committee's Concluding Observations on States Parties Reports and the

General Comments on *ICCPR* articles, in assessing conduct relating to lawful sanctions.

*J Failing to Legislate about Conduct Conducive Towards Torture —  
Cruel, Inhuman and Degrading Treatment or Punishment*

Interestingly, the *Act* does not criminalise acts that fall short of the *Convention* definition of torture,<sup>196</sup> namely acts involving cruel, inhuman or degrading treatment or punishment. The *Convention* does not specifically create a textual obligation to criminalise these lesser acts.<sup>197</sup> Instead, art 16 of the *Convention* uses the more general term of 'prevent' in relation to identified obligations in arts 10, 11, 12 and 13. Nor does the *Convention* define what constitutes cruel, inhuman or degrading treatment or punishment.<sup>198</sup>

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Rodley and Pollard, above n 119, 5, cite Italy, Netherlands, the United Kingdom and the United States as declaring this position at adoption of the *Convention*, and Switzerland as subsequently making such a declaration.

<sup>193</sup> Or as Nowak and McArthur, above n 118, 84 state: 'But what are the relevant standards of international law?'

<sup>194</sup> The *ICECSR*, *CEDAW*, *CERD*, *CROC* and *CROPD*.

<sup>195</sup> See McClelland, above n 15; Robert McClelland, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release, 2 June 2010) <[http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_SecondQuarter\\_2June2010-Enhancingparliamentaryscrutinyofhumanrights.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_2June2010-Enhancingparliamentaryscrutinyofhumanrights.html)>.

<sup>196</sup> See the discussion under Part III(D) above.

<sup>197</sup> Article 16 (1) of *CAT* states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The art 2 and art 4 *CAT* obligations to take legislative measures are confined to torture. See also Burgers and Danelius, above n 107, 149, noting the textual absence of a states parties obligation to legislate against this treatment or punishment.

<sup>198</sup> Cruel and inhuman treatment is differentiated from the art 1 *CAT* definition of torture through either a lack of one of the essential elements of torture or a falling

The formal obligations under art 16 of the *Convention* have been identified as one of prevention within states territorial jurisdiction of ‘acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, where such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.<sup>199</sup> Unlike art 1, the infliction of cruel, inhuman or degrading treatment or punishment need not be for a specified purpose.<sup>200</sup> In addition, the ‘victims of acts referred to in art 16 must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment’.<sup>201</sup>

Two further points are worth highlighting. General Comment 2 of the Committee Against Torture identifies a clear link between these lesser activities and torture,<sup>202</sup> with a distinctive torture offence advancing the *Convention*’s overarching aim of preventing torture and ill-treatment.<sup>203</sup> Secondly, in the Concluding Observations of the Committee Against Torture to the Third Periodic Report of Australia, the art 4 *Convention* obligations were considered to highlight the nexus between the two forms of conduct, warranting the introduction of a specific lesser offence.<sup>204</sup>

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short of the requisite severity or intensity of inflicted suffering: see Nowak, above n 149, 162–3. Degrading treatment is associated with the humiliation of the victim, from either the victim’s perspective or the perspective of others: see Nowak, above n 149, 165. See also Malcolm Evans ‘Getting to Grips With Torture’ (2002) 52 *International and Comparative Law Quarterly* 365, 375–6: ‘[Art 16] acts fail to qualify as acts of torture for the purposes of the Convention either because they did not involve a sufficiently severe degree of pain or suffering or because they were not inflicted for a purpose’; Joseph, Schultz and Castan, above n 148, 209: ‘no specific definitions of ‘cruel’, ‘inhuman’ or ‘degrading’ treatment have emerged under the ICCPR or CAT. The requirements of severity, intention, and purpose are presumably applied more leniently in determining whether such treatment has occurred’. The contestability and indeterminacy of the phrase ‘inhuman and degrading treatment’ raises a series of interpretive possibilities: see Jeremy Waldron, ‘Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 269.

<sup>199</sup> Burgers and Danelius, above n 107, 149.

<sup>200</sup> Ibid 150.

<sup>201</sup> Ibid 149.

<sup>202</sup> *CAT General Comment 2*, above n 66, [3] describes the obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment as ‘interdependent, indivisible and interrelated’ and that as ‘the conditions that give rise to ill-treatment frequently facilitate torture ... the measures required to prevent torture must be applied to prevent ill-treatment’. *CAT General Comment 2* therefore clearly contemplates the criminalisation and other measures in relation to such conduct.

<sup>203</sup> *CAT General Comment 2* above n 66, [10]–[11].

<sup>204</sup> Committee Against Torture, *Concluding Observations: Australia*, above n 26, [18]. The *Convention* preventative obligation in relation to torture and its nexus with cruel, inhuman or degrading treatment or punishment led the Committee to assert that the lesser conduct ‘has likewise a non-derogable nature under the Convention’.

There is nothing in art 16 of the *Convention* which excludes domestic criminalisation of cruel, inhuman or degrading treatment or punishment falling short of the *Convention's* definition of torture.<sup>205</sup> Accordingly, the omission to include such an offence in the *Criminal Code* amendments indicates an unnecessarily narrow view of the practical issues of the prevention and prohibition of torture — by failing to create a specific offence for conduct known to be related to, conducive towards and preparatory for, torture. The legislative changes to the *Criminal Code* are insufficiently preventative, taking an overly restricted approach by not creating a specific offence against such incremental conduct. The omission of this broader offence appears simplistically linked to the absence of a textual obligation in the *Convention* to criminalise.<sup>206</sup>

In the alternative, art 7 of the *ICCPR* provides a further foundation for the criminalisation of cruel, inhuman and degrading treatment.<sup>207</sup> *General Comment* 20 on art 7 of the *ICCPR* contemplates both criminalisation and other measures against such conduct.<sup>208</sup> The linkage between cruel, inhuman or degrading treatment and torture, suggests that a more anticipatory, preventative approach would have been to enact an offence covering the lesser conduct. This offence would draw upon the preventive obligation on a state within its territory of such acts<sup>209</sup> and be reinforced by the *Convention* acknowledgment of obligations in other international instruments prohibiting cruel, inhuman or degrading treatment or punishment.<sup>210</sup> The omission in the legislation of an offence of engaging in cruel, inhuman or degrading treatment or punishment is confirmatory of a legislatively conservative approach. The fact that cruel, inhuman or degrading treatment is not defined in either the *Convention* or under the *ICCPR* would not prevent a suitable legislative definition from being formulated from the relevant committee jurisprudence and the respective *General Comments*. Indeed, the earlier *UN Declaration Against Torture*<sup>211</sup> stated that alleged perpetrators of well founded

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<sup>205</sup> Indeed, art 16 obliges states to take preventative measures, and makes a *non exclusive reference* to obligations contained in arts 10, 11, 12, 13 of the *Convention*.

<sup>206</sup> For discussion of the lack of obligation under the *Convention* to criminalise ill treatment — that ‘States are therefore not required to lay down the offence of inhuman treatment as a crime in domestic law and apply the principle of universal jurisdiction to these forms of ill-treatment’ — see Nowak and McArthur, above n 118, 571.

<sup>207</sup> See also the related discussion under the heading ‘D *Parallel International Torture Prohibition Obligations For Australia* — The International Covenant of Civil and Political Rights’.

<sup>208</sup> See *ICCPR General Comment 20*, above n 153, [8]:

The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. State parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

<sup>209</sup> See *CAT* art 16(1).

<sup>210</sup> See *CAT* art 16(2).

<sup>211</sup> *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452,30th sess (UN Doc A/10408) (9 December 1975).

allegations of cruel, inhuman or degrading treatment or punishment shall be subjected to criminal, disciplinary or other appropriate proceedings.<sup>212</sup>

K *Extending the Geographical Reach and Ancillary Offence Application of the Crime of Torture*

In giving emphasis to implementation of the *Convention’s* Art 5 universal jurisdiction obligations<sup>213</sup> in establishing jurisdiction, the Act applies the broadest category of Category D Extended geographical jurisdiction,<sup>214</sup> to the s 274.2 of the *Criminal Code* (Cth) torture offences. It makes, however, proceedings for torture offences allegedly having occurred outside Australia, subject to the consent in writing of the Commonwealth Attorney General.<sup>215</sup> The Committee has queried whether this consent requirement amounts to an adequate and specific criminalisation of torture in accordance with *Convention* obligations.<sup>216</sup> The Attorney General’s consent in writing requirement is possibly susceptible to a perception of potential political influence and raises questions of international comity and good relations with foreign states, when the conduct of foreign nationals raises a prima facie case relating to the torture offences.

Furthermore, the div 274 of the *Criminal Code* (Cth) torture offences are ‘not intended to exclude or limit the concurrent operation of any other law of the

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<sup>212</sup> Ibid art 10.

<sup>213</sup> Article 5 of the *CAT* states:

- (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State
  - (c) When the victim is a national of that State if that State considers it appropriate
- (2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

<sup>214</sup> *Criminal Code* (Cth) s 15.4:

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

<sup>215</sup> *Criminal Code* (Cth) s 274.3 (1): ‘Proceedings for an offence against this Division, where the conduct constituting the alleged offence occurs wholly outside Australia, must not take place except with the consent in writing of the Attorney-General’.

<sup>216</sup> Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of Australia*, above n 27: Specific information on the implementation of Arts 1 to 16 of the Convention, including with regard to the Committee’s previous recommendations, [1]. Extraterritorial jurisdiction issues for Australian victims of torture abroad had previously been raised by the *CAT* Committee: see *Concluding Observations: Australia*, above n 26, [19].

Commonwealth or any law of a State or Territory'.<sup>217</sup> This reflects the obligations of Art 5(3) of the *Convention*<sup>218</sup> by acknowledging the overlap of the Commonwealth torture offences with other more general, non specific criminal offences under Commonwealth, State and Territory law.

The *Convention* through Art 4 also extends state party criminal liability obligations<sup>219</sup> of attempts to commit torture and complicity or participation in torture.

These obligations are also implemented by the application of pt 2.4 of the *Criminal Code* (Cth) to the s 274.2 *Criminal Code* (Cth) torture offences — ss 11.1,<sup>220</sup> 11.2<sup>221</sup> and 11.2A<sup>222</sup> of the *Criminal Code* (Cth) provide various extensions of criminal responsibility to *Criminal Code* (Cth) offences such as the torture offences.

#### IV CONCLUSION

The criminalisation of torture in Australian domestic law through the introduction of torture offences in div 274 of the *Criminal Code* (Cth) is a welcome practical affirmation of Australia's international human rights obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. This measure is one of several human rights initiatives expressing re-engagement with the United Nations human rights system, ranging from specific convention based measures<sup>223</sup> to the seeking an elected seat on the

<sup>217</sup> *Criminal Code* (Cth) s 274.6. A prohibition against double jeopardy for the same conduct is contained in s 274.7 of the *Criminal Code* (Cth).

<sup>218</sup> Article 5(3) states that 'This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law'.

<sup>219</sup> Article 4 states that

(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture

(2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

<sup>220</sup> A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

<sup>221</sup> A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

<sup>222</sup> Joint commission: (1) If (a) a person and at least one other party enter into an agreement to commit an offence; and (b) either: (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3)); the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

<sup>223</sup> Robert McClelland and Stephen Smith, 'Reaffirming Our Commitment to International Human Rights Obligations' (Media Release, 21 April 2010) <<http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorney>

Security Council, in part to actively promote human rights. The criminalisation of torture under Commonwealth law is also an important symbolic rejoinder to the international emergence of torture as an intelligence gathering response in the war on terror. It will also enable Australia to respond cogently and positively about its *Convention* obligations in its 2012 states parties reporting process. Along with other convention based measures, it affirms to the international community that Australia gives due consideration to its international human rights obligations, including United Nations human rights conventions.

Significantly, the legislative enactment implementing the obligations of one of Australia’s identified seven core international human rights conventions, is an expression of the central operating principle of the government’s human rights policy and Human Rights Framework, with its distinct emphasis upon parliamentary sovereignty and parliamentary interpretation and assessment of human rights by rejecting an enhanced judicial role in interpreting rights through a statutory charter of rights.

An analysis of the scope and reach of the *Act*, assessed against the actual possibilities open under the *Convention* and the *ICCPR* to domestically implement obligations under the s 51(xxix) external affairs power, has revealed that several opportunities for more broadly drafted criminalisation provisions have not been taken up. Individual analyses of the torture criminalisation provisions have demonstrated unnecessarily restrictive legal drafting, confirming that narrower human rights policy choices have been settled upon in the language of the *Act*. Telling examples of this practice have been identified under this article’s various analyses regarding the criminalising of torture in Australian domestic law.

Within the domestic and international contextual factors discussed around the emergence of the torture criminalisation legislation, and the expressed international and domestic Australian government directions of human rights policy and legislation, the *Act* therefore signals an identifiable disposition and methodology. This is manifested mainly, but not altogether consistently, in a close textual implementation in legislation of the immediate *Convention* obligations, tending towards a minimal, literal compliance with the *Convention* obligations. It indicates that the corollary of the Government’s policy choice in rejecting domestic implementation of *ICCPR* articles through the introduction of a statutory human rights charter, may well emerge as a minimal, hesitant and cautious legislative expression of those *Convention* obligations.

It is too early to determine whether the present practices in the *Act* are properly predictive of a broader principle. Other examples of Australian human rights legislative development may test whether the present Australian government

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general.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\_2010\_Second\_Quarter\_21April2010-ReaffirmingourCommitmenttoInternationalHumanRightsObligations.html> indicating ‘a range of initiatives the Government has already taken to further engage with the international community to protect and promote human rights at home, in our region and in the rest of the world’.

also favours minimal legislative responses elsewhere and whether the legislative responses the present *Act* should be seen as a methodological template. A specific immediate example is Australia's commitments made arising from the 2011 Universal Periodic Review, to accept, or accept in part 137 of 145 recommendations, with 'a number of recommendations focused on Australia's international human rights obligations and domestic implementation of those obligations, which had been used to inform the development of the National Human Rights Action Plan that was currently underway'.<sup>224</sup>

A more general example is in how, applying Parliamentary practice, discretion, interpretation and the application of requisite international human rights law expertise, the legislative functions of the Parliamentary Joint Committee on Human Rights<sup>225</sup> and the requirement of Statements of Compatibility<sup>226</sup> with human rights for bills and for legislative instruments, will be carried out. The skeletal functions of the Parliamentary Joint Committee,<sup>227</sup> and the Statements of Compatibility<sup>228</sup> provide a very significant scope for Executive determined and discretionary minimal interpretations of both legislative scrutiny and accountability based human rights functions, similar to the approach in the *Act*. This possibility is made real by the fact that the phrase 'human rights' is defined in the *Human Rights*

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<sup>224</sup> Peter Woolcott, Permanent Representative of Australia to the United Nations Office at Geneva, *Consideration of the Outcome of Universal Periodic Review of Australia*, Human Rights Council (8 June 2011) in UN document 'Human Rights Council adopts outcomes of Universal Periodic Review on Myanmar, Australia and Georgia' <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11124&LangID=E>>; Human Rights Council *Report of the Working Group on the Universal Periodic Review Australia* (UN Doc A/HRC/17/10) (24 March 2011) 'II. Conclusions and/or recommendations 86.1 to 86.145'.

<sup>225</sup> See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pt 2.

<sup>226</sup> *Ibid* pt 3.

<sup>227</sup> In relation to the Parliamentary Joint Committee on Human Rights, under s 6 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) 'All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of Parliament'. Under s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Committee's functions are

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for Compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney General, and to report to both Houses of the Parliament on that matter.

<sup>228</sup> In relation to Statements of Compatibility, a statement must be prepared in respect of a bill intended to be introduced into the Parliament (s 8(1)) and that statement must be presented to the Parliament when the bill is introduced (s 8(2)). The statement of compatibility only has to 'include an assessment of whether the Bill is compatible with human rights': s 8(3). It is neither binding on any court or tribunal (s 8(4)), and a 'failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth' (s 8(5)).

*(Parliamentary Scrutiny) Act 2011* (Cth) as ‘the rights of freedoms recognised or declared’ by the seven United Nations human rights conventions to which Australia is a party<sup>229</sup> and that the definition clearly contemplates Australian reservations and statements upon the seven conventions.<sup>230</sup>

What becomes clear is that the *Act* could have done more to provide a resounding legislative expression of Australia’s commitment to the criminalisation of torture. As discussed, the *Act* would have been strengthened by the adoption of several, modest enhancements tweaking and extending the reach of the criminalisation measures and ancillary provisions. Such changes would beneficially impact upon the operational scope of the *Act*, asserting a more prohibitory approach by removing appearances of legislative hesitation and uncertainty, and in strongly demonstrating re-engagement with the United Nations human rights system. This would then set a higher benchmark for the development of Australia’s Human Rights Framework and an exemplary foundation for Australian advocacy of human rights in international forums.

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<sup>229</sup> See McClelland, ‘Enhancing Parliamentary Scrutiny of Human Rights’, above n 195; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3 definition.

<sup>230</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(2): In the definition of human rights in subsection (1), the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

## CONSPIRACIES, CODES AND THE COMMON LAW: *ANSARI V THE QUEEN AND R V LK*

Criminal proceedings before higher appellate courts tend to involve either matters of procedure, or the technical interpretation of specific, offence-creating statutes. In this context, tracing a discernible approach to statutory interpretation can enhance understanding of how an appellate court may deal with future criminal cases. Of course, where the jurisdiction out of which the proceedings arise has a criminal code, the importance of approaches to statutory interpretation is higher still. This paper will examine the High Court's recent approach to construing offence-creating legislation, by means of two cases involving charges of conspiracy laid under the *Criminal Code Act 1995* (Cth) sch 1 ('*Commonwealth Code*'): *R v LK*<sup>1</sup> and *Ansari v The Queen*.<sup>2</sup> These cases indicate a possible, and perhaps controversial, tendency to read criminal legislation and particularly criminal codes in such a way as to reflect common law criminal offences.

Both *Ansari* and *LK* arose out of the Sydney underworld of organised crime. The defendants in both sets of cases were brothers allegedly involved in international money laundering rings. The Ansari brothers were accused of dealing with AUD2 million, thought to be the proceeds of criminal activity, for a Romanian associate. The brothers RK and LK were charged with respect to the movement of CHF25 million through various offshore accounts, and into the archetypal Swiss bank account.

Both sets of brothers were charged with conspiracy to commit money laundering offences under the *Commonwealth Code*. The common question that governed their fates was whether it is possible to conspire to commit an offence based on recklessness rather than intention; whether it is possible to conspire with another person to be reckless.

Conspiracy is criminalised by s 11.5(1) of the *Commonwealth Code*. The elements of the offence are that:

- the defendant entered into an agreement with other persons;<sup>3</sup>

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<sup>1</sup> (2010) 241 CLR 177 ('*LK*').

<sup>2</sup> (2010) 241 CLR 299 ('*Ansari*').

<sup>3</sup> *Commonwealth Code* s 11.5(2)(a).

- the defendant and one of the other parties to the agreement intended that an offence would be committed pursuant to the agreement;<sup>4</sup> and
- the defendant or one of the other parties to the agreement committed an overt act pursuant to the agreement.<sup>5</sup>

So, the requisite fault element for conspiracy is the intention to commit some other offence, or that another party to the agreement commits some other offence. This is one of the unusual characteristics of conspiracy — it relies upon the commission or intention to commit some other, separate offence.

In *Ansari* and *LK*, that other offence was money laundering, criminalised by s 400.3(2) of the *Commonwealth Code*. Money laundering involves a physical element of dealing with money in particular ways. Unusually, the offence in s 400.3(2) also has two fault elements, both of which must be made out for a finding of guilt:

- the defendant must intentionally deal with the money; and
- the defendant must also be reckless as to the money being the proceeds of crime, or reckless as to the fact that the money may in future be used as an instrument of crime.

RK and LK were alleged to have intentionally dealt with money and to have been reckless as to it being the proceeds of crime. The *Ansari* brothers were alleged to have intentionally dealt with money and to have been reckless as to the possibility of it being used as an instrument of crime in the future.

In proving a criminal conspiracy to commit money laundering, the first fault element of money laundering — intentionally dealing with money — poses no great conceptual difficulty. The second fault element — recklessness as to the status or future uses of the money — raises logical and legal difficulties. Conspiracy requires two people to agree (and to intend) that they will in future commit an offence. Yet if that offence involves being reckless, then the question inevitably arises: is it possible for a person to agree and intend to be reckless in future conduct? The High Court said that it was not possible. Upon this basis, the Court construed conspiracy's fault element of intention as governing, and effectively replacing, the fault elements of the substantive offences upon which the conspiracy relies.

The joint judgment in *LK* was written by Gummow, Hayne, Crennan, Kiefel and Bell JJ.<sup>6</sup> In *Ansari*, their Honours were joined by Heydon J, and largely adopted the reasoning outlined by the joint judgment in *LK*. The joint judgments paid close attention to conspiracy as established at common law, for which the prosecution must demonstrate not merely an intention to commit the conduct that is the separate

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<sup>4</sup> Ibid s 11.5(2)(b).

<sup>5</sup> Ibid s 11.5(2)(c).

<sup>6</sup> Heydon J concurred with the reasoning and orders of the joint judgment.

offence, but must also demonstrate knowledge of each of the essential facts upon which the conduct operates to constitute this separate offence.<sup>7</sup> For the purposes of money laundering, at common law the conspirators must have entered into an agreement intending not only to engage in money laundering generally, but with knowledge of each of the facts that made dealing with *this* money in *this way* money laundering.<sup>8</sup> As a consequence, if the fault element for a substantive offence is recklessness, for the purposes of conspiracy to commit that substantive offence the fault element for the substantive offence will be treated as though it were intention. This interaction between conspiracy and other offences at common law was considered reasonably well established.<sup>9</sup>

Having determined the common law position, the joint judgment then integrated it into the *Commonwealth Code*'s conception of conspiracy. The *LK* joint judgment reasoned that the terms 'conspire' and 'conspiracy' had acquired established common law meanings at the time the Code was enacted. The Code's use of these terms imported their common law meanings into the legislative framework.<sup>10</sup> Moreover, the joint judgment argued, the terms in which the Code offences had been drafted would anyway have produced the same result as the common law. In *LK*, their Honours said that:

As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence. This is consistent with authority with respect to liability for the offence of conspiracy under the common law.<sup>11</sup>

Chief Justice French wrote separate judgments in *Ansari* and in *LK*. He reached the same conclusion as the joint judgments in both cases, namely that conspiracy under the *Commonwealth Code* required that there be an intention to commit all elements of the substantive offence, even if one of the elements of the substantive offence itself required only a recklessness fault element.<sup>12</sup> Like the joint judgment, French CJ reached this conclusion through an examination of the workings of conspiracy at common law,<sup>13</sup> as well as a relatively brief consideration of the Code's terms. Moreover, French CJ referred extensively to statements made by drafters of the *Commonwealth Code* to support his conclusions.<sup>14</sup>

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<sup>7</sup> *LK* (2010) 241 CLR 177, 224 [107], 218–19 [94], 227 [114], 228 [117]; *Ansari* (2010) 241 CLR 299, 318 [59].

<sup>8</sup> *LK* (2010) 241 CLR 177, 228 [117].

<sup>9</sup> *Ibid* 218–19 [94], 225 [110], 225–6 [112].

<sup>10</sup> *Ibid* 224 [107].

<sup>11</sup> *Ibid* 228 [117].

<sup>12</sup> *Ibid* 212 [75].

<sup>13</sup> *Ibid* 206–9 [59]–[67]. In *Ansari* (2010) 241 CLR 299, French CJ simply referred back to his discussion of the common law in *LK*: at 308 [21].

<sup>14</sup> *LK* (2010) 241 CLR 177, 203–6 [51]–[57].

In *LK*, French CJ's judgment reflected largely the same reasoning process as that used by the joint judgment. Yet in the later-decided *Ansari*, French CJ made some additional, interesting observations. The Chief Justice reiterated his conclusion from *LK* that s 11.5(1) of the *Commonwealth Code*, when read in light of common law conspiracy principles, required that the defendant had an *intention* to commit all elements of the future substantive offence.<sup>15</sup> However, his Honour disagreed with the *LK* joint judgment's reasoning<sup>16</sup> that it was conceptually impossible for a person to intend in the present to act recklessly in future. For instance, French CJ said, a conspirator could intend in future to deal with money, while knowing that there was a risk that it will become an instrument of crime, or the conspirator may intend in future to deal with money while also intending that there be a risk that the money will become an instrument of crime.<sup>17</sup> Both of these situations would constitute a person intending to be reckless in future. However, despite this reading being conceptually possible, French CJ reaffirmed his view that the *Commonwealth Code*'s intention requirements should be read in line with the common law position.<sup>18</sup>

It is interesting to note that the judges in both cases narrowed the scope of the Code offence of conspiracy, in a way that I argue was not necessarily required by the statute. Two possible reasons were given by the High Court for doing so: simple logic, and the influence of the common law. I will assess each in turn.

At this point, it may be useful to diverge briefly into a discussion of the nature of intention and recklessness as fault elements. Most offences involve some form of mental or fault element; indeed, at common law, a mental element is automatically presumed.<sup>19</sup> Intention and recklessness are two common forms of fault element. The common law meaning of intention is that the defendant has an aim or purpose of bringing about the constituent elements of the offence in question.<sup>20</sup> Generally, a person is reckless in the common law sense if the person acts with knowledge that a consequence is a probable or possible result of his or her actions, and that consequence constitutes an offence.<sup>21</sup>

However, some recent Commonwealth offences adopt a less typical form of recklessness: offences like money laundering and supporting terrorism use recklessness as to *present knowledge* rather than recklessness as to a *future*

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<sup>15</sup> *Ansari* (2010) 241 CLR 299, 308 [21].

<sup>16</sup> *LK* (2010) 241 CLR 177, 228 [117] (joint judgment). This passage is quoted in the text accompanying n 11.

<sup>17</sup> *Ansari* (2010) 241 CLR 299, 310 [26].

<sup>18</sup> *Ibid* 308 [21].

<sup>19</sup> *Allchurch v Cooper* [1923] SASR 370, 373–4 (Gordon J).

<sup>20</sup> See generally *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Bouhey v The Queen* (1986) 161 CLR 10.

<sup>21</sup> *Pemble v The Queen* (1971) 124 CLR 107; *La Fontaine v The Queen* (1976) 136 CLR 62.

*consequence*.<sup>22</sup> So, for instance, the money laundering provisions in *LK* and *Ansari* criminalise dealing with money while reckless as to whether it is proceeds of crime; by contrast, the classic recklessness offence of manslaughter uses recklessness as to the consequences of one's actions. The *Commonwealth Code* uses recklessness rather than intention as the fault element for these offences for interrelated evidentiary and normative reasons. As an evidentiary matter it can be very hard, or impossible, to show that a person actually knew what they were taking part in; but as a normative matter, the unusual nature of the activity (such as moving CHF25 million into an offshore account in small instalments) should have caused them to take some care about what they were taking part in.<sup>23</sup> So, the question is how the law of inchoate offences should be adapted to this type of crime. *LK* and *Ansari* grappled with the *Commonwealth Code*'s attempt at adaptation, but ultimately, I argue, reverted to the common law position and its orthodox conception of recklessness as relating to consequences rather than knowledge. The result is that an intended new formulation for recklessness has been left by the wayside.

I turn now to the logic of conspiracy's interaction with other *Commonwealth Code* offences, as expounded by the joint judgments in *LK* and *Ansari*. The starting point is clear: under the *Commonwealth Code*, the physical element for conspiracy is entering into an agreement, and the fault element is intention. More particularly, conspiracy requires an intention that an offence would in future be committed pursuant to the agreement entered into by the conspirator.<sup>24</sup> Yet this deceptively simple statement fails to specify exactly what about the future offence must be intended; must the defendant merely intend to pursue some general course of action, made up of his intended acts and also of circumstances beyond his knowledge and control? Or must the defendant intend both to commit all the necessary acts, and intend to do so in the particular circumstances that make these acts criminal, in order for the defendant to be guilty of criminal conspiracy? To illustrate, does the defendant intend to commit the reckless money laundering offence criminalised under s 440.3 of the Code if he intends to deal with money knowing only that there is a *risk* that the money will be the proceeds of crime? Or in order to intend to commit the s 440.3 offence, must the defendant intend to deal with the money, and also know and intend that the money is the proceeds of crime?

The High Court said that the *Commonwealth Code* requires the latter. I will make a few points about this conclusion.

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<sup>22</sup> This use of recklessness is not entirely unknown to the common law, but is more rare: see, eg, *R v Wozniak* (1977) 16 SASR 67; *R v Hemsley* (1988) 36 A Crim R 334; *R v Kitchener* (1993) 29 NSWLR 696.

<sup>23</sup> Explanatory Memorandum, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (Cth). I note that if the fault element of intention to launder money can be made out, then the defendant may be charged with a different offence that carries a higher penalty: *Commonwealth Code* s 400.3(1).

<sup>24</sup> *Commonwealth Code* s 11.5(2)(b).

First, the *Commonwealth Code* expressly establishes a comprehensive fault element regime. In particular, it establishes that as a general rule, for a physical element of conduct the fault element is intention, but for a physical element consisting of a circumstance, the fault element is recklessness.<sup>25</sup> This mapping of fault elements is reflected in the money laundering offence with which the defendants in the present cases were charged: there must be intention to deal with money (that is, intention as to conduct), but only recklessness as to the circumstance of the money dealt with being the proceeds of crime or becoming an instrument of crime (that is, recklessness as to the circumstances in which the conduct takes place). The use of recklessness for knowledge as to circumstances as well as results or consequences is unusual at common law, as I discussed previously, but is adopted as the norm for the *Commonwealth Code*.<sup>26</sup> Yet this general norm for organising different levels of fault element to conduct and circumstances was rejected by the High Court for use in conspiracy offences: according to *LK* and *Ansari*, the fault element for both types of physical element is to be intention.

What is it about the offence of conspiracy that alters the organisation of fault elements used as the Code's general scheme? The High Court answered that conspiracy's requirement of an intention fault element alters the allocation of fault elements within the substantive offence; essentially, conspiracy's fault element is substituted for all of the fault elements of the substantive offence.<sup>27</sup> The joint judgment said that this is because it is not logically possible to intentionally agree to be reckless; that is, that it is not possible for two people to jointly intend to do a thing, and intend to be reckless as to the circumstances in which that thing is done.<sup>28</sup>

There need not be conceptual or logical difficulty in agreeing and intending to be reckless in the sense of the new offences: a person can intend to deal with money in a week's time, while not know today whether that money is the proceeds of crime; and two people can similarly agree to deal with money in a week's time, while not knowing today whether that money is the proceeds of crime. However, the person knows today that there is a strong possibility that the money to be dealt with in a week is the proceeds of crime, and the person still has an intention today to deal with that money next week even if the person does not come across new information demonstrating that the money is not the proceeds of crime. In this way, the person (or the two conspirators) intends to commit the offence of dealing with money, and is reckless as to whether it is the proceeds of crime.

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<sup>25</sup> *Ibid* s 5.6.

<sup>26</sup> The *Commonwealth Code's* adoption of this as the norm is expressly recognised by the High Court in *LK* (2010) 241 CLR 177, 230 [127] (joint judgment).

<sup>27</sup> *LK* (2010) 241 CLR 177, 228 [117], 234–5 [141] (joint judgment); *Ansari* (2010) 241 CLR 299, 318 [59]–[61] (joint judgment).

<sup>28</sup> *LK* (2010) 241 CLR 177, 228 [117].

Yes, it is a little contorted, and instructing a jury would not be easy.<sup>29</sup> But conceptually and logically, it does seem to be possible to intentionally agree to a reckless offence. Perhaps the most simple way of considering the matter is not that two people are intentionally agreeing to be reckless in the future, but that they are intentionally agreeing to do something that is reckless, knowing that it is reckless.

So, if there is no conceptual impossibility in intending and agreeing to be reckless, then there can be an intentional conspiracy to commit a recklessness offence. The terms of the Code direct that guilty conspirators must intend to commit a further substantive offence, and the substantive offence in question in *LK* and in *Ansari* required that the conspirators intend to engage in conduct and be reckless as to knowledge. So, the terms of the Code do not themselves indicate that conspiracy's fault element of intention should apply separately to all of the physical elements (including factual circumstances) of the offence, rather than to the offence overall. Why depart from that *prima facie* meaning, if logic does not require it? An alternative reason offered by the High Court is that the common law offence of conspiracy requires intention to commit all elements of the substantive offence, and that this common law rule has been woven into the terms of the Code offence.

In interpreting the provisions of the *Commonwealth Code* relating to conspiracy, the entire Court in both *Ansari* and *LK* also analysed in detail the requirements of the corresponding common law offence.<sup>30</sup> In doing so, the joint judgment in *LK* referred to Pearce and Geddes' authoritative treatise on statutory interpretation.<sup>31</sup> Pearce and Geddes note that 'the theoretical idea of a code is that it replaces all existing law and becomes the sole source of the law on that particular topic',<sup>32</sup> except:

- where words of the code evidence ambiguity; or
- where words used have acquired a technical meaning at common law, which is not excluded or superseded by terms of the code.<sup>33</sup>

It was this second exception that was relied upon — their Honours said that 'conspiracy' had a technical common law meaning, which had been imported into the Code.<sup>34</sup>

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<sup>29</sup> As was disapprovingly noted in *Ansari* (2010) 241 CLR 299, 317 [57] (joint judgment).

<sup>30</sup> *LK* (2010) 241 CLR 177, 224–6 [108]–[112] (joint judgment), 206–7 [59]–[61] (French CJ); *Ansari* (2010) 241 CLR 299, 317–18 [58] (joint judgment), 308 [21] (French CJ).

<sup>31</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2006) 273–4, quoted in *LK* (2010) 241 CLR 177, 219–20 [96]–[97].

<sup>32</sup> Pearce and Geddes, above n 31, 273–4.

<sup>33</sup> *Ibid.*

<sup>34</sup> *LK* (2010) 241 CLR 177, 220 [97].

However, Pearce and Geddes also referenced significant controversy about when these exceptions will be engaged and allow reference to common law.<sup>35</sup> It is clear that when interpreting a code, as with any other exercise in statutory interpretation, the first loyalty is to the text.<sup>36</sup> Only if the text is ambiguous, for instance by using an undefined technical legal term, should one look to the pre-existing common law.<sup>37</sup>

This rule has been unequivocally affirmed by the High Court on multiple occasions. Clear instances include in *Mellifont v Attorney-General (Qld)*,<sup>38</sup> where five justices writing together said:

The primary difficulty with the applicant's argument is that it is not legitimate to look to the antecedent common law for the purpose of interpreting the Code unless it appears that the relevant provision in the Code is ambiguous. That ambiguity must appear from the provisions of the statute; in other words, it is not permissible to resort to the antecedent common law in order to create an ambiguity. Nor, for that matter, is it permissible to resort to extrinsic materials, such as the draft Code and Sir Samuel Griffith's explanation of the draft Code ... in order to create such an ambiguity.<sup>39</sup>

Moreover, in *Director of Public Prosecutions (NT) v WJI*,<sup>40</sup> Kirby J noted that:

Codification puts a brake on the modern technique of looking beyond the statutory language. It focuses the attention of the decision-maker on the text of the code. That, after all, is the object of replacing the vast mass of decisional law with codified provisions. The purpose of codification would be undermined if lawyers, in the guise of construction, reintroduced all of the common law authority which the NT Code was intended to replace.<sup>41</sup>

Yet in *LK*, both the joint judgment and French CJ did exactly this: their Honours examined explanations of the Code's drafters,<sup>42</sup> rather than referring to ambiguities in the text, to justify resort to the common law.

The word 'conspiracy' clearly has a technical legal meaning at common law. However, this meaning is not automatically imported into the Code — judges look

<sup>35</sup> Pearce and Geddes, above n 31, 274–6.

<sup>36</sup> Ibid 274; *Bank of England v Vagliano Bros* [1891] AC 107; *Brennan v The Queen* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

<sup>37</sup> Pearce and Geddes, above n 31, 275; *Stuart v The Queen* (1974) 134 CLR 426, 437; *R v Barlow* (1997) 188 CLR 1, 18; *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 309.

<sup>38</sup> (1991) 173 CLR 289.

<sup>39</sup> Ibid 309 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

<sup>40</sup> (2004) 219 CLR 43.

<sup>41</sup> Ibid 66.

<sup>42</sup> *LK* (2010) 241 CLR 177, 220–4 [99]–[107] (joint judgment), 203–6 [51]–[58] (French CJ).

to the terms of the Code to determine whether these terms supersede the common law. Unlike in many State criminal codes,<sup>43</sup> ‘conspiracy’ is not an undefined term implanted into the *Commonwealth Code* without further explanation. Its elements are clearly established in s 11.5(2).

The joint judgment in *LK* argued that s 11.5(2) of the Code did not outline elements of the offence of conspiracy, but merely specified some aspects of the existing meaning of the term ‘conspiracy’.<sup>44</sup> This existing meaning, according to their Honours, had been imported from the common law. This reasoning process, and approach to interpretation of the Code, seems to evince a desire to read the Code as corresponding to the common law.

It bears remembering the purpose of a code. Burbury CJ in *Murray v The Queen*<sup>45</sup> said:

The court will then incline to hold the view that the intention of the legislature was to retain the pre-existing legal concept as part of the criminal law and will in spite of semantic difficulties which may arise from the literal interpretation of related provisions of the code give effect to that intention as a controlling interpretative factor.<sup>46</sup>

Pearce and Geddes remarked of this statement that:

It is statements of this kind that infuriate advocates of codification of the law. It illustrates the great difficulty that common law judges experience when confronted with a code and how readily they will abandon its terms and retreat to the familiar ground of the common law.<sup>47</sup>

So, the High Court interpreted the *Commonwealth Code* offence of conspiracy based on common law ideas, and what the justices thought was the only logical interpretation of the interaction between various fault elements in the Code. What I have sought to show is that the terms in which the Code offence of conspiracy is drafted do not logically require intention with respect to all elements of the substantive offence — although it requires some minor mental contortions, it is possible to see how one can currently intend to be reckless in the future as to the existence of some circumstance, as was explained by French CJ in *Ansari*, and therefore how two people can jointly currently intend to be reckless as to some

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<sup>43</sup> *Criminal Code Act 1899* (Qld) ss 541–3 (‘*Criminal Code* (Qld)’); *Criminal Code Act 1924* (Tas) s 297 (‘*Criminal Code* (Tas)’); *Criminal Code Act Compilation Act 1913* (WA) s 558 (‘*Criminal Code* (WA)’).

<sup>44</sup> *LK* (2010) 241 CLR 177, 224 [107].

<sup>45</sup> [1962] Tas SR 170.

<sup>46</sup> *Ibid* 172–3.

<sup>47</sup> Pearce and Geddes, above n 31, 276.

future circumstance.<sup>48</sup> We are left with the High Court reading into the Code the common law requirements of conspiracy, which is not without controversy.

The decisions in *LK* and *Ansari* will not directly bear upon criminal law in jurisdictions other than the Commonwealth and the Territories; the State criminal codes, unlike that of the Commonwealth, do not specify the elements of ‘conspiracy’,<sup>49</sup> meaning that the common law would naturally supply these elements. Therefore, the approach taken by the High Court in *LK* and *Ansari* would be utterly without controversy as applied to some codes.

Nevertheless, adopting a narrow view of the Commonwealth offence of conspiracy, as the High Court has done here, may yet have far-reaching effects. Conspiracy regularly applies to a broad range of substantive offences: money laundering, as we saw in these two cases, but also drug dealing and trafficking, smuggling of people and goods, and violence by organised crime. Participation in these types of crime, where each player does only a small but important component act, is increasingly criminalised within legislation and codes using fault elements of recklessness — now nullified when the charge is of conspiracy. *LK* and *Ansari* have likely narrowed the scope of the Commonwealth offence of conspiracy, making it harder to prosecute those who help in the planning and preparation of these substantive, and serious, offences.

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<sup>48</sup> *Ansari* (2010) 241 CLR 299, 310 [26].

<sup>49</sup> *Criminal Code* (Qld) ss 541–3; *Criminal Code* (Tas) s 297; *Criminal Code* (WA) s 558.

## WOTTON V QUEENSLAND (2012) 285 ALR 1

### I INTRODUCTION

In *Wotton v Queensland*<sup>1</sup> the High Court ('Court') considered whether restrictions on a parolee's ability to attend public meetings and engage with the media breached the implied freedom of political communication. This case note will examine whether the Court's approach in *Wotton* was consistent with the underlying basis of the implied freedom by examining its application to executive bodies, the requirement that the law burden political communication and the treatment of state based political communication.

### II THE IMPLIED FREEDOM

The foundation of the implied freedom was articulated in *Lange v Australian Broadcasting Corporation*.<sup>2</sup> The Court established that freedom of political communication was an 'indispensable incident'<sup>3</sup> of the constitutionally prescribed system of government, requiring that the receipt of information by voters<sup>4</sup> be protected so that the Parliament can be properly chosen by the people.<sup>5</sup> As the freedom flows from the text and structure of the *Constitution*<sup>6</sup> the implication extends only so far as is necessary to protect representative government.<sup>7</sup> It does not apply to communications generally.<sup>8</sup> A law will breach the implied freedom when it imposes an effective burden on political communication ('the first limb

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<sup>1</sup> (2012) 285 ALR 1 ('*Wotton*').

<sup>2</sup> (1997) 189 CLR 520 ('*Lange*').

<sup>3</sup> Ibid 559.

<sup>4</sup> See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J); Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs' (2008) 29 *Adelaide Law Review* 247, 248.

<sup>5</sup> *Lange* (1997) 189 CLR 520, 559; *Constitution* ss 7, 24.

<sup>6</sup> *Lange* (1997) 189 CLR 520, 559, 566–7; Nicholas Aroney 'Lost in Translation: From Political Communication to Legal Communication?' (2005) 28(3) *University of New South Wales Law Journal* 1, 2.

<sup>7</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J) ('*McGinty*'); *Lange* (1997) 189 CLR 520, 566–7; *Coleman v Power* (2004) 220 CLR 1, 48 [88] (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J) ('*Coleman*').

<sup>8</sup> *McGinty* (1996) 186 CLR 140, 231–2 (McHugh J); *Lange* (1997) 189 CLR 520, 566–7; *Coleman* (2004) 220 CLR 1, 48 [88] (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

of the *Lange* test’) which is not appropriate and adapted to a legitimate end (‘the second limb of the *Lange* test’).<sup>9</sup>

### III BACKGROUND

#### A *Facts*

The appellant, Lex Wotton, was an indigenous man from Palm Island, Queensland. Following an indigenous death in custody he participated in a protest, causing property damage.<sup>10</sup> Mr Wotton was convicted of rioting causing destruction<sup>11</sup> and sentenced to six years imprisonment with a two year non-parole period.<sup>12</sup>

The parole conditions imposed on the appellant were the subject of the appeal. The relevant parole board, pursuant to s 200(2) of the *Corrective Services Act*,<sup>13</sup> required that the appellant not attend public meetings on Palm Island without a corrective service officer’s approval and that he not interact with the media.<sup>14</sup> A further control was placed on the appellant as under s 132(1) of the *Corrective Services Act* no person was able to interview or obtain documents from him without the approval of the chief executive of Queensland Corrective Services.<sup>15</sup> If a journalist did seek to engage with the appellant the appellant would have been guilty of aiding and abetting a breach of s 132(1) and therefore violate the parole requirement that he not commit an offence.<sup>16</sup>

#### B *The Decision*

Three separate judgments were delivered. The plurality of French CJ, Gummow, Hayne, Crennan and Bell JJ held that political communication was burdened but that the burdens imposed by ss 200(2) and 132(1) were appropriate and adapted to the legitimate ends of community safety<sup>17</sup> and ensuring the good conduct of parolees.<sup>18</sup> Justice Kiefel concurred with the plurality.<sup>19</sup> Whilst Heydon J also held that the laws were valid his Honour’s conclusion was on the basis that the laws did not ‘realistically threaten’ free speech and therefore did not constitute a burden which offended the first limb of the *Lange* test.<sup>20</sup>

<sup>9</sup> *Lange* (1997) 189 CLR 520, 567.

<sup>10</sup> *Wotton* (2012) 285 ALR 1, 19–20 [68]–[69] (Kiefel J).

<sup>11</sup> *Criminal Code 1899* (Qld) ss 61, 65.

<sup>12</sup> *Wotton* (2012) 285 ALR 1, 3 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>13</sup> *2006* (Qld).

<sup>14</sup> *Wotton* (2012) 285 ALR 1, 6 [15]–[16] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>15</sup> *Ibid* 6–7 [17] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Corrective Services Act 2006* (Qld) s 132(2)(d).

<sup>16</sup> *Wotton* (2012) 285 ALR 1, 6–7 [17] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Criminal Code 1899* (Qld) s 7.

<sup>17</sup> *Wotton* (2012) 285 ALR 1, 10 [31].

<sup>18</sup> *Ibid* 10 [32].

<sup>19</sup> *Ibid* 24–5 [88]–[91].

<sup>20</sup> *Ibid* 17 [58].

## IV EXECUTIVE DECISION MAKING

*Wotton* confirms that the implied freedom only restricts legislative power as the Court will examine the conferral of authority on an executive body, not the exercise of that authority.<sup>21</sup> This technical point has substantial implications given the wide range of executive discretionary powers.<sup>22</sup> The plurality and Kiefel J held that the conditions imposed under s 200(2) were irrelevant.<sup>23</sup> Rather the question was whether the empowering section, which required that conditions imposed by the parole board be impositions the parole board reasonably considered necessary to ensure good conduct and to stop offences occurring, breached the implied freedom.<sup>24</sup> The plurality and Kiefel J held that review of the actual conditions was a matter for judicial review.<sup>25</sup> Justice Heydon however followed a different approach and focussed on the validity of the conditions.<sup>26</sup> As the implied freedom operates as a limitation on legislative power, rather than conferring individual rights,<sup>27</sup> the plurality and Kiefel J's approach is preferable. Allowing people who are dissatisfied with executive decisions to challenge them because the decision breaches the *Lange* test would transform the implied freedom into an individual right. Applicants in judicial review proceedings could argue that a decision, which only applies to their case, breaches the freedom rather than seeking to establish a general constraint on executive or legislative power. To ensure consistency with the freedom's rationale the appropriate role of judicial review is to determine whether the decision maker acted outside their power.<sup>28</sup> The question of the implied freedom should be resolved by review of the empowering legislation.

## V BURDEN

Referring to the principles underpinning *Lange* may assist to better determine when a burden exists. Justice Heydon stated that a burden is too often 'conceded or assumed'.<sup>29</sup> The plurality and Kiefel J arguably perpetrated this criticism. The plurality stated that the s 132(1) burden was the requirement to seek permission from the chief executive and the s 200(2) burden the 'observance of conditions the parole board reasonably considers necessary'.<sup>30</sup> Justice Kiefel did not explicitly explain why there was a burden, rather her Honour focused on the interaction

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<sup>21</sup> Ibid 8 [21]–[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

<sup>22</sup> See Transcript of Proceedings, *A-G (SA) v Corporation of the City of Adelaide* [2012] HCATrans 107 (11 May 2012) 60 (M G Hinton QC).

<sup>23</sup> *Wotton* (2012) 285 ALR 1, 8 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

<sup>24</sup> Ibid 9 [28] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

<sup>25</sup> Ibid 10 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

<sup>26</sup> Ibid 16–17 [56]–[57].

<sup>27</sup> See, eg, *Coleman* (2004) 220 CLR 1, 51 [95] (McHugh J).

<sup>28</sup> See generally *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613–14 (Brennan J); *Shrimpton v Commonwealth* (1945) 69 CLR 613, 629–30 (Dixon J).

<sup>29</sup> *Wotton* (2012) 285 ALR 1, 12 [41].

<sup>30</sup> Ibid 9 [28].

between the Commonwealth and the states.<sup>31</sup> These approaches suggest that the first limb of the *Lange* test no longer requires an effective burden<sup>32</sup> but rather any factor that restricts communication.

The approach of Heydon J to the first limb should be preferred as it is more consistent with the implied freedom's foundation. Requiring a realistic threat to the freedom to communicate<sup>33</sup> ensures that the restriction on legislative power is no more than what is necessary to ensure that the *Constitution* functions.<sup>34</sup> A burden should present a realistic threat<sup>35</sup> as only substantial burdens will impact on the electorate's free choice.<sup>36</sup> This focuses the inquiry on what burdens will affect voters rather than general concepts of free speech. Holding that any impact on political communication is a burden suggests that the Court is thinking in absolute terms rather than focussing on what is necessary to protect the *Constitution*.

## VI APPLICATION TO STATE POLITICAL COMMUNICATION

In *Wotton* the distinction between state and Commonwealth communication was further reduced. Since *Lange* the implied freedom has operated on state legislative power where the relevant communication has a federal connection.<sup>37</sup> Whilst it has traditionally been the case that the federal connection need not be strong<sup>38</sup> *Wotton* further lowers the threshold. The plurality determined that a sufficient connection existed as both the Commonwealth and state executives comprise indigenous affairs ministers<sup>39</sup> and due to the integration of federal and state policing.<sup>40</sup> Justice Kiefel merely stated that indigenous affairs 'concern'<sup>41</sup> both levels of government whilst Heydon J did not consider the issue. If a federal connection exists when there are ministerial responsibilities at both levels of government then establishing a Commonwealth connection is not difficult. There are very few, if any, policy areas which are not overseen by both a state and federal minister.<sup>42</sup> Equally the plurality did not elaborate on what was a sufficient level of police integration to enliven the limitation. Given the extensive cross-government cooperation between

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<sup>31</sup> Ibid 22 [79]–[80].

<sup>32</sup> *Lange* (1997) 189 CLR 520, 567.

<sup>33</sup> *Wotton* (2012) 285 ALR 1, 17 [58] (Heydon J).

<sup>34</sup> See generally Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

<sup>35</sup> *Wotton* (2012) 285 ALR 1, 17 [58] (Heydon J).

<sup>36</sup> *Lange* (1997) 189 CLR 520, 560.

<sup>37</sup> Ibid 561; *Levy v Victoria* (1997) 189 CLR 579, 626 (McHugh J); Wait, above n 4, 250.

<sup>38</sup> Wait, above n 4, 256.

<sup>39</sup> *Wotton* (2012) 285 ALR 1, 9 [26].

<sup>40</sup> Ibid 9 [27].

<sup>41</sup> Ibid 22 [79].

<sup>42</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 8 May 2012, 4 (Julia Gillard, Prime Minister); Queensland, *Queensland Government Gazette*, No 77, 3 April 2012, 850; South Australia, *Extraordinary Gazette*, No 19, 25 March 2010, 1151.

the states and the Commonwealth<sup>43</sup> it is possible to find some level of integration in most policy areas. Furthermore Kiefel J's statement that the matter need only 'concern'<sup>44</sup> both state and federal governments is unclear as her Honour did not quantify what was a sufficient concern. Requiring only a minimal Commonwealth connection is consistent with French CJ's statement in *Hogan v Hinch*<sup>45</sup> that due to the 'significant interaction' between the levels of government the limitation of the freedom to Commonwealth communication 'is not of great practical significance'.<sup>46</sup> It is now questionable whether any real distinction is drawn between Commonwealth and state communication. If the distinction still exists its theoretical underpinnings are unclear.

Applying the implied freedom merely when there is some connection with federal affairs is arguably inconsistent with the basis of the freedom. If a low threshold exists then potentially the freedom is not limited to what is necessary for the effective operation of the *Constitution*.<sup>47</sup> Where there is only a limited or remote connection the issue is unlikely to be of sufficient significance to actually impact on the election of the Parliament. Similar to Heydon J's argument that a burden should not be readily 'conceded or assumed'<sup>48</sup> the question of a Commonwealth connection could also benefit from greater factual analysis. This inquiry could focus on whether the integration between the state and federal issues is such that the burdened communication will actually influence the electors' decision. In *Wotton* the prominence of indigenous issues in the national debate and the overt role that the Commonwealth plays in indigenous affairs suggests that the communication would influence federal voters. Whilst this results in the same conclusion as arrived at by the Court greater focus on the impact on voters guards against departure from the *Constitution's* structure<sup>49</sup> through ill-defined and unlimited notions of integration.

## VII CONCLUSION

*Wotton* suggests that the Court may be according insufficient factual analysis to what constitutes a burden on Commonwealth political communication. Further, exploring the implications of impugned legislation would ensure that the operative question remains what will impact on the election of the Commonwealth Parliament so that the Court does no more than what is necessary to protect the *Constitution*. The plurality's and Kiefel J's refusal to review the actions of the parole board affirms that the implied freedom only operates as a restriction on state and federal legislatures.

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<sup>43</sup> See Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Wotton v Queensland*, No S314 of 2010, 5 [18].

<sup>44</sup> *Wotton* (2012) 285 ALR 1, 22 [79].

<sup>45</sup> (2011) 243 CLR 506.

<sup>46</sup> *Hogan v Hinch* (2011) 243 CLR 506, 543.

<sup>47</sup> *Lange* (1997) 189 CLR 520, 561.

<sup>48</sup> *Wotton* (2012) 285 ALR 1, 12 [41].

<sup>49</sup> Wait, above n 4, 254.



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## ***EMERGING CHALLENGES IN INTELLECTUAL PROPERTY***

Edited by Kathy Bowrey, Michael Handler and Dianne Nicol

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The teaching of intellectual property in Australian law schools (and indeed the teaching of intellectual property into other disciplines such as media, journalism and science) is, like the universe, continuously evolving and expanding. As an undergraduate law student I had the luxury of being taught intellectual property as an elective subject for an entire year. We covered what we thought was ‘everything’ then: copyright, patents, trade marks, designs, and confidential information; but of course, we did not know the important topics that had to be left out due to time constraints. Now intellectual property teachers commonly face the difficulty of the ‘survey course’, all of the above (and more) in one semester. This means that teachers have to attempt to throw everything into one subject or, if they are lucky, their law school may offer two intellectual property electives, and it can be divided into ‘copyright’ and ‘patents’. The dilemma then is what topics to cover and which book to prescribe. Indeed, what book is fair to prescribe for the student doing the survey course or only a one semester elective?

The other problem encountered by intellectual property teachers and textbook writers is the need to remain current. New issues in intellectual property emerge daily, with several appeals being heard by the High Court in the last two years.<sup>1</sup> In addition, there has been a steady stream of reviews and inquiries.<sup>2</sup> Thus it is

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<sup>1</sup> See, eg, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144; *Health World Limited v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590; *Roadshow Films Pty v iiNet Ltd* (2012) 286 ALR 46.

<sup>2</sup> Eg, in 2009 IP Australia released a series of seven public consultation papers proposing reforms to Australia’s intellectual property system. These papers were followed up with a further two consultation papers which consolidated proposals for reform for public discussion, see IP Australia, *Consultation Papers for IP Reforms* (19 December 2011) <<http://www.ipaustralia.gov.au/about-us/what-we-do/ip-reforms/consultation-papers-ip-reforms/>>.

This process culminated in the Intellectual Property Laws Amendment (Raising the Bar) Bill 2011. In 2010, in parallel with this broader process, the Patent Amendment (Human Genes and Biological Materials) Bill 2010 was introduced alongside two separate reports: Senate Community Affairs References Committee, Parliament of Australia, *Gene Patents* (November 2010); Advisory Council on Intellectual Property, *Patentable Subject Matter*, Final Report (December 2010). A similar number of reviews relate to copyright, including the recent announcement that the

difficult to select a textbook that will remain current and will be worth the student's investment. Bowrey, Handler and Nicol have addressed the issue of scope, depth, and currency in their recently published textbook *Australian Intellectual Property: Commentary, Law and Practice*, by focusing on key precedents and using them 'to illustrate how the courts approach the application of intellectual property law to new technologies and meet other social challenges'.<sup>3</sup> In addition, they have produced a companion volume which includes 12 essays on 'issues' in the area of intellectual property from a range of Australian intellectual property experts. It is this unique companion volume which is the subject of this review.

Intellectual property ('IP') is an international issue. It is attracting significant interest from governments in the context of trade agreements, competition, and innovation. It is also a domestic issue. Regulated by Commonwealth statutes, areas such as copyright, patent, and trade marks have evolved from their English origin and been shaped by Australia's unique culture and marketplace, as well as our obligations under international treaties. There is a need for Australian law students to learn how intellectual property in Australia fits into its international context, as well as developing in-depth knowledge and skills in domestic IP practice.

Further, topics such as copyright and patent law have become the focus of general public concerns about their tendency to 'restrict', 'block' and 'inhibit' creativity, with models such as Creative Commons being portrayed as more user friendly. As the preface to the collection states:

Opinions on the politics, social costs and benefits of IP rights, and the wisdom (or otherwise) of recent case law or law reform are offered freely. Views can be quite strongly held, but are not always based on sound legal foundations.<sup>4</sup>

This collection of essays, covering topics such as the intersection of intellectual property, politics and philosophy; cultural rights, trade practices and competition; and biotechnology, medicine and cultural rights, is intended to provide sufficient depth for law students to develop an understanding of key issues in the area, as well as to develop their own critical understanding of the issues. The topics chosen are intended to provide readers with an introduction to specific areas of controversy and to place the Australian concerns in these areas in an international context. The chapters can all be read in isolation but collecting them all in one volume makes it easy for students to read a range of pieces developed specifically to

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Australian Law Reform Commission is to undertake a review relating to copyright exceptions in 2012 and the proposed revisions to the 'safe harbour' provisions in the *Copyright Act 1968* (Cth), see Australian Copyright Council, *The Attorney General and the Greens Put Copyright Reform on the Agenda* (29 October 2011) <<http://www.copyright.org.au/news-and-policy/details/id/1832/>>.

<sup>3</sup> Kathy Bowrey, Michael Handler and Dianne Nicol, *Australian Intellectual Property: Commentary, Law and Practice* (Oxford University Press, 2010) xxxv.

<sup>4</sup> Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) vii.

provide accessible scholarship on a breadth of intellectual property issues. Given the student focus of the chapters, their emphasis is on the practical rather than the theoretical. It must also be kept in mind that the chapters are intended to serve as an introduction to the area being discussed, thus there is little room for in-depth doctrinal analysis and debate.

The collection opens with Kimberlee Weatherall's 'IP in a Changing Information Environment'.<sup>5</sup> Weatherall focuses on the key issues of intellectual property (largely copyright) in the digital environment, namely digital locks, intermediary liability, the Commons movement, the issue of private ordering through contracts, and licences versus public ordering through enforcement of intellectual property rights. This is a well structured and clear introduction to the issues that follow and she has consciously and deliberately avoided much of the hyperbole in this area, whilst still signposting readers to the alternative views of commentators such as the US 'free culture' proponents, Lessig, Barlow and Benkler.<sup>6</sup>

The next chapter authored by Peter Drahos, 'Six Minutes to Midnight: Can Intellectual Property Save the World?', adopts a patent focus.<sup>7</sup> Drahos places the patenting versus innovation argument in the context of climate change and asks whether strong intellectual property rights are more likely to impede or promote effective and timely responses to climate change.<sup>8</sup> This current and topical example of the potential role of patenting is an effective method of getting readers to focus on specific issues rather than general unfocused arguments about rights, which is often a key weakness of undergraduate legal writing.

Kathy Bowrey's chapter highlights both the domestic and international failures to deal adequately and effectively with indigenous intellectual property rights ('IPRs').<sup>9</sup> Again, whilst dealing with a specific issue, this chapter uses those issues to highlight the place of domestic IPRs in the global context.

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<sup>5</sup> Kimberlee Weatherall, 'IP in a Changing Information Environment' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 1.

<sup>6</sup> Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin, 2005); John Perry Barlow, 'The Economy of Ideas: Selling Wine without Bottles on the Global Net' (1994) 2.03 *Wired* 8; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

<sup>7</sup> Peter Drahos, 'Six Minutes to Midnight: Can Intellectual Property Save the World?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 30.

<sup>8</sup> See generally Matthew Rimmer, *Intellectual Property And Climate Change: Inventing Clean Technologies* (Edward Elgar, 2011).

<sup>9</sup> Kathy Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 46.

David Lindsay focuses upon the complex relationship between ‘Copyright and Freedom of Expression’.<sup>10</sup> Lindsay outlines the foundational discourse in this area, particularly the US academic writing where this issue has been most extensively considered.<sup>11</sup> He then considers the key Anglo-Australian case law, *Commonwealth v John Fairfax*<sup>12</sup> and *Ashdown v Telegraph*.<sup>13</sup> This area has of course become even more topical with recent controversial developments such as WikiLeaks and the News of the World scandal in the UK.<sup>14</sup>

A selection of copyright-related issues are considered by Leanne Wiseman in her chapter, with specific emphasis on their impact upon the creative arts.<sup>15</sup> She discusses the resale royalty right for artists, the Google Books settlement and its implications for the Australian context, Creative Commons, the role of fair dealing and the need for copyright reform. Again this is a neat overview of a collection of contemporary issues, clearly summarised for undergraduate discussion.

Jason Bosland and Megan Richardson tackle the complexities of trade mark law, looking specifically at the apparent shift from a harm-based approach to a rights-based approach.<sup>16</sup> They give a rounded overview of the complexities of trade mark protection, considering the role of brands in the marketplace, the impact of free speech interests and the lack of a rigorous approach to the role of limitations in the enforcement of trade mark protection. This chapter highlights the importance of a valuable intellectual property right which is often overlooked.<sup>17</sup>

This analysis leads neatly on to the next chapter in which Michael Handler and Robert Burrell consider the role of Geographical Indications (‘GIs’).<sup>18</sup> They outline

<sup>10</sup> David Lindsay, ‘Copyright and Freedom of Expression’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 68.

<sup>11</sup> Melville Nimmer ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 *UCLA Law Review* 1180, cited in Lindsay, above n 10, 72–3.

<sup>12</sup> (1980) 147 CLR 39.

<sup>13</sup> [2002] Ch 149.

<sup>14</sup> Bret Stephens, ‘News of the World vs WikiLeaks’, *The Wall Street Journal* (online), 19 July 2011 <<http://online.wsj.com/article/SB10001424052702303795304576453722472758028.html>>.

<sup>15</sup> Leanne Wiseman, ‘Copyright and the Creative Arts: Emerging Issues’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 90.

<sup>16</sup> Jason Bosland and Megan Richardson, ‘Competing Discourses of “Rights” and “Harms” in Trade Mark Law’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 103.

<sup>17</sup> See, eg, Bosland and Richardson, above n 16, who observe that ‘many IP students and scholars are rather scornful of trade mark law, relegating it to the narrow role of protecting consumers from confusion’: at 104.

<sup>18</sup> Michael Handler and Robert Burrell, ‘GI Blues: The Global Disagreement over Geographical Indications’ in Kathy Bowrey, Michael Handler and Dianne Nicol

the political, cultural, and economic drivers for GI protection and highlight the lack of international consensus regarding the shape and nature of GI protection. This serves to demonstrate how different GIs are from the other forms of intellectual property rights discussed in the book. Interestingly, although given a whole chapter in this collection, the subject of GIs takes up only a few paragraphs in the companion text book.

Dianne Nicol considers how the judiciary is responding to the emerging challenges in patent law created by biotech patents.<sup>19</sup> She addresses the issues of utility and the inventive step, and places the broader theoretical discussion in the context of the case of the BRCA1 gene, mutations of which have been linked to increased risk of breast cancer. Again, this specific example provides readers with a clear demonstration of the practical importance of the broader issues being discussed.

Intellectual property and plants are the subject matter of the chapter by Jay Sanderson.<sup>20</sup> He deals with a range of issues including the patenting of gene sequences, access to plants for research, and the role and effectiveness of Plant Breeders' Rights ('PBRs'). In particular, he assesses the effectiveness of patent protection versus PBRs, and concludes that PBRs have a valid role to play in the protection of plants.

The interaction between intellectual property protection and competition law is an important issue, which often receives less attention than it deserves in the overall consideration of intellectual property law. This is in part due to the complexity of the relevant law. In her chapter 'Competition Law and Intellectual Property: Establishing a Coherent Approach' Jane Nielsen argues that it is in the enforcement, rather than the grant, that the majority of competition problems emerge in the IP context.<sup>21</sup> Nielsen argues that the goals of competition law and IP are broadly aligned. She compares the Australian law with that of the European Union and the US. This serves again to highlight the importance of placing IP in its domestic as well as its global context. This chapter provides a useful starting point for further consideration of a challenging topic.

Christopher Arup looks at bilateral and multilateral approaches to IP enforcement in his chapter 'Intellectual Property and International Trade: Securing and

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(eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 126.

<sup>19</sup> Dianne Nicol, 'Are the Courts Solving the Emerging Challenges of Biotech Patents?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 145.

<sup>20</sup> Jay Sanderson, 'Intellectual Property and Plants: Constitutive, Contingent and Complex' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 164.

<sup>21</sup> Jane Nielsen 'Competition Law and Intellectual Property: Establishing a Coherent Approach' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 183.

Sharing the Benefits'.<sup>22</sup> He stresses the fact that countries have used free trade agreements as a way to alter the bargain struck in multilateral agreements such as *TRIPS*.<sup>23</sup> Given the significant impact that the *Australia–United States Free Trade Agreement* has had on Australian copyright law in recent years,<sup>24</sup> necessitating several rounds of amendments to intellectual property statutes,<sup>25</sup> the importance of this issue cannot be overstated.

The final chapter by Adam Liberman addresses the frequently neglected matter of intellectual property and commercialisation.<sup>26</sup> It is excellent that this topic is addressed with equal weight to some of the more academic issues, as it forms the basis of intellectual property practice. The basic point that 'success requires a good commercialisation strategy'<sup>27</sup> is rarely a focus of undergraduate intellectual property courses. Liberman provides an overview of commercialisation issues as well as an outline of various commercialisation models. This is an excellent treatment of a neglected topic.

The 12 essays therefore cover a variety of topics from a practical, rather than a solely academic focus. They are intended to assist with providing the context for class and public debate about the role intellectual property protection plays in society, and the collection satisfies this aim. It is a useful resource for an undergraduate law course and could be prescribed as readings to assist with the limited class time available to consider these matters in any depth. It also provides an excellent resource as the starting point for undergraduate research assignments, providing the foundations from which further in-depth study may be undertaken.

The individual chapter topics are well chosen to reflect both important legal and social issues as well as identifying matters that are likely to be of interest to students and those with only an embryonic understanding of the law in the area. Thus the book would also make for good preliminary reading for anyone undertaking a masters unit requiring an overview of intellectual property, or as a refresher for anyone working in the area who wants a quick 'dip' into a range of topics.

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<sup>22</sup> Christopher Arup, 'Intellectual Property and International Trade: Securing and Sharing the Benefits' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 202.

<sup>23</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPS*') is a treaty administered by the World Trade Organization: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C.

<sup>24</sup> *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

<sup>25</sup> See, eg, *US Free Trade Agreement Implementation Act 2004* (Cth); *Copyright Legislation Amendment Act 2004* (Cth); *Copyright Amendment Act 2006* (Cth).

<sup>26</sup> Adam Liberman, 'Intellectual Property and Commercialisation' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 218.

<sup>27</sup> *Ibid* 218.

## SUBMISSION OF MANUSCRIPTS

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In preparing articles for submission authors should be guided by the following points:

1. Submissions must be made via email to the Editors/Book Review Editor, or to the Publications Officer <panita.hirunboot@adelaide.edu.au>, or via ExpressO <<http://law.bepress.com/expresso/>>.
2. Authors are expected to check the accuracy of all references in the manuscript before submission. It is not always possible to submit proofs for correction.
3. Biographical details should be starred (\*) and precede the footnotes. They should include the author's current employment.
4. The journal has adopted the *Australian Guide to Legal Citation* (AGLC3), published by the Melbourne University Law Review Association Inc <<http://mulr.law.unimelb.edu.au/go/aglc>>.
5. An abstract of between 150 and 200 words should also be included with the submitted contribution (excluding case notes and book reviews).
6. If the contribution is accepted by the *Adelaide Law Review*, it will be published in both the traditional Law Review and electronically.
7. Authors must sign an Author Agreement (available at <[www.law.adelaide.edu.au/review/submissions/](http://www.law.adelaide.edu.au/review/submissions/)>) prior to the publication of their submission. The Editors prefer that a signed Author Agreement be included at the time of submission.













