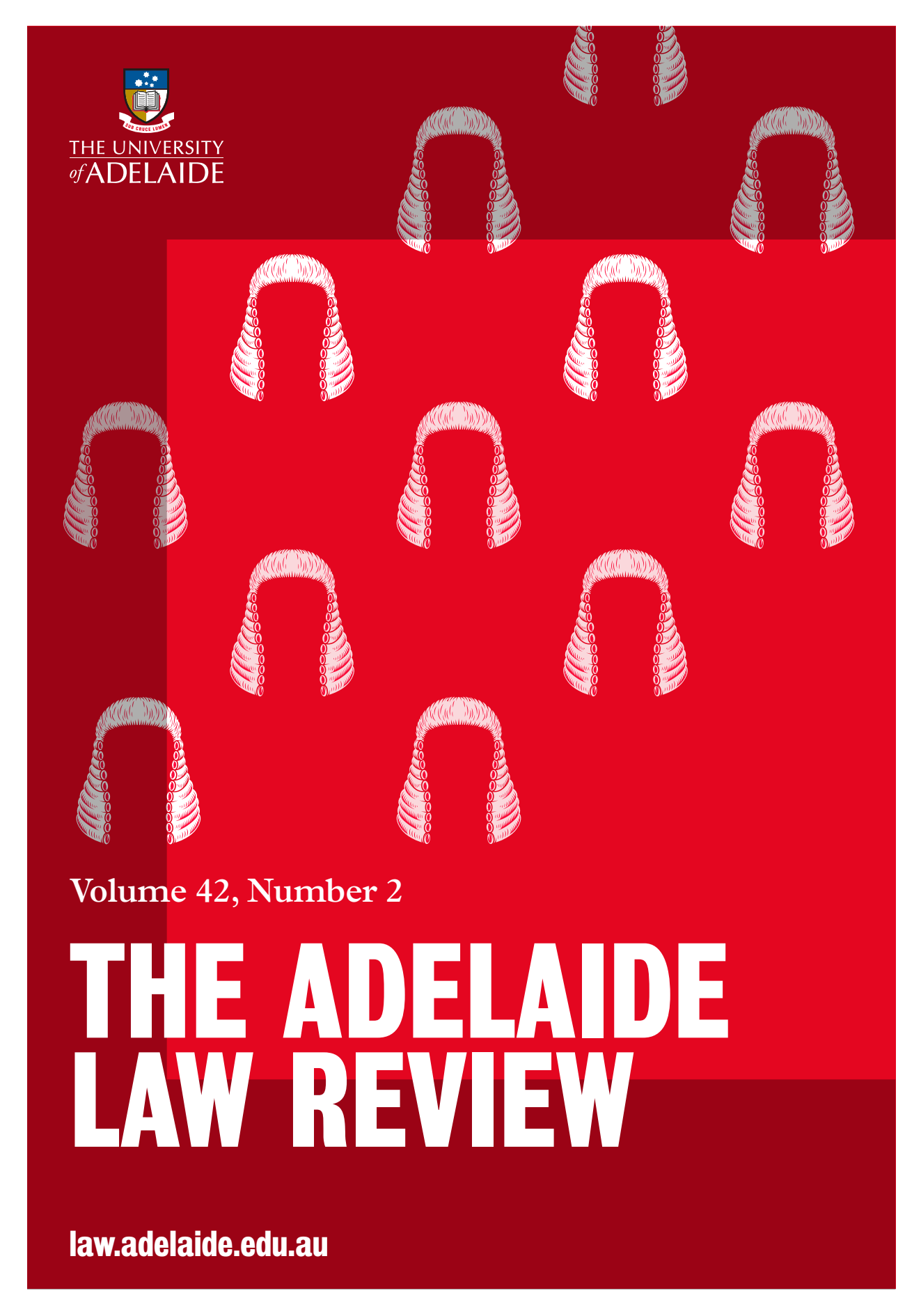

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*Alice Taylor**

ANTI-DISCRIMINATION LAW AS THE PROTECTOR OF OTHER RIGHTS AND FREEDOMS: THE CASE OF THE *RACIAL DISCRIMINATION ACT*

Abstract

The prohibitions on discrimination on the basis of race in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') are different from those contained in other Commonwealth anti-discrimination legislation. Rather than requiring complainants to demonstrate 'less favourable' treatment on the basis of a ground, the *RDA* requires complainants to demonstrate that an act or a law has made a distinction based on race that has the purpose or effect of nullifying or impairing the enjoyment of a person's human rights and fundamental freedoms. This article argues that while this construction has avoided some of the problems that plague other Commonwealth discrimination laws, the focus on 'other rights and freedoms' in the *RDA* gives rise to a different problem — the need for an effective articulation of the content and scope of such other rights and freedoms. Such a problem could be resolved through refocusing attention on the underlying purpose of the *RDA* — the facilitation of equality and non-discrimination on the basis of race.

I Introduction

Similar to much of the case law on anti-discrimination legislation in Australia, the field of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') is 'littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress',[1] but who still fail in their claims. Though the failures of the *RDA* in redressing discrimination are consistent with outcomes for complainants utilising other Commonwealth anti-discrimination legislation some of the reasons for these failures are nevertheless distinctive. This stems from the different analysis required in a racial discrimination claim made pursuant to the *RDA*. Rather than requiring a complainant to demonstrate 'less favourable' or 'unfavourable' treatment on the basis of a ground,[2] ss 9(1) and 10(1) of the

* Assistant Professor, Faculty of Law, Bond University.

1 *X v Commonwealth* (1999) 200 CLR 177, 213 [120] (Kirby J).

2 'Less favourably' is the wording used to describe direct discrimination in other Commonwealth legislation: *Age Discrimination Act 2004* (Cth) s 14(a) ('*ADA*'); *Disability Discrimination Act 1992* (Cth) s 5(1) ('*DDA*'); *Sex Discrimination Act 1984* (Cth) ss 5,

RDA require a complainant to demonstrate that an act or a law has the purpose or effect of creating a distinction based on race, that in turn has the purpose or effect of impairing a person's human rights or fundamental freedoms.[3] This focus on the impairment of the enjoyment of a person's rights or freedoms adds an additional layer of complexity to *RDA* claims.

Complainants lose racial discrimination claims for several reasons. First, as Beth Gaze,[4] Jonathan Hunyor,[5] and Loretta De Plevitz[6] have all identified, courts have consistently placed a heavy burden on complainants to prove racial discrimination, persistently utilising the so-called '*Briginshaw* standard'[7] for assessing evidence.[8] Second, complainants have often failed to demonstrate a distinction based on race.[9] Third, courts have accepted that measures which have created a distinction based on

5A, 5B, 5C, 6 ('*SDA*'). 'Unfavourable treatment' is the wording used to describe direct discrimination in some of the state legislation: *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8. For a discussion of the difference between these two expressions, see Colin Campbell and Dale Smith, 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43(1) *Federal Law Review* 91.

3 *Racial Discrimination Act 1975* (Cth) ss 9(1), 10(1) ('*RDA*'). Sections 9 and 10 of the *RDA* actually prohibit discrimination on the basis of 'race, colour, descent or national or ethnic origin'. The content of this article relates to discrimination on all of these grounds, however, for ease of expression this article will only refer to 'racial discrimination' or 'discrimination on the basis of race'.

4 Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11(1) *Australian Journal of Human Rights* 171, 191.

5 Jonathan Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 539.

6 Loretta De Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 308, 311.

7 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*'). The '*Briginshaw* standard' is derived from the judgment of Dixon J, where his Honour remarked in obiter that more convincing evidence is required to meet the standard of proof, if the allegation in question is particularly serious or unlikely to have occurred: at 362.

8 An approach first taken in *Department of Health (Vic) v Arumugam* [1988] VR 319: at 330. Such an approach was adopted in numerous decisions such as *Sharma v Legal Aid (Qld)* (2002) 115 IR 91: at 98–9 [40]. However, more recent decisions have cautioned against simply applying the *Briginshaw* (n 7) standard. See, eg: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 571 [110] (French and Jacobson JJ), 576–7 [139] (Branson J); *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 183 [113] ('*Wotton [No 5]*').

9 See, eg, *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing (Qld)* [2012] 1 Qd R 1 ('*Aurukun*'). See also 'Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury' (2010) 14(1) *Australian Indigenous Law Review* 106.

race are, nevertheless, 'special measures'.[10] However, I suggest that one of the less explored reasons for the failure of racial discrimination claims is the parasitic nature of the rights contained in ss 9 and 10 of the *RDA*. This notion stems from the requirement of infringement of 'other human rights and fundamental freedoms', the focus on which gives rise to a challenge not faced by complainants pursuing other anti-discrimination law claims — that of effectively articulating the existence, content and scope of these other human rights and fundamental freedoms and demonstrating that they have been breached. Complainants have frequently struggled with this challenge and have been admonished by the courts for failing to develop arguments as to the substance and content of those rights.[11] Thus, I aim to unpack this particular challenge foisted on complainants and determine whether the analysis required is effective in achieving the *RDA*'s ultimate aim of *eliminating* discrimination.

In this article, I interrogate cases which invoke a right to minority language usage to demonstrate the challenges faced by complainants. By using the right to minority languages as a case study, I demonstrate that bringing a successful claim is particularly challenging where the right invoked is not well developed in international law. I argue that the approach to the content of other rights and freedoms is problematic, because the focus on the specific content of the human right or fundamental freedom fails to appreciate the difference between a claim of discrimination and a claim that another specific human right has been infringed. While one solution offered in the case law, particularly with respect to s 9, is to accept that the *RDA* captures a generalised right to equality, I suggest that there is a better approach to understanding the purpose and content of ss 9 and 10 of the *RDA*. This involves a shift of focus back to the discriminatory act or law complained of by only requiring the act or law to be within the 'ambit' of the fundamental right or freedom.[12]

To make this argument, this article is presented in four substantive parts. In Part II, I interrogate the text and structure of the prohibition of discrimination in the *RDA*. I assess the general approach taken to the construction of ss 9 and 10 of the *RDA* and outline some of the benefits of the adopted interpretation. In Part III, I interrogate the case law to determine the content, scope and source of the rights and freedoms protected by the *RDA*. In particular, I utilise recent cases invoking a right to use a minority language as a case study. I argue that the need to define the scope and content of the right or freedom said to have been infringed is unnecessarily burdensome for complainants. In Part IV, I tackle the vexed problem of the protection, content and scope of a freestanding right to equality and argue that without substantive content,

10 See *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*') 177 [5] (French CJ), 195 [51] (Hayne J), 213–14 [112] (Crennan J), 239 [191] (Bell J), 263–4 [263] (Gageler J). See also George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution' (2015) 36(1) *Adelaide Law Review* 241.

11 See Mortimer J's criticisms of the complainant's submissions in *Wotton [No 5]* (n 8): at 317 [677]–[679].

12 Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the "Ambit" under Article 14 ECHR' (2006) 69(5) *Modern Law Review* 714, 715.

a shift to a focus on a right to equality is not a useful or fulfilling enterprise. In Part V, I suggest that rather than requiring a complainant to demonstrate in precise terms the *content and scope* of the right or freedom engaged, a better and more normatively consistent approach would be to focus on the *ambit* of ss 9 and 10, drawing on the jurisprudence on art 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[13]

II The Text and Structure of the Prohibition of Discrimination in the *RDA*

The *RDA* was the first federal prohibition of discrimination on any ground when it was passed in 1975. In introducing the Bill, the Commonwealth Attorney-General Kep Enderby acknowledged that its purpose was to implement Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*'),[14] remedy the inadequacies of the common law, and educate the public about the 'undesirable and unsocial consequences of discrimination … and make them more obvious and conspicuous'.[15] The structure of the *RDA* is different from the other Commonwealth anti-discrimination legislation. This is, in part, because the *RDA* is older than the other legislation. The most obvious difference is that its text and structure closely resembles the *CERD*. In contrast, though each of the other Commonwealth statutes lists corresponding international conventions in its objects clauses or application provisions,[16] none of them follow the structure of those conventions as closely as the *RDA* follows the *CERD*.[17] The close textual relationship between the *RDA* and the *CERD* could be explained by the fact that at the time of passage, the full extent of the Commonwealth's powers with respect to external affairs were yet to be clarified by the High Court.[18] Regardless of the reason, the close resemblance is distinctive and has led to the use of different tests to prove discrimination from those required by other Commonwealth anti-discrimination legislation.[19]

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13 *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) art 14 ('*ECHR*').

14 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Kep Enderby, Attorney-General).

16 *SDA* (n 2) s 3(1); *ADA* (n 2) s 10(7); *DDA* (n 2) s 12(8).

17 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 227.

18 Ibid; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217–20 (Stephen J), 224 '(Mason J) ('*Koowarta*').

19 Rees, Rice and Allen (n 17) 133–4.

While all other Commonwealth anti-discrimination legislation prohibits direct and indirect discrimination on the basis of an attribute (also commonly understood as a ground),[20] the *RDA* defines discrimination differently, namely, as a distinction which has the purpose or effect of impairing or nullifying a person's human rights or fundamental freedoms.[21] Section 9 makes racial discrimination unlawful and s 10 confirms that there is a right to equality before the law. Section 9(1) provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of *nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom* in the political, economic, social, cultural or any other field of public life.[22]

Section 9(1) is described as the prohibition on 'direct discrimination', though there is nothing in its wording which precludes it from also prohibiting 'indirect discrimination'.[23] To clarify that the *RDA* was also intended to cover indirect discrimination, the Commonwealth Parliament amended it in 1990 to include the prohibition in s 9(1A).[24] However, again, unlike other Commonwealth anti-discrimination legislation, indirect discrimination is defined as requiring a person to comply with a term, condition or requirement which is not reasonable and has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom.[25]

Section 10 provides for a right to equality before the law. This is not a general protection, but arises only where a measure affects the enjoyment of a person's rights and freedoms. Section 10 provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.[26]

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20 *SDA* (n 2) ss 5–7B, 7D; *ADA* (n 2) ss 14–15; *DDA* (n 2) ss 5–6.

21 *RDA* (n 3) ss 9(1), 9(1A), 10(1).

22 Ibid s 9(1) (emphasis added).

23 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 71, 74 (Sackville J) ('*Wilson*').

24 *Law and Justice Legislation Amendment Act 1990* (Cth) sch, inserting *RDA* (n 3) s 9(1A).

25 *RDA* (n 3) s 9(1A).

26 Ibid s 10(1).

While s 10 has been described as pursuing equality before the law,[27] it more modestly could be described as being designed to overcome inequality before the law on the basis of race.[28]

Though the aim of ss 9 and 10 may be understood as providing a right to non-discrimination and to achieve equality, this is not necessarily reflected in the respective provisions. Consequently, some judges have questioned whether the provisions are directed towards discrimination at all.[29] However, because the nature of a distinction on the basis of race is undefined, considerable scope is given to the judiciary in interpreting these provisions.

The High Court jurisprudence on the *RDA* has generally been focused on the provision for equality before the law in s 10(1),[30] but both ss 9–10 are relevant in understanding the nature of the obligations set out in the *RDA*.[31] The test to prove discrimination has been described as having a number of steps. In *Baird v Queensland* ('*Baird*'),[32] Allsop J cautioned that the prohibition should be understood and interpreted in a holistic manner and not simply as the sum of finite parts.[33] In *Wotton v Queensland [No 5]* (2016) 352 ALR 146 ('*Wotton [No 5]*'),[34] Mortimer J described s 9(1) as having two separate limbs.[35] The first is a conduct limb which requires an 'act involving a distinction, exclusion, restriction or preference which is based on race'.[36] The second is an outcome-based limb which looks at whether the conduct had the purpose or effect of nullifying or impairing human rights.[37] Another test which has been adopted breaks down the steps of proving racial discrimination into small parts.[38] These parts were articulated by Sackville J in *Australian Medical Council v Wilson* ('*Wilson*') which are still cited as the test for s 9(1).[39] In summary:

(1) a person;

(2) must have done some act or conduct;

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27 See, eg: *Gerhardy v Brown* (1985) 159 CLR 70, 94 (Mason J) ('*Gerhardy*'); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 205 (Wilson J) ('*Mabo [No 1]*').

28 *Maloney* (n 10) 179 (French CJ).

29 See, eg: *Western Australia v Ward* (2002) 213 CLR 1, 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*'); *Maloney* (n 10) 200–2 [65]–[68] (Hayne J).

30 See, eg: *Gerhardy* (n 27); *Koowarta* (n 18); *Mabo [No 1]* (n 27); *Ward* (n 29); *Maloney* (n 10).

31 *Wotton [No 5]* (n 8) 282 [527].

32 (2006) 156 FCR 451 ('*Baird*').

33 Ibid 462 [37].

34 *Wotton [No 5]* (n 8).

35 Ibid 283 [530]–[531].

36 Ibid 283 [530].

37 Ibid 283 [530]–[531].

38 *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba* [2019] FCA 1585, [58].

39 *Wilson* (n 23) 73.

(3) the act or law must involve a distinction, exclusion, restriction or preference;

(4) that distinction must have been drawn on the basis of race or ethnic origin; and

(5) the distinction must have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Regardless of whether courts use the two-limb test or the five step test, complainants bringing applications under the *RDA* have avoided some of the difficulties confronted by those proceeding under other anti-discrimination legislation.

The test described above is different to that utilised when considering other Commonwealth anti-discrimination legislation. In particular, there is less emphasis placed on constructing a hypothetical comparator to compare the complainant's treatment against.[40] In *Baird*, a case concerning stolen wages of Indigenous persons,[41] the Full Court of the Federal Court accepted that complainants proceeding under the *RDA* do not need to show that there is a direct comparison to demonstrate racial discrimination.[42] This conclusion was justified because in some cases, there will be no comparator to be found.[43]

In avoiding this challenge, the *RDA* could theoretically be a more flexible instrument than other Australian discrimination laws. Nevertheless, complainants are still overwhelmingly unsuccessful in their claims for various reasons. First, as Hunyor has highlighted, the evidentiary burden on complainants is often heavy.[44] In many cases, complainants are required to adduce evidence of facts that are only within the knowledge of the respondent. In some cases, such evidence may not even be consciously acknowledged by the respondent, such as the 'true' reason why the complainant was unsuccessful in a job application.[45] Second, in many cases where courts have rejected a claim of racial discrimination, they have rejected the argument that there has been a distinction made on the basis of race.[46] However, there are a further group of cases where the complainant has overcome evidentiary challenges, and has

40 *Baird* (n 32) 469 [63] (Allsop J, Spender J agreeing at 452 [5], Edmonds J agreeing at 473 [82]).

41 *Baird* (n 32). For further discussion of this case and others concerning stolen wages, see Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *University of New South Wales Law Journal* 647.

42 *Baird* (n 32) 469 [63] (Allsop J, Spender J agreeing at 452 [5], Edmonds J agreeing at 473 [82]).

43 Ibid.

44 Hunyor (n 5) 536–7, 542–3, 546–7. See also Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 180.

45 Hunyor (n 5) 537–8.

46 A recent example of this kind of case is *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba [No 2]* (2020) 275 FCR 669.

demonstrated a distinction based on race but has nevertheless failed in their claim/s. What has challenged complainants in this instance is the need to demonstrate that the act or law has the prohibited purpose or effect under s 9. This challenge has remained a sticking point for complainants.

III Impairing the Enjoyment of Human Rights and Fundamental Freedoms

In their focus on the nullification or impairment of the enjoyment of rights and freedoms, the general prohibitions in the *RDA* have a parasitic or dependent quality. That is because they rely upon the existence of *another* human right or fundamental freedom, which must be engaged and impaired in some way for a claim to be successful. Thus, a complainant needs to demonstrate the existence of another right or freedom of the kind protected by the *RDA*. From an assessment of the case law, this inquiry appears to have three stages of analysis. A complainant is required to identify the human right or freedom which has been impaired,[47] the precise content, scope or sphere of operation of that right or freedom,[48] and the manner in which there is an impairment or nullification of that right or freedom.[49]

A *Identifying the Human Right or Fundamental Freedom*

The kind of rights and freedoms required to be identified by complainants is described in ss 9(2) and 10(2) as 'a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'[50] and 'includes any right of a kind referred to in … [art] 5 of the … [*CERD*]'.[51] In *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*'),[52] it was accepted that the rights and freedoms referred to in s 9(2) (and in s 10(2)) were not only legal rights found in domestic law but also a wide variety of rights as understood at international law.[53] Further, the High Court accepted that ss 9(2) and 10(2) are not limited to those rights articulated in art 5 of the *CERD* but also encompass rights of a similar kind in other international instruments to which Australia is a signatory.[54]

The wide scope of human rights and fundamental freedoms protected does present some challenges, as highlighted by Mason J in *Gerhardy*:

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47 *Gerhardy* (n 27) 102 (Mason J).

48 Ibid; *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 111 [85] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]) ('*Iliafi*').

49 *Iliafi* (n 48) 101 [42], 102 [45], 103 [51], 104 [56].

50 *RDA* (n 3) s 9(2).

51 Ibid. See also at s 10(2) which is in similar terms.

52 *Gerhardy* (n 27).

53 Ibid 125–6 (Brennan J).

54 Ibid.

> In deciding whether the right of access given by s 18 is a human right or fundamental freedom we encounter the ever present problem of defining or describing the concept of human rights. The expression 'human rights' is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. … As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself.[55]

As a consequence, it becomes important to identify what is entailed by the notion of human rights and fundamental freedoms in the context of the *RDA*. In his Honour's judgment in *Gerhardy*, Mason J emphasised the challenge:

> The concept of human rights as it is expressed in the Convention … evokes universal values, ie values common to all societies. This involves a paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society … to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.[56]

Due to the broad scope of the possible rights incorporated in ss 9–10, there is a need to have some clarity as to the sources that can be relied upon to determine the 'precise content of the relevant right or freedom'.[57] This has become more challenging since the High Court's decision in *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*'), which concerned the legality of alcohol restrictions on Palm Island.[58] As Patrick Wall has argued, the High Court's approach to international law in *Maloney* was 'narrow'.[59] While in *Maloney*, all members of the Court accepted the legitimacy of referring to international law and, in particular, the *CERD*, their Honours justified the use of international law on a variety of bases and in a variety of ways.[60] In particular, the Court was divided on the materials that could legitimately be used

55 Ibid 101–2.

56 Ibid 102.

57 Ibid. See also *Iliafi* (n 48); *Bropho v Western Australia* (2008) 169 FCR 59; *Wotton [No 5]* (n 8).

58 *Maloney* (n 10) 176 (French CJ).

59 Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228, 228.

60 *Maloney* (n 10) 185 [23] (French CJ), 198–9 [61] (Hayne J), 221–2 [134] (Crennan J), 263–4 [263] (Gageler J).

to interpret the *CERD*.[61] As Wall highlights, all members of the Court overlooked the use of customary international law.[62] Further, the majority took a conservative approach to the use of extrinsic materials.[63] In the context of interpreting ss 8 and 10 of the *RDA*, all judges aside from Gageler J warned against interpretations at odds with the express wording of the *CERD*, which could potentially undermine the intention of states parties.[64] In their respective judgments, French CJ, Hayne J, Crennan J, Kiefel J and Bell J did not use international materials in a significant manner to develop the content of ss 8 or 10 of the *RDA*, despite acknowledging the integral link between those provisions and the *CERD*.[65]

The early case law indicates that the concept of human rights and freedoms is fundamentally different from rights found in domestic law. Sections 9(2) and 10(2) invoke and protect rights which are broader than the specific rights contained in the *CERD*.[66] To determine the content of those rights, in *Wotton [No 5]*, Mortimer J suggested that it was appropriate to have regard to international materials in developing the content of rights in the *CERD* and other international conventions such as the *International Covenant on Civil and Political Rights* ('*ICCPR*').[67] Her Honour acknowledged that such a finding was potentially inconsistent with some of the judgments in *Maloney*.[68] Nevertheless, Mortimer J determined that international materials were relevant and justified their use by determining that the content of rights was not a question regarding the construction of a provision of a domestic statute.[69] Justice Mortimer concluded that although the use of extrinsic materials may be impermissible in construing the meaning of ss 9–10, those materials were nevertheless relevant in determining the content of the human rights protected by those provisions.[70] In determining whether a right is 'of a kind referred to in … [art] 5', in terms of ss 9–10, courts engage in statutory interpretation to determine what the expression 'of a kind' means, in the context of the rights protected by the *RDA*.[71] However, the case law, particularly those

61 Ibid 198–9 [61] (Hayne J), 221–2 [134]–[135] (Crennan J), 234–5 [174]–[176] (Kiefel J). Cf ibid 180–1 [14] (French CJ), 255–6 [234]–[236] (Bell J).

62 Wall (n 59) 231, 234.

63 Simon Rice, '*Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28, 30; *Maloney* (n 10) 181–2 (French CJ), 198–9 (Hayne J), 221–2 (Crennan J), 235 (Kiefel J), 255–6 (Bell J).

64 *Maloney* (n 10) 185–6 [23]–[26] (French CJ) 198–9 [61] (Hayne J), 221–2 [134] (Crennan J), 234–5 [171]–[176] (Kiefel J), 255–6 [234]–[235] (Bell J).

65 Wall (n 59) 250.

66 *Koowarta* (n 18); *Gerhardy* (n 27); *Mabo [No 1]* (n 27).

67 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *Wotton [No 5]* (n 8) 279–80 [516].

68 *Wotton [No 5]* (n 8) 280 [519]–[520].

69 Ibid 280–2 [516]–[527].

70 Ibid 281–2 [526] .

71 See, eg, Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 320.

cases involving novel rights claims, seems to indicate that since *Maloney*, courts have still been referring to a variety of international and foreign materials in interpreting the content of rights protected by ss 9–10 of the *RDA*.[72]

B *The Limitations of 'Content and Scope': An Exploration of Language Rights Cases*

A criticism in some judgments is that complainants have failed to articulate clearly the scope or content of the rights and freedoms upon which they rely.[73] However, this articulation can be challenging due to the way in which the right is understood and articulated in international and foreign legal materials, and the manner in which those ideas can be transposed into the Australian context given the general lack of broad human rights protection in Australian domestic law. Notably, in Australia there has often been a marked reluctance to recognise and discuss human rights.[74]

A useful illustration of this challenge is presented by cases which focus on the intersection between language and race. Language represents an interesting case study in understanding the operation of racial discrimination in the Australian context as language rights are of significant concern for minority groups, whilst being ill-defined at international law. Australia has no official national language.[75] The 2016 Census indicated that more than 300 languages are spoken at home across Australia and that more than 21% of respondents speak a language other than English at home.[76] Nevertheless, other polling data from around the same period indicates that 92% of respondents considered that speaking English was a more important identifier of Australian identity than birthplace or citizenship.[77] In 2020, in announcing changes to citizenship requirements, both the Prime Minister and the Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs emphasised a renewed focus on English language competency in preparing migrants for Australian citizenship.[78] The rationale for the focus on English language ability was identified

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72 See, eg: *Iliafi* (n 48); *Wotton [No 5]* (n 8); *Hamzy v Commissioner of Corrective Services (NSW)* [2020] NSWSC 414 ('*Hamzy*').

73 See, eg, *Iliafi* (n 48). In that case, the complainants were chastised for failing to engage in a 'sophisticated jurisprudential analysis' of the right to freedom of expression 'at their peril': at 111 [89] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

74 See, eg, Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195, 196.

75 Cf *Official Languages Act*, RSC 1985 (4th Supp), c C-31, s 2.

76 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia* (Catalogue No 2071.0, 28 June 2017).

77 Jill Sheppard, *Australian Attitudes towards National Identity: Citizenship, Immigration and Tradition* (Report No 18, Australian Centre for Applied Social Research Methods, April 2015) 2.

78 Mostafa Rachwani, 'The New Australian Citizenship Test: What Is It and What Has Changed?', *The Guardian* (online, 18 September 2020) <https://www.theguardian.com/australia-news/2020/sep/18/the-new-australian-citizenship-test-what-is-it-and-what-has-changed>.

as a means to counteract the negative economic and social outcomes for migrants who arrive with limited English.[79] However, the solution to such a problem is focused on achieving a form of assimilation based on language, rather than focusing on the capacity for an accommodation of difference.[80] Consequently, though many languages are spoken throughout Australia, the general approach to race and language suggests a strong preference towards the assimilation of language.

There remains a critical link between language, race and inequality. A shared language is integral to the continued existence of a minority community and a continuing connection to culture. Many scholars have recognised the important role of language in keeping individuals associated with their culture and race.[81] Language acts as an important aspect of identity, both for the individual as well as for the cultural community that they are part of.[82] Focusing specifically on Indigenous languages and the Indigenous experience, Laura Beacroft highlights that Indigenous identity is better represented through an association with language groups as opposed to the colonial conception of race.[83] The rapid decline in languages is presented as a significant cultural cost and one that, at its heart, is a question of inequality. As James Crawford highlights, 'language death does not happen in privileged communities. It happens to the dispossessed and disempowered'.[84]

Part of the challenge for complainants in language rights cases is that at an international level, language rights are often not particularly well developed compared to other human rights and fundamental freedoms.[85] Stephen May describes language rights as the 'Cinderella' of human rights, 'a "bastard stepchild" … roundly rejected

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79 Anveet Arora, 'Australia Announces Changes to Citizenship Test and English Language Program for Migrants', *SBS Punjabi* (online, 28 August 2020) <https://www.sbs.com.au/language/english/australia-announces-changes-to-citizenship-test-and-english-language-program-for-migrants>.

80 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 30. This would appear to be consistent with the idea of 'racelessness' in Australian society presented in Margaret Thornton and Trish Luker, 'The New Racism in Employment Discrimination: Tales from the Global Economy' (2010) 32(1) *Sydney Law Review* 1: at 20.

81 See, eg: Laura Beacroft, 'Indigenous Language and Language Rights in Australia after the *Mabo (No 2)* Decision: A Poor Report Card' (2017) 23 *James Cook University Law Review* 113; David Smillie, 'Human Nature and Evolution: Language, Culture, and Race' (1996) 19(2) *Journal of Social and Evolutionary Systems* 145; Philip Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective* (Continuum, 2007).

82 Alison Crump, 'Introducing LangCrit: Critical Language and Race Theory' (2014) 11(3) *Critical Inquiry in Language Studies* 207, 208.

83 Beacroft (n 81) 117.

84 James Crawford, 'Endangered Native American Languages: What Is to Be Done and Why?' (1995) 19(1) *Bilingual Research Journal* 17, 35.

85 Stephen May, 'Language Rights: The "Cinderella" Human Right' (2011) 10(3) *Journal of Human Rights* 265, 270–1.

as problematic and/or regularly ignored at worst'.[86] Drawing on Kloss, May argues that there are two different ways of approaching language rights: a tolerance-oriented approach and a promotion-oriented approach.[87] The tolerance-oriented approach conceives of the purpose of language rights as a means to preserve a person's own language in private, non-governmental spheres of life.[88] This can include the right to use one's first language at home and in public and encompasses a freedom of association and assembly as well as the right to private and cultural expressions of language in private institutions.[89] In contrast, a promotion-oriented approach to language rights involves promoting the use of minority languages in public spaces and through public institutions such as legislative, administrative and educational bodies.[90]

Unlike the position of language rights in international law generally, the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*') appears to adopt a promotion-oriented approach to Indigenous language rights.[91] The *UNDRIP* includes the right of Indigenous peoples to use, develop and transmit to future generations their language as well as the right to establish and control educational systems and institutions to provide education in their language.[92] A case which concerns Indigenous language and persons is *Munkara v Bencsevich*,[93] but this case involved an argument that a failure to accommodate individuals who had difficulties speaking English was racially discriminatory, rather than an infringement of a right to use an Indigenous language.[94] It may be that given the more specific rights contained in the *UNDRIP*, Indigenous language rights cases may be treated differently to other language rights cases given the significantly different contexts and experiences of different racial groups.

The Australian case law focuses on two aspects of language disadvantage. Complainants have brought claims arguing that their limited ability to speak English has meant that restricted time periods for appeals in both curial and non-curial settings are

86 Ibid 265.

87 Ibid 266.

88 Ibid.

89 Ibid.

90 Ibid.

91 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

92 Ibid arts 13.1, 14.1.

93 [2018] NTCA 4 ('*Munkara*').

94 Ibid [14] (Kelly J). Consistently with the limited use of the *RDA* by Indigenous communities more generally, see, eg: Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens' (2013) 17(2) *Australian Indigenous Law Review* 3; Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law: It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* 1.

racially discriminatory and impair their right to the equal administration of justice.[95] Cases in which it has been argued that the disadvantages suffered by persons due to a limited ability to speak English are racial discrimination have almost uniformly failed. That is because the courts have distinguished between a racial characteristic and a personal characteristic and have deemed that a limited ability to speak English is a personal 'characteristic' unconnected to race.[96] The question of rights infringement has generally not been considered in these cases because the complainants have failed to demonstrate a distinction on the basis of race.

Claims also arise where private and public bodies have limited the ability of persons to use a language other than English in both public and private settings. In cases where the complainant makes such an allegation, the courts generally focus on whether an infringement of the enjoyment of a fundamental right or freedom has occurred. The first useful illustration of this type of case is *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* ('*Iliafi*').[97] In *Iliafi*, the appellants were Samoan members of the Church of Jesus Christ of Latter-Day Saints ('Church'). The Church had operated several Samoan-speaking wards or congregations and the appellants were able to worship in their native language.[98] The Church discontinued their Samoan-speaking wards and directed that worshippers could only worship in English.[99] The appellants argued that this change constituted discrimination pursuant to s 9 of the *RDA*.[100] The appellants argued that the decision had violated their rights to nationality as outlined in art 5(d)(iii) of the *CERD*, freedom of religion as outlined in art 5(d)(vii), and freedom of expression as outlined in art 5(d)(viii).[101] The central issue in the appeal was whether the right of a group to worship publicly in their native language was a human right or fundamental freedom of the kind protected by s 9.[102] This involved two steps — first, identifying the content of arts 5(d)(iii), (vii) and (viii) of the *CERD*,[103] and second, whether the claimed right was of a kind referred to in those provisions.[104]

Justice Kenny (Greenwood J and Logan J agreeing) consulted extensive international materials including international, supranational and foreign jurisprudence,

95 *Munkara* (n 93); *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514 ('*Sahak*'); *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 ('*Nguyen*').

96 See, eg, *Sahak* (n 95) 525 [47] (Goldberg and Hely JJ). Similar conclusions were also reached in *Nguyen* (n 95); *Munkara* (n 93); *Hamzy* (n 72).

97 *Iliafi* (n 48).

98 Ibid 88 [2] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

99 Ibid 88 [3].

100 Ibid 88 [4].

101 Ibid 93 [12].

102 Ibid 117 [110].

103 Ibid 104 [55].

104 Ibid.

conventions, and literature.[105] Her Honour determined that although art 5 was not an exhaustive list of rights, the right to worship in one's native language was not a right of the kind protected by s 9 of the *RDA*. Justice Kenny concluded that though both the right to public worship and the right of minority groups to use their language in private and in public were protected,[106] this did not equate to a protection of a right to worship in public in a person's native language.[107] Drawing on European jurisprudence on art 9 of the *ECHR*, Kenny J concluded that the appellants' right to freedom of religion was not infringed by the Church's decision because the appellants still had the ability to leave the religious community and the Church.[108] The right to belong to a linguistic minority was also not infringed by the Church's decision, because the appellants still had the right to use their native language outside of the Church. Further, the Court concluded that the purpose of the protection of linguistic diversity was to ensure the survival of cultural, religious and social identity of minorities which was not at issue in this case.[109] Consequently, the appellants failed to establish that a right to worship publicly as a group in their native language was of a 'kind' protected by art 5 of the *CERD*.[110]

While this decision appears consistent with the international jurisprudence cited by Kenny J, it is hard to reconcile with the overarching goals of anti-discrimination law. It is noticeable that the decision does not focus on rights to non-discrimination or equality but instead focuses on the substance of *other* rights and freedoms. In particular, utilising Kenny J's consideration of the rights protected by the *RDA*, it is hard to imagine many scenarios in which a person's right to a freedom of worship or their language rights could be protected by s 9. Although the complainants' right to freedom of religion may be preserved through their capacity to leave the Church, such a finding does not resolve a question of whether the Church's behaviour still could constitute racial discrimination and impair the complainants' right to be free from discrimination. For example, any differentiation between racial groups by religious organisations would not be racial discrimination pursuant to s 9 because a complainant would continue to have the right to leave the religious organisation. With respect to a right to worship however, such an outcome would nevertheless appear to be the antithesis of the *RDA*'s purpose because it would essentially allow for all religious organisations to indirectly discriminate on the basis of race.

Another recent decision which highlights some of the challenges for complainants is *Hamzy v Commissioner of Corrective Services* ('*Hamzy*').[111] In *Hamzy*, the complainant was an inmate at a correctional facility and was designated as an 'extreme high risk restricted … inmate' ('EHRR').[112] As a consequence of his EHRR status,

105 Ibid 104–5 [57]–[59].

106 Ibid 107 [70].

107 Ibid 111 [85].

108 Ibid 108–10 [78]–[84].

109 Ibid 115 [103].

110 Ibid 117 [110].

111 *Hamzy* (n 72).

112 Ibid [2].

the *Crimes (Administration of Sentences) Regulation 2014* (NSW) required that all conversations that the complainant had with visitors (with the exception of conversations with a legal practitioner) be conducted in English, or a language approved by the Commissioner of Corrective Services.[113] The complainant was a Lebanese Arab and an Arabic speaker.[114] He communicated with his parents, in part, in Arabic as their English was limited. Arabic was not an approved language that the complainant was able to use to communicate with visitors.[115] The complainant argued that the consequent and effective requirement to speak English (or another approved language) was inconsistent with ss 9 or 10 of the *RDA*.[116]

The complainant argued that the 'right' infringed was 'the right to speak to members of his family in the Arabic language when they visit[ed] him in custody'.[117] The defendant argued that the regulation was not discriminatory because its purpose was not to constrain the rights of an inmate but to ensure that communications could be monitored securely.[118] The defendant argued that it was necessary that communications be properly monitored.[119] English, as the most widely spoken language, was Australia's 'de facto' national language and it was legitimate to limit a prisoner's right to speak languages other than English as prisons were public spaces.[120]

In his Honour's judgment, Bellew J considered which rights were engaged by the dispute and whether any such rights were protected by ss 9(1) or 10(1) of the *RDA*.[121] At the outset, Bellew J concluded that conversations in English were conversations that consisted entirely of English words, phrases or expressions or words that have been borrowed from other languages and incorporated into English.[122] His Honour further accepted that conversations in English also included conversations which incorporated some foreign phrases such as Arabic phrases based upon Quranic verses.[123] Justice Bellew concluded that the right engaged by the dispute was the right to 'speak and/or express … [oneself] in Arabic in all circumstances'.[124]

It was on the basis of this framing of the right said to have been engaged that Bellew J proceeded to determine whether such a right was protected by the *RDA*. For Bellew J, the closest corresponding right protected by the *RDA* was the right of

113 Ibid [4].

114 Ibid [120].

115 Ibid.

116 Ibid [121]–[122].

117 Ibid [125].

118 Ibid [127]–[128].

119 Ibid.

120 Ibid [127].

121 Ibid [138].

122 Ibid [136]–[137].

123 Ibid.

124 Ibid [141].

freedom of opinion and expression as outlined in art 5(d)(viii) of the *CERD*.[125] Thus, the question became whether the right to freedom of opinion and expression was broad enough in scope to capture the complainant's 'right' as framed by Bellew J.[126] In his Honour's judgment, Bellew J utilised both domestic and foreign authorities including views of the United Nations Human Rights Committee and judgments of the European Court of Human Rights ('ECtHR') to establish that the right to freedom of opinion and expression did not extend to allowing the complainant to communicate in Arabic while in prison.[127]

In coming to this decision, Bellew J emphasised the following three propositions. First, drawing on *Nguyen v Refugee Review Tribunal*,[128] Australia's 'official' language was English and thus it was justifiable that in some public contexts, persons are required to speak English.[129] This appears to be an acceptance of the idea put forward by the defendant that English is Australia's 'de facto' language as Australia technically has no official language. Second, Bellew J highlighted that, as was accepted in *Iliafi*, a right to freedom of expression encompasses 'every form of subjective ideas and opinions capable of transmission to others' but does not equate to a 'right to language'.[130] Third and finally, not only did Bellew J emphasise that the right to expression did not encompass a right to language, his Honour also found that any right to language was relatively narrowly drawn. Drawing upon international jurisprudence, his Honour appeared to adopt a tolerance-oriented approach to any possible right to language. In taking this approach, Bellew J drew a distinction between regulating choice of language in 'spheres of public life' and regulating a person's language in a private capacity.[131] In this conception, the state was entitled to regulate and prohibit the use of some languages in the public sphere but not in the private sphere.[132] As the prison was a public facility, there were no limitations on the regulation of speech and language.[133]

Articulating the content and scope of rights and freedoms has been a challenging exercise for complainants. In the early case law, the High Court accepted that 'human rights and fundamental freedoms' are broad in scope. However, more recent case law has become more complex. Complainants have been chastised for failing to utilise a full range of international and foreign materials to develop their claims

125 Ibid [144].

126 Ibid.

127 Ibid [153].

128 *Nguyen* (n 95).

129 *Hamzy* (n 72) [154].

130 Ibid [146], quoting *Iliafi* (n 48) 111–12 [91]–[92] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

131 Ibid [148]–[150], quoting Human Rights Committee, *Views: Communications Nos 359/1989 and 385/1989*, 47th sess, UN Docs CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (5 May 1993) [11.4] ('*Ballantyne v Canada*').

132 *Hamzy* (n 72) [148]–[150].

133 Ibid [153].

'at their peril',[134] yet in other decisions, international and foreign materials are not referred to.[135] Part of the problem could be the reality that the circumstances of cases do not cleanly fit within the scope of traditional understandings of rights and freedoms.

A larger problem is that in focusing on the content of rights and freedoms, the crux of the claim, namely racial discrimination, is lost. The purpose and focus of the *RDA* is to prevent discrimination in the enjoyment of rights and freedoms on the basis of race. The *RDA* does not import the substance of other international human rights into domestic law but instead prevents those rights from being impaired on the basis of race. The focus on the content and scope of human rights and fundamental freedoms loses sight of this important distinction. The question should not be whether the complainant can demonstrate a substantive infringement of a human right or fundamental freedom, but whether in the *enjoyment* of those rights there has been a distinction based on race.

The facts in *Hamzy* provide a useful illustration of this distinction, as Bellew J determined whether the complainant had a right to speak and communicate with others in a language of his choosing. This is the wrong question in a racial discrimination complaint. The question is not whether the substantive right has been breached, but whether, in limiting the complainant's speech on the basis of language, the complainant's right to express themself has been *impaired* to a *greater extent* than those from other racial backgrounds. By changing the question to consider the difference in treatment and the impairment, the inquiry then is focused on different treatment and effects based on race rather than the substantive content of other rights and freedoms. Thus, the question becomes one of impairment and limitation as compared to others, rather than one focused on the substantive content of the right in question. There is a chance that by changing the question, courts could interpret the *RDA* in a similar manner to other anti-discrimination legislation in Australia and require a strict and formalistic comparison between people.[136] However, this would appear to be unlikely given the relatively flexible manner in which comparison has been dealt with elsewhere in the case law.[137]

IV The Position of Equality in the *RDA*

One solution to the problem of determining the content and scope of rights and freedoms could be accepting that a general, freestanding right to equality is protected by ss 9–10 of the *RDA*. In what appears to be an attempt to sidestep the detailed rights and freedoms analysis required by the courts, complainants have argued that

134 *Iliafi* (n 48) 111 [89] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

135 See, eg: *Morton v Queensland Police Service* (2010) 271 ALR 112 ('*Morton*'); *Munkara* (n 93).

136 See, eg, *Purvis v New South Wales* (2003) 217 CLR 92.

137 See, eg: *Baird* (n 32); *Vata-Meyer v Commonwealth* [2015] FCAFC 139.

the *RDA* protects a general and freestanding right to equality. Whether the *RDA* protects such a right is a vexed issue in the case law without a clear position. It may be that the answer depends on whether the complainant is claiming an infringement of s 9 or s 10 of the *RDA*. Complainants have argued for an application of ss 9–10 to protect a freestanding right to equality as contained in art 26 of the *ICCPR* in *Aurukun*,[138] *Morton v Queensland Police Service* ('*Morton*'),[139] *Maloney*,[140] and *Wotton [No 5]*.[141] Article 26 is in the following terms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[142]

From this line of cases, there is no clear statement as to whether art 26 can operate as a freestanding right protected by either ss 9 or 10 of the *RDA*.

In considering the nature, content and applicability of the right to equality, judges have come to differing conclusions as to the nature and the effect of the right depending on whether the case is concerned with s 9 or s 10 of the *RDA*. The argument was first put in *Aurukun*, which involved limitations on the sale of alcohol in Indigenous communities.[143] Justice Philippides accepted the existence of a freestanding right to equality in art 26 and that a broad construction of s 10 could protect a right to 'equal protection of the law' which operates to nullify legislation that is racially discriminatory in 'any field regulated and protected by public authorities'.[144] In doing so, her Honour relied upon the recommendation of the Human Rights Committee and concluded that art 26 was a right capable of autonomous and substantive content.[145] In her Honour's judgment, McMurdo P also accepted that art 26 operated as a freestanding right against discriminatory laws.[146] In contrast, Keane JA rejected the existence of a freestanding right to equality that was protected by the *RDA*.[147] His Honour concluded that art 26 was simply a paraphrase of the purpose of s 10 of the *RDA*. As such, the right had no freestanding content of its own.

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138 *Aurukun* (n 9) 37 [32]–[34] (McMurdo P), 65 [139] (Keane JA).

139 *Morton* (n 135) 134 [82], 136–7 [90]–[94] (Chesterman JA, Holmes JA agreeing at 125 [39]).

140 *Maloney* (n 10) 294–5 [336] (Gageler J).

141 *Wotton [No 5]* (n 8) 175 [650]–[651].

142 *ICCPR* (n 67) art 26.

143 *Aurukun* (n 9).

144 Ibid 98 [241].

145 Ibid.

146 Ibid 37 [34].

147 Ibid 65 [140].

The position of the Queensland Court of Appeal changed when the argument came before it again in *Morton*,[148] which considered the legality of alcohol bans in Queensland Indigenous communities. The majority of the Court concluded that art 26 was not a right protected by s 10 of the *RDA*. In his Honour's judgment, Chesterman JA (with whom Holmes JA agreed) concluded:

> The right 'without any discrimination to the equal protection of the law', is elusive in meaning and content. It is the expression of an ideal, or high moral principle, lacking any indication of how it is to be achieved, or more profoundly, what it means.
>
> …
>
> It is, I think, obvious that s 10 itself confers a right on persons of all races to be treated equally by the law. It does so by the particular mechanism described in the section. It is not obvious to me that the object sought by [a]rt 26 is not achieved by the enactment of s 10.
>
> The focus of [a]rt 26 is on equal treatment before the law, or equal protection of the law. Section 10, it seems to me, is a provision which aims to achieve that very goal.[149]

In her Honour's dissenting judgment, McMurdo P did not specifically address the issue but acknowledged that the *RDA* could capture rights contained in the *ICCPR*.[150]

The High Court's decision in *Maloney* did little to clarify matters. Though a right to equality was argued by the complainant and the Australian Human Rights Commission, intervening, supported the existence of such a right, only three judges considered the issue. Of those, Bell J did not consider the content of such a right.[151] Chief Justice French, Hayne J and Crennan J all declined to consider whether s 10 protected a freestanding right to equality. Both Kiefel J and Gageler J concluded that equality could not itself be a 'right' protected by s 10 of the *RDA*.[152] In Kiefel J's opinion, giving art 26 substantive content would render s 10 unnecessary.[153] Justice Kiefel's statements were made in the context of the broader claim made in *Maloney* and in light of her Honour's conclusions that the 'right' to possess alcohol was not a right protected by the *CERD* or the *RDA*.[154] Justice Kiefel further rejected the submissions by the complainant and the interveners that there was a 'right' to be protected from the practical discriminatory effect of domestic laws.[155] Instead, her

148 *Morton* (n 135).

149 Ibid 136 [89]–[91] (Chesterman JA, Holmes JA agreeing at 125 [39]).

150 Ibid 119 [18]–[19].

151 *Maloney* (n 10) 250–1 [219]–[222].

152 Ibid 230–1 [161]–[162] (Kiefel J), 294 [335]–[336](Gageler J).

153 Ibid 230 [161].

154 Ibid 229–31 [156]–[162].

155 Ibid.

Honour concluded that the purposes of art 26 of the *ICCPR* and art 5(a) of the *CERD* were to illustrate the 'broader' objectives that the *CERD* and the *RDA* addressed.[156] Justice Gageler made similar conclusions regarding art 26, though his Honour, in particular, focused on the circularity of operation if art 26 were within the scope of s 10.[157] In particular, Gageler J concluded:

> [I]t is in the nature of such a right that a question about its enjoyment requires the undertaking of an analysis that mirrors the very analysis that s 10 requires to be undertaken with respect to the human rights to which it refers. To inquire for the purposes of s 10 into whether there is by reason of a law unequal enjoyment of a human right to equality before the law or equal protection of the law is to become mired in unproductive circularity.[158]

Only Bell J concluded that art 26 of the *ICCPR* was a right which was protected by the *CERD* and formed part of the customary law of nations.[159] However, her Honour also refrained from determining the content of art 26 for the purposes of the *RDA* or its interaction with ss 9 or 10 specifically.[160]

In *Wotton [No 5]*, which considered whether the Queensland Police Service's response after a death in custody on Palm Island was racially discriminatory, the complainants argued that art 26 established an autonomous human right which was protected by s 9 of the *RDA*.[161] They contended that art 26 had three aspects or limbs of operation:[162] first, equality before the law and the entitlement, without discrimination, to equal protection before the law;[163] second, an entitlement to a guarantee of equal and effective protection against discrimination on any ground;[164] and third, an entitlement to a guarantee of non-discrimination through prohibitions in the law.[165] In contrast, the respondent argued that there was no freestanding right to equality and that art 26 operated as an 'objective' which the *CERD* and the *RDA* were designed to address.[166] While Mortimer J considered that the weight of authority indicated that art 26 was not a human right upon which s 10 operated, her Honour distinguished the facts under consideration in *Wotton [No 5]* on the basis that the complainants had argued that the police's impugned conduct was in breach of s 9 of the *RDA*, rather than s 10.[167]

156 Ibid 230 [160].

157 Ibid 294 [336].

158 Ibid.

159 Ibid 249–50 [219].

160 Ibid.

161 *Wotton [No 5]* (n 8) 308 [635].

162 Ibid.

163 Ibid.

164 Ibid.

165 Ibid.

166 Ibid 308 [636].

167 Ibid 308 [639], 311 [654].

Further, Mortimer J distinguished the different limbs of operation of art 26.[168] Her Honour concluded that the second and third limbs, the entitlement to a guarantee of equal and effective protection against discrimination on any ground, and the entitlement to a guarantee of non-discrimination through prohibitions in the law, were captured and implemented by s 10.[169] However, the first limb, encompassing the *application* of the law without discrimination, was not.[170]

Justice Mortimer explained that art 26 was captured by s 9 of the *RDA* where a person's right to equality has been nullified, not by a domestic statute per se but by the application or exercise of a discretionary statutory power.[171] In her Honour's analysis, Mortimer J considered the exercise of a discretion as an 'act' which can impair the protection that the law provides to a person on equal footing.[172] However, while Mortimer J concluded that art 26 had substantive and freestanding content, her Honour nevertheless found that the utility of such a right was limited in respect of most of the complainant's claims.[173] Many of these allegations were better characterised as breaches of other rights and freedoms, leaving the right to equality with little relevance in the case.[174]

After Mortimer J's decision in *Wotton [No 5]*, it appears that while a right to equality will not be captured by s 10, it is still possible that such a right, to a limited extent, is captured by s 9. However, though Mortimer J's judgment does develop the substance of the right to equality, it is still difficult to understand how such a right is particular or distinctive as compared to other rights and freedoms which are engaged by ss 9–10. What a right to equality requires is not an easy question, particularly if one accepts that the substance of a right to equality is more than simply formal equality. A substantive interpretation of equality creates challenges for judges which do not exist within a formal paradigm. Substantive equality requires judges to make determinations as to whether distinctions are just or unjust. It necessitates a balancing exercise not necessary for formal equality. How that balancing exercise should be conducted is not obvious or clear. Whether it is based upon notions such as dignity, liberty, equality or a combination of these values, is a matter that needs to be articulated by the courts.

Without a clear articulation of what substantive equality requires, the interpretation of ss 9–10 of the *RDA* by courts, and the interactions between non-discrimination and rights and freedoms including equality, could conform to Peter Westen's

168 Ibid.

169 Ibid 311 [653].

170 Ibid.

171 Ibid 316 [672].

172 Ibid 316–17 [675].

173 Ibid 318 [682]–[683].

174 Ibid.

conception of the 'empty' idea of equality.[175] He maintains that whilst, prima facie, discrimination claims seem substantively concerned with 'equality', any claim of discrimination 'must originate in a substantive idea of the kinds of wrongs from which a person has a right to be free'.[176] For Westen, the right to equal treatment on its own, without reference to other rights, is meaningless. But when articulated with reference to other rights, 'equality' is merely a restatement of those rights rather than a separate and distinctive right of its own.[177] An example given by Westen is the right to vote. In his view, a statement that all citizens have an equal right to vote is no different to a statement that all citizens have a right to vote.[178] The problem with such an approach is that it does not adequately grapple with the kinds of harms caused by discrimination and distinctions on the basis of race.

V A Better Way: A Focus on Discrimination

Rather than conceptualising ss 9–10 of the *RDA* as protecting a general right to equality, a different and possibly simpler solution would be to place less emphasis on interrogating the nature of the various rights engaged. This would allow for a more expansive and flexible definition of the impairment of the enjoyment of human rights and fundamental freedoms and focus attention on the potential harms caused by distinction, differentiation and discrimination rather than the content of separate and distinct rights.

The question is whether such an expansive and flexible definition of rights and freedoms is possible given the wording of the provisions. As was highlighted in Part III, Mason J's judgment in *Gerhardy* and the more recent Federal Court decisions have accepted the need for a complainant to articulate precisely the 'scope and content' of the right or freedom they contend is engaged and impaired. However, there is nothing in the provisions of the *RDA* or the *CERD* which requires such an approach to be adopted. The Committee on the Elimination of Racial Discrimination recommends a flexible interpretation of the instrument to achieve its overarching goal, which is the elimination of all forms of racial discrimination.[179]

175 Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537. For a critique of Westen, see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

176 Westen (n 175) 567.

177 Ibid 538.

178 Ibid 563–4.

179 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) 3–4.

A way to achieve such a flexible interpretation could be to look towards the interpretation of art 14 of the *ECHR*. Similar to ss 9–10 of the *RDA*, art 14 of the *ECHR* is a 'parasitic' right.[180] It is in the following terms:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[181]

Similar to ss 9–10 of the *RDA*, art 14 is not prescriptive and gives judges a broad discretion in the interpretation of its terms. Of particular focus for this article, courts interpreting art 14 have to consider what it means to enjoy rights and freedoms. That is because art 14 guarantees non-discrimination but only in the 'enjoyment of the rights and freedoms set forth in … [the] Convention'.[182] The ECtHR has considered that art 14 has no independent existence.[183] As such other rights and freedoms need to be engaged for art 14 to have effect. In the early case law, the ECtHR assumed that there had to be a breach of another Convention right in order to give art 14 any effect.[184] Such an interpretation makes a provision like art 14 redundant — if another Convention right has been breached, then there is little work for a non-discrimination principle to do, that is, if a Convention right has not been breached, then there is also no discrimination. However, the wording of art 14, similarly to the wording of ss 9–10 of the *RDA*, does not require discrimination in the breach of a Convention right, only that the *enjoyment* of Convention rights 'shall be secured without discrimination'. This subtle, but important, distinction was first recognised in the *Belgian Linguistics Case [No 2]* ('*Belgian Linguistics*').[185]

Belgian Linguistics involved a claim that the Dutch speaking regions of Belgium did not provide adequate French language education.[186] The complainants argued that the various pieces of legislation which limited educational opportunities for French speaking children breached their right to education and their right to non-discrimination.[187] The Belgian government argued that the breach of another Convention right was required for art 14 to be enlivened.[188] In contrast, the European Commission of Human Rights submitted that a substantive breach of a Convention right was not necessary.[189] Instead, art 14 only required that the discrimination complained of 'touch[ed] the enjoyment' of

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180 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273, 273 ('Emerging from the Shadows').

181 *ECHR* (n 13) art 14.

182 Ibid.

183 Fredman, *Discrimination Law* (n 80) 146.

184 Baker (n 12) 715.

185 *Belgian Linguistics Case [No 2]* (1968) 1 EHRR 252 ('*Belgian Linguistics*').

186 Ibid 3–4.

187 Ibid 4–5.

188 Ibid 5–6, 8.

189 Ibid 6–7.

another protected right or freedom.[190] The Court accepted the latter approach,[191] which has since become known as the 'ambit' principle.[192]

This was an important development for art 14. Accepting that a claim only needed to fall within the 'ambit' of another right has greatly expanded the scope of art 14 and allowed for a greater development of the concept of 'discrimination' pursuant to the *ECHR*.[193] The 'ambit' principle has expanded the scope of state actions which fall within the purview of art 14, particularly in the context of social and cultural rights. For example, the outcome of *Belgian Linguistics* was that, while the Court rejected the complainant's claim with respect to a right to education because art 2 of Protocol 1 to the *ECHR* did not give individuals the right to a particular kind of educational establishment, the complainants could nevertheless succeed in their claim.[194] This was because once a state has determined that it will provide a certain kind of educational establishment, art 14 of the *ECHR* requires its provision to be conducted in a non-discriminatory fashion.

Another example of the distinction between the breach of a substantive Convention right and art 14 is provided by *Ghaidan v Godin-Mendoza* ('*Ghaidan*').[195] In *Ghaidan*, the House of Lords determined that although the *ECHR* did not require a state to provide security of tenure to members of a deceased tenant's family, if a state chose to enact legislation which did require such security, it could not do so in a discriminatory fashion.[196] As Baroness Hale emphasised:

> Everyone has the right to respect for their home. This does not mean that the state — or anyone else — has to supply everyone with a home … [b]ut if it does grant that right to some, it must not withhold it from others in the same or an analogous situation.[197]

In essence, the concept of ambit requires that if the state offers a benefit, it cannot discriminate in the provision of that benefit. Such an approach has opened opportunities for courts to engage in art 14 analysis in a wide variety of cases and on a variety of issues not previously explored or considered. There is, unsurprisingly, considerable debate as to how far the ambit of art 14 extends and how closely the case must 'touch' on another right or freedom. In their more recent analysis, the members of the ECtHR have taken a relatively expansive approach to the scope or ambit of art 14.[198] The result of this approach may be significant and far-reaching in extending socio-economic benefits and protections to often excluded and marginalised groups.

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190 Ibid 25.

191 Ibid 30.

192 Baker (n 12) 715.

193 Fredman, 'Emerging from the Shadows' (n 180) 274.

194 *Belgian Linguistics* (n 185) 79, 85.

195 [2004] 2 AC 557.

196 Ibid 565 [5] (Lord Nicholls).

197 Ibid 605 [135].

198 Fredman, 'Emerging from the Shadows' (n 180) 276.

Aaron Baker has advocated for an approach in which art 14 will be applicable where state conduct 'touches' on a right based on the 'ordinary understanding, in the relevant society, of when a person can be said to be enjoying … privacy, liberty, or free expression'.[199] Rather than considering the specifics of the right in question, this places the focus on the distinction or discrimination that is involved.

How such an approach would work in the context of the *RDA* is usefully explored utilising the fact scenario of *Hamzy*.[200] In *Hamzy*, the infringed right was described as the right to speak in any language one wished to speak in all circumstances.[201] That such a right existed or was infringed was rejected by the Supreme Court of New South Wales. However, if one understood and framed that case differently and in line with the idea of ambit, a more nuanced discussion of the discrimination issues could emerge. By regulating the language that inmates could speak, the conduct of Corrective Services New South Wales *touched on* the enjoyment of rights of inmates to speak their own language and potentially their right to freedom of expression. If it could be established that such conduct touches on the enjoyment of a human right or fundamental freedom, the complainant would not need to demonstrate an infringement of the right or provide significant evidence from international and foreign materials as to the extent and nature of the right in question. Instead, the focus of the analysis would remain on the question of discrimination. Consequently, the analysis would shift to whether such conduct makes a distinction based upon race. This would allow for a proper interrogation of the conduct, why it is wrongful and how the acts or laws in question discriminate on the basis of race.

VI Conclusion

The *RDA* continues to be distinctive in the Australian anti-discrimination law landscape. This distinctiveness has some benefits. The very existence of s 10 of the *RDA* affords the *RDA* greater capacity to curtail discriminatory actions of the state, more effectively than the other Commonwealth anti-discrimination legislation. Its broader language and closer relationship with its corresponding international convention, the *CERD*, suggests that a flexible approach could be taken as to its meaning. Such an approach can be seen in the wider and more flexible interpretation of comparators taken with respect to the *RDA* as compared to other Commonwealth anti-discrimination legislation. However, I have argued that there are potential pitfalls in its interpretation, particularly in the focus on the existence and scope of 'other rights and freedoms' where those other rights and freedoms are not well developed in the international jurisprudence. Those pitfalls have, thus far, curtailed the *RDA*'s effectiveness in protecting complainants from racial discrimination. Nevertheless, international jurisprudence continues to provide avenues for substantive and progressive interpretations of the *RDA*. Those avenues shift the focus back to the fundamental question of discrimination, distinction and impairment rather than the nebulous conception of other rights and freedoms.

199 Baker (n 12) 717.

200 *Hamzy* (n 72) [13]–[31].

201 Ibid [141].

Jason Taliadoros, Rebecca Tisdale** and Jane Kotzmann****

APPLICATION OF WORK HEALTH AND SAFETY AND WORKERS' COMPENSATION LAWS TO ON-DEMAND WORKERS IN THE GIG ECONOMY: THE NEED FOR LEGAL CLARITY

Abstract

This article examines the legal status of on-demand or 'gig' workers in work health and safety and workers' compensation legislation in Australia — are they covered by such legislation? The analysis indicates that the relevant provisions do not specifically deal with these kinds of workers, and so their status is unclear. This uncertainty over worker protections is as significant in these areas as it is in employment law, the latter of which has been the subject of more recent academic commentary. By focusing on the practical application of work health and safety and workers' compensation legislation to three well-known on-demand exemplars — Uber, Deliveroo, and Airtasker — this article suggests that there is a need for legal clarity which could be delivered by reforms that include the adoption of nationally consistent legislation and other measures aimed at making the law more coherent.

I Introduction

Recently the Fair Work Commission determined that a Deliveroo driver was an employee rather than an independent contractor, and that therefore the driver was entitled to protection against unfair dismissal.[1] The decision

* LLB, BA (Hons), PhD, GradCertHE, Associate Professor, Deakin Law School.

** BA, LLB (Hons), Clinical Solicitor, Deakin Law School.

*** LLB (Hons), BCom, PhD PG(DipTeach) TGA, Senior Lecturer, Deakin Law School.

1 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, [138]–[139] (Commissioner Cambridge) ('*Franco*'). Deliveroo appealed this decision to the Full Bench of the Fair Work Commission, which was heard on 19 July 2021 but awaits determination: see Transcript of Proceedings, *Deliveroo Australia Pty Ltd v Franco* (Fair Work Commission, C2021/3221, Vice President Hatcher, Vice President Catanzariti, Deputy President Cross, 19 July 2021).

lies in seeming contradiction to a decision of the Full Bench of the Fair Work Commission in 2020 that an Uber Eats driver was an independent contractor rather than an employee.[2] The only thing that is clear at this stage is that this area of the law is uncertain. New developments have seen corporate entities taking action in this space. In the United Kingdom, following a ruling of the Supreme Court of the United Kingdom, Uber has moved to treat its 70,000 drivers as workers, meaning they will be entitled to a number of basic employment protections.[3] Menulog, which has a similar online business platform to Deliveroo, has made statements that it will trial an employee model in Australia.[4]

Academic commentary,[5] as well as government-initiated inquiries and reports,[6] have discussed the issue of whether on-demand workers are employees or independent contractors.[7] Although much of this attention has focused on the question from the standpoint of employment law or labour law, this article attends to the issue from the perspective of work health and safety ('WHS') and workers' compensation legislation. The answer to this question is important as it will mean the difference between

2 *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246, 276 [70] (Ross J and Vice President Hatcher) ('*Gupta*'). Gupta appealed this decision to the Full Court of the Federal Court; however, Uber settled the matter before judgment was handed down: Transcript of Proceedings, *Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia — Full Court, NSD566/2020, Bromberg, Rangiah and White JJ, 27 November 2020) 51 (Bromberg J), 60 (White J). The amount and terms of the settlement were confidential, but likely far less onerous than the potential cost for Uber of having to pay its workers a minimum wage, roster them, and comply with unfair dismissal rules: see Nick Bonyhady, 'Staring down the Barrel of a Landmark Judgment on its Workers' Status, Uber Folds', *The Sydney Morning Herald* (online, 30 December 2020) <https://www.smh.com.au/politics/federal/staring-down-the-barrel-of-a-landmark-judgment-on-its-workers-status-uber-folds-20201217-p56oij.html>.

3 *Uber BV v Aslam* [2021] ICR 657 ('*Aslam*'); Sharon Marris and John-Paul Ford Rojas, 'Uber Gives 70,000 UK Drivers Worker Benefits: But Uber Eats Couriers Left Out', *Sky News* (online, 17 March 2021) <https://news.sky.com/story/uber-move-to-give-70-000-uk-drivers-worker-benefits-will-reverberate-through-the-entire-gig-economy-12248229>.

4 Kristy Peacock-Smith and Tessa Carlisle, 'Menulog to Trial Employment Model for Food Delivery Service', *Bird & Bird* (Web Page, April 2021) <https://www.twobirds.com/en/news/articles/2021/global/menulog-to-trial-employment-model-for-food-delivery-service>.

5 See, eg, Paula McDonald et al, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Report, November 2019). This report presented the findings from research commissioned by the Victorian Department of Premier and Cabinet.

6 See, eg, Industrial Relations Victoria, *Inquiry into the Victorian On-Demand Workforce* (Background Paper, December 2018) ('*IRV Report*'); Industrial Relations Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Final Report, June 2020) ('*On-Demand Workforce*').

7 See also Anthony Forsyth, *Labour Law Down Under* (Web Page) <https://labourlawdownunder.com.au/>.

such persons being entitled or not to protections under these statutes. Not only is this an issue for injured individuals, who may face severe financial consequences following injury; it is also of concern to society and the economy more broadly due to lost productivity and an increased burden on health services.

The purpose of this article, therefore, is first to seek clarity on the employment status of on-demand workers in the contexts of WHS and workers' compensation law and, second, to suggest ways that such clarity and coherence might be achieved. It is the contention of this article that a nationally-consistent approach is appropriate in both WHS and workers' compensation legislation to deal with the uncertain status of on-demand workers. Further, it is suggested that this issue can be dealt with by further reforms of national workers' compensation laws. Given the nature of these areas of law, it is contended that their application to on-demand workers should be clear one way or the other. Ultimately, the position will be a policy decision to be made by government.

The argument of this article is structured as follows. Part II defines on-demand workers, outlines the common law employee/independent contractor test and introduces three well-known exemplars to serve as illustrations of the practical application of the law. Parts III and IV outline the law as it relates to on-demand workers in WHS and workers' compensation legislation in the Australian states and territories, and concludes that this law is unsettled in terms of whether such on-demand workers are employees or independent contractors. Part V suggests that reform is appropriate to bring coherence and clarity to the status of on-demand workers by a nationally-consistent approach to the definitions of 'worker' in WHS and workers' compensation legislation, and other reforms particular to workers' compensation law.

II The Uncertain Status of On-Demand Workers

A *Defining On-Demand Workers*

The term 'on-demand worker' has become familiar in recent times, and is associated with terms such as 'gig-worker' or 'non-standard employment'.[8] Such workers are engaged in the 'gig economy', 'crowdsourcing', the 'sharing economy'[9] or 'online platform work'.[10] The 'gig' economy has been identified as being synonymous

8 International Labour Organization, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Report, 16 November 2016) 8 ('*Non-Standard Employment Report*').

9 The Treasury (Cth), *Tackling the Black Economy: A Sharing Economy Reporting Regime* (Consultation Paper, January 2019) 2–3; McDonald et al (n 5) 14.

10 European Agency for Safety and Health at Work, *Protecting Workers in the Online Platform Economy: An Overview of Regulatory and Policy Developments in the EU* (Report, 2017) 3; Industrial Relations Victoria, *On-Demand Workforce* (n 6) 11 [42].

with the 'on-demand' or 'sharing' economy, all of which are characterised by their confined scope to jobs involving small tasks known as 'gigs' or 'micro-tasks'.[11]

Given the potentially wide-ranging nature of online platform work, this article focuses on three well-known online service provider companies operating in Australia, namely, Uber, Deliveroo, and Airtasker. Further, much of the recent case law, both in Australia and overseas, has focused on these and similar online service providers, and therefore they provide a practical and visible manifestation of the application of the law to the on-demand workforce.

B *Employee v Independent Contractor*

Much of the commentary in relation to on-demand workers has focused on the correct classification of their engagement, namely, whether an on-demand worker is an employee or independent contractor.[12] In this regard, the characterisation of the

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11 Productivity Commission (Cth), *Digital Disruption: What Do Governments Need to Do?* (Research Paper, 2016) 149: 'At present, the gig economy is mostly limited to micro-tasks, or other low- to medium-value transactions'. See also Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy: An Explainer' (Research Note No 7, Parliamentary Library and Information Service, Parliament of Victoria, June 2018) 1–2.

12 The literature is vast, but some of the leading contributions include: Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420; Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37(3) *Comparative Labor Law and Policy Journal* 471; Valerio De Stefano and Antonio Aloisi, *European Legal Framework for Digital Labour Platforms* (Report, 2018); Miriam A Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635; Antonio Aloisi, 'Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of On-Demand/Gig Economy Platforms' (2016) 37(3) *Comparative Labor Law and Policy Journal* 653; Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in Pamela Meil and Vassil Kirov (eds), *Policy Implications of Virtual Work* (Palgrave Macmillan, 2017) 273; Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, and Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619; Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) ch 5. See also some of the major reviews of international case law on this issue, including: International Labour Organization, *Job Quality in the Platform Economy* (Issue Brief No 5, 2nd Meeting of the Global Commission on the Future of Work, 15–17 February 2018); International Labour Organization, *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (Report, 2021); International Lawyers Assisting Workers Network, *Taken for a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021).

relationship is critical for many of the worker's entitlements, including in relation to minimum wages and other terms and conditions of employment, which accrue only to employees.[13]

The primary, or common law, definition of an employee requires a person to prove the existence of a contract of employment or contract of service. This encapsulates the two requirements for a person to be an employee at common law, namely: 'they must be engaged under a valid and enforceable contract; and, … the contract must be characterised as one of employment'.[14] Most of the case law concerns whether a person is an employee at common law or an independent contractor. The prevailing approach in Australia is to apply a multi-factor test. The two main cases that laid the foundations for all subsequent decisions are *Stevens v Brodribb Sawmilling*[15] and *Hollis v Vabu Pty Ltd* ('*Hollis*'),[16] in which the 'multi-factor test' emerged. The test has been subsequently endorsed by the High Court in *Sweeney v Boylan Nominees*.[17]

At first blush, on-demand workers will not fall within this primary definition of worker because of the three-way arrangement with the platform provider and the client, in which the on-demand worker is categorised as an independent contractor. However, where the particular circumstances indicate that, for instance:

- the platform provider has a high level of legal control over the on-demand worker in terms of the number of hours worked and the nature of the work performed;[18]

- there is limited ability to refuse work or, in practice, limited refusal;[19]

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13 See, eg, the majority of entitlements under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

14 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 204 [8.20].

15 (1986) 160 CLR 16, 29 (Mason J), 35 (Wilson and Dawson JJ), 47 (Brennan J), 49 (Deane J), ('*Stevens*').

16 (2001) 207 CLR 21, 41–5 [46]–[57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*'). Note that in the recent decision of *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 ('*WorkPac*'), the High Court downplayed the authority of *Hollis* by stating that it afforded 'no assistance, even by analogy, in the resolution of a question as to the character of an employment relationship, where there is no reason to doubt that the terms of that relationship are committed comprehensively to the written agreements by which the parties have agreed to be bound': at 700 [101] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

17 (2006) 226 CLR 161, 173 [31]–[33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (*Sweeney*).

18 *Stevens* (n 15) 24 (Mason J), 36 (Wilson and Dawson JJ); *Hollis* (n 16) 44 [54], [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 17) 173 [32] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

19 *Hollis* (n 16) 42 [49] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448, 446 [48] (Keane CJ, Sundberg and Kenny JJ).

- there is a near or total exclusivity of work for or with that provider;[20] or
- the on-demand worker wears livery or uniform of that platform provider,[21]

the on-demand worker may well satisfy the common law multi-factor test such that he or she will be considered an employee.[22]

This test could well apply to any on-demand worker in the service of Uber, Deliveroo, or Airtasker. The application of the multi-factor test, however, produces no clear and distinct bright line separating employees from independent contractors. Ultimately, when applying these principles to on-demand workers, whether or not they will be employees will be a matter for the court and dependant on the particular factual circumstances.[23] In particular, the business model of the relevant platform, including whether the platform is a 'vertically-integrated firm' or an 'intermediary or matching service' will be relevant to this assessment, as described by Andrew Stewart and Shae McCrystal.[24] This can be illustrated by applying the multi-factor test to the three exemplar on-demand platforms.

C *Uber, Deliveroo and Airtasker as Exemplars of the On-Demand Workforce*

1 *Uber*

According to its Australian terms and conditions, Uber BV and Portier Pacific Pty Ltd ('Uber') enter a contract with individuals (customers) by providing 'a technology platform' (ie, an app or website) that enables those customers to 'arrange and schedule' transportation or delivery services from 'independent third party providers' and 'purchase' or 'facilitate payments' for those services from those third party providers. The customer, according to these terms and conditions, enters 'a separate agreement' with the third party provider. These third party providers are 'independent third party contractors who are not employed by Uber'.[25] Accepting these terms at face value, the driver is not working for Uber, either as an employee or

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20 *Hollis* (n 16) 44 [55] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 125 [218] (Bromberg J) ('*On Call Interpreters*') citing *Commissioner of Taxation v Barrett* (1973) 129 CLR 395, 407 (Stephen J).

21 *Hollis* (n 16) 42 [50] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

22 For a useful summary of the various indicia which can be relevant to the test, see Louise Floyd et al, *Employment, Labour and Industrial Law in Australia* (Cambridge University Press, 2018) 13–17 [1.15.45].

23 *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, [14]–[17] (Commissioner Wilson) ('*Pallage*').

24 Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 10.

25 'Terms and Conditions', *Uber* (Web Page, 13 May 2021) <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=australia&lang=en-au>.

as an independent contractor. Rather, Uber is supplying a service to the driver. This characterisation has repeatedly been rejected, most notably by the European Court of Justice in competition law rulings,[26] and also the Supreme Court of the United Kingdom in *Uber BV v Aslam*, where Uber was found to be running a transportation business.[27]

In the recent Australian decisions of *Kaseris v Rasier Pacific VOF*[28] and *Pallage v Rasier Pacific Pty Ltd*,[29] the Fair Work Commission held that the lack of exclusivity and control meant that Uber drivers providing rideshare services were not employees.[30]

In contrast to Uber's ridesharing service, Uber's food delivery service, Uber Eats, has a different model. Although originally Uber's food delivery service used the same type of contracts as Uber's ridesharing services, after settling the appeal from the decision in *Gupta v Portier Pacific Pty Ltd*,[31] it switched to a contract in which Uber provides 'delivery services' but subcontracts such services to a 'delivery person' who is not an employee of Uber and may delegate those services to another person.[32] In this way, the drivers/riders are working for Uber's food delivery service as independent contractors, in a model similar to that used by Deliveroo.

2 *Deliveroo*

Deliveroo's Australian terms and conditions indicate that its service aims 'to link' customers to restaurants that it partners with and 'allow' customers 'to order [i]tems for delivery'. The terms and conditions state: 'Deliveroo acts as an agent on behalf of that … [r]estaurant to conclude' the customer's order from Deliveroo's

26 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (Court of Justice of the European Union, C-434/15, ECLI:EU:C:2017:981, 20 December 2017); *Uber France SAS v Bensalem* (Court of Justice of the European Union, C-320/16, ECLI:EU:C:2018:221, 10 April 2018).

27 *Aslam* (n 3).

28 [2017] FWC 6610.

29 *Pallage* (n 23).

30 Stewart and McCrystal (n 24) 11. The authors relevantly point out that in these cases neither Uber driver was legally represented, nor did they challenge evidence given by Uber as to its business arrangements. Note that a recent application in the Federal Court on behalf of four Uber rideshare drivers and the Rideshare Driver Network asserting non-compliance with record-keeping provisions of the *Fair Work Act* (n 13) will deal with their employment status: Ann Patty, 'Uber Drivers Launch Test Case in Federal Court', *The Sydney Morning Herald* (online, 2 August 2021) <https://www.smh.com.au/business/workplace/uber-drivers-launch-test-case-in-federal-court-20210801-p58es8.html>.

31 *Gupta* (n 2).

32 'Portier Pacific Pty Ltd: Terms and Conditions for Uber Delivery: Australia', *Uber* (Web Page) <https://www.uber.com/legal/sk/document/?country=australia&lang=en-au&name=general-terms-of-use> ('Terms and Conditions for Uber Delivery').

application or website 'and to manage' the customer's 'experience throughout the order process'.[33] The terms and conditions state that once the order is placed, Deliveroo or the restaurant will deliver the items to the customer.[34] In this last respect, Deliveroo's terms differ from Uber's in that the latter's terms specifically state that the customer enters a separate agreement with the driver and further that such drivers are 'independent third party contractors who are not employed by Uber'.[35] Nevertheless, in its submission to the Senate Inquiry on the Future of Work and Workers, Deliveroo classified its riders who deliver food as self-employed independent contractors.[36]

Deliveroo's classification of its rider partners as independent contractors is not determinative of the issue of employment status under the multi-factor test. Accordingly, in *Franco v Deliveroo Australia Pty Ltd* ('*Franco*'),[37] Commissioner Cambridge of the Fair Work Commission applied the multi-factor test to find that a Deliveroo rider was an employee for the purposes of an unfair dismissal application. In this case, consideration of the totality of the parties' relationship led to the conclusion that Mr Franco was not carrying on a trade or business of his own, but was working in Deliveroo's business, with significance placed on the level of control which Deliveroo could exercise over him.[38] This conforms with the earlier decision in *Klooger v Foodora Australia Pty Ltd*,[39] where the Fair Work Commission held that a Foodora bike rider was an employee after applying the multi-factor test, but citing as the principal reason the fact that the rider was not engaged in a business of his own.[40]

3 *Airtasker*

Airtasker's terms and conditions state that it 'operates an online platform allowing Users to connect through the Airtasker Platform with other Users who provide Services'.[41] Its services are providing the Airtasker Platform, namely, its application or website, to Users, who include both the 'Poster', the person who uses the platform

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33 'Legal', *Deliveroo* (Web Page) <https://deliveroo.com.au/legal>.

34 Ibid.

35 Terms and conditions for Uber Delivery (n 32).

36 Deliveroo Australia Pty Ltd, Submission No 103 to Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Inquiry into the Future of Work and Workers* (2018) 3.

37 *Franco* (n 1).

38 Ibid [139]. This decision was appealed to the Full Bench of the Fair Work Commission, but the tribunal reserved its determination pending the outcome of appeals to the High Court from the decisions of the Full Court of the Federal Court in *Jamsek v ZG Operations Pty Ltd* (2020) 279 FCR 114 and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631: see *Deliveroo Australia Pty Ltd v Franco* [2021] FWCFB 5015, [1].

39 (2018) 283 IR 168.

40 Ibid 187 [102] (Commissioner Cambridge).

41 'Terms and Conditions', *Airtasker* (Web Page, September 2021) <https://www.airtasker.com/terms/>.

to search for particular 'Services' to be performed, ie the 'Posted Task', and the 'Tasker', the person who provides the Services to the Poster by making an offer in response to the Posted Task. If the Poster accepts an offer, the terms and conditions state that a 'Task Contract is created between the Tasker and the Poster' and the Poster must pay the Agreed Price into a Payment Account, an account operated by an entity appointed by Airtasker. Airtasker indicates that the Tasker is an independent contractor engaged by the Poster.[42]

Given Airtasker's position that it does not have a work relationship with the Tasker (either as employer-employee or principal-independent contractor) and the wide variety of circumstances in which tasks will arise, it is difficult to apply the multi-factor test meaningfully. In the case of a straightforward situation by which a Poster engages a Tasker to perform a task posted on the Airtasker platform, it is unlikely that the indicia of control, exclusivity, mode of remuneration, or right to sub-contract would be met.[43] Therefore, the Tasker would likely not be considered an employee. It may be that the Tasker, on the other hand, could be considered an employee of the Poster on the basis of these indicia.

On the basis of the above, it can be seen that it is difficult to be certain as to the circumstances in which an on-demand worker will be considered an employee under the common law test. Ultimately, the question will turn on the particular facts before the court.

III Legal Status of On-Demand Workers under Australian Work Health and Safety Legislation

There has been significant recent attention placed on the workplace safety of on-demand workers, particularly ridesharing drivers and food delivery riders, both in government inquiries and the media.[44] This attention has demonstrated that there is a lack of clarity around workplace safety in this space arising from the fact that

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42 'How Do I Get a Payment Invoice?', *Airtasker* (Web Page, 2018) <https://support.airtasker.com/hc/en-au/articles/217384148-How-do-I-get-a-payment-invoice-?utm_source=googleads&utm_medium=cpc&utm_campaign=AU_--&utm_content=&utm_term=&gclid=Cj0KCQiA2ZCOBhDiARIsAMRfv9LjTW-ytrBi8WuBjNdwpG73LanplmIsCrUdOiV2OBBeXwZ8CfwuTqIaArBzEALw_wcB>.

43 See Pt IIB above and the references cited therein.

44 See Industrial Relations Victoria, *On-Demand Workforce* (n 6); Senate Select Committee on Job Security, Parliament of Australia, *First Interim Report: On-Demand Platform Work in Australia* (Report, June 2021); Michael Rawling and Joellen Riley Munton, 'Tough Gig: Urgent Regulation of On-Demand Work Economy Needed', *The Sydney Morning Herald* (online, 19 March 2021) <https://www.smh.com.au/business/workplace/tough-gig-urgent-regulation-of-on-demand-work-economy-needed-20210316-p57b6j.html>; Joel Harward, 'Danger for Delivery: Cyclists Put Their Lives at Risk for Your Convenience', *The Age* (online, 30 November 2020) <https://www.theage.com.au/national/victoria/danger-for-delivery-cyclists-put-their-lives-at-risk-for-your-convenience-20201129-p56iuv.html>.

the legal status of on-demand workers is not expressly addressed in Australian WHS legislation. This Part outlines how these legal frameworks apply to determine the rights of, and duties owed to, on-demand workers.

In Australia there has largely been a harmonisation of WHS laws, commencing in 2011. This harmonisation has led to a convergence of coverage in most jurisdictions. Seven of the nine Australian jurisdictions have implemented the Model WHS laws, which comprise the model Work Health and Safety Act ('Model WHS Act'), the model Work Health and Safety Regulations, and the model Codes of Practice.[45] The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the Model WHS laws on 1 January 2012;[46] South Australia and Tasmania implemented the laws on 1 January 2013.[47] Western Australia has recently passed the *Work Health and Safety Act 2020* (WA), which is very similar to the Model WHS Act and is substantially identical in terms of the provisions related to the discussion below. Although the new Act is not yet in force, it will come into effect when the regulations are finalised.[48] On this basis, this article will consider the Western Australian position as in line with the Model WHS Act.

This leaves Victoria as the only jurisdiction which remains an outlier in its regulation of WHS matters. In this respect, this article will identify the critical areas in which the differences between the Model WHS Act and the Victorian law impact on duties owed to on-demand workers. The relevant Victorian statute is the *Occupational Health and Safety Act 2004* (Vic) ('*Vic OHS Act*').

In considering the discussion below in relation to WHS duties, one important feature of this regulatory scheme must be borne in mind — that it is one in which statutory breaches give rise to criminal prosecutions by a regulator. This means that the criminal burden of proof (beyond reasonable doubt) must be met in respect of each element of a breach.

A *Duties under the Model WHS Act*

The Model WHS Act imposes a 'primary duty of care' for safety in the workplace on a 'person conducting a business or undertaking' ('PCBU').[49] In this context,

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45 'Law and Regulation', *Safe Work Australia* (Web Page, 11 February 2021) <https://www.safeworkaustralia.gov.au/law-and-regulation>.

46 *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld). For the purposes of this article, the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*') will be cited wherever the Model Work Health and Safety Act (WHS Act) is referenced.

47 *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

48 'Work Health and Safety Act 2020 Receives Assent', *Government of Western Australia, Department of Mines, Industry Regulation and Safety* (Web Page, 30 August 2021) <https://www.commerce.wa.gov.au/worksafe/november-2020-work-health-and-safety-act-2020-receives-assent>.

49 *WHS Act* (n 46) ss 5, 19.

the word 'primary' is intended to indicate the importance of the PCBU as the duty holder, rather than the employer, the latter term not defined in the Model WHS Act. The meaning of PCBU is specified in s 5 as a person who conducts a business or undertaking alone or with others, whether for profit or not, and includes each partner in a partnership and an incorporated association. Section 5 also specifies certain persons who will not be a PCBU, such as a worker or a volunteer. It also provides for categories of PCBUs to be specified by the *Work Health and Safety Regulations 2011* (Cth).

The PCBU owes a duty to two groups of people under s 19 of the Model WHS Act, namely, 'workers' under s 19(1), and 'other persons' under s 19(2). In addition, a self-employed person has a duty under s 19(5) expressed in the same terms as s 19(1), namely, to 'ensure, so far as is reasonably practicable, his or her own health and safety while at work'. There are also duties imposed on workers in s 28 and 'other persons' under s 29, although these are not expressed as assurances but rather as the taking of reasonable steps.

The duty owed by a PCBU to 'workers' under s 19(1) is to 'ensure, so far as is reasonably practicable, the health and safety' of relevant workers at relevant times. A further duty is owed by a PCBU to 'other persons' under s 19(2) to 'ensure, so far as is reasonably practicable, that the health and safety of other persons *is not put at risk* from work carried out as part of the conduct of the business or undertaking'.[50] Note that the requirement here is to avoid risk to health and safety, which is a negative (rather than positive obligation), [51] and may be narrower than the general assurance of health and safety in s 19(1).

In what circumstances will the duty of a PCBU to a 'worker' under s 19(1) be enlivened? Section 19(1) requires that: first, the on-demand worker is a 'worker' within the meaning of the Model WHS Act; second, the worker has a specific connection to the PCBU; and third, at the relevant time, the on-demand worker was 'at work in the business or undertaking'. It is necessary to consider each of these matters in detail.

In respect of the first matter, a 'worker' is broadly defined by the Model WHS Act in s 7 as a person who

> carries out work in any capacity for a … [PCBU], including work as:
>
> (a) an employee; or
>
> (b) a contractor or subcontractor; or
>
> (c) an employee of a contractor or subcontractor; or
>
> (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking …

50 Ibid s 19(2) (emphasis added).

51 Richard Johnstone, 'Regulating Work Health and Safety in Multilateral Business Arrangements' (2019) 32(1) *Australian Journal of Labour Law* 41, 50.

According to the Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth) ('Explanatory Memorandum'), the breadth of the definition is deliberate and was intended to 'recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers'.[52] In the context of the gig economy, this broad definition obviates the need for an analysis of whether a worker is an independent contractor or employee when considering whether the platform owes a primary duty regarding workplace safety, since the duty will be owed whichever categorisation applies. It is also relevant to note that the definition of worker in s 7 is not tied to the particular PCBU said to owe them a duty under s 19(1); rather, the worker must work for *a* PCBU.[53] This means that a worker could be carrying out work either in the business or undertaking of the platform, or in their own PCBU (for example, as a self-employed person), or in the PCBU of the ultimate end user of their services, or a combination of these.[54] Given this, it is likely that most on-demand workers will fall within the definition of 'worker' in s 7.

The second matter requires the worker to have a connection to the PCBU. There are various ways that the connection can be demonstrated, as set out in ss 19(1)(a)–(b) as follows:

> (a) workers engaged, or caused to be engaged by the … [PCBU]; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the … [PCBU] …

Richard Johnstone has undertaken significant analysis of these requirements, including in the context of multilateral business arrangements.[55] Johnstone notes that these requirements do not depend on a contractual relationship between the PCBU and the worker, and that it is possible that the breadth of ways in which a person is 'caused to be engaged' could include circumstances where a platform provider brings together a worker and the end user.[56]

In terms of the third matter — which requires the worker to be 'at work in the undertaking or business' — the expression 'at work in the undertaking or business' is not defined, and nor are the terms 'work' or 'at work'.[57] In the non-traditional workplace of on-demand workers, this uncertainty may be further exacerbated as a worker could be undertaking work for multiple platforms at one time (for example, where a rider has two orders in their delivery bag from two different platform providers).

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52 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth) 7 [32] ('Explanatory Memorandum'). See Johnstone (n 51) 44.

53 Johnstone (n 51) 46.

54 Ibid.

55 Ibid 46–7.

56 Ibid 47.

57 Johnstone notes that the term 'conduct of the undertaking' has been given a broad interpretation in previous versions of Australian OHS laws: ibid 48.

In such a case, the application of this duty to on-demand workers could be particularly unclear. As described below, the Model WHS Act is designed so that multiple parties may have duties for health and safety at the same time; however, this situation presents unique challenges. In a usual multi-duty holder situation (for example, a labour hire arrangement under which both the host and the labour hire company will have duties) the parties are aware of each other's obligations. In the present example, platform operators may not be aware that a worker to whom they owe duties is also undertaking work for another *simultaneously*. Where the worker is working for two different businesses *in sequence*, this issue will be less difficult to address.

While the primary duty is owed by a PCBU to workers (however engaged), the Model WHS Act makes clear in s 15 that a person can have more than one duty and in s 16 that more than one person can concurrently have a duty for safety in the workplace. It further provides in s 16(2) that, where this occurs, all duty holders must comply with that duty to the standard required by the Act — that is, a duty holder is not relieved of their duty just because another party also holds that same duty. In the context of the on-demand workforce, this overlap of duties can occur in several ways. For example, the platform may have duties to workers as a PCBU under s 19(1), provided the requirements of that section are met, and the worker will have duties in respect of themselves under s 28 (and possibly under s 19(5) as a self-employed independent contractor). Further, where the worker is employed or engaged by an intermediary business, the duty holders would be the platform (as a PCBU), the intermediary (also as a PCBU), and the worker.

If, in relation to a particular matter, there is more than one duty holder then the duty is imposed on each person, and pursuant to s 16(3), each person must 'discharge' their duty to the extent to which they have 'the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity'. In light of this provision, the question of influence and control is relevant to the *discharge* of the platform's duty (as a PCBU), but not to whether the platform owes a duty to the worker in the first instance. This is confirmed as the intention of the provision in the Explanatory Memorandum, which explains that 'where a duty holder has a very limited capacity, that factor will assist in determining what is "reasonably practicable" for them in complying with their duty of care'.[58] This position has also been taken in prosecutions in NSW under the Model WHS Act, such as *SafeWork NSW v Assign Blue Pty Ltd*.[59] Further, the Explanatory Memorandum indicates that 'the capacity to control' in s 16(3) means both 'actual' or 'practical' control; in addition, 'the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances'.[60]

58 Explanatory Memorandum (n 52) 15 [9].

59 [2020] NSWDC 756, [3] (Scotting DCJ). See also *Poletti Corporation Pty Ltd v SafeWork NSW* (2020) 300 IR 167.

60 Explanatory Memorandum (n 52) 15 [9].

B *Practical Application of Model WHS Act to On-Demand Workers*

Given the broad meaning of PCBU under s 5 of the Model WHS Act, the online platforms Uber, Deliveroo and Airtasker are likely within the ambit of that term. Accordingly, it is likely that these online platforms owe duties under ss 19(1)–(3). Further, given that the Model WHS Act does not distinguish employees from independent contractors in its definition of 'worker' in s 7, the WHS duties owed by platforms to their on-demand workers will not be impacted by the classification of the engagement as either employment or independent contracting. The duties owed by the platform, as a PCBU, to its employees and to independent contractors are identical. However, where a platform says that it has no employment or independent contracting relationship with the worker, the duties of the parties are difficult to discern.

1 *Uber*

As indicated above, it is necessary to consider Uber's ridesharing and food delivery services as distinct.

In both models, Uber would meet the definition of a PCBU. The key issue is whether, in its ridesharing service, a driver is considered a worker. As noted above, a PCBU owes a primary duty for safety to its workers under s 19(1) to ensure, so far as is reasonably practicable, their health and safety while they are at work in the business or undertaking. In this regard, in respect of its ridesharing service, Uber says it provides technology services to its drivers and customers. If this is accepted, it is possible that Uber drivers would not be workers to whom Uber owes duties for want of meeting the second or third matters outlined above — that is, they are not workers with a sufficient connection to Uber, nor are they 'at work' in Uber's business or undertaking. Rather, Uber is providing the driver with a service.

Given that Uber's application causes the driver to be matched with the end user, it can be argued that Uber causes the driver to be engaged by the end user, thus satisfying the connection requirement of s 19(1)(a). The question then arises as to whether an Uber driver is 'at work' in Uber's business or undertaking. In the authors' view, this term should be broadly construed in accordance with previous case law as noted by Johnstone.[61] Given that the business of Uber is to charge for a ridesharing service, the conduct of a driver providing driving services to an end user should be seen as work within Uber's business or undertaking.

Even if Uber does not owe duties to drivers as workers under s 19(1), it is likely that s 19(2) would extend protection to drivers as 'other persons'. In this regard, a driver is allocated work through Uber's platform which would likely bring that driver into the scope of s 19(2) even though they are not working in Uber's business or undertaking.[62]

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61 Johnstone (n 51) 48.

62 Ibid 50.

Uber's food delivery service, as noted above, explicitly engages its riders/drivers as independent contractors. Such an arrangement would mean that the riders would be 'engaged by' Uber and working within Uber's business or undertaking such that Uber would owe its riders duties under s 19(1).

Given the nature of the way in which drivers and riders interact with the Uber platform, there may, in certain circumstances, be questions about when a driver is 'at work'. As noted above, the duty is limited to workers while 'at work in the business or undertaking', and this undefined expression may be uncertain in its application, particularly to on-demand workers.

As drivers and riders also have a duty for their own safety, Uber is required to discharge its duty to 'the extent to which [Uber] has the capacity to influence and control the matter'.[63] This will be a factual question, and the control exercised by Uber will depend on a number of factors, including the matter in respect of which the safety breach is alleged.

2 *Deliveroo*

A similar analysis to that above regarding Uber's food delivery service applies to Deliveroo. Deliveroo would be a PCBU engaging it riders as workers and, therefore, would owe its drivers/riders (as workers) duties under s 19(1).

As with Uber's food delivery service, there is a strong possibility that the restaurant, cafe, or other food supplier for whom the rider is performing deliveries would also owe WHS duties to the Deliveroo rider/driver. In this regard, the rider/driver could possibly be considered a worker of the restaurant for the purposes of s 19(1) as a sub-contractor whose work is directed or influenced by the restaurant, and whose delivery duties are considered to occur while 'at work' in the restaurant's business or undertaking. At the very least, a s 19(2) duty would arise for the restaurant to ensure, so far as is reasonably practicable, that the rider/driver is not put at risk from work carried out as part of the restaurant's business or undertaking. Foreseeable examples of when this duty could be relevant are when the rider/driver is at the relevant restaurant waiting for food or in ensuring that food provided to the rider/driver is safely packed.

3 *Airtasker*

Airtasker is likely to be considered a PCBU under the broad meaning of that term in the Model WHS Act and, therefore, owe a duty under section 19(1) to 'workers'. Based on comments made by Airtasker's Chief Executive Officer to a recent Senate inquiry, Airtasker would likely argue that it is not responsible for the health and safety of Taskers as a PCBU.[64]

63 *WHS Act* (n 46) s 16(3).

64 Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope Is Not a Strategy: Our Shared Responsibility for the Future of Work and Workers* (Report, 19 September 2018) 80 [4.82]–[4.83].

The critical issue is whether the Taskers would be considered as workers with a sufficient connection to Airtasker, given Airtasker's position that it does not have either an employment or principal-contractor relationship with the Tasker. Despite this, s 7 of the Model WHS Act has a broad, inclusive definition of 'worker' and is not limited to workers of Airtasker but includes a worker engaged by any PCBU. Assuming that the Tasker is a 'worker' (either in their own PCBU or another PCBU, as discussed further below), the question is whether a Tasker is a worker who meets the connection requirement with Airtasker and is considered to be 'at work in … [Airtasker's] business or undertaking' within the meaning of s 19(1).

Airtasker may well argue successfully that it did not engage or cause the Tasker to be engaged, or influence or direct the work of the Tasker. In this regard, Airtasker could argue that the worker is engaged by the Poster for whom work is carried out, and that Airtasker merely facilitated that arrangement. To this end, Airtasker may well rely on a distinction being drawn between 'causing the worker to be engaged' and *arranging or facilitating* the performance of that work. A useful analogy drawn by Stewart and McCrystal could be relied upon, being that between Airtasker and a 'newspaper or website publishing classified advertisements'.[65] A critical issue here may be whether Airtasker recommends or actively connects the Poster and the Tasker, or whether the parties determine this themselves. This can be seen as distinct from Uber's drivers, who are matched by the platform.

In the event that Taskers are considered 'workers' who are owed duties by Airtasker, the extent of Airtasker's duty under s 19(1) is likely to be limited. As described above, s 16(3) limits a person's duties to the extent to which they have influence and control over the matter. For example, if the task is performed by the Tasker from their home office (such as graphic design work), Airtasker may be seen to have limited influence or control over that workplace. Similarly, if the task is performed by the Tasker at the Poster's home, office or another location, then Airtasker will also be limited in its ability to influence or control matters related to safety in that workplace. It may be that the ability Airtasker has to influence or control these spaces is limited to providing information about a safe workplace or responding to safety related complaints.

On the other hand, if the Tasker is not a worker owed duties by Airtasker under s 19(1), it is possible that Airtasker would owe that Tasker a duty of care within the conception of 'other persons' to which s 19(2) speaks. Again, this will only be the case if the Tasker is seen as being put at risk from work undertaken as part of the conduct of Airtasker's business or undertaking. If the view is adopted that the work undertaken as part of Airtasker's business is simply the facilitation of advertisements and processing of payments, the safety of the Tasker when on a task may not be sufficiently connected to Airtasker's business or undertaking.

It is also relevant to consider the potential duties of the Poster in engaging with the Airtasker platform. It is possible that the Poster could fall within the definition of a

65 Stewart and McCrystal (n 24) 10.

PCBU under the Model WHS Act and, therefore, owe duties to the Tasker (as a 'worker' or 'other person'). This will require close consideration of the characteristics of the Poster, and also a determination of whether the Tasker is a 'worker'. For instance, where the Poster is a business, it will itself be a PCBU owing duties generally under the Model WHS Act and consideration must be given to whether those duties extend to the Tasker as a 'worker'. In this regard, the Tasker could be a worker because the nature of the relationship between the Poster and the Tasker (including features such as control, regularity of work and the degree of supervision) transform a bare contractual relationship into a work relationship such that the worker is an employee or contractor of the Poster as a PCBU. Alternatively, the Tasker may already work in their own PCBU (perhaps as a self-employed person or through another business). Further, for the Tasker to be a 'worker' who is owed duties by the Poster, consideration would need to be given to the nature of the task. If the task is one being undertaken in the Poster's business or undertaking, s 19(1) duties will be enlivened.

Where a Poster is an individual consumer or householder, it is very unlikely that they will be considered a PCBU given the definition of PCBU in s 5, although this is not entirely clear.[66] Where the Poster is an individual and posting a task of a household or domestic nature, Safe Work Australia's Interpretive Guideline suggests that in such situations, an engagement of a Tasker to provide one-off household or domestic work (such as putting together furniture or the conduct of home improvements by a tradesperson) is not intended to make the Poster a PCBU.[67]

C *Duties under the Vic OHS Act*

As noted above, Victoria has not implemented the Model WHS Act, and the legislation in force is the *Vic OHS Act*. Under the *Vic OHS Act,* the principal duty-holder in respect of maintaining a safe workplace is not the PCBU, but rather the 'employer', defined in s 5(1) as 'a person who employs one or more other persons under contracts of employment or contracts of training'. The employer owes duties to two main groups: employees and independent contractors under s 21; and 'other persons' under s 23.[68]

1 *Duty of Employer to Employees and Independent Contractors*

Section 21(1) relevantly provides that an 'employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment

66 Johnstone (n 51) 45–6.

67 'Interpretive Guideline: Model Work Health and Safety Act', *Safe Work Australia* (Web Page, 2021) 4 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/interpretive_guideline_-_pcbu.pdf>.

68 This article will not deal with s 26(1) of the *Occupational Health and Safety Act 2004* (Vic) ('*Vic OHS Act*') which requires persons who have 'the management or control of a workplace' to 'ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health', as such a duty is not explicitly directed to workers or contractors and, therefore, does not raise the same issues as the other provisions dealt with here.

that is safe and without risks to health'. In a similar structure to s 19(3) of the Model WHS Act, s 21(2) of the *Vic OHS Act* then goes on to provide a non-exhaustive list of requirements which, if not met by the employer, would result in the employer being in breach of this general duty. Section 5(1) of the *Vic OHS Act* defines an 'employee' as 'a person employed under a contract of employment or contract of training'. It therefore accords with the definition of 'employer' in that Act.

Section 21(3) of the *Vic OHS Act* explicitly extends the employer's duty under ss 21(1) and (2) 'to an independent contractor engaged by the employer, and any employees of the independent contractor'. While the contractual terms of the ridesharing service provided by Uber and the services provided by Airtasker would arguably exclude any such 'engagement', Uber's food delivery service and that of Deliveroo would most likely include this kind of engagement. That duty, whether under ss 21(1) or (2), is attenuated or limited in its application to independent contractors and employees of independent contractors by s 21(3)(b) to 'matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control'.

While the term 'control' is not defined in the legislation, it has been the subject of judicial consideration in Victoria and other jurisdictions. Analysis of relevant case law illustrates that control can be a contentious issue. In *Baiada Poultry Pty Ltd v The Queen* ('*Baiada Poultry*'),[69] the Victorian Court of Appeal considered that the meaning of control for the purposes of s 21(3) turns on whether the employer 'has the right to control',[70] not whether that right to control was exercised. The exercise of the right goes to what was reasonably practicable in the circumstances, and is a question of fact and degree. Further, it was noted that in the case of independent contractors, such control may arise but will vary in its extent depending on the circumstances.[71] Therefore, the issue of control is one of determining the legal rights of the employer in respect of the worker, and the extent of any such rights. In *Baiada Poultry*, Nettle JA referenced the contract between the parties in making this decision,[72] and other indicators of a right of the employer to direct how the contractor performs their work.[73] It is conceivable that there would be matters relevant to a safe working environment over which an on-demand platform provider may be found not to have control, such that they do not owe the resultant safety duties to their independent contractors.

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69 (2011) 203 IR 396 ('*Baiada Poultry*'). Note that the appeal to the High Court from this decision, *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, concerned the unrelated issue of the prosecution having to prove its case beyond reasonable doubt, a failure of which led to a miscarriage of justice.

70 *Baiada Poultry* (n 69) 401 [19] (Nettle JA).

71 Ibid.

72 Ibid 401–2 [20].

73 *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; *Stratton v Van Driel Ltd* (1998) 87 IR 151, 157 (Byrne J).

2 *Duty of Employer to Other Persons*

In addition to the duty to employees, an employer owes a duty to 'other persons' under s 23 of the *Vic OHS Act* to 'ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer'. The Supreme Court of Victoria in *Muscat v Magistrates' Court of Victoria*[74] confirmed that this provision applies to non-employees, including independent contractors. Thus, Richards J confirmed that a prosecutor can elect to pursue charges either under ss 21 or 23[75].

It is noteworthy that the duty under s 23 differs in several respects from the duties under ss 21(1) and (2) in that: first, its scope extends to assurance against 'risks to … health and safety', while the s 21 duties are expressed positively and more broadly to 'provide and maintain … a working environment that is safe and without risks to health';[76] and second, it is not attenuated in the same way as the s 21 duties to 'matters over which the employer had or would have control'.[77]

D *Practical Application of Vic OHS Act to On-Demand Workers*

As indicated above, ss 21(1) and (2) of the *Vic OHS Act* create duties of health and safety that are owed by online platform providers regardless of whether the on-demand worker is considered an employee or independent contractor. Whether that on-demand worker is categorised as an employee or independent contractor, however, will affect the *extent* of the duties owed by the platform provider. If the worker is considered an independent contractor, the duty owed will be less extensive and include only those matters over which the platform provider has 'control' within the meaning of s 21(3).

As with the Model WHS Act analysed above, the obligations owed by the platform are less clear where the online platform's position is that it has no working relationship with the on-demand worker.

1 *Uber*

In the event that an Uber driver providing rideshare services is not considered an employee or an independent contractor, no duty would be owed by Uber under s 21 of the *Vic OHS Act*. Section 23 of the *Vic OHS Act* could be seen to apply to the drivers as 'persons other than employees of the employer' for similar reasons to s 19(2) of the Model WHS Act applying to 'other persons', being that 'conduct of the undertaking of [Uber]'[78] should be seen to encompass the undertaking of ride-sharing services.

74 (2018) 59 VR 570.

75 Ibid 582–3 [52]–[54].

76 *Vic OHS Act* (n 68) s 21(1).

77 Ibid s 21(3)(b).

78 Ibid s 23(1).

As indicated above, Uber's duty in respect of health and safety under ss 21(1) and (2) of the *Vic OHS Act* will be attenuated in the case of Uber food delivery drivers, if they are considered independent contractors consistent with Uber's understanding of its contractual terms, to those matters over which Uber has control per s 21(3). Therefore, where Uber is found not to control a matter relevant to a driver's safety, there can be no duty owed to the driver in respect of that matter.

2 *Deliveroo*

Given the similarity in working arrangements to Uber's food delivery service, a Deliveroo driver/rider will similarly be owed a duty under ss 21(1) and (2) of the *Vic OHS Act*, although this will be limited if the driver is classified as an independent contractor. In the event that the driver/rider is an independent contractor, duties will also be owed under s 23(1).

Given the recent finding in *Franco* that a Deliveroo worker was an employee, such a finding would, in relation to health and safety, broaden Deliveroo's duties. In this regard, if workers are employees, and not independent contractors, duties would be owed in respect of all matters, not just matters over which Deliveroo has control.

3 *Airtasker*

As the description of Airtasker's business model at the beginning of this article suggests, Airtasker's position is that it forms no contract for the performance of work with either the Tasker or the Poster; rather, those two parties enter into their own contract. If such a position is accepted, the Tasker will be neither an employee nor an independent contractor of Airtasker captured by ss 21(1), (2) or (3). Consequently, s 23(1) would operate to impose a duty on Airtasker to ensure, so far as is reasonably practicable, that other persons (ie, Taskers) are not exposed to risks to health and safety arising from Airtasker's business. Critical issues in this regard are whether the risks to a Tasker when they are performing work arise 'from the conduct of the undertaking of [Airtasker]' and, if so, what will be considered to be 'reasonably practicable' for Airtasker. This will be a question of fact contingent on the particular circumstances.

As discussed above in relation to the Model WHS Act, the Poster may owe a duty to the Tasker. This responsibility for safety being imposed on Posters is a matter which has been identified by Airtasker directly.[79]

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79 Timothy Fung, Chief Executive Officer of Airtasker Pty Ltd, stated:

> [I]f the environment provided for that person to work in was unsafe, then a lot of the responsibility would lie with the person who procured the work. In relation to that, there are different levels of insurance that are provided, such as home and contents insurance. Some of them provide cover for some of these trades; some of them don't provide cover for these kinds of trades.

Evidence to Senate Select Committee on the Future of Work and Workers, Parliament of Australia, Canberra, 4 May 2018, 4 (Timothy Fung).

If, for example, the Poster is considered an employer under the *Vic OHS Act*, and has engaged the Tasker as an employee or independent contractor, then duties will be owed under ss 21(1) and (2). Again, these will be limited to matters over which the Poster has control if the Tasker is an independent contractor. Control would depend on contractual matters and also be informed by other matters such as the nature of work and where it is being undertaken. For example, if the task is being performed in the employer's (Poster's) business premises, then the extent of the Poster's control may be very high, such that the duties owed under s 21 are significant and more akin to those owed by an employer to employees. On the other hand, if the work is being performed externally, ie, remotely by the Tasker, the duties owed by the Poster may be minimal.

E *Summary of WHS as it Relates to On-Demand Workers*

The above analysis indicates that the uncertain employment status and variable contractual arrangements of on-demand workers mean that their protections under the Model WHS Act and *Vic OHS Act* are unclear. While it is clear that some online platform providers will owe on-demand workers duties in respect of health and safety, in some business models the existence of health and safety duties are far from certain. Further, where a duty does arise, the *extent* of that duty is less clear as it varies between duties owed to employees, independent contractors, and other persons. In addition, there are instances where third parties accessing services through an online platform may owe duties for safety which may not be evident to those involved in a transaction.

IV The Application of Australian Workers' Compensation Laws to On-Demand Workers

There are 12 main workers' compensation systems in Australia. Unlike the WHS legislation, there is no harmonisation of workers' compensation statutes. Each of the eight Australian states and territories has developed its own workers' compensation scheme and there are also four Commonwealth schemes.[80] Like the Australian WHS legislation, there are no specific provisions in the workers' compensation legislation that deal with on-demand workers. The coverage of an on-demand worker for injuries will depend on whether their injury has a connection to their employment and this, in turn, depends in part on whether they are considered to be a 'worker' within the meaning of the relevant statute.

80 For the four Commonwealth schemes, see: *Safety Rehabilitation Compensation Act 1988* (Cth) ('*SRC Act*') (which applies to Commonwealth government employees and employees of licensed self-insurers); *Seafarers Rehabilitation and Compensation Act 1992* (Cth) ('*Seacare Act*') (which applies to certain seafarers); *Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* (Cth) ('*DRC Act*') (which applies to Australian Defence Force personnel who served prior to 1 July 2004); *Military Rehabilitation and Compensation Act 2004* (Cth) ('*MRC Act*') (which applies to military personnel who served on or after 1 July 2004).

The Australian states and territories do not have a uniform definition of the term 'worker'. There is, however, a degree of consensus that a person will be considered to be a 'worker' if they meet one or more of the following types of definition of a worker:

- That equivalent to an employee at common law, namely, a person engaged under a 'contract of employment', also known as a 'contract of service'.[81] Most of the definitions of 'worker' in the workers' compensation schemes accord with this approach, which we will call the 'primary' definition.

- A contractor engaged in circumstances that are akin to an employment relationship such that the legislation 'deems' them to be a worker. We refer to this as the 'contractor deeming provision'.

- Engaged in activities of a particular nature such that the legislation 'deems' them to be a worker. Relevant examples include drivers carrying passengers for reward (ie, taxi drivers), drivers providing transport of the carriage of goods for reward, and labour hire workers. We refer to this as the 'specified activity deeming provision'.

The Commonwealth workers' compensation schemes do not have contractor deeming provisions or specified activity deeming provisions, and therefore we do not deal with them in the following discussion.[82]

A *Application of Primary Definition to On-Demand Workers*

The primary definition of 'worker' in all Australian jurisdictions makes reference to either a contract of service[83] or to a contract of employment,[84] and so effectively reproduce the common law test for an employment contract referred to above. As also indicated above, the practical application of that common law definition to

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81 See above Part II(B).

82 See: *SRC Act* (n 80) s 6, which confines coverage to 'employees'; *Seacare Act* (n 80) s 26, which also confines coverage to 'employees'; *DRC Act* (n 80) s 4AA, which confines coverage to any 'employee'; *MRC Act* (n 80) s 7A, which confines coverage to 'members'.

83 *Workers' Compensation Act 1951* (ACT) s 8(1)(a) ('*ACT WC Act*'); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 4(1) (definition of 'worker') ('*NSW WIMWC Act*'); *Return to Work Act 2014* (SA) s 4(1)(a) (definition of 'worker' para (a)) ('*SA RTW Act*'); *Workers Rehabilitation and Compensation Act 1988* (Tas) s 3(1) (definition of 'worker' para (a)) ('*Tas WRC Act*'); *Workers' Compensation and Injury Management Act 1981* (WA) s 5(1) (definition of 'worker') ('*WA WCIM Act*').

84 See: *Return to Work Act 1986* (NT) s 3B ('*NT RTW Act*'); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(1) ('*Qld WCR Act*'), which require both a 'contract' and that the person is an employee for tax purposes. See also *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3 (definition of 'worker' para (a)) ('*Vic WIRC Act*'), which requires both a 'contract of employment … or otherwise' and that the worker performs work or agrees to perform work at the direction of the employer.

on-demand workers is uncertain and will vary depending on the particular factual scenario.[85]

B *Application of Contractor Deeming Provision to On-Demand Workers*

The contractor deeming provision is designed to look beyond the outward form of the contract between a principal and a contractor to determine whether the substance of that relationship is in fact akin to that of an employer and employee. The contractor deeming provisions in all Australian state and territory workers' compensation statutes have one feature in common, namely, the requirement that the contractor is not working in their own independent trade or business.[86]

There are additional requirements that feature in several states' provisions, namely that:

- the contractor's performance of the work is 'not incidental to' the work normally performed by the contractor (NSW, Qld, Tas);[87]
- the contractor does not delegate work to another person, such as a subcontractor (NSW, Qld, Vic);[88]
- the contractor's provision of the services is 'not ancillary to' the provision of goods or materials by that contractor (Vic);[89]
- the contractor is working for the principal most of the time and deriving most of their income from that principal (Vic);[90] and
- the contractor is self-employed (SA).[91]

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85 See a recent application to the County Court of Victoria by an Uber Eats driver whose application for compensation under the *Vic WIRC Act* (n 84) was rejected on the basis that he was not a 'worker' within the meaning of that Act, but rather a self-employed contractor: Tom Cowie, 'Uber Eats Faces Test Case over Driver's Ruptured ACL During Delivery', *The Age* (online, 12 September 2021) <https://www.theage.com.au/national/victoria/uber-eats-faces-test-case-over-driver-s-ruptured-acl-during-delivery-20210909-p58q4q.html>.

86 *ACT WC Act* (n 83) s 8(1)(b); *NSW WIMC Act* (n 83) s 5, sch 1 cl 2; *NT RTW Act* (n 84) s 127(1); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 s 3; *SA RTW Act* (n 83) s 4(1) (definition of 'worker' para (a)); *Return to Work Regulations 2015* (SA) ('*SA RTW Regs*') regs 5(1) (definition of 'building work' para (a)), ('definition of 'cleaning work' para (b)); *Tas WRC Act* (n 83) s 4B; *Vic WIRC Act* (n 84) s 3 ('definition of 'worker' para (b)), sch 1 cl 9; *WA WCIM Act* (n 83) s 5(1)(b).

87 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 2; *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 s 3; *Tas WRC Act* (n 83) s 4B.

88 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 2; *Qld WCR Act* (n 73) s 11(2), sch 2 pt 1 s 3; *Vic WIRC Act* (n 84) s 3 ('definition of 'worker' para (b)), sch 1 cl 9.

89 *Vic WIRC Act* (n 84) s 3 (definition of 'worker' para (b)), sch 1 cl 9.

90 Ibid.

91 *SA RTW Act* (n 83) s 4(1) (definition of 'contract of service' para (a)); *SA RTW Regs* (n 86) reg 5(1) (definition of 'building work' para (a)), ('definition of 'cleaning work' para (b)).

The requirement that the contractor not be working in their own independent trade or business has close connections to the common law test for employment. This is evident from an analysis of the Victorian provisions, arguably the most comprehensive of the contractor deeming provisions. Schedule 1 cl 9(1) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('*Vic WIRC Act*') lists a number of criteria, all of which must be satisfied for the contractor to be deemed a worker. Even if these are satisfied, however, cl 9(2) precludes the contractor from being deemed a worker if that contractor is 'carrying on an independent trade or business'. The current understanding of the cl 9(2) test, according to the Victorian Court of Appeal decision in *BSA Ltd v Victorian WorkCover Authority*,[92] is the 'modified control test' formulated in the High Court decision of *Humberstone v Northern Timber Mills*.[93] This test overlaps in part with the common law concepts of control and exclusivity in the multifactor test discussed above.

How do these contractor deeming provisions apply to Uber, Deliveroo, and Airtasker? We apply sch 1 cl 9 of the *Vic WIRC Act* by way of example and illustration.

There are five factors to consider in sch 1 cl 9 of the *Vic WIRC Act*, namely:[94]

- whether there is a contract in place (cl 9(1)(a));
- whether the services by the contractor are 'not ancillary to the provision of materials or equipment' by that contractor (cl 9(1)(b));
- whether the contractor does 80% of the work themselves (cl 9(1)(c));
- whether the gross income from the contract is at least 80% of the gross income from those services during the 'relevant period' (12 months) (cl 9(1)(d)); and
- whether the contractor is 'carrying on an independent trade or business': (cl 9(2)).

The application of these factors is considered in the next section.

92 [2018] VSCA 265.

93 (1949) 79 CLR 389, 404 (Dixon J): 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.' This test was subsequently rearticulated in *Zujis v Wirth Brother Pty Ltd* (1955) 93 CLR 561, 571 (Dixon CJ, Williams, Webb and Taylor JJ, McTiernan J agreeing at 576). For critical analysis of this decision, see Jason Taliadoros and Genevieve Grant, *Victorian Statutory Compensation Schemes* (LexisNexis Butterworths, 2021) 45–8 [3.29]–[3.37].

94 Taliadoros and Grant (n 93) 4 [3.24].

1 *Uber*

It has been observed above that Uber could assert that a work contract might exist between its food delivery service and the relevant driver or rider, while it could contest the notion that there is any work contract at all between them in respect of its rideshare service.

In terms of the latter arrangement, it is unlikely that an Uber rideshare driver would satisfy the criteria in sch 1 cl 9 of the *Vic WIRC Act*. In the former arrangement, however, it is possible that an Uber food delivery driver/rider would satisfy four of the five criteria, namely:

- the existence of a contractual relationship between the driver and Uber to provide food delivery services for reward;

- that these food delivery services 'not [be] ancillary to the provision of materials or equipment by the contractor to the principal under the contractual arrangement',[95] noting that only the food delivery services would be provided;

- that at least 80% of the contracted services be provided by the contractor personally, assuming there is no delegation; and

- that the driver's gross income from the contracted services be at least 80% of their total gross income 'earned from services of the same class provided by or on behalf of the contractor in the relevant period',[96] that is, the preceding 12-month period. This fourth criterion would exclude some workers who derived their income from more than one platform, however.

As noted above, the fifth criterion found in cl 9(2) will preclude the Uber food delivery driver from being a deemed worker if that driver 'is carrying on an independent trade or business'. If an Uber driver has been engaged in circumstances akin to those in *Pirot Pty Ltd v Return to Work South Australia (Schultz)* ('*Schultz*'),[97] namely, of near exclusivity and of tight control (but by Uber rather than the intermediate taxi business as in *Schultz*), then it is likely that cl 9(2) will not operate to preclude the Uber driver from being deemed an employee of Uber, given the likelihood that the driver is not carrying on an independent business. Each case, however, will turn on its facts.

2 *Deliveroo*

As discussed above, Deliveroo classifies its rider partners as independent contractors, and so sch 1 cl 9 of the *Vic WIRC Act* would potentially apply in a similar way to Uber's food delivery contractual arrangements. One significant difference here is

95 *Vic WIRC Act* (n 84) sch 1 cl 9(1)(b).

96 Ibid sch 1 cl 9(1)(d).

97 [2017] SAET 92.

that cl 9(1)(a) specifically excludes from its purview 'transport services' within the meaning of cl 8. Schedule 1 cl 8 of the *Vic WIRC Act* is a specified activity deeming provision, and its application to Deliveroo is discussed below.

3 *Airtasker*

Schedule 1 cl 9 of the *Vic WIRC Act* is unlikely to apply to the relationship between the Poster and the Tasker. Three of the five criteria are likely to be met, namely: the existence of a contractual relationship; the ancillary services test; and the personal performance of work test. But it is unlikely that the fourth criterion, the one principal test, would be met, as Taskers are likely to complete tasks for a number of different Posters and not exclusively or near-exclusively for one Poster. Further, the fifth criterion — the preclusion in cl 9(2) — is likely to apply since many Taskers are running their own businesses. The application of cl 9 would depend on the facts, but would most likely exclude Taskers from being deemed workers of the Poster.

C *Application of Other Contractor Deeming Provisions to On-Demand Workers*

Sections 8(1)(b)–(c) of the *Workers Compensation Act 1951* (WA) ('*ACT WC Act*') are noteworthy as they provide two further contractor deeming provisions, namely:

> (b) works under a contract, or at piecework rates, for labour only or substantially for labour only;[98] or
>
> (c) works for another person under a contract (whether or not a contract of service) unless—
>
> (i) the individual—
>
> (A) is paid to achieve a stated outcome; and
>
> (B) has to supply the plant and equipment or tools of trade needed to carry out the work; and
>
> (C) is, or would be, liable for the cost of rectifying any defect in the work carried out …

Section 8(1)(b) is broader than the common law definition of an employment contract, since it applies to a contract for 'labour only or substantially for labour only'; it is also quite distinct from other contractor deeming provisions, such as those in

98 For the meaning of the phrase 'for labour only or substantially labour only', see the recent case law on the similar phrase in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth), which deems a person to be an employee if that person works under a contract that is 'wholly or principally for the labour' of that person, including the recent decision of *Dental Corporation Pty Ltd v Moffet* (2020) 278 FCR 502, [82]–[84] (Perram and Anderson JJ, Wigney agreeing at 527–8 [115]–[118]) ('*Moffet*'). Cf *On Call Interpreters* (n 20) 146 [306] (Bromberg J).

sch 1 cl 9 of the *Vic WIRC Act*, which require the satisfaction of multiple criteria, not simply that there is a contract for all or mostly labour services. Section 8(1)(c) is also broader than the conventional contract of service, and applies to situations normally associated with independent contractor arrangements, namely, where the contractor is paid for achieving a 'stated outcome', provides their own plant and equipment, and is liable for rectifying any defective work. Section 8(1)(c)(i) is similar in nature to other contractor deeming provisions; however, as the features just described would typify the circumstances of an individual running their own independent business, that would exclude such a person from being deemed a worker.

How would these contractor deeming provisions in ss 8(1)(b) and (c) of the *ACT WC Act* apply to the three on-demand platforms?

1 *Uber*

The s 8(1)(b) requirement for labour-only/substantially contracts would, on initial appearances, appear to be satisfied by Uber drivers/riders providing their labour in food delivery services. On the application of the principles in *Dental Corporation Pty Ltd v Moffet* ('*Moffet*'),[99] the contract is principally or predominantly for their labour in driving or riding rather than the provision of equipment, ie, the vehicle. Further, even if an Uber food delivery driver is deemed to be a worker, it is not clear who the 'employer' would be in these circumstances; the *ACT WC Act* is silent on this. Consistent with *Moffet*, the perspective of the entity 'for' whom labour is provided is critical in determining the purpose of those services, ie, whether they are for labour. As noted above, where that entity is a business, such as a cafe or restaurant, it may be that such a purpose is apparent.

Section 8(1)(c)(i) would not apply to Uber food delivery drivers/riders as they satisfy the disqualifying factor in sub-s (A), namely, they are paid to achieve a stated outcome; further, they (arguably) satisfy the disqualifying factor in sub-s (B), in that they have to supply their own plant and equipment (ie, the vehicle). On the application of the principles in *Moffet* to s 8(1)(b), it would, therefore, depend on the interpretation to be given to the labour-only/substantially component. Little guidance to date exists in the case law.

In respect of Uber's rideshare service, from Uber's perspective, its purpose is arguably, applying *Moffet*, not to receive services from its drivers (it provides technology services to them) and so there is a mere contractual relationship and no work relationship between the entities for the purposes of s 8(1)(b). If Uber's perspective were not accepted and it was seen to be providing transport services, however, then s 8(1)(b) would apply in the same way as with its food delivery service.

99 *Moffett* (n 98) requires: that '(a) there should be a "contract"; (b) which is wholly or principally "for" the labour of a person; and (c) that the person must "work" under that contract': at 522 [82] (Perram and Anderson JJ).

2 *Deliveroo*

These contractor deeming provisions in s 8(1)(b) would apply to Deliveroo drivers/riders in a similar manner to their application to Uber food delivery drivers/riders, as described above.

3 *Airtasker*

Section 8(1)(b) of the *ACT WC Act* may not apply to Taskers engaged via Airtasker because the labour only/substantially component would disqualify any skilled taskers who provided tools and/or equipment for the task, such as a fencer. Section 8(1)(c)(i) would not apply to Taskers either because the disqualifying factor in sub-s (A), being paid to achieve a stated outcome, would apply; further, the Taskers would (arguably) satisfy the disqualifying factor in sub-s (B), in that they supply their own plant and equipment (tools and materials, eg, nail gun and fence posts).

Accordingly, s 8(1) of the *ACT WC Act* is unlikely to apply to on-demand workers, although little guidance to date exists in the case law to confirm this.

D *Application of Specified Activity Deeming Provisions to On-Demand Workers*

The specified activity deeming provisions in workers' compensation legislation in Australia deem individuals performing certain categories of activities to be workers. Such provisions exist in workers' compensation legislation in certain states and territories, and can typically be divided into three types of activities: driving passengers for reward;[100] transporting goods for reward;[101] and labour hire arrangements.[102] We examine the applicability of these provisions below.

1 *Uber*

The taxi-driving deeming provisions usually require that there is a bailment arrangement in place, eg, *Vic WIRC Act* sch 1 cl 7(1)(a). Most Uber drivers, however, use their own vehicles and so there will be no bailment between the driver and Uber.

2 *Deliveroo*

The carriage of goods for reward deeming provision, eg sch 1 cl 8 of the *Vic WIRC Act*, has some likelihood of applying to the contract that exists between Deliveroo

100 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 10; *Return to Work Regulations 1986* (NT) reg 3A(1)(c) ('*NT RTW Regs*'); *SA RTW Regs* (n 86) reg 5(1)(d); *Tas WRC Act* (n 83) ss 4DA, 4DB; *Vic WIRC Act* (n 84) s 3(b), sch 1 cl 7.

101 *ACT WC Act* (n 83) s 11 (examples 3 and 8); *SA RTW Regs* (n 83) reg 5(1)(e); *Vic WIRC Act* (n 84) s 3(b), sch 1 cl 8.

102 *ACT WC Act* (n 83) s 12; *NSW WIMWC Act* (n 83) s 5, sch 1 cl 1 2A; *NT RTW Act* (n 84) s 3B(16); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 cls 4–6; *Tas WRC Act* (n 83) s 4DA; *Vic WIRC Act* (n 84) ss 3 (definition of 'employer'), 109.

and its drivers. This is despite Deliveroo's treatment of such drivers as third-party independent contractors. The existence of such a contract, in contrast to the position of Uber, would not itself have the effect of disqualifying the application of these carriage of goods for reward deeming provisions.

Schedule 1 cl 8 deems an 'owner-driver' to be an employee where that person 'drives a motor vehicle, of which he or she is the owner, mainly for the purposes of providing transport services to the principal'. This could potentially apply to Deliveroo drivers, since the expression 'transport services' is defined in cl 8(6) as 'the service of transporting and delivering goods', which appears to be broad enough to include the transportation or delivery of food. However, similar to cl 9, cl 8 does not apply where the owner-driver 'is carrying on an independent trade or business' under cl 8(2). Clause 8(2), like cl 9(2), would exclude a Deliveroo driver from being a deemed worker where there is evidence that the driver is running their own business.

3 *Airtasker*

The provisions deeming labour hire workers vary across the jurisdictions and take various forms. These forms are usually of three kinds: deeming the labour hirer to be the employer (NSW and Vic);[103] deeming the hired worker to be the worker (ACT, NT, Qld and Tas);[104] or no labour hire provisions being present at all (SA and WA). Common to such provisions is that there must be: first, an employment relationship between the worker and the labour hire company that 'hires' their services to the third party 'hirer'; and second, a hiring or lending contract to that third party hirer. As noted above, it is unlikely that an employment relationship between the Tasker and Airtasker exists, or that a hiring or lending arrangement between either Airtasker or the Poster and the Tasker such as would satisfy these provisions. Usually, the Tasker uses the Airtasker online platform to market their services for future work and their services are provided no more often than an intermittent basis.

E *Summary of the Application of Workers' Compensation Laws to On-Demand Workers*

In light of the above, the following observations can be made about the definition of 'worker' under workers' compensation legislation in the Australian states and territories. First, while the primary definition of a worker is more or less consistent across the Australian states and territories, as a person engaged under a contract of service or a contract of employment in accordance with the common law understanding of an employee, there is no complete uniformity in this definition. Added to this is the great uncertainty in the application of such a definition to any given factual scenario. Second, the contractor deeming provision varies to a large extent in its form and substance across the Australian states and territories workers' compensation acts.

103 *NSW WIMWC Act* (n 83) s 5, sch 1 cls 1, 2A; *Vic WIRC Act* (n 84) ss 3 (definition of 'employer'), 109.

104 *ACT WC Act* (n 83) s 12; *NT RTW Act* (n 84) s 3B(16); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 cls 4–6; *Tas WRC Act* (n 83) s 4DA.

The one commonality is the provision requiring that a worker *not* be working independently in their own business or undertaking. Yet the form of this provision, too, varies across jurisdictions. Like the primary definition, this test is uncertain in its application and factually contingent. Third, a specific activity deeming provision has not been enacted in all of the Australian states and territories and, where enacted, the specific activity deeming provision varies in its form and covers different activities. Such a provision has the advantage of being reasonably clear in its application, but most likely will not apply to the three exemplar on-demand workers dealt with in this article. Such a provision, therefore, is of limited utility in dealing with the identified problems of on-demand workers.

V Discussion and Reform Recommendations

In light of the above, it is apparent that the problems in respect of on-demand workers and Australia's WHS laws, on the one hand, and workers' compensation schemes, on the other, share the singular problem of lack of uniformity across the states and territories. The problems facing the workers' compensation legislation, however, are more extreme in this regard and go beyond mere disconformity.

A *Australian WHS*

In terms of the WHS laws, online platform providers, such as Uber Eats or Deliveroo, are likely to be considered either employers or PCBUs and therefore criminally liable for any breach of WHS duties. Airtasker and Uber rideshare services are quite different in that their contractual terms arguably create no work relationship with the worker (although this is under challenge in the courts in relation to Uber), and so any application of the WHS laws to them as PCBUs or employers is uncertain and factually contingent. Further, other parties, such as businesses who have a role in directing the services provided by Airtasker and Uber rideshare, may be implicated as PCBUs.

1 *National Consistency*

It is the authors' view that *all* states and territories should enact the Model WHS laws; that is to say, Victoria should join the scheme. This is consistent with the object in s 3(1) of the *WHS Act*, 'to provide for a balanced and nationally consistent framework', although the current trend has seen substantial variations in Queensland and (to a lesser extent) New South Wales and South Australia.[105] Uniformity of concepts (such as those of PCBU and worker) will only increase the coherence and consistency of the application of such laws across Australia.

This recommendation for complete uniformity is in line with internationally benchmarked standards, such as the *Occupational Safety and Health Convention 1981*

[105] Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, December 2018) 21–2, 25.

('*OHS Convention*').[106] The *OHS Convention* was developed by the International Labour Organization ('ILO'). Australia is a signatory to the *OHS Convention*, having ratified the ILO's P155 Protocol of 2002 to the *OHS Convention* on 26 March 2004.[107] Although the *OHS Convention* does not deal explicitly with on-demand workers, its key relevance is the requirement for a coherent national policy in art 4.1, which imposes obligations on Members to 'formulate, implement and periodically review a coherent national policy on occupational safety, occupation health and the working environment'.[108] In this regard, the differences among Australian jurisdictions in relation to WHS is inconsistent with the *OHS Convention*.

Further, it is possible for regulators such as Safe Work Australia to provide interpretative guidance on these duties as they apply to on-demand workers, or else to support and fund test cases in the High Court on such matters.

B *Australian Workers' Compensation*

In terms of workers' compensation, the varying provisions defining workers and their uncertain application call for reform.[109] Although Australia is not a signatory to the *Convention Concerning Benefits in the Case of Employment Injury*, other ILO documents have relevance. The Preamble to the *Constitution of the International Labour Organization* ('*ILO Constitution*'), to which Australia is a signatory, refers to the need for 'protection of the worker against sickness, disease and injury arising out of his [or her] employment … [and], provision for old age and injury'.[110] Further, the annex to the *ILO Constitution*, which comprises the *Declaration Concerning the Aims and Purposes of the ILO* ('*Declaration of Philadelphia*'),[111] contains two provisions of aspirational relevance to workers' compensation schemes in ch III, namely that such legislation should aim to provide:

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106 *Convention (No 155) Concerning Occupational Safety and Health and the Working Environment*, opened for signature 11 August 1983, 1331 UNTS 279 (adopted 22 June 1981).

107 'Ratifications for Australia', *International Labor Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544>.

108 *Convention (No 155) Concerning Occupational Safety and Health and the Working Environment* (n 106) art 4.1

109 See, eg: *IRV Report* (n 6) 116 [803], [805]; David Peetz, *Operation of the Queensland Workers' Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018) 16–21, 88, 94–108; Stewart and McCrystal (n 24) 11–12; Stewart and Stanford (n 12) 427; McDonald et al (n 5) 16; International Labour Organization, *Non-Standard Employment Report* (n 8) 199–203, 261–6.

110 *Constitution of the International Labour Organization*, opened for signature 28 June 1919 (entered into force 10 January 1920) Preamble para 2.

111 *Constitution of the International Labour Organization*, opened for signature 28 June 1919 (entered in to force 10 January 1920) annex ('*Declaration of Philadelphia*').

> (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
>
> (g) adequate protection for the life and health of workers in all occupations …

In addition, the *Employment Injury Benefits Convention* ('*EIB Convention*') provides for minimum levels of coverage for all injured 'employees' in art 4.1.[112] Australia, however, has not ratified the *EIB Convention*, and so is not bound to observe it. Article 4.2 permits exceptions to coverage where necessary, such as in the case of:

> (a) persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business; and
>
> …
>
> (d) other categories of employees, which shall not exceed in number 10 per cent of all employees …

These *EIB Convention* provisions, therefore, exclude coverage of casuals, independent contractors and other employee categories forming a minority percentage of the workforce.

The above provisions from the *Declaration of Philadelphia* do not deal specifically with on-demand workers. They aspiringly seek coverage for 'workers in all occupations'[113] and all injured employees, which is not helpful as it begs the question of who is classified as an employee. It also seeks coverage for 'all in need … of protection',[114] although without specifying who this might be. The universal nature of this measure is something that we will return to below in the discussion of reform. These provisions do not, however, indicate what kinds of workers should be covered and protected and so do not provide any clear assistance on the issue of on-demand workers.

1 *National Consistency*

As with the Australian WHS laws, it is the authors' view that the Australian workers' compensation laws, in line with the aim of coherence, should be reformed so as to contain uniform provisions providing a definition of 'worker'. This would include uniform or 'model' provisions regarding the different types of definition of worker, namely the primary definition, the contractor deeming provision, and the specified activity deeming provision.

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112 *Convention (No. 121) Concerning Benefits in the Case of Employment Injury*, opened for signature 8 July 1964, 602 UNTS 259 (entered into force 28 July 1967) ('*EIB Convention*').

113 *Declaration of Philadelphia* (n 111) ch III (g).

114 Ibid ch III (f).

In respect of the primary definition, it is suggested that consistent terminology be adopted that is centred on the notion of the existence of a contract of employment, or a contract of service. We discuss further below the additional need to clarify this test of worker status. In respect of the adoption of uniform provisions for the other deeming provisions, it is suggested that, at least as a first step, there be the uniform adoption of a precluding provision, already common to nearly all jurisdictions, that a contractor not be deemed a worker where that contractor is working independently for their own business.

With the adoption of nationally-consistent laws, an on-demand worker in one jurisdiction in Australia will not be prejudiced by the 'postcode injustice' of being subject to different provisions than those that apply elsewhere in Australia.

2 *Clarity and Modification of the Definition of Worker*

In addition, it is suggested that there be legislative intervention to clarify the common law worker status test. Such a measure is required so long as there is a lack of definitive guidance by the High Court on the matter. Further, the plethora of competing public policy considerations and theories make it more appropriate that the legislature be the source of such clarity rather than the judiciary. Recent academic commentary has suggested several alternatives, which are discussed below.

One is the adoption of an overarching principle by which to decide the issue of worker status. The *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* ('*On Call Interpreters*')[115] 'enterprise test', as the sole test of employment status for the purposes of the primary definition of worker, has come into favour recently and continues to cause discussion, despite the High Court's adoption of the multi-factor test.[116] Pauline Bomball has recently and convincingly argued that the 'enterprise test', favoured in *On Call Interpreters*, provides a coherent unifying thread for interpreting the multi-factor test.[117] This is the approach favoured by the authors of this article. It has the advantage of drawing on a considerable body of case law as well as the practical realities of such circumstances. Furthermore, such an approach is consistent with the majority of Australian workers' compensation contractor deeming provisions, and numerous specified activity deeming provisions, that exclude persons independently running their own business from being classified as workers. At the time of writing, however, two relevant appeals to the High Court await determination.[118] It remains to be seen whether the Court will take the enterprise approach or revisit *Hollis* by taking an

115 *On Call Interpreters* (n 20).

116 *Hollis* (n 16); *Stevens* (n 15).

117 Bomball (n 12).

118 Transcript of Proceedings, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2021] HCATrans 138; Transcript of Proceedings, *ZG Operations Australia Pty Ltd v Jamsek* [2021] HCATrans 139.

approach consistent with its decision in *WorkPac v Rossato*[119] in placing the primacy of the contract ahead of other factors.[120]

An issue that arises in respect of this approach is the distinction identified in this article between, on the one hand, a work model of principal-contractor, such as that between Uber food delivery services and Deliveroo and their drivers/riders, and, on the other, a model that recognises no work relationship, such as that between Uber rideshare services and its drivers and Airtasker and its Taskers. It is not clear that an 'enterprise test' of the kind suggested above would necessarily provide any clearer guidance to such circumstances than the existing multi-factor test.

A second means is to substitute the notion of 'employer' in the WHS and workers' compensation legislation with that of a PCBU. David Peetz, in the most recent review of the Queensland workers' compensation scheme, suggests that the notion of a PCBU from the Model WHS Act be inserted in workers' compensation legislation to replace the term 'employer'. Such an amendment would in turn replace the requirement of an employment contract, as constitutive of 'worker' status, with a requirement that there be a person who carries out work in any capacity for a PCBU.[121] Given that the aims of both of these legislative schemes are to provide 'protections' for workers, this suggestion has much to commend it as a longer-term aim of legislative reform. As Peetz outlines, this alignment of WHS and workers' compensation with the notion of the PCBU may well provide consistency, although it may not necessarily cover all online platforms.[122] This would face the same issues identified above in the WHS law discussion as to whether a PCBU's duties would extend to platforms such as Uber's ridesharing and Airtasker.

A third means is to include a further category of worker in workers' compensation statutes, namely, 'agents'. As Peetz suggests,

> [u]nder this option coverage would be extended to people engaged to perform work under an agency arrangement where an employment relationship is not created with another party, and responsibility for premiums would go to the ['']intermediary organisations' or 'agencies' that hire them.[123]

Peetz suggests a possible wording for this 'agency liability' provision, namely: 'A person engaged via an intermediary or agency to perform work under a contract (other than a contract of service) for another person'.[124] It is not clear whether such a provision would replace or be in addition to existing deeming provisions in the legislation. It is also conceded by Peetz that this agency liability provision may well

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119 *WorkPac* (n 16).

120 The authors are grateful to one of the anonymous reviewers for suggesting this possible development.

121 Peetz (n 109) 104.

122 Ibid.

123 Ibid 105.

124 Ibid.

apply to a number of categories of employee additional to on-demand workers.[125] Stewart and McCrystal appear to damn this suggestion with faint praise as being 'rather creative'.[126] This agency approach is clearly aimed at bringing within its sphere intermediary platforms such as Uber's ridesharing and Airtasker.

An alternative additional category of deemed worker suggested by a report into employment law in the United Kingdom, known as the 'Taylor Review', is the 'dependant contractor'.[127] This is based on the 'limb (b)' definition of 'worker' in s 230(3) of the *Employment Rights Act 1996* (UK). Stewart and McCrystal have criticised this proposed 'intermediate category of worker', which they label 'independent worker', on the basis that it may have the unintended consequence, as it has in Italy and arguably in the United Kingdom, 'to disenfranchise existing employees through reclassification or manipulation of their legal status'.[128]

Yet another additional category of deemed worker could be created, according to Peetz, by way of ad hoc deeming provisions to deem certain persons workers by the relevant Minister by means of subordinate legislation, such as regulations.[129] This would be a means of responding nimbly to particular circumstances and including particular categories of workers, such as on-demand workers. It would also have the added advantage, if the relevant subordinate legislation is carefully drafted, of only including those intended categories. Conceivably, such a measure could operate in response to any 'emerging signs of organisation and collective action by platform workers, both in Australia and overseas'.[130] In this way, the lack of a work contract, in platforms such as Uber's ridesharing and Airtasker, would not prevent workers providing services to be deemed 'workers' by such deliberate ad hoc legislative or regulatory intervention.

3 *Other Measures*

Two further measures have been suggested by commentators in the context of employment law, one radical and the other more pragmatic. With reference to the latter, Stewart and McCrystal have suggested that more active measures be taken to tackle 'sham contracting', arguing that

> the issue of sham contracting, or misclassification of workers, can best be tackled by clarifying and expanding the category of employment, in particular by presuming workers to be employees unless they can be shown to be running their own business.[131]

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125 Ibid 107.

126 Stewart and McCrystal (n 24) n 44.

127 Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (Report, July 2017) 35–6.

128 Stewart and McCrystal (n 24) 19.

129 Peetz (n 111) 107.

130 Stewart and McCrystal (n 24) 20. See also Luke Mason, 'Locating Unity in the Fragmented Platform Economy: Labor Law and the Platform Economy in the United Kingdom' (2020) 41(2) *Comparative Labor Law and Policy Journal* 329, 340.

131 Stewart and McCrystal (n 24) 21–2.

This is broadly consistent with the principal suggestion advocated above of harmonising the definition of employee according to the principles espoused in *On Call Interpreters*. It could apply to the deeming provisions in workers' compensation legislation.

The more radical option suggested by Stewart and McCrystal is to establish certain minimum 'universal rights' that apply 'to *all* types of contract, not just those involving employment'.[132] In this way, certain minimum requirements would apply to any contractual scenario, whether there is an employee-employer or principal-contractor contract in place, and thus potentially including on-demand workers. This would cover matters such as 'work health and safety, redress for discrimination or harassment, privacy, access to cheap and effective dispute resolution, whistleblower protection and general obligations of fair dealing as appropriate subjects for broadly framed standards'.[133] Such a measure, however, would require a radical remodelling of not just workers' compensation legislation but a raft of other statutory and common law institutions.

VI Conclusion

This article has highlighted the lack of clarity in the application of WHS and workers' compensation laws to on-demand workers in the gig economy. This lack of clarity stems from longstanding unpredictability in the application of the law as to whether an individual is an employee or independent contractor at common law, as well as legal uncertainties in this area (matters which are at the time of writing pending determination by various courts, including the High Court). These uncertainties have consequences that impact on the coherence and consistency of WHS and workers' compensation legislation across the Australian states and territories. In addition, as outlined in this article, the contracting models of the online platform providers have increased this uncertainty; issues of employment status arise not only in the context of the traditional employee-independent contractor dichotomy but also in situations where arguably no work contract exists.

This article has also pointed to a range of measures that have been put forward to resolve the lack of clarity and the uncertain application of employment status regarding on-demand workers in the context of WHS and workers' compensation laws. The issue is a timely one, and calls for decisive and prompt attention by policy-makers, legislatures, regulatory bodies and the courts. By such action, in accordance with coherence and consistency, the opportunity presents itself to bring much-needed clarity to this area of law and to deal with the dynamic and ever expanding scope of the digital economy.

132 Ibid 13 (emphasis in original).

133 Ibid 21.

Francina Cantatore and Brenda Marshall***

SAFEGUARDING CONSUMER RIGHTS IN A TECHNOLOGY DRIVEN MARKETPLACE

Abstract

Although online technology — including artificial intelligence ('AI') technology — is increasingly regulated in Australia, there are numerous challenges facing regulators in the area of consumer rights. Consumers may be negatively impacted in various ways by online technology, such as the mining and exploitation of their personal data, instances of automated decisions posing risks to their privacy, new forms of misleading or deceptive conduct online, and the anti-competitive consequences of AI-led market collusion. This article considers the impact of online technology on consumer rights in the context of the current Australian regulatory framework, by focusing on the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law*, the recommendations made in the *Digital Platforms Inquiry Final Report*, and the effect of the recently introduced Consumer Data Right legislation. It investigates whether the reach of Australia's existing laws, together with the recommendations of the *Digital Platforms Final Report*, will be adequate to protect consumer rights in the future, finding that ongoing vigilance against technology related abuses is required of regulators and consumers in a technology driven marketplace.

I Introduction

Developments in artificial intelligence ('AI') engineered technology have increased risks to consumers in a number of ways, often amplified by a lack of awareness on the part of online platform users. It has been established that there is a substantial disconnect between how consumers think their data should be treated and how it is actually treated.[1] For example, digital platforms such as Google

* BA; LLB (Hons) (Pretoria); MA (Griffith); GDLP (ANU); PhD (Bond); Associate Professor, Faculty of Law, Bond University.

** BCom (Hons); LLB (Hons); LLM (UQ); SJD (QUT); Professor, Faculty of Law, Bond University.

1 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 3 ('*DPI Final Report*') <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

and Facebook have been found to employ AI to utilise users' personal information for marketing purposes, causing the Australian Competition and Consumer Commission's ('ACCC') *Digital Platforms Inquiry Final Report* ('*DPI Final Report*') to recommend more oversight of digital platforms.[2] Consumers are increasingly affected by breaches of the *Australian Consumer Law* ('*ACL*')[3] by online marketing organisations, such as misleading or deceptive conduct perpetrated by comparison websites.[4] In addition, consumer rights could be adversely affected by online AI-led market collusion and breaches of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') in the digital marketplace.[5]

This article assesses the impact of online — including AI-led — technology on consumer rights in the context of the current Australian regulatory framework, by focusing on the *CCA* and *ACL*, as well as the recommendations made in the *DPI Final Report*.[6] In addition, it considers the effect of the recent Consumer Data Right ('CDR') legislation, introduced by the Commonwealth government in August 2019.[7] The article investigates whether the reach of the existing laws, together with the recommendations of the *DPI Final Report*, will be adequate to protect consumer rights in the future, while also outlining how online threats to consumer welfare are likely to evolve in response to ongoing technological developments.

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2 Ibid 2.

3 *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*'). To the extent that the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') sets out equivalent consumer protection provisions applicable to financial products and services, the relevant sections of the *ASIC Act* are referenced in footnotes wherever their *ACL* counterparts are discussed.

4 See below Part IV.

5 Rod Sims, 'The ACCC's Approach to Colluding Robots' (Speech, Australian Competition and Consumer Commission, 16 November 2017) <https://www.accc.gov.au/speech/the-accc%E2%80%99s-approach-to-colluding-robots>; Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence and Collusion: When Computers Inhibit Competition' [2017] (5) *University of Illinois Law Review* 1775.

6 The *DPI Final Report* has been followed by the Digital Advertising Services Inquiry and the Digital Platform Services Inquiry, both announced in February 2020, with the latter releasing its first interim report in September 2020 as an update to the *DPI Final Report* in relation to search and social media platforms: see Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry* (Interim Report, September 2020) 1 <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report> ('*DPSI Interim Report*').

7 *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth).

II The Increase of AI Technology in the Marketplace

In considering online technology in the context of this article, a broad view of AI is taken in investigating its impact on consumers. Artificial intelligence has been defined by John McCarthy as 'the science and engineering of making intelligent machines', especially intelligent computer programs,[8] while Ariel Ezrachi and Maurice Stucke define AI as 'software and computers capable of self-learning and intelligent behaviour'.[9] John Lennox notes that there is a difference between literal intelligence and its digital equivalent, noting that it is not truly 'intelligence' as most understand the term and distinguishing between various types of intelligence, eg, general intelligence (aligned with sentience, self awareness etc) and general *artificial* intelligence.[10] This article endorses the views of McCarthy, Ezrachi and Stucke, and supports Lennox's characterisation of general artificial intelligence as distinct from human intelligence. The term has been used to include tasks such as abstract reasoning, solving puzzles, time planning, recognising objects and sounds, speaking, translating, performing social or business transactions, creative work and controlling robots.[11] It should be differentiated from the term 'machine learning', which — as a subset of AI — denotes an added ability to automatically learn from data.[12] Machine learning ('ML') has been defined as a science that is 'concerned with the question of how to construct computer programs that automatically improve with experience'.[13] In this sense, ML systems can quickly apply knowledge and training from large datasets to excel at tasks such as facial, speech and object recognition and translation.[14] Instead of creating a software program with specific instructions to complete a task, ML allows a system to learn to recognise patterns on its own and make predictions.[15] These deep learning techniques are increasingly being applied by companies seeking to increase their customer base and revenue, which provides challenges for the existing legislative framework in dealing with consumer protections.

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8 John McCarthy, 'What Is Artificial Intelligence?', *Professor John McCarthy* (Web Page, 12 November 2007) <http://jmc.stanford.edu/articles/whatisai.html>.

9 Ezrachi and Stucke (n 5).

10 John C Lennox, *2084: Artificial Intelligence and the Future of Humanity* (Zondervan, 2020) 95.

11 Kristian Kersting, 'Machine Learning and Artificial Intelligence: Two Fellow Travelers on the Quest for Intelligent Behavior in Machines', *Frontiers in Big Data* (Web Page, November 2018) <https://www.frontiersin.org/articles/10.3389/fdata.2018.00006/full>.

12 Ibid.

13 Tom M Mitchell, *Machine Learning* (McGraw-Hill, 1997) xv.

14 Hope Reese, 'Understanding the Differences between AI, Machine Learning, and Deep Learning', *TechRepublic* (online, 23 February 2017) <https://deeplearning.lipingyang.org/wp-content/uploads/2016/11/Understanding-the-differences-between-AI-machine-learning-and-deep-learning-TechRepublic.pdf>.

15 Ibid.

One indicator of the increasing demand for ML and AI-related skills in the marketplace is the fact that there are currently more than 12,000 open positions on LinkedIn worldwide[16] that require TensorFlow expertise.[17] Vacant positions on LinkedIn requesting ML expertise further reflect its growing dominance in all businesses; for example, at present there are nearly 99,000 jobs worldwide according to LinkedIn that list 'machine learning' as a required skill.[18] Louis Columbus further asserts that the global market for ML is projected to grow to USD30.6 billion in 2024 (from USD7.3 billion in 2020).[19] This trend demonstrates a growing need for businesses to employ AI technology in order to remain competitive in the market.

The top five uses of ML in companies that have 10,000 employees or more have been identified as: generating customer intelligence or insights; improving customer experience; internal processing automation; retaining and interacting with customers; and reducing costs.[20] In this context, the International Data Corporation ('IDC') has forecast that spending on AI systems will reach nearly USD98 billion in 2023, to be led by the retail and banking industries,[21] which will affect consumers, given the consumer focus of the AI generated data. As stated by the IDC research director, '[a]rtificial intelligence and machine learning are top of mind for most organisations today, and IDC expects that AI will be the disrupting influence changing entire industries over the next decade'.[22]

Thus, and significantly, recent research undertaken by Algorithmia — a United States-based machine learning model deployment and management organisation, which hosts the largest public marketplace for algorithms — indicated that this expected growth in the use of AI technology will necessarily impact consumers.[23] This research also revealed that customer-centric applications of ML, such as generating customer insights and improving customer experience, are currently the most common use

16 Louis Columbus, 'Roundup of Machine Learning Forecasts and Market Estimates, 2020', *Forbes* (online, 19 January 2019) <https://www.forbes.com/sites/louiscolumbus/2020/01/19/roundup-of-machine-learning-forecasts-and-market-estimates-2020/#6a3f28d85c02>.

17 Tensor Flow is an end-to-end open-source machine learning platform: see *TensorFlow* (Web Page) <https://www.tensorflow.org>.

18 Columbus (n 16).

19 Ibid.

20 Algorithmia, *2020 State of Enterprise Machine Learning* (Report, October 2019) 5 <https://info.algorithmia.com/hubfs/2019/Whitepapers/The-State-of-Enterprise-ML-2020/Algorithmia_2020_State_of_Enterprise_ML.pdf?hsLang=en-us>.

21 Business Wire, 'Worldwide Spending on Artificial Intelligence Systems Will Be Nearly $98 Billion in 2023, According to New IDC Spending Guide' (Media Release, 4 September 2019) <https://www.businesswire.com/news/home/20190904005570/en/Worldwide-Spending-on-Artificial-Intelligence-Systems-Will-Be-Nearly-98-Billion-in-2023-According-to-New-IDC-Spending-Guide>.

22 Ibid.

23 Algorithmia (n 20) 5.

of AI.[24] In some instances, this may be positive, resulting in enhanced customer experience and better communication; but it could also have negative implications, such as privacy and data breaches as well as consumer law breaches if the technology is implemented without the necessary checks and balances. It is unclear from Algorithmia's report whether these customer-centric functions take into account potential impact on consumer data and privacy. However, it has been recognised that in order to supplement the development of AI, controllers collect vast amounts of consumer personal data to enable algorithms to learn, as an algorithm cannot accurately learn from its environment without processing large amounts of personal data.[25] Since this is what is required for AI to work 'efficiently' or actually optimise certain functions, it raises real concerns for consumer privacy and data, especially when consumers are unaware of or oblivious to the implications of their data being collected. In the context of the *General Data Protection Regulation*[26] ('*GDPR*') in the European Union ('EU'), for example, there is a tension between the development of AI technologies which require the continual learning and use of data, including prior data, and the *GDPR* which allows consumers to withdraw their consent and use of personal data.[27]

The *Artificial Intelligence Index*, a report prepared by Stanford University researchers which 'tracks, collates, distils, and visualizes data relating to artificial intelligence',[28] acknowledges that

> [p]ublic concerns over the technology's threat to data privacy have grown over time, driven by news of mistaken identities during crime surveillance, biometric scans that can be applied to videos or photos without consent, and the idea of data ownership as it relates to social media platforms that utilize the technology.[29]

This trend is particularly concerning considering the significant impact AI may have on the end consumer and the fact that consumers are constantly targeted by

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24 Ibid 2.

25 Matthew Humerick, 'Taking AI Personally: How the EU Must Learn to Balance the Interests of Personal Data Privacy and Artificial Intelligence' (2018) 34(4) *Santa Clara High Technology Law Journal* 393, 395.

26 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation*) [2016] OJ L 119/1 ('*GDPR*') is a regulation in European Union ('EU') law on data protection and privacy for all individual citizens of the EU and the European Economic Area ('EEA'). It also addresses the transfer of personal data outside the EU and EEA areas.

27 Humerick (n 25) 406.

28 Raymond Perrault et al, *Artificial Intelligence Index 2019* (Annual Report, Stanford Institute for Human-Centered Artificial Intelligence, December 2019) 4 <https://hai.stanford.edu/sites/default/files/ai_index_2019_report.pdf>.

29 Ibid 151.

marketers through the application of analytics and ML.[30] AI has been 'regarded as the 21st century equivalent of the late 19th century steam engine' because the algorithms apply to mass amounts of data, resulting in a transformation of the culture of consumption and production,[31] impacting widely on traditional methods of marketing. It has also been noted that digital profiling is one of the most commercially valuable results of AI technologies (ie, the ability to collect data by tracking online behaviour and then creating highly accurate predictions about individuals' 'behaviours, interests, preferences, and traits').[32] In a consumer law context this means that unfair practices can arise from digital profiling as there is more opportunity for the exploitation of an individual if AI technology can mine digital datasets that can predict a particular individual's preferences, tastes or vulnerabilities.[33] This is exacerbated by the fact that these profiling practices 'are highly opaque, dynamic, and largely operate hidden from public view'.[34]

The recorded uses of AI in marketing and data collection practices in consumer-centric applications can have significant implications for consumers, ranging from privacy concerns to unfair practices and potential breaches under consumer law. These issues may be further complicated by the lack of uniform regulation given the use of AI across territorial borders. Whilst many of the observations above relate to concerns and practices in jurisdictions outside Australia, in practice these activities are often being conducted across borders due to the global nature of the international marketplace. In the Parts below, this article considers the impact of AI technology on consumers in the Australian context.

III Digital Platforms: The Collection and Use of Consumer Data

A *The Power of Digital Platforms: The Digital Platforms Inquiry*

The exploitation and monetisation of consumers' data by technology companies has been widely acknowledged,[35] identifying concerns about the misuse of consumer

30 Maria Averina, 'How Artificial Intelligence Can Impact Your Consumer Habits', *Society30* (Blog Post, 15 September 2019) <https://society30.com/how-artificial-intelligence-can-impact-your-consumer-habits/>.

31 Karen Yeung, 'Five Fears about Mass Predictive Personalization in an Age of Surveillance Capitalism' (2018) 8(3) *International Data Privacy Law* 258, 259.

32 Ibid 258–9.

33 Ibid 261.

34 Ibid.

35 See, eg: Cesare Fracassi and William Magnuson, 'Data Autonomy' (2021) 74(2) *Vanderbilt Law Review* 327; Stuart A Thompson and Charlie Warzel, 'Twelve Million Phones, One Dataset, Zero Privacy', *The New York Times* (online, 19 December 2019) <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>; Sam Schechner and Mark Secada, 'You Give Apps Sensitive Personal Information. Then They Tell Facebook', *The Wall Street Journal* (online, 22 February

data. There have been a significant number of large-scale and damaging data breaches over the past few years which have exposed the personal information of billions of people,[36] illustrating the detrimental effect of mismanagement of personal data, especially where AI driven technology is applied. The business model of these digital platforms which provide 'free' services, where access is exchanged for personal data, has been labelled a 'critical' issue.[37] For AI technology to function efficiently, mass amounts of data are generally required to support marketable services such as consumer behaviour analysis, which may result in significant data privacy risks for consumers.

Recently, the ACCC found that the growth of today's leading digital platforms can be explained by

> a number of distinct contributing factors, including:
>
> - the transition of communications to the online world, and the rapid increase in the number of internet users in the past two decades;
> - the innovative, user-friendly services the platforms provide;
> - the role of network effects in building scale in platform user bases;
> - the ability of digital platforms to collect and harness user data for advertising purposes; and
> - the vertical and horizontal integration of platform businesses.[38]

The *Digital Platforms Inquiry* ('*DPI*'), conducted by the ACCC in 2019 and resulting in the *DPI Final Report*, examined the role and impact of digital platforms, including anti-competitive conduct, privacy concerns, copyright issues, the scope and scale of user information collected by platforms, and the risk of exploitation of consumer vulnerabilities.[39] The scope of the report was limited to digital search engines, social media platforms and other digital content aggregation platforms with its interrogation

2019) <https://www.wsj.com/articles/you-give-apps-sensitive-personal-information-then-they-tell-facebook-11550851636>; Geoffrey A Fowler, 'I Found Your Data. It's for Sale', *The Washington Post* (online, 18 July 2019) <https://www.washingtonpost.com/technology/2019/07/18/i-found-your-data-its-sale/>; Carly Minsky, 'Is Consumer Protection Legislation Fit for Purpose?', *Financial Times* (online, 19 November 2019) <https://www.ft.com/content/3901dd14-ca55-11e9-af46-b09e8bfe60c0>.

36 Fracassi and Magnuson (n 35) 358; Saima Salim, 'The 21 Biggest Data Breaches of 2018', *Digital Information World* (online, 19 December 2018) <https://www.digitalinformationworld.com/2018/12/biggest-data-breaches-of-2018.html>.

37 Terry Flew, 'Platforms on Trial' (2018) 46(2) *InterMEDIA* 24, 27.

38 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 43.

39 Ibid 1.

squarely focused on Google and Facebook,[40] both being prolific users of AI driven technology. The ACCC viewed Google and Facebook's access to personal data as constituting a significant competitive advantage, emphasising 'the volume, quality, granularity, and diversity of such data',[41] which allows these companies to generate revenue and thus offer their services for free. It has been stated that large platforms such as Google and Facebook are becoming increasingly central to media and information ecosystems,[42] and that the dominance of these digital platforms has 'rendered doing business with them unavoidable for news businesses, in contrast to, say, Bing or Twitter'.[43]

One of the key findings of the *DPI Final Report* was that digital platforms generate their revenue primarily from advertising, generally by collecting and harnessing user data to capture user attention.[44] This 'highly-targeted advertising' is precipitated by the platforms' large scale data collection practices.[45] The report also identified a lack of transparency around the collection and use of consumer personal data which led to a lack of choice regarding the use of such data by these platforms, particularly the ability of these platforms to sell data to third parties.[46] One of the points emphasised by the ACCC in its report was that Google and Facebook do not compete in a dynamically competitive market and that their position in the market raises a barrier to entry for new rivals or the expansion of any existing ones.[47] This limits consumers' choice of providers of the services Google and Facebook supply as well as their ability to choose more privacy-focused services — especially because these services operate largely as a result of the 'network effect' created by data sharing between organisations.

B *Use of Personal Data and Privacy Concerns*

The *DPI Final Report* identified privacy as a major area of concern in the use of consumers' personal information and data.[48] In particular, it was found that many consumers want to be able to opt out of certain types of data practices and that, while some digital platforms give consumers the impression that they provide extensive privacy controls, not all of them afford consumers meaningful control

40 Ibid; Caron Beaton-Wells, 'Ten Things to Know about the ACCC's Digital Platforms Inquiry' (Research Paper No 834, Melbourne Legal Studies Research Papers Series, 13 August 2019) 2.

41 Beaton-Wells (n 40) 6.

42 Terry Flew and Derek Wilding, 'The Turn to Regulation in Digital Communication: The ACCC's Digital Platforms Inquiry and Australian Media Policy' (2021) 43(1) *Media, Culture and Society* 48, 49.

43 Ibid 50.

44 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 43.

45 Ibid 46.

46 Beaton-Wells (n 40) 8.

47 Ibid 6.

48 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 374.

over the collection, use and disclosure of their data.[49] As consumers have become more knowledgeable about the use of 'web cookies' tracking their usage,[50] digital platforms have broadened their development and use of other online tracking technologies such as web beacons or pixel tags, device or browser fingerprinting, facial recognition, mobile device tracking, cross-device tracking, and audio beaconing.[51] In a previous ACCC survey it was found that more than three in four digital platform users surveyed (77%) regarded the tracking of their online behaviour as a misuse of their personal information if it was used to create profiles or enable targeted advertising,[52] yet many consumers are unaware of the extent to which their personal data is being tracked. Significantly, the ACCC found that

> the existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.[53]

The report has highlighted the need for regulation to address these issues and protect consumers; however, regulators should guard against over-regulation which may limit the broader application of AI technologies, with some commentators suggesting a more 'holistic' regulatory approach.[54] Samsom Esayas and Dan Svantesson have noted that there has been increased attention on data privacy with some literature suggesting that data be considered as part of competition policy, and that '[o]ne approach gaining traction is to factor in data privacy as a non-price competition parameter'.[55]

Currently there is no right to privacy in Australia, which has contributed to the debate regarding regulation of data use.[56] Data privacy is regulated by the Australian

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49 Ibid.

50 Web cookies are a means for internet web browsers to track, personalise, and save information about each user's session, and are used to identify a user's computer when using a computer network: see *Macquarie Dictionary* (online at 7 September 2021) 'cookie' (def 3a).

51 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 388–9.

52 Rebecca Varley and Neha Bagga, *Consumer Views and Behaviours on Digital Platforms* (Final Report, November 2018) 21 <https://www.accc.gov.au/system/files/ACCC%20consumer%20survey%20-%20Consumer%20views%20and%20behaviours%20on%20digital%20platforms%2C%20Roy%20Morgan%20Research.pdf>.

53 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 374.

54 Samson Esayas and Dan Svantesson, 'Digital Platforms under Fire: What Australia Can Learn from Recent Developments in Europe' (2018) 43(4) *Alternative Law Journal* 275, 276.

55 Ibid 279.

56 Gerard Goggin et al, 'Data and Digital Rights: Recent Australian Developments' (2019) 8(1) *Internet Policy Review* 1, 6.

Privacy Principles ('APPs'),[57] which apply to any organisation or agency covered by the *Privacy Act 1988* (Cth) ('*Privacy Act*'), including government agencies and certain large or industry specific organisations. The 13 APPs govern standards, rights and obligations around: 'the collection, use and disclosure of personal information'; 'an organisation or agency's governance and accountability'; 'integrity and correction of personal information'; and 'the rights of individuals to access their personal information'.[58] Although the APPs regulate the use of personal information by certain large organisations, there is no provision for individuals to sue for breach of any of these principles, and it has been suggested that privacy and data protection in Australia is being addressed at a legislative level 'in a piecemeal way'.[59] Consumers are limited to the right to complain to the relevant organisation and then to the Office of the Australian Information Commissioner.[60]

C *The Consumer Data Right Legislation*

In addition to digital platforms such as Google and Facebook, financial technology companies in particular have been identified as '[u]sing a combination of big data, artificial intelligence and mobile computing' to become more efficient providers,[61] which may impact on consumers' ability to control their data. In Australia, the Commonwealth government has introduced the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) — commonly known as Consumer Data Right ('CDR') legislation — with a view to ensuring that consumers own their data.[62] Consumer data rights are rights of consumers to direct a supplier (such as their bank) to share information held about themselves with other suppliers for the purposes that they have authorised.[63] The legislation was the result of the Commonwealth government's *Review into Open Banking* in 2017,[64] and the Productivity Commission's report on *Data Availability and Use*,[65] which found that there was exponential growth in data and its use in the digital economy which put existing data protection frameworks in

57 See: *Privacy Act 1988* (Cth) sch 1; 'Australian Privacy Principles', *Office of the Australian Information Commissioner* (Web Page) <https://www.oaic.gov.au/privacy/australian-privacy-principles> ('APP').

58 APP (n 57).

59 Goggin et al (n 56) 8.

60 Ibid 6.

61 Fracassi and Magnuson (n 35) 332.

62 Ibid 371.

63 See 'Consumer Data Right', *Australian Government: The Treasury* (Web Page) <https://treasury.gov.au/consumer-data-right>.

64 Australian Government, *Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-For-web-1.pdf>.

65 Productivity Commission (Cth), *Data Availability and Use* (Inquiry Report No 82, 31 March 2017) <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>.

need of reform.[66] In particular, one of the conclusions of the report on the state of the banking sector in Australia and how consumer data rights can be implemented was that 'aggressive new regulation' was required.[67] The resulting CDR legislation effectively introduced a right for Australian consumers to control their data and have greater capacity to intervene in the growing data economy.[68]

Prior to the CDR legislation, the only legislation that regulated privacy and data protection in Australia was the *Privacy Act*. Australian law had previously only focused on protecting 'personal information' under the APPs, which was in contrast to the EU protection of 'personal data'.[69] The *Privacy Act* defines 'personal information' as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable';[70] however, the definition was called into question after the decision in *Privacy Commissioner v Telstra Corporation Ltd*,[71] which ultimately made no specific determination about whether metadata could be included as personal information.[72] As noted below, the Australian approach in CDR regulation of data now aligns with the European framework in relation to data rights, allowing Australian consumers to control their data in the marketplace.[73]

Although the CDR is intended to apply a framework to the entire Australian economy (whereas the EU approach is sector by sector),[74] it has been determined that the CDR will first apply to the banking sector, followed by the energy sector.[75] The telecommunications sector is currently proposed to follow after implementation of the CDR in the energy sector.[76] It has been noted that the CDR, while giving individuals the right to data portability, does not confer rights to privacy generally.[77] James Meese,

66 Samson Yoseph Esayas and Angela Daly, 'The Proposed Australian Consumer Data Right: A European Comparison' (2018) 2(3) *European Competition and Regulatory Law Review* 187, 195, 200.

67 Fracassi and Magnuson (n 35) 371.

68 James Meese, Punit Jagasia and James Arvanitakis, 'Citizen or Consumer? Contrasting Australia and Europe's Data Protection Policies' (2019) 8(2) *Internet Policy Review* 1, 5.

69 Ibid 4.

70 *Privacy Act 1988* (Cth) s 6 (definition of 'personal information').

71 (2017) 249 FCR 24, which was decided on an earlier definition of personal information.

72 Ibid. In particular, the Court confirmed that assessing what is 'personal information' requires 'an evaluative conclusion, depending on the facts of any individual case' and that 'even if a single piece of information is not "about an individual" it might be about the individual when combined with other information': at 36 [63] (Kenny and Edelman JJ).

73 Meese, Jagasia and Arvanitakis (n 68) 5.

74 Ibid 6.

75 'Consumer Data Right', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0>.

76 Ibid.

77 Meese, Jagasia and Arvanitakis (n 68) 9.

Punit Jagasia, and James Arvanitakis have stated that '[w]hile there are privacy safeguards in place, the ultimate value of the reform is presumed to be generated through a consumer's greater purchasing power and ability to better choose between commercial competitors'.[78]

This is in contrast to the European *GDPR* which has protection of data privacy as its key focus, as a result of its fundamental human rights approach.[79] Therefore, the CDR remains limited in scope, and at the time of writing only applies to the Australian banking sector, where CDR measures are being implemented on a gradual basis.[80]

IV Consumer Protection in the Digital Environment

In 2018, the ACCC acknowledged that algorithms are 'fundamental to getting the most out of data and play a key role in how consumers benefit from the wealth of data now available', but also expressed concern about the impact of algorithms on the consumer experience.[81] It is not surprising, therefore, that a central focus of the *DPI* was to re-evaluate the protections provided to consumers by the *ACL* in relation to the current practices of digital platforms and other businesses, particularly those involving data collection and use.[82]

The *DPI Final Report* concluded that the *ACL* contains several effective tools for addressing business practices that may give rise to consumer protection issues in the digital marketplace.[83] Indeed, all businesses subject to the *ACL*, including those that operate online or utilise AI technology:

- are prohibited from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive,[84] or from making false or misleading representations about their goods or services[85] (including incorrect or misleading statements about how user data is collected, used or shared);

78 Ibid 11.

79 Humerick (n 25).

80 See Australian Competition and Consumer Commission, 'Consumer Data Right Goes Live for Data Sharing' (Media Release No 135/20, 1 July 2020) <https://www.accc.gov.au/media-release/consumer-data-right-goes-live-for-data-sharing>.

81 Australian Competition and Consumer Commission, 'ACCC to Further Increase Enforcement Work' (Media Release No 145/18, 3 August 2018) <https://www.accc.gov.au/media-release/accc-to-further-increase-enforcement-work>.

82 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

83 Ibid 436–7.

84 *ACL* (n 3) s 18. An intention to mislead is irrelevant to the contravention of s 18: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 216. The equivalent provision in respect of misleading or deceptive conduct concerning financial services is *ASIC Act* (n 3) s 12DA. A 'financial service' includes financial products: at s 12BAB(1AA).

85 *ACL* (n 3) ch 3 pt 3-1 div 1; *ASIC Act* (n 3) s 12DB.

- are prohibited from engaging in unconscionable conduct in connection with the supply or acquisition of goods or services;[86] and

- must comply with the unfair contract term provisions of the *ACL*[87] in respect of any consumer-facing terms of use and privacy policies (which the ACCC considers to be standard form contracts).[88]

By way of future-proofing the *ACL*, the focus of the *DPI Final Report* was on the tightening or introduction of *ACL* provisions dealing with unfair contract terms and unfair trading practices.[89] This Part considers those recommendations, but first examines a range of other issues that threaten to compromise the ability of consumers to make informed choices or expose them to exploitation in the digital environment.

A *Misleading Representations*

To date, the ACCC has enjoyed considerable enforcement success in targeting businesses which make false or misleading representations online, with the 'consumer watchdog' obtaining orders against defendant companies for, inter alia, pecuniary penalties,[90] injunctions,[91] corrective notices,[92] and review or implementation of compliance programs.[93]

Recent cases discussed below have involved breaches of ss 18, 29(1)(b), 29(1)(e), 29(1)(g), 29(1)(i), 34 of the *ACL*. Those provisions prohibit: misleading or deceptive conduct (s 18); false or misleading representations that services are of a particular standard, quality, value or grade (s 29(1)(b)); false or misleading representations that purport to be a testimonial by any person relating to goods or services (s 29(1)(e)); false or misleading representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits (s 29(1)(g)); false or misleading representations with respect to the price of goods or services (s 29(1)(i)); and conduct that is liable to mislead the public as to the nature or characteristics of any services (s 34).

For example, in *Australian Competition and Consumer Commission v Service Seeking Pty Ltd*,[94] the defendant company admitted to contraventions of ss 18, 29(1)(e) and

86 *ACL* (n 3) ch 2 pt 2-2; *ASIC Act* (n 3) ss 12CA, 12CB.

87 *ACL* (n 3) ch 2 pt 2-3; *ASIC Act* (n 3) pt 2 div 2 sub-div BA.

88 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 437.

89 Ibid.

90 *ACL* (n 3) s 224. Currently, maximum penalties stand at $10 million, three times the benefit obtained from the breach, or 10% of annual turnover connected with Australia — whichever is higher.

91 Ibid s 232.

92 Ibid s 246(2)(d).

93 Ibid s 246(2)(b).

94 [2020] FCA 1040.

34 of the *ACL* in connection with its online tasking platform which allows customers to seek quotes for jobs — such as gardening, building or cleaning services — from businesses registered with the platform.[95] Specifically, Service Seeking admitted to falsely representing that thousands of reviews published on its platform were provided by customers, when in fact the reviews had been created by the businesses themselves.[96]

Similarly, in *Australian Competition and Consumer Commission v HealthEngine Pty Ltd*,[97] the defendant company admitted to breaches of ss 18, 29(1)(b), 29(1)(i), 34 of the *ACL* arising from the operation of its online healthcare directory. HealthEngine's online directory, which lists over 70,000 health practices and practitioners in Australia, allows prospective patients to search for and book appointments with health practitioners, and to access reviews from past patients about the quality and services provided by those practitioners.[98] However, HealthEngine admitted that it had declined to publish some 17,000 reviews, edited another 3,000 reviews to remove negative comments or add positive ones, and misrepresented to consumers the reasons why it had not published reviews for some health practices.[99] The company also admitted that it gave non-clinical personal information (eg, names, dates of birth, phone numbers and email addresses) of over 135,000 patients to third party private health insurance brokers without adequately disclosing this to consumers.[100] In this case, in addition to orders that HealthEngine pay a pecuniary penalty and review its compliance program, the company was also ordered to contact affected consumers to provide details of how they could regain control of their personal information.[101]

Interestingly, in the wake of key findings in the *DPI Final Report* that Google and Facebook hold substantial market power in the markets for online search services (including search advertising) and social media services (including display advertising),[102] the ACCC is vigorously challenging the conduct of these dominant platforms in Australia. For instance, in *Australian Competition and Consumer Commission v Google LLC [No 2]*,[103] the ACCC accused Google of misleading consumers in 2017–18 about the way it collected, kept, and used location data when certain Google account settings were enabled or disabled. The essence of the ACCC's argument was that Google had not properly disclosed that both the 'Location History' and 'Web & App Activity' settings had to be switched off if consumers did not want Google to collect, keep, and use their location data, and consequently that Google had dealt

95 Ibid [1]–[3] (Jackson J).

96 Ibid.

97 [2020] FCA 1203.

98 Ibid [1]–[2] (Yates J).

99 Ibid.

100 Ibid [5].

101 Ibid [6]–[8].

102 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 8–9.

103 [2021] FCA 367 ('*Google [No 2]*').

with this highly sensitive and valuable personal information without consumers consciously choosing to share their location data with Google.[104] In a decision hailed by the ACCC as 'a world-first' in consumer protection enforcement,[105] Thawley J found that Google's conduct contravened ss 18, 29(1)(g), 34 of the *ACL*.[106]

The ACCC has also launched proceedings against Google alleging it misled consumers regarding its use of their personal information online, including, in particular, on third party websites, in order to enhance the provision of targeted advertising to them.[107] The conduct in question involves a purported failure by Google to properly inform consumers, and obtain their explicit consent, when, in 2016, it began combining personal information in consumers' Google accounts with information relating to their activities on non-Google websites that used Google technology.[108]

In addition, the ACCC has instituted proceedings against Facebook for allegedly misleading consumers during 2016–17 by promoting and offering for free download the 'Onavo Protect' application as a secure means of managing their mobile data use.[109] While Facebook's representation that the virtual private network ('VPN') service provided by Onavo Protect would keep users' personal activity data 'private, protected and secret' is consistent with the general nature of VPNs, other critical information was not shared with consumers according to the ACCC.[110] Specifically, the ACCC is contending that Facebook failed to disclose that Onavo Protect also collected and aggregated significant amounts of users' data (such as records of every app they accessed and the amount of time spent using those apps) to support Facebook's own commercial purposes in identifying potential acquisition targets, thereby depriving consumers of the opportunity to make an informed

104 Ibid [2] (Thawley J).

105 Australian Competition and Consumer Commission, 'Google Misled Consumers about the Collection and Use of Location Data' (Media Release No 47/21, 16 April 2021) <https://www.accc.gov.au/media-release/google-misled-consumers-about-the-collection-and-use-of-location-data>.

106 *Google [No 2]* (n 103) [330]–[332].

107 Australian Competition and Consumer Commission, 'Correction: ACCC Alleges Google Misled Consumers about Expanded use of Personal Data' (Media Release No 152/20, 27 July 2020) <https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data>.

108 Ibid.

109 Australian Competition and Consumer Commission, 'ACCC Alleges Facebook Misled Consumers when Promoting App to "Protect" Users' Data' (Media Release No 272/20, 16 December 2020) <https://www.accc.gov.au/media-release/accc-alleges-facebook-misled-consumers-when-promoting-app-to-protect-users-data#:~:text=Articles-,ACCC%20alleges%20Facebook%20misled%20consumers%20when,to%20'protect'%20users'%20data&text=The%20ACCC%20has%20instituted%20proceedings,mobile%20app%20to%20Australian%20consumers>.

110 Ibid.

choice about the collection and use of their personal activity data by Facebook and Onavo Protect.[111]

B *Comparison Websites*

Comparison websites are intended to provide consumers with a convenient means of comparing deals offered by competing businesses,[112] but concerns continue to be expressed about whether the representations on these websites are based on price and consumer benefit, or on commissions.[113] In keeping with the discussion in the preceding section, the *ACL* is well equipped to deal with misleading or deceptive conduct, and/or false or misleading representations, on the part of these websites. This is evidenced by the recent decision in *Trivago NV v Australian Competition and Consumer Commission*,[114] where the Full Court of the Federal Court held that the hotel comparison website, Trivago, had misled consumers about cheap hotel room rates, both on its website and in television advertising, in contravention of ss 18, 29(1)(i), 34 of the *ACL*.[115]

In upholding the findings of Moshinsky J at first instance,[116] the Full Court unanimously agreed that Trivago had misled consumers by representing that its website would quickly and easily identify the cheapest rates available for a hotel room in response to a user's search when, in fact, Trivago often did not rank hotel rooms based on the cheapest rates, but primarily prioritised rankings based on which hotels paid it the highest 'cost-per-click' fee.[117] In their Honours' joint judgment, Middleton, McKerracher and Jackson JJ also held that Trivago's hotel room rate comparisons, displayed through the use of strike-through prices or text in different colours, misrepresented that the comparison was between prices offered for the same room category in the same hotel when, in fact, the comparison was often between prices offered for a standard room and a luxury room at the same hotel, thereby creating a false

111 Ibid.

112 Australian Competition and Consumer Commission, *The Comparator Website Industry in Australia: An Australian Competition and Consumer Report* (Report, November 2014) 1 <https://www.accc.gov.au/system/files/926_Comparator%20website%20industry%20in%20Australia%20report_FA.pdf>.

113 Ibid 17–19. See also Australian Competition and Consumer Commission, 'ACCC to Further Increase Enforcement Work' (Media Release No 145/18, 3 August 2018) <https://www.accc.gov.au/media-release/accc-to-further-increase-enforcement-work>.

114 (2020) 384 ALR 496 566–7 [278]–[282] ('*Trivago v ACCC*').

115 Ibid [2]–[3] (Middleton, McKerracher and Jackson JJ).

116 *Australian Competition and Consumer Commission v Trivago NV* (2020) 142 ACSR 338.

117 *Trivago v ACCC* (n 114) [220]–[221] (Middleton, McKerracher and Jackson JJ). Trivago operated its business such that it was paid by the featured hotels for each click it generated for them. This incentivised Trivago to promote the hotels that paid the highest amount per click, as opposed to those that provided the best value for customers.

impression of savings.[118] Finally, their Honours found that Trivago had misled the public to believe that its website provided an impartial, objective and transparent price comparison service in circumstances where it was not made clear to consumers that Trivago was receiving a 'cost-per-click' fee.[119]

In commenting on the decision at first instance, the ACCC said the case

> sends a strong message to comparison websites and search engines that if ranking or ordering of results is based or influenced by advertising, they should be upfront and clear with consumers about this so that consumers are not misled.[120]

Importantly, the case establishes that the *ACL*'s existing provisions are capable of applying to AI technology use, at least as long as the algorithms are easily identifiable or able to be understood.[121]

In another recent case, *Australian Competition and Consumer Commission v iSelect Ltd*,[122] the defendant company admitted liability under ss 18, 29(1)(g), 29(1)(i), 34 of the *ACL* for making false or misleading representations about the retail electricity comparison service offered through its commercial price comparison website.[123] Significantly, under iSelect's business model, the company does not charge consumers for use of its comparison service; rather, it is paid fees and commissions by its partner retailers when consumers who have used the comparison service purchase an energy plan through iSelect.

iSelect represented on its website that it would compare all electricity plans offered by its retail partners and recommend the most suitable or competitive plan.[124] However, the company admitted that it did not compare all available plans, did not necessarily recommend the most competitive plan, and did not disclose on its website that cheaper plans were available via its call centre.[125] iSelect also admitted that it had misrepresented the price of some of the plans it recommended to approximately

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118 Ibid [257].

119 Ibid [268].

120 Australian Competition and Consumer Commission, 'Trivago Misled Consumers about Hotel Room Rates' (Media Release No 4/20, 21 January 2020) <https://www.accc.gov.au/media-release/trivago-misled-consumers-about-hotel-room-rates>. See also Australian Competition and Consumer Commission, 'Trivago Loses Appeal after Misleading Consumers over Hotel Ads' (Media Release No 235/20, 4 November 2020) <https://www.accc.gov.au/media-release/trivago-loses-appeal-after-misleading-consumers-over-hotel-ads>.

121 Nathan Feiglin, 'Algorithmic Collusion and Scrutiny: Examining the Role of the ACCC's Information Gathering Powers in the Digital Era' (2020) 43(4) *University of New South Wales Law Journal* 1137, 1143.

122 [2020] FCA 1523.

123 Ibid [4] (Moshinsky J).

124 Ibid [8].

125 Ibid [10].

5,000 consumers due to a coding error which caused it to underestimate the cost of those plans by up to $140 per quarter.[126]

Trumpeting the AUD8.5 million pecuniary penalty imposed on iSelect by the Federal Court,[127] the ACCC said the case served as a salutary reminder that comparison websites must 'make it very clear if their recommendations are influenced or limited by commercial relationships' and showed that comparison websites have a responsibility to ensure 'their algorithms are correct' and to implement 'measures to prevent incorrect recommendations'.[128]

C *Personalised Pricing*

AI technology and sophisticated pricing algorithms enable businesses to mine and process vast quantities of consumer data (address, family, job, income, search history, spending habits, and more) and to set different prices for different consumers based on what the business thinks they are willing to pay.[129] This practice, known as 'personalised pricing', is simply price discrimination disguised by another name.[130] The concept is not a new one — gender-based pricing, such as charging different rates for male and female haircuts, is a longstanding example of price discrimination.[131] However, algorithms and big data create the potential for firms to 'hyper' discriminate by relying on extremely detailed information about consumers' characteristics and conduct, even moments of so-called 'willpower fatigue', to build user profiles that incorporate the likely 'reservation price' (ie, the upper limit of willingness to pay) of those consumers.[132] Uber, for instance, has acknowledged its use of

126 Ibid [12], [53].

127 Australian Competition and Consumer Commission, 'iSelect to Pay $8.5 Million for Misleading Consumers Comparing Energy Plans' (Media Release No 211/20, 8 October 2020) <https://www.accc.gov.au/media-release/iselect-to-pay-85-million-for-misleading-consumers-comparing-energy-plans>.

128 Ibid.

129 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 101.

130 Ibid.

131 'Can Robots Collude?', *Gilbert + Tobin* (Web Page, 16 November 2017) <https://www.gtlaw.com.au/insights/can-robots-collude>. Another common example is differential pricing in fast-food chains depending on the areas in which particular stores are located.

132 Maurice E Stucke and Ariel Ezrachi, 'How Digital Assistants Can Harm Our Economy, Privacy, and Democracy' (2017) 32(3) *Berkeley Technology Law Journal* 1239, 1264; Kayleen Manwaring, 'Will Emerging Information Technologies Outpace Consumer Protection Law? The Case of Digital Consumer Manipulation' (2018) 26(2) *Competition and Consumer Law Journal* 141, 145; Rhonda L Smith and Arlen Duke, 'Inequality and Competition Law' (2019) 27(1) *Competition and Consumer Law Journal* 1, 18.

'machine-learning techniques to estimate how much groups of customers are willing to shell out for a ride'.[133]

There is no provision in the *CCA* or *ACL* explicitly prohibiting personalised pricing.[134] However, there are circumstances in which the practice may raise issues for consumers,[135] for instance: where a business falsely represents that all consumers visiting a particular website will be offered the same prices for the same products;[136] or where a business is alleged to have acted unconscionably by using pricing algorithms to discriminate against vulnerable or disadvantaged consumers on the basis of real or perceived attributes 'relating to neighbourhoods, housing, job security, health and payment capacity'.[137]

With personalised pricing said to be prevalent online,[138] there is some irony in the fact that consumers concerned about the practice may find it is also AI technology — in the form of comparison websites, as discussed above — which offers the best opportunity of evening the scales. Algorithms may be used to determine the highest price a consumer is willing to pay, but they can also be used to find the lowest price at which a business is prepared to sell.[139]

D *Search Engines*

The way in which information and advertising is displayed in response to search queries on search engine results pages is attracting current scrutiny.[140] Given its 95% share of the market for general search services in Australia, this scrutiny is directed primarily at Google.[141] Google's approach is to present search results as 'organic results', which are the most relevant results for the search query according to its

133 Eric Newcomer, 'Uber Starts Charging What It Thinks You're Willing to Pay', *BloombergQuint* (online, 19 May 2017) <https://www.bloombergquint.com/markets/uber-s-future-may-rely-on-predicting-how-much-you-re-willing-to-pay>. See also Rangika Palliyaarachchi and Kanchana Kariyawasam, 'The Rise of Uber and Airbnb: The Future of Consumer Protection and the Sharing Economy' (2021) 28(1) *Competition and Consumer Law Journal* 1, 22–3.

134 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 103.

135 Such issues may include competition concerns arising from AI-led forms of pricing strategy. See below Part V for relevant discussion.

136 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 103.

137 Kate Mathews-Hunt, 'CookieConsumer: Tracking Online Behavioural Advertising in Australia' (2016) 32(1) *Computer Law and Security Review* 55, 66.

138 Stucke and Ezrachi (n 132) 1264.

139 Feiglin (n 121) 1142–3.

140 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 62.

141 Ibid.

algorithm (noting that businesses do not pay Google to appear in this category), and 'sponsored results' (ie, advertisements) for which Google has been paid.[142]

1 *Google Case*

Google's practices regarding search results first attracted the attention of the ACCC 10 years ago,[143] culminating in the High Court's decision in *Google Inc v Australian Competition and Consumer Commission*.[144] The case related to 'sponsored links' (as they were then known) that appeared on Google's search page in response to user queries. At the time, traders were able to add their competitors' names to Google's advertising algorithm ('AdWords'), to ensure that when a consumer searched for 'Harvey World Travel', for example, a sponsored link to 'STA Travel' would appear at the top of the search results under the headline 'Harvey Travel'.[145] The ACCC claimed that the sponsored links were misleading or deceptive because the link led to the advertiser's webpage rather than the webpage of the competitor whose trading or product name actually featured in the headline.[146]

In the Federal Court, Nicholas J rejected the ACCC's claim that Google had failed to differentiate between its organic search results and sponsored links, finding that ordinary and reasonable consumers who access the internet would have understood that sponsored links were advertisements and therefore different to Google's organic search results.[147] Turning to the 11 sponsored links in dispute in the case, his Honour determined that four were misleading or deceptive — the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement, and the Trading Post advertisement[148] — and that the first respondent, Trading Post Pty Ltd, one of the advertisers, was liable accordingly.[149] However, Nicholas J held that no liability attached to Google as ordinary and reasonable members of the relevant class of consumers would have understood that the search engine had not 'endorsed or

142 A Daly and A Scardamaglia, 'Profiling the Australian Google Consumer: Implications of Search Engine Practices for Consumer Law and Policy' (2017) 40(3) *Journal of Consumer Policy* 299, 302.

143 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 ('*ACCC v Trading Post*').

144 (2013) 249 CLR 435 ('*Google v ACCC*').

145 Ibid 448–9 [25]–[26], 451 [35] (French CJ, Crennan and Kiefel JJ).

146 Ibid 442 [3] (French CJ, Crennan and Kiefel JJ); *ACCC v Trading Post* (n 143) 520 [85] (Nicholas J). The action was brought under *Trade Practices Act 1974* (Cth) s 52, the predecessor provision to s 18 of the *ACL* (n 3): *ACCC v Trading Post* (n 143) 502 [1] (Nicholas J).

147 *ACCC v Trading Post* (n 143) 536 [169], [173].

148 Ibid 550–1 [237] (STA Travel); 554 [251] (Carsales); 567 [317]–[318] (Ausdog); 572–3 [341]–[342] (Trading Post).

149 Ibid 575 [354].

adopted' any of the sponsored links, but was merely 'passing on' the advertising message.[150]

In the appeals that followed, the only question in issue was whether Google had itself engaged in misleading or deceptive conduct by displaying the sponsored links.[151] Notably, the ACCC did not challenge the trial judge's finding that ordinary and reasonable users of Google's search engine would have understood the difference between sponsored links and organic results,[152] nor did Google dispute the findings at first instance that four of the sponsored links were misleading or deceptive.[153]

The Full Court of the Federal Court unanimously held that Google had engaged in misleading or deceptive conduct,[154] reasoning that the search query had been 'made of Google and it is Google's response which is misleading'.[155] The High Court unanimously reversed the Full Court's decision, holding, as the trial judge did, that Google had not engaged in misleading or deceptive conduct.[156] Chief Justice French, Crennan and Kiefel JJ concluded that 'Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading representations made by advertisers'.[157]

According to the ACCC, what is important about its case against Google is that four of the sponsored links were misleading, that the traders who used Google's AdWords algorithm to create those misleading links contravened Australia's consumer laws, and that Google subsequently ensured the practice no longer occurred.[158]

150 Ibid 542 [194].

151 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503, 504–5 [2] (Keane CJ, Jacobson and Lander JJ) ('*ACCC v Google*'); *Google v ACCC* (n 144) 441 [1] (French CJ, Crennan and Kiefel JJ).

152 *Google v ACCC* (n 144) 462–3 [81] (Hayne J). Daly and Scardamaglia have criticised this finding on the basis that it was made 'without reference to any actual evidence of Australian Internet users, their habits and their understanding of how Google operates and how it generates different kinds of search results': Daly and Scardamaglia (n 142) 305.

153 *Google v ACCC* (n 144) 462–3 [81] (Hayne J).

154 *ACCC v Google* (n 151) 524 [104] (Keane CJ, Jacobson and Lander JJ).

155 Ibid 522 [93].

156 *Google v ACCC* (n 144) 460 [73] (French CJ, Crennan and Kiefel JJ), 474 [124] (Hayne J), 491 [166] (Heydon J).

157 Ibid 442 [3] (French CJ, Crennan and Kiefel JJ). Justice Heydon took the same position: at 481 [146]. Justice Hayne found that consumers 'would not understand Google to be making the representations which the trial judge found to be misleading or deceptive': at 463 [82].

158 Sims (n 5).

2 *Increased Prominence of Non-Organic Search Results*

The renewed interest in how Google's search results are presented stems from recent research suggesting that non-organic search results (including sponsored results) now constitute an increasing proportion of overall search results at the expense of organic search results.[159] This phenomenon has been exacerbated by a growing difficulty in differentiating between organic and sponsored results, which has increased the propensity for users to click on the latter links (ie, rarely is a sponsored link identified with any prominence and in such a format that it is clearly distinguished from organic search results), thereby further contributing to the 'crowding out' of organic traffic.[160]

Websites are incentivised to be positioned as highly as possible on a search engine results page because consumers are known to focus their attention on the highest ranking search results,[161] especially the top three or four results.[162] This behaviour is even more pronounced on mobile devices.[163]

Accordingly, for businesses seeking to reach consumers online (ie, through Google Search), shifts in the balance of sponsored and organic results may lead to businesses spending more heavily on search advertising, further entrenching the presence of sponsored results.[164] This increased expenditure could harm businesses that would ordinarily use the funds for other purposes, potentially reducing their competitiveness. It could also result in consumer harm. If businesses spend more on search advertising, rather than relying on organic results, then eventually this can be expected to be passed on to consumers in the form of higher prices.[165] Moreover, exposing consumers to fewer organic results also arguably reduces the level of choice made available to them.[166]

E *Unfair Contract Terms*

The *DPI Final Report* found that bargaining power imbalance in the relationship between consumers and digital platforms means that many consumers have no real

159 Jan Krämer and Oliver Zierke, 'Paying for Prominence: The Effect of Sponsored Rankings on the Incentives to Invest in the Quality of Free Content on Dominant Online Platforms', *SSRN* (Article, 24 April 2020) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584371>.

160 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 66.

161 Ibid 64.

162 Competition & Markets Authority (UK), *Online Search: Consumer and Firm Behaviour* (Report, 7 April 2017) 86 [6.6(a)] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf>.

163 Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 65.

164 Ibid 67.

165 Ibid.

166 Ibid 68.

choice but to join or use these platforms and accept the terms of use offered.[167] Moreover, this imbalance allows digital platforms to include potentially unfair terms in their standard form contracts with consumers (or small businesses) via terms of use or privacy policies.[168]

Part 2-3 of ch 2 of the *ACL* ('unfair contract terms')[169] specifies that a 'standard form contract' — effectively a contract prepared in advance by a supplier[170] — will qualify as a 'consumer contract' if it involves the sale of goods, services or land to an individual predominantly for their personal, domestic or household use or consumption,[171] or as a 'small business contract' if the sale is to a business employing fewer than 20 persons and the upfront price payable under the contract does not exceed $300,000 (or $1 million if the contract has a duration of more than 12 months).[172] A term of such a contract will be 'unfair' if it causes a significant imbalance in the parties' rights or obligations under the contract, is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment to a party if it were to be applied.[173]

However, it is not currently a contravention of the *ACL* to include unfair terms in standard form contracts, meaning that no penalties can be sought for this conduct per se. At the time of writing, if a particular term is declared unfair, it is simply void[174] —hence the ACCC's concerns that the existing unfair contract terms regime does not provide sufficient deterrence.[175]

For this reason, the *DPI Final Report* recommended that the *ACL* be amended so that the inclusion of unfair terms in standard form consumer or small business contracts would be prohibited and attract the imposition of pecuniary penalties in order to increase the deterrent effect of the law.[176] The recommendation has implications on an economy-wide scale for all businesses that deal with consumers and small businesses, not simply those that operate on digital platforms. In responding to this

167 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 400.

168 Ibid 497.

169 See also *ASIC Act* (n 3) pt 2 div 2 sub-div BA.

170 Ibid s 12BK; *ACL* (n 3) s 27.

171 *ACL* (n 3) s 23(3); *ASIC Act* (n 3) s 12BF(3).

172 *ACL* (n 3) s 23(4); *ASIC Act* (n 3) s 12BF(4). The note to s 12BF of the *ASIC Act* (n 3) extends the application of the relevant provisions to 'insurance contracts'.

173 *ACL* (n 3) s 24(1); *ASIC Act* (n 3) s 12BG(1).

174 *ACL* (n 3) s 23(1); *ASIC Act* (n 3) s 12BF(1). However, this is now changing: see below nn 178–82 and accompanying text.

175 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 441.

176 Ibid 497.

recommendation, the Commonwealth government undertook to consult on a range of policy options to strengthen the unfair contract term protections in the *ACL*.[177]

On 9 November 2020, following a lengthy public consultation process, the Commonwealth government published a *Regulation Impact Statement*, proposing significant reforms to the existing unfair contract terms regime.[178] Key reforms included making unfair contract terms unlawful and giving courts the power to impose pecuniary penalties up to the maximum set out under the *ACL*,[179] and creating a rebuttable presumption that a contract term is unfair if the same or a substantially similar term has previously been used by the same entity or in the same industry sector and declared by a court to be unfair.[180] In the latter scenario, the term will be presumed to be unfair unless the contract-issuing party is able to adduce evidence to demonstrate why it was not unfair in the particular circumstances of the case.[181] Exposure draft legislation to give effect to these reforms was released by the Commonwealth government on 23 August 2021.[182]

F *Unfair Trading Practices*

During the course of the *DPI*, the ACCC identified a range of business practices that it considers cause significant detriment to consumers, but which do not fit neatly within the existing provisions of the *ACL*.[183] These practices evolved in conjunction with the significant growth in the amount and variety of consumer data being collected, and increased sophistication in data analysis that allows for even greater targeting of consumers by businesses.[184] The practices in question include

- businesses collecting and/or disclosing consumer data without express informed consent;

- businesses failing to comply with reasonable data security standards, including failing to put in place appropriate security measures to protect consumer data;

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177 Australian Government, *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 2019) 19 <https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf> ('*Regulating in the Digital Age*').

178 Department of the Treasury (Cth), *Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision* (Impact Statement, September 2020) <https://treasury.gov.au/publication/p2020-125938> ('*Regulation Impact Statement*').

179 Ibid 6.

180 Ibid 6–7.

181 Ibid 7.

182 Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021 (Cth): Unfair Contract Terms Reforms (Exposure Draft, 23 August 2021) <https://treasury.gov.au/sites/default/files/2021-08/c2021-201582_edl.pdf>.

183 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

184 Ibid.

- businesses unilaterally changing the terms on which goods or services are provided to consumers without reasonable notice, and without the ability for the consumer to consider the new terms, including in relation to subscription products and contracts that automatically renew;

- businesses inducing consumer consent to data collection and use by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information to enable consumers to properly consider the contract terms; and

- business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.[185]

Accordingly, the *DPI Final Report* recommended that the *ACL* be amended to include a general prohibition of unfair trading practices, noting that similar laws apply in other jurisdictions such as the United States and the EU.[186] In the ACCC's view, this is critical to addressing the problematic business practices listed above.[187]

This would be a new provision in Australia and the ACCC has recommended that the scope of any such prohibition 'be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance'.[188] At a minimum, it is expected that the new prohibition would

- protect both consumers and small businesses;

- operate in addition to existing protections, including the prohibitions against unconscionable conduct and misleading or deceptive conduct;

- focus on conduct that causes significant detriment to consumers or small businesses; and

- attract the same maximum civil pecuniary penalties that apply under most of the *ACL*.[189]

185 Ibid.

186 Ibid 498, 439–40.

187 Ibid 499. The same view is taken in JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 14.

188 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

189 Gilbert + Tobin, *Competition and Consumer Regulation: Review of 2019 and Insights for 2020* (Report, March 2020) 27 <https://www.gtlaw.com.au/insights/australian-competition-consumer-law-insights-2020> ('*Competition and Consumer Regulation*'). See also Paterson and Bant (n 187).

However, at least at the outset, the new prohibition 'would necessarily be broader and more uncertain in its application than existing protections against specific unfair practices and the case law that has developed around unconscionable conduct' and misleading or deceptive conduct.[190] This is hardly optimal when the recommendation for reform is based on the ACCC's view that existing *ACL* provisions are not fully fit for digital purpose.[191]

The Commonwealth government has noted, but not specifically responded to, this recommendation, instead referring to the separate work on this issue currently underway through Consumer Affairs Australia and New Zealand.[192]

G *Competitive Markets*

As its title makes clear, the *CCA* is both a competition regulation and consumer protection statute. The goals and functions of these two areas of law are 'mutually-reinforcing'.[193] Competition law facilitates competitive markets so as to increase consumer choice and enhance consumer welfare; and consumer law protects consumers' ability to make free and informed choices that maximise their own utility, thereby promoting competitive markets.[194] It follows that competition law is an equally critical tool in addressing the detriment to consumers of AI-driven market abuses.[195] The next Part of the article explores this issue.

V AI-Led Market Collusion

'Collusion' encompasses any form of agreement or coordination among competing firms with the objective of raising profits to a higher level than would be possible without such agreement or coordination.[196] Also known as cartel conduct, collusion is typically either explicit or tacit.[197] Explicit collusion arises where two or more industry competitors, through an express agreement, work together to control prices or output.[198] In contrast, tacit collusion occurs where rival firms, usually in markets where there are fewer competitors, engage in anti-competitive cooperative

190 Gilbert + Tobin, *Competition and Consumer Regulation* (n 189) 27.

191 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

192 Australian Government, *Regulating in the Digital Age* (n 177) 19.

193 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 139.

194 Ibid.

195 See generally Nathalie A Smuha, 'From a "Race to AI" to a "Race to AI Regulation": Regulatory Competition for Artificial Intelligence' (2021) 13(1) *Law, Innovation and Technology* 57.

196 OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (Report, 2017) 19 <http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf>.

197 Ibid.

198 Ibid.

behaviour through the apparently independent pursuit of their own profit-maximising strategies.[199]

The complexity in this area has increased in line with rapid technological developments, including wholesale computerisation of the marketplace and the proliferation of big data, which have created an environment where firms are investing in AI technologies to assist with 'pricing decisions, planning, trade, and logistics'.[200] Traditionally, humans would monitor market activity and decide whether, and by how much, to raise or lower the prices of their goods or services.[201] Now, however, with the use of pricing algorithms, AI systems can respond to changes in market conditions almost instantaneously.[202] In simple terms, if a competitor increases or decreases their prices, an algorithm can monitor this and match that price immediately.[203]

Competition authorities are able to deal with explicit collusion by adducing evidence of an agreement to cooperate which has the purpose or effect of achieving a desired anti-competitive outcome. However, tacit collusion is much more difficult to establish — suspicions may arise, but typically the only available evidence is each firm's decision to follow a particular profit-maximising strategy. This is a challenge for regulators as the business environment shifts from a world 'where executives expressly collude in smoke-filled rooms to a world where pricing algorithms continually monitor and adjust to each other's prices and market data'.[204] In particular, there are concerns that AI pricing systems could:

- facilitate, or discretely give effect to, price fixing arrangements;[205]
- make detection of price fixing arrangements more difficult;[206]
- result in supra competitive price levels for products;[207] and
- collude with other AI systems without any human interaction, either by design or as an unintended consequence of their operation.[208]

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199 Ibid.

200 Ezrachi and Stucke (n 5) 1776.

201 Ibid 1780.

202 Francisco Beneke and Mark-Oliver Mackenrodt, 'Artificial Intelligence and Collusion' (2019) 50(1) *International Review of Intellectual Property and Competition Law* 109, 111.

203 Feiglin (n 121) 1139.

204 Ezrachi and Stucke (n 5) 1782.

205 Michael S Gal, 'Algorithms as Illegal Agreements' (2019) 34(1) *Berkeley Technology Law Journal* 67, 73.

206 Emilio Calvano et al, 'Artificial Intelligence, Algorithmic Pricing and Collusion', *SSRN* (Article, December 2019) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304991>.

207 Beneke and Mackenrodt (n 202) 114.

208 Ezrachi and Stucke (n 5) 1795.

A *Types of AI-Led Collusion*

To date, four categories of AI-led collusion, whether explicit or tacit, have been identified.[209]

1 *Messenger*

The first category ('messenger')[210] is a form of explicit collusion that makes use of AI technology to execute an agreement between two or more rivals to collude.[211] What distinguishes this category from the other three is that the competitors have already agreed to form a cartel and the use of AI technology merely facilitates their collusion.[212]

An example of this can be seen in *United States v Topkins*,[213] where the defendant, David Topkins, an executive of an ecommerce seller of posters, prints and framed art, had agreed with co-conspirators to fix the prices of certain posters sold in the United States through the website, Amazon Marketplace.[214] In furtherance of the agreement, the defendant and his co-conspirators wrote computer code to implement pricing algorithms for the sale of the posters with the goal of coordinating changes to their respective prices.[215]

2 *Hub and Spoke*

The second category ('hub and spoke')[216] is another form of explicit collusion.[217] It involves a scenario where rival firms use the same third party AI pricing technology, effectively creating a hub and spoke cartel where the common algorithm becomes

209 Ibid 1782–3. The same four categories are widely cited in the competition law literature. See, eg: Rob Nicholls and Brent Fisse, 'Concerted Practices and Algorithmic Co-ordination: Does the New Australian Law Compute?' (2018) 26(1) *Competition and Consumer Law Journal* 82, 86–7; Ulrich Schwalbe, 'Algorithms, Machine Learning, and Collusion' (2019) 14(4) *Journal of Competition Law and Economics* 568, 572–5; Feiglin (n 121) 1144–5.

210 Ezrachi and Stucke (n 5) 1784.

211 Ibid 1782.

212 Nicholls and Fisse (n 209) 88.

213 United States, 'Plea Agreement', filed in *United States of America v David Topkins*, CR 15-00201 WHO, 30 April 2015 <https://www.justice.gov/atr/case-document/plea-agreement-462>.

214 Ibid 3.

215 Ibid 4. See also Department of Justice (US), 'Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution' (Press Release No 15-421, 6 April 2015) <https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace>.

216 Ezrachi and Stucke (n 5) 1784.

217 Ibid 1782.

the de facto 'hub' used by the competitors (the 'spokes') to coordinate their pricing decisions.[218]

In the same way that competitors cannot communicate directly with one another to fix prices, they also cannot use an intermediary to reach such an agreement.[219] If it can be shown that competing firms each entered into separate agreements with the supplier of a particular pricing algorithm, and did so with the common understanding that their fellow competitors would use the identical algorithm, that evidence could be used to prove collusion among the competitors.[220]

3 *Predictable Agent*

The third category ('predictable agent')[221] is more complex because it involves the unilateral development of pricing algorithms that respond to competitor action or movement in a set, or predictable, manner.[222] This can lead to tacit collusion in circumstances where each firm appreciates, when configuring its pricing algorithm, that the optimal profit maximising strategy may be to follow the price increases of their competitors when possible, and each firm is aware that if other competitors implement similar algorithms, then a pricing equilibrium may be established above competitive levels.[223]

4 *Digital Eye*

The fourth category ('digital eye'),[224] which is even more complex than the third, again involves the unilateral design of pricing algorithms.[225] The difference here, however, is that the AI system is capable of significant ML and will make autonomous pricing decisions based on trends and behaviour in the market.[226] Such AI systems may decide that following the price increases of competitors is the most effective strategy for avoiding a price war or maintaining higher profits.[227] This would mean that firms could engage in tacit collusion without any 'human intention' of doing so.[228]

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218 Nicholls and Fisse (n 209) 95.

219 United States, Note No DAF/COMP/WD(2017)41 to 127th OECD Competition Committee, *Algorithms and Collusion* (21–23 June 2017) 6 [16] <https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf> ('*Algorithms and Collusion*').

220 Ibid 6 [17].

221 Ezrachi and Stucke (n 5) 1784.

222 Nicholls and Fisse (n 209) 97.

223 Ezrachi and Stucke (n 5) 1791.

224 Ibid 1784.

225 Ibid 1783.

226 Ibid.

227 Nicholls and Fisse (n 209) 100.

228 Ezrachi and Stucke, 'Artificial Intelligence and Collusion' (n 200) 1795.

Among the four categories of AI-led collusion, the last one stands out as presenting unique challenges for regulators. On its face, the idea that firms which leave pricing decisions to efficient and autonomous AI systems can be accused of collusion may suggest regulatory overreach.[229] Moreover, there is significant debate in this area over whether AI systems are even able to engage in tacit collusion.[230]

In 2017, an Organisation for Economic Co-operation and Development ('OECD') working paper found it was not possible to conclude, at that point in time, that AI pricing systems were capable of successful autonomous collusion.[231] However, the paper also noted that its research was time sensitive and, given rapid advances in technology, may quickly become outdated.[232] Subsequently, a 2019 study found that AI pricing systems 'systematically learn to play collusive strategies',[233] but that the degree of collusion decreases as the number of competitors rises.[234] The 2019 study found that AI systems typically coordinate prices which are lower than the monopoly level, but substantially higher than the competitive pricing equilibrium.[235] Based on the findings of the 2019 study, it is arguable that firms which utilise autonomous AI pricing systems are consciously adopting a collusive strategy, or at least a strategy that will trend towards collusion.

B *Relevant CCA Provisions*

AI-led collusion is difficult to police because most forms of anti-cartel legislation regard explicit collusion as the primary concern and thus prioritise provisions prohibiting rival firms from entering into agreements to engage in anti-competitive conduct.[236] This approach has been criticised for placing too much emphasis on the intention to engage in collusive behaviour and not enough on the manifestation of collusion in the form of anti-competitive market prices.[237]

Division 1 of pt IV of the *CCA* takes the traditional path, prohibiting parties that are, or are likely to be, in competition with each other from making or giving effect to a

229 Ibid; Brent Fisse, 'Competition and Consumer Law: Algorithmic Market Coordination' (2018) 46(3) *Australian Business Law Review* 210, 212.

230 See Beneke and Mackenrodt (n 202) 110; Schwalbe (n 209) 568.

231 Ai Deng, 'When Machines Learn to Collude: Lessons from a Recent Research Study on Artificial Intelligence', *SSRN* (Article, 30 August 2017) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029662>.

232 Ibid 8.

233 Calvano et al (n 206) 3.

234 Ibid.

235 Ibid.

236 United States, *Algorithms and Collusion* (n 219) 6 [18]; Caitlin Davies and Luke Wainscoat, 'Not Quite a Cartel: Applying the New Concerted Practices Prohibition' (2017) 25(2) *Competition and Consumer Law Journal* 173, 176–8; Nicholls and Fisse (n 209) 83; Calvano et al (n 206) 2.

237 Calvano et al (n 206) 2.

'contract, arrangement or understanding' (ie, an agreement) that contains a 'cartel provision'.[238] The statutory definition of 'cartel provision' specifically includes provisions relating to fixing prices or restricting outputs in the production and supply chain.[239] However, reflecting the recommendations of the 2015 Competition Policy Review ('Harper Review'),[240] pt IV div 2 of the *CCA* goes further by prohibiting a corporation from engaging with one or more persons in a 'concerted practice' that has the purpose, effect or likely effect of substantially lessening competition.[241]

Interestingly, the Harper Review considered it unnecessary to introduce a legislative definition of 'concerted practice', reasoning that the word 'concerted' meant 'jointly arranged or carried out or co-ordinated' and hence a 'concerted practice' between market participants was 'a practice that is jointly arranged or carried out or co-ordinated between the participants'.[242] Taking this lead, the Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), which introduced the concept of concerted practices to the *CCA*, explained that

> [a] concerted practice is any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.[243]

Most commonly, concerted practices will involve a pattern of communication or cooperative behaviour between two or more businesses.[244] The concept is intended

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238 See *CCA* (n 3) ss 45AF, 44AG (offences); at ss 44AJ and 45AK (civil penalty provisions). The parallel regimes of offences and civil penalty provisions permit a 'proportionate' response by enforcement authorities, with criminal prosecution targeted at more serious cartel conduct: *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct*, signed 15 August 2014, [1.2] <https://www.cdpp.gov.au/partner-agencies/memoranda-understanding-mou>.

239 *CCA* (n 3) ss 45AD(2)–(3).

240 Ian Harper et al, *Competition Policy Review* (Final Report, Department of the Treasury (Cth), 31 March 2015) <https://treasury.gov.au/publication/p2015-cpr-final-report>. The relevant recommendation was that 'section 45 of the *CCA* be extended to cover concerted practices which have the purpose, effect or *likely* effect of substantially lessening competition': at 89–90 (emphasis added).

241 *CCA* (n 3) s 45(1)(c).

242 Harper et al (n 240) 60.

243 Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) [3.19] ('Explanatory Memorandum to Competition and Consumer Amendment Bill').

244 See 'Anti-Competitive Conduct', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-conduct>.

to capture conduct that falls short of a 'contract, arrangement or understanding'.[245] Thus, a concerted practice may exist in the absence of any direct contact between the firms (eg, where firms communicate indirectly through an intermediary), and where none of the parties is obliged, either legally or morally, to act in any particular way,[246] but the conduct must go beyond a business independently responding to market conditions.[247]

It is not possible to provide a comprehensive list of all the circumstances that might amount to a concerted practice.[248] However, a business is particularly at risk of engaging in a concerted practice if independent decision-making is replaced or reduced by cooperation with its competitors regarding strategic commercial decisions such as: how the business determines the price of its products; where and to whom the business sells its products; whether the business bids for a tender and/or the terms of a tender; or the quantity of the product the business offers or produces.[249] Additionally, while parties to a concerted practice will often be competitors or potential competitors, this is not a legislative requirement. Depending on the nature of their involvement, other parties such as suppliers, distributors, and trade or professional associations may engage in a concerted practice.[250]

Unlike cartel conduct, which is prohibited per se, concerted practices are only prohibited if they substantially lessen competition in a market. Once conduct has been found to be a concerted practice, the central issue, and the determinant of whether the relevant conduct is prohibited under s 45 of the *CCA*, is whether the concerted practice has the purpose, effect or likely effect of substantially lessening competition.[251]

From a *CCA* compliance perspective, the following advice to businesses that utilise AI pricing systems remains instructive:[252]

- Maintain detailed and up-to-date records of the objectives of the pricing algorithm, and the ways in which those objectives will be achieved. Broad statements such

245 Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.21]; Davies and Wainscoat (n 236) 176; Nicholls and Fisse (n 209) 85.

246 Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.22].

247 See 'Anti-Competitive Conduct' (n 244).

248 Australian Competition and Consumer Commission, *Guidelines on Concerted Practices* (Guidelines, 31 August 2018) [5.1] <https://www.accc.gov.au/publications/guidelines-on-concerted-practices>.

249 Ibid.

250 Ibid [2.3].

251 Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.28].

252 Gilbert + Tobin, 'Can Robots Collude?' (n 131).

as 'optimise profits' or 'save costs' should be avoided; an objective of 'lessening competition' is likely to be problematic.

- Be alert to any impact that the use of the pricing algorithm may be having on competition in the relevant market, such as changes in market shares or market concentration.

- Consider whether other firms are using the same pricing algorithm. Bespoke or proprietary algorithms are unlikely to raise a hub and spoke issue, but off-the-shelf purchases or use of a common supplier could present risks. Retaining the ability to adjust and override the algorithm's operation may help to offset this.[253]

C *Role of the ACCC*

The ACCC is well aware of the debate around AI-led collusion. In 2017, Rod Sims, the ACCC Chair, delivered a speech on 'colluding robots' which traversed both the opportunities and threats posed by AI technology.[254] The upshot of Sims' address was that, no matter how anti-competitive conduct occurred, 'a legal hook' would be found in the *CCA* allowing the ACCC to take enforcement action and no firm would be able to avoid liability by saying, "'my robot did it'".[255] In particular, Sims expressed confidence that the introduction of the concerted practices provision would, in appropriate cases, permit the ACCC to focus on considering whether there had been cooperation between competing businesses that substantially lessened competition, rather than fixating on the formalities of proving an agreement to collude.[256]

At present then, there are measures in place under Australian competition law to effectively deal with all forms of AI-led collusion. Possibly the greater challenge will be detecting the collusion in the first place.[257] In this regard, the following scenarios should at least raise 'red flags', prompting further investigation: where firms or programmers use similar algorithms, data on market conditions or case studies, even though better algorithms, sources of data or case studies are available; where firms take steps to make it easier for competitors to observe their algorithms or databases; and/or where algorithms technologically 'lock' so that they cannot be changed.[258] It will be important for the ACCC to continue to monitor this space closely over the coming years.

253 It is noted, however, that businesses may be unwilling to make any adjustments if likely to diminish their profits, which is the likely reason for AI pricing.

254 Sims (n 5).

255 Ibid.

256 Ibid.

257 Calvano et al (n 206) 2.

258 Gal (n 205) 113–15.

VI Conclusion

The far-reaching impact of online technology on consumer rights cannot be underestimated. The *DPI Final Report* has identified some of the effects on consumers of AI-led practices by large corporations such as Google and Facebook and has highlighted the need for regulation to address these issues and protect consumers. For example, the *DPI Final Report* recommended: broad reform of Australian privacy law and a strengthening of the protections in the *Privacy Act*; an enforceable code of conduct governing dealings between digital platforms and media organisations; a mandatory code on copyright enforcement by platforms; government-funded programs to improve digital media literacy in the community; and ongoing monitoring and investigation of conduct by digital platforms likely to cause consumer harm.[259] The extent to which these recommendations will be implemented remains to be seen.

The *DPI Final Report* also found an imbalance in bargaining power between consumers and digital platforms, such that many consumers were given no real choice but to join or use these platforms and accept the terms of use offered.[260] If the proposals in the Commonwealth government's *Regulation Impact Statement* relating to the treatment of unfair contract terms under the *ACL* were to be implemented, that would help to remedy this imbalance.[261] Similarly, implementation of the *DPI Final Report* recommendation that the *ACL* be amended to include a general prohibition of unfair trading practices would significantly assist in addressing problematic business practices online.[262]

In considering consumer data privacy, CDR legislation has been introduced in an attempt to provide Australian consumers with control over their personal data and align regulatory structures with the EU approach. However, the CDR legislation needs to be expanded to other sectors, as it remains limited in scope at the time of writing, only applying to the Australian banking sector where CDR measures are being implemented on a gradual basis.[263] A consultation was held in late 2020 regarding the CDR framework to be implemented in the energy sector, although it is unclear when such rules will be introduced.[264]

In relation to AI-led market collusion — another practice which adversely affects consumers — it has been noted that rapid technological developments and the

259 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 31–6.

260 Ibid 400.

261 Department of the Treasury (Cth) (n 178).

262 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

263 Australian Competition and Consumer Commission, 'Consumer Data Right Goes Live for Data Sharing' (n 80).

264 See 'CDR in the Energy Sector', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr/cdr-in-the-energy-sector>.

growth of big data have combined to create an environment where firms are investing in complex AI algorithms to assist with their pricing decisions,[265] making collusion difficult to detect. Furthermore, the increase in AI systems capable of significant ML, which are able to make autonomous pricing decisions based on trends and behaviour in the market, poses a challenge for regulators, due to the evidentiary hurdles associated with tacit collusion.[266] On a positive note, the concerted practices provision in the *CCA* would allow the ACCC to consider whether there has been cooperation between competing firms that has the purpose, effect or likely effect of substantially lessening competition, rather than focusing on the formalities of proving an agreement to collude.[267] To help refute allegations of collusion or cooperation, it has been suggested that firms could provide information on how their algorithms operate, without disclosing trade secrets or opening their computer code to public scrutiny given that specific algorithms or code itself is proprietary information.[268]

In view of the observation that customer-centric applications of ML are currently the most common use of AI,[269] and the proliferation of AI-led technology on digital platforms, there remain numerous challenges facing regulators in the area of consumer rights. The adverse impact of irresponsible use of AI-led technology on consumers' personal data and privacy rights — as well as their ability to access fair and accurate product information and choices — can be significant. The findings in the *DPI Final Report* illustrated convincingly that not only is ongoing vigilance against online abuses required in a technology driven marketplace, but also that a proactive approach by regulators has become paramount.

265 Ezrachi and Stucke (n 5) 1776.

266 See: Beneke and Mackenrodt (n 202) 110; Schwalbe (n 209) 568.

267 Sims (n 5).

268 Laura Rosenberger and Lindsay Gorman, 'How Democracies Can Win the Information Contest' (2020) 43(2) *Washington Quarterly* 75, 82.

269 Algorithmia (n 20) 2.

*Neerav Srivastava**

INDIE LAW FOR YOUTUBERS: YOUTUBE AND THE LEGALITY OF DEMONETISATION[1]

Abstract

YouTube has a de facto monopoly on over 95% of global public video communications. The YouTube business model is built on advertising revenue generated from content provided by uploaders, known as YouTubers — the vast majority of whom are small-timers. Advertising revenue is then split between the YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or content is deemed by YouTube as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. Many YouTubers complain they have been wrongly demonetised. This article argues, first, that despite foreign exclusive jurisdiction and choice of law clauses, an Australian court can hear a claim by Australian YouTubers under the *Australian Consumer Law* ('*ACL*'). Second, this article suggests that wrongful demonetisation may breach the consumer guarantees under the *ACL*, and third, that not providing reasons when a YouTuber is demonetised is unconscionable. Finally, this article concludes by arguing that clauses that allow YouTube to unilaterally vary its terms, and the monetisation policy, are unfair terms under the *ACL*.

* LLB (Lond); BCom (Accounting and Finance) (UWA); LLM (Melb); PCLL (CityU); PhD Candidate (Monash). I am grateful to Associate Professor Normann Witzleb, my PhD supervisor at the Faculty of Law, Monash University for his analytical and thoughtful guidance; to Professor Megan Richardson at the Faculty of Law, University of Melbourne for her valuable comments; to the anonymous reviewers for their thoughtful and thorough comments to the student editors Brian Lian and Bella Mickan for being so professional, thorough and passionate; and to Mr Bruno Tomat for his guidance on the practicalities of YouTube.

1 In this article, I refer to YouTubers as 'indie' (small-time) celebrities. This article discusses the ongoing dispute between YouTubers as indie celebrities, and YouTube, a powerful corporate entity. In this context, the term 'indie law' is intended to denote laws that protect weaker parties. While the relationship between YouTube and YouTubers is used to illustrate the context of a multinational platform's interaction with Australian users of the platform, nothing in this article is intended to constitute legal advice. The analysis is an academic exercise.

I Introduction

YouTube is a new ecosystem for entertainment. YouTube controls approximately 95% of public video communication in the world.[2] The new celebrities are called YouTubers. They are also known as indie celebrities, vloggers, and microcelebrities. One of the most popular YouTubers, Felix Kjellberg, known online as PewDiePie, has more than 100 million subscribers[3] and is worth approximately USD30 million.[4] While elite YouTubers can make about USD1 million a month,[5] the vast majority of YouTubers are small-timers.[6] To these smaller content creators, YouTube is a limited source of income. While YouTubers may promote a talent, what they actually sell is their personality. That authenticity is lucrative to advertisers,[7] and may be more persuasive than the haughtiness of a Hollywood endorsement.

But YouTube is the digital 'Wild West'.[8] In 2017, the first 'Adpocalypse' hit.[9] Adpocalypse is a neologism that describes how advertisers abandon YouTube when they

2 Greg Bensinger and Reed Albergotti, 'YouTube Discriminates against LGBT Content by Unfairly Culling It, Suit Alleges', *Washington Post* (online, 14 August 2019) <https://www.washingtonpost.com/technology/2019/08/14/youtube-discriminates-against-lgbt-content-by-unfairly-culling-it-suit-alleges/?noredirect=on>.

3 Julia Alexander, 'PewDiePie Becomes the First Individual YouTube Creator to Hit 100 Million Subscribers', *The Verge* (Web Page, 26 August 2019) <https://www.theverge.com/2019/8/26/20831853/pewdiepie-100-million-subscribers-youtube-tseries-competition> ('PewDiePie').

4 Dan Western, 'PewDiePie Net Worth', *Wealthy Gorilla* (Web Page) <https://wealthygorilla.com/pewdiepie-net-worth/>.

5 Tufayel Ahmed, 'How Much is Logan Paul Worth? YouTube Star behind Japan Suicide Forest Video Earns Millions from Videos', *Newsweek* (online, 3 January 2018) <https://www.newsweek.com/how-much-logan-paul-worth-youtube-star-behind-japan-suicide-forest-video-earns-769018>.

6 Matthias Funk, 'How Many YouTube Channels Are There?', *Tubics* (Blog Post, 13 November 2020) <https://www.tubics.com/blog/number-of-youtube-channels>; Mansoor Iqbal, 'YouTube Revenue and Usage Statistics (2021)', *Business of Apps* (Web Page, 14 May 2021) <https://www.businessofapps.com/data/youtube-statistics/>.

7 Anne Jerslev, 'In the Time of the Microcelebrity: Celebrification and the YouTuber Zoella' (2016) 10(1) *International Journal of Communication* 5233, 5240–5; Stuart Dredge, 'Why Are YouTube Stars So Popular?', *The Guardian* (online, 3 February 2016) <https://www.theguardian.com/technology/2016/feb/03/why-youtube-stars-popular-zoella>.

8 Mark Bergen, 'As YouTube Mulls Changes to Kids' Content, Rival Services See Opportunity', *IOL* (Web Page, 24 August 2019) <https://www.iol.co.za/business-report/international/as-youtube-mulls-changes-to-kids-content-rival-services-see-opportunity-31054726>.

9 Alex Sinke, 'YouTube's Demonetization Situation and the Adpocalypse', *Diggit Magazine* (online, 26 September 2018) <https://www.diggitmagazine.com/articles/youtubes-demonetization-situation-and-adpocalypse>.

are unhappy about YouTubers posting offensive content.[10] YouTube responded by imposing conditions for YouTubers to earn advertising revenue. This included raising the minimum threshold number of views required for a YouTuber to earn advertising revenue[11] and implementing tighter regulations on inappropriate content. YouTubers called the new conditions 'demonetisation'.[12] When a channel is demonetised, a YouTuber might not be reasons.[13] The channel may contain hundreds of videos. However, the objectionable passage(s) might not be pinpointed, nor detailed reasons given for demonetisation. The result of demonetisation policies has been that small-time YouTubers have lost what little advertising revenue they had.[14]

YouTubers understand the need to demonetise inappropriate content. Their concern is not the principle but its application. For example, YouTubers complain that demonetisation is wrongly applied to benign content,[15] that high-profile YouTubers are given more leeway, and that it lacks transparency,[16] and was introduced in a unilateral fashion.[17]

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10 Sangeet Kumar, 'The Algorithmic Dance: YouTube's Adpocalypse and the Gate-Keeping of Cultural Content on Digital Platforms' (2019) 8(2) *Internet Policy Review* 1, 2.

11 The current eligibility requirement for monetisation is 4,000 hours of 'watchtime' within the past 12 months and 1,000 subscribers: see Neal Mohan and Robert Kyncl, 'Additional Changes to the YouTube Partner Program (YPP) to Better Protect Creators', *YouTube Official Blog* (Blog Post, 16 January 2018) <https://blog.youtube/news-and-events/additional-changes-to-youtube-partner>. See also 'YouTube Partner Program Overview & Eligibility', *YouTube Help* (Web Page, August 2021) <https://support.google.com/youtube/answer/72851?hl=en>.

12 Julia Alexander, 'The Yellow $: A Comprehensive History of Demonetization and YouTube's War with Creators', *Polygon* (Blog Post, 10 May 2018) <https://www.polygon.com/2018/5/10/17268102/youtube-demonetization-pewdiepie-logan-paul-casey-neistat-philip-defranco?> ('The Yellow $').

13 Ibid.

14 Piper Thomson, 'Understanding YouTube Demonetization and the Adpocalypse', *LearnHub* (Blog Post, 14 June 2019) <https://learn.g2.com/youtube-demonetization>.

15 See, eg, Benjamin Goggin and Kat Tenbarge, '"Like You've Been Fired from Your Job": YouTubers Have Lost Thousands of Dollars after Their Channels Were Mistakenly Demonetized for Months', *Insider* (Web Page, 24 August 2019) <https://www.businessinsider.com/youtubers-entire-channels-can-get-mistakenly-demonetized-for-months-2019-8/?r=AU&IR=T>.

16 See, eg, Ford Fischer, 'I Filmed the Capitol Riots: YouTube Suspended Me for "Pushing" Election Disinformation', *Daily Dot* (Blog Post, 11 March 2021) <https://www.dailydot.com/debug/ford-fischer-youtube-primary-source/>.

17 See, eg, *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018) ('*Sweet*').

YouTubers have unionised in Germany as 'FairTube'[18] to combat demonetisation.[19] They want fairness and transparency[20] and have the backing of Europe's largest trade union.[21] FairTube recommends that YouTube:

- Publish all categories and decision criteria that affect monetization and views of videos
- Give clear explanations for individual decisions, ie, which parts of the video violated which criteria in the Advertiser-Friendly Content Guidelines
- Give YouTubers a human contact person … to explain decisions that have negative consequences for YouTubers (and fix them if they are mistaken)
- Let YouTubers contest decisions that have negative consequences
- Create an independent mediation board for resolving dispute
- [Provide for the f]ormal participation of YouTubers in important decisions, for example through a YouTuber Advisory Board.[22]

The problem with demonetisation is that it is a blunt instrument being applied by a de facto monopoly. Part II of this article introduces YouTube and demonetisation.

The YouTube contract has a proper law of contract clause in favour of Californian law and an exclusive jurisdiction clause in favour of Californian courts.[23] In light of these clauses, Part III considers whether an Australian YouTuber will be able to (a) claim under the *ACL*[24] regarding demonetisation, and (b) start proceedings in Australia. The article answers 'yes' to both (a) and (b).

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18 See 'For Fairness and Transparency in Platform Work', *FairTube* (Web Page) <https://fairtube.info/en/>.

19 Scott Bicheno, 'YouTube Creators Unionize to Combat Demonetization and Censorship', *Telecoms.com* (Blog Post, 30 July 2019) <http://telecoms.com/498779/youtube-creators-unionize-to-combat-demonetization-and-censorship>.

20 G Torbet, 'YouTubers Are Unionizing, and the Site Has 24 Days to Respond', *Engadget* (Blog Post, 29 July 2019) <https://www.engadget.com/2019/07/29/youtube-union-ig-metall>.

21 Carmin Chappell, 'Thousands of YouTubers Want to Unionize, and They've Got the Support of Europe's Largest Trade Union', *CNBC Make It* (Web Page, 6 August 2019) <https://www.cnbc.com/2019/08/06/youtubers-want-to-unionize-and-theyve-got-the-support-of-ig-metall.html>.

22 Cal Jeffrey, 'YouTubers Union Demands More Transparency Regarding Demonetization', *Techspot* (Blog Post, 29 July 2019) <https://www.techspot.com/news/81190-youtubers-union-demands-more-transparency-regarding-demonetization.html>.

23 See below n 87 and accompanying text.

24 *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').

On the assumption that the *ACL* applies, Part IV–VI considers three substantive claims that Australian YouTubers could raise under the *ACL*,[25] namely whether:

(a) wrongful demonetisation of content by YouTube contravenes the consumer guarantees in the *ACL*;[26]

(b) YouTube's lack of transparency is contrary to the statutory[27] unconscionability provisions of the *ACL*; and

(c) the clauses relied on by YouTube to introduce demonetisation unilaterally are void as unfair terms under the *ACL*.[28]

This article concludes that a claim under (a) will face challenges, whereas claims (b) and (c) may succeed. While YouTube is used for illustrative purposes in the article, the issues raised are of relevance to a new paradigm — how does Australian law protect consumers when the business is a multinational digital platform?

II YouTube: The Only Theatre in Town

YouTube was founded in 2005.[29] It was acquired by Google in 2006,[30] which positioned YouTube as a haven for indie creators who did not quite fit into Hollywood.[31]

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25 The following issues are outside the scope of this article: competition law; the livelihood of YouTubers and worker protection; whether YouTube might owe fiduciary obligations with respect to demonetisation; whether wrongful demonetisation might be defamatory; and censorship and discrimination.

26 *ACL* (n 24) pt 3.2 div 1.

27 The present analysis does not rely upon common law unconscionability under s 20 of the *ACL*. When s 21 applies, s 20(2) provides that the prohibition on common law unconscionability 'does not apply to conduct that is prohibited by s 21'. It is also unclear whether common law unconscionability can be relied upon, given that the contract is governed by Californian law. It is argued below that statutory unconscionability is a mandatory law that cannot be excluded by a proper law of contract clause. Hence, whether s 20 applies does not need to be resolved.

28 *ACL* (n 24) ss 23–8.

29 Susan Wojcicki, 'YouTube at 15: My Personal Journey and the Road Ahead', *YouTube Official Blog* (Blog Post, 14 February 2020) <https://blog.youtube/news-and-events/youtube-at-15-my-personal-journey>. The first YouTube video was uploaded to the website on 23 April 2005: see 'YouTube A to Z: #HappyBirthdayYouTube', *Google Official Blog* (Blog Post, 29 May 2015) <https://blog.google/products/youtube/youtube-to-z-happybirthdayyoutube>.

30 'Google Buys YouTube for $1.65B', *NBC News* (online, 10 October 2006) <http://www.nbcnews.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/#.XWSNk-gzY2w>.

31 Julia Alexander, 'The Golden Age of YouTube is Over', *The Verge* (Web Page, 5 April 2019) <https://www.theverge.com/2019/4/5/18287318/youtube-logan-paul-pewdiepie-demonetization-adpocalypse-premium-influencers-creators> ('The Golden Age of YouTube is Over').

In 2006, YouTube began using AdSense, that is, its proprietary algorithms, to monetise content by matching it to suitable advertisements.[32] Advertising revenue is split between the YouTuber (55%) and YouTube (45%).[33] Soon after this development, YouTubing became a career rather than a pastime for *successful* YouTubers.[34] By early 2017, one billion hours of YouTube content was watched every day.[35] In 2019, it was estimated that YouTube earned approximately USD15 billion a year in advertising revenue.[36] There are two billion YouTube users globally, and YouTube is valued between USD140–300 billion.[37]

There are about 22,000 YouTubers with one million subscribers and 230,000 YouTubers with 100,000 subscribers. Over 30 million YouTubers are small-timers with less than 100,000 subscribers. Their subscriber numbers vary from being considerable to negligible.[38]

When it comes to public video communication globally, it is fair to say that YouTube is the 'only theatre in town'. It has unparalleled power to influence and regulate content. In not adopting 'best practices' regarding demonetisation, which it may have done if it had competition, YouTube is acting like a monopoly.[39]

In Australia, the entertainment industry is growing at a 'phenomenal rate'.[40] Advertising spending is estimated to reach AUD17.3 billion in 2021.[41] The YouTube

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32 Valentin Niebler, '"YouTubers Unite": Collective Action by YouTube Content Creators' (2020) 26(2) *European Review of Labour and Research* 223, 223.

33 Karin van Es, 'YouTube's Operational Logic: "The View" as Pervasive Category' (2019) 21(3) *Television and New Media* 223, 229.

34 PewDiePie left school and became a fulltime YouTuber: see Alexander, 'The Golden Age of YouTube is Over' (n 31).

35 Cristos Goodrow, 'You Know What's Cool? A Billion Hours', *YouTube Official Blog* (Blog Post, 27 February 2017) <https://blog.youtube/news-and-events/you-know-whats-cool-billion-hours>.

36 Nick Statt, 'YouTube is a $15 Billion-a-Year Business, Google Reveals for the First Time', *The Verge* (Web Page, 3 February 2020) <https://www.theverge.com/2020/2/3/21121207/youtube-google-alphabet-earnings-revenue-first-time-reveal-q4-2019>; Iqbal (n 6).

37 Iqbal (n 6).

38 Funk (n 6).

39 Whether YouTube has infringed the anti-competitive provisions of the *Competition and Consumer Act 2010* (Cth) is not within the scope of this article.

40 Elise Tornos, '6 Key Trends in the Australian Entertainment Industry and What They Mean for Grads', *GradAustralia* (Blog Post) <https://gradaustralia.com.au/advice/6-key-trends-entertainment-industry-what-they-mean-for-grads>; 'Data Analysis Finds Australia's Entertainment Sector Is Booming', *Which-50* (Web Page, 24 April 2017) <https://which-50.com/data-analysis-finds-australias-entertainment-sector-booming>.

41 > [N]ewspaper and free-to-air television advertising are expected to shrink by 8.9 percent and 4.7 percent respectively by 2021, [and] internet advertising is expected to grow by about 10 percent … [v]ideo game revenue [is now] far outstripping revenue within the film and music industries.
>
> Tornos (n 40).

ecosystem contributed AUD608 million to the Australian economy in 2020.[42] In 2016, there were more than 100 Australian YouTubers that earned more than AUD100,000, and a further 2,000 that earned between AUD1,000–100,000.[43] To put this in context, there are over 4,000 physical performing artists in Australia.[44] In May 2021, YouTube had 16.5 million unique Australian visitors.[45] For advertising, YouTube makes use of location targeting,[46] meaning an Australian YouTuber with primarily Australian viewers is likely to have local advertisements.

A *YouTubers' Appeal to Advertisers*

YouTubers are redefining what it means to be a celebrity.[47] Many YouTubers are conventional entertainers. They sing,[48] dance,[49] perform and sometimes achieve mainstream success.[50] Most YouTubers, though, revel in being themselves. What YouTubers sell is their personality. That is what attracts audiences and advertisers. While not all YouTube content gives pleasure[51] — sometimes it provokes and exasperates, that is true of any entertainment. YouTube is considered a substitute[52] for TV, often competing and winning.[53]

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42 Oxford Economics, *A Platform for Australian Opportunity: Assessing the Economic, Societal, and Cultural Impact of YouTube in Australia* (Report, 2021) 3.

43 Johnny Lieu, 'YouTubers from This Country Are Killing It, Thanks to the Rest of the World', *Mashable* (Blog Post, 14 November 2017) <https://mashable.com/2017/11/14/australian-youtube-money-makers>.

44 Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview, 2009* (Catalogue No 4172.0, 21 October 2010).

45 David Correll, 'Social Media Statistics Australia: May 2021', *Social Media News* (Web Page, 1 June 2021) <https://www.socialmedianews.com.au/social-media-statistics-australia-may-2021/>.

46 'Target Ads to Geographic Locations', *Google Support* (Web Page) <https://support.google.com/google-ads/answer/1722043?hl=en-AU>.

47 Jerslev (n 7) 5246.

48 The globally successful singer Troye Sivan started his entertainment career as a YouTuber.

49 'Top 100 Dance YouTube Channels on Dance & Choreography Videos/Tutorials', *Feedspot* (Blog Post, 26 February 2019) <https://blog.feedspot.com/dance_youtube_channels>.

50 Issa Rae's 'Awkward Black Girl' series would eventually lead to HBO's 'Insecure': 'Insecure', *HBO* (Web Site, 2021) <https://www.hbo.com/insecure>. See also Alexander, 'PewDiePie' (n 3).

51 See David C Giles, *Twenty-First Century Celebrity: Fame in Digital Culture* (Emerald Publishing, 2018) 131–53.

52 For discussion of how economists identify 'entertainment', see ibid.

53 Chloe Kenyon, 'How YouTube Has Changed the Entertainment Industry', *Huffington Post* (online, 2 March 2017) <https://www.huffingtonpost.co.uk/chloe-kenyon/youtube-entertainment-industry_b_9360434.html>.

The traditional celebrity is on a pedestal and socially distant. YouTubers are more relatable and celebrate their ordinariness.[54] The average person is now turning off from traditional celebrities and turning toward more 'normal' celebrities.[55] Their ordinariness and 'uber-authentic' nature[56] make YouTubers attractive to advertisers.[57] When a celebrity endorses a household item, we may wonder if they know anything about it. When a YouTuber endorses a product, it feels like a recommendation by a friend.[58] It is no surprise that for teenage purchasing decisions, YouTubers are more influential than traditional celebrities.[59]

B *Demonetisation*

In 2016, a rift emerged between YouTube and YouTubers. Inappropriate content was being uploaded by YouTubers. It included child abuse material, terrorist recruitment drives,[60] and videos depicting irresponsible behaviour by prominent YouTubers. The content led advertisers to withdraw paid advertisements from the platform.

The shift to content vigilance was precipitated by three 'Adpocalypses'. The first Adpocalypse was in 2017. PewDiePie, the YouTuber with the most subscribers at the time, uploaded a video in which he paid people to hold placards with anti-Semitic language.[61] The second was in 2018. Logan Paul, then a rising YouTuber, uploaded a video showing the body of a suicide victim in the Aokigahara Forest in Japan.[62] The third was in 2019. Steven Crowder, a conservative talk show host, uploaded a video where he made homophobic comments and jokes about another political YouTuber.[63]

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54 Dredge (n 7).

55 Kenyon (n 53).

56 Giles (n 51) 131.

57 Jerslev (n 7) 5240–5; Dredge (n 7).

58 Megan Farokhmanesh, 'YouTubers Are Not Your Friends', *The Verge* (Web Page, 17 September 2018) <https://www.theverge.com/2018/9/17/17832948/youtube-youtubers-influencer-creator-fans-subscribers-friends-celebrities>.

59 Susanne Ault, 'Survey: YouTube Stars More Popular Than Mainstream Celebs among US Teens', *Variety* (online, 5 August 2014) <https://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/>.

60 Sinke (n 9).

61 Ibid.

62 James Vincent, 'YouTuber Logan Paul Apologizes for Filming Suicide Victim, Says "I Didn't Do It for Views"', *The Verge* (Web Page, 2 January 2018) <https://www.theverge.com/2018/1/2/16840176/logan-paul-suicide-video-apology-aokigahara-forest>.

63 Thomson (n 14).

In light of such poor behaviour, it is understandable that YouTube is regulating content through 'demonetisation'.[64] Following the first Adpocalypse, YouTube started regulating inappropriate content and introduced a minimum threshold of views and watchtime for monetisation.[65] When demonetised, content is not necessarily removed from the platform, but paid advertisements are withdrawn.

Under YouTube's current advertiser-friendly content guidelines,[66] inappropriate content includes:

- Inappropriate language
- Violence
- Adult content
- Shocking content
- Harmful or dangerous acts
- Hateful and derogatory content
- Recreational drugs and drug-related content
- Firearms-related content
- Controversial issues
- Sensitive events
- Incendiary and demeaning [content]
- Tobacco-related content
- Adult themes in family content.[67]

YouTube management explained that minimum threshold views were introduced in 2018 so that

64 The term 'demonetisation' was coined by YouTubers: Alexander, 'The Yellow $' (n 12).

65 Mohan and Kyncl (n 11).

66 'YouTube Channel Monetization Policies', *YouTube Help* (August 2021, Web Page) <https://support.google.com/youtube/answer/1311392?hl=en&ref_topic=9153642>.

67 'Advertiser-Friendly Content Guidelines', *YouTube Help* (Web Page) <https://support.google.com/youtube/answer/6162278>.

> bad actors can't hurt [the] ecosystem … Back in April of 2017, we set [an] eligibility requirement of 10,000 lifetime views … [and now] the eligibility requirement for monetization [is being changed] to 4,000 hours of watchtime within the past 12 months and 1,000 subscribers.[68]

This quotation does not establish a correlation between the appropriateness of content and the number of views. If anything, the Adpocalypses suggest the opposite. Salacious content by high-profile YouTubers attracts views.[69] That is not to suggest that small YouTubers should be allowed to post inappropriate content. However, smaller YouTubers may have been disproportionately punished for high-profile YouTuber misconduct. Small YouTubers allege that popular YouTubers who generate more advertising revenue receive special treatment.[70] Some of YouTube's content moderators allege that demonetisation decisions were frequently overruled when a high-profile YouTuber was involved and '[t]he operation was designed instead to protect the source of YouTube's revenue'.[71]

It is even alleged that the AdSense algorithm is designed to favour high-profile YouTubers.[72] One may surmise that YouTube does not want to incur the expense of filtering content unless there is a minimum amount of revenue involved. To an extent, that is understandable. Expense is a legitimate concern.

The impact of the Adpocalypses depended on the type of YouTuber. High-profile YouTubers were contrite, but it is not clear how much it affected them financially. Medium-sized YouTubers reportedly had their revenue substantially reduced.[73] Small-time YouTubers lost what little advertising revenue they had due to changes to the minimum hours of watchtime for monetisation.[74]

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68 Mohan and Kyncl (n 11).

69 Taylor Lorenz, 'What Won't the Nelk Boys Do?', *The New York Times* (online, 29 June 2021) <https://www.nytimes.com/2021/06/29/style/nelk-youtube.html>.

70 It has been suggested that Logan Paul was treated lightly after vlogging a dead body because of his status as a high-profile YouTuber. Two weeks after this incident, Logan Paul posted a video showing himself shooting dead rats with a taser, raising concerns that he had not learnt his lesson: see Abby Ohlheiser, 'Logan Paul Promised a "New Chapter" after Vlogging a Dead Body. Then, the YouTuber Tasered a Dead Rat', *Washington Post* (online, 10 February 2018) <https://www.washingtonpost.com/news/the-intersect/wp/2018/02/09/logan-paul-promised-a-new-chapter-after-vlogging-a-dead-body-then-the-youtuber-tasered-a-dead-rat>; Bensinger and Albergotti (n 2).

71 Elizabeth Dwoskin, 'YouTube's Arbitrary Standards: Stars Keep Making Money Even after Breaking the Rules', *Washington Post* (online, 9 August 2019) <https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/>.

72 Maximilian Henning, 'FairTube Ultimatum Expires: YouTube Invites Unions to Talks', *Netzpolitik.org* (Web Page, 26 August 2019) <https://netzpolitik.org/2019/fairtube-ultimatum-expires-youtube-invites-unions-to-talks>.

73 *Sweet* (n 17) 2 (Chen J).

74 Thomson (n 14).

C *AdSense Terms*

Demonetisation was deployed by YouTube under the AdSense contract ('AdSense Terms') with YouTubers.[75] The AdSense Terms provide:[76]

- That the AdSense policies[77] are incorporated into the contract.[78] For content to be monetised, it must meet the advertiser-friendly[79] content guidelines;
- YouTube 'may modify the AdSense Terms [and Policies] at any time'.[80] If the YouTuber does not 'agree to any modified term, [they] have to stop using the affected Services' ('Variation Term');[81]
- Either party can terminate the agreement. For a YouTuber, 10 days' notice is required;[82]
- YouTubers only receive payment when they 'have remained in compliance with the AdSense Terms (including all AdSense Policies)';[83]
- All statistics are confidential apart from the gross payment figure;[84]
- There are exclusion of liability clauses to the maximum extent permitted by law;[85]
- The YouTube Partner Program terms are incorporated into the contract. One term provides that 'YouTube is not obligated to display any advertisements alongside … videos and may determine the type and format of ads available' ('Display Term');[86] and

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75 To be clear, as mentioned later in the article, a paid YouTuber must agree to both the general terms of service and the Adsense terms. The terms of service can be found at: 'Terms of Service', *YouTube* (Web Page, 10 December 2019) <https://www.youtube.com/t/terms?preview=20191210#a2219a5f68>. Updated terms of service come into force on 5 January 2022. The analysis in this article is with respect to the AdSense Terms, and not affected by the change.

76 'AdSense Online Terms of Service', *Google AdSense* (Web Page, 2021) <https://www.google.com/adsense/new/localized-terms> ('AdSense Terms').

77 'YouTube Channel Monetization Policies' (n 66).

78 'Adsense Terms' (n 76) cl 1. See also 'Terms of Service', *YouTube AU* (Web Page, 1 June 2021) <https://www.youtube.com/static?template=terms> ('YouTube Terms of Service').

79 'Advertiser-Friendly Content Guidelines' (n 67).

80 'Adsense Terms' (n 76) cl 4.

81 Ibid.

82 Ibid cl 6.

83 Ibid cl 5.

84 Ibid cl 11.

85 Ibid cls 12–14.

86 The Display Term was considered in *Sweet* (n 17) 6 (Chen J).

- There is a proper law of contract clause in favour of Californian law and an exclusive jurisdiction clause in favour of Californian courts.[87]

III Proper Law of Contract Clauses and Exclusive Jurisdiction Clauses

The proper law of contract and exclusive jurisdiction clauses raise preliminary questions as to whether Australian YouTubers can sue under the *ACL* and in Australia. The proper law is the system of law, for example Australian, that generally governs all aspects of the contract.[88] An exclusive jurisdiction clause states which court has jurisdiction. Whether a YouTuber can sue under the *ACL* in Australia is relevant to the few thousand YouTubers in Australia. It may also have implications for YouTubers globally. In the United States' ('US') decision in *Sweet v Google Inc*[89] ('*Sweet*'), YouTubers claimed that YouTube's unilateral change to its advertising terms and AdSense practices was unfair. The claim was dismissed. It was held that YouTube was entitled to make unilateral changes to the monetisation policy. The arguments that the Display Term was unfair, unconscionable, or subject to good faith were rejected.[90] *Sweet* is discussed below,[91] but as a result of this decision, it may be

> nearly impossible for a party to successfully sue Google/YouTube based upon their monetization policy changes, as YouTube's terms and conditions read that they can change their policies at will and that YouTube has no duty to display ads …[92]

In contrast, this article concludes that the Variation and Display Terms might be void in Australia under the *ACL*.[93] If a good claim can be made in Australia, it may change the tactical and legal landscape for YouTubers globally. Regarding platforms generally, there has been a rapid growth in online consumer transactions.[94] Many

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87 Clause 15 of the 'AdSense Terms' (n 76) provides that

> [a]ll claims arising out of or relating to the AdSense Terms or the Services will be governed by California law, excluding California's conflict of laws rules, and will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA ...

See also 'YouTube Terms of Service' (n 78).

88 Neerav Srivastava, 'Heritage and Vitality: Whether the Rule in Antony Gibbs Is a Presumption' (2021) 29(2) *Insolvency Law Journal* 61, 63.

89 *Sweet* (n 17).

90 Ibid 7, 14.

91 See below Part VI.

92 Gwendolyn Seale, 'Making Sense of YouTube's Monetization Policies', *Law Journal Newsletters* (Blog Post, January 2019) <http://www.lawjournalnewsletters.com/2019/01/01/making-sense-of-youtubes-monetization-policies/>.

93 See below Part VI.

94 'The Top eCommerce Australia Statistics for 2021 and Beyond', *Commission Factory* (Web Page, 3 May 2021) <https://blog.commissionfactory.com/ecommerce-marketing/analysis-of-australian-ecommerce-statistics>.

Australian consumers are now subject to proper law of contract clauses and exclusive jurisdiction clauses, which are often in favour of US law and US courts. That means that Australian consumers are exposed to US policy. As a matter of respective policy, Australia places a greater emphasis on consumer protection,[95] whereas the US gives primacy to freedom of contract.[96] In *Sweet*, the first legal foray by YouTubers in the US was unsuccessful. In Australia, claims may succeed. Hence, the policy differences between Australian and US law are significant.

Australian consumers exist in a new paradigm where multinationals provide online products to Australian consumers pursuant to foreign proper law of contract clauses and exclusive jurisdiction clauses. In essence, this Part is stress-testing Australian consumer protections in this new paradigm. At issue is whether the *ACL* is still able to achieve its objective to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[97] The broader concern is that widespread use of proper law of contract clauses and exclusive jurisdiction clauses alienates Australian consumers from their legal system and specifically the protection of the *ACL*. Those clauses may also debase the Australian market norms and the objects of the *ACL*.

This Part argues that: (a) the proper law of contract clause in the YouTube contract will not exclude the application of the relevant provisions of the *ACL*; and (b) despite the exclusive jurisdiction clause, an Australian YouTuber will be able to claim in Australian courts.

A *Proper Law of Contract Clause*

Under the proper law of contract clause,[98] a claim for breach of contract by a YouTuber against YouTube must generally[99] be established under Californian law.[100] The main

95 Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

96 See, eg, *Sweet* (n 17). See also ibid 587.

97 *Competition and Consumer Act 2010* (Cth) s 2 ('*CCA*').

98 See above n 87 and accompanying text.

99 M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 484–8 [19.39]. Mandatory laws are a civil law concept and not well established in Australian courts. However, Australian academics are now framing the analysis in terms of 'mandatory' laws. See also Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 201.

100 An Australian court hearing the claim could still apply Californian law. In this respect, foreign law is a question of fact and is presumed to be the same as the law of the forum, ie, Australian law, unless evidence is led to the contrary: *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 131 FLR 447, 455 (Young J).

limitation on a proper law of contract clause is that it is overridden by a 'mandatory law'.[101] Mandatory laws are

> laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied.[102]

In addition, where there is a weaker party, special treatment might be called for regarding the proper law of contract clause.[103]

For an Australian YouTuber to claim under the *ACL*:

- the *ACL* must apply to demonetisation; and
- relevant provisions of the *ACL* must be mandatory laws such that they override the proper law of contract clause.

1 *Applicability of the ACL*

The *ACL* applies either extra-territorially to conduct outside Australia where the corporation[104] carries on business within Australia; or directly to conduct within Australia.[105]

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101 For a discussion of mandatory laws, see Davies et al (n 99) 484–93 [19.39]–[19.49].

102 Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 248.

103 See Alex Mills, *Party Autonomy in Private International Law* (Cambridge, 2018) ch 9; Davies et al (n 99) 470–2 [19.10], 492 [19.48]. Beyond being overridden by a mandatory law, and weaker party protection, there are other overlapping reasons for challenging a selection of the proper law of contract clause. First, the proper law of contract clause might be contrary to public policy: see generally Angus Macauley, 'Contracts against Public Policy: Contracts for Meretricious Sexual Services' (2018) 40(4) *Sydney Law Review* 527. Second, the clause might be an attempt to evade local law and therefore lacks bona fides: see *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378, 384 (Hoare J). In Canada, the selection of a proper law of contract clause has to be made in good faith: see Mills (n 103) 455.

104 In Australia, the corporation that is the contracting entity is Google Asia Pacific Pte Ltd: see 'AdSense Terms' (n 76) cl 1.

105 See Philip Clarke and Sharon Erbacher, *Australian Consumer Law: Commentary and Materials* (Lawbook, 6th ed, 2018) [17-55]:

> When considering the application of the ACL to an e-commerce transaction involving the supply … of goods or services from outside Australia to a consumer … an initial matter for consideration should always be the proper territorial characterisation … If that conduct is properly regarded as having occurred only … 'outside Australia' [under s 5(1) of the *CCA*] … the ACL will apply to that conduct if it was engaged in by a corporation 'incorporated or carrying on business within Australia' … On the other hand, if the impugned conduct can properly be regarded as having occurred inside Australia, even though some, or even most of it, took place or emanated elsewhere, then the ACL will apply directly … and s 5(1) will not be relevant.

The *ACL*'s reach is consistent with State sovereignty.[106] To apply a local law in a foreign State risks intruding on its sovereignty.[107] Under the related territorial presumption, it is presumed that a statute has territorial, and not extra-territorial, application.[108] Further, for a State to legitimately regulate extra-territorial matters, there needs to be a proper nexus, for example, carrying on business in Australia.[109]

Let us *assume* that demonetisation is conduct that occurs outside Australia. If so, for the *ACL* to apply extra-territorially, YouTube must be 'carrying on business within Australia'[110] under s 5(1) of the *Competition and Consumer Act* ('*CCA*').[111] YouTube is carrying on business in Australia: it has many customers in Australia, has been carrying on business for many years, and is earning significant revenue from Australian consumers.[112] As the *ACL* applies extra-territorially, it is not necessary to consider whether it applies directly.

Alternatively, demonetisation is conduct in Australia and the *ACL* applies directly. This is probably the better view. For the reasons discussed below,[113] it will be assumed that monetisation is a 'service', not a 'good'.[114] For Australian YouTubers to claim

106 Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray, 1834) 19–20; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 51–3. See also ibid [17-55].

107 The modern approach views contract law as a private matter between the parties, although the parties are still subject to a State's regulations. See Srivastava (n 88) 63.

108 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J); Douglas (n 99) 213; John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 83.

109 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 13–14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 40th ed, 2018) [CCA.5.120].

110 The courts take a liberal approach to this. Carrying on business was established in the following cases: *Australian Competition and Consumer Commission v Hughes* [2002] FCA 270, regarding online advertising from overseas to Australian consumers; *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309, regarding online overseas selling of bookings for the Sydney Opera House; *Australian Competition and Consumer Commission v Worldplay Services Pty Ltd* (2004) 210 ALR 562, regarding a pyramid selling scheme run from Australia but only for overseas customers; *Australian Competition and Consumer Commission v StoresOnline International Inc* [2007] FCA 1597, regarding a US-based company conducting seminars and workshops in Australia.

111 *CCA* (n 97).

112 See Oxford Economics (n 42) 3; *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647, 650–1 [4] (Edelman J) ('*Valve*').

113 See below Part IV(A).

114 *ACL* (n 24) s 2 (definition of 'services'), (definition of 'goods').

under the *ACL,* there must have been a 'supply' of services to them.[115] Section 2 of the *ACL* gives 'supply' a broad meaning, which includes to 'provide, grant or confer' — this suggests a movement from the supplier to the consumer. Such words, arguably, emphasise where the service will be supplied to the consumer, ie, Australia, rather than where it is developed. Hence, monetisation is arguably a service 'provided' in Australia to an Australian YouTuber.[116] *Australian Competition and Consumer Commission v Valve Corporation [No 3]*[117] ('*Valve*') provides analogical support for this.[118] In *Valve*, Edelman J rejected the argument that the supply of US computer software took place where the agreement took place (ie, in the US). His Honour held that the 'supply' took place where the Australian consumer downloaded the software.[119] Further, a conclusion that an overseas online service used by consumers in Australia is 'supplied' in Australia is consistent with the objects of the *ACL*.[120]

2 *Approach to Determining Mandatory Laws*

Having concluded the *ACL* applies to demonetisation, the next question is whether any of the relevant statutory provisions are mandatory such that they apply despite the proper law of contract clause. A statutory provision may expressly provide that it is a mandatory law.[121] Most statutory provisions, though, are 'generally worded'. At this point, academics differ as to how to determine whether the provision is a mandatory law.[122] Some favour the traditional classification approach:[123]

> [I]n a conflict of laws problem two separate sets of rules are applied: the choice-of-law rules of the forum, which [WR Lederman] describes as 'indicative rules' … [that] merely indicate the law which will supply the rule or rules settling

115 The relevant consumer guarantees, statutory unconscionability, and unfair contract term provisions all speak of a 'supply' of services: ibid ss 21(1)(a), 23, 60–1.

116 Ibid s 2 (definition of 'supply').

117 *Valve* (n 112).

118 Ibid 676 [137] (Edelman J). This aspect of the decision was not challenged on appeal: *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 212–13 [83] (Dowsett, McKerracher and Moshinsky JJ).

119 *Valve* (n 112) 676 [137], 684 [178]–[180].

120 *CCA* (n 97) s 2. In *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 ('*Home Ice Cream*'), the objects of the *ACL* were mentioned in the context of refusing a stay on the basis of an Illinois exclusive jurisdiction clause: at [18] (Greenwood ACJ).

121 Davies et al (n 99) 477 [19.20].

122 For a defence of the traditional approach, see: Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435; Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1. For support for the statutory interpretation approach, see Douglas (n 99) 201–28.

123 Hook (n 122) 436.

> the issue (the *lex causae*),[124] and the relevant rule or rules of the *lex causae* which [Lederman] describes as 'dispositive rules' since they will settle the issue between the parties.[125]

If Australian law is identified as the *lex causae*,[126] then Australian legislation will be applied despite the proper law of contract clause.[127]

The alternative approach is to apply ordinary statutory interpretation to determine whether a generally-worded provision applies in a mandatory fashion.[128] Ordinary statutory interpretation is the ascendant approach.[129] Martin Davies et al state:

> The *Valve* litigation may thus be understood as contemporary authority for the proposition that the purpose (or policy) of a statute may determine whether the statute should operate in a mandatory fashion. Although this proposition is controversial among private international law scholars, *in Australia, it is mandated by legislation* such as s 15AA of the *Acts Interpretation Act 1901* (Cth).[130]

For the *ACL* specifically, the traditional approach seems inappropriate. A justification for the traditional approach has been a presumption that the statute was subject to,[131] or did not consider,[132] existing choice-of-law rules. However, the *ACL* was passed in the 21st century global economy, is explicitly conscious of territorial issues,[133] and deals with 'matters of high public policy'.[134] Further, the editors of *Dicey, Morris & Collins on the Conflict of Laws* point out that the common law never developed a classification rule for consumer contracts,[135] a specific category in the *2008 Rome I*

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124 For example, formalities of marriage are governed by the law of the place of celebration.

125 Davies et al (n 99) 360 [14.2], citing WR Lederman, 'Classification in Private International Law' (1951) 29(1) *Canadian Bar Review* 3.

126 This is a term of art that refers to the law of the cause of action.

127 Keyes (n 122) 10–11: '[i]f the legislative provision … forms part of the law of the cause, then the court must apply it. If the legislative provision is not part of the law of the cause, then it is not applied'.

128 Douglas (n 99) 201–28; Davies et al (n 99) 470–2 [19.10].

129 While Hook prefers the traditional approach, she acknowledges that the statutory interpretation approach is in the ascendant: Hook (n 122) 436.

130 Davies et al (n 99) 484–8 [19.39] (emphasis added).

131 Hook (n 122) 440.

132 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423 (Dixon J), cited in Douglas (n 99) 217.

133 See, eg: *CCA* (n 97) s 5; *ACL* (n 24) s 67.

134 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528–9 [99]–[103] (Gummow J), quoting *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256 (Lockhart J).

135 AV Dicey et al, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2018) [32-008].

Convention.[136] These circumstances leave little room for a presumption that the legislature did not consider choice-of-law rules in enacting the *ACL*.[137]

3 *Provisions of ACL That Are Mandatory Laws*

Hence, ordinary statutory interpretation will be applied to determine whether an *ACL* provision is a mandatory law. The provisions that are relevant to this article are the consumer guarantees in pt 3-2 and the general protections in ch 2. There are three general protection provisions in ch 2: misleading and deceptive conduct (s 18); unconscionability (s 21); and unfair contract terms (s 23).

The consumer guarantees in pt 3-2 are expressly mandatory laws. Sections 64 and 67 state that they cannot be 'excluded, restricted, or modified' by a term of the contract, such as a proper law of contract clause.[138]

The general protections in ch 2 of the *ACL* do not have a direct equivalent to s 67. Both Davies et al[139] and Michael Douglas[140] point out that this absence may suggest that the ss 21 and 23 protections are not mandatory. Nevertheless, there are good counterarguments.

First, to be clear, ch 2 does not state that its protections are not mandatory.

Second, the general protections in ch 2 may be characterised as rights that cannot be excluded. In *Home Ice Cream Pty Ltd v McNabb Technologies LLC*[141] ('*Home Ice Cream*'), s 18 was described as a right, and it was held that an Illinois choice of law clause 'cannot operate in such a way as to deprive [the plaintiff] of the rights it seeks to agitate under the [*ACL*]'.[142] The authorities on, at least, s 18 suggest that the provision is mandatory.[143]

Third, the objects of the *ACL* support the view that the general protections under ch 2 are mandatory laws. As Davies et al explain:

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136 Under art 6(1), the default position is that a consumer contract is governed by the law of the country where the consumer is habitually resident: *Regulation 2008/593/EC of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6, art 6(1).

137 The overzealous application of the presumption may raise separation of power concerns: Douglas (n 99) 220.

138 See also *Valve* (n 112).

139 Davies et al (n 99) 492 [19.48].

140 Douglas (n 99) 226–7 makes the point with respect to s 18 of the *ACL*.

141 *Home Ice Cream* (n 120).

142 Ibid [19] (Greenwood ACJ).

143 Douglas (n 99) 203.

> [T]he policy of a 'forum statute', as understood through orthodox principles of statutory interpretation, may play a determinative role in choice-of-law problems for cross-border contracts, particularly where the contract is the result of inequality of bargaining power.[144]

The objects of the *ACL* include consumer protection. The effect of proper law of contract and exclusive jurisdiction clauses may be to alienate Australian consumers, the weaker party, from pursuing legal remedies.[145]Allowing this to proliferate would be inconsistent with the objects of the *ACL*. To use an extreme example, if the general protections under ch 2 are not mandatory laws, all businesses — Australian and international — could start using proper law of contract clauses to avoid ch 2. The result would be that ch 2 is rendered otiose. Further there is a public dimension to the ch 2 protections in the *ACL*.[146] The Australian Competition and Consumer Commission ('ACCC') has regulatory powers concerning the ch 2 protections that extend beyond the parties.

Fourth, as for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21 and 23 are directed at redressing inequality.[147] Historically, the essence of unconscionability is the exploitation of a weaker party.[148] Unfair contract terms are void under s 23 where one party is a consumer or small business.[149]

Fifth, regarding s 21 specifically on unconscionable conduct, in *Epic Games Inc v Apple Inc* ('*Epic*'), Perram J held that s 21 was a mandatory law,[150] although it is fair to add that the decision does not undertake a detailed analysis as to why. In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions. A claim under s 21 does not depend on a pre-existing

144 Davies et al (n 99) 470–2 [19.10].

145 See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963 ('*Océano*').

146 *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ) ('*Epic Appeal*').

147 See generally Mills (n 106) 460–1. See especially Davies et al (n 99) 470–2 [19.10], 492 [19.48].

148 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) ('*ASIC v Kobelt*'). For a discussion of unconscionability, see below Part V.

149 See, eg, *ACL* (n 24) ss 24–5.

150 [2021] FCA 338, [19] (Perram J) ('*Epic*'). Although the focus of the discussion was whether the competition provisions in pt IV of the *CCA* were mandatory laws, his Honour granted Apple a stay of proceedings pursuant to an exclusive jurisdiction clause. However, on appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Appeal* (n 146). That said, Perram J's conclusion that s 21 was a mandatory law was not challenged on appeal: at 76–7 [48] (Middleton, Jagot and Moshinsky JJ).

contract.[151] Analogical support for a 'conduct' analysis can be found from cases on s 18 like *Valve*.[152] In *Valve*, Edelman J reiterated that the test for s 18 is objective.[153] The effect of a contractual provision, such as a proper law of contract clause, is not to exclude s 18, but to neutralise the misleading or deceptive conduct.[154] The cases on exclusion clauses in commercial contracts reach the same conclusion.[155]

Further, unconscionability is determined by reference to 'norms' of Australian society, and is, therefore, not an issue exclusively between the parties.[156] The ACCC can apply for a court to order, for example, that pecuniary penalties be paid to the government[157] and compensation be awarded to non-parties.[158] Hence, the regulation of unconscionable conduct in Australia is also a matter of public interest. In this respect, s 21 is similar to criminal laws, which are generally understood to be strictly territorial.[159]

Sixth, it is less certain whether s 23 on unfair contract terms is a mandatory law.[160] At common law, the proper law of a contract governs all aspects of a contractual obligation, including its validity.[161] In the instant case, this suggests that the unfairness of a term would normally be determined under Californian law. As per *Sweet*, that would mean the terms are not unfair.[162] The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber.[163] An interpretation that s 23 can be disapplied by a proper law of contract clause would be problematic. As Davies et al note, a proper law of contract clause designed to evade the operation of ss 21 or 23 might

151 *ACL* (n 24) s 21(1).

152 In *Valve* (n 112) it was held that a contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of: see above Part III(A)(1).

153 *Valve* (n 112) 689 [212]–[213].

154 *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

155 Miller (n 109) [ACL.18.420].

156 *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J) ('*ACCC v Get Qualified*').

157 See *ACL* (n 24) s 224.

158 Ibid s 227.

159 Goldring (n 108) 87–8.

160 Davies et al (n 99) 492 [19.48].

161 Ibid 463 [19.1].

162 *Sweet* (n 17) 7 (Chen J).

163 Stephen Corones et al, *Comparative Analysis of Overseas Consumer Policy Frameworks* (Report, Queensland University of Technology, Faculty of Law, April 2016) [2.1.1]. For the definition of a 'small business contract', see *ACL* (n 24) s 23(4).

itself be unconscionable or unfair.[164] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 of the *ACL* also has a public interest element, in that under s 250 the ACCC, as a regulatory body, can independently apply to have a term declared unfair. Looking at both sides, it is more likely than not that s 23 continues to apply despite the proper law of contract clause.

Hence, despite the proper law of contract clause, the consumer guarantees continue to apply, and this article will assume that ss 21 and 23 apply.

B *Exclusive Jurisdiction Clause*

Even though an Australian YouTuber can rely on provisions of the *ACL* under Australian law, that point might be academic if they cannot bring proceedings in Australia. A foreign court, assuming jurisdiction under an exclusive jurisdiction clause, may or may not apply the *ACL*'s mandatory laws. So, whether an Australian YouTuber can sue locally is practically important.

Since YouTube has a presence in Australia,[165] Australian courts have jurisdiction to hear a claim by YouTubers. YouTube can apply to stay those proceedings on the basis of the exclusive jurisdiction clause. The granting of a stay of the Australian proceedings is discretionary and such an application is unlikely to succeed.[166] When a party legitimately invokes Australian jurisdiction, they have a 'prima facie right to insist upon its exercise'.[167] So, generally, for a stay to be granted, it must be shown that the Australian forum is clearly inappropriate.[168] If there is an exclusive jurisdiction clause, the position is different in that a stay should be granted unless there are strong reasons for refusing it. However, (1) YouTube's exclusive jurisdiction clause is either void; and (2) even if not void, there are strong reasons for refusing the stay.

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164 Davies et al (n 99) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.

165 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 lays down three conditions for a corporation to have a presence in Australia. First, the corporation must be carrying on business in Australia; second, the business must be carried on at some fixed or definite place; and third, the business has carried on for sufficient time: at 165 (Holland J). All three are satisfied in YouTube's case. For further discussion on the general principles of jurisdiction in personam, see ibid ch 3. For further discussion on the criteria for when a corporation has a presence in Australia, see ibid 846–52 [35.15]–[35.25]. Proceedings can be brought in the Federal Court or the Federal Circuit Court: see *CCA* (n 97) ss 138, 138A; proceedings can be brought in State or Territory courts: at s 138B.

166 Davies et al (n 99) 168 [7.38].

167 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241, 243 (Deane J) ('*Oceanic Sun Line*').

168 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. See also Davies et al (n 99) 200–3 [8.13]– [8.19].

1 *Whether the Exclusive Jurisdiction Clause Is Void*

First, with respect to a YouTuber's claim for breach of the consumer guarantees under s 64 of the *ACL*, an exclusive jurisdiction clause is void to the extent that it 'has the effect of excluding, restricting or modifying' the application, or exercise, of the consumer guarantees. Under an exclusive jurisdiction clause, a consumer must pursue proceedings overseas. It is an obligation that can be contrasted with the relative ease of small consumer claims at local bodies[169] and the emergence of virtual hearings during the COVID-19 pandemic.[170] The decision of the European Court of Justice in *Océano Grupo Editorial SA v Murciano Quintero*[171] ('*Océano*') captures the effect of an exclusive jurisdiction clause on a consumer:

> In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause [them] to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action …[172]

An average Australian YouTuber is unlikely to be able to afford to fly to California to commence legal proceedings.[173] Hence, the exclusive jurisdiction clause is likely to be void regarding a consumer guarantees claim and cannot support YouTube's stay application.

If an Australian YouTuber could afford to travel to California, the exclusive jurisdiction clause would still be void if it can be shown that the Californian court will not enforce the consumer guarantees under the *ACL*.[174] As Byrne J said in a slightly different context:

> [I]t is a hard thing to turn away a litigant [due to an exclusive jurisdiction clause] who has properly invoked the jurisdiction of this court, [with respect to proceedings under the *Trade Practices Act 1974* (Cth)] particularly where the consequence of this must be that the litigant is precluded from enforcing rights which [they enjoy] as a person engaging in commerce in Victoria by virtue of legislation in force in this jurisdiction.[175]

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169 The Victorian Civil and Administrative Tribunal, for example.

170 See, eg, local county courts. See 'Virtual Hearings and Trials', *County Court of Victoria* (Web Page, 19 May 2021) <https://www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials>.

171 *Océano* (n 145).

172 Ibid I-4972 [22].

173 As a non-Californian resident, the YouTuber also potentially faces the restriction of having a security for costs order made against them: see 14 Cal CCP Code § 1030 (1988).

174 Garnett (n 95) 581.

175 *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 705 [91] (Byrne J).

Therefore, an Australian court would hear a claim under the *ACL* for breach of consumer guarantees.

Second, as for a claim under the general protections at ch 2, the exclusive jurisdiction clause may be void under s 21 for being unconscionable,[176] or void under s 23 as an unfair term. Regarding s 21, this possibility was discussed by Perram J at first instance in *Epic*.[177]

Under s 23,[178] the exclusive jurisdiction clause is likely unfair. An exclusive jurisdiction clause has the potential to disenfranchise a YouTuber from making a claim. As per s 24, it causes a significant imbalance[179] in the parties' rights and causes detriment[180] to a YouTuber. It is hard to see why a Californian exclusive jurisdiction clause is reasonably necessary[181] for an organisation as large as YouTube with a significant revenue base in Australia.[182] This is especially so given that there are reasonable local alternatives such as arbitration. Section 25 provides examples of what might be an unfair term, one of which is a term that 'limits, or has the *effect* of limiting, one party's right to sue another party'.[183] An exclusive jurisdiction clause does not formally limit an Australian YouTuber's right to sue. As per the analysis above regarding s 64 and *Océano*, it may have that 'effect' under s 25.

Third, there are Australian dicta to the effect that a foreign court is not competent to determine issues under the *ACL*. In *Home Ice Cream*, Greenwood ACJ observed that a foreign exclusive jurisdiction clause 'does not, as a matter of principle, prevail over statutory protective provisions'.[184] Such an approach may elide the technical distinction between proper law and jurisdiction and has been criticised internationally.[185] However, as Alex Mills observes, it may be necessary to invalidate an exclusive

176 See *Epic* (n 150) [17] (Perram J).

177 In *Epic*, his Honour rejected the notion that the 'inclusion of [the exclusive jurisdiction clause] constituted unconscionable conduct on the part of Apple' since both parties were 'large corporations'. Justice Perram, however, left open the possibility that such a contractual clause could be unfair within the meaning of s 21 'if Epic were a consumer' under the *ACL*.

178 See below Part VI.

179 *ACL* (n 24) s 24(1)(a).

180 Ibid s 24(1)(c).

181 Ibid s 24(1)(b).

182 See Oxford Economics (n 42) 3.

183 *ACL* (n 24) s 25(k) (emphasis added). Under ss 267–70 of the *ACL*, an action can be brought against suppliers of services for breach of consumer guarantees. Sections 232, 236 provide for an injunction or damages respectively for a contravention of general protections under ch 2 (which includes the statutory unconscionability and unfair terms provisions).

184 *Home Ice Cream* (n 120) [19] (Greenwood ACJ).

185 Alex Mills states that 'Australian practice on this point has been viewed critically by some commentators, and there is at best mixed support for this approach in the United States': Mills (n 106).

jurisdiction clause to ensure that mandatory laws are not 'evaded through the combination' of proper law of contract clauses and exclusive jurisdiction clauses.[186]

If the exclusive jurisdiction clause is void, it will be hard for YouTube to show that the Australian forum is clearly inappropriate.

2 *If the Exclusive Jurisdiction Clause Is Not Void, an Australian Court Will Still Refuse Stay*

Even if the exclusive jurisdiction clause is not void with respect to a ch 2 claim, it seems that a stay will still be refused. Despite the exclusive jurisdiction clause, it is submitted that there are strong reasons for refusing the stay.[187]

First, there are a number of public policy reasons for refusing a stay. Even if the *ACL*'s mandatory laws do not void the exclusive jurisdiction clause, they are relevant to the discretion.[188] A mandatory law, by its nature, is likely to have a public policy dimension.[189] This is especially so where it is clear that the foreign court will not apply a mandatory Australian law.

Support for this proposition can be drawn from *Epic*.[190] Epic Games is a developer of gaming apps.[191] Apple requires that developers use Apple's in-app payment processing system, which entails a 30% commission to Apple for each payment.[192] Epic introduced its own in-app payment processing system for its popular game, Fortnite — thereby circumventing Apple's payment processing system.[193] In Australian proceedings, Epic alleged that Apple was contravening certain provisions of the *CCA*. Apple sought a stay. On appeal, the stay was refused on public policy grounds. The Full Court referred to mandatory laws being essential to the legal polity, and the need for Australia to maintain the integrity of its markets.[194] The Full Court concluded by noting that the result of proceedings might be particularly 'far reaching' in that they may adversely affect the 'state of competition in markets in Australia and very large numbers of Australians'.[195]

186 Ibid 482.

187 See *The Eleftheria* [1969] 2 All ER 641, 645 (Brandon J); *Oceanic Sun Line* (n 167) 230–1 (Brennan J), 259 (Gaudron J); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 428–9 (Dawson and McHugh JJ) ('*Akai*'); *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320, [20] (Middleton J).

188 Davies et al (n 99) 361–2 [14.5]; Mills (n 106) 482.

189 *Epic Appeal* (n 146) 72 [23], 75–6 [42] (Middleton, Jagot and Moshinsky JJ).

190 Ibid.

191 Ibid 69 [4].

192 Ibid.

193 Ibid 69–70 [7], quoting *Epic* (n 150) [6]–[7] (Perram J).

194 *Epic Appeal* (n 146) 75–6 [42], 78 [54].

195 Ibid 87 [97].

Likewise, proceedings against YouTube are far reaching and would affect a large number of Australians. It would directly affect over 1,900 Australian YouTube channels and their local and global audiences.[196] YouTube's regulation of content is not just an issue between private parties; it raises the issue as to whether YouTube's approach aligns with Australian cultural norms.[197] A number of the issues in proceedings against YouTube would go to the general integrity of the Australian market. Platform transparency — and accountability — to Australian consumers has become an important issue. So too is the enforceability of unilateral variation clauses ('UVCs') in multinational platform contracts. A more general issue arising is the extent to which Australian online consumers should be subject to US consumer law and policy, as opposed to the stronger consumer protection regime of Australia.

Ubiquitous exclusive jurisdiction clauses that effectively disenfranchise Australian consumer are inconsistent with the objects of the *ACL*, and that, in itself, is a public policy concern.[198] There are local dicta that suggest — where a consumer is involved, unlike commercial parties[199] — an exclusive jurisdiction clause does not carry much weight.[200] Most Australian YouTubers will be 'consumers' under s 3(3) of the *ACL*. Under s 3(3)(a)(ii), a person acquires goods or services as a consumer if the amount paid did not exceed AUD100,000.[201] At least two-thirds of Australian YouTubers will come under s 3(3)(a)(ii).[202] As the Supreme Court of Canada put

196 This figure only includes Australian channels that have over 100,000 subscribers: Oxford Economics (n 42) 4.

197 *Epic Appeal* (n 146) 71 [13], 84–5 [87]. See also Katherine Daniell, *The Role of National Culture in Shaping Public Policy: A Review of the Literature* (Report, HC Coombs Policy Forum, June 2014) i.

198 For a discussion of the 'offends public policy' reason against granting a stay, see *Akai* (n 187) 445 (Toohey, Gaudron and Gummow JJ), cited in LexisNexis, *Halsbury's Laws of Australia* (online at 5 August 2021), 85 Conflict of Laws, '1 Conflict of Laws in General' [85-515].

199 See: *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383, 394 [40] (Spigelman CJ, Giles JA agreeing at 404 [101], Tobias JA agreeing at 404 [102]) ('*Global Partners Fund*'), quoting *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 267 ALR 144, 166 [118] (Hammerschlag J); *Global Partners Fund* (n 199) 398 [61] (Spigelman CJ, Giles JA agreeing at 404 [101], Tobias JA agreeing at 404 [102]), quoting *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165 (Gleeson CJ).

200 *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J). Cf *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [126] (Button J): Justice Button suggested it was reasonable for a company to have one forum for its consumer disputes rather than multiple forums.

201 *Treasury Laws Amendment (Acquisition as Consumer: Financial Thresholds) Regulations 2020* (Cth) sch 1 item 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 77A.

202 Two-thirds of Australian YouTubers earn less than AUD100,000: see Lieu (n 43). That means they pay YouTube AUD45,000 (55% of their total advertising revenue) or less as part of their AdSense contract: see van Es (n 33) 229. I am assuming most of these

it in *Douez v Facebook* ('*Douez*'), not all exclusive jurisdiction clauses are created equal.[203] In refusing a stay, the majority stated:

> [C]ommercial and consumer relationships are very different … the *consumer context may provide strong reasons not to enforce forum selection clauses* … [because] the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate … [does not] suppor[t] certainty and security, [instead] forum selection clauses in consumer contracts may do 'the opposite for the millions of ordinary people who would not foresee or expect its implications'.[204]

For a YouTuber, the exclusive jurisdiction clause is part of the AdSense Terms, a standard click-wrap agreement. The AdSense Terms are presented on a 'take it or leave it' basis rather than being a 'meeting of the minds'.[205] It is most unlikely that a lay YouTuber will read the exclusive jurisdiction clause at the time of contracting.[206]

Second, a YouTuber might not be able to afford to claim overseas, and would therefore be unduly prejudiced.[207] The prejudice, as per *Océano*, is to forego a legal remedy.[208]

Third, while California has equivalent remedies, the remedies are broader in Australia.[209] For example, under s 23, Australia extends its unfair terms protection to small businesses. California does not.

YouTubers are paying YouTube less than AUD40,000 for the service. Therefore, at least two-thirds of YouTubers, with the actual ratio probably being much higher, are 'consumers' under the *ACL*. For successful YouTubers, who pay YouTube more than AUD40,000, it is questionable whether they are consumers, under *ACL* (n 24) s 3(3)(b), as demonetisation is unlikely to be a service is of a kind ordinarily for 'personal, domestic or household use'.

203 [2017] SCR 751, [33] ('*Douez*'). Unlike *Douez*, *Epic* concerned commercial parties. In *Epic*, the Federal Court considered that there was a public interest in holding a commercial party to an exclusive jurisdiction clause to which it had agreed: *Epic* (n 150) [17] (Perram J). Therefore, a YouTuber would be in a similar position to *Douez*. See also *ACCC v Get Qualified* (n 156).

204 *Douez* (n 203) [33] (emphasis added).

205 DW Greig and JLR Davis, *The Law of Contract* (Law Book, 1987) 22–3.

206 Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128, 129–30.

207 For a discussion of the 'undue prejudice' reason for refusing a stay, see *Oceanic Sun Line* (n 167), cited in LexisNexis, *Halsbury's Laws of Australia* (n 198) [85-515].

208 *Océano* (n 145) I-4972 [22].

209 For a discussion on relief in local proceedings being unavailable in foreign proceedings, see *Akai* (n 187), cited in LexisNexis, *Halsbury's Laws of Australia* (n 198) [85-515].

Finally, the exclusive jurisdiction clause does not prevent the YouTuber from bringing proceedings in Australia for a breach of the consumer guarantees. To ask the YouTuber to bring claims under ch 2 of the *ACL* in California would create a multiplicity of proceedings, which would increase costs and create a risk of inconsistent findings. It is unlikely that a judge will allow such a fragmentation.[210]

Hence, regardless of approach, it appears that where a consumer is involved, Australian courts will refuse a stay.

In summary, provided a robust approach is taken, the *ACL* will apply despite the proper law of contract clause, and an Australian court will hear a claim by an Australian YouTuber. On that basis, this article turns to consider the substantive issues.

IV Wrongful Demonetisation

The first substantive issue is whether a wrongful demonetisation contravenes the due care and skill guarantee under s 60 of the *ACL*; or, the fit for purpose guarantee under s 61.

The following examples of wrongful demonetisation by YouTube provide context. Ford Fischer is a prominent political video journalist. In 2019, Fischer's entire channel was demonetised. After seven months of advocacy and the loss of his livelihood, YouTube apologised and remonetised the channel.[211] Unlike a small-time YouTuber, presumably, Fischer was able to leverage the support of the media.[212] In a second incident involving Fischer, his recording of the 6 January 2021 storming of the United States Capitol led to his channel being demonetised because it contained 'harmful content'.[213] There were other recordings of the incident that were not demonetised.[214] YouTube again apologised for its 'over-enforcement'.[215]

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210 Davies et al (n 99) 192 [7.89].

211 Soo Youn, 'Journalist, Teacher Get Caught up in YouTube's Struggles with Hate Speech', *ABC News* (online, 7 June 2019) <https://abcnews.go.com/Business/journalist-teacher-caught-youtubes-struggles-hate-speech/story?id=63529939>. Fischer has written about his demonetisation troubles: see Fischer (n 16).

212 Youn (n 211).

213 Joseph A Wulfsohn, 'YouTube's "Dangerous" Crackdown on Independent Journalists: "It Defies All Logic and Reason"', *Fox News* (online, 4 February 2021) <https://www.foxnews.com/media/youtube-cracking-down-on-independent-journalists> ('YouTube's "Dangerous" Crackdown').

214 See, eg, Fischer (n 16).

215 Joseph A Wulfsohn, 'YouTube Remonetizes Independent Journo's Account Hours after Fox News Runs Story on Its "Dangerous" Actions', *Fox News* (online, 4 February 2021) <https://www.foxnews.com/media/youtube-remonetizes-independent-journos-account-hours-after-fox-news-runs-story-on-its-dangerous-actions>; Wulfsohn, 'YouTube's "Dangerous" Crackdown' (n 213).

A *Whether the Guarantees Are Engaged*

Both ss 60 and 61 of the *ACL* are engaged when 'a person supplies, in trade or commerce, services to a consumer'.[216] As discussed, there has been a 'supply' of monetisation to YouTubers,[217] and two-thirds of YouTubers are 'consumers'.[218]

As to whether monetisation by YouTube amounts to 'goods' or 'services' under s 2 of the *ACL*,[219] there are two products provided by YouTube. One is the online platform for uploading content that is subject to the general YouTube contract. The other is monetisation of content if the YouTuber signs the AdSense Terms. It is the latter that is the focus of this article.

The definition of 'services'[220] in the *ACL* is open-ended. 'Services' include 'rights, benefits, privileges or facilities'.[221] Examples of 'services' include 'the performance of work (including work of a professional nature)'[222] and 'the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction'.[223]

Substantively, it is submitted that monetisation is a 'service'.[224] Like the examples of 'services' in s 2 of the *ACL*, demonetisation is not a physical product. In contrast, the examples of 'goods' are mostly physical.[225] The securing of advertising revenue is a 'benefit' under s 2.[226] YouTube can be described as performing 'work':[227] monetising involves generating advertising revenue by matching an advertiser to content. There is a parallel with professional services, such as an advertising professional or an accountant.[228]

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216 *ACL* (n 24) ss 60, 61(1)(a), (2)(a).

217 Ibid s 2 (definition of 'supply'); see above Part III(A)(1).

218 *ACL* (n 24) s 3(3); see above Part III(B)(2).

219 *ACL* (n 24) s 2 (definition of 'goods'), (definition of 'services').

220 Ibid s 2 (definition of 'services').

221 Ibid s 2 (definition of 'services' para (b)).

222 Ibid s 2 (definition of 'services' para (b)(i)).

223 Ibid s 2 (definition of 'services' para (b)(ii)).

224 A complication with concluding that monetisation is a service is that s 2 of the *ACL* includes 'computer software' in the definition of 'goods': ibid s 2 (definition of 'goods' para (e)). In *Valve* (n 112) 676–7 [137]–[142], it was held that a crucial feature in determining what was 'computer software' was whether the game could be played offline. If it could be used offline, then there must have been downloaded software instructing the computer: the software was a 'good'. Monetisation is not something that an Australian YouTuber uses offline. *Valve* (n 112) is to be distinguished.

225 See *ACL* (n 24) s 2 (definition of 'goods').

226 Ibid s 2 (definition of 'services').

227 Ibid s 2 (definition of 'services' para (b)(i)).

228 See Miller (n 109) [CCA.4.500] as to broad scope of service.

YouTube can also be described as a 'facilit[y]'[229] for monetisation of 'entertainment'.[230] Further, it is relevant that the AdSense Terms describe monetisation as a '[s]ervice'.[231]

Finally, YouTube is acting in 'trade or commerce'.[232] Pursuant to s 2, YouTube is undertaking a 'business or professional activity'.[233] Further, monetisation has a commercial character in that both YouTubers and YouTube profit.[234]

Hence, the consumer guarantees are engaged. The next question is whether wrongful demonetisation contravenes the consumer guarantees.

B *Due Care and Skill Consumer Guarantee*

The due care and skill consumer guarantee under s 60 of the *ACL* is analogous to negligence.[235] That is, s 60 focuses on a breakdown in the process.

Historically, a decision like demonetisation would likely have been made by an employee. Negligence under s 60 could be proven by showing a breakdown in the decision-making process. Perhaps the training the employee received was deficient, they spent too little time reviewing the demonetised video, or they misunderstood the distinction between hate and educational videos.

In modern times, it is YouTube's algorithm, AdSense, that makes a decision to demonetise. YouTube admits that its algorithm will get better with machine learning.[236] Similarly, Facebook has acknowledged that its content moderation algorithm needs to improve.[237] Let us say that an algorithm has failed to distinguish between bigoted and anti-bigoted content in an educational video.[238] Establishing negligent demonetisation by an algorithm is not easy. Wrongful demonetisation by

229 *ACL* (n 24) s 2 (definition of 'services' para (b)(ii)).

230 Ibid.

231 'AdSense Terms' (n 76) cl 1.

232 *ACL* (n 24) s 2 (definition of 'trade or commerce' para (b)).

233 Ibid s 2 (definition of 'trade or commerce').

234 Miller (n 109) [CCA.4.540].

235 Clarke and Erbacher (n 105) [13.10]; Miller (n 109) [ACL.60.20].

236 Erik Kain, 'YouTube Wants Content Creators to Appeal Demonetization, But It's Not Always That Easy', *Forbes* (online, 18 September 2017) <https://www.forbes.com/sites/erikkain/2017/09/18/adpocalypse-2017-heres-what-you-need-to-know-about-youtubes-demonetization-troubles/#13e7192f6c26>: 'an appeal gets sent to a human reviewer and their decisions help our systems get smarter over time'.

237 Nick Clegg, 'Facebook's Response to the Oversight Board's First Set of Recommendations', *Facebook* (Web Page, 25 February 2021) <https://about.fb.com/news/2021/02/facebook-response-to-the-oversight-boards-first-set-of-recommendations/>.

238 For a discussion of how YouTube treats bigoted and anti-bigoted content: see Thomson (n 14).

an algorithm is not likely to be a misunderstanding or an idiosyncratic application of policy, as may occur with an employee. An algorithm is a set of instructions to a computer. The reason for the wrongful demonetisation is probably systemic: it lies in the design of the algorithm. The remit given by management to the programmer may have negligently omitted an educational purposes exception.[239] If included, the programmer might have failed to code for it or written negligent code. But what is negligent coding? What amounts to reasonable care when coding? These are difficult questions. Apart from the legal test, delving into an algorithm to prove negligence is a practical obstacle. While it *may* be possible to rely on *res ipsa loquitur*,[240] in order to do so the plaintiff would have to show that the only reasonable explanation for wrongful demonetisation is an algorithmic breakdown. That, in itself, is a difficult task.

Rather than a forensic examination of the algorithms, a neater argument might be that the demonetisation process as a whole is flawed. A reasonable system should have some human supervision.[241] For many matters, algorithms may raise current standards. Analysing content is not *yet* one of them. The richness of human experience can be found in YouTube content.[242] Algorithms cannot currently vet such richness to the sophistication required; something that YouTube and Facebook admit.[243] So, not having some supervision, at least at this early stage, is inherently flawed. Interestingly, YouTubers suggest using crowdsourcing[244] to vet content,[245] perhaps as a way of managing costs.

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239 For instance, if an education video regarding Nazi Germany was misclassified: see Jim Waterson, 'YouTube Blocks History Teachers Uploading Archive Videos of Hitler', *The Guardian* (online, 6 June 2019) <https://www.theguardian.com/technology/2019/jun/06/youtube-blocks-history-teachers-uploading-archive-videos-of-hitler>.

240 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 459–60 [8.7.3.4].

241 Samir Chopra and Laurence White make a similar point when discussing liability for negligent supervision of a highly autonomous agent: see Samir Chopra and Laurence F White, *A Legal Theory for Autonomous Artificial Agents* (University of Michigan Press, 2011) 132–3.

242 Consider, for instance, how eminent the Facebook Oversight Board is. See: below Part V(C); 'Ensuring Respect for Free Expression, through Independent Judgement', *Facebook Oversight Board* (Web Page, 8 April 2021) <https://oversightboard.com/>.

243 In admitting that their algorithms will improve. See also Kain (n 236); Clegg (n 237).

244 Crowdsourcing is 'outsourcing a function or activity of an organisation to a network of people in the form of an open call': see C Devece, D Palacios and B Ribeiro-Navarrete, 'The Effectiveness of Crowdsourcing in Knowledge-Based Industries: The Moderating Role of Transformational Leadership and Organisational Learning' (2019) 32(1) *Economic Research* 335, 335.

245 Mike Masnick, 'YouTube and Demonetization: The Hammer and Nail of Content Moderation', *Techdirt* (Blog Post, 26 February 2019) <https://www.techdirt.com/articles/20190223/00430041656/youtube-demonetization-hammer-nail-content-moderation.shtml>.

C *Fitness for Purpose*

The consumer guarantee under s 61 of the *ACL* that a service be reasonably fit for purpose focuses on the result and quality rather than the process.[246] When content is wrongly demonetised, the quality of the monetisation service is in issue. However, whether s 61 is breached is not straightforward. If we approach each piece of content as a discrete unit, then wrongly demonetising a discrete unit would breach s 61. The alternative approach might be that s 61 requires that the general service level of monetisation be reasonably fit for purpose. YouTube may argue that it had made only one mistake and that it was generally meeting the service level standard.[247] Neither approach is satisfactory. The former is perhaps slightly preferable if we assume that some content is more valuable than other content. It highlights how each demonetisation decision may need to be judged discretely. That a toboggan run had a history of being safe was no defence when it was not safe for the specific transaction in question.[248]

In short, there are challenges to establishing a claim under the consumer guarantees.[249]

V Lack of Transparency as Unconscionable Conduct?

The second substantive issue is whether YouTube not being sufficiently transparent about a demonetisation decision is contrary to s 21 of the *ACL*.[250] When a YouTuber's

246 See generally Gail Pearson, 'Reading Suitability against Fitness for Purpose: The Evolution of a Rule' (2010) 32(2) *Sydney Law Review* 311.

247 If looking at the general service level is acceptable, then the question becomes what level of wrongful demonetisation amounts to AdSense not being reasonably fit for purpose? There is no comparator regarding acceptable service levels. See also Stephanie Overby, Lynn Greiner and Lauren Gibbons Paul, 'What is an SLA? Best Practices for Service-Level Agreements', *CIO* (Web Page, 5 July 2017) <https://www.cio.com/article/2438284/outsourcing-sla-definitions-and-solutions.html>.

248 *Gharibian v Propix Pty Ltd* [2007] NSWCA 151, [53]–[55] (Ipp JA).

249 Unlike negligence, *ACL* (n 24) s 267(4) does not limit the type of loss for which damages can be awarded. Damages have been awarded for such matters as disappointment distress: see, eg, *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326. It may also be possible to establish a claim based on stigma and loss of reputation. If a claimant has lost standing in the LGBTIQ+ community, that may support a claim for damages: Bensinger and Albergotti (n 2).

250 As mentioned, it may be difficult to argue that common law unconscionability, under s 20 of the *ACL* (n 24), survives the choice of Californian law. As the article submits that s 21 applies, the s 20 issue does not need to be resolved. As to the difficulties of being able to rely on Australian law for the purposes of an equitable claim where another choice of law rule, eg, proper law, exists, see Dicey et al (n 135) [2-037]:

> [T]he most persuasive authority tends to suggest that where an obligation which would be equitable in domestic law arises in connection with another legal relationship for which a specific choice of law rule exists, the equitable claim will be characterised as falling within the domain of that other relationship and governed by the same law.

entire channel is demonetised, only bare reasons are given.[251] The YouTuber is not told which passage(s) is objectionable. Nor are they given detailed reasons. The main category of advertising guideline purportedly infringed will be stated, for example, harmful content, but no more. Not surprisingly, *sometimes* a YouTuber does not know why they have been demonetised.[252] On other occasions, the reasons for demonetisation are obvious, such as where a specific video has previously been identified before the entire channel is demonetised.

A *Critical Matter*

It should be appreciated that YouTube's lack of transparency is a critical matter to YouTubers. It affects their existing video portfolio, livelihood, reputation, and the contents of proposed videos. David Hoffman, a 78-year-old YouTuber, repurposes content from his Academy Award-winning film career. He complained that he had been wrongly demonetised. In response, he received no explanation:

> Unfortunately, we cannot provide you specific details on what guideline your content has violated and also, we're not able to provide you where your channel does not comply with YouTube's YouTube Partner Program terms.[253]

Graham Elwood, a left-wing political commentator, was told that his YouTube channel was demonetised because the content was 'harmful to viewers' and 'focuse[d] on controversial issues'.[254] It was not stated which passage in Elwood's bank of 2,200 videos, built up over four years, was objectionable and why. Elwood estimates a further 10–12 political commentators were demonetised at the same time.[255] Content

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See also *A-G (England and Wales) v The Queen* [2002] 2 NZLR 91, 94 [30] (Tipping J):

> It would be anomalous to apply one system of law to an issue which would have arisen at law [such as the proper law pursuant to a proper law of contract clause], and another to an issue which would have been for the Courts of Equity to deal with [such as common law unconscionability].

See also Davies et al (n 99) ch 14.

251 Alexander, 'The Yellow $' (n 12).

252 Casey Neistat captures this well: '[n]ow, imagine this. Your boss doesn't tell you what's going on, you can't get in touch with your boss, you don't know how to get in touch with your boss. You look around for answers … there are no answers': Sinke (n 9).

253 An initial email spoke of 'duplication' but did not provide any details: see Goggin and Tenbarge (n 15).

254 Mohamed Elmaazi, 'US Comedian Graham Elwood Explains How YouTube "Demonetised" His Show for Alleged "Harmful Content"', *Sputnik* (online, 13 February 2021) <https://sputniknews.com/interviews/202102131082049822-us-comedian-graham-elwood-explains-how-youtube-demonetised-his-show-for-alleged-harmful-content/>.

255 Ibid.

that amounts to a 'controversial issue'[256] is too vague when it comes to a political commentator unless it identifies an objectionable passage.

Given the chorus of complaints, YouTube has added two manual options: YouTubers can submit content to YouTube before it goes live for vetting; and they can appeal a demonetisation decision.[257] But a pre-check may mean an opportunity is lost in an era of real-time information. As for an appeal, the onus is still on YouTubers to take matters forward without the benefit of reasons or even the specific passage being identified.

B *Approach to Unconscionability*

Historically, common law unconscionability was concerned with exploiting a special disadvantage by a stronger party.[258] It only protected against the most extreme forms of unfair conduct.[259] The traditional fact pattern of unconscionable conduct involved a weaker party entering into a contract because the stronger party had exploited their special disadvantage.[260] As to what was a 'special disadvantage':

> Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, *lack of assistance or explanation where assistance or explanation is necessary*.[261]

Section 20 of the *ACL* preserves common law unconscionability.[262] Section 21 creates a parallel statutory unconscionability. Section 21(1)(a) provides that a 'person must not, in trade or commerce' in the connection with the supply of goods or services 'engage in conduct that is, in all the circumstances, unconscionable'. Section 21(4)(a) expressly states that statutory unconscionability is 'not limited by the unwritten law', and it is designed to be broader than its common law equivalent.[263]

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256 YouTube describes 'controversial issues' as 'topics that may be unsettling for our users and are often the result of human tragedy': see 'Advertiser-Friendly Content Guidelines' (n 67).

257 'Request Human Review of Videos Marked "Not Suitable for Most Advertisers"', *YouTube Help* (Web Page) <https://support.google.com/youtube/answer/7083671?hl=en#zippy=%2Chow-to-appeal>.

258 *ASIC v Kobelt* (n 148).

259 Ruth Kooy, 'Identifying Unconscionable Conduct Post-Kobelt: Is Good Faith the Key to Interpreting the Statutory Unconscionability Provisions in Australian Law?' (2021) 28(1) *Competition and Consumer Law Journal* 75, 82.

260 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

261 *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J) (emphasis added) ('*Blomley*'). In *Amadio* (n 260), Mason J affirmed these were exemplifications of when someone is at a special disadvantage: at 462.

262 *ACL* (n 24) s 20, but not with respect to conduct prohibited by s 21.

263 Kooy (n 259).

Section 22 provides a non-exhaustive list of factors to be considered when determining statutory unconscionability.[264] There remains a lack of consensus as to what statutory unconscionability means.[265] In *Australian Securities and Investments Commission v Kobelt* ('*ASIC v Kobelt*'), Gageler J laid down what is perhaps the closest to an accepted test, at least in Victoria.[266] His Honour described unconscionability as 'conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[267] Justice Gageler concluded that statutory unconscionability did not dilute the gravity of common law unconscionability but enabled it to be applied to a broader range of fact patterns.[268] In *Australian Competition and Consumer Commission v Woolworths*, it was held that the norms in question might be industry standards rather than general social norms.[269] It has been argued that courts are adhering to the rigorous standards of the traditional common law doctrine and under-utilising the s 22 factors.[270] The more recent authorities do suggest that an unconscionability claim should be approached with circumspection.[271]

C *Lack of Transparency Far Outside Societal Norms*

Nevertheless, this article submits that a lack of sufficient transparency by YouTube is unconscionable in all the circumstances. YouTubers are the weaker party, sometimes dependent on monetisation for a livelihood, and on YouTube being transparent.[272] It has been clarified that a disadvantage, disability or vulnerability of which advantage is taken is not an essential requirement under s 21 but remains relevant to an assessment of statutory unconscionability.[273] YouTube is exploiting the fact that it makes the decisions and controls the relevant information. This is perhaps what

264 *ACL* (n 24) s 22.

265 In *ASIC v Kobelt* (n 148) the High Court was split 4:3 and there was a lack of consensus as to what unconscionability means. In *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 ('*Jams 2*') the Victorian Court of Appeal stated that Gageler J's dicta should be followed unless the High Court says otherwise: at [90] (Beach, Kyrou and Hargrave JJA). Special leave to appeal to the High Court has been granted: see Transcript of Proceedings, *Stubbings v Jams 2 Pty Ltd* [2021] HCATrans 23.

266 See above n 265.

267 *ASIC v Kobelt* (n 148) 40 [92] (Gageler J).

268 Justice Gageler states Parliament's appropriation of unconscionability 'is indicative of an intention that conduct of the requisite gravity need not be found only in a fact-pattern which fits within the equitable paradigm of a stronger party to a transaction exploiting some special disadvantage which operates to impair the ability of a weaker party': ibid 39 [89].

269 [2016] FCA 1472, [129] ('*ACCC v Woolworths*').

270 Kooy (n 259) 78.

271 *ASIC v Kobelt* (n 148); *Jams 2* (n 265); *ACCC v Woolworths* (n 269).

272 Unless, of course, it is obvious why the YouTuber has been demonetised.

273 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 388 ALR 577, 578 [4], 596 [80]–[84] (Allsop CJ, Besanko and McKerracher JJ).

French J would call a 'situational' disadvantage, as opposed to a 'constitutional' one such as infirmity.[274] It is, arguably, far outside societal norms as per Gageler J in *Kobelt*.[275] It is like being subject to disciplinary sanctions at work without being told what the infringing conduct was. There is an impact asymmetry. A lack of transparency can result in a YouTuber losing their livelihood, while for YouTube it is the incremental cost of providing limited reasons regarding a decision that has *already* been made. Much of the work has already been done. That being so, it is hard to see why YouTube could not state the specific passage(s) containing the objectionable content and provide a little more than the summary 'controversial issues' in cases like Elwood's. An explanation is called for.[276]

YouTube's highhanded approach can be contrasted with an analogous situation, being Facebook's new approach to content moderation.[277] Facebook has committed to providing more details when it removes content,[278] and accepts that any enforcement measure should be proportionate. Content should not be removed if a less intrusive measure is sufficient. Facebook will be launching a transparency centre[279] and preparing transparency reports.[280] It has appointed an independent oversight board[281] to review representative cases of content removal by Facebook. Four of the first five content removal decisions reviewed by the Board were overturned.[282] While the Board upheld the decision to suspend President Trump from Facebook,

274 See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1893, [9] (French J), quoted in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 322–3 [64] (Gray, French and Stone JJ). See also Gleeson CJ's warning in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63–4 [9]–[10] ('*ACCC v Berbatis*') that the shorthand of 'situational disadvantage' should not supplant the underlying statutory principle.

275 *ASIC v Kobelt* (n 148).

276 *Blomley* (n 261) 415.

277 For further discussion on the board's decisions, see: Jacob Schulz, 'What Do the Facebook Oversight Board's First Decisions Actually Say?', *Lawfare* (Blog Post, 29 January 2021) <https://www.lawfareblog.com/what-do-facebook-oversight-boards-first-decisions-actually-say>; Evelyn Douek, 'The Oversight Board Moment You Should've Been Waiting For: Facebook Responds to the First Set of Decisions', *Lawfare* (Blog Post, 26 February 2021) <https://www.lawfareblog.com/oversight-board-moment-you-shouldve-been-waiting-facebook-responds-first-set-decisions>.

278 Douek (n 277); 'Oversight Board Selects Case on Hydroxychloroquine, Azithromycin and COVID-19', *Facebook* (Blog Post, 1 December 2020) <https://about.fb.com/news/2020/12/oversight-board-selects-case-on-hydroxychloroquine-azithromycin-and-covid-19/>.

279 Clegg (n 237).

280 'Oversight Board Selects Case on Hydroxychloroquine, Azithromycin and COVID-19' (n 278).

281 See 'Ensuring Respect for Free Expression, through Independent Judgement' (n 242).

282 Schulz (n 277).

it stated that an indefinite suspension was not appropriate.[283] Facebook is also going to improve its algorithm.[284] Given Facebook's stance, it is not open to YouTube to argue that a lack of transparency is the industry norm.[285]

The s 22(1) factors under the *ACL* and common law cases[286] support the submission that YouTube not being sufficiently transparent about a demonetisation decision might be unconscionable.

On the parties' 'relative strength' under s 22(1)(a), a small-time[287] Australian YouTuber is up against one of the largest multinational companies. YouTube is a de facto monopoly[288] and perhaps the world's first information public utility company.[289] Further, YouTubers are looking to maintain a long-term relationship with YouTube. For some, it affects their livelihood. One disputed piece of content that is considered inappropriate can result in their entire channel being demonetised.

Another disparity in the parties' 'relative strength'[290] is the information asymmetry. YouTube has the information. YouTubers are dependent on it to be transparent, placing them at a 'situational' special disadvantage. Without clarification, they will be uncertain which of their current videos might be inappropriate and how to approach future videos.

More generally, the lack of transparency by platforms is a growing issue. One of the main objectives of consumer protection is to redress information asymmetry.[291] With proper information, consumers can make informed decisions and better understand their rights. The information asymmetry between businesses and

283 See 'Case Decision 2021–001–FB–FBR', *Facebook Oversight Board* (Web Page, 11 July 2021) <https://oversightboard.com/decision/FB-691QAMHJ/>.

284 See 'Ensuring Respect for Free Expression, through Independent Judgement' (n 242).

285 In this respect, *ACCC v Woolworths* (n 269) is distinguishable in that 'price gap' was a practice in the supermarket retail industry.

286 See above Part V(B).

287 As discussed above in Part II, two-thirds of Australian YouTubers earn between AUD1,000–100,000 a year: see Lieu (n 43).

288 Bensinger and Albergotti (n 2).

289 See generally Rex Chen, Kenneth L Kraemer and Prakul Sharma, 'Google: The World's First Information Utility?' (2009) 1(1) *Business and Information Systems Engineering* 53.

290 *ACL* (n 24) s 22(1)(a).

291 It was not until the 1960s that consumers were officially recognised as a body and systemic protection of consumers began. See: John F Kennedy, 'Special Message to Congress on Protecting Consumer Interest' (Speech, 15 March 1962); Jacob Ziegel, 'The Future of Canadian Consumerism' (1973) 51(2) *Canadian Bar Review* 191, 193–4; Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market' (2000) 37(2) *Common Market Law Review* 367, 368.

consumers is growing in the 21st century digital economy.[292] A lack of transparency exacerbates this.[293]

Under s 22(1)(b), YouTube has a 'legitimate interest' in demonetising inappropriate content. Society and advertisers would like to see content regulated.[294] Further, YouTube has a legitimate interest in positioning itself to maximise revenue. However, the issue is not regulating content. It is whether YouTube has a legitimate interest in not being transparent when demonetising. The analogy of disciplinary proceedings without reasons or natural justice illustrates this distinction. If the substantive demonetisation decision is ultimately justified, the process may still be unconscionable. When even the decision is wrong, and covered up by a lack of transparency, YouTube's actions are questionable. It is worrying that YouTube has made errors[295] and that Facebook's Oversight Board overturned four of the first five decisions before it.[296]

The appeal process does not remedy the problem. It still, unfairly, expects a YouTuber to appeal without the benefit of having the objectionable passage pinpointed to them. Further, a lack of transparency cannot be justified as a cost concern given that the objectionable passage has already been identified.

Another 'legitimate interest' of YouTube might be to avoid endless debates. If so, again, a lack of transparency goes beyond what is reasonably necessary. Debates can be brought to a close.[297] Reasons may legitimise YouTube's decisions, create precedents, and lead to better future content moderation. FairTube's recommendations[298] can be seen as a win-win. Developments at Facebook are, arguably, a better model.

Although s 22(1)(c) asks 'whether [a] customer was able to understand any documents', a lack of transparency, such that there is no documentation, is more serious.

Under s 22(1)(d), the lack of transparency may be considered an 'unfair tactic'. Not having the specific objectionable passage pinpointed is unfair. Case law refers to

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292 Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016* (Report, 18 May 2016) 19–67 <https://consumer.gov.au/sites/consumer/files/2016/05/ACL-Consumer-Survey-2016.pdf>.

293 Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework* (Report No 45, 30 April 2008) 28.

294 See above Part II.

295 Goggin and Tenbarge (n 15).

296 See above Part IV.

297 One of FairTube's recommendations, for example, is an independent mediation board: Jeffrey (n 22).

298 See above Part II(B). See also 'For Fairness and Transparency in Platform Work' (n 18).

'exploitation'.[299] YouTube controls the information and the decision. A YouTuber is dependent on YouTube. Taking advantage of a lack of understanding,[300] clarity, or not providing 'assistance or explanation where necessary'[301] can amount to unconscionability.[302] As per the non-binding *United Nations Guidelines for Consumer Protection*,[303] not being transparent raises issues about fairness, accessibility of information, and whether due regard is shown to YouTubers' interest.

A related point is that demonetisation of the entire channel is a disproportionate and unfair response. Elwood's 2,200 videos were presumably acceptable for four years. Now they have all been demonetised.

Under s 22(1)(e), and a YouTuber's inability to *turn to a competitor*, YouTube is a de facto monopoly, and that aggravates the unfair tactic of not being transparent.

Regarding s 22(1)(f), small-time YouTubers allege partiality in favour of high-profile YouTubers.[304] A *difference in treatment* by YouTube supports the unconscionability claim.

Under ss 22(1)(g)–(h), legislation and applicable codes of conduct are relevant to an assessment of unconscionability.

Under ss 22(1)(j)–(k), YouTubers did not have the option to negotiate the contract, and YouTube can vary the terms unilaterally.

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299 *ACCC v Berbatis* (n 274) 63 [9].

300 *Amadio* (n 260) 477.

301 Miller (n 109) [ACL.20.60].

302 See *Wu v Ling* [2016] NSWCA 322, [95]–[110]. Although unconscionability was not established in this case, it contains discussion of the distinction between mere unawareness and improvidence on the part of the plaintiff, as opposed to when they suffer from a special disadvantage.

303 *United Nations Guidelines for Consumer Protection*, 70th sess, GA Res 70/186 (adopted 22 December 2015). Guideline IV(11) requires:

> (a) Fair and equitable treatment. Businesses should deal fairly and honestly with consumers at all stages of their relationship … (b) Commercial behaviour. Businesses … should have due regard for the interests of consumers and responsibility for upholding consumer protection … (c) Disclosure and transparency. Businesses should provide complete, accurate and not misleading information … Businesses should ensure easy access to this information … (d) Education and awareness-raising. Businesses should … develop programmes and mechanisms to assist consumers … to take informed decisions … (f) Consumer complaints and disputes. Businesses should make available complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution.

304 Goggin and Tenbarge (n 15).

Under s 22(1)(l), not providing at least limited reasons for demonetisation is contrary to good faith, a matter discussed below.[305] It is arbitrary, uncooperative, and potentially undermines the bargain.

In summary, when a channel is demonetised, it is hard to see why, when the circumstances require, the objectionable video or passage cannot be pinpointed and reasons provided. YouTube is taking unfair advantage of its monopolistic position. The impact on YouTubers can be significant, and their vulnerability is being exploited. As for remedies, an injunction[306] could require YouTube to be sufficiently transparent.[307]

VI Unilateral Changes to Contract and Contractual Discretion

The final substantive issue is whether YouTube's Variation and Display Terms are unfair terms under s 24 the *ACL*, such that demonetisation lacks a legal foundation.[308] It will be recalled that the changes in the monetisation policy resulted in small-time YouTubers losing what little ad revenue they had.[309] It affected midsize YouTubers too. Fischer and Elwood lost their income; and in *Sweet*, the plaintiff's YouTube income was reduced from USD300–500 to USD20–40 per day.[310]

Demonetisation has purportedly been introduced pursuant to the Variation or the Display Terms.[311] Under the Variation Term, YouTube can vary the terms and policies, such as content policies, at any time. A policy change constitutes a change in the terms.[312] Under the Display Term, YouTube has a discretion as to which if any advertisements to display and how they should be displayed.[313]

Section 23 applies to the AdSense contract. Section 23 provides that a term of a 'consumer contract', or 'small business contract', in a 'standard form contract' is void if it is unfair.[314] The AdSense contract is a small business standard form

305 See below Part VI(B).

306 *ACL* (n 24) s 232.

307 As above, the minimum would be transparency regarding the specific objectionable passage(s) and provision of limited reasons, including the sub-guideline infringed.

308 This article does not consider whether YouTubers are employees or independent contractors of YouTube; and whether YouTubers can make a claim on that basis.

309 See Thomson (n 7).

310 *Sweet* (n 17) [2].

311 See above Part II(C).

312 'AdSense Terms' (n 76) cl 1.

313 See above Part II(C).

314 *ACL* (n 24) ss 23(1)(a)–(b).

contract.[315] The vast majority of Australian YouTubers are probably sole traders and so the AdSense contract will meet the criterion of a 'small business contract' under s 23(4).[316] A hugely successful YouTuber might not meet the small business criterion, but they do not need the s 23 protection.[317]

On the basis that s 23 applies, we can now consider whether the Variation and Display Terms are void as unfair terms. Under s 24(1) of the *ACL,* a term is unfair if

> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term is unfair, under s 24(2) the court may take into account such matters as it thinks relevant, but it must consider the contract as a whole[318] as well as whether the term is 'transparent'.[319]

A *Variation Term*

The ACCC has targeted the use of UVCs by local businesses as unfair terms.[320] It has worked with *local* businesses to change their UVCs.[321] What is different about

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315 Ibid ss 2, 27. See also Clarke and Erbacher (n 105) 494–5 [8.65]. It is worth remembering Lord Reid's famous dicta in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406:

> In the ordinary way the customer has no time to read [the standard contract] … and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

316 *ACL* (n 24) ss 24(4)(a)–(b) provides that a contract is a 'small business contract' if the contract is for a supply of goods or services and at least one party to the contract is a business that employs fewer than 20 persons. Also considered is whether the upfront price payable does not exceed $300,000 or the contract has a duration of more than 12 months and the upfront price payable does not exceed $1,000,000: at ss 24(4)(c)(i)–(ii).

317 So, we do not have to resolve whether the AdSense contract is a 'consumer contract'. It may or may not be.

318 *ACL* (n 24) s 24(2)(b).

319 Ibid s 24(2)(a).

320 Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (Report, March 2013) 6–7.

321 Ibid 7.

YouTube is that it is a *multinational* corporation, and the Variation Term arises in a Californian contract.[322]

YouTube's Variation Term is probably unfair. First, it is likely[323] that an unfettered UVC in a consumer or small business contract results in a significant imbalance.[324] UVCs have been held to be unfair in several cases.[325] One example of a term that *may* be unfair,[326] as per s 25(d) of the *ACL*, is 'a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract'.[327] Section 25(d) supports the conclusion that the Variation Term is unfair. A UVC with a limited scope might be acceptable. A blanket, open-ended UVC is problematic. It effectively says that a meeting of the minds is not required.[328] Instead, the contract is a piece of clay that YouTube can mould as it sees fit. YouTubers do not have an equivalent UVC that they can exercise.[329] In theory, YouTube could use the Variation Term to incrementally increase its share of the advertising revenue to 90%. The example demonstrates the inherent unfairness of such clauses. On 1 June 2021, YouTube introduced what it calls a 'right to monetise' term:

> You grant to YouTube the right to monetize your Content on the Service (and such monetization may include displaying ads on or within Content or charging users a fee for access). *This Agreement does not entitle you to any payments*.[330]

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322 Many multinational platforms now make use of UVCs. See, eg: 'Uber BV Terms and Conditions: Australia', *Uber* (Web Page) cl 1 <https://www.uber.com/legal/en/document/?country=australia&lang=en-au&name=general-terms-of-use>; 'Terms of Service', *Airbnb* (Web Page) cl 3 <https://www.airbnb.com.au/terms#sec201910_3>; 'Terms of Use', *Tinder* (Web Page) cl 1 <https://policies.tinder.com/terms/intl/en>; 'Terms and Conditions', *Airtasker* (Web Page) cl 15 <https://www.airtasker.com/terms/>.

323 Jeannie Marie Paterson and Rhonda L Smith, 'Why Unilateral Variation Clauses in Consumer Contracts are Unfair' (2016) 23(3) *Competition and Consumer Law Journal* 201, 206.

324 The concept of causing a significant imbalance has issues: see Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 231, 242–5. There is also a distinction between two commercial parties' considered allocation of risk by means of a UVC and a consumer or small business contract where it is artificial to describe the UVC as a considered term agreed upon by both parties: see ibid 206–7.

325 For a list of cases in which a UVC has been held to be unfair see Paterson and Smith (n 323) 206 n 22.

326 Ibid 206.

327 *ACL* (n 24) s 25(d).

328 Greig and Davis (n 205) 21–2.

329 *ACL* (n 24) s 25(d). See also *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [126]–[149] (Judge Harbison).

330 'YouTube Terms of Service' (n 78) (emphasis added).

The right to monetise may be part of an incremental, or creeping, strategy by which YouTube increases its share of revenue. YouTube first demonetised small-time YouTubers for being below the minimum threshold of views. It has now reserved for itself the right to monetise the content.

Second, under s 24(4) there is a presumption that the Variation Term is not reasonably necessary unless YouTube proves otherwise. YouTube does have a legitimate interest to protect: it needs a degree of contractual and policy flexibility in order to regulate inappropriate content. Regulating content goes to YouTube's standing in the community, ability to respond to evolving circumstances, market conditions, its relationship with advertisers, earning advertising revenue, and costs of monitoring content.[331]

As a blanket UVC, the Variation Term goes beyond what is reasonably necessary to protect YouTube's legitimate interest. It is not limited to managing inappropriate content. Regulators in Australia[332] and the United Kingdom[333] have stated that delineating exactly when a UVC will be exercised may rescue it from being declared void. For example, a term providing that '[m]anagement reserves the right to alter the opening times as it sees fit' was susceptible to being held unfair.[334] It was rescued by changing the term to '[m]anagement reserve the right to adjust the hours for the purpose of cleaning, decorating, repairs or special functions and holidays'.[335] Further, YouTube has not established a direct correlation between the number of views and inappropriate content. In other words, the exercise of the Variation Term by YouTube so far, arguably, has gone beyond its legitimate interest.

Third, as per s 24(1)(c) of the *ACL*, the application of demonetisation 'would cause detriment' to YouTubers. The detriment is loss of advertising income, sometimes livelihood, reputation, and the ability to sell the YouTube content as an asset.[336]

Fourth, looking at the contract as a whole under s 24(2), either party can terminate the contract at any time. A YouTuber that is unhappy with a unilateral change to

331 Paterson and Smith (n 323) 209.

332 Commonwealth of Australia, *Unfair Contract Terms: A Guide for Businesses and Legal Practitioners* (Guide, March 2016) <https://consumer.gov.au/sites/consumer/files/2016/05/0553FT_ACL-guides_ContractTerms_web.pdf>.

333 Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (Guide, September 2008) 52–3 [10.3]–[10.6] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf>.

334 Office of Fair Trading, *Historic Annex A to Unfair Contract Terms Guidance* (Guide, September 2008) 58 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450467/Unfair_terms_guidance_Annex_A.pdf>.

335 Ibid.

336 Goggin and Tenbarge (n 15). In *Sweet*, the allegedly wrongful demonetisation adversely affected the plaintiffs' ability to sell the content: *Sweet* (n 17).

policy, and so the AdSense Terms, is free to leave YouTube.[337] Hence, YouTube could argue that a YouTuber is choosing to agree to the new terms rather than it being a unilateral change. However:

- YouTube is a de facto monopoly. YouTubers have nowhere to go;
- Behavioural economics suggests that consumers will not leave.[338] Platforms know this;
- Even if it were possible for a YouTuber to move elsewhere, they might be confronted by another UVC.[339] This speaks to the general need to regulate UVCs in platform-consumer contracts;
- Having built a brand, a YouTuber would incur a cost if they moved; and
- In short, a YouTuber does not have a true freedom in the circumstances.

Fifth, regarding transparency, the AdSense Terms are not found in one document, but in a series of interlinking online contracts and policies.[340] The Variation and Display Terms are, of themselves, transparent. Their operation in coordination with content policies is not transparent. Navigating interlinking documents makes it hard for YouTubers to understand the terms. The lack of understanding is something that the court can take into account under s 24(2) of the *ACL*.

So, under ss 23 and 24, the Variation Term is likely void. If the Variation Term is void, then changes made to the terms purportedly pursuant to the Variation Term, such as demonetisation, lack legal foundation.

B *Display Term*

Another option for YouTube is to argue, as per *Sweet*, that demonetisation was introduced under the Display Term. There are two problems with YouTube relying on the Display Term:

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337 'AdSense Terms' (n 76) cl 6. See also 'YouTube Terms of Service' (n 78); Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (n 333) 52–3 [10.3].

338 Paterson and Smith (n 323) 214.

339 Ibid 215.

340 The interlinking character is brought out by 'AdSense Terms' (n 76) cl 1:

> By using our Services, you agree to (1) these Terms of Service, (2) the AdSense Program Policies, which include but are not limited to the Content Policies, the Webmaster Quality Guidelines, the Ad Implementation Policies, and the EU User Consent policy (collectively, the 'AdSense Policies'), and (3) the Google Branding Guidelines (collectively, the 'AdSense Terms').

- Like the Variation Term, it too might be void under s 23; and
- If not void, because the Display Term must be exercised in good faith, then YouTube has probably breached the good faith obligation.

1 *Whether Void under s 23*

In *Sweet*, Chen J held that the Display Term was not a UVC but a contractual 'discretion'.[341] His Honour then rejected the plaintiffs' argument that there was an implied covenant that the discretionary power be exercised in good faith. The ability to imply such a covenant in the face of express terms was 'narrowly circumscribed' under US law.[342]

The approach under s 23 in Australia is different. Under s 23, there does not appear to be a sharp distinction between UVCs and contractual discretions. In stating 'the effect of' permitting one party to vary the contract, s 25(d) is not limited by the formal description of a term, for example as a UVC or a discretion, but considers its substantive effect. As per the AdSense Terms, demonetisation is a change to both policy and terms.

That being so, under ss 23 and 24 the Display Term might be void. Most of the reasons above regarding the Variation Term being void, also apply to the Display Term, albeit not with the same intensity. Unlike the Variation Term, the Display Term has a specific scope, ie, a necessary discretion regarding displaying advertisements. Having said that, the Display Term is unlike UVCs rescued by regulators in that it does not specify the purpose of the discretion or provide guidelines as to its application.[343] For example, the Display Term could be used for an illegitimate purpose, such as YouTube favouring a YouTuber. Section 25(g) supports the Display Term being unfair. The s 25(g) example of a term that might be unfair is one that permits 'one party unilaterally to vary the characteristics of the goods or services to be supplied'. It is arguable that the character of a positive monetisation service has been changed, especially for small to midsize YouTubers. Hence, YouTube may struggle to prove that the Display Term, as it stands, is reasonably necessary under s 24(4).

Alternatively, the requirement that the contract as a whole should be considered at s 24(2)(b) has led some commentators to suggest that s 24 imposes a good faith obligation.[344] That is, the Display Term is subject to an obligation of good faith, and not void for this reason. If so, then the issue becomes whether YouTube is in breach of the good faith obligation.

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341 *Sweet* (n 17) [5]–[9].

342 Ibid [6]. Such a covenant could only contradict an express 'discretion when necessary to protect an agreement that otherwise would be rendered illusory and unenforceable': applying *Third Story Music Inc v Waits*, 48 Cal Rptr 2d 747, 806 (Ct App, 1995).

343 Office of Fair Trading, *Historic Annex A to Unfair Contract Terms Guidance* (n 334) 58.

344 Corones et al (n 163) 6 [2.5].

2 *Whether Breach of Good Faith*

The AdSense Terms is a Californian contract, and *Sweet* held that the Display Term was not subject to an implied covenant that it be exercised in good faith.[345] In Australia, it is likely that the Display Term is subject to a good faith obligation. Good faith may arise by virtue of s 24. A stronger foundation for it to arise is the statutory *Franchising Code of Conduct* ('*Franchising Code*').[346] Where there is a franchising agreement under reg 5, both parties owe a non-excludable obligation of good faith to each other under reg 6.[347]

First, there is a good argument that the *Franchising Code* applies to an Australian YouTuber–YouTube relationship. Under reg 5, an Australian YouTuber is probably in a 'franchising agreement'[348] with YouTube provided they are carrying on a business.[349] Under reg 5(1)(b), an Australian YouTuber is distributing services[350] *in Australia*; and operating 'under a system or marketing plan substantially determined, controlled or suggested'[351] by YouTube. YouTube provides the platform, lays down the content guidelines, and organises the advertising. Under reg 5(1)(c), 'YouTubers' are associated with the YouTube brand.

Second, at common law, the meaning of good faith has not been settled in Australia.[352] Without limiting its common law meaning, reg 6 states that good faith may involve whether the party acted honestly and not arbitrarily; and whether the party cooperated to achieve the purposes of the agreement.[353]

345 *Sweet* (n 17).

346 *Competition and Consumer (Industry Codes: Franchising) Regulation 2014* (Cth) ('*Franchising Code*').

347 That being so, other reasons why a good faith obligation may arise are not considered.

348 *Franchising Code* (n 346) reg 5(1)(b)–(c) defines a franchising agreement as an agreement

> in which a person (*the franchisor*) grants to another person (*the franchisee*) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor … [and] under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol.

349 The *Franchising Code* (n 346) will not apply to a purely amateur YouTuber.

350 The definition of services in the *CCA* includes entertainment: 'the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction': *CCA* (n 97) s 4 (definition of 'services' para (a)(ii)).

351 See *Australian Competition and Consumer Commission v Kyloe Pty Ltd* [2007] FCA 1522, [40] for a non-exhaustive list of factors to consider in determining whether this requirement is met.

352 See generally Jessica Viven-Wilksch, 'Good Faith in Contracts: Australia at the Crossroads' (2019) 1(1) *Journal of Commonwealth Law* 273.

353 *Franchising Code* (n 346) regs 6(3)(a)–(b).

Common law cases have emphasised that good faith applies where the contract involves a relationship, for example, employment.[354] Good faith may arise to redress a power imbalance or particular vulnerability in the relationship.[355] One reason that a non-excludable good faith obligation was introduced was asymmetric power:

> There is an inherent and necessary imbalance of power in franchise agreements in favour of the franchisor, but abuse of this power can lead to opportunistic practices including encroachment … termination at will, and unreasonable unilateral variations to the agreement.[356]

There is foreign authority that a contractual discretion might be subject to an obligation of good faith.[357] The Supreme Court of Canada recently held that exercising a contractual discretion in a way that is unconnected to, or outside the compass, of its purpose is arbitrary.[358] As for 'cooperating', it has been held that the parties must act with fidelity to, and not undermine, the bargain.[359] To be clear, a party subject to a good faith obligation can still act selfishly or in their own interest.

Third, it is submitted that YouTube's unilateral introduction of demonetisation has not been in good faith. It is 'arbitrary'. YouTube has not established a direct correlation between the number of views and inappropriate content. Moreover, the Variation

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354 See, eg, *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639.

355 See, eg: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 258 (Priestley JA) ('*Renard Constructions*'); *Mineralogy v Sino Iron Pty Ltd [No 6]* (2015) 329 ALR 1, 161 [1010] (Edelman J) ('*Mineralogy*'). See also Viven-Wilksch (n 352) 280.

356 Parliamentary Joint Committee on Corporation and Financial Services, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (Report, December 2008) 101 [8.3].

357 See *Renard Constructions* (n 355)*; Mineralogy* (n 355).

358 *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] 454 DLR (4th) 1, [63]–[72].

359 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584, 650 [288]. See also Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 (January) *Law Quarterly Review* 66, 69:

> [Good faith] embraces no less than three related notions: (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties.

This passage was applied by Bathurst CJ in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184: at 59–60 [145]. Justice Edelman has also expressed the view that good faith requires that a contractual discretion be exercised reasonably: see *Mineralogy* (n 355) 161 [1010]. For the purposes of this article, we do not need to enter the debate as to whether good faith requires reasonableness.

Term seems to be the proper mechanism for changes to terms and content policy. The Display Term's purposes are probably to maximise advertising revenue for both parties, execute YouTube's content policy, and manage YouTube's own business and costs. Hence, using the Display Term to change policy is, arguably, outside the compass of its purpose.

It is not 'co-operative'. Unilaterally changing the monetisation policy, when a purpose of the AdSense Terms is a 'partnership' to generate revenue for both YouTubers and YouTube, is hardly cooperative. This is especially so given YouTube's subsequent assertion that it reserves the right to monetise the content itself. Unilateral demonetisation undermines the bargain. For many small-time YouTubers, the decision has ended a long-term relationship with YouTube. At the very least, it appears that the interest of small-time YouTubers has not been given due consideration.

C *YouTube in Breach of Contract*

In summary, the unilateral introduction of demonetisation lacks legal foundation. Both the Variation and Display Terms might be void under s 23 of the *ACL*. If they are void, YouTube lacks the contractual basis to change the policy and terms. Alternatively, the Display Term is not void because it is subject to an obligation of good faith. But then YouTube breached the good faith obligation when it unilaterally introduced demonetisation. In theory, YouTubers who have had their content demonetised, without there being a proper contractual foundation for doing so, may be able to sue for unpaid advertising revenue.

Recognising that YouTube has a legitimate interest, a more penetrating inquiry might be to ask how the parties' interests can be balanced? YouTube has a vested interest in more even-handed clauses, which are not void, and allow it to make policy changes. The Variation Term could specify the circumstances when it will be exercised. YouTube could cooperate by consulting with a YouTube representative body, such as FairTube, before making significant policy changes. Facebook is moving in this direction. The Display Term could explicitly state that the discretion is to be exercised in good faith. It could state the purpose of the discretion is to maximise advertising revenue for both parties and manage YouTube's profitability.

VII Conclusion

This article submits that, first, despite the proper law of contract and exclusive jurisdiction clauses, the *ACL* applies to a demonetisation claim by an Australian YouTuber and will be heard by Australian courts. Second, there are practical challenges to proving a claim for wrongful demonetisation under the consumer guarantees. Third, YouTube's lack of transparency regarding demonetisation contravenes s 21 of the *ACL*. Transparency is a critical issue for YouTubers. Fourth, YouTube's unilateral introduction of demonetisation is in breach of contract. As the use of UVCs by multinational platforms is becoming ubiquitous, it is good that the *ACL* appears able to withstand such clauses.

Something should be said about reform:

- Proper law of contract and exclusive jurisdiction clauses are disenfranchising Australian consumers and debasing Australian market norms. It would be better if the consumer guarantees under ch 2 of the *ACL* were expressly made mandatory laws. Judges have been left to do the heavy lifting;

- Alternatively, proper law of contract and exclusive jurisdiction clauses can be added to the list of s 25 terms that might be unfair. That way, judges have a discretion to disapply them. To use the language of s 24(1): what legitimate interest drives the use proper law of contract or exclusive jurisdiction clauses? The larger the Australian operations and volume of Australian customers, the harder it is to justify their use. Such reform would be consistent with developments in Canada and the European Union. In Canada, it is recognised that a consumer needs to be protected from an exclusive jurisdiction clause.[360] The European Union provides the strongest protection: a consumer can only be sued in their own domicile [361] The consumer has the option of suing in their own domicile or that of the other party;

- The *ACL* may need to do more to redress information asymmetry. Statutory unconscionability is a limited and exceptional remedy. The right to be informed was one of four original rights in Kennedy's Consumer Bill of Rights in the early 1960s.[362] The problem of information asymmetry has become acute in the 21st century. It is, therefore, odd that information asymmetry is not explicitly tackled by the *ACL*; and

- A battleground in the 21st century is likely to be algorithm negligence, something that may be difficult to prove. The *ACL* should consider how it can facilitate proof. It could, for example, introduce a reverse-onus provision.

Organisations like FairTube are thoughtful and conciliatory about demonetisation. YouTubers want to maintain a long-term relationship with YouTube. They accept that YouTube needs to police content and make a profit. Their complaints are about transparency and fairness. We should acknowledge the modesty of such concerns. YouTubers ask no more than what we would expect of a public utility or large corporation. Perhaps the fundamental issue is that YouTube is essentially unregulated.

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360 *Douez* (n 203).

361 *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L 351/1, art 4(1).

362 The original four rights were the right to safety, the *right to be informed*, the right to choose, and the right to be heard: Kennedy (n 291).

*Jordan Tutton**

VEXATIOUS LITIGANT ORDERS IN SOUTH AUSTRALIA: TIME FOR A NEW LOOK?

I Introduction

Discussions about the administration of justice routinely feature concerns about court delay and the efficient use of public resources, especially where an individual uses court resources to pursue vexatious litigation.[1] Courts seek to protect themselves, the people involved in litigation, and the wider community from such litigation in various ways. In the most extreme cases, courts can exercise statutory powers to prohibit individuals from commencing actions without court permission.

Two recent decisions of the Supreme Court of South Australia highlight the limits and limited utility of the Court's power to prohibit vexatious litigation.[2] That power is principally provided by s 39(1) of the *Supreme Court Act 1935* (SA) and may only be exercised where 'the court is satisfied that a person has persistently instituted vexatious proceedings'.

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* LLB/LP (Hons) (Flinders). The views expressed in this paper do not reflect those of past or current employers. The author appreciates the helpful comments of Irene Nikoloudakis and the editors on an earlier draft.

1 See, eg: *PPG Development Pty Ltd v Capitanio* (2016) 126 SASR 307, 327 [79] (Doyle J); Chief Justice John Doyle, 'Imagining the Past, Remembering the Future: The Demise of Civil Litigation' (2012) 86(4) *Australian Law Journal* 240, 243–4. See also: Sean Fewster, 'Going Nowhere: Court Reforms Generate Zero Change', *The Advertiser* (online, 23 May 2021) <https://www.adelaidenow.com.au/truecrimeaustralia/police-courts-sa/reforms-introduced-five-years-ago-to-end-12month-wait-for-criminal-trials-have-resulted-in-a-12month-wait-for-a-criminal-trial/news-story/99279fab664974b64f6969516039b3a8>; Meagan Dillon, 'Australia's "Vexatious Litigants" Are Diverse: They Include a Mass Killer and an Inventor', *ABC News* (online, 27 June 2019) <https://www.abc.net.au/news/2019-06-27/more-than-100-people-declared-australian-vexatious-litigants/11225640>; South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6231–3 (Vickie Chapman, Shadow Attorney-General).

2 *Georganas v Barkla* [2021] SASC 47 ('*Georganas v Barkla*') (application for orders under s 39(1) of the *Supreme Court Act 1935* (SA) ('*Supreme Court Act*') or by exercise of inherent power of the Court); *Groom v Police* [2021] SASCA 1, [9]–[13] (referral of matter by Court of Appeal to the Attorney-General under s 39(2) of the *Supreme Court Act* (n 2)).

Unlike equivalent laws in almost every other jurisdiction in Australia (and New Zealand),[3] s 39 has not been significantly amended since its introduction in 1935 when it was adapted from 1896 English legislation.[4] Nor has it been reformed in this century to account for significant changes in the civil justice system.[5]

This article first discusses the policy underpinning vexatious proceedings legislation, common features in that legislation across Australia, and how those laws operate in practice. There is particular emphasis on the South Australian position. Second, the article considers whether s 39 of the *Supreme Court Act* fulfils its protective function having regard to its exercise to date and the contemporary understanding 'that the courts are concerned not only with justice between the parties … but also with the public interest in the proper and efficient use of public resources'.[6] The article concludes that it is time for a new, nuanced review of the content and practice of vexatious litigant legislation in South Australia.

II Managing Vexatious Litigants: Policy, Law and Practice

It is 'a fundamental right that every member of our society has of access to a court to seek remedies as a consequence of an alleged infringement of his or her rights'.[7]

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3 In Australia and New Zealand, this includes the following legislation enacted in the last 20 years: *Federal Court of Australia Act 1976* (Cth) pt VAAA, as inserted by *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) which provided equivalent provisions for the other Commonwealth courts; *Vexatious Proceedings Act 2008* (NSW); *Vexatious Proceedings Act 2006* (NT); *Vexatious Proceedings Act 2005* (Qld); *Vexatious Proceedings Act 2011* (Tas); *Vexatious Proceedings Act 2014* (Vic); *Vexatious Proceedings Restriction Act 2002* (WA); *Senior Courts Act 2016* (NZ) ss 166–69. The exception is *Supreme Court Act 1933* (ACT) s 67A, although in fairness that section was introduced in 1998.

4 *Vexatious Actions Act 1896* (Imp) 59 & 60 Vict, c 51.

5 See David Bamford and Mark Rankin, *Principles of Civil Litigation* (Lawbook, 3rd ed, 2017) ch 1; Alexander Vial, 'The Overriding Objective of Australian Civil Procedure' in Adrian Zuckerman (ed), *Zuckerman on Australian Civil Procedure* (LexisNexis Butterworths, 2018) ch 1; Jordan Tutton, 'Litigation in the South Australian Fast Track Streams' (2017) 6(3) *Journal of Civil Litigation and Practice* 108, 108–9.

6 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 189 [23] (French CJ) ('*Aon Risk Services*'). See also: at 211 [92]–[93], 213 [98], 214 [100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *UBS AG v Tyne* (2018) 265 CLR 77, 93–4 [38] (Kiefel CJ, Bell and Keane JJ), remarking that '[i]ntegral to a "just resolution" is the minimisation of delay and expense'.

7 *Kowalski v Mitsubishi Motors Australia Ltd* (2011) 198 FCR 153, 162 [58] (Jacobson, Siopis and Nicholas JJ). Compare in the Supreme Court of the United States: *Chambers v Baltimore & Ohio Railroad Company*, 207 US 142, 148 (1907) (the Court remarking that '[i]n an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship').

Recognising and respecting that right, courts have developed strategies and procedures for managing litigants who are unfamiliar with law, or are unreasonable, emotional or quarrelsome.[8]

The predominant view is that only few people are sufficiently problematic to be regarded as vexatious. However, this 'small but vocal group of complainants … by persistence and insistence, consum[e] disproportionate amounts of time and energy'.[9] It is for this reason that Australian parliaments have introduced specific powers that enable courts to order that the right of these individuals to institute proceedings be qualified.

Vexatious litigant orders are intended to be protective, not punitive.[10] They are designed to guard against

> the debilitating and damaging effect that vexatious proceedings have on those against whom such proceedings are brought; the stress suffered by those who are the subject of vexatious allegations; and the waste of the court's scarce resources

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8 In psychiatry, research has sought to better understand the cognate 'querulous litigant'. See, eg, Grant Lester, 'Searching for the Spectrum of the Querulous' in Wayne Petherick and Grant Sinnamon (eds), *The Psychology of Criminal and Antisocial Behavior: Victim and Offender Perspectives* (Academic Press, 2017) 489. Lester defines the 'morbidly querulous [as] an individual who embarks on a persistent quest for restitution … through complaint … and sometimes litigation, with resulting negative impact on their … functioning': at 504.

Research on querulous litigants provides a scientific understanding of the spectrum of querulous behaviour, where early intervention can be achieved, how individuals might escalate in their conduct and effective means of managing deviant behaviour. See generally: Ian Freckelton, 'Querulent Paranoia and the Vexatious Complainant' (1988) 11(2) *International Journal of Law and Psychiatry* 127 ('Querulent Paranoia'); Christopher Adam Coffey, 'Litigation Overdone, Overblown, and Overwrought: A Mixed Methods Study of Civil Litigants' (PhD Dissertation, The University of Alabama, 2019) 2–4, 8–12, 53–61, 64–7; MWD Rowlands, 'Psychiatric and Legal Aspects of Persistent Litigation' (1988) 153(3) *British Journal of Psychiatry* 317.

9 Grant Lester, 'The Vexatious Litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 17. See: Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 444–8; Ian Freckelton, *Vexatious Litigants: A Report on Consultation with Court and VCAT Staff* (Report, 1 October 2008) 8–13 ('*Consultation with Court and VCAT Staff*') (reporting findings from focus groups conducted with Victorian court and tribunal staff); Ian Freckelton, *Vexatious Litigants: A Report on Consultation with Judicial Officers and VCAT Members* (Report, 1 October 2008) 11–18 ('*Consultation with Judicial Officers and VCAT Members*') (reporting findings from interviews with 20 Victorian judicial officers and tribunal members); Freckelton, 'Querulent Paranoia' (n 8) 139–42 (describing the experience of an Australian complaints authority).

10 *Official Trustee in Bankruptcy v Gargan [No 2]* [2009] FCA 398, [3] (Perram J); *Teoh v Hunters Hill Council [No 8]* [2014] NSWCA 125, [56] (Beazley P, Emmett JA and Sackville AJA).

> in dealing with vexatious litigation and the diversion of those resources from more worthy litigation.[11]

Protection is achieved by requiring that the vexatious litigant seeks judicial permission before instituting future proceedings.

Overall, vexatious proceedings legislation seeks to balance the protective imperative against the individual's right to access the court. To achieve that balance, a limited form of a vexatious litigant order will often be made. These limited orders will only affect the individual's right to institute proceedings against an identified respondent (or class of respondents) or in relation to an identified issue. Such an order may expire after a set time.

Turning from policy to legal doctrine, the laws enacted across Australia are broadly similar and almost wholly developed from research and consultations conducted in the 21st century. The Western Australian Parliament implemented recommendations made by the Law Reform Commission of Western Australia in 1999.[12] That legislation was the 'starting point'[13] for a model bill endorsed by the Standing Committee of Attorneys-General in 2003. The model bill was then implemented in Queensland, the Northern Territory, New South Wales, Tasmania and the Commonwealth.[14] Each of New Zealand and Victoria considered that model, reviewed the 'graduated' system used in England and Wales, and undertook separate law reform inquiries to determine their preferred approach.[15] There is now refinement of, and reflections on, these reforms.[16]

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11 *Shire of Katanning v Bride [No 2]* [2016] WASC 314, [74] (Tottle J). See also Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants* (2008) 83–92.

12 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (Final Report, Project No 92, September 1999) 161–6.

13 Diana Bryant, 'Self Represented and Vexatious Litigants in the Family Court of Australia' (Speech, Access to Justice: How Much Is Too Much?, 30 June – 1 July 2006) 37.

14 See Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth) 2–3, 407 [253]–[302] ('Explanatory Memorandum').

15 See: Law Reform Committee (n 11); New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, November 2012) 158–64; *Siemer v New Zealand Law Society* [2019] NZHC 3075, [7]–[12] (summarising the development of the law in New Zealand).

16 See, eg: Department of Justice (NSW), *Vexatious Proceedings Act: Statutory Review* (Report, May 2017); Clare van Balen, 'Beyond the *Vexatious Proceedings Act*: Victoria's Unfinished Business' (2018) 43(1) *Alternative Law Journal* 35; Productivity Commission (Cth) (n 9) vol 1, 451; Narelle Bedford and Monica Taylor, 'Model No More: Querulent Behaviour, Vexatious Litigants and the *Vexatious Proceedings Act 2005* (Qld)' (2014) 24(1) *Journal of Judicial Administration* 46.

Australian vexatious proceedings legislation is designed so that first, specific threshold criteria must be met before the power may be exercised. These criteria generally require that a person's past litigation:

- had an inappropriate, 'vexatious' quality. For example, proceedings must have been 'an abuse of the process of a court', or instituted 'without a reasonable ground', 'for an ulterior purpose' or for a 'wrongful purpose'; and

- was instituted in a persistent or frequent way, such as to warrant intervention by the court to prevent further litigation. Traditionally, this criterion has been of a qualitative nature (ie proceedings must have been instituted 'persistently' or 'habitually'), although with legislative reform this criterion has become more of a quantitative inquiry (eg 'frequently').

Second, if all threshold criteria are met, the court must regard it as appropriate in all the circumstances to exercise its discretion. An influential judgment summarises that 'the factors which will be relevant are informed by the protective purpose which the order serves,' but that the order is 'not lightly to be made'.[17]

The trend over time has been to make the threshold criteria easier to satisfy. One way this has been achieved is in the reduction of criteria required to be met.[18] Other approaches include the softening of the threshold criteria,[19] and permitting courts to have regard to a wider range of matters when assessing those criteria.[20]

A *Vexatious Litigant Orders in South Australia*

Section 39 of the *Supreme Court Act* remains in substantially similar terms as it was in 1935, although there was a mostly cosmetic reform in 1987.[21]

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17 *Official Trustee in Bankruptcy v Gargan [No 2]* [2009] FCA 398, [2], [12].

18 For example, by deleting the criterion that there be 'habitual' institution of proceedings: See *Supreme Court Act Amendment Act 1987* (SA) cl 2.

19 For example, by lowering the 'persistently' criterion to 'frequently'. See: Explanatory Memorandum (n 14) 42 [267]–[268]; *Ramsey v Skyring* (1999) 164 ALR 378, 390 [55] (Sackville J).

20 For example, by expanding the definition of 'proceedings' to include a wider range of interlocutory activity, as well as proceedings in tribunals and specialist courts. See: Explanatory Memorandum (n 14) 40 [257], 42 [266]; Department of Justice (NSW) (n 16) 11 [3.37]–[3.39].

21 In terms of substantive amendments since 1935, the 1987 amendment dropped the threshold criterion that proceedings be instituted 'habitually' and defined more clearly what constitutes a 'vexatious' proceeding: *Supreme Court Act Amendment Act 1987* (SA) cl 2 amending *Supreme Court Act* (n 2) s 39. In 1995, the section was amended so that applications could be brought by any 'interested person': *Statutes Amendment (Courts) Act 1995* (SA) cl 20 amending *Supreme Court Act* (n 2) s 39. In 2004, the forums to be considered for the s 39(1) criteria expanded to include State tribunals, following *A-G (SA) v Burke* (1997) 190 LSJS 28 (Perry J); *Statutes*

On an application for an order under s 39(1), the Court must be satisfied that:

- the individual has instituted proceedings[22] within a prescribed court;[23]
- those proceedings are vexatious in that they were instituted (i) to harass or annoy, (ii) to cause delay, (iii) for any other ulterior purpose, or (iv) without reasonable ground; and
- the individual has instituted those proceedings *persistently*.[24]

If all the criteria are satisfied, the Court will then consider whether to exercise its discretion to make an order against the individual.

There have been 10 successful applications for s 39 orders, with orders made between 1997 and 2016. Four of those were in a 'limited' form, controlling litigation only against specific parties or on specific issues. Of the six in 'general' form,[25] two were made against individuals already subject to limited orders.

Most of the 10 successful applications involved significant endeavour on the part of the party applying for the order, as well as for the court and judicial officer. For example, in the most recent s 39 application heard in South Australia:

- the Court managed the proceedings before trial (between March 2014 and May 2015), then heard the application over 15 days in mid-2015.[26] In December 2016,

Amendment (Courts) Act 2004 (SA) s 27 amending *Supreme Court Act* (n 2) s 39(6); South Australia, *Parliamentary Debates*, House of Assembly, 4 December 2003, 1142 (Michael Atkinson, Attorney-General).

22 The authoritative view is that instituting 'proceedings' requires 'invok[ing] the jurisdiction of the Court': *Garrett v Mildara Blass Ltd* [2009] SASC 19, [123] (Layton J). Different views have been expressed as to whether documents lodged, but rejected by, the Registry will count: *A-G (SA) v Kowalski* [2014] SASC 1, [932]–[934] (Blue J); *Georganas v Barkla* (n 2) [105]–[106] (Livesey J).

23 The 'prescribed courts' are the State courts, South Australian Employment Tribunal, South Australian Civil and Administrative Tribunal and Legal Practitioners Disciplinary Tribunal: *Supreme Court Act* (n 2) s 39(6); *Supreme Court Regulations 2018* (SA) reg 4.

24 As to the meaning of 'persistently', see: *Kowalski v Mitsubishi Motors Australia Ltd* [2005] SASC 433, [43] (Perry ACJ, Duggan and Anderson JJ); *Kowalski v Mitsubishi Motors Australia Ltd* (2011) 198 FCR 153, 163 [65], 164 [67] (Jacobson, Siopis and Nicholas JJ); *Georganas v Barkla* (n 2) [67]–[79] (Livesey J).

25 This includes *Workcover Corporation of South Australia v Moore-McQuillan* [2016] SASC 191 (Blue J) (where some proceedings were allowed to continue and so were 'carved out' of the vexatious litigant orders).

26 Ibid [323]–[325].

the judge delivered a 1,038-paragraph judgment (176 pages), concluding that the individual had instituted 63 proceedings without reasonable ground;[27]

- the matter was appealed, with the appeal dismissed in September 2017 (roughly three and a half years after the s 39 application was made);[28]

- the Court was supported by court staff (eg managing voluminous documents lodged in the Registry, communicating with parties, transcribing hearings, providing security for hearings) and each judge's staff (communicating with parties, preparing materials for the trial, assisting in-court and with judgment preparation);[29] and

- the applicant paid and instructed its legal team to prepare extensive documentary evidence and other court documents relating to 89 court proceedings, appear at all hearings (likely with counsel and at least one solicitor), and generally conduct the day-to-day management of the matter for those three and a half years.

In sum, one individual was responsible for initiating 63 proceedings without reasonable ground. To limit his ability to bring future claims (but not bar it), considerable public resources were expended over three and a half years.

The above application was unusual, given the respondent's conduct[30] and the possibility that some of the impugned claims were meritorious.[31] These features may

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27 Ibid [992]. The statistics do not record the significant time spent judgment writing by the judge. On a typical day, 40% of Australian supreme court judges will spend three hours or longer writing judgments: Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012) 84 (Figure 11). One senior judicial officer estimates, from his own experience and after discussing with his judicial colleagues, that 'the time taken to write a judgment is on average some 150 per cent as long as the time taken to hear a case': Dennis Mahoney, 'Judgment Writing: Form and Function' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of NSW, 2003) 103, 103.

28 *Moore-McQuillan v Workcover Corporation of South Australia* [2017] SASCFC 113 (Kourakis CJ, Peek and Bampton JJ).

29 As to the impact of vexatious litigation on court staff, see Freckelton, *Consultation with Court and VCAT Staff* (n 9) 6–11. See also: Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9) 14, 17; *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [245]–[247] (Anderson J); *Georganas v Barkla* (n 2) [17], app B (Livesey J).

30 Among other things, the respondent assaulted the applicant's barrister during the hearing: *R v Moore-McQuillan* [2018] SASCFC 121, [26], [38] (Kelly J).

31 That view finds support in the workers compensation decision that followed: *Moore-McQuillan v Return to Work SA* [2018] SAET 139 (Farrell DPJ and Lieschke DP finding in favour of the worker, Hannon DPJ dissenting). However, the Full Bench's orders were set aside by the Full Court: *Return to Work Corporation of South Australia v Moore-McQuillan* [2020] SASCFC 119 (Kourakis CJ, Kelly and Bleby JJ).

also reflect forensic decisions made by the applicant in prosecuting the matter. Nonetheless, this author's review of Australian vexatious litigant applications suggests that the Supreme Court of South Australia scrutinises the underlying proceedings more carefully and permits more witness examination than superior courts elsewhere.[32]

While statistics on hearing and judgment length are of limited value, the relative differences in those data suggest that the Supreme Court has often taken a different approach than other superior courts in Australia. First, few applications required more than three days to hear across all Australian courts. However, more than three days were required for four out of 10 South Australian cases.[33] Overall, South Australia has had the two longest vexatious litigant trials by a sizeable margin. Second, South Australian judgments appear disproportionately in the longest vexatious litigant judgments. Although only 10 judgments in the selection were produced by the Supreme Court of South Australia, six of the 10 longest judgments nationally were from South Australia.[34]

These quantitative data are crude measures. However, they suggest something is unusual about the analysis undertaken by the Supreme Court, its management of

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32 The author identified Australian cases where courts made a vexatious litigant order. When searching for cases, search terms and methods tended to favour applications made by Attorneys-General, cases that were subject to appellate review, cases that were cited positively in later judgments, and judgments published since 2000. One hundred cases were selected for study (representing almost all cases identified in the searches), with the author wishing to gather a mix of cases with different procedural histories, from different jurisdictions, under different legislation, involving different kinds of parties and relating to different areas of law. The search was not exhaustive other than for South Australia, although likely captured most matters having regard to the total number of vexatious litigants in Australia. The search deliberately excluded Family Court and Federal Circuit Court matters due to distinctive concerns arising in the family law jurisdiction. See: Bryant (n 13); Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 307–10 [10.37]–[10.50].

All cases were skim read, then subjectively coded as to whether the court 'went behind' the underlying judgments. Quantitative data were collected in the form of hearing and judgment length. Given the approach was not particularly rigorous, this article reports only on the broad, clearly discernible matters emerging from the review.

33 These were conducted in: the SASC (15 days); SASC (12 days); NSWSC (seven days) and VSC (seven days in two matters); NSWSC (five days) and SASC (five days); NSWSC (four days in two matters) and NTSC (four days) and SASC (four days). In contrast, 45 Federal Court and Queensland Supreme Court decisions were retrieved. On the face of those judgments, none appear to have been heard for more than two days.

34 In order of length, these judgments were delivered by the: SASC (1,994 paragraphs); SASC (1,038 paragraphs); SASC (358 paragraphs); NSWSC (346 paragraphs); SASC (294 paragraphs); SASC (289 paragraphs); NTSC (267 paragraphs); NSWSC (263 paragraphs); SASC (254 paragraphs); and NSWSC (234 paragraphs).

s 39 cases, and the evidence generally received on an application. The data cannot illuminate whether that difference arises from the requirements of s 39 or if it relates to a judicial practice in Adelaide.

Elsewhere in Australia, there is generally consensus that it is not 'necessary to re-examine the circumstances of each [underlying] proceeding',[35] and if a proceeding has been dismissed 'as frivolous or vexatious … it is not for a court considering [an] application to go behind the order and go into the merits of the argument as a court of appeal would do'.[36] The New South Wales Court of Appeal reasoned that decisions on the underlying proceedings are not 'determinative of an application', but '[o]rdinarily, the court that heard and decided the earlier proceedings will have been best placed to determine whether they were an abuse of process or instituted without reasonable grounds'.[37] The Court reasoned with reference to the policy underpinning vexatious proceeding legislation:

> It would be an odd result if [the earlier judgment] simply has to be ignored … The oddity of the result is reinforced by the likelihood that an application under the [legislation] would be prolonged if the findings made and views expressed in the earlier proceedings could not be taken into account. Indeed there would be a real risk that the court would be burdened with relitigation of issues of the very kind that the legislation is designed to avoid.[38]

It seems that the Supreme Court of South Australia is aware that its historic approach has sometimes been exceptional. For example in the s 39 trial described above, the judge remarked that 'ordinarily it may be expected that proceedings of this type should really be heard within a day or two'.[39] This observation is consistent with s 39 orders made in three low-profile South Australian matters without exhaustive examination and a prolonged trial.[40] It may be that on a future application, the Court more readily adopts the less rigorous approach, perhaps encouraged by the examples

35 *Kay v A-G (Vic)* (2000) 2 VR 436, 437 [1] (Ormiston JA). For a recent review of the authorities and the general consensus on how to approach a vexatious litigant application, see *Fokas v Trustee of the Estate of Maria Fokas [No 2]* [2020] FCA 30, [42]–[44], [51]–[53] (Wheelahan J) ('*Fokas [No 2]*').

36 *A-G (Vic) v Horvath* [2001] VSC 269, [28] (Ashley J).

37 *Teoh v Hunters Hill Council [No 8]* [2014] NSWCA 125, [52]–[53] (Beazley P, Emmett JA and Sackville AJA).

38 Ibid [53].

39 See *Workcover Corporation of South Australia v Moore-McQuillan* (Supreme Court of South Australia, Blue J, 4 May 2016), [34] quoted in *Moore-McQuillan v Workcover Corporation of South Australia* [2017] SASCFC 113, [29] (Kourakis CJ).

40 Limited-form orders were made in each matter: *Commonwealth Bank of Australia v Heinrich* [2003] SASC 322 (Debelle J); *Purins v Alpine Constructions Pty Ltd* [2008] SASC 11 (Debelle J); *Westwill Pty Ltd v Norman Waterhouse Pty Ltd* [2009] SASC 391 (Sulan J).

provided by senior judicial officers interstate or those accepted as appropriate by appeal courts.[41]

There is no empirical research on experiences and perceptions of s 39.[42] However, it may be instructive that each of the current and previous Attorneys-General not only consider vexatious litigants to be a problem in South Australia but also appear to be critical of s 39.

In 2016, the South Australian Parliament debated the Legal Practitioners (Miscellaneous) Amendment Bill 2016 (SA).[43] During debate the former Deputy Leader of the Opposition (who was Attorney-General from 2018–21) suggested, among other things, that s 39 'is a process which in itself is often quite lengthy'.[44]

The Attorney-General (at the time) appeared to agree with her observations about the s 39 procedure, replying:

> [The Deputy Opposition Leader] is speaking about people who are vexatious litigants …
>
> These people derive some bizarre satisfaction from conflict and participating in the legal system. They relish the opportunity to make complaints and are basically making a nuisance of themselves. There is a process, a very difficult process, whereby these people can be declared vexatious. They have to reach a really high bar before they can be declared vexatious. …
>
> The bottom line is that we have a situation where a very small number of people are wasting an enormous amount of time and money … in the courts and everywhere else. Eventually, we must get to the point where we can say, 'Look,

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41 Although the author has not reviewed the submissions made in all previous s 39 matters, it is unlikely that the Court was taken to the following examples decided under a stricter test: *Granich & Associates v Yap* [2004] FCA 1567 (French J) (one day, 38 paragraphs); *National Australia Bank Limited v Freeman* [2005] FCA 1895 (Spender J) (one day, 37 paragraphs, upheld on appeal); *Jones Lang Lasalle (Qld) Pty Ltd v Dart* [2005] FCA 1614 (Kiefel J) (one day, 44 paragraphs); *Velissaris v Maryvell Investments (in liq) [No 2]* [2008] FCA 511 (Gordon J) ('*Velissaris*') (one day, 21 paragraphs); *Tsekouras v Olsen* [2009] FCA 429 (Bennett J) (one day, 44 paragraphs); *Commonwealth v Scott* [2011] FCA 768 (North J) (one day, 23 paragraphs).

42 The empirical research conducted for the Victorian parliamentary inquiry offers insights for South Australia given the similarity between s 39 and the previous s 21 of the *Supreme Court Act 1986* (Vic). See: Freckelton, *Consultation with Court and VCAT Staff* (n 9); Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9). There is little empirical research on civil litigation in South Australia: See Tutton (n 5) 112.

43 The context giving rise to the following comments was a clause of that Bill that empowered the Legal Profession Conduct Commissioner to close a complaint immediately after receipt if the complaint was vexatious: See *Legal Practitioners Act 1981* (SA) s 77C(1)(a).

44 South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6231. See also Dillon (n 1), quoting and summarising the former Attorney-General's more recent comments.

> you have worn your welcome out. You have overdone it and you are actually wasting valuable public resources …' …
>
> What we are talking about here is people who make that job extremely difficult to do by clogging the system up with completely unmeritorious or tactical complaints …
>
> [T]he deputy leader is fully aware of who a number of these celebrity people are. … These people are basically abusing the system. I think the system, ultimately, when it gets to the point where it is being abused to this extent, should have the capability of defending itself.[45]

The Parliament seems to be aware of the difficulties arising from s 39 and the comments of these two politicians suggest discontent with its operation.[46] But what, if anything, should be done to address those difficulties?

III Legislative Reform of the Vexatious Litigant Law

The challenges presented by vexatious litigants can be managed in different ways. That might be at an organisational and registry level[47] or by individual judicial officers through the early finalisation of proceedings,[48] effective case management,[49]

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45 South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2016, 6232–3.

46 Similar comments were made in Parliament decades earlier. One Opposition member remarked during debate of the Supreme Court Act Amendment Bill 1987 (SA) that '[t]he problem of how we can dissuade people who abuse their rights under the law will no doubt test our legislative powers for many years to come. Certainly, this Bill does not seem to go any way towards improving the situation': South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1987, 1743 (SJ Barker).

47 See, eg: Law Reform Committee (n 11) 83–92; Roderick Joyce and William Fotherby, 'Dealing with Querulous Litigants (Pt 1)' (2012) 1(2) *Journal of Civil Litigation and Practice* 66, 69–70; Lester, 'The Vexatious Litigant' (n 9) 19; Coffey (n 8) 61–4. See especially discussion about empowering the Registry to reject documents for being abuses of process (*Uniform Civil Rules 2020* (SA) r 32.3(1) ('*Uniform Civil Rules*')) and amending court rules to limit fee waivers for repeat litigants: Law Reform Committee (n 11) 111–14 [8.1.1]; Supreme Court of Victoria, Submission No 34 to Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants* (30 June 2008) 6; Roderick Joyce and William Fotherby, 'Dealing with Querulous Litigants (Pt 2)' (2013) 2(4) *Journal of Civil Litigation and Practice* 185, 187–8.

48 These include mechanisms for early resolution of a matter under the *Uniform Civil Rules* (n 47): applications for dismissal (rr 143.1 and 143.2), summary judgment (r 144.2) and/or strike-out (rr 34.1 and 70.3). See *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, [41]–[70] (Doyle J) ('*Adelaide Brighton Cement*').

49 Such case management might include limiting the length of oral submissions (or determining applications on the papers), listing the substantive matter for hearing as early as possible (and so limiting unnecessary interlocutory disputes) or requiring evidence-in-chief to be given in writing.

or in-court management.[50] One should also be alert to the possible unintended consequences arising from a stricter approach to vexatious litigant orders,[51] as well as the benefits of an extra-legal response to the phenomenon of querulous litigants.[52] These are important matters to be considered in any fulsome discussion about managing vexatious litigants in South Australia.

Nonetheless, for the reasons discussed above with respect to the operation of s 39 in practice, the case for reform at the legislative level is such to merit a new look, perhaps towards a *Vexatious Proceedings Act* for South Australia.[53] In suggesting that, this article now poses questions as to whether legislative change — through slight tinkering or broader reform – should be contemplated.

A *Should There Be Some Limited Legislative Change? Is s 39 Fit for Purpose?*

Leaving to one side questions about whether s 39 achieves the desirable balance between important policy imperatives, there is a strong case in favour of at least minor legislative reform. Two recent Supreme Court cases illustrate this point.

Georganas v Barkla [2021] SASC 47 concerned a person who was prohibited from instituting proceedings in the Supreme Court of Western Australia in 2016,[54] and then in the Federal Court in 2018.[55] In 2019, he commenced an action in the Magistrates Court of South Australia against a federal parliamentarian, apparently connected to

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50 See, eg: Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) 126–8, 130–1, 143–6 (empirical research on how judicial officers manage the emotions of self-represented litigants); Bridgette Toy-Cronin, 'Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person' (PhD Thesis, University of Otago, 31 July 2015) 187–94, 246–7 (empirical research on how judges manage self-represented litigants in New Zealand courts).

51 For example, the likelihood that the now-vexatious litigant will transfer their grievances elsewhere. As Freckelton observes, 'there are still many targets for the often increasingly disconsolate and desperate renegade from the court system': Freckelton, 'Querulent Paranoia' (n 8) 132.

52 Lester, 'Searching for the Spectrum of the Querulous' (n 8) 513–15; Coffey (n 8) 65–7.

53 Compare the Victorian Law Reform Commission's conclusion that it 'is mindful of the reforms that have been implemented in other jurisdictions and believes similar reforms should be introduced in Victoria to ensure that vexatious litigants can be dealt with more effectively and efficiently': Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008) 598 [1.3.9]. Similarly, the Victorian Parliament Law Reform Committee found that 'reform is justified in *some* areas where [the legislation] does not appear to be working effectively': Law Reform Committee (n 11) 154 (emphasis in original). The former Victorian law was substantially similar in substance and practice to that in South Australia.

54 *A-G (WA) v Barkla* [2016] WASC 298 (Le Miere J).

55 *Barkla v Allianz Australia Insurance Ltd* [2018] FCA 2070 (Charlesworth J) ('*Barkla v Allianz Australia Insurance*').

his earlier litigation. The federal parliamentarian applied to the Supreme Court for orders under s 39 to stay the Magistrates Court claim and prohibit further claims.

The Supreme Court carefully analysed the history and case law concerning s 39. Justice Livesey held that the s 39 criteria were not met because the respondent had only commenced at best two proceedings in prescribed courts – notwithstanding that 30 proceedings had been initiated over about 10 years in other Australian courts.[56] In the alternative, Livesey J invited the applicant to make submissions on whether a limited form of the order could be made without use of s 39, through the inherent power of the Court. The Court found that it did have that power,[57] and it would be appropriate to make such an order.

The order is unlikely to be controversial to most readers. However, it is odd that to achieve that end, the Court could not exercise the legislative power that exists for the exact purpose of curbing vexatious litigation. Instead it had to embark upon a lengthy, cautious examination of its own powers to ensure there was some alternative basis to prevent future misuse of the Court's processes.

There is no clear, principled reason for why the Supreme Court cannot take into account litigation elsewhere in the federation.[58] All other Australian jurisdictions have removed the limitation.[59] The limitation is especially problematic given that vexatious litigants habitually cross between the courts west of King William Street and those east of it.[60] Perhaps for these reasons Livesey J remarked, *twice*, '[i]t is a matter for the Parliament to consider whether the definition of "proceedings" in s 39(6) should be broadened to embrace proceedings in any Australian court or tribunal'.[61]

The second of the cases, *Groom v Police* [2021] SASCA 1, highlights another limitation in the legislation. The decision concerned an application for permission to appeal from a Supreme Court decision (made in September 2020) to uphold a magistrate's decision (made in May 2020) to dismiss an application for revocation of an intervention order. The Court of Appeal refused permission to appeal on the

56 *Georganas v Barkla* (n 2) [119]–[121].

57 Ibid [224]. The inherent power was used for this purpose in two earlier Supreme Court matters: *Westwill Pty Ltd v Heath* [2010] SASC 358 (Gray J); *Manolakis v DPP (Cth)* [2009] SASC 193 (Gray J). Cf *Hunter v Leahy* (1999) 91 FCR 214 (French J).

58 A possible explanation arises from the enactment of s 39 pre-dating the Federal Court and the Federal Magistrates Court (established in 1976 and 1999 respectively).

59 This includes legislation pre-dating the model bill: see *Supreme Court Act 1933* (ACT) s 67A.

60 See, eg, *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [65], [226], [231] (Anderson J) (the individual asserting that he would choose to 'take [his litigation] across to the Federal Court' if prohibited from filing in the Supreme Court).

61 *Georganas v Barkla* (n 2) [121], [225].

basis that the action was an abuse of process; the applicant was 'attempt[ing] to relitigate matters previously ventilated'.[62] In support of that proposition, the Court of Appeal identified three earlier Full Court judgments concerning the applicant's revocation request, as well as five single-judge Supreme Court judgments involving such requests (in addition to various Magistrates Court attendances).

Elsewhere in Australia, legislation allows courts to consider a vexatious litigant order on its own motion (or for a court registrar to apply for an order).[63] Faced with similar circumstances, those courts might invite the applicant to make submissions on the issue and if it considers an order is appropriate, make the order with little delay or further waste of resources. That course was recently taken by Sofronoff P of the Queensland Court of Appeal in comparable circumstances.[64] In 1984, the judges of the Supreme Court of South Australia commented that s 39 'depends upon an initiative of the Attorney-General. This may not always meet the needs of the situation and it is of some importance that the Court be empowered to make the order contemplated … of its own motion'.[65] The recommended amendment was refused in favour of the existing ability to refer matters to the Attorney-General for her or his consideration.[66] (And so the Court of Appeal referred Mr Groom's case to the Attorney-General.)

The cases show significant constraints in the existing legislation. Those issues have been considered and remedied in almost all other jurisdictions. The reforms in other jurisdictions have created vexatious litigant procedures which are logical, more responsive and better able to achieve the legislation's purpose. They are compelling examples of why even modest updating of s 39 would mean that it is more fit-for-purpose. But should there be more extensive reform and modernisation of the South Australian law?

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62 Ibid [10].

63 This was a clause of the model legislation. See: *Federal Court of Australia Act 1976* (Cth) s 37AO(3); *Vexatious Proceedings Act 2008* (NSW) s 8(4); *Vexatious Proceedings Act 2006* (NT) s 7(6); *Vexatious Proceedings Act 2005* (Qld) s 5(1); *Vexatious Proceedings Act 2011* (Tas) s 5(1); *Vexatious Proceedings Restriction Act 2002* (WA) s 4(2). In Victoria, the Supreme Court did not support an 'own motion' power: Supreme Court of Victoria (n 47) 2.

64 *Bradley v The Queen* [2021] QCA 101, [8]–[9] (Sofronoff P).

65 Chief Justice Len King, *Report of the Judges of the Supreme Court of South Australia for the Year Ended 31 December 1984* (Report, 6 April 1984) 11.

66 South Australia, *Parliamentary Debates*, Legislative Council, 6 October 1987, 949–50 (Christopher Sumner, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 15 October 1987, 1212–15. See also South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1987, 1743 (Stephen Baker, Member for Mitcham) (where an Opposition member remarked that '[t]he Opposition supports the Bill … although it does not go anywhere at all, it certainly puts into the Act a practice that must surely exist today').

Without wishing to speculate, a certain frustration at the arrangement might be read in *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173, [243]–[254] (Anderson J) (where Anderson J exercised the referral power twice in the same matter).

B *Should There Be Broader Legislative Changes? Is the Balance Struck by s 39 Consistent with Community Expectations as to the Administration of Justice?*

Vexatious proceedings legislation balances the need to respect an individual's right to access the courts against the need to protect the courts, people targeted by litigation, and the community. A broader policy question is whether, in the contemporary Australian legal system, s 39 strikes the desired balance between those two interests.

Traditionally, courts aspired to deliver substantive justice: 'justice was achieved when an individual claim or dispute concluded with a court judgment that was "substantively accurate"'.[67] John Sorabji argues that civil procedure reforms commencing at the turn of the century in England and Wales effected a 'shift in judicial philosophy',[68] where 'rights were [now] to be vindicated through the application of a new theory of justice'.[69] That new approach is 'committed to what has been described as proportionate justice' where 'substantive justice … is one aim amongst others, those being the pursuit of economy, efficiency, expedition, equality and proportionality'.[70]

In Australia, that shift is seen by comparing the High Court's position in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 to that in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.[71] In the latter case, a majority of the High Court remarked:

> [C]ase management … is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago … that a different approach was required to tackle the problems of delay and cost in the litigation process. …
>
> The views … that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants, are also now generally accepted.[72]

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67 John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) 2 (citation omitted). Cf Chief Justice Doyle's remarks on how this kind of approach is contributing to the 'demise of civil litigation': Doyle (n 1) 240, 244.

68 Sorabji (n 67) 136, quoting *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1, 280 [153] (Lord Hobhouse).

69 Sorabji (n 67) 2.

70 Ibid 2–3 (citation omitted). See also: at 197–8; Vial (n 5) 1–4, 21–34.

71 Justices Dawson, Gaudron and McHugh remarked that '[c]ase management is … an important and useful aid for ensuring the prompt and efficient disposal of litigation. But … even in changing times … the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim': *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154.

72 *Aon Risk Services* (n 6) 211 [92], 214 [100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

In this contemporary context, the imposition of a vexatious litigant order may not seem as offensive as it once may have.[73] Recent decisions have been more nuanced in describing the precise nature of the infringement imposed by vexatious litigant orders. Justice Gordon emphasised that a vexatious litigant order 'does not preclude a litigant from pursuing a properly formulated claim if one should be presented to the court'.[74] Similarly, Wheelahan J characterised the order as a 'control', rather than a 'bar'.[75] In another decision, the Supreme Court of Western Australia contextualised the infringement of a litigant's right by explaining that although an order is not punitive, 'with every right comes a duty. The duty here is on the litigant to make proper and appropriate use of the courts' resources. That duty is breached when the same hopeless argument is run again and again.'[76]

The changing understanding of how 'justice' is to be achieved by the courts is, in some respects, recognised by legislative reform to their powers in other jurisdictions.[77] Recognising that there has been a fundamental shift in how the legal system understands justice, a new look at s 39 is sensible.

IV Vexatious Litigant Orders in South Australia: Time for a New Look?

Vexatious litigants are not a new phenomenon. Neither is the Supreme Court's procedure for dealing with them.

Having regard to the practice of s 39 applications analysed above, one might fairly observe that s 39 creates a rarely used, resource-intensive, costly and onerous procedure for responding to vexatious litigation. The effect of this is that a few individuals have – and will continue to – waste limited public resources through abuses of the court processes, harassing or annoying people targeted by those processes. Such conduct has – and will continue to – limit access to the courts for other members of the community, possibly eroding public confidence in the administration of justice.

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73 Cf Freckelton, *Consultation with Judicial Officers and VCAT Members* (n 9) 9 (one Victorian Supreme Court judge describes making vexatious litigant orders as 'such a draconian thing to do, the criteria should continue to be strict').

74 *Velissaris* (n 41) [20]. See also *Barkla v Allianz Australia Insurance* (n 55) [82]; *Hambleton v Labaj* [2010] QSC 124 (Applegarth J).

75 *Fokas [No 2]* (n 35) [36].

76 *A-G (WA) v Glew* [2014] WASC 100, [13] (Master Sanderson).

77 The legislation amending federal laws was titled the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth). The Act included various amendments intended to 'improve access to justice in a variety of ways', including by 'ensur[ing] that valuable judicial resources are used appropriately, efficiently and effectively: for the benefit of all litigants': Commonwealth, *Parliamentary Debates*, House of Assembly, 23 November 2011, 13555 (Brendan O'Connor). See also Victorian Law Reform Commission (n 53) 90–4 [4.1]; Law Reform Committee (n 11) 16–17.

Whereas all other state and Commonwealth courts have modernised their legislation, reasonable questions may be asked about whether the South Australian equivalent fits the purpose of vexatious litigant legislation, as well as the contemporary emphasis on achieving a just resolution of disputes by proportionate means. Those questions have previously been contemplated in a bipartisan way in the Parliament and arise on reading recent Supreme Court decisions.

The former Attorney-General stresses that 'access to justice in a timely manner is an important part of our civil justice system, which is why it is so important we have laws that help the courts deal with vexatious litigants in an appropriate manner'.[78] So in this modern court system explicitly concerned with 'the just, efficient, timely, cost-effective and proportionate resolution' of disputes,[79] perhaps it's time for a new look at old s 39.

78 See Dillon (n 1).

79 *Uniform Civil Rules* (n 47) r 1.5; *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, [46] (Doyle J).

*Rachel Neef**

ARTEMIS ACCORDS: A NEW PATH FORWARD FOR SPACE LAWMAKING?

I Introduction

On 13 October 2020, seven countries — Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates and the United Kingdom — signed onto the United States-led initiative, the Artemis Accords ('Accords').[1] Since then, Brazil,[2] New Zealand,[3] the Republic of Korea,[4] and the Ukraine,[5] have joined, with the Accords reaching 12 signatories as of October 2021.[6] The Accords set up the framework under which NASA and international partners plan to return to the Moon by 2024. While the Moon is currently the primary mission objective, the Accords apply to civil activities in outer space, and all activities that may

> take place on the Moon, Mars, comets, and asteroids, including their surfaces and subsurfaces, as well as in orbit of the Moon or Mars, in the Lagrangian points for the Earth-Moon system, and in transit between these celestial bodies and locations.[7]

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* LLB (Hons) Candidate; BIntSt Candidate; DipLang Candidate (Adel); Student Editor, *Adelaide Law Review* (2021).

1 'The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes', *National Aeronautics and Space Administration* (13 October 2020) <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf> ('Artemis Accords').

2 'Brazil Signs Artemis Accords', *National Aeronautics and Space Administration* (Web Page, 16 June 2021) <https://www.nasa.gov/feature/brazil-signs-artemis-accords>.

3 'New Zealand Signs Artemis Accords', *National Aeronautics and Space Administration* (Web Page, 1 June 2021) <https://www.nasa.gov/feature/new-zealand-signs-artemis-accords>.

4 'Republic of Korea Joins List of Nations to Sign Artemis Accords', *National Aeronautics and Space Administration* (Web Page, 27 May 2021) <https://www.nasa.gov/feature/republic-of-korea-joins-list-of-nations-to-sign-artemis-accords>.

5 'Ukraine Becomes the 9th Country to Sign the Artemis Accords', *United States Embassy in Ukraine* (Web Page, 17 November 2020) <https://ua.usembassy.gov/ukraine-becomes-the-9th-country-to-sign-the-artemis-accords/>.

6 The Accords remain open for signature to States, and 'any State seeking to become a Signatory to these Accords may submit its signature to the Government of the United States for addition to this text': 'Artemis Accords' (n 1) s 13(3).

7 Ibid s 1.

Concerns have been raised about the consistency of the Accords with other instruments of international law. These inconsistencies primarily relate to the interaction between art II of the *Outer Space Treaty*,[8] which prohibits States from claiming sovereignty in outer space 'by means of use or occupation' and ss 10 and 11 of the Accords, which respectively allow in situ space resource utilisation (space mining), and establish 'safety zones'.[9] This comment does not address the tensions between the *Outer Space Treaty* and the Accords,[10] but instead explores what the signing of the Accords means for the continuing development of the legal regime in outer space.

This comment contains two Parts. Part II will outline the history of the development of space law and the main actors and instruments that created the initial regime. This primarily focuses on how outer space law is increasingly being developed through 'soft' law instruments as opposed to rules that give rise to binding legal obligations. For the purposes of this comment, law and lawmaking is understood as the 'principles, norms, rules, and decision-making procedures around which actor expectations converge'.[11] Part III examines how the Artemis Accords have built on existing methods to change/interpret the law and what this means for the future of lawmaking in outer space. To conclude, I speculate that the Accords signify a new

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8 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*').

9 In the context of the Artemis Accords, safety zones aim to avoid harmful interference (in reference to art IX of the *Outer Space Treaty* (n 8)). For further information about safety zones, see generally Matthew Stubbs, 'The Legality of Keep-Out, Operational, and Safety Zones in Outer Space' in Cassandra Steer and Matthew Hersch (eds), *War and Peace in Outer Space: Law, Policy, and Ethics* (Oxford University Press, 2020) 201. Generally keep-out zones have been suggested for protecting satellites in orbit or for mining extractions. The International Space Station has a keep-out sphere of 200 m radius, centred at the station's centre of mass: at 201.

10 For discussion of space resource utilisation see generally: Rossana Deplano, 'The Artemis Accords: Evolution or Revolution in International Space Law?' (2021) 70(3) *International and Comparative Law Quarterly* 799, 804–10; Sa'id Mosteshar, 'Artemis: The Discordant Accords' (2020) 44(2) *Journal of Space Law* 591, 592–4. For a discussion of the legality of safety zones see generally: Melissa de Zwart, 'To the Moon and Beyond: The Artemis Accords and the Evolution of Space Law' in Melissa de Zwart and Stacey Henderson (eds), *Commercial and Military Uses of Outer Space* (Springer, 2021) 65, 75–6; Tanja Masson-Zwaan and Mark J Sundahl, 'The Lunar Legal Landscape: Challenges and Opportunities' (2021) 46(1) *Air and Space Law* 29, 48–51. For States that are signatories to the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) ('*Moon Agreement*'), notably Australia, the obligation to not engage in in situ resource utilisation also exists under art 11. For a discussion on Australia's obligation see Fabio Tronchetti and Hao Liu, 'Australia's Signing of the Artemis Accords: A Positive Development or a Controversial Choice?' (2021) 75(3) *Australian Journal of International Affairs* 243.

11 Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36(2) *International Organization* 185, 185.

way of governance in outer space and have set a precedent as an alternative method to fill the current gaps in space law.

II Development of Outer Space Law

In October 1957, States acquiesced to Sputnik 1, flying over their land in outer space (as opposed to air space which is the national jurisdiction of States) and quickly (arguably instantly), it became customary international law that outer space was not subject to national jurisdiction.[12] The international community was eager to set guiding principles for the use and exploration of outer space and the United Nations Committee on the Peaceful Uses of Outer Space ('COPUOS') was formed in December 1958.[13] On 13 December 1963 the General Assembly adopted resolution 1962 (XVIII) on the *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*.[14] Many of the principles that were in this early instrument made their way into the *Outer Space Treaty* in some form or another.

The *Outer Space Treaty* entered into force in October 1967, just over 10 years after the launch of Sputnik 1. It is considered the 'constitution'[15] of outer space, with 111 State Parties and 23 additional signatories that have not yet ratified the treaty.[16] However, the *Outer Space Treaty* is rapidly becoming the *outdated* space treaty. While the provisions are still well regarded by States, there are two key concerns about the efficacy of the treaty moving forward. First, the aspirational nature of the treaty leaves much room for interpretation in some articles, which may rapidly see the fragmentation of its interpretation in the coming decades if not years.[17] Secondly, its 'success' as a treaty has made it exceedingly difficult to amend, especially in

12 Ram S Jakhu and Steven Freeland, 'The Relationship between the Outer Space Treaty and Customary International Law' (Conference Paper 32294, International Astronautical Congress, 2016) 5–6.

13 *Question of the Peaceful Use of Outer Space*, GA Res 1348 (XIII), UN Doc A/4090 (13 December 1958) established COPUOS as an ad hoc body, with 19 members. In 1959 the General Assembly passed *International Co-operation in the Peaceful Uses of Outer Space*, GA Res 1472 (XIV), UN Doc A/4354 (12 December 1959) establishing COPUOS as a permanent body with 24 members. The First Committee of the UN (Disarmament and International Security) also has an active role in creation of outer space law.

14 *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962 (XVIII), A/RES/1962 (XVIII) (13 December 1963).

15 Ram Jakhu, 'Legal Issues Relating to the Global Public Interest in Outer Space' (2006) 32(1) *Journal of Space Law* 31, 31.

16 *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2021*, UN Doc A/AC.105/C.2/L.317 (31 May 2021).

17 Brian Israel, 'Treaty Stasis' (2014) 108(1) *American Journal of International Law Unbound* 63, 64–5.

responding to the changing nature of the actors, and their use of outer space.[18] The *Outer Space Treaty* was drafted in a time where the only actors in space were powerful, well-resourced States. Increasingly, however, we are seeing powerful, well-resourced individuals being the actors that shape the future of outer space and the laws that will apply.[19] There is increasing pressure to create law in outer space to fuel investment and ensure secure and sustainable access.[20]

Since the *Outer Space Treaty*, three other core treaties have entered into force. The *Rescue Agreement* in 1968,[21] the *Liability Convention* in 1972[22] and the *Registration Convention* in 1975.[23] In 1984 the *Moon Agreement*[24] entered into force, however with only 18 State Parties, the treaty has not yet made a significant contribution to the wider international legal regime. The current era of lawmaking in outer space is marked by the decline of the 'traditional' treaty method.[25] Over time, 'soft law' has become the dominant method for the development of international principles governing outer space.[26] Soft law instruments do not create binding obligations on States but are of moral and normative value. They can 'significantly influence [S]tates' behaviour and directly contribute to the progressive elaboration and consolidation of international law norms'.[27] A 'substantial' approach to soft law puts forward the notion that the legal value of soft law should be understood by the intention of the parties instead of the label attached to a legal instrument.[28] The value of soft law outside of its normative status can be to guide

18 Ibid 67–8.

19 See, eg, 'Space Law Is Inadequate for the Boom in Human Activity There', *The Economist* (online, 20 July 2019) <https://www.economist.com/international/2019/07/18/space-law-is-inadequate-for-the-boom-in-human-activity-there>.

20 Ibid.

21 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968).

22 *Convention on International Liability for Damage Caused by Space Objects*, opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972).

23 *Convention on Registration of Objects Launched into Outer Space*, opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976).

24 *Moon Agreement* (n 10).

25 Peter Martinez, 'The Role of Soft Law in Promoting the Sustainability and Security of Space Activities' (2020) 44(2) *Journal of Space Law* 522, stating there is 'little appetite in multilateral fora for negotiating new legally binding instruments': at 522. See also Israel, 'Treaty Stasis' (n 17) 64–5.

26 Fabio Tronchetti, 'Soft Law' in Christian Brünner and Alexander Soucek (eds), *Outer Space in Society, Politics and Law* (Springer, 2011) 619, 619.

27 Ibid.

28 Ibid 622.

treaty interpretation,[29] be the basis for a new treaty, or contribute to the formation of customary international law.[30]

Since the decline of treaties, United Nations General Assembly Resolutions have attempted to fill the gaps and have allowed for discussion and development of space law without forcing States to sign onto a binding treaty.[31] This preference for soft law over binding multilateral treaties can be seen in the failure of the 2008 and 2014 joint submissions by China and Russia, on the *Draft Treaty on the Prevention of the Placement of Weapons in Our Space and of the Threat of Force against Outer Space Objects* tabled in the UN Conference of Disarmament.[32] The proposed treaty has had little success creating a binding obligation and instead General Assembly Resolutions that outline the relevant principles have been adopted.[33] Then, how

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29 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b) ('*VCLT*') allows subsequent practice of States to be used to interpret treaties.

30 Alan Boyle, 'Soft Law in International-Law Making' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 141, 142; *Statute of the International Court of Justice* art 38(b).

31 See, eg, *Principles Relating to Remote Sensing of the Earth from Outer Space*, GA Res 41/65, UN Doc A/RES/41/65 (3 December 1986). The UNOOSA, *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space* (Guidelines, 2010) was endorsed by the General Assembly in *International Cooperation in the Peaceful Uses of Outer Space*, GA Res 62/217, UN Doc A/RES/62/217 (1 February 2008, adopted 22 December 2007) para 26 ('*Debris Mitigation Guidelines*') <https://www.unoosa.org/pdf/publications/st_space_49E.pdf>. For an overview of soft law instruments governing the law of outer space, see generally Masson-Zwaan and Sundahl (n 10) 33–7.

32 See: *Letter Dated 2008/02/12 from the Permanent Representative of the Russian Federation and the Permanent Representative of China to the Conference on Disarmament Addressed to the Secretary-General of the Conference Transmitting the Russian and Chinese Texts of the Draft "Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT)" Introduced by the Russian Federation and China*, UN Doc CD/1839 (29 February 2008); *Letter Dated 10 June 2014 from the Permanent Representative of the Russian Federation and the Permanent Representative of China to the Conference on Disarmament Addressed to the Acting Secretary-General of the Conference Transmitting the Updated Russian and Chinese Texts of the Draft "Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT)" Introduced by the Russian Federation and China*, UN Doc CD/1985 (12 June 2014).

33 *Prevention of an Arms Race in Outer Space*, GA Res 69/31, UN Doc A/RES/69/31 (11 December 2014, adopted 2 December 2014); *Further Practical Measures for the Prevention of an Arms Race in Outer Space*, GA Res 72/250, UN Doc A/RES/72/250 (12 January 2018, adopted 24 December 2017). For further discussion on the role of soft law in regulating arms in outer space see Jack M Beard, 'Soft Law's Failure on the Horizon: The International Code of Conduct for Outer Space Activities' (2017) 38(2) *University of Pennsylvania Journal of International Law* 335.

exactly is space law to develop when States are only looking to sign onto non-binding agreements?

Brian Israel has proposed three different methods by which *new* space law may be created: Space Law 1.0, Space Law 2.0 and Space Law 3.0.[34] Space Law 1.0 is the creation of large multilateral treaties with binding legal obligations.[35] The conclusion of a multilateral treaty has been described as the '"holy grail" of legal reform'[36] however, there is little hope that this will be the way forward for space governance. Space Law 2.0 involves national legislation, but legislation that is independent from a treaty or extends outside of its direct obligations (thus imposing no binding international obligations).[37] The United Nations has noted this form of lawmaking, with the General Assembly adopting *Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space* in 2013.[38] A key example is the legislation introduced by both the United States[39] and Luxembourg,[40] which legalised the collection and commercial use of space resources.[41] This legislation went outside the boundaries of the *Outer Space Treaty* in offering an interpretation that space resource utilisation was *not* national appropriation and therefore *not* prohibited by art II. At best this type of lawmaking will create a 'constitutional multipolarity' with good faith interpretations that are consistent with the terms of the treaty, and at worst it will create fragmentation of the current regime.[42] The impact of soft law on Space Law 2.0 can be seen by the introduction of domestic legislation implementing debris mitigation guidelines. These guidelines were endorsed by

34 Brian R Israel, 'Space Resources in the Evolutionary Course of Law Making' (2019) 113(1) *American Journal of International Law Unbound* 114 ('Evolutionary Course of Law Making').

35 Ibid 115.

36 Masson-Zwaan and Sundahl (n 10) 30.

37 Israel, 'Evolutionary Course of Law Making' (n 34) 116–17. '*[N]on-binding* does not *mean non-legal*, in the sense that States can choose to domesticate their politically binding agreement to such voluntary frameworks in their domestic regulatory practices': Martinez (n 25) 557 (emphasis in original).

38 *Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space*, GA Res 68/74, UN Doc A/RES/68/74 (16 December 2013, adopted 11 December 2013).

39 *Space Resource Exploration and Utilization Act of 2015*, 51 USC 513.

40 *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace* (Luxembourg).

41 Japan has recently passed the *Law Concerning the Promotion of Business Activities Related to the Exploration and Development of Space Resources 2021* (Japan) which will come into force on 23 December 2021. Article 2 requires that persons need a permit in order to undergo any space resource extraction. The United Arab Emirates has passed *Federal Law No (12) of 2019 on the Regulation of the Space Sector* (United Arab Emirates). Article 18 allows for permits to be issued by the Council for the exploration, exploitation and use of space resources.

42 Israel, 'Evolutionary Course of Law Making' (n 34) 117, 118.

a UN General Assembly Resolution,[43] and have since been incorporated (even if only in part) into the domestic legislation of States, including Australia,[44] and New Zealand.[45] Space Law 3.0 is a 'private law system of contracts between operators'.[46]

These three categories should not be seen as a linear scale of how the law in outer space will develop, but as interrelated modalities of progress. For example, national legislation (Space Law 2.0) still frames itself within the limits of the multilateral treaties (Space Law 1.0). Furthermore, private law contracts (Space Law 3.0) will likely be dependent on national legislation (Space Law 2.0) and could see the development of new Space Law 1.0 type agreements.[47] This multipolarity presents a challenge

> to design global space governance, meaning broadly the formal and informal laws, institutions, processes, and practices that structure relations, stabilize expectations, guide and restrain behavior, and frame policy responses for stakeholders.[48]

How the Accords fit as a means of designing space governance is considered in the next Part.

III The Artemis Accords

The Accords do not create legally binding obligations and thus cannot be categorised as 'hard law'. The only alternative is that the Accords form part of the ever-growing category of soft law that is filling the lacunae in outer space law and governance. Soft law does not mean 'not law' as has been shown above. States ultimately create international law and the Accords provide an interesting case study for the continued development of outer space law. They do not fit neatly into one of the categories described by Israel, nor can they be described as one of the more 'traditional' soft law instruments that guide the use of outer space. This Part explores how the Artemis Accords are different to previous instruments and what this could mean for future governance in outer space.

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43 *Debris Mitigation Guidelines* (n 31) iv.

44 *Space Activities Amendment (Launches and Returns) Act 2018* (Cth) sch 1 cl 34 requires applications for launch permits, and that overseas payload permits include a debris mitigation strategy: at sch 1 cl 46G.

45 *Outer Space and High-altitude Activities Act 2017* (NZ) ss 9(1)(c), 25(1)(c), 17(1)(b), 33(1)(b) ('*NZ Act*') respectively require that applicants for launch licenses, payload permits, overseas launch licenses, or overseas launch permits produce an orbital debris mitigation plan. See also *NZ Act* (n 45) s 88(1).

46 Israel, 'Evolutionary Course of Law Making' (n 34) 118.

47 Ibid.

48 Saadia M Pekkanen, 'Introduction to the Symposium on the New Space Race: Governing the New Space Race' (2019) 113(1) *American Journal of International Law Unbound* 92, 95.

The Artemis Accords were presented as a way to guide NASA and its international partners' future missions to the Moon, but in reality its scope is much broader.[49] Despite being merely political agreements,[50] the value of the Accords as a normative instrument to interpret existing law and as a potential new mode of governance is noteworthy. The Accords are not the first agreement between a small numbers of States for a mission in space. The International Space Station ('ISS') was set up and is overseen by the Intergovernmental Agreement[51] ('IGA'), which sets out the responsibilities for each State and its crew. The notable difference between the two agreements is that the IGA created binding legal obligations on its parties. The ISS is not just governed by the IGA though, but a three-tiered legal framework: the IGA; bilateral Memoranda of Understanding between NASA and the four Cooperating Agencies; and various 'implementing arrangements'[52] concluded between NASA and another Cooperating Agency when required. Similarly, once the Accords have been signed, NASA intends to set out the legal obligations of States through bilateral agreements. Rather than using the international agreement as the means of apportioning responsibility (as with the IGA), the Accords instead set standards of behaviour for its Signatories.

On the surface there is nothing explicitly within the Accords that says the parties are seeking to make new law or interpret the existing law, but simply that the provisions of the Accords are rooted in the *Outer Space Treaty* and other instruments.[53] The Accords however, are at the 'cusp of a wider trend' in lawmaking in outer space.[54] They sit at the cross roads between global multilateral and unilateral (ie, national legislation) or between the worlds of Space 1.0 and 2.0, but their status is further complicated by their political character. As discussed above, national legislation and gaining a broader consensus of what the law is may be a path forward for creating space law — the examples being the United States and Luxembourg and their legislative acts which legalise space resource utilisation. Gaining broad agreement on the status of art II of the *Outer Space Treaty* is key for the Artemis project to move forward in compliance with the international regime. The Accords have created an instrument whereby States through their civil agencies effectively condone space resource utilisation and 'safety zones', as not violating article II of the *Outer Space*

49 'Artemis Accords' (n 1) s 1.

50 'The Accords represent a *political commitment* to the principles described herein, many of which provide for operational implementation of important obligations contained in the Outer Space Treaty and other instruments': ibid (emphasis added).

51 *Agreement among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station*, signed 29 January 1998, TIAS 12927 (entered into force 28 March 2001).

52 Ibid art 4.

53 'Artemis Accords' (n 1) s 1.

54 Deplano (n 10) 814.

Treaty.[55] Frans von der Dunk contends that the United States is using the Accords to 'gather consensus' of its interpretation of the *Outer Space Treaty* in regards to space (specifically lunar) resource utilisation.[56] David Fidler asserts that 'the United States is using its influence as the predominant spacefaring nation to strengthen [its understanding of] international space law'.[57] The Accords have created an environment where States do not have to pass their own domestic legislation in order to contribute to relevant practice on the interpretation of the *Outer Space Treaty*. As such it is likely that there will be broader and more rapid consensus on these interpretations.

Unlike previous soft law instruments, which have been drafted by COPUOS and put forward to all States at the United Nations General Assembly, the Accords were drafted primarily by the United States. As von der Dunk expresses above, the Accords are the attempts of one State to begin to interpret or perhaps even modify the bounds of outer space law. As put by David Fidler, 'the United States is using existing governance regimes to advance space activities rather than pursue revision of the *Outer Space Treaty* or negotiate a new agreement'.[58] This is starkly different to the global focus that has previously been utilised when creating soft law. It is clear, particularly, in relation to s 10 (Space Resources) and s 11 (Deconfliction of Space Activities), that the Accords intend to present an interpretation that can be consistent with the interpretation of the *Outer Space Treaty* and to resolve the ambiguity of the views of the Signatories.

There is some argument that the Accords promote multilateralism, with sections on safety zones, space resources and heritage all stating that '[t]he Signatories intend to use their experience under the Accords to contribute to multilateral efforts to further develop international practices' and rules.[59] There equally are concerns that the approach will exclude relevant actors from the lawmaking process. For example, being headed by one State means that national laws can influence and prohibit who can sign onto the agreement. In the case of the Artemis Accords, China is effectively banned from committing to them due to United States domestic legislation.[60] While this does not have practical effects for the Chinese space program, which is pursuing its own mission to the Moon, it does affect who makes norms in outer space and how

55 'Artemis Accords' (n 1) ss 10, 11. Notably Australia, which has signed the Artemis Accords (through the Australian Space Agency), also signed the *Moon Agreement*, which specifically prohibited the extraction of Moon resources, see *Moon Agreement* (n 10) art 11. For further discussion on this see Tronchetti and Liu (n 10).

56 Frans von der Dunk, '"For All Moonkind": Legal Issues of Human Settlements on the Moon' (Conference Paper 55891, International Astronautical Congress, October 2020), quoted in Stirn (n 10).

57 David P Fidler, 'The Artemis Accords and the Next Generation of Outer Space Governance', *Council on Foreign Relations* (Blog Post, 2 June 2020) <https://www.cfr.org/blog/artemis-accords-and-next-generation-outer-space-governance>.

58 Ibid.

59 'Artemis Accords' (n 1) ss 1, 9.2, 10.4, 11.6.

60 *Department of Defense and Full-Year Continuing Appropriations Act, 2011*, Pub L No 112-10, §1340, 125 Stat 38, 123.

they are made and their consequences for drafting future instruments. The costs of space travel are of course astronomical and essentially, the United States has created an environment that requires less resourced nations to either agree to their interpretations or risk being left behind.

In response to the Artemis Accords, in March 2021, Russia and China announced their own joint initiative to create a lunar base on the Moon — the International Lunar Research Station ('ILRS').[61] Russia had previously criticized the Artemis program as being 'too US-centric'.[62] While at present the project exists only between the two States, the Guide for Partnership, published in June 2021 explains that State partners can join the project through negotiation with Russia and China.[63] The information released as of October 2021, relates primarily to the mission objectives of the Station but 'development of the legal documents' is listed as one of the 'Cooperation Domains' of the station.[64] While it remains to be seen what these legal documents will include, it is not unlikely that just how the United States have included their interpretations of the *Outer Space Treaty*, China and Russia will seek to do the same. Russia has previously criticised the United States' position on space mining through Roscosmos, with the State Corporation for Space Activities stating that 'attempts to expropriate outer space and aggressive plans to actually take over other planets' deter international cooperation.[65] China is more welcoming of resource utilisation with a prototype mining spacecraft being launched by commercial aerospace company Origin Space Co Ltd in April 2021.[66] How the parties to the ILRS respond to this issue in light of the Artemis Accords will be informative, especially considering that 'lunar resources in-situ utilization' is listed as one of the Scientific Objectives of the Station.[67]

The Accords, and likely the ILRS framework, provide tentative evidence for a trend in States using their own methods of lawmaking, not necessarily to create *new* laws

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61 China National Space Administration, 'China and Russia Sign a Memorandum of Understanding Regarding Cooperation for the Construction of the International Lunar Research Station' (Media Release, 9 March 2021) <http://www.cnsa.gov.cn/english/n6465652/n6465653/c6811380/content.html>.

62 Jeff Foust, 'Russia Skeptical about Participating in Lunar Gateway', *Space News* (Web Page, 12 October 2020) <https://spacenews.com/russia-skeptical-about-participating-in-lunar-gateway/>.

63 China National Space Administration and Roscosmos, *International Lunar Research Station (ILRS): Guide for Partnership* (Guide, June 2021) 12 ('*ILRS Guide for Partnership*') <https://www.roscosmos.ru/media/files/mnls.pdf>.

64 Ibid.

65 Bob Daemmrich, 'Russia Compares Trump's Space Mining Order to Colonialism', *The Moscow Times* (online, 7 April 2020) <https://www.themoscowtimes.com/2020/04/07/russia-compares-trumps-space-mining-order-to-colonialism-a69901>.

66 'Chinese Company Launches Prototype Space Mining Spacecraft', *Xinhua* (Web Page, 28 April 2021) <http://www.xinhuanet.com/english/2021-04/28/c_139912690.htm>.

67 *ILRS Guide for Partnership* (n 63) 3.

per se, but to interpret existing laws in line with their goals. The *Vienna Convention on the Law of Treaties* looks to subsequent state practice to interpret a treaty,[68] and particularly when there is so much debate as to what conduct is lawful or unlawful under the *Outer Space Treaty*, agreements like the Artemis Accords will be influential in determining the law. Just as Israel raised concerns that Space Law 2.0 would create a constitutional multipolarity with numerous States passing their own national legislation, there is equally the concern that the Accords and now the ILRS framework will create at the very least a bipolarity of how space law should be interpreted.

The Artemis Accords (and any future agreements like this) provide a potential new path forward for creating the law in outer space, whereby dominant space faring nations seek to use their soft power to push forward interpretations of the law that benefit their own interests. It could be argued that this is how the multilateral treaties first came into existence. The *Outer Space Treaty* was largely an amalgamation of the two drafts proposed by the United States and USSR,[69] which at the time were the two dominant space powers. Notably different though is that large space powers are now pushing forward initiatives without broader global consensus. This may exclude smaller, non-space faring nations from participating in future developments of outer space law. Africa has been identified as a region that may be left out due to the bilateral nature of the Accords.[70] If this mode of development continues, there is a great risk that governance of the domain will only represent the interests of powerful nations. Given the increasing importance of access to outer space for both civil and military activities, being precluded from its governance may pose a serious threat to a State or region's security and more broadly to the system of space governance established by the United Nations and COPUOS.[71]

IV Conclusion

Whether or not the Artemis Accords do much to affect the content of outer space law is not something that can be fully understood until a dispute arises under a formal instrument of international law. What can be said is that, the Accords have changed the *way* that States approach the making of laws that apply to outer space. The Accords confirm that binding multilateral obligations will no longer be the way forward. Even further though, the Accords may signal the end of large multilateral

68 *VCLT* (n 29) art 31(3)(b).

69 *Draft Treaty Governing the Exploration of the Moon and Other Celestial Bodies*, UN Doc A/AC.105/C.2/L.12 (11 July 1966); *Draft Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Moon and Other Celestial Bodies*, UN Doc A/AC.105/C.2/L.13 (11 July 1966).

70 Memme Onwudiwe and Kwame Newton, 'Africa and the Artemis Accords: A Review of Space Regulations and Strategy for African Capacity Building in the New Space Economy' (2021) 9(1) *New Space* 38.

71 It is outside the scope of this comment to discuss whether the Untied Nations and COPUOS is the *more* appropriate mechanism for outer space governance. Merely it is contended that the Accords may threaten the established processes.

soft law instruments in the General Assembly in favour of more specific and intentional agreements either bilaterally or between small numbers of like-minded States that seek to move the law and governance in a similar direction.

This is in contrast to both Space Law 1.0 and 2.0 which Israel proposed as methods going forward to create space law. The United States Accords and the Chinese–Russian response have set a new precedent that law in outer space can and likely will develop through soft law as evidence of subsequent state practice for treaty interpretation[72] or even through state practice and *opinio juris* creating customary international law (though this is less likely). This may be in conjunction with national legislation creating a consensus through state practice (Space Law 2.0). However, given that only four States had formally passed such legislation on space resource utilisation and now 12 States have signed the Accords, it is possible that targeted political agreements will be more effective in developing the legal regime. The Artemis Accords represent a new path forward for filling the gaps in outer space law, one that is mission specific and is progressed by individual States gaining consensus through political/soft law agreements.

72 *VCLT* (n 29) art 31(3)(b).

Keagan Lee*

COMMON FUND ORDERS: WHERE ARE WE NOW, AND WHERE TO NEXT?

I Introduction

The Australian class action regime, at its introduction in 1992,[1] promised a revolution for access to justice.[2] Since that time, the class action frameworks provided for in pt IVA of the *Federal Court of Australia Act 1976* (Cth) and the *pari materia* mechanisms in New South Wales,[3] Victoria,[4] and other states have been the subject of significant change. One of the most significant, recent changes came in *BMW Australia Ltd v Brewster* ('*Brewster*'),[5] in which the High Court severely limited the scope for courts to make common fund orders ('CFOs'). This article outlines the legal position before and after *Brewster*. It then investigates the benefits and limitations of CFOs and the extent to which the effect of the decision in *Brewster* is to limit access to justice. The article concludes that legislative reform to grant courts the express jurisdiction to make CFOs is necessary.

II Class Actions and Litigation Funding: A Social Good?

The existence of a mechanism for representative proceedings is generally perceived to be of social utility. Such proceedings expand the availability of access to justice. Assessing the extent to which a mechanism facilitates access to justice requires a compartmentalisation of the term 'access to justice'. As Stefan Wrbka, Steven Van Uytsel and Matthias Siems identify:

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* LLB (Hons) Candidate, BCom (Acc) (Adel). The views expressed in this article are the author's own and are not those of any organisation with whom the author is or has been associated. The author would like to thank the anonymous peer reviewers, and the *Adelaide Law Review*'s editors and student editors for their insightful comments on this article.

1 See *Federal Court of Australia Amendment Act 1991* (Cth).

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General), quoted in Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 402. See also Justice Michael Kirby, 'Law Reform: Past, Present, Future' (Speech, Alberta Law Reform Institute, 2 June 2008) 18.

3 *Civil Procedure Act 2005* (NSW) pt 10.

4 *Supreme Court Act 1986* (Vic) pt 4A.

5 (2019) 374 ALR 627 ('*Brewster*').

> The term *access to justice* consists of two parts: *access* and *justice*. In its literal meaning, *access* stands for the chance to reach or accomplish something, whereas *justice* refers to … the concept that everybody's rights are safeguarded. In a combined sense it traditionally represents the procedural ideal that everybody regardless of his [or her] financial, social or intellectual circumstances should be able to enforce his [or her] rights by suitable legal means.[6]

Representative proceeding regimes are well placed to achieve both components of the term 'access to justice' by providing remedies to persons who may 'not know what rights and remedies are available' or to those who fear the legal process.[7] They similarly provide an avenue to obtain a remedy in circumstances where the legal costs otherwise likely to be incurred are disproportionate to the remedy itself.[8] Such proceedings are especially necessary in modern society, the commercial environment of which raises the risk of 'mass wrongs, such as the mass-produced defective product, large-scale pollution, and misleading advertising or securities disclosures aimed at numerous consumers or shareholders'.[9]

Representative proceedings may also have an impact upon behaviour, typically corporate behaviour, by encouraging corporations to exercise greater caution in producing goods or communicating information due to fear of 'large judgments'.[10] Further, class action regimes allow defendants to avoid multiple, related proceedings,[11] because they allow multiple persons to vindicate their complaints in one set of proceedings. Consequently, class action regimes may[12] also facilitate economic use of judicial resources by limiting the number of separate proceedings that are pursued in relation to the same infringement of rights.[13] These propositions are, generally

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6 Stefan Wrbka, Steven Van Uytsel and Mathias Siems, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge University Press, 2012) 27 (emphasis in original).

7 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, October 1988) 9.

8 Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 431 (MR Thomson, Minister for Small Business).

9 Michael Legg, 'Evaluating Class Action Effectiveness' [2015] (July–August) *Precedent* 10, 10–11.

10 Justin Scott Emerson, 'Class Actions' (1989) 19(2) *Victoria University of Wellington Law Review* 183, 188.

11 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, December 2000) 54 [120]–[121].

12 There is some evidence to the contrary. See, eg: Thomas E Willging, Laura L Hooper and Robert J Niemic, *Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules* (Report, Federal Judicial Center, 13 March 1996) 19; Roger Bernstein, 'Judicial Economy and Class Actions' (1978) 7(2) *Journal of Legal Studies* 349.

13 Mathew Good, 'Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions' (2009) 47(1) *Alberta Law Review* 185, 209.

speaking, uncontroversial. It is at the intersection between litigation funding and class actions where the controversy lies.

Consistently with this controversy, the law has historically taken a dim view of litigation funding. This view, rooted 'in Grecian and Roman law',[14] found expression in the offences and torts of maintenance and, as a species thereof,[15] champerty. The tort and offence of maintenance operated to prevent uninterested parties from countenancing or funding another's litigation.[16] Champerty arose if a maintainer sought to 'make a profit out of another'[17] person's action, ordinarily by taking a portion of the damages obtained.[18] These ancient offences have been abolished in each Australian state expressly[19] or by omission.[20] In New South Wales,[21] South Australia,[22] Tasmania,[23] and Victoria,[24] the torts have been expressly removed, though it remains in Western Australia,[25] while the position is unclear in Queensland.[26] Further, in at least New South Wales,[27] South Australia,[28] Victoria,[29] and Western Australia,[30] champertous agreements can be made void.

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14 *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd [No 4]* [2019] QSC 228, [72] (Crow J) ('*Gladstone Ports [No 4]*').

15 *Hill v Archbold* [1968] 1 QB 686, 694–5, 700 (Lord Denning MR, Winn LJ agreeing at 699).

16 *Neville v London Express Newspapers Ltd* [1917] 1 KB 402, 407 (Viscount Reading CJ); *Alabaster v Harness* [1895] 1 QB 339, 342–3 (Lord Esher MR).

17 *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 654 (Lord Denning MR).

18 Ibid.

19 *Crimes Act 1900* (NSW) sch 3 cl 5; *Criminal Law Consolidation Act 1935* (SA) sch 11 cl 1(3) ('*CLCA*'); *Crimes Act 1958* (Vic) s 322A.

20 *Gladstone Ports [No 4]* (n 14) [105] (Crow J); *Criminal Code Act Compilation Act 1913* (WA) app B s 4; *Treacy v Rylestone Pty Ltd* [2002] WASC 178, [43]–[45] (Scott J); *Criminal Code Act 1924* (Tas) s 6; *Mok v DPP (NSW)* (2016) 257 CLR 402, 422 n 74 (French CJ and Bell J).

21 *Civil Liability Act 2002* (NSW) sch 2 cl 2.

22 *CLCA* (n 19) sch 11 cl 3(1).

23 *Civil Liability Act 2002* (Tas) ss 28E(ba)–(bb).

24 *Wrongs Act 1958* (Vic) s 32(1) ('*Wrongs Act*').

25 *Freehill Hollingdale & Page v Bandwill Pty Ltd* [2000] WASCA 150, [27] (Owen, Steytler and Miller JJ); *Freeman v Kellerberrin Farmers Co-Operative Co Ltd* [2008] WASC 182, [32] (Hasluck J); *Chandler v Water Corporation* [2004] WASC 95, [36] (Hasluck J). See also Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia* (Discussion Paper, September 2019) 21.

26 *Gladstone Ports [No 4]* (n 14) [131] (Crow J); *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261, 268 (Lockhart, Cooper and Kiefel JJ).

27 *Civil Liability Act 2002* (NSW) sch 2 cl 2(2).

28 *Hegarty v Keogh* [2020] SASC 237, [127] (Master Bochner).

29 *Wrongs Act* (n 24) s 32(2).

30 See, eg: *Clairs Keeley v Treacy* (2003) 28 WAR 139; *Clairs Keeley v Treacy* (2004) 29 WAR 479, 482 [1] (Steytler, Templeman and McKechnie JJ).

Nonetheless, the historical scepticism towards litigation funding has subsided to some extent. Significantly, the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* ('*Fostif*')[31] restricted the operation of the maintenance doctrine. Justices Gummow, Hayne, and Crennan[32] (with whom Gleeson CJ agreed)[33] and Kirby J[34] found that the mere fact that representative proceedings were funded by a third party on terms that, if the action succeeded, the third party would be entitled to one third of the damages, did not render the proceedings an abuse of process. Justice Kirby in particular considered the utility of litigation funding in facilitating access to justice in representative proceedings.[35]

Justice Kirby's views appear to have been vindicated. Between March 2006 and March 2007, there were only seven class actions instituted across Australia.[36] In the following twelve-month period, 26 class actions were instituted.[37] Since then, the number has ranged between 17 and 38 per year.[38] Further, the number of representative proceedings that are funded by third parties has been increasing over time, and 'in 2017 and 2018, 77 per cent of finalised Federal Court class actions were third-party funded'.[39]

Thus, it has been said that litigation funding in representative proceedings 'enhance[s] access to justice by reducing financial risk and postponing or removing the cost barrier to participation'.[40] In this sense, litigation funding 'facilitate[s] access to collective redress which would otherwise be very limited'.[41] Ignoring for one

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31 (2006) 229 CLR 386 ('*Fostif*').

32 Ibid 434–6 [91]–[95].

33 Ibid 407 [1].

34 Ibid 451 [146].

35 Ibid 449 [138].

36 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, Global Class Actions Exchange, Stanford University, July 2017) 22–3 <http://globalclassactions.stanford.edu/content/empirical-study-australias-class-action-regimes-fifth-report-first-twenty-five-years-class-a>.

37 Ibid.

38 Ibid.

39 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 34 [4.22], citing Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 74 ('*An Inquiry into Class Action Proceedings*').

40 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Final Report, March 2018) 3 [1.7].

41 Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19(1) *Theoretical Inquiries in Law* 303, 304–5.

moment the means, litigation funding thus achieves the same positive ends that are central to class action regimes.

III The Law

A *Pre-Brewster*

Returning now to the means, it is necessary to understand the operation of CFOs and the problem they resolve. After *Fostif*, class actions would often be initiated with some members having signed funding agreements and some having not.[42] The latter were styled 'free-riders' on the basis that they obtained the benefit of the funding without contributing to it.[43] The original solution to this problem was to pursue 'closed' class actions.[44] Such closure could be achieved through one of two methods:[45] first, commencing with a closed class;[46] or, second, seeking a class closure order.[47] The first of these methods is effected by limiting a class to those who have 'entered into a litigation funding agreement'.[48] This approach does not extinguish the claims of non-signatories but would require such persons to pursue a remedy separately.[49] The second is effected by instituting an ordinary open class action and subsequently seeking orders that unfunded parties sign a funding agreement, opt out, or do nothing.[50] Doing nothing extinguishes the person's right to pursue a remedy.[51] These orders may be made in Victoria.[52] In New South Wales, however, such orders

42 Roger Gamble, 'Jostling for a Larger Piece of the (Class) Action: Litigation Funders and Entrepreneurial Lawyers Stake Their Claims' (2017) 46(1) *Common Law World Review* 3, 6.

43 Jacob Varghese and Lee Taylor, 'Mediating Australian Class Actions' (2015) 2(2) *Alternative Dispute Resolution Law Bulletin* 28, 28.

44 Gamble (n 42) 6.

45 *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527, [161] (Murphy J).

46 *Matthews v SPI Electricity Pty Ltd [No 13]* (2013) 39 VR 255, 262 [20] (Forrest J) ('*Matthews [No 13]*').

47 Gamble (n 42) 6.

48 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176, [19] (Finkelstein J).

49 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 298 [173]–[178] (Jacobson J, French J agreeing at 277 [1], Lindgren J agreeing at 277 [2]).

50 See, eg, *Furnell v Shahin Enterprises Pty Ltd* (2021) 386 ALR 245, 257–60 [44]–[52] ('*Furnell*') in which White J discussed the decision of the New South Wales Court of Appeal in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 ('*Wigmans*') in which that Court found that class closure orders were impermissible in New South Wales.

51 *Matthews [No 13]* (n 46) 262 [23]; Waye and Morabito (n 41) 316–18.

52 *Supreme Court Act 1986* (Vic) s 33ZG; *Matthews [No 13]* (n 46).

have recently been held to be beyond the courts' jurisdiction.[53] Although the Federal Court has made such orders,[54] later decisions have followed the recent New South Wales authority.[55]

Alternatively, a court was able to resolve the 'free-rider' problem by making a funding equalisation order ('FEO') or a CFO.[56] The former involves reducing the amount of the settlement or judgment sum payable to unfunded class members and correspondingly increasing the amount of the settlement or judgment sum payable to funded class members[57] such that, accounting for funding costs, both unfunded and funded class members receive similar sums.[58] By reason of the equalisation principle that underlies these orders and concerns of interfering 'with the terms of arms-length commercial agreements',[59] courts are reluctant to vary the percentage payable to the funder, and their jurisdiction to do so has been questioned.[60] FEOs are typically made at the settlement stage or at the time that the court gives judgment.[61] CFOs, on the other hand, are generally made at an early stage of the proceedings with a rate to be set by the court at the appropriate time.[62]

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53 See *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890; *Wigmans* (n 50) 214–19 [79]–[112] (Macfarlan, Leeming and White JJA).

54 See *Jones v Treasury Wine Estates Ltd [No 2]* [2017] FCA 296. See also *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, 21–2 [74] (Jagot, Yates and Murphy JJ) ('*Melbourne City*').

55 See *Furnell* (n 50) 264 [73] (White J); *Owners of Strata Plan No 87,231 v 3A Composites GmbH [No 3]* [2020] FCA 748, [203] (Wigney J); *Pabalan v Coles Supermarkets Australia Pty Ltd* [2021] FCA 118, [7] (Perram J).

56 Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91(8) *Australian Law Journal* 655, 657–8.

57 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [17]–[19] (Stone J); *Brewster* (n 5) 660 [134] (Gordon J); Ross Foreman, 'High Court's Rejection of Common Funds Shakes Up Class Action Landscape' [2020] (63) *LSJ: Law Society of NSW Journal* 72, 72.

58 *Re Banksia Securities Ltd (rec and mgr apptd)* [2017] VSC 148, [100] (Robson J).

59 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 211–12 [92] (Murphy, Gleeson and Beach JJ) ('*Money Max*').

60 *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd [No 3]* [2020] FCA 461, [28], [33] (Beach J) ('*Bellamy's Australia [No 3]*'). See also: *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, [25], [42], [47]–[48] (Lee J) ('*McGraw-Hill*'); *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd [No 3]* (2018) 132 ACSR 258, 305 [209] (Murphy J) ('*Petersen Superannuation [No 3]*'); Justice MBJ Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (2017) 44(11) *Brief* 22, 26. But see: *Melbourne City* (n 54) 24–5 [90]; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [157] (Murphy J) ('*Earglow*').

61 *Money Max* (n 59) 217 [126]–[128].

62 Ibid 221 [146]–[148].

B *Where Are We Now?*

The High Court in *Brewster* determined that the power conferred on the Federal Court[63] and, mutatis mutandis, the New South Wales Supreme Court[64] in representative proceedings to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' ('Power') did not extend to making CFOs.[65] The plurality, Kiefel CJ, Bell and Keane JJ (with whom Nettle J[66] and Gordon J[67] generally agreed), outlined six primary reasons for that conclusion. First, the Power does not permit the making of orders whose purpose is to enable the proceedings 'to go forward',[68] and CFOs are such orders.[69] Secondly, CFOs are 'not apt to ensure that justice is done in the proceeding'[70] but instead ensure the financial viability thereof.[71] Thirdly, the Power is supplementary, and does not 'meet the exigencies of litigation not adverted to'[72] in the provisions that surround it, especially with respect to the questions of whether proceedings should continue[73] and who should bear costs at the early stages[74] of the proceeding to ensure that they do continue.[75] Answering such questions would be an impermissibly speculative exercise.[76] Fourthly, courts cannot utilise the supplementary Power to facilitate access to justice where such access is denied for want of funding.[77] Fifthly, FEOs are more appropriate to do justice between the parties, and such orders are appropriately left to the end of the proceedings.[78] Finally, the Power is not to be used for the benefit of funders, especially to prevent funders from incurring expense in 'book building' (that is, seeking members for a closed class).[79]

63 *Federal Court of Australia Act 1976* (Cth) s 33ZF ('*Federal Court of Australia Act*').

64 *Civil Procedure Act 2005* (NSW) ss 183, 155 (definition of 'Court').

65 *Brewster* (n 5) 630 [3] (Kiefel CJ, Bell and Keane JJ), 658 [128] (Nettle J), 667 [170] (Gordon J).

66 Ibid 657 [124]–[125].

67 Ibid 658–67 [129]–[165].

68 Ibid 639 [49].

69 Ibid.

70 Ibid 640 [53].

71 Ibid.

72 Ibid 641 [60].

73 Ibid 642 [62]–[65].

74 Ibid 643 [68].

75 Ibid 643–6 [68]–[81].

76 Ibid 642–3 [67].

77 Ibid 647 [82]–[84].

78 Ibid 647–8 [85]–[90].

79 Ibid 649 [91]–[94].

Nonetheless, CFOs have lived to see another day. First, CFOs made before *Brewster* have survived, consistent with the position in *New South Wales v Kable*.[80] Secondly, the New South Wales Court of Appeal recently suggested that, because the ratio of *Brewster* is limited to prohibiting CFOs at the early stages of proceedings ('commencement CFOs'),[81] CFOs at settlement or judgment may be made.[82] The power to make such orders was said to be sourced in the requirement that '[r]epresentative proceedings may not be settled or discontinued without the approval of the Court'.[83] The Court of Appeal further considered that it likely would not be constrained by seriously considered dicta in the *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* sense[84] in making such CFOs.[85] This is because the High Court in *Brewster* did not directly consider the position with respect to settlement and judgment CFOs, and to operate on the assumption of what the High Court *might* find would be speculative.[86] The Court of Appeal did not, however, make a settlement CFO because one had not yet been proposed.[87]

In similar circumstances, before the parties had proposed a settlement CFO, the Full Court of the Federal Court in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* ('*Davaria*')[88] considered that it was not prevented by *Brewster* from making settlement or judgment CFOs. Further, in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd [No 3]*,[89] Lee J approved a settlement CFO. Justice Beach followed suit in *Evans v Davantage Group Pty Ltd [No 3]*.[90]

Davaria was the subject of a recent application for special leave to appeal to the High Court. The applicant had expressed its intention to seek such leave shortly after the Full Court's judgment was delivered.[91] During the course of the special leave hearing,

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80 (2013) 252 CLR 118, 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoted in *Pearson v Queensland [No 2]* [2020] FCA 619, [264] (Murphy J) ('*Pearson [No 2]*').

81 *Brewster v BMW Australia Ltd* [2020] NSWCA 272, [38] (Bell P, Bathurst CJ agreeing at [1], Payne JA agreeing at [49]) ('*Brewster (NSWCA)*').

82 Ibid [39].

83 *Civil Procedure Act 2005* (NSW) s 173(1). See also *Federal Court of Australia Act* (n 63) s 33V(1).

84 (2007) 230 CLR 89, 150–1 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

85 *Brewster (NSWCA)* (n 81) [33] (Bell P).

86 Ibid [33]–[36].

87 Ibid [46]–[48].

88 (2020) 384 ALR 650, 661 [42] (Lee J, Middleton J agreeing at 652 [1], Moshinsky J agreeing at 652 [4]) ('*Davaria*').

89 (2020) 385 ALR 625, 634 [33].

90 [2021] FCA 70, [49], [51] ('*Davantage Group [No 3]*').

91 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 101 [9.27], citing Cat Fredenburgh, 'High Court Asked to Deal Death Blow to Common Fund Orders', *Lawyerly* (online, 7 December 2020) <www.lawyerly.com.au/high-court-asked-to-put-the-nail-in-the-coffin-of-common-fund-orders/>.

the applicant contended that the Full Court erred in considering that *Brewster* did not prevent it from making a settlement or judgment CFO.[92] Counsel for the applicant expressed the view that the reasoning in *Brewster*, as outlined above, applied equally to commencement, judgment, and settlement CFOs.[93] The High Court (Keane, Edelman and Gleeson JJ) considered that the application was not a suitable vehicle through which to determine the issue.[94] It may be gleaned from the transcript that the Court's reasons for so holding include, first, the fact that the funder and applicant had not participated in the hearing at first instance[95] and, secondly, the fact that the Full Court had not actually made a settlement or judgment CFO.[96]

Thus, as the law currently stands, commencement CFOs are prohibited. It is possible that settlement and judgment CFOs may be made, but an appellate court is yet to approve one. The position is thus one of uncertainty.

IV Need for Reform?

The uncertainty that characterises the current legal position with respect to CFOs requires clarification. Effective legislative reform could provide the solution. In late 2020, the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services ('PJC') recommended legislative reform 'in accordance with' *Brewster*.[97] The Commonwealth Attorney-General[98] and Treasurer[99] have expressed publicly their willingness to act on and consult the public in relation to the PJC's recommendations. Specifically, there has been a focus on the PJC's recommendation to implement a maximum or graduated entitlement for litigation funders out of settlement agreements in representative proceedings.[100]

92 Transcript of Proceedings, *7-Eleven Stores Pty Ltd v Davaria Pty Ltd* [2021] HCATrans 113, 106–10 (NJ Young QC).

93 Ibid 105–10 (NJ Young QC).

94 Ibid 238–40 (Keane J).

95 Ibid 28–34 (Edelman J).

96 Ibid 10–14 (NJ Young QC), 15–18 (Keane J).

97 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 125 [9.124].

98 Michael Pelly, 'Michaelia Cash Goes into Bat for Legal Consumers', *The Australian Financial Review* (online, 28 May 2021) <https://www.afr.com/politics/michaelia-cash-goes-into-bat-for-legal-consumers-20210525-p57uwx>.

99 Josh Frydenberg, 'Consulting on the Recommendations of the Parliamentary Joint Committee Report on Litigation Funding and Class Actions' (Joint Media Release, 28 May 2021).

100 Michael Pelly, 'Michaelia Cash Targets Class Actions "Feeding Frenzy"', *The Australian Financial Review* (online, 27 May 2021) <https://www.afr.com/politics/federal/michaelia-cash-targets-class-actions-feeding-frenzy-20210526-p57vd7>.

Before *Brewster*, in 2018, the Australian Law Reform Commission ('ALRC') recommended, inter alia, that courts be given express legislative jurisdiction to make CFOs.[101] Similarly, Michael Legg suggested in 2007[102] and 2011[103] that the 'common fund approach' would be the preferable solution to the 'free-rider' problem. This article advocates for the ALRC's and Legg's broader approach for reasons that follow.

A *Judicial Discretion*

Following a detailed analysis of many jurisdictions' class action regimes, the Law Reform Commission of Hong Kong concluded that 'one essential feature … predominates. It is that all class actions must be managed by the courts.'[104] A major limitation of the current position of CFOs in Australia is that it limits the courts' ability to manage class actions, a fact that Beach J identified in *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd [No 3]*, his Honour expressly requesting legislative reform: 'this is something that the legislature should address sooner rather than later … Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case'.[105]

This limitation becomes apparent upon consideration of the High Court's proposed comparator for the CFO — the FEO.[106] Whereas courts determine the percentage to which the funder will be entitled in making a CFO,[107] they have not adjusted the percentage specified in the funding agreement for the purposes of an FEO.[108] The courts' ability to vary the percentage in the funding agreement, absent some equitable wrong, has been questioned.[109] This is not a problem for CFOs, which are

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101 See *An Inquiry into Class Action Proceedings* (n 39) 9, outlining Recommendation 3.

102 Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81(7) *Australian Law Journal* 478, 488.

103 Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions: The Need for a Legislative Common Fund Approach' (2011) 30(1) *Civil Justice Quarterly* 52, 63 ('Reconciling Litigation Funding and the Opt Out Group Definition').

104 Law Reform Commission of Hong Kong, *Class Actions* (Report, May 2012) 5 [13] <https://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf>.

105 *Bellamy's Australia [No 3]* (n 60) [34].

106 *Brewster* (n 5) 647–8 [85]–[90] (Kiefel CJ, Bell and Keane JJ), 667 [168]–[169] (Gordon J).

107 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 507 [118]–[119] (Beach J) ('*Blairgowrie Trading*').

108 *Bellamy's Australia [No 3]* (n 60) [28] (Beach J). See also Michael Legg, 'Litigation Funding of Australian Class Actions after the High Court Rejection of Common Fund Orders: *BMW Australia Ltd v Brewster*; *Westpac Banking Corporation v Lenthall* [2019] HCA 45' (2020) 39(4) *Civil Justice Quarterly* 305, 310.

109 *McGraw-Hill* (n 60) [25], [42], [47]–[48] (Lee J); *Petersen Superannuation [No 3]* (n 60) 305 [209] (Murphy J). But see *Earglow* (n 60) [157]. See also: Lee (n 60) 26; *Endeavour River Pty Ltd v MG Responsible Entity Ltd [No 2]* [2020] FCA 968, [4]–[5] (Murphy J). But see *Melbourne City* (n 54) 24–5 [90], in which Jagot, Yates and

separate from any agreement between the funder and the parties. Nonetheless, the funder will ordinarily[110] receive greater returns under a CFO than an FEO.[111] The return to the funder vis-à-vis the class is not, however, the end that the courts sought to achieve in making commencement CFOs.

B *Diminishing Access to Justice?*

The principal end that courts sought to achieve in making commencement CFOs was to ensure that the class remained open.[112] CFOs were effective in serving that end. For the period between *Fostif* in 2006, in which the High Court found that litigation funding was not contrary to public policy,[113] and the making of the first CFO in 2016,[114] 36% of funded representative proceedings involved closed classes.[115] On the other hand, between the making of the first CFO and 30 September 2018, notwithstanding an increased percentage of funded litigations, only 13.2% of funded representative proceedings involved closed classes.[116]

The reasons for this decrease are threefold, and each reason is cumulative. First, CFOs generally provide greater returns to funders,[117] and thereby encourage the funding of class actions generally. Secondly, CFOs reduce the expenses involved

Murphy JJ suggested in what is arguably obiter that courts 'can deal with' litigation funding commissions in a settlement approval application. Further, in *Earglow* (n 60), Murphy J considered that a court could 'reduce the funding commission to be deducted pursuant to the terms of settlement': at [157]. His Honour did not, however, consider the contention that such a reduction would not prevent the funder from seeking the shortfall from class members in separate proceedings: at [158]. Nor did his Honour vary the funding commission on the basis that it was 'fair and reasonable': at [194]–[196]. The questions in relation to the courts' jurisdiction to vary the percentage to which a funder is entitled under an FEO have still not definitively been resolved: see *Botsman v Bolitho* (2018) 57 VR 68, 142–3 [376]–[378] (Tate, Whelan and Niall JJA).

110 But see Justice Bernard Murphy, 'Civil Justice Reforms in Class Actions and Litigation Funding' (2019) 46(1) *Brief* 30, 32.

111 Greg Williams and Peter Sise, 'Did the High Court Really Strike Down Common Fund Orders in Brewster? Options Emerge for Class Action Litigation Funders', *Clayton Utz* (Blog Post, 21 February 2020) <https://www.claytonutz.com/knowledge/2020/february/did-the-high-court-really-strike-down-common-fund-orders-in-brewster-options-emerge-for-class-action-litigation-funders>.

112 See, eg: *Davantage Group [No 3]* (n 90) [44] (Beach J); *Blairgowrie Trading* (n 107) 505 [106] (Beach J); *Duck v Airservices Australia* [2018] FCA 1541, [17] (Bromwich J); *Money Max* (n 59) 196–7 [14], 218 [133] (Murphy, Gleeson and Beach JJ).

113 *Fostif* (n 31). See above nn 31–5 and accompanying text.

114 *Money Max* (n 59).

115 Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Closed Class Actions, Open Class Actions and Access to Justice* (Report, October 2018) 9.

116 Ibid 10.

117 Williams and Sise (n 111).

in seeking individuals to sign funding agreements (known as 'book building').[118] Finally, and crucially, CFOs incentivise litigation funders to increase the number of members involved in a representative proceeding, irrespective of whether those members have signed funding agreements, on the basis that CFOs connect funders' returns to the number of class members insofar as, generally, the funder's return increases as the number of class numbers increases.[119] This, accordingly, provides an active incentive for litigation funders to facilitate open class actions.

When these features are understood, it becomes apparent that settlement or judgment CFOs do not remedy the absence of commencement CFOs; the function which CFOs serve — incentivising the funding of open class actions — is spent at settlement and judgment. For similar reasons, FEOs, which are made at settlement or judgment, do not provide an appropriate solution to the absence of commencement CFOs. Litigation funders may thereby be required to book build, for fear that such CFOs will not be available and absent the 'known and stable foundation'[120] of a commencement CFO.[121] The absence of commencement CFOs thus reduces the return for funders without correspondingly reducing the risk associated with funding litigation. For some, this equation may not balance, leading to a consequent reduction in funders' willingness to fund open class actions and a connected reduction in competition between funders.[122] This reduction in competition would be especially unfortunate in light of the High Court's recent approval of the 'beauty parade'[123] approach to selecting between competing class actions, which allows courts to determine which class actions will be stayed and which class action will be permitted to proceed.[124] In particular, the High Court considered that the funding agreements in competing class actions could be a relevant, though not determinative, consideration, such that the set of proceedings which involves the agreement which is most generous to class members could be permitted to continue.[125] Where, however, litigation funders cannot be certain of the secure basis that a commencement CFO provides, there are likely to be fewer competing class actions. The benefit of the 'beauty parade' approach is, accordingly, likely to be limited in the absence of commencement CFOs.

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118 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 14 [25] (Lee J) ('*Perera*'); Anthony Lo Surdo, 'Litigation Funding Revisited: All for One, One for All?' [2015] (17) *LSJ: Law Society of NSW Journal* 76, 76.

119 See, eg, *Perera* (n 118) 14 [25] (Lee J).

120 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21, 45 [91] (Allsop CJ, Middleton and Robertson JJ).

121 Chris Pagent et al, 'The Top Ten Class Action Predictions for 2021', *Corrs Chambers Westgarth* (Blog Post, 12 March 2021) <https://corrs.com.au/insights/the-top-ten-class-action-predictions-for-2021>.

122 Ibid.

123 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 70 [7.23].

124 *Wigmans v AMP Ltd* (2021) 388 ALR 272.

125 Ibid 300–1 [111], 302–3 [118]–[119] (Gageler, Gordon and Edelman JJ).

It is for the same reasons that implementing a maximum or graduated percentage entitlement for litigation funders, which the PJC considered,[126] does not provide a solution. A PricewaterhouseCoopers ('PwC') report[127] found that the PJC-recommended entitlement of 30% would have caused litigation funders to suffer a loss or break even in 36% of publicly available class action litigation outcomes.[128] PwC predicted that, in such circumstances, those cases would not have been pursued at all.[129] Instead, facilitating the exercise of judicial discretion by permitting courts to make CFOs — which enable the court to set a funding percentage when all pertinent information is before it — would ensure that funders are remunerated reasonably for adopting the risk of funding the proceedings whilst ensuring that the funding percentage is fair to class members. The courts are well positioned to make this assessment on a case-by-case basis.[130] In this way, the courts can strike an adequate balance between funders' interests and ensuring that class members receive funding to pursue their claims.

The benefits do not, however, reside solely with the funder. The increase of open class actions benefits class members who otherwise would not be able to pursue a remedy.[131] CFOs, by facilitating open class actions, also benefit defendants insofar as they consequently encourage finality as to the result, because all possible class members are bound thereby in an open class action.[132]

Pearson v Queensland [No 2] ('*Pearson [No 2]*')[133] offers a compelling example. The claim related to legislative and executive policies in Queensland that operated, between 1939 and 1972, to deprive Aboriginal and Torres Strait Islander peoples of wages.[134] The claim was initially commenced as a closed class,[135] until Murphy J was able to make an interdependent class opening order and a commencement CFO.[136] In passing, his Honour observed that the commencement CFO made in that case 'allowed thousands more people, many of whom are elderly, not well-educated, lack commercial and legal sophistication and who live in isolated communities, to

126 See Parliamentary Joint Committee on Corporations and Financial Services (n 39) 206 [13.62], outlining Recommendation 20.

127 PricewaterhouseCoopers, *Models for the Regulation of Returns to Litigation Funders* (Final Report, Omni Bridgeway, 16 March 2021) <https://omnibridgeway.com/docs/default-source/insights/regulation/class-action-centre/litigation-funding---final-pwc-report---march-2020.pdf?sfvrsn=6f7cc6ec_7>.

128 Ibid 4.

129 Ibid 16.

130 See, eg, *Money Max* (n 59) 195–6 [11].

131 *Pearson [No 2]* (n 80) [23] (Murphy J).

132 *Federal Court of Australia Act* (n 63) s 33ZB; *Civil Procedure Act 2005* (NSW) s 179.

133 *Pearson [No 2]* (n 80).

134 Ibid [1].

135 See *Pearson v Queensland* [2017] FCA 1096.

136 Ibid [3], [7]–[29] (Murphy J).

become class members and to share in the settlement'.[137] Absent the CFO, such persons would likely not have pursued separate claims and would, therefore, in effect be denied a remedy in respect of 'discriminatory, unjust and … disgraceful legislation and policies'.[138] Justice Murphy also identified the benefit for the defendant of finality in the proceedings.[139]

Firms are predicting that the uncertainty that surrounds CFOs may cause a rise, once again, in book building,[140] which is likely to effect a corollary increase in closed class actions. Such closed classes are antithetical to the 'opt out' approach that Australian class action regimes have adopted,[141] and will likely result in diminished access to justice,[142] thereby undermining two central tenets of the Australian class action milieu.[143]

Contrary to the position[144] of opponents to CFOs and the law's historical scepticism of litigation funding, litigation funding and CFOs have been found 'not [to have] caused the feared "explosion" in the number of class actions'.[145] Instead, CFOs reduce the pool of potential class actions by encouraging open class actions, disincentivising closed class actions, and consequently reducing the number of different groups seeking a remedy in respect of the same factual and legal matrix.[146]

The law's historical scepticism towards litigation funding also provides the foundation on which opponents of CFOs argue that CFOs should not be allowed because they increase the return to funders to the detriment of claimants.[147] Such an argument

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137 *Pearson [No 2]* (n 80) [23].

138 Ibid [1].

139 Ibid [23].

140 Pagent et al (n 121); Odette McDonald and Eliot Olivier, 'Recent Developments in Common Fund Applications: *Pearson v State of Queensland* & *Blairgowrie v Allco Finance Group [No 3]*' (2017) 31(4) *Commercial Law Quarterly* 37, 37.

141 *An Inquiry into Class Action Proceedings* (n 39) 34–5 [1.54]; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 31–2 [39]–[40] (Gaudron, Gummow and Hayne JJ); *Abbott v Zoetis Australia Pty Ltd [No 2]* (2019) 369 ALR 512, 523–4 [36] (Lee J); *Matthews [No 13]* (n 46) 262 [21] (Forrest J).

142 See, eg, Lachlan Peake, 'Testing the Regulator's Priorities: To Sanction Wrongdoers or Compensate Victims?' (2020) 39(2) *University of Queensland Law Journal* 277, 297–8.

143 Stefanie Wilkins, 'Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148' (2017) 36(2) *Civil Justice Quarterly* 133, 141–3.

144 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 113–15 [9.74]–[9.81].

145 Gamble (n 42) 5.

146 Waye and Morabito (n 41) 309, 312–13, 328; Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition' (n 103) 61.

147 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 115–16 [9.82]–[9.86].

allows perfection to become the enemy of good,[148] and ignores the scenarios, such as that with which Murphy J dealt in *Pearson [No 2]*,[149] which require scope for judicial management.

V Conclusion

The legal position with respect to CFOs is unclear. At present, commencement CFOs are prohibited in New South Wales and Commonwealth courts, although there appears to be scope for courts in those jurisdictions to make settlement or judgment CFOs. In refusing to grant special leave in the *Davaria* litigation, the High Court declined to provide much-needed clarity. Nonetheless, even if the High Court were, through an appropriate vehicle, to preserve settlement or judgment CFOs, and dispel the uncertainty that exists in respect of such orders, legislative reform is necessary. It is preferable that courts be given express jurisdiction to make CFOs at *all* stages of representative proceedings such that they are able appropriately to craft orders to fit the circumstances before them. Such an approach would allow courts to balance the interests of class members with those of litigation funders to ensure that class actions remain open and that the Australian class action regimes serve their intended purpose of facilitating access to justice.

148 See, eg, Michael Molavi, 'Law's Financialization: Litigation Finance and Multilayer Access to Justice in Canada' (2018) 33(3) *Canadian Journal of Law and Society* 425, 437.

149 *Pearson [No 2]* (n 80). See Kaitlin Ferris, 'The Increasing Role of Class Actions: Developments in Litigation Funding' [2019] (July–August) *Precedent* 36, 41.

*Ravi Baltutis**

SOUTH AUSTRALIA'S TRUTH IN POLITICAL ADVERTISING LAW: A MODEL FOR AUSTRALIA?

> 'I reached the conclusion that you can venerate a contest of ideas, if you will, and we all do and that's important, but it shouldn't be in a way that hides agendas. A contest of ideas shouldn't be used to legitimise disinformation. And I think it's often taken advantage of.'[1]

I Introduction

Truth in political advertising legislation has been proposed, enacted, and often promptly repealed in Australian states and federally since 1983.[2] By contrast, South Australia has consistently regulated inaccurate and misleading electoral advertisements under s 113 of the *Electoral Act 1985* (SA) ('*SA Electoral Act*'). This law addresses both misinformation and disinformation[3] in election advertising

* LLB; BCom (Adel); Research Assistant, School of Social Sciences, The University of Adelaide; Student Editor, *Adelaide Law Review* (2021).

1 James Murdoch on why he resigned from News Corporation: Maureen Dowd, 'James Murdoch, Rebellious Scion', *The New York Times* (online, 10 October 2020) <https://www.nytimes.com/2020/10/10/style/james-murdoch-maureen-dowd.html>.

2 See, eg: *Commonwealth Electoral Act 1918* (Cth) s 329(2), as repealed by *Electoral and Referendum Amendment Act 1984* (Cth) s 5(a); Commonwealth Electoral Amendment Bill 1987 (Cth); Commonwealth Electoral and Referendum Amendment Bill 1989 (Cth); Electoral and Referendum Amendment Bill 1995 (Cth); Electoral Amendment (Political Honesty) Bill 2003 (Cth); Electoral Amendment Bill 1995 (Qld). See also George Williams, 'Truth in Political Advertising Legislation in Australia' (Research Paper No 13, Parliamentary Library, Parliament of Australia, 24 March 1997) 1–3; Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (Parliamentary Paper No 282, February 2010) 50–1, 158.

3 'Disinformation is meant to deceive, while misinformation may be inadvertent or unintentional': Andrew M Guess and Benjamin A Lyons, 'Misinformation, Disinformation, and Online Propoganda' in Nathaniel Persily and Joshua A Tucker (eds), *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge University Press, 2020) 10, 11. Disinformation is understood as 'false, inaccurate, or misleading information designed, presented, and promoted to intentionally cause public harm or for profit': Joo-Cheong Tham and KD Ewing, 'Free Speech and Elections' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 312, 327, quoting European Commission, *A Multi-Dimensional Approach to Disinformation: Report of the Independent High Level Group on Fake News and Online Disinformation* (Report, 2018) 3.

and it has survived constitutional challenge.[4] It is timely to consider whether South Australia's law is suitable for adoption throughout Australia and how it could be strengthened. National polls indicate that approximately 90% of Australians want truth in political advertising laws[5] while the Australian Labor Party ('ALP') plans to introduce federal truth in political advertising laws as a current priority.[6] In Victoria, the Electoral Matters Committee has recommended that the Victorian Government introduce a truth in political advertising law and consider the South Australian legislation as a model.[7] And on 25 October 2021, Independent MP, Zali Steggall, has formally introduced a private members' bill into the House of Representatives[8] that seeks to introduce similar laws and whose explanatory memorandum refers to this South Australian law.[9]

Recent elections in Australia have demonstrated that disinformation threatens democracy. During the 2016 federal election, the ALP ran a 'Mediscare' campaign claiming that the Liberal–National Coalition (the 'Coalition') intended to privatise Medicare without evidence indicating such a plan.[10] In the 2019 federal election, the Coalition alleged that the ALP would introduce a 'death tax' if elected.[11]

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4 *Cameron v Becker* (1995) 64 SASR 238 ('*Cameron*').

5 Survey results from nationally representative samples: Australia Institute, *Polling: Truth in Political Advertising* (Report, June 2020). See also Paul Carp, 'Vast Majority of Australians Support Ban on Misleading Political Advertising', *The Guardian* (online, 18 August 2019) <https://www.theguardian.com/media/2019/aug/18/vast-majority-of-australians-support-ban-on-misleading-political-advertising>.

6 Australian Labor Party, *ALP National Platform: As Adopted at the 2021 Special Platform Conference* (Report, 2021) 71 [25].

7 Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (Report, September 2021) 124.

8 Zali for Warringah, 'Zali Steggall OAM MP Introduces the Stop the Lies Bill' (YouTube, 25 October 2021) <https://www.youtube.com/watch?v=PBORcu_GRow>; Colin Brinsden, 'Most Want Laws for Truth in Political Ads', *Canberra Times* (online, 25 October 2021) <https://www.canberratimes.com.au/story/7482231/most-want-laws-for-truth-in-political-ads>.

9 'Commonwealth Electoral Amendment (Stop the Lies) Bill 2021', *Zali Steggall* (Web Page) <https://www.zalisteggall.com.au/commonwealth_electoral_amendment_stop_the_lying_bill>; 'Electoral Legislation Amendment (Stop the Lies) Bill 2021: Explanatory Memorandum', *Zali Steggall* (Web Page) [21]–[23] <https://www.zalisteggall.com.au/commonwealth_electoral_amendment_stop_the_lying_bill> ('*Stop the Lies Memorandum*').

10 Amanda Elliot and Rob Manwaring, '"Mediscare!": Social Issues' in Anika Gauja et al (eds), *Double Dissolution: The 2016 Federal Election* (Australian National University Press, 2018) 549, 551.

11 Katharine Murphy, Christopher Knaus and Nick Evershed, '"It Felt Like a Big Tide": How the Death Tax Lie Infected Australia's Election Campaign', *The Guardian* (online, 8 June 2019) <https://www.theguardian.com/australia-news/2019/jun/08/it-felt-like-a-big-tide-how-the-death-tax-lie-infected-australias-election-campaign>.

Disinformation campaigns like these can have a profound effect on election outcomes,[12] which suggests that counter speech alone is not sufficient to address them. At least three factors lessen the efficacy of counter speech in Australian elections. One major factor, according to former Prime Minister of Australia, Kevin Rudd, is that the traditional Australian media landscape is monopolised, which undermines democratic expression and polarises national debate.[13] Another reason to doubt the efficacy of counter speech is the growing evidence in the fields of psychology and behavioural economics that 'highlight[s] fundamental human tendencies that can lead to the acceptance of false information over accurate information'[14] — cognitive biases that can be exploited by political advertisers.[15] These factors are compounded by the rapid and broad dissemination of digital advertising, particularly close to the 'blackout period' before election day, that makes it difficult to correct falsehoods before they cause irreparable damage.[16]

All of this suggests that the marketplace of ideas is corruptible and therefore warrants regulation of misleading electoral advertising. This comment outlines South Australia's current truth in political advertising law, how the courts have interpreted it, and the extent to which it is consistent with the implied freedom of political communication in the *Constitution*. This comment will also propose recommendations for reform while having regard to legislative constraints.

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12 See Andrea Carson, Aaron J Martin and Shaun Ratcliff, 'Negative Campaigning, Issue Salience and Vote Choice: Assessing the Effects of the Australian Labor Party's 2016 "Mediscare" Campaign' (2020) 30(1) *Journal of Elections, Public Opinion and Parties* 83, 96–101. See also Nicholas Reece, 'Why Scare Campaigns Like "Mediscare" Work: Even if Voters Hate Them', *The Conversation* (online, 14 July 2016) <https://theconversation.com/why-scare-campaigns-like-mediscare-work-even-if-voters-hate-them-62279>.

13 Kevin Rudd, Submission No 52 to Senate Standing Committee on Environment and Communications, *Inquiry into Media Diversity in Australia* (January 2021) 2 [4], 3 [7]. See generally Bulent Kenes, 'Rupert Murdoch: A Populist Emperor of the Fourth Estate' (ECPS Leader Profile Series No 4, European Center for Populism Studies, December 2020).

14 The literature illustrates how selective exposure, confirmation bias and heuristics for coping with information overload, and directionally motivated reasoning, undermine rationality: Philip M Napoli, 'What if More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble' (2018) 70(1) *Federal Communications Law Journal* 55, 66. See also Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books, 2012) 55–7, 61–4.

15 Kelly Weidner, Frederik Beuk and Anjali Bal, 'Fake News and the Willingness to Share: A Schemer Schema and Confirmatory Bias Perspective' (2020) 29(2) *Journal of Product and Brand Management* 180, 183–5.

16 Electoral Commission SA, *State Election 2014* (Report, 2015) [5.3.6].

II South Australian Law

South Australia regulates disinformation in electoral advertising to a greater extent than any other democratic polity;[17] the law that does so is widely accepted in the State.[18] Section 113 of the *SA Electoral Act* is a strict liability offence[19] where:

> (2) A person who authorises, causes or permits the publication of an electoral advertisement (an ***advertiser***) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.
>
> Maximum penalty:
>
> (a) if the offender is a natural person — $5 000;
>
> (b) if the offender is a body corporate — $25 000.

This provision applies to an 'electoral advertisement' defined in the *SA Electoral Act* as an advertisement containing 'electoral matter',[20] which, in turn, means matter 'calculated to affect the result of the election'.[21] Consequently, s 113 is applicable to electoral advertisements published on a wide range of mediums, such as television, radio, corflute boards and social media. Section 113, in principle, does not apply to political discussions, speeches, interviews, newspaper articles,[22] or any form of communication that cannot be defined as an 'electoral advertisement' and is therefore not required to be authorised under s 112 of the *SA Electoral Act*. However, this definition could be interpreted broadly. For example, a newspaper article tarnishing a political candidate or party might be seen as 'calculated to affect the result of the election'. News coverage of political parties in Australia can degenerate into a 'systemic campaign of smear and delegitimisation'.[23] Although the more cogent view is that an advertisement — defined as a notice or announcement[24] — can be readily distinguished from a full-length article.

Section 113 only applies to purported statements of fact, not statements of opinion. In *Channel Seven Adelaide Pty Ltd v Manock*, Gleeson CJ said that 'a statement

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17 Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (Report, The Constitution Unit, University College London, March 2019) 22.

18 Ibid 28–9.

19 *Cameron* (n 4) 241 (Olsson J).

20 *Electoral Act 1985* (SA) s 4(1) (definition of 'electoral advertisement') ('*SA Electoral Act*').

21 Ibid (definition of 'electoral matter').

22 Renwick and Palese (n 17) 22.

23 Rudd (n 13) 7 [27].

24 *Macquarie Dictionary* (online at 10 July 2021) 'advertisement'.

is more likely to be recognisable as statement of opinion if the facts on which it is based are identified or identifiable'.[25] This reasoning was applied by Vanstone J in *Hanna v Sibbons*,[26] a case arising from the South Australian state election in 2010. The South Australian Labor Party ('SA Labor') had circulated four leaflets during the election asserting that the petitioner was 'soft on' crime, hoons and drugs. These statements were printed above excerpts from Hansard of relevant speeches made by the petitioner. Justice Vanstone held that the petitioner was disputing an inference drawn from verifiable facts in the leaflets, and therefore SA Labor was not in breach of s 113.[27] By contrast '[a] bald comment, made in circumstances where it is not possible to understand it as an inference, is likely to be treated as an assertion of fact'.[28]

The offence can only be established if the purported statement of fact is inaccurate and misleading to a *material extent*, meaning:

> [T]he making of the statements was the type of event by which the court could be satisfied that there is reasonable ground to believe that a majority of electors may have been prevented from electing the candidate they preferred.[29]

The test does not involve a counterfactual inquiry into whether the election would have been decided differently.[30] Instead the focus is on whether it is likely that a substantial number of electors have been led astray by deceit. This concept is exemplified in the judgment of *King v Electoral Commissioner*.[31] That case concerned an advertisement published in the Adelaide Advertiser newspaper during the closely contested 1997 South Australian Parliamentary election. It conveyed the message that a vote for an SA Labor candidate, or '[t]hanks to preferences', an independent candidate or Democrat, would result in the election of Mike Rann.[32] Justice Prior held that the statement was in breach of s 113 because it gave a deceptive impression that preferences would automatically flow to SA Labor.[33]

Section 113 provides a defence where the onus is on the defendant to prove that they took no part in determining the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and

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25 (2007) 232 CLR 245, 252–3 [4] ('*Manock*').

26 (2010) 108 SASR 182, 190 [29], quoting ibid ('*Hanna*').

27 *Hanna* (n 26) 192 [36], 194 [45]–[46], 202–3 [96].

28 *Manock* (n 25) 274–5 [54] (Gummow, Hayne and Heydon JJ), quoting *Lowe v Associated Newspapers Ltd* [2007] QB 580, 599 [55] (Eady J).

29 *Featherston v Tully [No 2]* (2002) 83 SASR 347, 373 [125] (Bleby J) (citations omitted) ('*Featherston*').

30 Ibid 395 [237]–[238].

31 (1998) 72 SASR 172 ('*King*').

32 Ibid 174.

33 Ibid 179.

misleading.[34] Additionally, in *Cameron v Becker* ('*Cameron*'), the Supreme Court of South Australia held that 'there is nothing in the subject matter of s 113 which would indicate a preclusion of the common law defence' of honest and reasonable mistake,[35] the defence articulated in *Proudman v Dayman*.[36] Both the statutory and common law defences involve the court assessing whether a reasonable person in the circumstances could have known that the statement in the electoral advertisement was inaccurate and misleading. Determining whether the defendant held a belief that the statement was true is an objective test.[37]

In 1997, s 113 was amended to empower the Electoral Commissioner to act on complaints of misleading electoral advertisements,[38] which can be submitted by anyone to the Electoral Commission of South Australia ('ECSA'). If the Electoral Commissioner is satisfied that an electoral advertisement is misleading and inaccurate to a material extent, the Commissioner may request the advertiser to withdraw and retract the advertisement in specified terms and in a specified manner and form.[39] The Electoral Commissioner makes this assessment on the balance of probabilities.[40] In the six South Australian elections since 1997, ECSA has made at least 27 requests for withdrawal or retraction.[41]

On 23 September 2021, an electoral amendment bill was received by the Legislative Council which would have the effect of removing the power of the Electoral Commissioner by deleting sub-ss (4) and (5) of s 113.[42] If passed, the South Australian Civil and Administrative Tribunal ('SACAT') will replace the function of the Electoral Commissioner in seeking orders for withdrawals and retractions. The amendment proposes 'rights of appeal to either the Court of Appeal or a single judge of the Supreme Court under the *South Australian Civil and Administrative Tribunal Act*

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34 *SA Electoral Act* (n 20) ss 113(3)(a)–(b).

35 *Cameron* (n 4) 245 (Olsson J, Bollen J agreeing at 239), 252 (Lander J).

36 (1941) 67 CLR 536.

37 The court compares the evidence that was available to the defendant with the purported statement of fact subsequently expressed in the electoral advertisement: see *Cameron* (n 4) 241–3 (Olsson J, Bollen J agreeing at 239).

38 *Electoral (Miscellaneous) Amendment Act 1997* (SA) s 19, amending *SA Electoral Act* (n 20) s 113.

39 *SA Electoral Act* (n 20) s 113(4).

40 Electoral Commission SA, *Election Report: 2018 South Australian State Election* (Report, 2019) 79 ('*SA State Election Report 2018*').

41 Renwick and Palese (n 17) 23; 'SA Opposition Leader Peter Malinauskas Forced to Apologise for Facebook Post about Health Staff Numbers, *ABC News* (online, 7 July 2021) <https://www.abc.net.au/news/2021-07-07/sa-opposition-leader-forced-to-apologise-for-facebook-post/100273028> ('Malinauskas Incident'). See also 'SA Liberals Forced to Correct Misleading Golden Grove O-Bahn Extension Flyer', *ABC News* (online, 11 April 2021) <https://www.abc.net.au/news/2021-04-11/sa-liberals-forced-to-correct-misleading-o-bahn-flyer/100061606>.

42 Electoral (Electronic Documents and Other Matters) Amendment Bill 2021 (SA) cl 36.

depending on the circumstances'.[43] This amendment is a response to the 2018 State Election Report which noted that ECSA spent significant time and resources in the investigation process 'to chase up the complainants for further information'.[44] Although ECSA also reported that once it 'receives all the necessary information, making a determination is relatively quick'.[45] The second reading speech states the central reason for vesting the power in SACAT: 'The amendments will mean that [the] Electoral Commissioner will be able to focus on administering the Act in the lead up to an election without having to become involved in potentially partisan disputes.'[46] In 2017, Alan Renwick and Michela Palese analysed hundreds of media articles on the operation of s 113 and found an isolated instance of a partisan actor attempting to undermine the authority of the Electoral Commission, which was later withdrawn.[47] Beyond that incident, Renwick and Palese state: 'we found no direct accusations of Electoral Commission bias at all, and no attempts undermine the Commission's legitimacy'.[48]

A case study of two contrasting examples illustrates that, currently, the Electoral Commissioner can only seek a withdrawal or retraction for electoral advertisements that contain a purported statement of *fact*. The Electoral Commissioner cannot ask parties to withdraw or retract advertisements containing an opinion, prediction or query about political policies or candidates. In 2014, SA Labor mailed out flyers asking, 'Can You Trust Habib?', shortly before the election campaign, which was authorised by SA Labor Secretary, Reggie Martin.[49] The flyer was widely and rightly condemned as a racist attack on Liberal candidate, Carolyn Habib, containing only her surname plastered on a crumbling brick wall littered with bullet holes.[50] The advertisement was also said to associate her falsely with Egyptian-Australian Mamdouh Habib, a former Guantánamo Bay detainee.[51] Subsequently, a complaint was made to the Electoral Commissioner, who did not find it in breach of s 113.[52] This example illustrates that s 113 only applies to a limited class of political communications that express a statement containing a truth value. Although it could be argued that the background suggests an answer to the question, it cannot be regarded as a decisive statement of fact and is therefore outside the scope of the provision.

43 South Australia, *Parliamentary Debates*, Legislative Council, 12 October 2021, 4443 (Rob Lucas, Treasurer) ('Second Reading Speech').

44 Ibid 4442 (Rob Lucas, Treasurer); *SA State Election Report 2018* (n 40) 80.

45 *SA State Election Report 2018* (n 40) 80.

46 Second Reading Speech (n 43) 4443.

47 Renwick and Palese (n 17) 28.

48 Ibid.

49 Stacey Lee, 'SA Labor Party Secretary Apologises For "Racist" Habib Flyer after Former MP Speaks Out', *ABC News* (online, 28 March 2021) <https://www.abc.net.au/news/2021-03-27/sa-labor-secretary-apologises-for-habib-flyer/100033472>.

50 Ibid.

51 Renwick and Palese (n 17) 24.

52 Ibid.

The most recent retraction occurred on 6 July 2021, following a request from the Electoral Commissioner to the leader of SA Labor, Peter Malinauskas. On 17 May 2021, Malinauskas had shared a link to an *InDaily* article titled, '"Secret" Plans to Axe Doctors, Nurses from Adelaide Hospitals: Clinicians',[53] and added the words: '[i]t is incomprehensible that the Marshall Liberal Government are secretly planning to cut even more doctors and nurses at our hospitals'.[54] *InDaily* had purportedly received confirmation from SA Health as to the existence of an '"internal working document" outlining "various opportunities" for savings', although 'no decisions ha[d] been made'.[55] Consequently, the Electoral Commissioner decided to seek a retraction from Malinauskas, stating: 'the Auditor-General's most recent annual report indicates … there were no fewer doctors in public hospitals in 2020 than in the previous two years'. Further, '[a]t the time the post was written, my office did not have sufficient evidence to support the statement that the Liberal Government has a "secret plan to cut more doctors and nurses from our hospitals"'.[56] Malinauskas complied with the Commissioner's request and posted the retraction to his Facebook page in the same form.[57]

Requests to remove electoral advertisements, like the example above, are generally respected.[58] In circumstances where the person or body corporate does not comply, the Electoral Commissioner can make an application to the Court of Disputed Returns.[59] A person can also dispute the validity of the election by petition addressed to the Court.[60] Subsequently, if the Court is satisfied beyond reasonable doubt that the offence has been committed, it can order the withdrawal of the advertisement and specify that a retraction be made.[61] The Court may also declare the results of the election void on the grounds of misleading advertising, if on the balance of probabilities, the result of the election was affected by that advertising.[62] Several cases have been brought under these provisions, two of which resulted in a finding that s 113 was breached.[63] However, none of these cases have overturned the result of the election.

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53 Jemma Chapman, '"Secret" Plans to Axe Doctors, Nurses from Adelaide Hospitals: Clinicians', *InDaily* (online, 17 May 2021) <https://indaily.com.au/news/2021/05/17/secret-plans-to-axe-doctors-nurses-from-adelaide-hospitals-clinicians/>.

54 'Malinauskas Incident' (n 41).

55 Chapman (n 53).

56 PMalinauskasMP (Facebook, 6 July 2021, 12:20am ACST) <https://www.facebook.com/PMalinauskasMP/posts/347677390052666>.

57 Ibid.

58 Bill Browne, 'We Can Handle the Truth: Opportunities for Truth in Political Advertising' (Discussion Paper, Australia Institute, August 2019) 7.

59 The Supreme Court is the Court of Disputed Returns: *SA Electoral Act* (n 20) s 103(1).

60 Ibid s 102.

61 Ibid ss 113(5)(a)–(b).

62 Ibid s 107(5).

63 Section 113 was breached in the first two of these cases: *Cameron* (n 4) 239 (Olsson J, Bollen J agreeing at 239), 250 (Lander J); *King* (n 31) 178–9 (Prior J); *Featherston* (n 29); *Hanna* (n 26).

Given the significant orders that the Court can make under the *SA Electoral Act*, s 113 may be challenged on the ground that it inappropriately burdens the freedom of political communication implied in the *Constitution*.

III The Implied Freedom of Political Communication

In 1995, the Full Court of the Supreme Court of South Australia ('Full Court') unanimously held in *Cameron* that s 113 of the *SA Electoral Act* is constitutionally valid.[64] That case concerned an appeal on the ground that s 113 of the *SA Electoral Act* contravenes the implied freedom of political communication found in the *Constitution*.[65] The Full Court held:

> Whilst this legislation does interfere with the freedom to engage in political discourse, it does so for the protection of the fundamental right, which is that an elector is not only to be as widely informed as the elector and any candidate would wish, but also that the elector is not lead by deceit or misrepresentation into voting differently from that which the elector would have done if the elector had not been misinformed.[66]

This is consistent with the seminal case of *Australian Capital Television Pty Ltd v Commonwealth*, which established the implied freedom of political communication in the *Constitution*.[67] In that judgment, Gaudron J stated that the freedom of political communication is not absolute, rather it

> is concerned with the free flow of information and ideas, it neither involves the right to disseminate false or misleading material nor limits any power that authorizes law with respect to material answering that description.[68]

Subsequently, in *Lange v Australian Broadcasting Corporation*, the High Court of Australia grounded the implied freedom in ss 7 and 24 of the *Constitution*[69] and provided the initial test for determining when the implied freedom would invalidate a law. The test was later modified by *Coleman v Power* to include a proportionality analysis[70] and disaggregated into three distinct steps in *McCloy v New South Wales*.[71]

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64 *Cameron* (n 4) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

65 Ibid 239.

66 Ibid 255 (Lander J).

67 (1992) 177 CLR 106 ('*ACTV*').

68 Ibid 217.

69 (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

70 (2004) 220 CLR 1, 50 [93] (McHugh J), 77 [196] (Gummow and Hayne JJ), 90 [235] (Kirby J). See generally Adrienne Stone and Simon Evans, 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677–88.

71 (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

A *Applying the Test*

Cameron[72] was decided prior to *McCloy*;[73] therefore, it is prudent to apply the modified test to s 113, which considers the burden that a law places on political communication, its purpose and whether it is reasonably appropriate and adapted to advance that purpose.

1 *Burden*

The first question is whether the law effectively burdens the freedom 'in its terms, operation or effect'.[74] This asks nothing more than whether the law puts 'some limitation on, the making or the content of political communications'.[75] Section 113 by its terms prohibits misleading and inaccurate political communications and operates to penalise persons who make them. In the case of *Cameron*, Lander J conceded that although s 113 'is directed to a very small class of persons in very narrow circumstances', it is 'a law that does interfere with the freedom of discourse in political matters'.[76] There is no doubt that the provision burdens the implied freedom, but its effect appears to be modest because it applies to a very limited subset of political communications.

2 *Purpose*

The second question is whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of representative government.[77] The purpose of s 113 is to protect a fundamental right in a representative democracy — that an elector is to be widely informed as they wish and not led by deceit when voting.[78] This purpose is of paramount importance to the maintenance of representative government. In *Smith v Oldham*, it was stated that '[t]he vote of every elector is a matter of concern to the whole Commonwealth … the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment'.[79] Further, Isaacs J observed that 'Parliament can forbid and guard against fraudulent misrepresentation'.[80] More recently, Keane J affirmed that the 'protection of the integrity of the electoral process from secret or undue influence is a legitimate end the pursuit of which is compatible with the freedom of political communication'.[81] Consequently, there

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72 *Cameron* (n 4).

73 *McCloy* (n 71).

74 Ibid 194 [2] (French CJ, Kiefel, Bell and Keane JJ), 280 [306] (Gordon J). See also at 230–1 [126] (Gageler J).

75 *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J).

76 *Cameron* (n 4) 254.

77 *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104] (Kiefel CJ, Bell and Keane JJ) ('*Brown*')

78 *Cameron* (n 4) 252, 255 (Lander J).

79 (1912) 15 CLR 355, 362 (Isaacs J).

80 Ibid.

81 *Unions NSW v New South Wales* (2013) 252 CLR 530, 579 [138].

is no doubt that s 113 has a legitimate purpose which is essential to the maintenance of representative government. In the recent case of *LibertyWorks Inc v Commonwealth*[82] — which concerned foreign interference legislation — the High Court affirmed that the burden on political communication effected by a law is relevant to the proportionality analysis and 'is considered in light of the importance of the purpose sought to be achieved'.[83]

3 *Proportionality*

The final consideration is whether s 113 is reasonably appropriate and adapted to advance its legitimate purpose. This involves a proportionality test to determine whether the restriction that the law imposes on the freedom of political communication is justified.[84] This test consists of three inquiries — whether the law is suitable, necessary, and adequate in its balance. It is worth bearing in mind that this approach, referred to as 'structured proportionality' or 'strict proportionality', has been rejected by Gageler J[85] and Gordon J.[86] Justice Gordon has endorsed the established 'reasonably appropriate and adapted' test.[87] With potentially greater consequence, Gageler J has advanced a categorical approach whereby 'the standard of justification … is calibrated to the degree of risk to the system of representative and responsible government'.[88] Of particular relevance to truth in political advertising laws, Gageler J has indicated that for a 'restriction on political communication in the conduct of an election for political office',[89] the standard should be close scrutiny of the reasonable necessity of the compelling purpose.[90] However, following *McCloy*, a majority of the High Court has consistently reaffirmed that structured proportionality is the accepted approach.[91] It will be applied to s 113 in the analysis below.

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82 (2021) 391 ALR 188 ('*LibertyWorks*').

83 Ibid 204 [63] (Kiefel CJ, Keane and Gleeson JJ), citing *McCloy* (n 71) 218 [84] (French CJ, Kiefel, Bell and Keane JJ).

84 *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

85 Ibid 235−7 [141]−[146]; *Brown* (n 77) 376–9 [160]–[165] ('*Brown*'); *Clubb v Edwards* (2019) 267 CLR 171, 225 [161] ('*Clubb*').

86 *Clubb* (n 85) 305−8 [390]−[399].

87 Ibid, citing *McCloy* (n 71) 281 [306] (Gordon J).

88 Murray Wesson, 'The Reception of Structured Proportionality in Australian Constitutional Law' (2021) 49(3) *Federal Law Review* 352, 357, quoting *McCloy* (n 71) 238 [150] (Gageler J).

89 *Unions NSW v New South Wales* (2019) 264 CLR 595, 621–2 [65] (Gageler J) ('*Unions NSW*'), citing *ACTV* (n 67) 143–4 (Mason CJ).

90 *Unions NSW* (n 89) 621–2 [65] (Gageler J), discussing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ).

91 See, eg: *Brown* (n 77) 368−70 [123]−[131] (Kiefel CJ, Bell and Keane JJ); *Clubb* (n 85) 202 [74] (Kiefel CJ, Bell and Keane JJ); *Comcare v Banerji* (2019) 267 CLR 373, 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 451 [188] (Edelman J) ('*Banerji*'); *Unions NSW* (n 89) 615 [42] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks* (n 82) 200 [48] (Kiefel CJ, Keane and Gleeson JJ), 240 [194] (Edelman J).

A law is suitable if there is a rational connection between the purpose of the law and the measures adopted to achieve that purpose, in the sense that the means for which it provides can realise that purpose.[92] The purpose of s 113 is realised by providing the power to withdraw, retract and order penalties for misleading electoral advertising. These measures have the direct effect of disincentivising and removing information that has the potential to mislead electors.

The law must be necessary in that there is no obvious and compelling alternative or reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom.[93] While the *SA Electoral Act* may have an unnecessarily broad definition of 'electoral matter', misleading electoral advertising is likely to be most harmful in the weeks prior to an election, therefore the operation of s 113 could be confined to the election period. However, this is unlikely to be a compelling alternative because it would detract from the broad purpose of the legislation, to ensure that electors are as widely informed as they wish. A more compelling alternative would be to remove the burden on second-hand publishers of electoral advertisements. Publishers who do not determine the content of the advertisement would not be subject to a pecuniary penalty. The current formulation of the law may have an unduly restrictive effect on political advertising if second-hand publishers perceive that there is a risk that they may be liable and are unwilling to undertake extensive vetting.[94] The person or body corporate who formulated and authorised the creation of the advertisement would remain liable under the current penalty provisions, whilst the court could order a second-hand publisher to withdraw (where possible) and retract the misleading advertisement. This alternative would be capable of achieving the same purpose with a less restrictive effect.

Finally, the law must be adequate in its balance between the importance of the purpose it serves and the extent to which it restricts the freedom of political communication.[95] This inquiry is problematic because it necessarily involves a value judgement. The majority in *McCloy* agreed that this does not entitle the courts to substitute their own assessment for that of the legislative decision-maker,[96] however, the courts have a duty to determine the limit of legislative power affecting constitutionally guaranteed freedoms.[97] Consequently, it is uncertain as to exactly how the courts will make this value judgement. Although it should be noted that the joint judgment in *McCloy* has 'built a substantial measure of deference [to the judgements of elected branches] into the balancing stage'.[98] In *Palmer v Western Australia*, Edelman J reiterated that

92 *Banerji* (n 91) 400 [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

93 *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

94 Renwick and Palese (n 17) 26.

95 *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

96 Ibid 219 [89]. See also *R v Secretary of State for the Home Department* [2015] AC 945, 964 [20] (Lord Sumption).

97 *McCloy* (n 71) 219–20 [89].

98 Wesson (n 88) 376.

'this third basis for invalidating laws must be highly exceptional'.[99] In fact, a proportionality analysis has not changed the outcome in any case before the High Court.[100]

It should not be assumed that a law will never be invalidated on this third step. It appears that s 113 places a greater burden on political communication than previously asserted in *Cameron*.[101] Section 113 is directed at a person who '*permits* the publication of an electoral advertisement'.[102] This means that both the candidate or political party authorising the advertisement and the media organisation that publishes it could be liable. If publishers bear the burden of determining whether an electoral advertisement breaches s 113 then it may generally discourage the publication of political advertising and be invalidated.[103]

IV Avenues for Reform

In light of the above, there are several ways South Australia's truth in political advertising law could be made more robust. Recent developments in the Australian Capital Territory are instructive. On 1 July 2021, s 297A of the *Electoral Amendment Act 2020* (ACT) came into effect — a truth in political advertising law that is a near transplant of the South Australian provision. The supplementary explanatory statement sets out that 'the offence is intended to apply only to people or political entities who post an advertisement, not the publisher'.[104] South Australia could consider amending s 113 of the *SA Electoral Act* to limit liability to the person or body corporate who formulates the content of the inaccurate and misleading advertisement and puts forward that view. This will reduce the risk that s 113 will be invalidated while remaining effective, albeit to a narrower range of political communications.

Financial penalties may be insufficient to deter wealthy candidates and political parties who can absorb the specified amount as a routine campaign expense to gain political advantage. One alternative, with a stronger deterrent effect, would be to impose a disqualification penalty that bars the candidate from standing for election.

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99 (2021) 388 ALR 180, 248 [267].

100 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123, 148.

101 *Cameron* (n 4) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

102 *SA Electoral Act* (n 20) s 113(2) (emphasis added).

103 George Williams, Submission No 19 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2016 Federal Election and Matter Related Thereto* (23 October 2016) 4.

104 Supplementary Explanatory Statement, Electoral Amendment Bill 2018 (ACT) 3. This statement was authored by Caroline Le Couteur MLA, who moved the amendments, but it was not formally endorsed by the House of Assembly. Notably, *Electoral Amendment Act 2020* (ACT) s 13, inserting *Electoral Act 1992* (ACT) s 297A(1)(a) ('*Electoral Act ACT*') includes the word 'disseminates' which means to 'publish': *Electoral Act ACT* (n 104) s 3 (definition of 'disseminate').

This type of penalty applies in the United Kingdom to any person or body corporate who publishes any false statement of fact in relation to a candidate's character before or during an election.[105] A breach of this provision may bar the individual from standing for Parliament or holding elected office for up to three years.[106] Similar penalties already exist for other electoral offences in Australian federal elections. Under s 386 of the *Commonwealth Electoral Act 1918* (Cth) any person who is convicted of bribery or undue influence can be disqualified from sitting as a Member of either House of the Parliament for a period of two years. A penalty provision of this kind would make the law more robust.

Another consideration is the need to adapt the legislation to technological developments. In particular, the rise of 'deepfakes' will pose significant challenges for regulating political advertising that can undermine the integrity of elections.[107] Deepfakes involve a manipulated photograph or image that impersonates an individual and can be 'animated to portray [them] speaking or acting in a certain way'.[108] The World Economic Forum has cited that deep fakes have been used in election campaigns in Belgium, Malaysia and Gabon to destabilise governments and political processes.[109] Deep fakes have already been employed in Australia during the 2020 Queensland election campaign to impersonate the Premier, although fortunately the advertisement was clearly labelled as doing so and was not a compelling impersonation.[110] Steggall's draft bill for truth in political advertising 'prohibits parties, candidates and campaigners from impersonating or passing off material as being from another candidate'.[111] South Australia should consider explicitly regulating the use of 'deep fakes' in electoral advertising.

Any amendments to the law should be accompanied with an explanation, at least in the second reading speech,[112] that sets out who could be liable, its purpose and how the law is appropriate and adapted to achieve that purpose. This is important because in *Unions NSW v New South Wales* it was stated by Gordon J that 'once it has been demonstrated that a legislative provision burdens the implied freedom, it is for

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105 *Representation of the People Act 1983* (UK) s 106(1).

106 Ibid ss 160(4)(b)–(c).

107 Emma Perot and Frederick Mostert, 'Fake It Till You Make It: An Examination of the US and English Approaches to Persona Protection as Applied to Deepfakes on Social Media' (2020) 15(1) *Journal of Intellectual Property Law and Practice* 32, 33.

108 Ibid 32.

109 Alexander Puutio and David Alexandru Timis, 'Deepfake Democracy: Here's How Modern Elections Could Be Decided by Fake News', *World Economic Forum* (Web Page, 5 October 2020) <https://www.weforum.org/agenda/2020/10/deepfake-democracy-could-modern-elections-fall-prey-to-fiction/>.

110 *Stop the Lies Memorandum* (n 9) [18]; Cam Wilson, 'Australia's First Deepfake Political Ad Is Here and It's Extremely Cursed', *Gizmodo* (online, 2 November 2020) <https://www.gizmodo.com.au/2020/11/australias-first-deepfake-political-ad-is-here-and-its-extremely-cursed>.

111 *Stop the Lies Memorandum* (n 9) [1].

112 Explanatory memoranda are generally not published for South Australian legislation.

the supporter of the legislation to persuade the Court that the burden is justified'.[113] Chief Justice Kiefel, Bell and Keane JJ stated that

> [i]t must be of course be accepted that Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts. However, its position in respect of legislation which burdens the implied freedom is otherwise.[114]

V Conclusion

Despite its limited scope, South Australia's truth in political advertising law has been invoked on numerous occasions to remove inaccurate and misleading electoral advertisements. This law is essential to protect the integrity of the electoral process from undue influence exacerbated by the spread of disinformation through digital media. The current law could be refined in light of recent developments to the test for the implied freedom of political communication. In particular, the law should not apply to second-hand publishers because doing so may generally discourage political advertising — an argument that could be made to invalidate the law. Another consideration is that the law could be strengthened by disqualifying candidates who authorise misleading political advertisements from standing for election. Furthermore, there is now a risk that deepfakes can be spread online to distort the electoral process. This new technology should be taken seriously given that it has already been used to destabilise foreign governments. Structuring the law with these considerations in mind may decrease the likelihood that it will be invalidated, while enhancing its deterrent effect. South Australia's law has already been adapted by the Australian Capital Territory to enhance the fairness of its electoral process. Its operation and structure are also being considered for a Commonwealth bill. Perhaps this is because it has provided an effective mechanism for removing misleading political advertising since 1997. All of this suggests that South Australia's law is not an aberration, but a workable model to address inaccurate and misleading advertising in elections. It is certainly capable of being adapted for implementation in all states and federally.

113 *Unions NSW* (n 89) 650 [151] (Gordon J).

114 Ibid 616 [45].

*Lachlan Prider**

THE SHOW MUST GO ON: *WIGMANS V AMP LTD* (2021) 388 ALR 272

I Introduction

Australian legislation governing representative proceedings — more commonly known as class actions — does not provide guidance on how courts are to deal with multiple representative proceedings brought in respect of the same controversy.[1]

This lack of guidance has led Australian courts to adopt a number of divergent approaches to the issue of a multiplicity of proceedings. One such approach is to adopt a process similar to that utilised by courts in the United States.[2] That is, to conduct a form of 'beauty parade', whereby one proceeding is selected to continue, and the others stayed, after conducting a 'multi-factorial analysis'.[3] The High Court's endorsement of this approach in *Wigmans v AMP Ltd* ('*Wigmans*')[4] means that 'beauty parades' look set to remain part of the Australian class action landscape in the future and provides much needed clarity with respect to the issue of multiplicity.

This case note explores the High Court's decision in *Wigmans* and the decisions of the courts below. Ultimately, it will accept that the majority's approach is the correct one, having regard to the purpose of representative proceedings and the consequences of the 'first in, best dressed' approach for which the appellant contended.

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* LLB Candidate; BCom (Acc) (Adel); Student Editor, *Adelaide Law Review* (2021).

1 Vince Morabito, 'Clashing Classes Down Under: Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27(2) *Connecticut Journal of International Law* 245, 248, 252, 317.

2 *Federal Rules of Civil Procedure of 2020*, 28 USC r 23 ('*Federal Rules of Civil Procedure*'). Similarly, in Canada, courts entertain 'carriage motions' to determine which proceeding should continue: ibid 282–4; Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 103–5 [4.54]–[4.57].

3 See, eg, *Perera v GetSwift Ltd* (2018) 263 FCR 92 ('*GetSwift*'). It should be noted that Australian courts have been loath to expressly employ the phrase 'beauty parade' for the process by which a multiplicity of proceedings is resolved: see, eg, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, 17 [62] (Jagot, Yates and Murphy JJ).

4 (2021) 388 ALR 272 ('*Wigmans*').

II Background

Evidence given by executives of AMP Ltd ('AMP') at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16–17 April 2018 revealed that AMP deliberately charged its customers fees for ongoing financial services that it had not provided.[5] Predictably, AMP's share price fell sharply.[6] Within seven weeks of the evidence being given, five open class[7] representative proceedings on behalf of AMP shareholders had been commenced against AMP.[8]

Ms Marion Wigmans, represented by Quinn Emanuel, was 'first off the mark' with proceedings on her behalf commencing in the Supreme Court of New South Wales on 9 May 2018. Some seven hours later, Wileypark Pty Ltd, represented by Phi Finney McDonald, commenced proceedings in the Federal Court of Australia. On 25 May 2018, Mr Andrew Georgiou, represented by Shine Lawyers, commenced proceedings in the Federal Court, as did Fernbrook (Aust) Investments Pty Ltd ('Fernbrook'), represented by Slater & Gordon. The fifth and final proceeding was commenced in the Federal Court on 7 June 2018 by Komlotex Pty Ltd ('Komlotex'), represented by Maurice Blackburn.[9]

The claims made in each of the proceedings overlapped considerably,[10] with each party seeking compensation for loss caused by AMP's alleged breach of its continuous disclosure obligations.[11] Claims of misleading and deceptive conduct and statutory unconscionability were also advanced.[12]

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5 See: ibid 273 [1] (Kiefel CJ and Keane J), 286–7 [54] (Gageler, Gordon and Edelman JJ); *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 140; Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Round 2, Commissioner Hayne, 16 April 2018) 1053–99; Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Round 2, Commissioner Hayne, 17 April 2018) 1103–201.

6 *Wigmans* (n 4) 273 [1] (Kiefel CJ and Keane J).

7 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 545–6 [4] (Bell P) ('*Wigmans* (CA)'):

> [T]he class actions … [were open] in the sense that, apart from the act of investment in [AMP] … none of the class or group members had to take any further step[s] to become a member of the class such as enter into a retainer agreement with a firm of solicitors and/or a funding agreement with a [litigation] funder.

8 *Wigmans* (n 4) 273 [2] (Kiefel CJ and Keane J), 287 [55] (Gageler, Gordon and Edelman JJ).

9 Ibid 273–4 [3] (Kiefel CJ and Keane J).

10 For a consideration of the differences in the respective proceedings, see ibid 287 [56] (Gageler, Gordon and Edelman JJ).

11 *Corporations Act 2001* (Cth) s 674(2); ASX, *Listing Rules* (at 1 May 2013) r 3.1.

12 *Wigmans* (n 4) 273 [2] (Kiefel CJ and Keane J).

The proceedings commenced in the Federal Court were transferred to the Supreme Court of New South Wales,[13] and the Fernbrook proceedings were consolidated with the Komlotex proceedings.[14]

Between 29 August 2018 and 9 November 2019 — faced with the threat of competing with multiple proceedings — the representative plaintiff in each of the four remaining proceedings sought orders that each of the other proceedings be stayed.[15] AMP took no position in relation to the applications, other than to submit, unsurprisingly, that it should only be made to face one of the four sets of proceedings.[16]

The task of the courts was to determine which of the proceedings should be allowed to continue.

III Decisions Below

A *Supreme Court of New South Wales*

At first instance, Ms Wigmans, the first party in time to file, advanced two primary submissions in support of her stay application. First, that the continuation of the subsequent proceedings was an abuse of process.[17] Second, given that the proceedings were further advanced in terms of preparation for mediation or an ultimate hearing, the application of case management principles contained within the *Civil Procedure Act 2005* (NSW) ('*CPA*')[18] supported the Wigmans proceeding being the only one permitted to continue.[19]

Chief Judge in Equity Ward rejected the abuse of process argument, noting that the legislation governing representative proceedings contemplates that there may be more than one proceeding in relation to the same controversy.[20] Instead, the issue of a multiplicity of proceedings was, in her Honour's view, to be dealt with by reference to case management principles.[21] However, the progress of the proceedings was but one factor to which Ward CJ in Eq had regard. Her Honour undertook a '"multi-factorial analysis" of the kind endorsed by the Full Court of the Federal Court'[22]

13 *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1 ('*Wileypark*').

14 *Wigmans v AMP Ltd* [2019] NSWSC 603, [112] (Ward CJ in Eq) ('*Wigmans* (SC)').

15 *Wigmans* (n 4) 273–4 [3] (Kiefel CJ and Keane J), 288 [58] (Gageler, Gordon and Edelman JJ).

16 Ibid.

17 *Wigmans* (SC) (n 14) [27] (Ward CJ in Eq).

18 To 'facilitate the just, quick and cheap resolution of the real issues in the proceedings': *Civil Procedure Act 2005* (NSW) s 56(1) ('*CPA*').

19 *Wigmans* (SC) (n 14) [30] (Ward CJ in Eq).

20 Ibid [98].

21 Ibid [104].

22 *Wigmans* (n 4) 274–5 [6] (Kiefel CJ and Keane J).

in *Perera v GetSwift Ltd* (‘*GetSwift*’).[23] Relevant to this analysis were eight factors drawn from the judgment of the Full Court in *GetSwift*,[24] as well as Lee J at first instance.[25] They were the

1. competing funding proposals, costs estimates and net hypothetical return to group members;[26]

2. proposals for security for AMP’s costs;

3. nature and scope of the causes of action advanced;

4. size of the respective classes;

5. extent of any bookbuild;[27]

6. experience of the legal practitioners (and funders) and availability of resources;

7. state of progress of the proceedings; and

8. conduct of the representative plaintiffs to date.[28]

Having regard to the proposals with respect to security for AMP’s costs, the choice of which proceedings to stay and which to continue was narrowed to two options. For Ward CJ in Eq, the proposals made by the Wigmans and consolidated Komlotex

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23 *GetSwift* (n 3) 136 [195] (Middleton, Murphy and Beach JJ).

24 Ibid 135–7 [188]–[197].

25 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 48–9 [169] (Lee J) (‘*Perera v Getswift*’), citing *McKay Super Solutions Pty Ltd v Bellamy’s Australia Ltd* [2017] FCA 947, [71] (Beach J) (‘*McKay Super Solutions*’).

26 A group member is a ‘member of a group of persons on whose behalf a representative proceeding has been commenced’: *Federal Court of Australia Act 1976* (Cth) s 33A (definition of ‘group member’). See also: *Civil Procedure Act 2005* (NSW) s 155 (definition of ‘group member’); *Supreme Court Act 1986* (Vic) s 33A (definition of ‘group member’). Group members are ultimately those who stand to benefit in any judgment sum or settlement obtained on their behalf.

27 A term used to describe the process by which a law firm seeking to act for plaintiffs in representative proceedings identifies potential group members, contacts them, creates awareness of the proceedings generally, and encourages those potential group members to register their interest or enter into retainer and funding agreements: John Walker, Susanna Khouri and Wayne Attrill, ‘Funding Criteria for Class Actions’ (2009) 32(3) *University of New South Wales Law Journal* 1036, 1044; Vicki Waye and Vince Morabito, ‘Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions’ in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2017) 155, 178.

28 *Wigmans* (SC) (n 14) [126] (Ward CJ in Eq), cited in *Wigmans* (n 4) 274–5 [6] (Kiefel CJ and Keane J), 288 [60] (Gageler, Gordon and Edelman JJ).

proceedings to pay security directly into court, as distinct from relying on 'after the event' ('ATE') insurance policies, meant that they were to be preferred.[29]

However, the decisive factor between the Wigmans and combined Komlotex proceedings was the 'no win, no fee' model proposed by the Komlotex proceedings with Maurice Blackburn charging a 25% uplift fee on its professional fees, should the action be successful.[30] This was compared with the funding model proposed by the Wigmans proceedings, under which a commercial litigation funder stood to receive up to 20% of any recovery in addition to the professional fees of Quinn Emanuel.[31] The 'no win, no fee' model was considered likely to deliver a greater net return to group members than the model proposed in the Wigmans proceeding.[32]

Ms Wigmans appealed to the New South Wales Court of Appeal.

B *New South Wales Court of Appeal*

President Bell, with whom Macfarlan, Meagher, Payne and White JJA agreed, found no error in the approach of Ward CJ in Eq below and dismissed the appeal.[33] The Court of Appeal upheld the multifactorial approach taken by Ward CJ in Eq in determining which of the proceedings ought to continue.[34] Analogies drawn by Ms Wigmans to the principles of *lis alibi pendens*, the 'clearly inappropriate forum' test, and abuse of process principles were, in the Court of Appeal's view, inapposite in this context.[35]

The only 'real point of difference' between the reasoning of Bell P and Ward CJ in Eq was one of terminology.[36] In Bell P's view, the task of dealing with a multiplicity of proceedings within the context of a stay application was not an exercise in mere 'case management' and instead 'involve[d] an assessment as to whether the ends of justice require such a remedy'.[37] Ms Wigmans appealed to the High Court of Australia.

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29 On the basis that reliance on ATE insurance would result in additional costs being borne by group members and that there was uncertainty surrounding the precise terms of the policies; those policies not being in evidence: *Wigmans* (SC) (n 14) [222], [226]–[228], [233] (Ward CJ in Eq).

30 Ibid [57].

31 Ibid [55]–[56].

32 Ibid [354].

33 *Wigmans* (CA) (n 7) 565 [100] (Bell P, Macfarlan JA agreeing at 565 [101], Meagher and Payne JJA agreeing at 565 [102], White JA agreeing at 567 [111]).

34 Ibid 564 [91]–[92] (Bell P).

35 Ibid 554–5 [43]–[44], 561 [73]–[77], 562 [80], 563–4 [88]–[90] (Bell P).

36 Ibid 565 [95] (Bell P).

37 Ibid.

IV High Court Decision

By a slim majority, comprising Gageler, Gordon and Edelman JJ, the High Court dismissed the appeal and held that the approach taken by Ward CJ in Eq to the multiplicity of proceedings was the correct one. Chief Justice Kiefel and Keane J dissented.

A *The Majority*

Ms Wigmans' 'central complaint'[38] before the High Court was that the Court of Appeal erred in not applying a rule or presumption that 'it is prima facie vexatious [and oppressive] to commence an action if an action is already pending in respect of the same controversy'.[39] In this regard, Ms Wigmans' relied on several lines of authority. Namely

- general law principles concerning multiplicity of suits, and *McHenry v Lewis*[40] in particular;
- the court's inherent power to grant a stay;
- abuse of process principles from *Henry v Henry*[41] and *Moore v Inglis*;[42] and
- equitable principles concerning test actions.[43]

In dismissing Ms Wigmans' 'central complaint', the majority turned to the statutory language of s 67 of the *CPA*, the source of the Supreme Court's power to grant a stay, and pt 10, governing representative proceedings more generally. In the majority's view, there was

> nothing in s 67 … that supports Ms Wigmans' contention that the considerations to which a court might have regard in exercising the power in s 67 are to be confined, or that the statutorily identified considerations … are to be displaced, by reference to a first-in-time rule or presumption.[44]

The conclusion that there is no first-in-time rule or presumption was, in the majority's view, reinforced by the scheme of pt 10.[45]

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38 *Wigmans* (n 4) 289 [68] (Gageler, Gordon and Edelman JJ).

39 Ibid 284 [43] (Kiefel CJ and Keane J).

40 (1882) 22 Ch D 397.

41 (1996) 185 CLR 571.

42 (1976) 9 ALR 509.

43 *Wigmans* (n 4) 289–90 [69] (Gageler, Gordon and Edelman JJ).

44 Ibid 291 [75] (Gageler, Gordon and Edelman JJ).

45 Ibid [76], citing *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 641–6 [60]–[81] (Kiefel CJ, Bell and Keane JJ), 660–3 [136]–[145] (Gordon J).

Employing the words of Lord Templeman in *The Abidin Daver*,[46] the majority observed that a first-in-time approach would be unworkable and would result in an 'ugly rush' to the court door, with causes of action and claims for relief being framed as broadly as possible to gain so-called 'juridical advantages'.[47]

Consistent with the decisions of the lower courts, the majority disagreed that the authorities relied upon by Ms Wigmans supported any first-in-time rule or presumption. Her arguments in this regard were, according to the majority, 'impermissibly selective and at various points merge[d] different ideas from areas with different jurisprudential foundations'.[48]

Instead, adopting the language of Bell P below, the majority held that there can be no 'one size fits all' approach to a multiplicity of representative proceedings.[49] The majority noted that staying one or more of the proceedings was but one option for dealing with the issue of multiplicity.[50]

When selecting which of the proceedings should go forward, the majority held that the court is to determine which proceeding going ahead would be in the best interests of group members.[51] This question is to be determined by reference to 'all relevant considerations', including those identified by the primary judge.[52] Contrary to Ms Wigmans' submissions, this included a consideration of the competing funding proposals, costs estimates and net hypothetical return to group members.[53]

In this regard, the majority noted that '[t]here is nothing foreign to the judicial process for a court to take into account likely success in proceedings or quantum of recovery'.[54] The majority noted this is a relevant factor when a court is considering

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46 [1984] AC 398.

47 *Wigmans* (n 4) 294 [86] (Gageler, Gordon and Edelman JJ), quoting ibid 426.

48 Ibid 294 [88].

49 Ibid 286 [52], 299 [106] (Gageler, Gordon and Edelman JJ).

50 Ibid 299 [106] (Gageler, Gordon and Edelman JJ). Other options included those initially identified by Beach J in *McKay Super Solutions* (n 25) [9], which involved competing representative proceedings in which Maurice Blackburn and Slater & Gordon acted for the applicants. The options were as follows: consolidate the proceedings; 'de-clas[s]' one or more of the proceedings under s 33N(1) of the *Federal Court of Australia Act 1976* (Cth); hold a joint trial of all proceedings with each left constituted as open class proceedings (described as the 'wait and see' approach in *Southernwood v Brambles Ltd* (2019) 137 ACSR 540, 545 [20] (Murphy J)); and close the classes in one or more of the proceedings but leave one of the proceedings as an open class proceeding, with a joint trial of all. For a recent example of consolidation being used as a means of dealing with the issue of multiplicity see *Fuller v Allianz Australia Insurance Ltd* [2021] VSC 581.

51 *Wigmans* (n 4) 286 [52], 300 [109] (Gageler, Gordon and Edelman JJ).

52 Ibid 300 [109], 301 [112] (Gageler, Gordon and Edelman JJ).

53 Ibid 300 [110] (Gageler, Gordon and Edelman JJ).

54 Ibid 301 [112] (Gageler, Gordon and Edelman JJ).

'whether bringing or defending litigation by trustees is proper or can be justified having regard to the best interests of those to whom fiduciary duties are owed'.[55]

B *The Minority*

In the minority, Kiefel CJ and Keane J held that the lower courts erred by not allowing Ms Wigmans her right to pursue her case as, in their Honours' view, the first-in-time case should prevail unless there is a juridical basis to prefer a later in time filed action.[56]

Unlike the majority, the minority was uncomfortable with the prospect of the Supreme Court making a speculative choice as to which sponsor, be it law firm or litigation funder, would be capable of delivering the best outcome for group members, particularly in circumstances where the same court will be tasked with ultimately determining the outcome of the proceedings.[57] The minority warned:

> The Supreme Court's fundamental function as the independent arbiter of the merits of the group members' claims as between them and the defendant sits awkwardly with the assumption, without legislative direction, of a role whereby the Court makes a reputational investment in the choice of sponsor.[58]

In emphasising that the provisions of the *CPA* did not provide for a process by which the Court would make a reputational investment in a particular sponsor, the minority contrasted the provisions of the *CPA* to 'carriage' and 'certification' motions under United States law.[59] The minority observed that in the United States, the *Federal Rules of Civil Procedure of 2020* ('*Federal Rules of Civil Procedure*') provide that the court must 'appoint class counsel' to control the prospective proceeding on the plaintiff's side of the record.[60] In circumstances where more than one adequate applicant has sought appointment, 'the court must appoint the applicant best able to represent the interests of the class'.[61]

The minority observed that the provisions of the *Federal Rules of Civil Procedure* 'stand in stark contrast to Pt 10 of the *CPA*'[62] and that

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55 Ibid. The majority there noted that 'similar principles apply to liquidators seeking advice or seeking approval to settle a proceeding or enter a funding agreement' and 'are centrally important when a court approves a compromise of a claim made by a person under disability': at 301 [112].

56 Ibid 277 [16] (Kiefel CJ and Keane J).

57 Ibid 277 [15] (Kiefel CJ and Keane J).

58 Ibid.

59 Ibid 281–2 [33] (Kiefel CJ and Keane J).

60 Ibid.

61 *Federal Rules of Civil Procedure* (n 2) r 23(g)(2).

62 *Wigmans* (n 4) 282 [35] (Kiefel CJ and Keane J).

> [i]t is telling that, when the *CPA* was enacted, the Parliament of New South Wales had before it the example of the legislative regime that operates in the United States to facilitate the determination by the courts of the competition between would-be sponsors of class actions, but did not adopt that example or any relevant aspect of it.[63]

The minority concluded that '[t]he stay and cross-stay applications ought to have been determined, not by the "multi-factorial analysis"'[64] for which they found no support in the *CPA*, 'but by reference to the principle that it is prima facie vexatious to commence an action if an action is already pending in respect of the same controversy'.[65]

As to whether this conclusion would result in a 'race to the courthouse' and inadequate preparation, the minority was of the view that this was an 'irrelevant distraction' and ironic given that s 56 of the *CPA* recognises speed in litigation as a positive virtue.[66]

V Comment

The majority's approach — and the approach of the courts below — to determine the question of multiplicity by reference to which of the proceedings would be in the best interests of group members, should be an uncontroversial one.[67] An approach that does not have the best interests of group members as its primary consideration would be inimical to the whole purpose of representative proceedings: 'to enable claimants … whose claims would be singularly too insignificant to justify … commencing [the] proceedings alone', to seek compensation.[68]

A 'first-in-best-dressed' approach that gave an arbitrary primacy to the time of filing would favour the commercial interests of law firms and litigation funders to be the first to the filing gate and ignore the interests of those whom the courts are ultimately there to protect.[69] There can be little doubt that such an approach would lead to an 'ugly rush' to the courthouse and would result in 'hasty preparation and lack of mature reflection'[70] with 'poorly thought through originating applications and pleadings'.[71] All of which would serve to vex respondents and undermine the policy

63 Ibid.

64 Ibid 284 [43] (Kiefel CJ and Keane J).

65 Ibid.

66 Ibid 285 [47] (Kiefel CJ and Keane J).

67 Indeed, it was the approach preferred by the Australian Law Reform Commission in its 2018 report into class action proceedings and third-party litigation funders: Australian Law Reform Commission (n 2) 119 [4.108].

68 *Kelly v Scenic Tours Pty Ltd* [2019] NSWSC 1266, [110] (Harrison AsJ).

69 *Wileypark* (n 13) 8 [18] (Allsop CJ).

70 Ibid.

71 *Perera v GetSwift* (n 25) 49 [170] (Lee J).

objectives of modern dispute resolution,[72] which are directed toward the 'just, quick and cheap resolution of the real issues in the proceedings'.[73] This is perhaps why, as Acting Justice of Appeal Arthur Emmett has observed, '[t]he common law has never favoured the first to file rule as a means of resolving which of competing actions should proceed'.[74]

In practice, unless one proceeding is well-advanced as compared to the others, most of the factors considered in a 'multi-factorial analysis' will be neutral, leaving, as it did in *Wigmans*, the net hypothetical return to group members as the determinative factor.[75] This will invariably lead to an increase in competition between law firms and litigation funders prepared to reduce their costs or proposed commissions to vie for the carriage of the proceeding. Ultimately, this competition will result in higher returns for group members.[76] Such a result is surely to be desired, not feared. Again, this approach will serve to benefit group members and not the commercial interests of law firms and litigation funders.

VI Conclusion

Wigmans provides welcome clarity to those involved in representative proceedings. It confirms that the issue of a multiplicity of proceedings should be dealt with by having primary regard to the best interests of group members and by reference to all relevant considerations.

In practice, as has already been demonstrated by the decision in *CJMcG Pty Ltd v Boral Ltd*,[77] the acceptance of a 'beauty parade' approach is likely to result in the net hypothetical return to group members being the determinative factor, resulting in law firms and litigation funders reducing their proposed commissions to vie for the privilege of conducting a representative proceeding on behalf of group members. It also avoids those actors competing in an 'ugly rush' to the courthouse with hastily prepared claims, liable to vex respondents and act to the detriment of group members.

Beauty parades in class action litigation are here to stay. That is a good thing.

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72 Ibid.

73 *CPA* (n 18) s 56. See also *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175, 210–11 [90]–[93] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

74 Acting Justice of Appeal Arthur Emmett, 'Class Action Squabbling' (2019) (15–16) *Butterworths Corporation Law Bulletin* [25]: 4–10, [23].

75 See also *CJMcG Pty Ltd v Boral Ltd [No 2]* (2021) 389 ALR 699 ('*CJMcG*'), in which Lee J found substantially all of the considerations to be neutral, such that the 'most compelling factor' was the net return to group members: at 704 [14], 724–5 [96].

76 Robert Johnston et al, 'Beauty Parades Are Here to Stay', *Johnson Winter & Slattery* (Article, March 2021) <https://jws.com.au/en/insights/articles/2021-articles/beauty-parades-are-here-to-stay>; Komlotrex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd, 'Second and Third Respondents' Submissions', Submission in *Wigmans v AMP Ltd*, S67/2020, 7 July 2020, [53].

77 *CJMcG* (n 75).

Samuel Whittaker and Leah Triantafyllos***

CLIVE PALMER, SECTION 92, AND COVID-19: WHERE 'ABSOLUTELY FREE' IS ABSOLUTELY NOT: *PALMER V WESTERN AUSTRALIA* (2021) 388 ALR 180

I Introduction

The World Health Organization officially declared the outbreak of SARS-CoV-2 ('COVID-19') a pandemic on 11 March 2020.[1] Global travel rapidly halted as countries around the world, including Australia, closed their international borders for protection against the spread of the deadly infection.[2] Tasmania was the first Australian state to impose interstate border restrictions on 20 March 2020,[3] with South Australia and Western Australia following on 24 March.[4] As such restrictions were unprecedented in Australia, many were left wondering — is this even legal in light of s 92 of the *Australian Constitution* ('*Constitution*')?[5] In *Palmer v Western Australia* ('*Palmer*')[6], the High Court unanimously confirmed that it was.[7]

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* LLB Candidate (Adel); Student Editor, *Adelaide Law Review* (2021).

** BCrim/LLB Candidate (Adel); Student Editor, *Adelaide Law Review* (2021).

1 Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Speech, World Health Organization, 11 March 2020).

2 Office of the Prime Minister, 'Border Restrictions' (Media Release, 19 March 2020); Yen Nee Lee, '5 Charts Show Which Travel Sectors Were Worst Hit by the Coronavirus', *Consumer News and Business Channel* (online, 6 May 2020) <https://www.cnbc.com/2020/05/06/coronavirus-pandemics-impact-on-travel-tourism-in-5-charts.html>.

3 'Tasmania to Enforce "Toughest Border Measures in the Country" amid Coronavirus Pandemic', *ABC News* (online, 19 March 2020) <https://www.abc.net.au/news/2020-03-19/coronavirus-tasmanian-premier-announces-border-restrictions/12069764>.

4 'Western Australia, South Australia to Close Borders in Response to Coronavirus Pandemic', *ABC News* (online, 22 March 2020) <https://www.abc.net.au/news/2020-03-22/wa-sa-set-to-close-borders-amid-coronavirus-fight/12079044>.

5 See eg: David Tomkins, 'The Constitutional Challenge to End the COVID Border Closures' (2020) 71 (October) *Law Society of New South Wales Journal* 72, 74; Anne Twomey, 'States Are Shutting Their Borders to Stop Coronavirus: Is That Actually Allowed?', *The Conversation* (online, 22 March 2020) <https://theconversation.com/states-are-shutting-their-bordersto-stop-coronavirus-is-that-actually-allowed-134354>.

6 (2021) 388 ALR 180 ('*Palmer*').

7 Ibid 199 [77] (Kiefel CJ and Keane J, Gageler J agreeing at 218–19 [166], Gordon J agreeing at 232 [212], Edelman J agreeing at 255 [293]).

Section 92 states that '[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States … shall be absolutely free'.[8] The difficulty in defining the content of 'absolutely free' has resulted in s 92 being the most litigated provision of the *Constitution*.[9] Throughout its history, the High Court has struggled to determine just what interstate trade, commerce and intercourse should be absolutely free from, while 'numerous theories … waxed and waned in popularity' over time.[10] *Cole v Whitfield* ('*Cole*')[11] was the beginning of the end to this confusion and is regarded as a 'revolutionary decision'[12] in which the Court decided that 'trade and commerce' were to be 'absolutely free' from discriminatory burdens of a protectionist kind.[13] The cases which followed *Cole* primarily concerned the trade and commerce aspect of s 92.[14] However, just what kind of burdens interstate intercourse must be 'absolutely free' from, would remain yet to be decided.[15]

Palmer ascertained the content and operation of s 92 in three ways. First, the Court rejoined the trade and commerce limb with the intercourse limb, which had been separated by *Cole*, after finding that 'trade, commerce and intercourse' was to be read as a composite expression.[16] All five Justices agreed that it was discrimination that underpins the section.[17] Second, the case confirmed that the approach adopted in *Wotton v Queensland* ('*Wotton*')[18] should be taken when determining the level at which laws should be assessed for constitutional validity.[19] Essentially, where executive action is taken pursuant to a statutory power, the question of constitutional validity falls only to be determined by the provisions of the statute, not the particular

8 *Australian Constitution* s 92 ('*Constitution*').

9 Shipra Chordia, 'Border Closures, COVID-19 and s 92 of the Constitution: What Role for Proportionality (If Any)?', *AUSPUBLAW* (Blog Post, 5 June 2020) <https://auspublaw.org/2020/06/border-closures-covid-19-and-s-92-of-the-constitution/>.

10 Ibid.

11 (1988) 165 CLR 360 ('*Cole*') (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

12 Justice Stephen Gageler, 'The Section 92 Revolution' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 26, 26.

13 *Cole* (n 11) 394.

14 See, eg: *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*'); *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 ('*Betfair [No 1]*'); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 ('*Betfair [No 2]*'); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298.

15 *Palmer* (n 6) 201 [92] (Gageler J).

16 Ibid 187–8 [27] (Kiefel CJ and Keane J), 223 [182] (Gordon J), 241–2 [246] (Edelman J).

17 Ibid 192 [48] (Kiefel CJ and Keane J), 202 [97] (Gageler J), 227–8 [197] (Gordon J), 242–3 [248] (Edelman J).

18 (2012) 246 CLR 1.

19 *Palmer* (n 6) 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [201]–[202] (Gordon J), 234–5 [225] (Edelman J).

exercise of the power.[20] Third, in deciding what level of justification is required for laws that burden the s 92 freedoms, three Justices took the opportunity to introduce structured proportionality,[21] reigniting the debate between members of the Bench regarding the appropriateness of this test in the Australian context. These aspects will be discussed in Part IV following an introduction to the background of this case and a discussion of each judgment in Parts II and III respectively.

II Background

A *Facts*

In response to the spread of COVID-19 in Australia, the Minister for Emergency Services for Western Australia declared a state of emergency pursuant to s 56 of the *Emergency Management Act 2005* (WA) ('*EM Act*') on 15 March 2020. The emergency declaration applied to the whole of Western Australia effective from 16 March 2020. On 5 April, the *Quarantine (Closing the Borders) Directions* (WA) ('*Directions*') came into force, effectively closing the Western Australian borders to all persons other than those specifically exempt.[22] The *Directions* were made by the Commissioner of Police acting as the State Emergency Coordinator pursuant to s 67 of the *EM Act*.

On 18 May 2020, the first plaintiff, Clive Palmer, was refused entry to Western Australia.[23] As a result, he and a privately held company under his personal management commenced proceedings in the original jurisdiction of the High Court on 25 May 2020 seeking a declaration that the *Directions* were invalid by the operation of s 92 of the *Constitution*.[24]

The plaintiffs challenged the *Directions* on two grounds. First, that the *Directions* impermissibly burdened the freedom of interstate intercourse 'by prohibiting cross-border movement of persons'.[25] Second, and in the alternative, that the *Directions* infringed the freedom of interstate trade and commerce by imposing a discriminatory burden of a protectionist kind as the border closures would favour businesses that were managed locally.[26] In reply, the defendants, the State of Western Australia and the Commissioner of Police for Western Australia contended that the laws did not impermissibly infringe s 92 because they were 'reasonably necessary' for the legitimate purpose of protecting the health of the population of Western Australia against the risks of COVID-19.[27]

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20 See above n 19.

21 *Palmer* (n 6) 196 [62] (Kiefel CJ and Keane J), 247 [264] (Edelman J).

22 Ibid 183 [1] (Kiefel CJ and Keane J).

23 Clive Frederick Palmer and Mineralogy Pty Ltd, 'Plaintiffs' Submissions', Submission in *Palmer v Western Australia*, B26/2020, 22 September 2020, 4 [20].

24 Ibid 19 [55].

25 *Palmer* (n 6) 185 [13] (Kiefel CJ and Keane J).

26 Ibid.

27 Ibid 185 [14] (Kiefel CJ and Keane J).

B *Legislation*

Under s 56 of the *EM Act*, the Minister may declare that a state of emergency exists in the whole or any part of Western Australia. However, such a declaration can only be made where the Minister has: considered the advice of the State Emergency Coordinator; is satisfied that an emergency has occurred, is occurring or is imminent; and is satisfied that extraordinary measures are required to limit harm.[28]

Once a state of emergency has been initially declared, it remains in effect for only three days unless extended under s 58.[29] Section 58 provides that an emergency declaration cannot be extended for more than 14 days. The Minister must be satisfied of the jurisdictional facts in s 56(2) each time an extension is declared.[30] The *Directions* were made by the Commissioner of Police as the authorised officer pursuant to s 67(a) of the *EM Act*, which permits a hazard management officer or authorised officer to 'direct, or by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area'.

The defendant contended that these provisions were necessary for the protection of the health and life of the citizens of Western Australia against the risks associated with COVID-19.[31] However, the extent of the risks posed by COVID-19 and the efficacy of border closures in mitigating these risks were contested facts that needed to be resolved in order to answer the constitutional question.[32] Accordingly, Kiefel CJ ordered that part of the proceedings be remitted to the Federal Court of Australia.[33] Notably, the Attorney-General for the Commonwealth intervened in support of the plaintiffs and the Attorney-General for Queensland intervened in support of the defendants, with both interveners actively participating in the hearing.[34] Following the conclusion of the hearing, however, the Commonwealth withdrew from the litigation.[35]

C *The Findings on Remitter*

Justice Rangiah made significant findings following evidence from the Chief Health Officer for Western Australia and other experts.[36] These findings on remitter were important in the High Court's ultimate decision as to the proportionality of

28 *Emergency Management Act 2005* (WA) ss 56(1), (2)(a)–(c).

29 Ibid s 57(b).

30 *Palmer* (n 6) 217–18 [159] (Gageler J).

31 Ibid 185 [14] (Kiefel CJ and Keane J).

32 Ibid 185 [15].

33 Ibid. Pursuant to s 44 of the *Judiciary Act 1903* (Cth).

34 *Palmer v Western Australia [No 4]* [2020] FCA 1221, [6] (Rangiah J).

35 Ibid [8]. See also Tomkins (n 5) 72.

36 Including experts in public health medicine, epidemiology, and infectious diseases: *Palmer* (n 6) 185–6 [16] (Kiefel CJ and Keane J).

the measures imposed by the *EM Act*. In summary, clinical and epidemiological knowledge regarding COVID-19 was relatively uncertain at the time of hearing.[37] The ability to quantify the probability of persons infected with COVID-19 entering Western Australia proved difficult given such uncertainties.[38] In the event a person entered Western Australia whilst infectious, the probability of the disease spreading would be high.[39] Alternative measures, such as entry and exit screening, mandatory face mask regulations on airplanes and/or following entry for two weeks, testing on relevant days, or hotspot regimes would be less effective compared to the relevant border restrictions.[40] Justice Rangiah concluded a 'precautionary approach' should be followed.[41]

III Decision

While the High Court accepted that an exercise of power pursuant to the *EM Act* could impose a differential burden between intrastate and interstate intercourse,[42] it held that this differential burden was justified.[43] So far as an impediment to interstate trade and commerce was argued, Kiefel CJ and Keane J dismissed this in the absence of any evidence demonstrating a discriminatory burden on trade or commerce.[44] The Court did not resolve the question of whether the nature of discrimination, which would render laws unconstitutional, differs between the two limbs of s 92. According to *Cole*, interstate trade and commerce are to be absolutely free from discrimination which is *protectionist*,[45] however this qualification was not endorsed by all of the Justices in *Palmer*.[46] What *Palmer* did confirm, however, is that interstate *intercourse* is to be absolutely free from discriminatory burdens of *any* kind.[47]

Further, the Court diverged in its approach to justification, raising yet another 'abstracted debate'[48] within its constitutional jurisprudence.

37 *Palmer v Western Australia [No 4]* (n 34) [95].

38 Ibid [241], [366].

39 Ibid [298].

40 Ibid [308]–[317], [366].

41 Ibid [245], [366] discussed in *Palmer* (n 6) 187 [23], 199 [79] (Kiefel CJ and Keane J).

42 *Palmer* (n 6) 197–8 [72] (Kiefel CJ and Keane J), 218–19 [166] (Gageler J), 230 [204] (Gordon J), 233–4 [222] (Edelman J).

43 Ibid 199 [81] (Kiefel CJ and Keane J), 218–19 [166] (Gageler J), 231 [209]–[210] (Gordon J), 254–5 [288]–[293] (Edelman J).

44 Ibid 199 [82] (Kiefel CJ and Keane J).

45 *Cole* (n 11) 393–4.

46 See below Part IV(A).

47 *Palmer* (n 6) 192 [47] (Kiefel CJ and Keane J), 203 [99], 207 [114] (Gageler J), 223–4 [184] (Gordon J), 243–4 [250]–[252] (Edelman J).

48 Ibid 213 [140] (Gageler J).

A *Chief Justice Kiefel and Justice Keane*

Chief Justice Kiefel and Keane J began by reconciling s 92 as a composite expression, affirming observations which preceded *Cole*.[49] Their Honours held:

> Section 92 may be understood to preclude a law which burdens any of the freedoms there stated, as subjects of constitutional protection, where the law discriminates against interstate trade, commerce or intercourse and the burden cannot be justified as proportionate to the non discriminatory, legitimate purpose of the law which is sought to be achieved.[50]

The joint judgment criticised the distinction drawn in *Cole* between the two 'limbs' of s 92, suggesting 'incoherence' and 'incompatibility' with the modern approach to constitutional interpretation.[51] Their Honours questioned the feasibility of extending the guarantee of interstate intercourse to a *personal* freedom 'to pass to and fro among the States without burden, hindrance or restriction'.[52] Consistent with a legalistic approach, the distinction failed to derive support from the text of s 92.[53] The joint judgment went further by drawing upon remarks by Hayne J in *APLA Ltd v Legal Services Commissioner (NSW)* ('*APLA*'), rejecting the requirement for different tests to be applied to three elements of a composite expression.[54]

While considering the approach to justification in both *Cole* and *Betfair Pty Ltd v Western Australia* ('*Betfair [No 1]*') as instructive,[55] the joint judgment favoured structured proportionality as the appropriate, albeit imperfect methodology to employ.[56] Sections 56 and 67 of the *EM Act* could not be held to discriminate by their terms, however discrimination was accepted to the extent that s 67 hindered interstate movement in its *application*.[57] Accordingly, their Honours needed to determine if this burden could be justified. For Kiefel CJ and Keane J, preventing

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49 Ibid 187–8 [27], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456 [400] (Hayne J) ('*APLA*'); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 381–2 (Dixon J).

50 *Palmer* (n 6) 196 [62].

51 Ibid 191–2 [45].

52 Ibid 191 [41]–[42], quoting *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J) ('*Gratwick*'); *Cole* (n 11) 393.

53 *Palmer* (n 6) 191–2 [45].

54 Ibid 192 [47]. See *APLA* (n 49) 456–7 [402] (Hayne J).

55 *Palmer* (n 6) 193 [50]–[52] (Kiefel CJ and Keane J), citing *Cole* (n 11) 408–10; *Betfair [No 1]* (n 14) 479–80 [110]–[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

56 *Palmer* (n 6) 194 [56].

57 Ibid 197–8 [72].

the spread of the highly infectious COVID-19 disease was a legitimate purpose,[58] and the restrictions imposed by the *Directions* were undoubtedly *suitable* to that purpose.[59] The statutory conditions and the shortness of an emergency declaration were considered indicative of proportionality.[60] The plaintiffs' argument that less burdensome means could be deployed was rejected, given the uncertainties found by Rangiah J.[61] In answering whether the *EM Act* was adequate in its balance, Kiefel CJ and Keane J held that the protection of health and life justified the severity of the restrictions, which were authorised by the *EM Act*.[62]

B *Justice Gageler*

Justice Gageler invoked the observations of Sir Henry Parkes to elucidate original thought regarding the constitutional guarantee of free movement.[63] His Honour opined that the harmonisation of both limbs would eliminate concerns raised in preceding cases, such as *Nationwide News Pty Ltd v Wills*,[64] and *APLA*.[65] In line with this reinterpretation, each element of s 92 invokes the same legal notion of discrimination as in 'the unequal treatment of equals, and, conversely, in the equal treatment of unequals'.[66]

Justice Gageler refrained from adopting structured proportionality, voicing concern regarding the standardised three-stage test and its 'rigidity'.[67] His Honour explained:

> Factors having no, or little, bearing on the true inquiry thrown up by the facts and the law in a particular case that are required by the standardised verbal formulae to be considered in sequence end up receiving unwarranted analytical prominence. Factors bearing on the true inquiry thrown up by the facts and the law in a particular case that do not readily fit within any of the standardised verbal formulae end up suffering one or more of a number of possible fates.[68]

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58 Ibid 198 [74]. The joint judgment distinguished provisions of the *EM Act* from those in *Gratwick*, which were held to directly restrict interstate movement: *Gratwick* (n 52) 14 (Latham CJ), 16 (Rich J), 17 (Starke J), 20 (Dixon J), 22 (McTiernan J).

59 *Palmer* (n 6) 199 [77].

60 Ibid.

61 See above Part II(C).

62 *Palmer* (n 6) 199 [81].

63 Ibid 203–5 [102]–[105].

64 (1992) 177 CLR 1 ('*Nationwide News*').

65 *Palmer* (n 6) 207–8 [115], citing ibid 83–4 (Deane and Toohey JJ); *APLA* (n 49) 390–1 [162]–[165] (Gummow J).

66 *Palmer* (n 6) 202 [98] (Gageler J), quoting *Castlemaine Tooheys* (n 14) 480 (Gaudron and McHugh JJ). This legal notion of discrimination was also cited by Kiefel CJ and Keane J: *Palmer* (n 6) 188 [31], quoted by Gordon J at 224 [184]. See also at 238 [236] (Edelman J).

67 *Palmer* (n 6) 214 [144].

68 Ibid 214 [146].

Justice Gageler instead adhered to the test of 'reasonable necessity' determined in *Betfair [No 1]*.[69] In applying this test, Gageler J characterised the *non-discriminatory legislative end* of the *EM Act* as 'managing the adverse effects of … [an] epidemic'.[70] The *constitutionally permissible means* of pursuing that legislative end — the ministerial power to declare a state of emergency — was justified with reference to two limitations. First, the jurisdictional limitation, including both the express preconditions to the exercise of power[71] and the implicit formation of a *reasonable* state of mind by the Minister.[72] Second, the temporal limitation on the initial declaration, and the implied requirement for the preconditions to be satisfied upon extending the declaration.[73]

C *Justice Gordon*

Justice Gordon conceptualised s 92 as most prominently concerned with unjustified differential burdens impeding upon interstate trade, commerce and intercourse.[74] Her Honour declared that reading s 92 as a composite expression would align with the purpose of s 92, which is to 'create a free trade area throughout the Commonwealth'.[75]

Justice Gordon rejected structured proportionality due to its apparent rigidity and inappropriate vesting of judicial power.[76] Her Honour explained the test to apply to s 92 in a similar vein as Gageler J, notwithstanding slight linguistic differences. A similar analysis was therefore apparent, where the confined discretionary powers of the Minister, and the time constraints on the emergency declaration, were relevant factors in determining whether the differential burden was *reasonably necessary*.[77] Sections 56 and 67 of the *EM Act* were held not to permit discretion to be exercised in 'a manner obnoxious to the freedom guaranteed by s 92'.[78]

D *Justice Edelman*

Justice Edelman identified three strands to the reasoning in *Cole* which had not since been resolved.[79] First, and of the least controversy, the alignment of the intercourse

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69 Ibid 202 [94].

70 Ibid 216 [153]. See also the discussion on the standard to be met for a differential burden at 200 [85].

71 Ibid 217 [157].

72 Ibid 217 [158] (emphasis added).

73 Ibid 217–18 [159].

74 Ibid 222–3 [181].

75 Ibid 223 [183], quoting *Cole* (n 11) 391.

76 *Palmer* (n 6) 228–9 [198]–[199].

77 Ibid 230–1 [206]–[208].

78 Ibid 230–1 [208], citing *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

79 *Palmer* (n 6) 232 [215]–[217].

limb with the trade and commerce limb.[80] His Honour noted many transactions will constitute trade and commerce while also constituting intercourse, mentioning the term used prior to federation, 'commercial intercourse'.[81] Second, his Honour stated the qualification of a protectionist purpose when analysing interstate trade and commerce, but not interstate intercourse, reflects 'incongruity' and hence a broader conceptualisation of discrimination should apply to both.[82] Third, a burden upon trade, commerce, or intercourse should be justified by an analysis of structured proportionality.[83]

Justice Edelman was the most vocal supporter of structured proportionality,[84] despite his Honour's previous indifference to the matter.[85] His Honour detailed structured proportionality in a sequential manner, invoking its adherence to the rule of law and adaptability to 'virtually every effective system of constitutional justice in the world'.[86] In assessing whether the *EM Act* was adequate in balance, Edelman J held the objective of both ss 56 and 67 was 'plainly sufficient to justify even the deep and wide burden' that the application of such public health provisions placed upon the guarantees prescribed by s 92.[87]

IV Comment

A *Absolutely Free from What? Re-Joining the Limbs of Section 92*

It was unfortunate that the intercourse limb was excluded from the 's 92 revolution' in *Cole*.[88] While it was not necessary for determination on the facts,[89] the unanimous judgment in that case effectively set it to one side by finding no 'correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse'.[90] This was primarily on the basis that the freedom of intercourse among the states was viewed as attracting a wider ambit of immunity from legislative intervention to the extent that if 'a like immunity were accorded to trade and commerce, anarchy would result'.[91]

80 Ibid 240–1 [241]–[243].

81 Ibid 240–1 [242].

82 Ibid 243–4 [252]–[253].

83 Ibid 247 [264].

84 Ibid 246–251 [261]–[276].

85 See, eg, *Brown v Tasmania* (2017) 261 CLR 328, 479–508 [484]–[568].

86 *Palmer* (n 6) 247 [263]–[264] (Edelman J), quoting Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 74.

87 *Palmer* (n 6) 255 [291].

88 See generally Gageler (n 12).

89 *Palmer* (n 6) 232 [215] (Edelman J).

90 *Cole* (n 11) 394.

91 Ibid 393.

However, in *Palmer*, it was found that there was no basis in either the text or purpose of the provision for this separation.[92] The expression 'trade, commerce, and intercourse' is composite and should be read as a whole. The protection against discrimination should therefore apply to both limbs as a matter of textual construction.[93] Furthermore, the purpose of s 92 is 'to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries'.[94] Accordingly, intercourse among the states should be 'absolutely free' from laws that impose differential burdens on interstate movement compared with intrastate movement, in either their legal operation or practical effect, that are not justified as a 'constitutionally permissible means of pursuing non-discriminatory legislative ends'.[95]

While the protectionist element was retained for the trade and commerce limb of s 92 by two Justices,[96] it was unanimously held that intercourse should be free from discriminatory burdens of *any* kind.[97] Justice Edelman went further. His Honour opined that, with respect to the trade and commerce limb, to retain the protectionism element was incongruous with the reunification of the limbs.[98] Protectionism only came to be an accepted requirement as to the nature of discrimination with regard to trade and commerce as this was the most common form of discrimination.[99] However, a law may not be protectionist but relevantly discriminate between interstate trade and commerce in a manner that was intended to be prohibited according to the purposes of s 92.[100]

Justice Edelman reasoned a broad interpretation of discrimination would align more closely with statements made during the Convention Debates and the ideals surrounding 'free trade' apparent at that time.[101] This line of argument can be traced

92 *Palmer* (n 6) 191–2 [45] (Kiefel CJ and Keane J), 207 [114] (Gageler J), 223 [182] (Gordon J), 243–4 [252] (Edelman J).

93 Ibid 222–3 [181] (Gordon J), 242–3 [248] (Edelman J).

94 *Cole* (n 11) 391.

95 *Palmer* (n 6) 202 [97] (Gageler J).

96 Ibid 207 [114] (Gageler J), 223–4 [184] (Gordon J). There is difficulty in delineating a clear position from the plurality judgment on this point.

97 Matthew Stubbs, 'Legal Perspectives on Border Closures and Freedom of Movement in Australia's COVID-19 Response' (2021) 32(2) *Public Law Review* 106, 110.

98 *Palmer* (n 6) 244 [253].

99 Ibid 244 [254].

100 Ibid 245 [256].

101 Ibid. Support for this proposition can also be found in Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Thomson Lawbook, 2008). Removing the qualification of protectionism would reflect a European-style approach to justification: Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19(4) *Federal Law Review* 322.

back to *Betfair Pty Ltd v Racing NSW* ('*Betfair [No 2]*'), where the Court questioned whether s 92 could apply to markets conducted without reference to state boundaries, hence removing the qualification of protectionism.[102] While it was not necessary to decide in *Betfair [No 2]*, nor in the present case, this ultimately leads one back to the riddle of s 92: what does 'absolutely free' mean? It has long been accepted that s 92 is subject to 'some reservation' which is often spoken of with regard to 'reasonable regulation' as being an exception to a discriminatory burden.[103] While this is one exception, removing the qualification of protectionism would be going a substantial step further.

Statements in the Australasian Federal Convention Debates described the freedom of interstate trade from 'everything in the nature of an obstruction placed in the way of intercolonial trade'.[104] While early interpretations of a unitary free trade area attract praise, adopting a broad conceptualisation of discrimination would arguably lead back to an 'individual rights' approach[105] and require the Courts to engage further in the unresolved justification stage of analysis.[106] In *Cole*, the Court specifically examined the Convention Debates as a means to elucidate the intended meaning and historical merits of 'free trade'.[107] The Court noted the individual rights approach created 'protectionism in reverse', whereby s 92 became a source of preferential treatment for interstate trade.[108] While adopting a broad interpretation of discrimination would reduce the arguably ill-suited role of courts assessing economic impacts in particular markets[109] and truly revise s 92 as a composite guarantee of freedom, this interpretation does not seem warranted by the text of s 92 or the established reference to 'free trade' which signifies an absence of protectionism.[110] The invitation was clearly opened for argument in a future case, but since it was not argued here, there was no need to finally decide the matter.

102 *Betfair [No 2]* (n 14) 293 [127] (Kiefel J, Heydon J agreeing at 271 [57]).

103 *Palmer* (n 6) 226–7 [193]–[194] (Gordon J), citing *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 640–1 (Lord Porter for the Court) (Privy Council). See generally *Castlemaine Tooheys* (n 14) 472–3 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

104 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 237 (Alfred Deakin), quoted in *Palmer* (n 6) 244 [254] (Edelman J).

105 Jeremy Kirk, 'Section 92 in its Second Century' in Justice John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 253, 269. For an early interpretation of the individual rights approach see *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 554 (Knox CJ, Isaacs and Starke JJ).

106 Kirk (n 105) 269.

107 *Cole* (n 11) 392–3.

108 Ibid 403.

109 Staker (n 101) 344–5. Cf Kirk (n 105) 269.

110 *Cole* (n 11) 392–3.

B *Constitutional Analysis: What Law?*

The plaintiffs in *Palmer* challenged the validity of the *Directions* without bringing a challenge to the authorising provisions of the *EM Act*.[111] This position may reflect the fact that where executive action is taken pursuant to a broadly expressed statutory power, it may be appropriate to confine the question of validity to the particular action before the Court.[112] However, in this case, as identified by Edelman J, there is a difference between determining the constitutional validity of an 'open-textured' piece of legislation by reference to the particular exercise of power and determining the constitutional validity of the exercise of the power itself.[113] The latter form of analysis, as adopted by the parties, 'simplified the constitutional question to the point of obscuring the manner of its answer' as it failed to take into consideration the important limitations on the exercise of the powers under the *EM Act*.[114]

Constitutional limitations operate on executive and legislative action, however, where executive action is taken under a statutory power, the constitutional question is limited to the empowering provisions of the Act according to the approach taken in *Wotton* and now adopted in *Palmer*.[115] This is because if the empowering provisions are constitutionally valid, the exercise of power under them will also be valid unless the action does not comply with the conditions imposed by the statute. Hence, whether the action 'falls within that source or is ultra vires' is question of a statutory nature — no constitutional issue remains.[116] Therefore, arguments raised by the plaintiffs that a range of other measures were open to the Minister, including to take a more calibrated response to the risk levels in the various Australian jurisdictions,[117] go more to whether the Minister had jurisdiction under s 56(2)(c) of the *EM Act* than to whether the *Directions* were reasonably necessary in the constitutional sense.[118]

C *Justification: Which Test?*

On the eve of the decision in *Palmer*, many speculated as to whether s 92 would provide new constitutional territory for the 'structured proportionality' test.[119] It was argued that using this test in the context of s 92 would introduce 'unnecessary

111 *Palmer* (n 6) 219–20 [171] (Gordon J).

112 Ibid 209 [123] (Gageler J).

113 Ibid 237 [231] (Edelman J).

114 Ibid 210 [126] (Gageler J).

115 Ibid 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [202] (Gordon J), 234–5 [225] (Edelman J).

116 Ibid 234–5 [225] (Edelman J).

117 Ibid 199 [78] (Kiefel CJ and Keane J).

118 Ibid 196 [64] (Kiefel CJ and Keane J).

119 Chordia (n 9); Michael Douglas and Charles Dallimore, 'Section 92 of the Constitution and the Future of Our Federation' (2020) 47(7) *Law Society of Western Australia Brief* 16; Twomey (n 5).

confusion' to the section.[120] Chief Justice Kiefel and Keane J, however, readily asserted that structured proportionality should be the test of justification by drawing an analogy between it and the detail of the 'reasonable necessity' test applied in *Betfair [No 1]*.[121] Justice Edelman also argued that structured proportionality analysis was a more 'transparent and concise test'.[122] Justice Gageler and Gordon J remained strongly opposed to the application of structured proportionality in the Australian context citing well-trodden arguments that the test is too rigid,[123] and encumbers the proper exercise of judicial discretion.[124]

The purpose of articulating clear tests of principle is so that 'lawyers and legislators' can have a level of certainty in their practice as to how the law will likely operate under a unique set of circumstances.[125] The tests are not exclusive of each other since the infringement of constitutional guarantees that have 'been held to not be absolute' may be justified by 'any rational means'.[126] In applying the respective tests in this case, each judgment considered broadly the same factors in reaching its conclusion, which were: the presence of a legitimate purpose;[127] and, the extent to which the burden was confined such that it went no further than was necessary to achieve its purpose.[128] In terms of the balancing stage in the structured proportionality test, Edelman J contended that it would only be in extreme circumstances where laws would not be found 'adequate in the balance'.[129] It is arguable the reasonable necessity test may also respond to these extreme cases by characterising the 'true purpose' of a disproportionately burdensome provision as being illegitimate.[130] Therefore, it may be that both tests are reconcilable;[131] since they are likely to yield similar outcomes, issues between them for practical purposes may be predominantly a matter of mere 'nomenclature'.[132]

120 Douglas and Dallimore (n 119) 17.

121 *Betfair [No 1]* (n 14). See *Palmer* (n 6) 193 [52].

122 *Palmer* (n 6) 247 [262].

123 Ibid 214 [144] (Gageler J), 228 [198] (Gordon J).

124 Ibid 214 [146] (Gageler J).

125 Ibid 194 [56] (Kiefel CJ and Keane J).

126 Ibid 195–6 [61].

127 Ibid 199 [82] (Kiefel CJ and Keane J), 216 [153] (Gageler J), 230 [205] (Gordon J), 251 [277] (Edelman J).

128 Ibid 199 [77] (Kiefel CJ and Keane J), 217–18 [166] (Gageler J), 230 [206] (Gordon J), 252–3 [282] (Edelman J).

129 Ibid 254 [288] (Edelman J).

130 Chordia (n 9).

131 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123, 153.

132 Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 123.

V Conclusion

Palmer consolidated and ascertained the content of s 92 by finding that trade, commerce and intercourse among the states should be absolutely free from laws which effect unjustified discriminatory burdens. While the question did not need to be finally resolved for this case, Edelman J clearly invited future argument on whether or not a law must be 'protectionist' to effectively burden the trade and commerce limb. However, as discussed in Part IV, there are important considerations on both sides of this argument in light of the text of s 92 and its acknowledged purpose to create a 'free trade area',[133] so resolution of this question will await a future case.

The case did confirm that the correct level of analysis for constitutional validity concerning subordinate legislation is the authorising statute according to the approach taken in *Wotton*. This may have come as a surprise to the plaintiffs whose submissions and arguments centred on the *Directions*.[134] While initially contesting the validity of the *Directions* also, the defendants subsequently adopted the submissions of Victoria which had raised the *Wotton* approach.[135] The Court accepted these submissions.[136] Indeed, arguments concerning the necessity of the *Directions* in the context of lower risk areas such as Queensland, may have been of better use in judicial review proceedings alleging that the Minister had not formed the relevant state of mind in relation to s 56(2)(c) of the *EM Act*. This opportunity arose every two weeks when the state of emergency declaration was extended during the period of border closures, however, no such opportunity was taken up.[137]

Palmer signifies the end of an era with the Court finally resolving the remaining part of the constitutional riddle of s 92 by articulating just what is to be 'absolutely free' in the context of intercourse among the states.[138] It has been over 30 years since the s 92 revolution began with *Cole*, from which the intercourse limb was effectively excluded.[139] In *Palmer* the intercourse limb has been reunited with the trade and commerce limb with the Court determining that it was to be discrimination that underpins the section.[140] As pointed out by Gordon J, although the nature of discrimination may differ, 'that does not detract' from the finding that the section is focused on preventing the unequal treatment of equals across state borders.[141] Laws which discriminate in the relevant sense will require justification in the same manner for either

133 *Cole* (n 11) 393.

134 See *Palmer* (n 6) 185 [13], 187 [24] (Kiefel CJ and Keane J), 209 [125] (Gageler J), 219 [167], [169] (Gordon J), 233 [219] (Edelman J).

135 Ibid 196 [63] (Kiefel CJ and Keane J).

136 Ibid 196 [63] (Kiefel CJ and Keane J), 210 [127] (Gageler J), 229–30 [202] (Gordon J), 234–5 [225] (Edelman J).

137 Ibid 231–2 [211] (Gordon J).

138 Ibid 200–1 [87] (Gageler J).

139 Ibid 191 [42] (Kiefel CJ and Keane J); Gageler (n 12).

140 *Palmer* (n 6) 223–4 [184] (Gordon J).

141 Ibid.

limb.[142] While the Court split as to which test would justify discriminatory burdens, the outcome of each respective test involved considerable weight being placed on essentially the same factors. Therefore, the question in this case was answered with both clarity and certainty: the 'absolute' freedom of interstate intercourse does not prevent Australian states from imposing near absolute border closures in the context of a pandemic where the power to do so is sufficiently constrained to its purposes.

142 Ibid 227–8 [197] (Gordon J).

*Stacey Henderson**

WAR AND PEACE IN OUTER SPACE: LAW, POLICY, AND ETHICS

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With recent media coverage of Virgin Galactic[1] and Blue Origin[2] launching tourists into suborbital space, and SpaceX[3] launching an all-civilian crew into Earth's orbit, one might be forgiven for thinking that outer space is the playground of billionaires and their space companies. While there can be no doubt that these launches are entertaining for many people, this is not the full story of what is currently happening in space nor who all the significant space actors competing for launch windows and orbits actually are.

In the past few years, there has been an increase in the number of dedicated space forces and space commands being added to militaries around the world.[4] The creation of the United States Space Force even inspired its own satirical Netflix series.[5] While this might give the impression that military space activities are something relatively new, this is far from the case. Space activities have always involved military and

* PhD, LLM, GDLP, LLB (Hons), BA; Lecturer, Adelaide Law School, University of Adelaide.

1 Jonathan Amos, 'Virgin Galactic: Sir Richard Branson Rockets to the Edge of Space', *BBC News* (online, 11 July 2021) <https://www.bbc.com/news/science-environment-57797297>.

2 Richard Luscombe, 'Jeff Bezos Hails "Best Day Ever" after Successful Blue Origin Space Flight', *The Guardian* (online, 21 July 2021) <https://www.theguardian.com/technology/2021/jul/20/blue-origin-launch-jeff-bezos-space-travel-latest>.

3 Kenneth Chang, 'Inspiration4 Astronauts Beam after Return from 3-Day Journey to Orbit', *The New York Times* (online, 18 September 2021) <https://www.nytimes.com/2021/09/18/science/spacex-inspiration4.html>.

4 The United States became the first State to do so with the establishment of the United States Space Force on 20 December 2019: 'About the United States Space Force', *United States Space Force* (Web Page) <https://www.spaceforce.mil/About-Us/About-Space-Force/>.

5 *Space Force* (Netflix, 2020) <https://www.netflix.com/au/title/81021929>.

government actors.[6] As Lieutenant General David D Thompson of the United States Space Force notes, '[t]he space domain has been an area of human competition and potential conflict since the dawn of the Space Age more than 60 years ago'.[7] Indeed, the Australian Department of Defence has explicitly recognised space as 'both an essential enabler of military operations and a warfighting domain in its own right'.[8] While there are those who protest against the militarisation of space,[9] the majority of scholarship in this area takes a more pragmatic approach, working with the reality of military activities in space and seeking to find ways to reduce the risks and consequences of war in space.

A new book, *War and Peace in Outer Space: Law, Policy, and Ethics*, is one such contribution, tackling as it does some of the challenges inherent in space as a military domain.[10] Taking an interdisciplinary approach, the book brings together chapters covering a wide range of perspectives — including legal, ethical, policy-based, and diplomatic — on topics related to military activities in outer space, in times of war and times of peace (as the title suggests). The book has its origins in a conference held in 2018 on the use of military force and cooperation in space at the University of Pennsylvania's Centre for Ethics and the Rule of Law.[11] While a majority of the papers are drawn from presentations at that conference, additional authors have been carefully selected by the editors in order to balance what would otherwise have been a very Western-centric collection.

As the editors note in their introductory chapter:

> Efforts to use space technology and the space environment to attack and to defend against attack have been present from the earliest experiments in spaceflight, yet spacefaring nations have traditionally approached the subject of warfare in space with judicious concern. A theater of battle unlike any other, the space environment, especially in Earth orbit, imposes demands on combatants and risks to combatants and noncombatants alike, that challenge diplomats, policymakers, and military leaders in profound ways.[12]

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6 See generally Melissa de Zwart and Dale Stephens, 'The Space (Innovation) Race: The Inevitable Relationship between Military Technology and Innovation' (2019) 20(1) *Melbourne Journal of International Law* 1.

7 David D Thompson, 'Foreword' in Cassandra Steer and Matthew Hersch (eds), *War and Peace in Outer Space: Law, Policy, and Ethics* (Oxford University Press, 2021) vii.

8 Australian Government Department of Defence, *Annual Report 19–20* (Report, 2020) 96 <https://www.defence.gov.au/annualreports/19-20/DAR_2019-20_Complete.pdf>.

9 See, eg, Ram S Jakhu, Kuan-Wei Chen and Bayar Goswami, 'Threats to Peaceful Purposes of Outer Space: Politics and Law' (2020) 18(1) *Astropolitics* 22.

10 Cassandra Steer and Matthew Hersch (eds) (n 7).

11 Matthew Hersch and Cassandra Steer, 'Introduction: Why Space Law Matters in War and Peace' in Cassandra Steer and Matthew Hersch (eds) (n 7) 1, 1 ('Introduction').

12 Ibid.

These challenges are not going to quietly disappear, and as space becomes more competitive, the risk of increased tensions is only likely to rise. The chapters in this book explore and seek to provide answers to some of the most challenging issues arising in connection with military activities in space. The book is divided into four parts, taking the reader progressively through: the general legal framework (Part I: The Law of War and Peace in Space); ethical issues (Part II: The Ethics of Space Security); specific threats to space security (Part III: Current and Future Threats to Space Security); and proposed legal and diplomatic solutions (Part IV: Toward Stability).

This is not a book about how to fight a war in space, although there is a chapter devoted to the application of the laws of war to space.[13] Instead, the focus of the majority of the chapters in the collection is on how to reduce the risk of conflicts escalating into a war in space. In Part I, Theresa Hitchens observes that

> norms and transparency and confidence-building measures (TCBMs) often serve as essential foundations to allow States to avoid misunderstandings, miscalculations, and conflict escalation by laying out 'rules of the road' for interactions and activities in the international sphere.[14]

Rather than relying on existing space law treaties and non-binding instruments to ensure peaceful uses of space, Icho Kealotswe-Matlou calls for the establishment of an Independent Outer Space Authority 'that regulates outer space activities [and] would provide a reliable and solid foundation for verification and enforcement of international obligations'.[15]

In Part II, the focus of the chapters turns to ethics and the ethical obligation to avoid taking part in escalatory behaviour, adding a unique perspective to the previous chapters that solely discussed the law. Space ethics is a highly specialised field of ethics research 'concerned with examining the idea that just because we can do certain things in space, it doesn't mean we should'.[16] If there is one criticism that could be made of this Part, it is that none of the contributing authors appear to be a space ethicist. Nonetheless, the treatment of the ethical issues and the ethical lens given to these chapters by their respective authors provide a valuable addition to the collection. PJ Blount argues that

> throughout the Outer Space Treaty the drafters used aspirational norms to add an ethical dimension to the law of outer space. For instance, while the Article I

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13 Cassandra Steer and Dale Stephens, 'International Humanitarian Law and Its Application in Outer Space' in Cassandra Steer and Matthew Hersch (eds) (n 7) 23.

14 Theresa Hitchens, 'Norm Setting and Transparency and Confidence-Building in Space Governance' in Cassandra Steer and Matthew Hersch (eds) (n 7) 55, 56.

15 Icho Kealotswe-Matlou, 'The Rule of Law in Outer Space: A Call for an International Outer Space Authority' in Cassandra Steer and Matthew Hersch (eds) (n 7) 91, 102.

16 'Space Ethics: Ethically Navigating the Next Frontier', *University of New South Wales: Canberra* (Web Page) <https://unsw.adfa.edu.au/our-research/space-ethics>.

> provision that the use and exploration of outer space shall be 'the province of all mankind' is ambiguous in meaning, it serves to link space activities to the goals and aspirations of humanity rather than a single State. … [S]uch linking does not create specific legal obligations, but rather colors hard obligations of the Outer Space Treaty with humanist notions prevalent in the still emerging post-1945 international law regime. … It is through these types of provisions that space law imbues not just obligations but also ethical values that States are meant to consider as they engage in space activities.[17]

The application of ethical values to the military use of outer space, and specifically US space dominance, is the subject of the final chapter in this Part. Joan Johnson-Freese and Kenneth Smith observe that views in relation to military uses of space range from the belief that space is an inevitable warfighting domain, to the belief that space should only be used for peaceful purposes.[18] However, as the authors argue in their chapter, the latter view is simply untenable due to the dual-use nature of most space technology and the multiple competing interpretations of peaceful purposes by different States and scholars. The authors note that

> with ethics analyses, disagreements between informed debaters can be distilled to differing definitions of justice, rights, common good, and well-being … A principled ethics analysis, however, can act as a guidepost during situations that seem to have no 'good' options.[19]

Part III contains chapters outlining threats to space security, current as well as forward-looking issues and challenges. Topics in this Part include the United States Space Force and its remit,[20] arms control,[21] zones,[22] and space hybrid operations.[23] Two chapters of note in this Part relate to the challenges of arms control in space and the creation of zones to exclude others. Jinyuan Su observes that the greatest challenge to preventing an arms race in outer space is the absence of a definition of what amounts to a weapon in space, as even inherently benign technology can be repurposed to capture or disable an adversary's space asset.[24] Su concludes his chapter by challenging the

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17 PJ Blount, 'Peaceful Purposes for the Benefit of All Mankind: The Ethical Foundations of Space Security' in Cassandra Steer and Matthew Hersch (eds) (n 7) 109, 109.

18 Joan Johnson-Freese and Kenneth Smith, 'US Space Dominance: An Ethics Lens' in Cassandra Steer and Matthew Hersch (eds) (n 7) 123.

19 Ibid 148.

20 Peter L Hays, 'What Should the Space Force Do? Insights from Spacepower Analogies, Doctrine, and Culture' in Cassandra Steer and Matthew Hersch (eds) (n 7) 153.

21 Jinyuan Su, 'The Legal Challenge of Arms Control in Space' in Cassandra Steer and Matthew Hersch (eds) (n 7) 181.

22 Matthew Stubbs, 'The Legality of Keep-Out, Operational, and Safety Zones in Outer Space' in Cassandra Steer and Matthew Hersch (eds) (n 7) 201.

23 Jana Robinson, 'Prominent Security Risks Stemming from Space Hybrid Operations' in Cassandra Steer and Matthew Hersch (eds) (n 7) 229.

24 Su (n 21) 191.

> international community, in particular major spacefaring countries … [to] think more broadly about international peace and security rather than their unilateral security interests, especially given our mutual dependencies on a sustainable and stable space environment.[25]

This would be a welcome approach by major spacefaring States, although sadly it is unlikely to eventuate in the current environment which seems to be very much one of competitiveness between States and a desire to dominate the space domain. In a forward-looking chapter, Matthew Stubbs observes that 'there are a variety of situations where it will be in the strategic (or even merely commercial) interests of a State to seek to prevent other States from accessing an area of outer space'.[26] After considering the legality of different types of zones in space and how this might be balanced with one of the fundamental principles of space law — that space is free for exploration and use by all — Stubbs concludes that States can legally declare keep-out and operational zones in space in limited instances, and predicts that this will be an area where the practice of States will shape the development and implementation of the law in the future.[27] The issue of zones in space has become an increasingly important topic in recent years with plans for space resource utilisation (or space mining) and with the release of the Artemis Accords.[28] This chapter provides a thoughtful contribution to scholarship in this area.

In the final Part (Part IV), the contributions focus on possible solutions to the issues and challenges raised in the previous Parts 'in order to avoid a space-based conflict in which there are no winners'.[29] Gilles Doucet proposes a multilateral treaty that could act as a transparency and confidence building measure, contributing to arms control in space by requiring States to notify and report any activity that results in the transfer of energy to any object in Earth orbit.[30] Doucet argues that adopting such a measure 'would make it more difficult for States to develop antisatellite weapons and also, more importantly, reduce their perceived need for such capability'.[31] Noting that the space domain presents distinct challenges for crisis management and the potential for heightened global and regional tensions to draw States into a conflict, Laura Grego utilises a crisis stability lens to evaluate space security — 'the avoidance of incentives to strike first, reducing the risks of misinterpretation and miscalculation, and increasing resilience to incipient crises, allowing them to be resolved as

25 Ibid 199.

26 Stubbs (n 22) 201.

27 Ibid 227.

28 'The Artemis Accords: Principles for a Safe, Peaceful, and Prosperous Future', *National Aeronautics and Space Administration* (Presentation) <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords_v7_print.pdf>.

29 Hersch and Steer, 'Introduction' (n 11) 17.

30 Gilles Doucet, 'A Proposed Transparency Measure as a Step toward Space Arms Control' in Cassandra Steer and Matthew Hersch (eds) (n 7) 247, 254.

31 Ibid 248.

quickly and nonviolently as possible'.[32] In the final chapter in this Part, Paul Meyer laments the decline in diplomacy and the consideration of diplomatic options in the approaches of States to space security.[33] Meyer argues that the greatest

> threat to the future exploitation of outer space resides in the potential for the 'peaceful purposes' of the Outer Space Treaty regime to be challenged by States intent on extending earthly conflict into this environment and, by means of 'weaponization,' transform it into just another domain for 'warfighting'. It is my contention that such a challenge is beginning to be mounted by leading space powers, and unless countervailing diplomatic efforts are made to preserve the special, pacific legal regime established for outer space half a century ago, we could witness a rapid degradation of this vital (if vulnerable) environment at great loss for humanity. A revival of diplomatic activism on behalf of space security is required, not only by concerned States but also on the part of the wider stakeholder community, including the private sector and civil society that benefit from the current regime.[34]

Meyer submits that a return to diplomacy can 'realign the depiction of outer space as a realm of promising international cooperation rather than one of inevitable confrontation and conflict'.[35] States would do well to heed this call and reflect on the solutions proposed in this Part of the collection.

Cassandra Steer and Matthew Hersch conclude the collection with a suggestion that

> [i]n order to counter the problems of 'congestion, contestation and competition' in space, we need to focus on 'cooperation, collaboration, and communication,' which should be held as paramount by State actors and private actors as we continue to be more and more dependent on space technologies and space operations. This includes capacity-building both nationally and internationally.[36]

The editors have done well to include a wide range of perspectives in this book and should be commended for their obvious efforts to achieve gender balance in contributing authors. The result is a carefully curated collection of chapters which will be of interest to students, academics, policy makers, and those operating in the space domain. This collection is timely, provides a valuable contribution to efforts to establish agreed norms of behaviour in space, and goes a long way in answering many of the urgent questions facing the space domain.

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32 Laura Grego, 'Outer Space and Crisis Risk' in Cassandra Steer and Matthew Hersch (eds) (n 7) 265, 270.

33 Paul Meyer, 'Diplomacy: The Missing Ingredient in Space Security' in Cassandra Steer and Matthew Hersch (eds) (n 7) 287.

34 Ibid 288.

35 Ibid 300.

36 Cassandra Steer and Matthew Hersch, 'Conclusion: Cooperation, Collaboration, and Communication in Space' in Cassandra Steer and Matthew Hersch (eds) (n 7) 301, 303.

*John Gava**

THE WASHINGTON DIARIES OF OWEN DIXON: 1942–1944

EDITED BY PHILLIP AYRES
FEDERATION PRESS, 2021
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Owen Dixon's wartime diaries are strangely addictive.

On 15 April 1942, Owen Dixon, then a Justice of the High Court and already having chaired the wartime Central Wool Committee and the Australian Coastal Shipping Control Board, was appointed Envoy Extraordinary and Minister Plenipotentiary to the United States ('US'). He held this post until mid-September 1944. In taking this appointment, Dixon was not breaking new ground. The then Chief Justice, Sir John Latham, had been Australia's first Minister to Japan, from August 1940 until the suspension of relations on 8 December 1941, following the Japanese attacks on Pearl Harbour and elsewhere. We might think these appointments rather unusual and exceptional, and they were. But these were also unusual and exceptional times.

Anyone wanting more details about Dixon's appointment and an analysis of his time in Washington, as well as his relations with the Prime Minister John Curtin and the mercurial Minister for External Affairs (and onetime colleague on the High Court) Herbert Vere Evatt, could commence with Ayres' biography of Dixon.[1] While it is apparent from his diary that Dixon was clearly suspicious of Evatt, Dixon did not hold forth about him, but merely noted when others, especially the President and his senior advisors, made their feelings known to him. Of course, one would need to examine the histories of the period to determine whether Dixon's attitude towards Evatt and Dixon's perception of others' attitude towards Evatt were accurate or justified.

Reproduced in this volume are Dixon's diary entries from the day he flew to Washington until the day he arrived back in Australia, more than two years later. Ayres provides succinct annotations, introducing each new person that Dixon meets and giving some context to the materials included or referred to.

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* BA, LLB (Macquarie); LLM (Sydney); PhD (Adel); Adjunct Associate Professor, Adelaide Law School, University of Adelaide.

1 Philip Ayres, *Owen Dixon* (Miegunyah Press, rev ed, 2007).

As indicated above, the diaries are strangely addictive. But, it needs to be made clear why, given what the diaries are not. They are not chatty or gossipy about the powers that be. Nor do they include Dixon's reactions to the events of the time, or the people he met. Rather, they seem to be matter-of-fact records of what he did and who he met on each day. At a guess, they would have served as his own record, acting as notes to refresh his memory in the years after his experiences at the centre of world power.

Can such dry, minimalist accounts be of any interest? I think so. Reading them, one becomes immersed in the daily activities of the representative of a minor power in what had become the centre of the world. This was not a world of wartime heroics, but one of constant meetings, constant writing of memoranda, reports and speeches to all and sundry, and, to a degree I found exhausting, dinners and receptions. Hardly a day passed when Dixon was not attending dinner, or hosting dinner (or lunch, for that matter) or taking part in or giving receptions for diplomats, US government officials, politicians, and members of Franklin Delano Roosevelt's formal and informal Cabinets and advisors. A dinner which stood out for me was one where Alexander Kerensky of Russian Revolution fame attended. Dixon did not write anything about this, other than noting Kerensky's appearance at the dinner, but Ayers does note that Kerensky's second wife was Australian, which probably accounts for Kerensky's appearance at a dinner for Dixon. At another dinner, Cary Grant was a guest.

His dry, minimalist accounts do contain some instances where Dixon allowed his feelings to come out, even if their expression is also dry and minimalist. He notes that at one meeting Douglas MacArthur 'orated to me'.[2] On another occasion Dixon wrote, in seeming exasperation, that he had had 'Mr and Mrs Code to lunch from twelve o'clock till 3.00!'.[3] On his way back to Australia at the end of his tenure he describes John Reed's *Ten Days That Shook the World*[4] as 'a poorly presented narrative by a man who would have been a valuable witness if he had never been a journalist. He wrote *Insurgent Mexico*, which might be worth getting'.[5]

Reading these diaries has, however, made me revise what I had written about Dixon in a review of the Ayres biography.[6] First, in following what Chief Justice James Spigelman had suggested,[7] I wrote the following:

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2 Philip Ayres (ed), *The Washington Diaries of Owen Dixon, 1942–1944* (Federation Press, 2021) ('*Washington Diaries*') 173.

3 Ibid 301.

4 See John Reed, *Ten Days That Shook the World* (Penguin Classics, 2nd ed, 2007).

5 Ayres, *Washington Diaries* (n 2) 371.

6 John Gava, 'Owen Dixon' (2003) 24(2) *Adelaide Law Review* 337.

7 Chief Justice James Spigelman, 'Australia's Greatest Jurist: Philip Ayres' Owen Dixon' (2003) 47(7–8) *Quadrant* 44, 45–6.

> How could such a learned, inquisitive man get bored so easily in New York, when it was, to use Spigelman's words, 'at that time the cultural capital of the world'? Is Spigelman right in saying that Dixon's intellectual depth came at the expense of breadth of interest and experience?[8]

Reading Dixon's diaries shows that this is inaccurate. Dixon was an enthusiastic walker, and whenever he visited other cities and towns (and at home in Washington), he walked whenever he could to see that city and its highlights. For example, when in San Francisco, he viewed the Golden Gate bridge and visited the Redwoods in the Muir Woods. In Chicago, he visited the famous Field Natural History Museum. He was also an inveterate visitor to bookshops, and his notes show the books, mainly American, ranging from literature to history to law and modern politics, that he read during his time in the US. He enjoyed films and art galleries. He also often visited US courts to see the law in action. Most such visits seem to have been without fanfare and without formal notification to the judges. For a busy man in the middle of a war in which Australia's short, medium and long-term interests were, at least to some extent, dependent on his work, he seems to have displayed a lot of curiosity about the US, even if this curiosity was not ostentatious.

These diaries also bring into question doubts about Dixon's effectiveness as Australia's representative made by Spigelman and David Day.[9] Spigelman, for his part, wondered whether Dixon's close relationship to men such as Dean Acheson, a future US Secretary of State, meant that he was not linked to the 'true focus of power in Washington'.[10] Was this true? The diaries show that Dixon was very friendly with Felix Frankfurter and Harry Hopkins, two very close, if informal, counsellors to President Roosevelt, and that he was in regular contact with the highest figures in the US government and military, and with Lord Halifax, the British ambassador to the US. Of course, such access is no guarantee of Dixon's effectiveness, but, at the very least, Dixon was plugged into both the formal and informal loci of power in the US.

While this volume will primarily attract readers interested in Dixon and those following Australia's involvement in World War II, it should also prove engaging to those with general reading habits.

8 Gava (n 6) 337–8 (citations omitted).

9 David Day, *The Politics of War* (HarperCollins, 2003) 380.

10 Spigelman (n 7) 45.

*Paul T Babie**

AUSTRALIAN JURISTS AND CHRISTIANITY

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I Introduction: Contemporary Law and Religion in Australia

The relationship between law and religion in Australia continues to evolve, gaining increasing public visibility and importance as it does. The long overdue achievement of marriage equality in 2017[1] catalysed two high profile and polarising moments in the contemporary structure of that relationship. First, in a concession to the Australian Christian Lobby ('ACL'), the Coalition government led by then Prime Minister Malcolm Turnbull established the Religious Freedom Review, led by Philip Ruddock ('Ruddock Review').[2] Having realised too late that it had lost the opportunity for some substantive protections for religious freedom by opposing any strengthening whatsoever of human rights protections as a result of the National Human Rights Consultation Committee's 2008 final report ('Brennan Review'),[3] the ACL found itself on the outside looking in following marriage equality, suddenly scrambling to retain even those protections which it did have

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* BA (Calgary); BThSt (Flinders); LLB (Alberta); LLM (Melb); DPhil (Oxon); Bonython Professor of Law, Adelaide Law School, University of Adelaide.

1 Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) sch 1 pt 3, amending *Marriage Act 1961* (Cth) s 5(1) (definition of 'marriage'). See also Megan Lawson and Paul Babie, 'The Law of Marriage Equality in Australia: The Shortest Distance between Two Points?' in Hilary D Regan (ed), Interface Theology (ATF Press, 2017) 1.

2 See: Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018); Prime Minister of Australia, Attorney General, 'Government Response to Religious Freedom Review' (Media Release, 13 December 2018) <https://www.pm.gov.au/media/government-response-religious-freedom-review>.

3 Frank Brennan et al, *National Human Rights Consultation* (Report, Attorney General's Department, September 2009). See also Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) (3) *Brigham Young University Law Review* 821, 855.

pursuant to state and territory anti-discrimination legislation.[4] In response to the ACL demands for protection, and to the Ruddock Review, the Morrison government released the badly drafted — and discriminatory — Religious Freedom Bills[5] (in the plural because they are now in their third iteration, following widespread public outcry about the discrimination that would eventuate through the enactment of this legislation). The Coalition government introduced the Bills at the end of 2021, which was met with widespread public concern.[6]

As the government attempted to placate the ACL with the Ruddock Review and its proposed legislation, controversy erupted in April 2018 following another, entirely unexpected, intervention. Purporting to be acting on genuine Christian faith and belief as an active member of an Assemblies of God fellowship,[7] Australian rugby player Israel Folau posted deeply offensive and vitriolic statements concerning LGBTIQ+ communities. Following these posts, Rugby Australia — the body with which Folau was contracted to play — announced its intention to terminate his contract.[8] A hearing on 16 May 2019 found Folau to have breached Rugby Australia's code of conduct,[9] and on 17 May, his four-year employment contract was

4 On these protections, see generally Paul Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2020) 47(1) *University of Western Australia Law Review* 64.

5 See the religious discrimination legislative package, comprising: Religious Discrimination Bill 2021 (Cth); Religious Discrimination (Consequential Amendments) Bill 2021 (Cth); Human Rights Legislation Amendment Bill 2021 (Cth). See also 'Religious Discrimination Bill 2021 and Related Bills', *Parliament of Australia* (Web Page, 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/ReligiousDiscrimination>.

6 See Michael Koziol, '"Right-Wing Backlash": Church Group to Make Religious Freedom an Election Issue', *The Sydney Morning Herald* (online, 6 June 2021) <https://www.smh.com.au/politics/federal/right-wing-backlash-church-group-to-make-religious-freedom-an-election-issue-20210602-p57xce.html>.

7 Rob Forsaith, 'Folau Content after Ditching Mormonism', *The Sydney Morning Herald* (online, 8 November 2011) <https://www.smh.com.au/sport/folau-content-after-ditching-mormonism-20111108-1n597.html>. Israel Folau, 'Israel Folau on Homosexuality and God', *PlayersVoice* (Web Page) <https://www.playersvoice.com.au/israel-folau-im-a-sinner-too/>.

8 Tom Decent, 'Rugby Australia Set to Sack Israel Folau for Anti-Gay Social Media Post', *The Sydney Morning Herald* (online, 11 April 2019) <https://www.smh.com.au/sport/rugby-union/rugby-australia-set-to-sack-israel-folau-for-anti-gay-social-media-post-20190411-p51dar.html>; Rugby Australia, 'Israel Folau Issued Sanction Directing Contract Termination for High-Level Code of Conduct Breach' (Media Release, 17 May 2019) <https://australia.rugby/news/2019/05/17/folau-sanction-breach>.

9 On the use of such contracts, see Jerome Doraisamy, 'Are Employment Contracts Increasingly Being Used to Control Employees' Lives?', *LawyersWeekly* (online, 11 June 2019) <https://www.lawyersweekly.com.au/biglaw/25814-are-employment-contracts-being-used-to-control-employees-lives>.

terminated.[10] On 6 June 2019, Folau brought proceedings in the Fair Work Commission against Rugby Australia and the Waratahs claiming unlawful termination on the basis of religious discrimination in violation of the *Fair Work Act 2009* (Cth).[11]

For many Australians, the suggestion that either the ACL broadly or individuals like Folau should have any protection to discriminate against others, or to vilify them on the basis of religious belief — to a large extent already protected by controversial exemptions from state and territory anti-discrimination provisions — represents an entirely unwarranted intrusion of what ought to be a personal matter into public life; of the sacred into the secular. For many commentators, the law is a justifiably secular space, hard-won and worth defending.[12] Frequently misunderstood, though, is a historical fact: the law we think to be secular today is in fact the product of a religious — largely Christian — influence. Harold J Berman first identified this fact[13] and scholars are now beginning to recognise that the law we defend as secular may never have been so.[14] A recent Australian book makes an important contribution to our understanding of the modern state of Australian law, demonstrating just how close the causal relationship of religion to law has been, not only historically, but even now, in our own time: *Australian Jurists and Christianity*[15] explores the leading Christian jurists from European invasion of the Australian continent until now.

In this review, I briefly examine two important contributions made by this book. Of course, we can look back at Australia's history since European invasion to consider the Christian influence on law as it was received and developed. But, more importantly, and unusually for a volume of this type, the editors also ask us to look ahead, to subject our law to a searching critique in order to understand better not only what might be positive in its Christian sources, but also what might be a burden upon contemporary law and in need of redress.

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10 Mike Hytner, 'Israel Folau Sacked over Social Media Posts after Panel Rules in Favour of Rugby Australia', *The Guardian* (online, 17 May 2019) <https://www.theguardian.com/sport/2019/may/17/israel-folau-sacked-after-panel-rules-in-favour-of-rugby-australia>.

11 Georgina Robinson, 'Folau Set to Seek $10 million in Damages from Rugby Australia', *The Sydney Morning Herald* (online, 7 June 2019) <https://www.smh.com.au/sport/rugby-union/folau-takes-fight-against-rugby-australia-to-fair-work-commission-20190606-p51v53.html>.

12 See Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, (Bloomsbury, 2009).

13 See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1985).

14 See Winnifred Fallers Sullivan, Robert A Yelle and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford University Press, 2011).

15 Geoff Lindsay and Wayne Hudson (eds), *Australian Jurists and Christianity* (Federation Press, 2021).

II Looking Back

Perhaps controversially, the 'object of th[is] volume is to illustrate … the influence of Christianity on the development of Australian law and society'.[16] Although, in order not to offend 'Australian sensibilities', it is entitled *Australian Jurists and Christianity*, rather than that which the editors suggest it might have been called: 'Great Christian Jurists in (Australian) History', which might better have demonstrated its primary aim.[17] The editors of the volume argue that '[the] lives and connection [of those examined] with the law provide an opportunity for the existence, nature and extent of Christianity's influence to be exposed to view'.[18] This is significant, for it is too easy to overlook that much of our modern western law finds its sources in Christianity: as I noted above, Harold Berman was the first to recognise this,[19] but we in Australia too often forget — sometimes willfully — that our law carries the burden of Christianity, if only interstitially.[20]

For the editors of this volume, then, a 'conscience influenced by Christianity' shaped '[t]he great advances in Australian legal history',[21] all of which fall into three broad categories: achieving national independence; providing a framework for a fair and just society; and reconciliation with Aboriginal and Torres Strait Islander peoples.[22] This last category has proven, and continues to prove, most difficult. Australia, in an ongoing attempt to 'fac[e] up to its racist history',[23] still does not provide any recognition of First Peoples in the *Constitution* and has not been successful in efforts to remedy discrimination in education, employment and health that affect the cultural and physical survival of Indigenous peoples.[24] This has the problematic consequence that the first two major shifts — independence from the British Empire and the effort to create a fair and just society — still exclude the third.[25] For many Australians, though, the mere suggestion that Christianity and Christians once had and may continue to play a role in the development of law and society is, at best, inaccurate and, at worst, entirely inappropriate.[26] The editors acknowledge this, writing that 'the

16 Geoff Lindsay and Wayne Hudson, 'Introduction: Spirit in the Temporal' in Geoff Lindsay and Wayne Hudson (eds) (n 15) 1, 1.

17 Ibid.

18 Ibid.

19 Berman (n 13).

20 Paul Babie, 'Breaking the Silence: Law, Theology and Religion in Australia' (2007) 31(1) *Melbourne University Law Review* 296, 305.

21 Lindsay and Hudson (n 16) 25 (emphasis omitted).

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

26 Babie (n 20). See also Lindsay and Hudson (n 16) 4–25.

very concept of a "Christian jurist" might be an affront'.[27] Yet, it is undeniable that legal doctrine bears the imprint of Christianity:

> Traces of the Christian Church's contribution to Anglo-Australian jurisprudence on these topics can be found … in the ongoing work of Australian State and Territory Supreme Courts exercising equity jurisdiction (formerly exercised by England's Lord Chancellor) and probate jurisdiction (formerly exercised by England's Ecclesiastical Courts). Those jurisdictions uncontroversially owe historical debts to the Christian clergy who once administered them.[28]

And more than this, the choice of 'law *and society*' rather than merely 'law' means that the book seeks to encompass much more than legal doctrine alone.[29] For the contributors to this volume, the Christian influence is evident and pervasive. To demonstrate this, the editors provide both a substantial assessment of the role of Christianity in the development of English law, and its ongoing development as the received law of Australia, as well as its role within the wider sweep of Australian history.[30]

The book is organised chronologically, with 'representatives [drawn from] a variety of interests, and traditions, by reference to geography, denominational affiliation, gender and race', whose contributions range from legal practice, to the bench, to politics, taking a broad, civilian stance towards the meaning of the word 'jurist'.[31] Thus, we find essays on significant judicial figures: George Higinbotham;[32] Sir Samuel Griffith;[33] Lord Atkin[34] (it is little known that Lord Atkin, forever associated with *Donoghue v Stevenson*,[35] ginger beer, snails, and the tort of negligence, was born in Queensland); Sir Victor Windeyer;[36] Dame Roma Mitchell;[37] Sir Ronald Wilson;[38]

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27 Lindsay and Hudson (n 16) 3–25.

28 Ibid 2 (citation omitted).

29 Ibid (emphasis in original).

30 Ibid 4–25.

31 Ibid 1.

32 Marion Maddox, 'George Higinbotham (1826–1892)' in Lindsay and Hudson (eds) (n 15) 79.

33 Simon Chapple, 'Samuel Walker Griffith (1845–1920)' in Lindsay and Hudson (eds) (n 15) 90.

34 Peter Applegarth, 'Lord Atkin (1867–1944)' in Lindsay and Hudson (eds) (n 15) 145.

35 [1932] AC 562.

36 Carol Webster, 'Victor Windeyer (1900–1987)' in Lindsay and Hudson (eds) (n 15) 167.

37 Susan Magarey, 'Roma Flinders Mitchell (1913–2000)' in Lindsay and Hudson (eds) (n 15) 180.

38 Mandy Tibbey, 'Ronald Wilson (1922–2005)' in Lindsay and Hudson (eds) (n 15) 203.

Sir Gerard Brennan;[39] Sir William Deane;[40] Murray Gleeson;[41] and Michael Kirby.[42] Many of those were also leading members of the profession prior to their appointment, as well as political figures. But, we also find essays on those whose entire contribution to law and history came in the political arena: Lachlan Macquarie;[43] James Stephen;[44] Andrew Inglis Clark;[45] Alfred Deakin;[46] Sir Robert Menzies;[47] and Gough Whitlam.[48] And still, other essays demonstrate the role which prominent Christians might play without being formally involved in either the law or politics, most notably Eddie Mabo.[49]

Taken together, the contextualising chapters written by the editors and the biographical essays combine to paint a portrait of Australia's post-European invasion history as being influenced — explicitly, but more often implicitly — by Christian thought and those who subscribe to some form of it. Yet, a portrait that stopped there would be incomplete, for as the book points out, the mark left by Christianity cannot be seen as an unmitigated success, or even one which we ought to accept. In other words, perhaps what this portrait most clearly reveals is the work still to be done to achieve full independence from the empire from which the nation emerged, forging a fair and just society for all its peoples, most notably for those dispossessed of the continent in its formation, the Aboriginal and Torres Strait Islander peoples.

III Looking Ahead

Recognising the religious and Christian influence on our law is not to succumb to the view that it is somehow religious, beyond logic and reason. The common law and its legislative descendants conform to the strictures of logic and reason for ongoing development and adaptation to new and changing social, political and economic

39 Patrick Keyzer, 'Francis Gerard Brennan (1928–)' in Lindsay and Hudson (eds) (n 15) 228.

40 Arthur Emmett, 'William Patrick Deane (1931–)' in Lindsay and Hudson (eds) (n 15) 240.

41 Michael Pelly, 'Murray Gleeson (1938–)' in Lindsay and Hudson (eds) (n 15) 274.

42 Nicolas Kirby, 'Michael Kirby (1939–)' in Lindsay and Hudson (eds) (n 15) 285.

43 Marie Bashir, 'Lachlan Macquarie (1761–1824)' in Lindsay and Hudson (eds) (n 15) 32.

44 Stephen Tong and Robert Tong, 'James Stephen (1789–1859)' in Lindsay and Hudson (eds) (n 15) 43.

45 Richard Ely, 'Andrew Inglis Clark (1848–1907)' in Lindsay and Hudson (eds) (n 15) 101.

46 Stephen Free, 'Alfred Deakin (1856–1919)' in Lindsay and Hudson (eds) (n 15) 124.

47 Anne Henderson, 'Robert Menzies (1894–1978)' in Lindsay and Hudson (eds) (n 15) 156.

48 James McComish, 'Gough Whitlam (1916–2014)' in Lindsay and Hudson (eds) (n 15) 191.

49 Kevin Smith, 'Eddie Mabo (1936–1992)' in Lindsay and Hudson (eds) (n 15) 262.

circumstances. While it has contributed to the potential for law to exist as a matter of logic and reason, religion remains, above all, a matter of reliance on faith, and for that reason has no ongoing, explicit place and no role to play in that adaptation. Yet, logic and reason may, surprisingly, be one of the legacies that the law has received from its Christian origins that we too easily forget when we overlook that history. This volume provides important insight into the processes by which that has occurred in Australia. This recognition, though, ought to exhort and admonish us to confront two consequences of the influence that our Christian forebears had on the law.

First, and significantly, we must remember the place of Aboriginal and Torres Strait Islander spirituality for at least 60,000 years prior to the arrival and invasion of Europeans, which was irreparably harmed — and in some cases obliterated — by those events.[50] Perhaps the most distressing parts of the book are those which recount the Myall Creek Massacre in New South Wales on 10 June 1838, in which 'a group of white stockmen … killed upwards of 30 Aboriginal men, women and children [in] … "an act of coldblooded and deliberate atrocity"'.[51] Following two trials prosecuted by the Attorney-General of New South Wales, John Hubert Plunkett,[52] seven of the accused were ultimately convicted for some of the murders, most notably for those of the child victims. The Myall Creek Massacre serves to remind, if any reminder were needed, of the abhorrent treatment of Aboriginal and Torres Strait Islander peoples since European invasion.

Second, and perhaps only becoming apparent more recently, is the very significant role played by other religions in the history of Australian society since European invasion. Other religious traditions continue to play a role in the development of the law, if not in doctrine, then at least by implication in its practice and in the lives of a great many Australians.[53]

In the light of these two contemporary dimensions of Australia's history, the editors conclude that

> [l]awyers interested in Australian legal history will need to be aware of the extent to which the histories of Indigenous peoples were left out of the older accounts, and of the extent to which 'other histories' now need to be included in any reliable history of Australia.[54]

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50 Jeremy Beckett and Melinda Hinkson, '"Going More Than Halfway to Meet Them": On the Life and Legacy of WEH Stanner' in Melinda Hinkson and Jeremy Beckett (eds), *An Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2008) 1, 17–19.

51 John Kennedy McLaughlin, 'John Hubert Plunkett (1802–1869)' in Geoff Lindsay and Wayne Hudson (eds), *Australian Jurists and Christianity* (Federation Press, 2021) 69, 74.

52 Ibid 69–78.

53 See Gary Bouma, *Australian Soul: Religion and Spirituality in the 21st Century* (Cambridge University Press, 2006).

54 Geoff Lindsay and Wayne Hudson, 'Rethinking "Religion" and "Law" in Australia' in Lindsay and Hudson (eds) (n 15) 316.

A significant contribution of this volume, then, is not only in understanding the ways in which Christianity influenced the course, and continues to inhabit the interstices of Australian law, but also, and much more importantly, it admonishes us to think deeply about how we ought to understand that history.

Precisely because the relationship between law and religion is so fraught, the editors conclude with eight suggestions for further research: (i) the contemporary and critical study of Australian history and Australian legal history; (ii) the reconsideration of Australia as a 'secular' country; (iii) that the geography involved in Australian history needs to be deconstructed and rethought; (iv) the role of American Christianity in shaping the work of Australian jurists; (v) the need to know more about the personal belief systems of those jurists; (vi) the extent to which (iv) and (v) have been influenced by religious sectarianism; (vii) the way in which law has been conceived and implemented; and (viii) the examination of an Australian political theology, and the role of 'religion and religious bodies in the development and operation of law and our legal system'.[55] But, what the editors and the contributors have found is

> that the influence of Christianity on Australian law is often to be sought *in what law has been taken to be, and how it has been administered*, rather than cases in which the religious belief of some or another denomination has allegedly influenced a particular legal decision or statute.[56]

There can be little doubt that law and religion continue to interact in both meaningful and troubling ways in modern Australia. Understanding how we got here from Australia's past can tell us a lot about why that is so. A better understanding of the relationship between law and religion, and what we still need to learn, will tell us how we might begin to mediate that relationship in ways that are both rigorous and constructive, for all involved in Australia's future. It is one thing to know history; quite another to accept it unthinkingly and uncritically.

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55 Ibid 315–18.

56 Ibid 315 (emphasis in original).

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In preparing manuscripts for submission, authors should be guided by the following points:

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