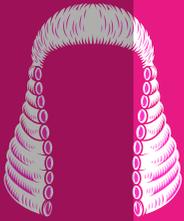
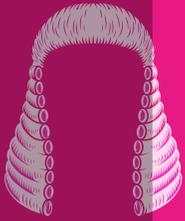




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AUSTRALIA'S COMMITMENT TO 'ADVANCE THE HUMAN RIGHTS OF INDIGENOUS PEOPLES AROUND THE GLOBE' ON THE UNITED NATIONS HUMAN RIGHTS COUNCIL

ABSTRACT

In 2018, Australia took up its first three-year term as a Member State of the United Nations Human Rights Council ('UNHRC'). In its bid for election, Australia made a number of voluntary commitments in relation to its human rights performance as a member. In this article, we consider the six elements of Australia's pledge relating to Indigenous rights at domestic and international levels. Although it is too early to assess Australia's overall performance on the UNHRC, an assessment of current human rights practice in relation to these six areas provides a helpful snapshot of contemporary Indigenous affairs and rights realisation in Australia. After considering Australia's performance within this framework, we advance recommendations for the constructive development of Australian law and policy in the future and in particular, advocate for the adoption of the *Uluru Statement from the Heart* ('*Uluru Statement*'). We also identify ways in which Australia can advance the rights of Indigenous peoples around the world.

I INTRODUCTION

The UNHRC is the key intergovernmental body responsible for promoting and encouraging respect for human rights and fundamental freedoms for all.¹ The UNHRC consists of 47 elected Member States serving three-year membership terms on a rotating basis. When States put themselves forward for election, they are evaluated not only on their record of human rights promotion and protection, but also

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¹ United Nations Human Rights Council, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006, adopted 15 March 2006) para 2.

any voluntary pledges they advance as candidates for membership. These pledges should consist of specific, measurable and verifiable commitments.²

As the key international human rights body, the UNHRC has an important role to play in promoting the rights of Indigenous peoples who are widely recognised to be amongst the most vulnerable and at-risk communities in the world today.³ This is a matter of concern for the United Nations ('UN') which, in response, has adopted the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'),⁴ appointed a UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People (now the 'UN Special Rapporteur on the Rights of Indigenous Peoples'), and established a UN Permanent Forum on Indigenous Issues.⁵ In Australia, Indigenous peoples experience significant disadvantages compared to their non-Indigenous counterparts.⁶ The stark gaps in health, life expectancy, and education outcomes for Indigenous peoples led the Council of Australian Governments ('COAG') in 2008 to adopt targets to improve these outcomes, via the Closing the Gap ('CTG') initiative.⁷ At the international level, Australia also made a pledge to advance the human rights of all Indigenous peoples,⁸ and was subsequently elected

² Ibid paras 7–8; United Nations Office of the High Commissioner for Human Rights, 'Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council' (Paper, 2006) 1.

³ Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Routledge, 2011) 1.

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').

⁵ Morgan (n 3).

⁶ For example, compared to non-Indigenous Australians, Indigenous peoples in Australia are expected to live approximately eight years less, receive inadequate education and employment, and despite comprising less than 3% of the population, account for 28% of Australia's prison population. See Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Life Expectancy Lowest in Remote and Very Remote Areas* (Catalogue No 3302.0.55.003, 29 November 2018); Department of the Prime Minister and Cabinet, *Closing the Gap 2019* (Annual Report, 2019) 10 ('*Closing the Gap*'); Australian Bureau of Statistics, 'Prisoners in Australia, 2019' (Catalogue No 4517.0, 30 June 2018).

⁷ National Indigenous Australians Agency, 'About Closing the Gap', *Closing the Gap* (Web Page) <<https://closingthegap.niaa.gov.au/about-closing-gap>>.

⁸ In this article we use the term 'Indigenous peoples' as it is the commonly used term in international law to describe First Nations peoples, and we use title case. Where we quote from government and other documents, lower case may be used for 'indigenous' and Indigenous peoples may be referred to as 'Indigenous Australians' — we avoid use of 'Indigenous Australians' as Indigenous groups have their own groups and identifiers pre-dating settler-colonial Australia. When referring to Indigenous peoples within Australia, and drawing on other sources, we also refer to Aboriginal and Torres Strait Islanders which we recognise is a preferred term for referring to Australia's First Peoples: Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Peoples Engagement Toolkit* (Engagement Toolkit Paper, 2012) 6.

to the UNHRC for the 2018–20 term.⁹ Australia's bid to join the UNHRC centred around its 'proud and long history of promoting and protecting human rights' and its status as 'arguably the most successful, the most diverse, multi-cultural society on earth'.¹⁰ Alongside its commitment to promote the rights of Indigenous peoples, Australia also made commitments across four other 'pillars': (i) advancing the rights of women and girls; (ii) promoting good governance and stronger democratic institutions everywhere; (iii) promoting and protecting freedom of expression; and (iv) promoting strong national human rights institutions and capacity-building.¹¹

This article focuses on the six specific commitments Australia made in relation to Indigenous rights in its UNHRC bid, namely to:

1. Support the *UNDRIP*;
2. Actively engage with multilateral processes affecting Indigenous peoples, including through discussions at the Permanent Forum on Indigenous Issues, and strengthen the Expert Mechanism on the Rights of Indigenous Peoples;
3. Continue efforts to increase the participation of Indigenous peoples in all relevant processes and mechanisms of the UN human rights system;
4. Advance the economic rights of Indigenous peoples;
5. Tackle Indigenous disadvantage in partnership with Aboriginal and Torres Strait Islander peoples to improve health, education, and employment outcomes; and
6. Pursue a referendum to recognise Aboriginal and Torres Strait Islander peoples under the *Constitution*.¹²

The article is structured according to these six elements of Australia's pledge, using them as a framework to examine Australia's performance on Indigenous rights at domestic and international levels. Although it is too early to assess Australia's overall performance on the UNHRC, an assessment of current practice in relation to the six areas of Australia's voluntary commitment provides a helpful snapshot and finds that in many areas, Australia falls short of giving effect to Indigenous rights. After considering performance in relation to its UNHRC commitments, we advance recommendations. The unifying themes of these recommendations are two-fold, first

⁹ Permanent Mission of Australia to the United Nations, *Note Verbale Dated 14 July 2017 from the Permanent Mission of Australia to the United Nations Addressed to the President of the General Assembly*, UN GAOR, 72nd sess, Provisional Agenda Item 115(d), UN Doc A/72/212 (24 July 2017) [18] ('*Australian UNHRC Pledge*').

¹⁰ Julie Bishop, 'Human Rights Council Campaign Launch' (Speech, Human Rights Council, 18 May 2017) <<https://www.foreignminister.gov.au/minister/julie-bishop/speech/human-rights-council-campaign-launch>>.

¹¹ See *Australian UNHRC Pledge* (n 9).

¹² *Ibid* [18].

they support the constructive development of Australian law and policy in the future, in line with Australia's broader obligations under international law. For example, a key recommendation is for the adoption of the *Uluru Statement*. Second, the recommendations identify ways in which Australia's commitment to Indigenous rights can support the rights of Indigenous peoples around the world, including through bolstering Indigenous rights at the UNHRC.

II SUPPORTING THE UNITED NATIONS DECLARATION ON THE RIGHT OF INDIGENOUS PEOPLES

'Support the Declaration on the Rights of Indigenous Peoples in both word and deed, including the promotion of the Declaration's principles through national engagement, and internationally through its aid programme.'¹³

One of the most important instruments for Indigenous rights at the international level is the *UNDRIP*, the product of over two decades of discussions at the UN. The resulting instrument sets out international standards which States can strive towards in an effort to truly recognise Indigenous peoples' rights to self-determination, participation in decision-making, respect for and promotion of culture, and equality and non-discrimination.¹⁴ Ongoing support for the *UNDRIP* by the UNHRC and its constituent members remains critical to realising its potential, for although Indigenous rights and the *UNDRIP* are generally accepted and recognised by States — especially by the legislature and judiciary — in many countries the practical implementation and effective realisation of the rights of Indigenous peoples remain unsatisfactory.¹⁵

For Australia, Eddie Synot has argued that the significance of the *UNDRIP* is its commitment to self-determination:

Regardless of the Australian Government's continuing reluctance to embrace international standards of human rights, those standards still are potent mechanisms for Indigenous peoples to speak from and be heard. *UNDRIP* especially provides recognition of the foundation of self-determination being key to all Indigenous rights and that Indigenous claims exist beyond the narrow understanding of Indigeneity aimed at the alleviation of socio-economic disadvantage. Perhaps most importantly, *UNDRIP* provides a principled road map to effect self-determination beyond abstraction.¹⁶

¹³ Ibid.

¹⁴ *UNDRIP* (n 4); Mick Gooda and Katie Kiss, 'Ensuring the Ongoing Survival of the Oldest Living Culture in the World' (Declaration Dialogue Series Paper No 4, Australian Human Rights Commission, July 2013) 4.

¹⁵ Federico Lenzerini, 'Implementation of the *UNDRIP* around the World: Achievements and Future Perspectives' (2019) 23(1–2) *The International Journal of Human Rights* 51.

¹⁶ Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320, 324.

He notes that the *Uluru Statement* is a self-determining document that sets the practical and meaningful groundwork of how to implement, protect and enforce self-determination through the three key pillars of Voice, Treaty and Truth. It represents a significant opportunity for Australia to meet its *UNDRIP* commitment to self-determination — an opportunity that has to date, been missed, as discussed in Section VII. Synot remains hopeful that UN instruments and institutions, including the UNHRC and the *UNDRIP*, will continue to play ‘important roles in amplifying Indigenous voices and increasing the ability of others and the Australian community to hear them’.¹⁷

As authors from both Indigenous and non-Indigenous backgrounds, we acknowledge that the *UNDRIP* has not received universal welcome by Indigenous peoples and scholars. Irene Watson argues that the *UNDRIP* positions Indigenous peoples within the boundaries of States — States which continue to determine all aspects of Aboriginal life.¹⁸ She also criticises the *UNDRIP*’s failure to centre Indigenous knowledges.¹⁹ Steven Newcomb situates the *UNDRIP* within the colonial framework of States, which define Indigenous peoples as ‘less-than-human’ and construct and institutionalise a framework of domination against Indigenous peoples through law and policy.²⁰ He sees the *UNDRIP* as not only failing to address the issue of domination over Indigenous peoples but rather, a mechanism by States to maintain the status quo. These criticisms fit within a broader critique of international law as a neo-colonising force.²¹ Acknowledging these valid criticisms, we seek to progress Indigenous rights through the existing framework but also expand the framework to incorporate more Indigenous knowledges by drawing on Indigenous initiatives and critiques that either seek to improve Indigenous rights in Australia, or internationally.

Australia was one of only four States to vote against the *UNDRIP* at the time of its adoption by the UN General Assembly (‘UNGA’) in 2007.²² Although endorsement came in 2009, it has not yet translated into domestic implementation of the *UNDRIP* obligations. Successive Commonwealth governments have been subjected to

¹⁷ Ibid 325.

¹⁸ Irene Watson, ‘Aboriginal(ising) International Law and Other Centres of Power’ (2011) 20(3) *Griffith Law Review* 619, 638.

¹⁹ Ibid 637.

²⁰ Steven T Newcomb, ‘The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination’ (2011) 20(3) *Griffith Law Review* 578.

²¹ See, eg, Makau Mutua, ‘What Is TWAIL?’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

²² The other three States were Canada, New Zealand and the United States (together referred to as CANZUS). The cohort collectively used their significant foreign policy budgets to negotiate the language used within the *UNDRIP*: see Megan Davis, ‘To Bind or Not to Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On’ (2012) 19 *Australian International Law Journal* 17, 42.

criticism and demands for adherence to the Declaration's principles.²³ Indeed, many policies since 2007 have been criticised for going *against* the right of Indigenous peoples to self-determination by adopting paternalistic strategies that erode the capacity of Indigenous peoples to protect the land or pursue social, economic or cultural development.²⁴ The implementation of the Northern Territory Emergency Response ('Intervention') directly conflicted with the *UNDRIP*'s principles of self-determination and consultation.²⁵ In 2010, the UN Committee on the Elimination of Racial Discrimination noted 'the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies ... (arts. 1, 2 and 5)'.²⁶

Australia falls short of its *UNDRIP* obligations in a number of areas. For example, Australia has not implemented the recommendations of the Special Rapporteur on the Rights of Indigenous People, a key UN mechanism for Indigenous peoples. Special Rapporteur Victoria Tauli-Corpuz's report on Australia in 2017²⁷ urged the government to address a number of issues including: Indigenous incarceration rates, child removal and compensation for victims of the Stolen Generation, and specifically criticised the Indigenous Advancement Strategy ('IAS') funding model, and the

²³ Australian Human Rights Commission, *Australia's Universal Periodic Review* (Report, 19 December 2014) 8; Australian Human Rights Commission, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (15 April 2015) 6; Australian NGO Coalition, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (March 2015) 6; United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN GAOR, 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [34]–[36], [107] ('*Report of the Special Rapporteur*').

²⁴ See, eg, the discussion of Stronger Futures and the Northern Territory Intervention in *Report of the Special Rapporteur* (n 23) [60]–[61]; National Congress of Australia's First Peoples, *Briefing for the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpuz* (Briefing Paper, March 2017) ('*Briefing for UN Special Rapporteur*').

²⁵ *UNDRIP* (n 4). The *UNDRIP* provides for self-determination: at art 3. The *UNDRIP* also provides that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them': at art 19. See also Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Washington International Law Journal* 247.

²⁶ Committee on the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, UN Doc CERD/C/AUS/CO/15–17 (13 September 2010, adopted 24 August 2010) para 16.

²⁷ See generally *Report of the Special Rapporteur* (n 23).

CTG initiative.²⁸ Former Indigenous Affairs Minister Nigel Scullion responded to the Special Rapporteur's recommendations defensively, stating that the 'government is absolutely committed to working with Indigenous Australians to deliver better outcomes' and referred to improvements to education and procurement.²⁹ However, there is no evidence of a substantive government response to the Special Rapporteur's report.

Australia has responded to recommendations to fully implement the *UNDRIP* with the argument that *supporting* the promotion of the Declaration, current domestic policies, and involvement in Indigenous affairs at an international level constitute sufficient action.³⁰ During its 2015 review by the UNHRC through the peer review mechanism, the Universal Periodic Review ('UPR'), the Commonwealth government therefore accepted the majority of Indigenous-related recommendations made by other States 'on the basis of existing law, policy and action'.³¹ It is debatable whether this means the government intended to take further action, or whether this meant 'business as usual' with no specific action intended.³²

Nonetheless, although proactive implementation of the *UNDRIP* has been lacking, many legislative and policy initiatives within Australia are at least aligned with the *UNDRIP*'s principles and provisions.³³ Several of these initiatives, and responses by the government to the UNHRC, refer to the IAS as the roadmap to realise Indigenous rights within Australia and further the implementation of the *UNDRIP*.³⁴

²⁸ Ibid [37]–[41], [46]–[47]; *Racial Discrimination Act 1975* (Cth).

²⁹ Calla Wahlquist, 'Australia's Rate of Indigenous Child Removal "Unique", UN Investigator Says', *The Guardian* (online, 4 April 2017) <<https://www.theguardian.com/australia-news/2017/apr/04/australia-rate-indigenous-child-removal-unique-un-investigator>>.

³⁰ Attorney-General's Department, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (18 September 2015) 6 ('Attorney-General's Submission for Second UPR'); Attorney-General's Department, 'Australia's Formal Response to the UPR Recommendations', Submission to the Universal Periodic Review Working Group (8 June 2011) 2.

³¹ Attorney-General's Submission for Second UPR (n 30) 6; Universal Periodic Review Working Group, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016) [23] ('UPR Report Australia').

³² See also Fiona McGaughey, 'The Role and Influence of Non-Governmental Organisations in the Universal Periodic Review: International Context and Australian Case Study' (2017) 17(3) *Human Rights Law Review* 421, 448.

³³ See, eg, 'Commonwealth Rights and Interests in Indigenous Grant Funded Property: Policy Statement', *Department of Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/indigenous-affairs/commonwealth-caveated-property/policy-statement>>; 'Culture and Capability', *National Indigenous Australians Agency* (Web Page) <<https://www.niaa.gov.au/indigenous-affairs/culture-and-capability>>.

³⁴ See, eg, 'Community Safety', *National Indigenous Australians Agency* (Web Page) <<https://www.pmc.gov.au/Indigenous-affairs/community-safety>>; Nigel Scullion, 'Celebrating the 10th Anniversary of the United Nations Declaration on the Rights

The IAS determines the way that the Australian government funds programs for Indigenous peoples. The introduction of the IAS in 2014 saw the Department of Prime Minister and Cabinet consolidate 27 programs into five application streams, including education, employment, and economic development.³⁵ Since its inception, the IAS has been criticised as 'deeply flawed' for its failure to adequately consult with Indigenous communities and its incoherent, rapid roll-out which lacked transparency.³⁶ The further \$5.2 billion in funding announced in the 2019–20 budget, and government praise of the strategy, falsely inflated the positive effects of the IAS,³⁷ when in fact the expeditious change in funding arrangements had a notably negative impact on community organisations.³⁸ While it is responsible for delivering financial support to many organisations, the IAS has been criticised for decreasing the number of Indigenous organisations by forcing them to compete in an arduous bidding process against much better resourced and well-funded companies.³⁹ Several large non-Indigenous corporations have been the greatest beneficiaries of the IAS funding, whose efforts in the name of 'reconciliation' have been prioritised over Indigenous self-determination.⁴⁰ Reports of funds under the IAS being given to lobby groups have been met with disapproval in Indigenous communities, with some suggesting that it is easier to attract funds to *help* Indigenous communities than to facilitate their self-determination and decision-making.⁴¹ In this way, the IAS fosters colonial

of Indigenous Peoples' (Media Release, Department of Prime Minister and Cabinet, 13 September 2017) ('Celebrating the 10th Anniversary'); *UPR Report Australia* (n 31).

³⁵ 'Indigenous Advancement Strategy', *National Indigenous Australians Agency* (Web Page) <<https://www.indigenous.gov.au/indigenous-advancement-strategy>>; Australian National Audit Office, *Indigenous Advancement Strategy* (Report No 25, 3 February 2017) 7.

³⁶ Elizabeth Strakosch, 'The Technical is Political: Settler Colonialism and the Australian Indigenous Policy System' (2018) 54(1) *Australian Journal of Political Science* 114, 121; Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Indigenous Advancement Strategy Tendering Processes* (Report, March 2016) 77; Megan Davis, 'Gesture Politics' *The Monthly* (online, December 2015) <<https://www.themonthly.com.au/issue/2015/december/1448888400/megan-davis/gesture-politics>>.

³⁷ *Ibid*; *Report of the Special Rapporteur* (n 23) [37]–[41]; Celebrating the 10th Anniversary (n 34).

³⁸ Senate Finance and Public Administration References Committee (n 36) 45.

³⁹ *Briefing for UN Special Rapporteur* (n 24); 'Indigenous Advancement Strategy', *Australian National Audit Office* (Web Page, 3 February 2017) <<https://www.anao.gov.au/work/performance-audit/Indigenous-advancement-strategy>>.

⁴⁰ Davis, 'Gesture Politics' (n 36).

⁴¹ For example, approval for funding has been given to fishing lobby groups to attain legal advice on how they will be affected by Indigenous land claims. See Jano Gibson, 'Indigenous Advancement Funds Given to Lobby Groups Impacted by Aboriginal Land Claims', *ABC News* (online, 31 October 2018) <<https://www.abc.net.au/news/2018-10-31/Indigenous-advancement-strategy-funds-given-to-lobby-groups-nt/10451664>>; Michele Madigan, 'The Government's Retrogressive Indigenous Advancement Strategy' (2015) 25(12) *Eureka Street* 23.

rhetoric,⁴² a poorly constructed system deemed necessary to improve Indigenous incapacity and inferiority, rather than a system implemented to progress Indigenous empowerment.

Australia's UNHRC pledge could have been shaped to refocus Indigenous policy objectives in line with international standards. Instead, few of the voluntary commitments Australia advanced went beyond the intention to maintain policies and programs already underway. Nevertheless, in this article we focus on potential avenues to substantive reform, rather than on a critique of Australia's reluctance to make more ambitious commitments to the UNHRC.

III ENGAGING WITH MULTILATERAL PROCESSES AFFECTING INDIGENOUS PEOPLES

'Actively engage with multilateral processes affecting Indigenous peoples, including through discussions at the Permanent Forum on Indigenous Issues, and strengthen the Expert Mechanism on the Rights of Indigenous Peoples.'⁴³

This pledge relates to Australia's engagement with multilateral processes affecting Indigenous peoples, an effort that has remained relatively constant in recent years. The key international-facing policy for the government's approach to Indigenous peoples is the 2015–19 Department of Foreign Affairs and Trade ('DFAT') Indigenous Peoples Strategy, which provided guidance for Australia's international policies and interaction with international partners.⁴⁴ Outlining Australia's commitment to issues facing Indigenous peoples internationally, the Strategy emphasised Australia's role as a 'longstanding advocate for the full and effective participation of indigenous peoples' in the UNGA, the UNHRC, the UN Permanent Forum on Indigenous Issues ('UNPFII') and the Expert Mechanism on the Rights of Indigenous Peoples ('EMRIP').⁴⁵ The government's commitment to these mechanisms is evidenced by their support for the attendance of Australian delegates at the UNPFII and EMRIP.⁴⁶ Further, Australia was involved in the 2016 amendments to the EMRIP mandate, which were designed to strengthen the body and to allow for better evaluation of

⁴² See generally Strakosch (n 36).

⁴³ *Australian UNHRC Pledge* (n 9) [18].

⁴⁴ Department of Foreign Affairs and Trade, *DFAT Indigenous Peoples Strategy 2015–2019: A Framework for Action* (Report, June 2015) 7 ('*DFAT Indigenous Strategy*').

⁴⁵ *Ibid.*

⁴⁶ There is no specific record of the attendance at the annual events, however some UN records, media releases and news articles note attendance of Australian participants at the UNPFII and the EMRIP. See, eg, *ibid.*; Peter de Krujiff, 'Young Leader Inspired after UN Visit', *The West Australian* (Perth, 30 May 2018); Permanent Forum on Indigenous Issues, *Attendance at the Seventeenth Session of the Permanent Forum on Indigenous Issues*, UN ECSOR, 16th sess, UN Doc E/C.19/2018/INF/1 (4 May 2018).

the impact of UNDRIP.⁴⁷ This pillar of the UNHRC pledge replicates the aforementioned Indigenous Peoples Strategy which expressed a commitment to 'remain active' in multilateral fora addressing Indigenous issues.⁴⁸ However, it is difficult to assess the success of the Strategy, as the findings from its 2017 mid-term review are not publicly available.⁴⁹ The Strategy has also expired and is yet to be reformulated for the period commencing 2020.

As an advocate for Indigenous rights, we would expect Australia's commitment to Indigenous rights in international fora to be evident. For example, Australia's UPR recommendations at the UNHRC to other States regarding Indigenous peoples is a key opportunity and could indicate a level of commitment to the issue. Yet at this point in Australia's UNHRC term, the government has not yet made any recommendations categorised as relating to 'Indigenous peoples' in the UPR-Info database of recommendations. There have been a total of 15 recommendations on 'Indigenous peoples' made historically, out of a total of 1,389 recommendations made by Australia to date.⁵⁰ This means that recommendations relating to Indigenous peoples constituted approximately 0.1 per cent of all recommendations made by Australia to other States. This is consistent with the records of other settler colonial States with Indigenous populations, including the United States (18 out of 1362 recommendations), New Zealand (nine out of 550) and Canada (28 out of 1,943), but pales in comparison to other member States' approaches, for example, Bolivia's 62 out of a total of 350 recommendations.⁵¹ An example of incongruence between DFAT's strategy and substantive action is the fact that Australia's recommendations during its UNHRC term relating to other issues dramatically outnumber Indigenous-related recommendations, with 208 relating to abolition of the death penalty and 565 relating to international instruments.⁵² Death penalty abolitionist advocacy relates to the 'good governance' pillar of Australia's UNHRC's pledges.

Prior to the commencement of Australia's UNHRC term, at the 2017 UNPFII, representatives from Indigenous organisations in Australia expressed their frustration at the actions of the government, such as the failure to develop a national

⁴⁷ Australian Government, 'Questionnaire: Reform of the Mandate of the Expert Mechanism on the Rights of Indigenous Peoples', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/MandateReview/States/Australia.pdf>>; *Expert Mechanism on the Rights of Indigenous Peoples*, HRC Res 33/25, UN GAOR, 33rd sess, 41st mtg, Agenda Item 5, UN Doc A/HRC/RES/33/25 (5 October 2016, adopted 30 September 2016).

⁴⁸ *DFAT Indigenous Strategy* (n 44) 6.

⁴⁹ *Ibid* 4.

⁵⁰ UPR Info, *Database of Recommendations* (Web Page) <<https://www.upr-info.org/database/>>.

⁵¹ *Ibid*.

⁵² *Ibid*.

policy framework for implementation of the *UNDRIP*⁵³ and the failure to address the shocking rates of Indigenous incarceration.⁵⁴ Also at the 2017 UNPFII, the Australian Human Rights Commission advocated for the inclusion of the *UNDRIP* in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and emphasised the former Special Rapporteur on the Rights of Indigenous Peoples' comments on the inadequacy of Australian governmental (federal, state and territory) responses to the efforts of Indigenous rights defenders.⁵⁵ The UNPFII provides a forum for governments to listen and learn from Indigenous peoples, however, the dialogue there is negatively affected by the division of UN Member States and Indigenous peoples' representatives into separate sessions.⁵⁶ Statements made by the Commonwealth government at the UNPFII acknowledge some challenges but avoid delving into the inadequacies of current policies. In 2018, Indigenous organisations appealed to the UNPFII to request that Australia undertake an audit of land rights legislation against the *UNDRIP* and to urge for comprehensive implementation of the *UNDRIP* to address the 'human rights crisis' facing Indigenous peoples.⁵⁷

Turning to the second international Indigenous forum, a somewhat similar pattern emerges. The EMRIP is the advisory body to the UNHRC engaged to prepare studies on issues affecting Indigenous peoples.⁵⁸ Commonwealth government statements generally acknowledge the role of the EMRIP and the potential for the mechanism

⁵³ Anthony Watson, 'Intervention by Mr Anthony Watson Chairman of the Kimberley Land Council, Australia', (Speech, Permanent Forum on Indigenous Issues, 16th sess, Agenda Item 4, 26 April 2017) <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHceca/647a36c1.dir/PF17watsonItem42604.pdf>>.

⁵⁴ Cathryn Eatock, 'Intervention Delivered by Cathryn Eatock on Behalf of the Indigenous Peoples Organisation of Australia and the Aboriginal Rights Coalition' (Speech, Permanent Forum on Indigenous Issues, 16th sess, Agenda Item 10, 1 May 2017) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHf93b/66bf1b46.dir/PF17Eatock100501.pdf>>.

⁵⁵ Permanent Forum on Indigenous Issues, *Compilation of Information from National Human Rights Institutions*, UN ESCOR, 16th sess, Provisional Agenda Item 4, UN Doc E/C.19/2017/9 (27 January 2017) 4.

⁵⁶ Eatock (n 54).

⁵⁷ Anne Dennis, 'Intervention by the New South Wales Aboriginal Land Council, Delivered by Councillor for the North West Region, and Member of the Gamilaraay People, Councillor Anne Dennis' (Speech, Permanent Forum on Indigenous Issues, 16th sess, Agenda Item 10, 2 May 2017) 2, 5 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH010c/9fe70325.dir/PF18DENNIS100418.pdf>>; Terry Mason, 'Intervention Delivered By Terry Mason On Behalf Of The Indigenous Peoples Organisation Of Australia' (Speech, Permanent Forum on Indigenous Issues, 17th sess, Agenda Item 8, 17 April 2018) 2 <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHec05/51244138/6da18e33.dir/PF18Mason080417_.pdf>.

⁵⁸ 'Expert Mechanism on the Rights of Indigenous Peoples', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>>.

to 'work together' with Indigenous peoples to achieve the goals of the *UNDRIP*.⁵⁹ However, submissions by Indigenous bodies, such as the Indigenous Peoples Organisation and the New South Wales Aboriginal Land Council accuse the government of 'clever window-dressing',⁶⁰ and urge for the development of national action plans and support for Aboriginal community-controlled approaches and frameworks.⁶¹ These organisations call for an EMRIP country visit to Australia to provide advice on these issues,⁶² and the appointment in 2019 of Cobble Cobble woman and academic expert Professor Megan Davis to the EMRIP presents opportune timing for such a visit.⁶³

IV PLEDGE TO INCREASE INTERNATIONAL INDIGENOUS PARTICIPATION

'Continue efforts to increase the participation of Indigenous peoples in all relevant processes and mechanisms of the United Nations human rights system. Australia will continue to contribute to the United Nations Voluntary Fund for Indigenous Peoples to support the participation of Indigenous peoples in relevant meetings.'⁶⁴

⁵⁹ Australian Mission to the United Nations, 'Australian Statement' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 10th sess, Agenda Item 5, 11 July 2016) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0181/7d4d6e61.dir/EM17Australia50711.pdf>>; Australian Mission to the United Nations, 'Australian Statement' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11th sess, Agenda Item 3, 10 July 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH016a/4f3f7a20.dir/EM18AUSTRALIA.30710.pdf>>.

⁶⁰ James Christian, 'Intervention by the New South Wales Aboriginal Land Council' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11th sess, Agenda Item 4, 9–13 July 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0703/c931820b.dir/EM18CHRISTIAN40709.pdf>>.

⁶¹ Anne Dennis, 'Intervention by the New South Wales Aboriginal Land Council, delivered by the Deputy Chairperson, Councillor Anne Dennis' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11th sess, Agenda Item 10, 9–13 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0193/61849c0f.dir/EM18DENNIS100712.pdf>>.

⁶² Jack Collard (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11th sess, Agenda Item 7, 11 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0134/d867ebf3.dir/EM18COLLARD70711.pdf>>; Noongar Child Protection Council (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11th sess, Agenda Item 7, 10 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHdacc/24cda83e.dir/EM18HOFFMAN30710.pdf>>.

⁶³ Letter from President of the Human Rights Council to Permanent Representatives to the United Nations Office at Geneva, 11 February 2019 <https://www.ohchr.org/Documents/HRBodies/SP/CallApplications/HRC40/20190211_President_List_HRC40_appointments.pdf>.

⁶⁴ *Australian UNHRC Pledge* (n 9) [18].

Almost eight years after the adoption of the *UNDRIP* at the World Conference on Indigenous Peoples,⁶⁵ the Member States of the UN requested that the President of the UNGA consult with Indigenous peoples and the UN mechanisms for Indigenous peoples (including the UNPFII, the EMRIP and the Special Rapporteur on the Rights of Indigenous Peoples), in respect of the actions required to enable participation of Indigenous peoples at meetings of relevant UN bodies.⁶⁶ The advisers appointed by the President of the UNGA undertook a consultation process resulting in the 2017 UNGA resolution, *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them* ('Resolution').⁶⁷

Australia is the fifth largest contributor to the Voluntary Fund for Indigenous Peoples, showing clear commitment to that aspect of the pledge.⁶⁸ However, there are also many Indigenous people from Australia who have attended UN events throughout Australia's UNHRC term (and historically) without government assistance and instead through support and sponsorship from non-governmental organisations.⁶⁹ Jackie Huggins, the Co-Chair of the National Congress of Australia's First Peoples, needed to fundraise in order to attend the UNPFII in 2018, despite the National Congress being referenced in the Australian UNHRC bid.⁷⁰ The Indigenous Peoples Organisation Network, a key organisation supporting access to the UN, was mentioned in Australia's UNHRC voluntary pledge,⁷¹ but has not received any government funding since 2014 and independently funds a cohort to attend the UNPFII.⁷²

⁶⁵ *UNDRIP* (n 4).

⁶⁶ *Rights of Indigenous Peoples*, GA Res 70/232, UN GAOR, 3rd Comm, 70th sess, Agenda Item 69(a), UN Doc A/Res/70/232 (16 February 2016, adopted 23 December 2015) para 19.

⁶⁷ *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them*, GA Res 71/321, UN GAOR, 71st sess, Agenda Item 65, UN Doc A/RES/71/321 (21 September 2017, adopted 8 September 2017).

⁶⁸ 'United Nations', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/international-relations/international-organisations/un/Pages/united-nations-un>>; 'UN Voluntary Fund for Indigenous Peoples: Last Session', *United Nations Human Rights Office of the High Commissioner* (Web Page, 2019) <<https://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/IPeopleFundLastsession.aspx>>.

⁶⁹ Tammy Solonec, 'UN Mechanisms for Indigenous Peoples: A Personal Account of Participation in 2010' (2010) 7(19) *Indigenous Law Bulletin* 8.

⁷⁰ Jackie Huggins, 'Australia's First People to the UN: Govt Statements Are "Hypocritical in the Extreme"' *The Mandarin* (online, 24 April 2018) <<https://www.themandarin.com.au/91664-australias-first-people-to-the-un-govt-statements-are-hypocritical-in-the-extreme>>; *Australian UNHRC Pledge* (n 9) [18].

⁷¹ *Australian UNHRC Pledge* (n 9) [18].

⁷² See Tammy Solonec (n 69).

In general, participation of civil society remains a challenge in the UN human rights system,⁷³ reflecting the dominance of state-centrism.⁷⁴ However, Indigenous peoples can face particular barriers in participation both in domestic consultation regarding UN human rights obligations and in participation in international fora.⁷⁵ The reality is that States hold the cards when it comes to Indigenous participation in the UN, and whilst the UNPFII is a significant annual event, its success has been undermined by its limited mandate.⁷⁶ Despite being higher in the UN hierarchy than the Working Group on Indigenous Populations ('WGIP'), the UNPFII has been criticised by Indigenous attendees from Australia due to the convoluted time frames, inaccessibility, significant costs associated with attending the event annually in New York, and its lack of innovation and failure to address issues seriously — in comparison to WGIP which they see as less problematic.⁷⁷ The two week sessions discuss only three of the six mandated areas annually and individuals are unable to successfully protest injustices by Member States due to the constrained schedule and resulting recommendations being reviewed and amended by the UN Economic and Social Council, further obstructing the mechanism from delivering substantive change.⁷⁸

V PLEDGE TO ADVANCE ECONOMIC RIGHTS OF INDIGENOUS PEOPLES

'Advance the economic rights of Indigenous peoples and harness the knowledge and expertise of Indigenous Australians in the design and delivery of its aid programme. We recognise that Indigenous businesses can provide expert, culturally appropriate, 'peer-to-peer' assistance to other Indigenous communities in developing countries.'⁷⁹

The aforementioned DFAT Indigenous Peoples Strategy pledges to implement and deliver international programs that improve outcomes for Indigenous peoples through consultation, a 'community of practice on Indigenous issues', and DFAT funded opportunities and grants with the aim of projecting a 'positive image of

⁷³ Fiona McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organisations Engaging with United Nations Human Rights Mechanisms' (2018) 36(2) *Netherlands Quarterly of Human Rights* 111, 129–30.

⁷⁴ See, eg, Linda Camp Keith, 'Human Rights Instruments' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, November 2010) 353, 355.

⁷⁵ See McGaughey (n 73).

⁷⁶ Megan Davis, 'Outwitted and Outplayed: Indigenous Internationalism and the United Nations' (2005) 6(11) *Indigenous Law Bulletin* 4, 5 ('Outwitted and Outplayed').

⁷⁷ Ibid; Isabelle Schule-Tenckhoff and Adil Hasan Khan, 'The Permanent Quest for a Mandate Assessing the UN Permanent Forum on Indigenous Issues' (2011) 20(3) *Griffith Law Review* 673, 674.

⁷⁸ Davis, 'Outwitted and Outplayed' (n 76) 5; Solonec (n 69); Aimee Ferguson, 'Reflections on the 2012 UN Permanent Forum on Indigenous Issues' (2012) 8(3) *Indigenous Law Bulletin* 24, 24.

⁷⁹ *Australian UNHRC Pledge* (n 9) [18].

Australia'.⁸⁰ Further to this, in 2017, DFAT published a Charter to promote the economic interests of Australian Indigenous businesses to the overseas market and provide further information to Indigenous businesses interested in pursuing opportunities abroad ('Indigenous Business Charter').⁸¹ The Indigenous Business Charter specifically aims to encourage trade, investment, and promotion of Australia as an outstanding place to visit.⁸²

The aspect of the Commonwealth government's UNHRC pledge relating to advancing the economic rights of Indigenous peoples reflects these policies and their aims.⁸³ It is evident from DFAT materials that this pillar has received considerable time and governmental input.⁸⁴ The Indigenous Peoples Strategy, the Indigenous Business Charter, and the wider framework within the *2017 Foreign Policy White Paper* reflect the prevalence of 'aid for trade' in international aid programs in recent decades. The use of aid as a means to address constraints to trade such as 'cumbersome regulations and poor infrastructure' reflects the neo-liberal policy agendas of recent government as a result of Australian business interests, structural power and the institutional context in which aid policy is developed.⁸⁵ Such an approach relies on the 'trickle-down' effect of private sector business and infrastructure aid investment to resolve poverty in developing countries and contrasts heavily with a social justice agenda, which would instead focus on targeted approaches.⁸⁶

Parallels can be drawn between the growth of aid policy facilitating institutional and political development in developing countries, and the domestic policy frameworks addressing Indigenous inequality.⁸⁷ The dominant approach to development has been criticised as materialistic, linear and ethnocentric,⁸⁸ and is often used as a political strategy to further the objectives of governmental interests as opposed to delivering programs to address the issues of inequality itself. One of the most recent developments during the UNHRC term is DFAT's release of the 'Private Sector Engagement in Australia's Aid Program: Operational Framework', with action plans including

⁸⁰ *DFAT Indigenous Strategy* (n 44) 8.

⁸¹ Department of Foreign Affairs and Trade, *Promoting the Economic Interests of Indigenous Australian Businesses Overseas* (Charter, 13 December 2017) 1, 10 ('*Indigenous Business Charter*').

⁸² *Ibid* 2.

⁸³ *Australian UNHRC Pledge* (n 9) [18].

⁸⁴ For example, the provision of grants annually and projects are frequently updated on the Grant Connect website. See, eg, 'Current Grant Opportunity List', *Grant Connect* (Web Page) <<https://www.grants.gov.au/Go/List>>.

⁸⁵ Andrew Rosser, 'Neo-Liberalism and the Politics of Australian Aid Policy-Making' (2008) 62(3) *Australian Journal of International Affairs* 372, 372.

⁸⁶ *Ibid* 377.

⁸⁷ Jack Corbett and Sinclair Dinnen, 'Examining Recent Shifts in Australia's Foreign Aid Policy: New Paradigm or More Incremental Change?' (2016) 70(1) *Australian Journal of International Affairs* 87, 89.

⁸⁸ See *ibid*.

promoting collaboration with Indigenous businesses.⁸⁹ However, the aid investment priorities of DFAT are the key determinants of Indigenous involvement in the aid program. As such, Indigenous businesses offering peer-to-peer assistance through the private sector Business Partnerships Platform will still be funded in line with economic incentives.⁹⁰ That being said, the Indigenous Investment Priorities have been developed with assistance from Indigenous Business Australia, a government organisation devoted to promoting economic independence for Indigenous peoples.⁹¹

Whilst financial investment and trade in partnership with Indigenous businesses has been shown to be beneficial for some Indigenous businesses in Australia,⁹² the underlying policy objectives centred on economic growth echo the heavily criticised efforts of 'practical reconciliation' which has been seen within the CTG strategy, as will be discussed in VI.⁹³ The use of both international aid and domestic Indigenous affairs policies to capitalise on potential for economic growth in line with government interests detracts from the core issue of inequalities which may be better addressed through a social justice approach.⁹⁴

While it is promising that an area of Australia's UNHRC pledge in respect of Indigenous peoples has received considerable attention, the lack of an accountability mechanism within DFAT and the neo-liberal policies underlying the motivations for Indigenous investment in developing countries undermine the value of the pledge. This could be addressed by frequent, publicly available reviews of the DFAT Indigenous People's Strategy and Indigenous Investment Priorities, which would provide a transparent understanding of the success of these initiatives. In this respect, many similarities can be drawn to the CTG campaign, as discussed next.

VI PLEDGE TO CLOSE THE GAP IN DISADVANTAGE

'Recognizing the need for a collaborative approach, tackle indigenous disadvantage in partnership with the Aboriginal and Torres Strait Islander peoples

⁸⁹ Department of Foreign Affairs and Trade, 'Private Sector Engagement in Australia's Aid Program: Operational Framework' (Paper, 28 March 2019).

⁹⁰ *Indigenous Business Charter* (n 81) 7; 'Private Sector Partnerships', *Department of Foreign Affairs and Trade* (Web Page) <<https://dfat.gov.au/aid/who-we-work-with/private-sector-partnerships/Pages/private-sector-partnerships.aspx>>.

⁹¹ *Indigenous Business Charter* (n 81) 5; Department of Prime Minister and Cabinet, 'Indigenous Business Australia', *Australian Government Directory* (Web Page) <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/indigenous-business-australia>>.

⁹² *Indigenous Business Charter* (n 81) 3.

⁹³ 'Practical reconciliation' refers to policy aimed at tangible advances in economic and employment areas: see Joan Cunningham and Juan Baeza, 'An "Experiment" in Indigenous Social Policy: the Rise and Fall of Australia's Aboriginal and Torres Strait Islander Commission (ATSIC)' (2005) 33(4) *Policy & Politics* 461, 465.

⁹⁴ Rosser (n 85) 376–7.

to improve health, education and employment outcomes, including through a refresh of the Closing the Gap agenda.⁹⁵

The Rudd government's CTG initiative is one of the most recognisable policy actions aimed at improving the socioeconomic determinants that significantly disadvantage Indigenous peoples in Australia. Announced in 2008, the COAG pledged, among other targets, to close the gap in life expectancy by 2030 and halve the gaps in education, health and employment.⁹⁶ Prior to the 10th anniversary of the agreement, it was announced that COAG would 'refresh' the agenda due to the expiration of four of the seven targets ('CTG Refresh').⁹⁷ The fact that four of the targets expired without being reached over the course of the initiative is a notable reflection on the success of the CTG framework overall.

Whilst the CTG initiative had potential to be revolutionary for Indigenous peoples, in practice it has failed to reach its potential, with the 2019 CTG Report announcing that only two targets out of seven were on track (these were Year 12 attainment and early childhood education).⁹⁸ Further to this, recent reports indicate that the mortality and life expectancy gaps are actually widening.⁹⁹ The results have been shadowed by the difficulty faced in measuring the progress of the targets. It has been found that much of this difficulty can be attributed to the inconsistency in data measurement and sample sizes.¹⁰⁰

Some of the key barriers to CTG's success have been the 'revolving door of Prime Ministers', unpredictable funding patterns and misalignment between policy intentions and actions.¹⁰¹ Following Labor's initial commitment to the targets, the Coalition government implemented cuts of \$530 million to the Indigenous Affairs budget, dramatically reducing the initiatives' prospects of accomplishment.¹⁰² While the government has continued to report annually on CTG statistics, there has not been sufficient oversight or evaluation of whether there is a correlation between the

⁹⁵ *Australian UNHRC Pledge* (n 9) [18].

⁹⁶ National Indigenous Australians Agency (n 7).

⁹⁷ Council of Australian Governments, 'COAG Statement on the Closing the Gap Refresh' (Media Release, 12 December 2018) <<https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>> ('Closing the Gap Refresh').

⁹⁸ Department of the Prime Minister and Cabinet, *Closing the Gap* (n 6) 10.

⁹⁹ Australian Institute of Health and Welfare, *Trends in Indigenous Mortality and Life Expectancy 2001–2015* (Report, 1 December 2017) vii ('*Trends in Indigenous Mortality*').

¹⁰⁰ Australian Institute of Health and Welfare, *Closing the Gap Targets: 2017 Analysis of Progress and Key Drivers of Change* (Report, 23 April 2018) 15 ('*Closing the Gap Targets*').

¹⁰¹ Chris Holland, 'A Ten-Year Review: The Closing the Gap Strategy and Recommendations for Reset' (Close the Gap Campaign Steering Committee, 8 February 2018) 8.

¹⁰² See *ibid.*

programs and the progress towards the targets.¹⁰³ The initial targets themselves also heavily imply personal responsibility for health inequalities, failing to grasp the social impacts of race on health outcomes.¹⁰⁴ The government's top-down, deficit-based approach to achieving statistical equality can be contrasted with strength-focused initiatives led by First Nations Australians.¹⁰⁵ On a whole, the 2008 CTG strategy has been highly criticised, with even the current Prime Minister Scott Morrison stating that it was 'set up to fail'.¹⁰⁶

Despite poor progress, the government has lauded the CTG program at the international level as a demonstration of its commitment to achieving equality for Indigenous peoples.¹⁰⁷ Indeed, the ambitious targets of the CTG program reflect Australia's apparent dedication to achieving change, but sufficient policy support and practical outcomes are lacking. In 2015, Australia relied on CTG in its UPR, accepting 37 of 49 recommendations from other Member States in relation to Indigenous affairs on the basis of existing law, policy and action (effectively claiming that these recommendations are already being attended to through CTG initiatives).¹⁰⁸

The government further relied on the quality of the CTG program in its pledge for membership of the UNHRC.¹⁰⁹ The relevant pledge recognised the role that Indigenous perspectives can play in shaping government policy affecting Indigenous peoples.¹¹⁰ Indeed, the inclusion of a pledge to engage in a 'collaborative approach' in 'partnership' with Indigenous peoples to address inequalities appears to have produced more substantive and measurable action than some other areas of Australia's

¹⁰³ Australian National Audit Office, *Closing the Gap* (Report No 27, 2018–2019).

¹⁰⁴ See Chelsea J Bond and David Singh, 'More Than a Refresh Required for Closing the Gap of Indigenous Health Inequality' (2020) 212(5) *Medical Journal of Australia* 198.

¹⁰⁵ Sandy O'Sullivan, 'Practice Futures for Indigenous Agency' in Joy Higgs, Steven Cork, and Debbie Horsfall (eds), *Challenging Future Practice Possibilities* (Brill Sense, 2019) 91, 92. For discussion of the concept of 'strengths-based' approaches in literature and in practice, see Deborah A Askew et al, 'Closing the Gap between Rhetoric and Practice in Strengths-Based Approaches to Indigenous Public Health: a Qualitative Study' (2020) 44(2) *Australia and New Zealand Journal of Public Health* 101.

¹⁰⁶ Deborah Snow and Fergus Hunter, 'Mixed Responses to Government's Closing the Gap Statement', *The Sydney Morning Herald* (online, 14 February 2019) <<https://www.smh.com.au/politics/federal/mixed-responses-to-government-s-closing-the-gap-statement-20190214-p50xwi.html>>.

¹⁰⁷ See, eg, Ian Anderson, 'Statement' (Speech, Permanent Forum on Indigenous Issues, 17th sess, Agenda Item 4, 19 April 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0192/39747f9c.dir/PF18ANDERSON040416.pdf>>.

¹⁰⁸ *UPR Report Australia* (n 31) [28].

¹⁰⁹ *Australian UNHRC Pledge* (n 9) [18].

¹¹⁰ Holland (n 101) 6; *UPR Report Australia* (n 31) [104]; Australian Human Rights Commission, 'New Approach to Closing the Gap Strategy Welcomed' (Media Release, 13 December 2018) <<https://www.humanrights.gov.au/news/media-releases/new-approach-closing-gap-strategy-welcomed>>.

UNHRC commitment. This is despite the early stages of the CTG Refresh process being criticised as rushed, lacking clarity, and reinforcing an agenda based on governmental views which were not developed through engagement with First Nations peoples.¹¹¹ Indigenous organisations informed Morrison that new targets should not be set without sufficient input from the Aboriginal and Torres Strait Islander communities.¹¹² The Prime Minister's response led to the establishment of the Joint Council on Closing the Gap, a committee of state and territory ministers, members of the National Coalition of Aboriginal and Torres Strait Islander Peak Organisations (a group of almost 40 Indigenous, community controlled peak bodies), and a representative from the Local Government Association.¹¹³ The body participated in the decision-making process for the design, implementation, monitoring and evaluation of the CTG Refresh.¹¹⁴ In early 2019, the Joint Council announced formal partnership arrangements, including the appointment of Indigenous representatives.¹¹⁵ The new *National Agreement on Closing the Gap* ('*National Agreement*') was finally released in July 2020, doubling the number of targets to 16 and adding four priority reforms.¹¹⁶

Many of the refreshed targets have been reframed as absolute targets as opposed to being relative to non-Indigenous populations. This is a beneficial change as it will draw attention solely to progress in Indigenous wellbeing, instead of seeing fast-paced non-Indigenous improvements detracting from the success of CTG targets by maintaining or widening the gap (as was documented in relation to child mortality).¹¹⁷ However, early reports of the refreshed agenda included a target of incarceration parity by 2093, a stark indicator of the government's indifference towards breaking the cycle of incarceration. When this indifference was illuminated by Indigenous leaders, the government was quick to reframe the target as a reduction of at least 15% by 2031—a similarly disappointing trajectory.¹¹⁸ Nonetheless, it is encouraging that the new targets focus on being more evidence-based and achievable, in contrast to

¹¹¹ Holland (n 101) 9.

¹¹² Calla Wahlquist, 'Indigenous Leaders in "Crisis Talks" with PM over Closing the Gap', *The Guardian* (online, 11 December 2018) <<https://www.theguardian.com/australia-news/2018/dec/11/Indigenous-leaders-crisis-talks-scott-morrison-closing-gap>>.

¹¹³ Joint Council on Closing the Gap, *First Meeting of the Joint Council on Closing the Gap* (Communique, 27 March 2019) 1 <<https://www.naccho.org.au/wp-content/uploads/ctg-joint-council-communique.pdf>>.

¹¹⁴ *Ibid* 1–2.

¹¹⁵ National Indigenous Australians Agency, 'About Closing the Gap' (n 7).

¹¹⁶ National Indigenous Australians Agency, 'National Agreement on Closing the Gap: At A Glance', *Closing the Gap in Partnership* (Web Page) <<https://www.closingthe-gap.gov.au/national-agreement-closing-gap-glance>>.

¹¹⁷ *Trends in Indigenous Mortality* (n 99) vii.

¹¹⁸ Greg Brown, 'Wyatt Shuns Closing the Gap Incarceration Target', *The Australian* (online, 3 July 2020) <<https://www.theaustralian.com.au/nation/wyatt-shuns-closing-the-gap-target-for-incarceration-target/news-story/353ce459100937186e9b4774073d609d>>.

the original targets that research had shown were overly ambitious and unachievable in the target timeframes.¹¹⁹

The refreshed agenda has expanded on the government's usual focus on employment and education, however, it fails to explore the impacts that other less measurable factors have on progress across relevant policy areas. The focus of the targets reflect a trend of 'practical reconciliation' which has been seen throughout governmental approaches to Indigenous affairs since the early 2000s, under then Prime Minister John Howard.¹²⁰ 'Practical reconciliation', as coined by Howard, referred to tangible gains in health, education, housing and employment,¹²¹ and rejected a parallel focus on what were depicted as purely 'symbolic' reforms. This approach artificially distinguishes between policy consideration of the impacts of Australia's colonial past from the contemporary practical needs of Indigenous peoples.¹²² The new *National Agreement* acknowledges the relevance of systemic flaws to Indigenous disadvantage in Australian institutions.¹²³ However, practical targets to address intergenerational trauma and racism, which cause significant impacts to Indigenous populations, are absent.¹²⁴

The partnership agreement for the CTG Refresh emphasised its embodiment of self-determination as 'key to achieving changes in the lives of Aboriginal and Torres Strait Islander people'.¹²⁵ However, it is hard to comprehend how a CTG agenda negotiated by a coalition of community-controlled service providers could ensure uncompromised commitment to statistical equality, when the funding of each organisation is dependent on government contracts. As noted by Davis, while the contributions of the Coalition of Peaks are 'a triumph and a testament to the peerless activism of pioneers in the health and services sector', they have not been elected

¹¹⁹ Closing the Gap Refresh (n 97); Australian Institute of Health and Welfare (n 100) 15.

¹²⁰ Cunningham (n 93) 465.

¹²¹ Ibid 469.

¹²² Deirdre Howard-Wagner, 'Governance of Indigenous Policy in the Neo-Liberal Age: Indigenous Disadvantage and the Intersecting of Paternalism and Neo-Liberalism as a Racial Project' (2018) 41(7) *Ethnic and Racial Studies* 1332, 1337–8.

¹²³ National Indigenous Australians Agency, 'National Agreement on Closing the Gap: At A Glance' (n 116) 12.

¹²⁴ *UPR Report Australia* (n 31) [27]–[31]; Judy Atkinson, Jeff Nelson and Caroline Atkinson, 'Trauma, Transgenerational Transfer and Effects on Community Wellbeing' in Nola Purdie, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Australian Institute of Health and Welfare, 1st ed, 2010) 135, 137.

¹²⁵ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Council of Australia Governments, *Partnership Agreement on Closing the Gap 2019–2029* (Agreement, 27 March 2019) 2.

to represent First Nations Australians and their seat at the table cannot equate to self-determination.¹²⁶

At its inception, the CTG initiative had tremendous potential to make considerable changes to Indigenous peoples' lives in Australia, yet it failed to meet expectations. The CTG Refresh provided the government with a second chance to make these changes, but a new policy orientation is necessary. We discuss further in VII that the *Uluru Statement* and associated advocacy offers the foundation of that new orientation.

VII PURSUING A CONSTITUTIONAL RECOGNITION REFERENDUM

'Pursue a referendum to recognise Aboriginal and Torres Strait Islander peoples under the Constitution. Australia is determined to ensure that no Australian is subject to violence and discrimination, and it strives to realize the economic, social and cultural rights of all citizens, but recognises that there is more work to be done, particularly for Indigenous Australians.'¹²⁷

Constitutional recognition has been a key political issue for a number of years and is another area which has received significant government attention.¹²⁸ Howard expressed commitment to a referendum to 'recognise' Indigenous peoples in Australia on the eve of the 2007 federal election.¹²⁹ However, as Dylan Lino and others note, questions regarding the status of Indigenous peoples in Australia predate this and indeed, a constitutional preamble recognising Aboriginal and Torres Strait Islander Peoples was rejected by referendum in 1999.¹³⁰

Following Howard's 2007 commitment, a series of parliamentary bodies were formed to further this commitment, including the 2010 appointment of the Expert Panel on Constitutional Recognition by the Gillard government,¹³¹ the 2015 and 2018 Joint

¹²⁶ Megan Davis, 'New Agreement Won't Deliver the Change Indigenous Australians Need', *The Sydney Morning Herald* (online, 8 July 2020) <<https://www.smh.com.au/national/new-agreement-won-t-deliver-the-change-indigenous-australians-need-20200705-p5593d.html>>.

¹²⁷ *Australian UNHRC Pledge* (n 9) [18].

¹²⁸ Jackie Huggins and Rod Little, 'A Rightful Place at the Table' in Shireen Morris (ed), *A Rightful Place* (Schwartz Publishing, 2017) 74, 76–7.

¹²⁹ Referendum Council, *Final Report of the Referendum Council*, (Report, 30 June 2017) iii.

¹³⁰ Dylan Lino, *Constitutional Recognition* (Federation Press, 2018); '1999 Referendum', *Australian Electoral Commission* (Web Page, 24 January 2011) <https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/1999.htm>.

¹³¹ Jenny Macklin, Julia Gillard and Robert McClelland, 'Expert Panel on Constitutional Recognition of Indigenous Australians Appointed' (Media Release, Australian Government, 23 December 2010).

Select Committees on Constitutional Recognition,¹³² and the Referendum Council appointed in 2015.¹³³ Despite public expectation that the recommendations arising from these bodies would result in constitutional recognition through a referendum, no such opportunity has yet been presented to the Australian electorate. Instead, and crucially, significant commentary from Aboriginal and Torres Strait Islander peoples has emphasised the need for more substantive change as opposed to solely symbolic recognition.¹³⁴

In response to a number of recommendations from other Member States during Australia's 2015 UPR,¹³⁵ the government outlined its strong commitment to pursue a referendum to recognise Indigenous peoples as Australia's first inhabitants and expressed its intention to 'consider the recommendations of the Parliamentary Committee on Constitutional Recognition'.¹³⁶ This statement was announced merely weeks after both the then Prime Minister Tony Abbott and the then Leader of the Opposition Bill Shorten met with 40 Indigenous leaders who had made it clear that a minimalist approach to constitutional change would not be acceptable to Aboriginal and Torres Strait Islander peoples.¹³⁷ The subsequent Prime Minister, Malcolm Turnbull, with bipartisan support, then created the Referendum Council, a body that was tasked with investigating the 'next steps' towards constitutional recognition.¹³⁸

Less than a month prior to the announcement of Australia's pledge for membership of the UNHRC in June 2017, the Referendum Council published its final report which specifically excluded a purely symbolic statement of recognition within the *Constitution*, and instead promoted the idea of an extra-constitutional Declaration of Recognition and a Voice to Parliament for Indigenous Peoples.¹³⁹ These recommendations aligned with the *Uluru Statement*, the result of an unprecedented dialogue process involving consultations with the most proportionately representative Aboriginal and Torres Strait Islander delegates ever seen. Each dialogue took place over three days in 12 communities across Australia, bringing together traditional owners, native title bodies, community leaders and members of the Stolen Generations to speak their truth and have a voice in the constitutional reform debate. The significance of the First Nations Regional Dialogues should not be understated; indeed, they represent the most substantial constitutional consultation in Australian history, incorporating the perspectives of 1200 Aboriginal and Torres Strait Islander

¹³² 'Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples>.

¹³³ Referendum Council (n 129) 3.

¹³⁴ *Ibid* 11.

¹³⁵ See UPR Info (n 50).

¹³⁶ Attorney-General's Submission for Second UPR (n 30) 2.

¹³⁷ Referendum Council (n 129) 4.

¹³⁸ *Ibid* 3, 46.

¹³⁹ *Ibid* 2.

delegates out of approximately 600,000 Indigenous people nationally.¹⁴⁰ This is particularly significant given that the pre-Federation constitutional debates entirely excluded Indigenous attendees.¹⁴¹

Arising from the Uluru Convention, the *Uluru Statement* called for three constitutional reforms: Voice, Treaty, and Truth. As discussed in Section II, the *Uluru Statement* sets the practical and meaningful groundwork of how to implement, protect and enforce self-determination, in line with Australia's *UNDRIP* commitment to self-determination.¹⁴² As a first priority, First Nations people called for a Voice to Parliament enshrined in the *Constitution* to address the structural inequality faced by Indigenous peoples. The body was visualised as having the capacity to challenge discriminatory legislation prior to its passage through Parliament. Where non-discrimination clauses act as a partial shield, the *Uluru Statement* envisaged the Voice as more of a sword — a powerful institution, comprising Indigenous representatives elected from within their communities, actively combatting racial discrimination in the heart of Australia's federal law-making institution. Racially discriminatory laws would no longer need to wait for a litigious challenge to be struck down, the Voice would be able to act as a front-line defence.¹⁴³ While the Voice would be solely an advisory body, the public support in a referendum necessary to enshrine it within the *Constitution* would bolster its impact,¹⁴⁴ and government dismissal of its recommendations would contradict public interest. Such a body could also provide the Parliament with advice on how domestic legislation could give greater effect to the *UNDRIP*.

The Voice could also oversee the development of the second much sought after reform: Treaty. Despite calls for a treaty echoing for decades through the Indigenous rights movement, it is crucial that the Voice is the first proposed reform that would ensure the government and legislature have an opportunity to hear from Aboriginal and Torres Strait Islander peoples when developing a treaty and surrounding policy. Without a Voice constitutionalising institutional listening,¹⁴⁵ the ability for Indigenous peoples to negotiate with the state is constrained by a significant power

¹⁴⁰ Ibid 10.

¹⁴¹ Ibid 109; Shireen Morris, “‘The Torment of Our Powerlessness’: Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement’s Call for a First Nations Voice in Their Affairs’ (2018) 41(3) *University of New South Wales Law Journal* 629, 647–648.

¹⁴² Synot (n 16).

¹⁴³ Megan Davis, ‘The Long Road to Uluru: Truth before Justice’ (2018) 60 *Griffith Review* 13, 32.

¹⁴⁴ Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making laws for Indigenous Affairs’ (2015) 26(3) *Public Law Review* 166, 185 (‘The Argument for a Constitutional Procedure’).

¹⁴⁵ See generally Gabrielle Appleby and Eddie Synot, ‘A First Nations Voice: Institutionalising Political Listening’ (2020) 20(10) *Federal Law Review* 1–14.

imbalance, underscored by decades of constitutional vulnerability and paternalistic policies,¹⁴⁶ and limitations in gaining an Indigenous consensus.

The third reform centres around truth-telling. Truth-telling was not an initiative that the Referendum Council took to the First Nations Regional Dialogues, yet it emerged as a constant theme from the discussions between delegates. To ascertain what meaningful reform would involve within their own communities, delegates reflected on their own experiences, and engaged in truth-telling in order to lead the discussion.¹⁴⁷ Truth-telling is not simply an exercise for Indigenous peoples in Australia, but is a crucial step in reconciliation for all Australian citizens. For decades, misinformation, ignorance and denial has omitted Indigenous history. To correct the record, an independent truth-telling process should be undertaken. Makarrata is a Yolngu word meaning 'coming together after a struggle', and the *Uluru Statement* has called for a Makarrata Commission to acknowledge the truth of Australia's history, stimulate healing and reconciliation, and ensure all Australians are conscious of the past.¹⁴⁸

Following the publication of the Referendum Council's Final Report on 30 June 2017, which contained the *Uluru Statement* in full, Turnbull quickly dismissed the Voice to Parliament proposal, describing the Voice as a 'third chamber of parliament' that is inconsistent with principles of unity and equality.¹⁴⁹ Nevertheless, the July 2017 Australian bid to the UNHRC contained a pledge to continue to pursue a referendum to 'recognise Aboriginal and Torres Strait Islander peoples under the *Constitution*'.¹⁵⁰ This suggests that the Referendum Council's recommendations were summarily dismissed in the formulation of the UNHRC pledges.

In the early stages of Australia's UNHRC term, we have seen the re-appointment of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.¹⁵¹ In the Joint Select Committee's Final Report, the *Uluru Statement* was labelled a 'major turning point' in the debate as it had rejected years of proposals for constitutional recognition in favour of the Voice. However, in line with recent governments' opposition to the substantive realisation of Indigenous self-determination, Morrison has continued to reject any addition

¹⁴⁶ Morris, 'The Torment of Our Powerless' (n 141) 635–8.

¹⁴⁷ Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 503–8.

¹⁴⁸ Referendum Council (n 129) 21.

¹⁴⁹ Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, Parliament of Australia, 26 October 2017).

¹⁵⁰ *Australian UNHRC Pledge* (n 9) [18].

¹⁵¹ Parliament of Australia, 'Finding Common Ground and a Way Forward for Indigenous Recognition' (Media Release, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 28 March 2018).

of a constitutionally-enshrined Indigenous Voice to Parliament.¹⁵² The Coalition government is instead pursuing a co-design process to legislate the Voice to Government.¹⁵³ Such a body would be subject to the political whims of the party in power and an act of Parliament away from abolishment, demonstrated historically by the watering down of the *Native Title Act 1993* (Cth) and the demise of the Aboriginal and Torres Strait Islander Commission.¹⁵⁴ Notably, the former Leader of the Opposition, Bill Shorten, publicly spoke out in support of the Voice to Parliament and committed to ensuring a referendum to enshrine the Indigenous representative body in the first term of a Labor government.¹⁵⁵ However, this was not realised due to the 2019 federal election outcome.

Despite contrary claims by the former Prime Minister, Malcolm Turnbull,¹⁵⁶ a symbolic statement of recognition is more likely to fail than a constitutionally enshrined Indigenous voice. It is evident from the most comprehensive engagement of Indigenous communities to date that a mere statement of symbolic recognition, without supplementation of other substantive reform, will not gain the support of Indigenous communities.¹⁵⁷ It would be unconscionable to hold a referendum without the support of Indigenous communities.¹⁵⁸ The significance of recent polling indicating that 71% of Aboriginal and Torres Strait Islander people would vote yes to constitutionally-enshrining the Voice to Parliament cannot be understated.¹⁵⁹ It must also be remembered that a referendum to impose a constitutional preamble recognising

¹⁵² Paul Karp, 'Scott Morrison Claims Indigenous Voice to Parliament Would Be a Third Chamber', *The Guardian* (online, 26 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/26/scott-morrison-claims-indigenous-voice-to-parliament-would-be-a-third-chamber>>.

¹⁵³ 'Indigenous Voice Co-Design Process', *Indigenous Voice* (Web page) <<https://voice.niaa.gov.au/>>; Greg Brown, 'Referendum on Recognition "Feasible": Ken Wyatt', *The Weekend Australian* (online, 31 May 2020) <<https://www.theaustralian.com.au/nation/referendum-on-recognition-feasible-ken-wyatt/news-story/9fc6881bc2631966fce7493d6836924d>>.

¹⁵⁴ Morris, 'The Torment of Our Powerlessness' (n 141) 638–40. For a discussion of lessons to be learnt from the abolishment of ATSIC, see also Morris, 'The Argument for a Constitutional Procedure' (n 144) 189.

¹⁵⁵ "'Long Overdue": Shorten Stands by Indigenous Referendum Plan Despite Criticism', *SBS News* (online, 27 April 2019) <<https://www.sbs.com.au/news/long-overdue-shorten-stands-by-indigenous-referendum-plan-despite-criticism>>.

¹⁵⁶ See Turnbull, Brandis and Scullion (n 149).

¹⁵⁷ Referendum Council (n 129), 11. See also Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012) 113–15.

¹⁵⁸ Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91(5) *Australian Law Journal* 350, 354.

¹⁵⁹ Shahni Wellington, "'Hugely Encouraging": Voice to Parliament Advocates Boosted by Poll', *NITV* (online, 16 July 2020) <<https://www.sbs.com.au/nitv/article/2020/07/15/hugely-encouraging-voice-parliament-advocates-boosted-poll>>. See also Morris, 'The Torment of Our Powerlessness' (n 141) 635.

Aboriginal and Torres Strait Islander Peoples was rejected by the Australian public on 12 August 1999,¹⁶⁰ and there is no strong argument as to why it would now be successful.¹⁶¹ The government is well aware of Indigenous distaste for symbolic recognition, evident from the disbandment of the key government marketing strategy *Recognise* in 2017.¹⁶² Incrementalists who argue that a symbolic statement will pave the way for further substantive changes should consider the history of this approach in the Australian Indigenous policy context. Kevin Rudd's 2008 symbolic apology was an incremental step which did not translate into a national restitution scheme for victims.¹⁶³ An incrementalist approach stalls momentum on substantive reforms by providing an inflated illusion of impact and delays reforms which deserve immediate attention.

Fundamentally, constitutional reform is about much more than acknowledgement — it is about shifting the power imbalance.¹⁶⁴ Much of the incompatibility between the visions of successive governments and Indigenous communities can be attributed to the former's inability to acknowledge the continuing conflict that remains to this day. A statement of recognition means nothing without true acknowledgement of the legacy of colonisation.¹⁶⁵ The reason why the Voice to Parliament is preferable to recognition is that such a body would provide a mechanism to manage the relationship between the government and Indigenous peoples, rather than ignore the ongoing conflict.¹⁶⁶

It is important to note at this point that these calls to action are predominantly focused on the Commonwealth government. Some of the state and territory governments are advancing reforms which address many of the areas of concern outlined in the prior Parts and within the *Uluru Statement*. For example, the Victorian government recently funded the election of a Victorian Treaty Advancement Commission to undertake treaty negotiations.¹⁶⁷ The Tasmanian government has also established

¹⁶⁰ *Australian Electoral Commission* (n 130).

¹⁶¹ Davis, 'The Long Road to Uluru: Truth before Justice' (n 143) 15.

¹⁶² 'Recognise Campaign to be Abandoned: Report', *SBS News* (online, 11 August 2017) <<https://www.sbs.com.au/news/recognise-campaign-to-be-abandoned-report>>.

¹⁶³ Morris (n 158) 355.

¹⁶⁴ See Morris, 'The Torment of our Powerlessness' (n 141) 643–46.

¹⁶⁵ Adrian Little, 'Reconciliation After Recognition? Indigenous-Settler Relations in Australia' in Isbandi Rukminto Adi and Rochman Achwan (eds), *Competition and Cooperation in Social and Political Sciences* (Routledge, 2017) 3, 6.

¹⁶⁶ *Ibid* 5.

¹⁶⁷ 'The Treaty Process in Victoria', *Australians for Native Title and Reconciliation Victoria* (Web Page) <<https://antarvictoria.org.au/treaty-process>>; 'Treaty Bodies', *Aboriginal Victoria* (Web Page, 9 October 2019) <<https://www.aboriginalvictoria.vic.gov.au/treaty-bodies>>.

a joint management plan over protected cultural wilderness areas,¹⁶⁸ implemented an Indigenous education curriculum,¹⁶⁹ and regularly holds open-door forums with Aboriginal peoples and government departments and agencies to ensure sincere consultation and contribution.¹⁷⁰

VIII RECOMMENDATIONS

Australia's UNHRC pledge to advance the rights of Indigenous peoples around the globe presents an opportunity to improve Australia's domestic and international compliance and commitment in this area. Based on our analysis in the preceding sections, we offer the following recommendations. In summary, these relate to: first, the importance of the *Uluru Statement*; second, Australia's support for the *UNDRIP*; third, action on CTG; and fourth, Australia's promotion of Indigenous human rights within the UN and options for elevating Indigenous perspectives within UN bodies.

First, at a domestic level, full and complete governmental support of the *Uluru Statement* is one of the most effective ways to address many of the gaps in the government's approach to Indigenous policy. This has been noted numerous times both here and at the international level. Domestically, support is evident from both sides of the political spectrum, as well as in the corporate sector and at a community level.¹⁷¹ Internationally, in December 2017, just before the commencement of Australia's UNHRC term, the UN Committee on the Elimination of Racial Discrimination reported on Australia's compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* and specifically recommended Australia to 'accelerate its efforts to implement Indigenous Peoples' self-determination demands, as set out in the *Uluru Statement from the Heart*'.¹⁷² The Special Rapporteur on the Rights of Indigenous Peoples participated in the First

¹⁶⁸ See generally Emma Lee and Benjamin J Richardson, 'From Museum to Living Cultural Landscape: Governing Tasmania's Wilderness World Heritage' (2017) 20 *Australian Indigenous Law Review* 78.

¹⁶⁹ 'The Orb', *Department of Education (Tas)* (Web Page) <<https://www.theorb.tas.gov.au/>>.

¹⁷⁰ Jacquie Petrusma, 'Another Significant Milestone in Resetting the Relationship' (Media Release, Department of Premier and Cabinet (Tas), 12 September 2018).

¹⁷¹ Since 2017, many corporate companies and Indigenous organisations have publicly declared their support: see 'Our Support', *The Uluru Statement* (Web Page) <<https://ulurustatement.org/our-support>>. For liberal and conservative perspectives on an Indigenous voice: see Damien Freeman and Shireen Morris (eds), *The Forgotten People* (Melbourne University Press, 2016).

¹⁷² Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, 94th sess, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017, adopted 6-7 December 2017) 2 [5]; *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).

Nations Regional Dialogue in Cairns, and recommended that the government 'act on the proposals put forth by the Referendum Council'.¹⁷³

While the government has repeatedly rejected the calls for implementing the Voice to Parliament,¹⁷⁴ it has allocated \$7.3 million to 'further support local and regional decision-making processes' through increasing Indigenous involvement in policy development and service delivery, consistent with recommendations of the Joint Select Committee 'to co-design with Aboriginal and Torres Strait Islander Australians options for a Voice to Parliament for Indigenous Australians'.¹⁷⁵ However, the government's unilateral decision to pursue a Voice to Government, as opposed to a Voice to Parliament, was made without consulting their hand-picked Senior Advisory Group.¹⁷⁶ This process cannot lead to self-determination for Indigenous Australians when it prevents their voice from reaching the legislative decision-makers.

The government must embrace all aspects of the *Uluru Statement* and bring a referendum to the Australian people. Constitutional reform is unlikely to be achieved without a thorough public education campaign focusing on the practical and legal effects of constitutional reform.¹⁷⁷ The government must ensure that a specific approach to constitutional reform is determined with widespread support by Indigenous peoples prior to taking a referendum campaign to the public.

Second, the government should also commit to fully supporting and implementing the *UNDRIP*. This could be done by giving effect to the *UNDRIP* in domestic law, but given the lack of domestic (particularly federal) laws giving effect to Australia's international human rights obligations under treaties, this seems unlikely. As more progress has been made recently at the state and territory level regarding human rights laws, perhaps legislation at that level is more likely, as has occurred in the province of British Columbia in Canada.¹⁷⁸ Another option is to amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to add the *UNDRIP* to the human rights instruments in s 3(1) of the Act, as recommended by the Australian Human

¹⁷³ *Report of the Special Rapporteur* (n 23) [107(a)].

¹⁷⁴ Turnbull, Brandis and Scullion (n 149); Karp (n 152).

¹⁷⁵ Nigel Scullion, '2019–20 Budget: Supporting a Better Future for Indigenous Australians through Investments in Education, Employment and Safer Communities' (Media Release, Department of Prime Minister and Cabinet, 2 April 2019).

¹⁷⁶ Pat Turner, 'Pat Turner AM: Australian Government is Kicking the Can Down the Road on the Voice to Parliament', *Alice Springs News* (online, 2 October 2020) <<https://alicespringsnews.com.au/2020/10/02/pat-turner-am-australian-government-is-kicking-the-can-down-the-road-on-the-voice-to-parliament/>>.

¹⁷⁷ Bridget Brennan and Isabella Higgins, 'Aboriginal Leaders Want Voice to Parliament Referendum Delayed', *ABC News* (online, 18 October 2018) <<https://www.abc.net.au/news/2018-10-18/aboriginal-leaders-delay-referendum-on-voice-to-parliament/10391714>>.

¹⁷⁸ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

Rights Commission.¹⁷⁹ The development of a national declaration strategy is another implementation mechanism used by a number of UN Member States,¹⁸⁰ and was one of the key recommendations from the 2014 World Conference on Indigenous Peoples.¹⁸¹ While it is recognised that the *UNDRIP* can be difficult to implement at a domestic level,¹⁸² outlining the most important principles and provisions of the *UNDRIP* would provide a benchmark for assessing both Bills and current domestic laws, and a guiding framework for policy and strategy development and evaluation. For example, the IAS Evaluation Framework is currently based on the criteria of the program under evaluation being relevant, robust, credible and appropriate. It should incorporate relevant *UNDRIP* provisions to ensure funding for Indigenous communities is provided in a manner that meets international standards for Indigenous rights.¹⁸³ Further, the principles of the *UNDRIP* could be used by a Voice to Parliament body to review pending legislation in line with international standards. What is clear is that a ‘state’s rhetorical commitment to the Declaration or ritual public incantation of its terms will not automatically lead to meaningful reform’.¹⁸⁴

Third, the government has an opportunity to deliver on its UNHRC pledge and develop a strong basis for the next 10 years of the CTG strategy. Stable funding for the life of the refreshed CTG agenda is required, regardless of the political party in power or the Prime Minister of the day. The new *National Agreement on Closing the Gap* was not substantiated with any further funding to action the additional eight targets,¹⁸⁵ potentially stalling the initiative’s progress before it even comes into effect. The government needs to stand by the commitment it has made to partner with Aboriginal and Torres Strait Islander peoples and ensure the Partnership

¹⁷⁹ See Australian Human Rights Commission, *Australia’s Universal Periodic Review* (n 23) 8; *Report of the Special Rapporteur* (n 23) [21], [107].

¹⁸⁰ Expert Mechanism on the Rights of Indigenous Peoples, *Summary of Responses from the Questionnaire Seeking the Views of States on Best Practices Regarding Possible Appropriate Measures and Implementation Strategies in Order to Attain the Goals of the United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 5th sess, Agenda Item 6, UN Doc A/HRC/EMRIP/2012/4 (30 April 2012) 12.

¹⁸¹ See, eg, discussion of various approaches in Gooda and Kiss (n 14); Tammy Solonec, ‘“We Don’t Even Have a Plan”: Solonec’, *National Indigenous Times* (online, 12 January 2018) <<https://nit.com.au/dont-even-plan-solonec/>>.

¹⁸² Scholars have discussed the difficulty Indigenous peoples face in articulating the best practical way for principles such as self-determination, etc. to be applied in a domestic context. See Davis (n 22) 29; Gooda (n 14) 7.

¹⁸³ See generally Department of Prime Minister and Cabinet, *Indigenous Advancement Strategy Evaluation Framework* (Report, 2018).

¹⁸⁴ Harry Hobbs, ‘Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1–2) *The International Journal of Human Rights* 174, 192.

¹⁸⁵ Isabella Higgins, Sarah Collard and Brad Ryan, ‘Closing the Gap Agreement Reset with 16 New Targets to Improve Lives of Aboriginal and Torres Strait Islander Australians’, *ABC News* (online, 30 July 2020) <<https://www.abc.net.au/news/2020-07-30/closing-gap-targets-agreement-aboriginal-torres-strait-islander/12506232>>.

Agreement with the Coalition of Peaks is respected and enforced. In particular, the community-based monitoring system would be truly beneficial as it would allow Indigenous people to have greater control over the programs.¹⁸⁶ Further, as 'shared decision-making' is a priority reform area,¹⁸⁷ the potential for a Voice to Parliament to engage in decision-making at a national level should not be overlooked. Many who were consulted on the CTG targets referred to a representative voice and the *Uluru Statement* when questioned about this priority,¹⁸⁸ yet neither are mentioned in the final release of the reforms. Instead, it is specifically noted that any shared decision making will build on existing structures, as opposed to the creation of a new national body.¹⁸⁹ The government should reconsider this view in line with the *Uluru Statement*.

Fourth and finally, Australia can promote Indigenous human rights through co-operation with relevant bodies and processes, such as UN Special Rapporteurs, and elevate Indigenous perspectives within UN bodies. Australia must be committed to meaningful consultation with Indigenous groups at a domestic level and support further engagement of Indigenous peoples at the UN. Further, by using the UNHRC's UPR, a mechanism with strong State engagement and one with some track record of success, Australia could prioritise Indigenous rights in its recommendations to other States. On the international stage, Australia broadcasted its 'proud and long history of promoting and protecting human rights at home and abroad' at the launch of Australia's UNHRC campaign.¹⁹⁰ These statements have been described as 'hypocritical' by prominent Aboriginal rights activist, and former Co-Chair of the National Congress of Australia's First Peoples, Dr Jackie Huggins, as they fail to reflect the true state of Aboriginal affairs.¹⁹¹ Rather than engage in merely performative rhetoric, the government should use its statement of intention to play a more active role in international institutions to promote consideration of Indigenous issues, elevate Indigenous perspectives in international decision-making, and bolster the UNPFII and EMRIP.¹⁹² In order for the government to truly engage with multilateral fora for Indigenous peoples, there needs to be a sincere attempt to actively listen to Indigenous voices.

¹⁸⁶ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Council of Australia Governments, *Partnership Agreement on Closing the Gap 2019–2029* (Agreement, 27 March 2019) 4.

¹⁸⁷ 'Priority Reforms', *Closing the Gap in Partnership* (Web Page) <<https://www.closingthegap.gov.au/priority-reforms>>.

¹⁸⁸ Coalition of Aboriginal and Torres Strait Islander Peak Organisations, *A Report on Engagements with Aboriginal and Torres Strait Islander People to Inform a New National Agreement on Closing the Gap* (Report, June 2020) 25, 34.

¹⁸⁹ *Ibid.*

¹⁹⁰ Bishop (n 10).

¹⁹¹ Huggins (n 70).

¹⁹² Marise Payne, 'Australia and the World in the Time of COVID-19' (Speech, National Security College, Australian National University, 16 June 2020) <<https://www.foreign-minister.gov.au/minister/marise-payne/speech/australia-and-world-time-covid-19>>.

IX CONCLUSION

The 2018–20 UNHRC membership term provides an opportunity for Australia to advance human rights at home and abroad. The membership bid for the UNHRC had potential to serve as a framework for the three-year term outlining key areas of focus and development. A close analysis of the government's actions and policies in respect of the pillar relating to Indigenous rights has provided a useful snapshot of the state of Indigenous affairs policy within Australia, as well as some indications of Australia's engagement with the issue in the UNHRC. We have found that Australia's UNHRC commitments in relation to Indigenous rights replicate decades of Indigenous affairs policy and evidence a persistent focus on 'practical reconciliation'. The Commonwealth government has not, to date, adequately acknowledged the underlying structural issues which continue to degrade the quality of life of Indigenous peoples, such as the lack of representation within the nation's most powerful institutions, and the impacts of racism and intergenerational trauma.

It cannot be said that the circumstances facing Indigenous peoples in Australia are too complex to properly address. We have identified numerous recommendations that, if implemented, would advance Australia's practice and record in Indigenous rights. These recommendations include the need for sincere consultations and Indigenous perspectives in governmental policy, which, in conjunction with genuine engagement with the issues raised at EMRIP, UNPFII and by the Special Rapporteur, would ensure issues facing Indigenous peoples are addressed efficiently and appropriately. Other essential recommendations include the development of a national strategy to incorporate the *UNDRIP* in domestic law, and reform of the IAS Evaluation Framework to ensure government funding is placed with appropriate Indigenous organisations to enhance Indigenous communities' self-determination and prospects of achieving substantive equality. At an international level, Australia has a unique opportunity to use the UNHRC and its monitoring mechanism, the UPR, to maintain a focus on issues raised by Indigenous peoples and to lobby for improvements to the UN fora regarding engagement with Indigenous peoples.

Finally, and most importantly, the government, Parliament and community should engage with the significance of the *Uluru Statement*, which provides a clear framework for change. There is both a clear need and a strongly stated aspiration for the reforms proposed in the *Uluru Statement* — a Voice to Parliament, a truth-telling commission, and treaty. To move forward as a nation, Australia and Australians must acknowledge the dark truths of our shared history and finally listen to the Indigenous voices seeking to be heard.

SENTENCING TO PROTECT THE SAFETY OF THE COMMUNITY

ABSTRACT

Section 3 of the *Sentencing Act 2017* (SA) states that '[t]he primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general)'. Under s 9, this primary purpose 'must be the paramount consideration when a court is determining and imposing the sentence'. There is no legislative indication of how to construe community safety, nor guidance as to how it might best be protected, and the primary purpose could influence sentencing practices in a variety of ways. This article suggests that a narrow construction, synonymous with incapacitation, should be avoided, since it may have undesirable effects, such as an increase in incarceration rates and the length of prison terms. Rather, the primary purpose of protecting the safety of the community should serve as a focal point for engagement with research into the effectiveness of criminal sanctions and a progressive agenda of public education.

I INTRODUCTION

On 30 April 2018, the *Sentencing Act 2017* (SA) ('new Act') came into effect. The new Act implemented amendments to the South Australian sentencing regime that include the introduction of intensive correction orders, changes to the treatment of dangerous offenders and an overhaul and reorganisation of the preceding legislation: the *Criminal Law (Sentencing) Act 1988* (SA). Alongside these substantive and organisational amendments was the introduction of a new 'primary sentencing purpose': under s 3 of the new Act, '[t]he primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general)'. Although the promulgation of sentencing as a means by which to further community safety is neither novel nor unusual in the Australian context, its elevation to 'the primary purpose' sets the South Australian regime apart.

The adoption of this primary purpose presents opportunities to improve sentencing practice and the way in which it is understood and communicated, but there are

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challenges that attend a focus on community safety. This article begins by setting out the place of sentencing purposes within the complex milieu of the sentencing exercise, and suggests that they can and should play an important role in structuring the sentencing calculation and in communicating the basis for this to the courtroom and beyond. From here, the article moves to examine the concept of ‘community safety’ and how the sentencing exercise might be oriented to its protection. Two principal advantages of this singular focus are proposed: the opportunity it presents to facilitate the implementation of effective, evidence-based sentencing practices; and the straightforward message that it communicates to the public about the roles and functions of sentencing and criminal punishment.

Alongside these potential advantages, the article also addresses problems that might arise in aligning the sentencing exercise with the primary purpose. For instance, there is a danger of over-simplification, whereby community protection is read as synonymous with incapacitation. The advent of the new Act came towards the end of a prolonged period of Labor governments, during which there had been a heavy emphasis on ‘populist and hard-line stances’ in relation to criminal justice matters.¹ Despite the potential for an overtly ‘law and order’ reading of the primary purpose, it is suggested that this would be an inadequate and ineffective interpretation, liable to create unrealistic expectations and perpetuate an unwelcome rise in incarceration rates. Moreover, concentrating sentencing on one primary purpose necessarily involves moving the focus away from other established sentencing purposes and principles. Four important areas of sentencing may be affected: the other traditional purposes of sentencing, now labelled ‘secondary purposes’ under s 4 of the new Act; proportionality; consistency in sentencing; and the participation and input of the victim.

This article therefore points to some of the potential ramifications of the foregrounding of community safety and urges sentencing judges and others involved in the policy and practice of sentencing offenders to take a broad and progressive view of how community safety might be protected.

II PROTECTING THE SAFETY OF THE COMMUNITY IN THE SENTENCING CALCULATION

A Sentencing Purposes and the Sentencing Calculation in South Australia

In Australia and similar jurisdictions, the sentencing exercise comprises a multi-factorial calculation that draws upon a great deal of judicial discretion, set within a complex legislative and common law framework. A central part of this is commonly a statutory statement of the purposes of sentencing.² Although framed differently

¹ Rob Manwaring, ‘The Renewal of Social Democracy? The Rann Labor Government (2002–11)’ (2016) 62(2) *Australian Journal of Politics and History* 236, 249.

² In the Australian jurisdictions, these are found in: *Crimes (Sentencing) Act 2005* (ACT) s 7 (‘*Sentencing Act* (ACT)’); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (‘*Sentencing Act* (NSW)’); *Sentencing Act 1995* (NT) s 5; *Penalties*

in each Australian jurisdiction, this statement generally comprises an unranked list of punitive (retribution, denunciation)³ and utilitarian (deterrence, rehabilitation, incapacitation) purposes that must inform the sentencing decision.⁴ These statutory sentencing purposes are overlaid onto similar common law purposes. In *Veen v The Queen [No 2]*, the High Court stated:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.⁵

The new Act includes these familiar sentencing purposes but departs from the usual practice by introducing a hierarchy: protecting the safety of the community is the primary purpose, and all others are now relegated to secondary purposes. The relevant provisions are found in ss 3 and 4 of the new Act:

3 — Primary sentencing purpose

The primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general).

4 — Secondary sentencing purposes

- (1) The secondary purposes for sentencing a defendant for an offence are as follows:
 - (a) to ensure that the defendant—
 - (i) is punished for the offending behaviour; and
 - (ii) is held accountable to the community for the offending behaviour;
 - (b) to publicly denounce the offending behaviour;

and Sentences Act 1992 (Qld) s 3 (*'Sentencing Act (Qld)'*); *Sentencing Act 2017* (SA) ss 3–4 (*'Sentencing Act (SA)'*); *Sentencing Act 1997* (Tas) s 3 (*'Sentencing Act (Tas)'*); *Sentencing Act 1991* (Vic) s 5(1) (*'Sentencing Act (Vic)'*).

³ Denunciation is sometimes said to constitute an additional category itself, furthering an 'expressive' purpose for criminal justice: Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49(3) *The Monist* 397.

⁴ Whether or not protecting the safety of the community is addressed explicitly, or as an implicit purpose to be inferred from such lists, varies according to the jurisdiction.

⁵ *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) (*'Veen [No 2]'*). See also *R v Sargeant* (1974) 60 Cr App R 74, 77.

- (c) to publicly recognise the harm done to the community and to any victim of the offending behaviour;
- (d) to deter the defendant and others in the community from committing offences;
- (da) to deter the defendant and others in the community from harming or assaulting prescribed emergency workers (within the meaning of section 20AA of the *Criminal Law Consolidation Act 1935*) acting in the course of official duties;
- (e) to promote the rehabilitation of the defendant.

The legislation also sets out the ‘sentencing factors’ and common law ‘principles of sentencing’ that might legitimately be taken into account to achieve these sentencing purposes.⁶ The relevant sentencing factors relate to the circumstances of the offence and the situation of the offender. The new Act gives South Australian sentencing judges and magistrates⁷ a single list of factors that might be relevant in terms of aggravating or mitigating the punishment to be imposed for the offence. Under s 11 of the new Act, and alongside sundry other particularised and qualificatory considerations, the court ‘must take into account’ the following factors insofar as they are ‘known’ and ‘relevant’:

- (a) the nature, circumstances and seriousness of the offence;
- (b) the personal circumstances and vulnerability of any victim of the offence whether because of the victim’s age, occupation, relationship to the defendant, disability or otherwise;
- (c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security;
- (d) the defendant’s character, general background and offending history;
- (e) the likelihood of the defendant re-offending;
- (f) the defendant’s age, and physical and mental condition (including any cognitive impairment);
- (g) the extent of the defendant’s remorse for the offence ...;
- (h) the defendant’s prospects of rehabilitation.

⁶ *Sentencing Act* (SA) (n 2).

⁷ For expediency, the terms ‘judge’ and ‘sentencing judge’ will be used to refer collectively to judges and magistrates carrying out the sentencing function.

This list is shorter than those in some equivalent jurisdictions,⁸ but this is not necessarily indicative of a narrow scope. Each of the factors in the new Act must be construed against the backdrop of the facts of the particular case, and the list is not exhaustive. In reality, the range of factors that could be taken into consideration is perhaps as extensive as the diverse contexts of offending.⁹

Overlaid onto these purposes and factors, and operating in conjunction with them, are the common law sentencing principles set out in s 10 of the new Act: proportionality; parity (equally situated offenders should be treated equally); totality (where offenders are being sentenced for more than one offence, the total sentence must be just, proportionate and appropriate to the overall criminality of the total offending behaviour); and the rule that a defendant may not be sentenced on the basis of having committed an offence for which the defendant was not convicted (commonly known as the '*De Simoni* principle').¹⁰ The most prominent and influential of these is 'proportionality', which dictates that the punishment imposed should be proportionate to the crime committed.¹¹

Other considerations exist that constrain sentencing judges and inform the sentencing calculation in South Australia. Judges can only impose a penalty that is available for the given offence and are bound by that offence's statutory maximum penalty, applicable to cases that comprise the worst possible example of the relevant offence. Rarely (and controversially), offences may also entail a statutory minimum, which must also be observed by the sentencing judge.¹² This may also involve the imposition of a mandatory non-parole period, as in the case of murder.¹³

For those who plead guilty or otherwise cooperate with law enforcement agencies, legislative provisions set out prescriptive formulae by which a discount on sentence will be applied.¹⁴ Looming over all of this is the possibility of appeal. An appeal

⁸ See, eg, the more than 30 mitigating or aggravating factors that appear in s 21A of the *Sentencing Act* (NSW) (n 2).

⁹ Most legislation allows for a catch-all whereby these factors are effectively supplemented by a host of accepted common law factors. In recent articles, Mirko Bagaric has suggested that there are 'more than 200 mitigating and aggravating factors in sentencing law': Mirko Bagaric, 'Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity' (2019) 42(1) *University of New South Wales Law Journal* 154, 157 ('Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity'); Mirko Bagaric, 'An Argument for Abolishing Delay as a Mitigating Factor in Sentencing' (2019) 40(3) *Adelaide Law Review* 725, 728.

¹⁰ *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

¹¹ *Veen [No 2]* (n 5) 472, 486, 490–1.

¹² In South Australia, the offence of murder brings a mandatory life sentence: *Criminal Law Consolidation Act 1935* (SA) s 11 ('*CLCA*').

¹³ Under s 47(5)(b) of the *Sentencing Act* (SA) (n 2), the mandatory non-parole period for murder is 20 years.

¹⁴ *Ibid* pt 2 div 2 sub-div 4.

against sentence may be brought by the offender or by the prosecution and will be successful where the sentencing judge can be shown to have: taken into account an irrelevant consideration; omitted to take into account a relevant consideration; or imposed a sentence that is ‘manifestly wrong’.¹⁵ As well as providing an avenue for redress in cases where there is held to be a sentencing error, the possibility of appeal is likely to encourage the sentencing judge to impose a sentence that is in the ‘normal range’ at first instance.¹⁶ In conjunction with the principle of proportionality, the possibility of appeal therefore helps to ensure a degree of consistency; as McHugh J pointed out in *Everett v The Queen*, the appellate courts ‘can ensure that, so far as the subject matter permits, there will be uniformity of sentencing’.¹⁷

Given this complex web of interrelating and interdependent considerations, it is difficult to weigh the influence of sentencing purposes in the sentencing calculation, particularly as there is no set formula that must be employed by sentencing judges under the ‘instinctive synthesis’ model of reasoning preferred in Australian jurisdictions.¹⁸ It is, however, expected that judges will align the imposition of punishment with the relevant sentencing purposes and this should be evident in their sentencing remarks. Kate Warner, Julia Davis and Helen Cockburn note that Victorian County Court judges, for example, almost always refer to at least one of six purposes of sentencing permissible under s 5(1) of the *Sentencing Act 1991* (Vic) (*‘Sentencing Act (Vic)’*).¹⁹ Moreover, in *R v Stunden*, the New South Wales Court of Criminal Appeal held that it was an appellable error for a sentencing judge not to address the purposes of sentencing:

Each of the [statutory purposes of sentencing] ... must be taken into account by a sentencing judge ‘... at least to an extent that is fairly related to the facts of the given case.’ ... It is an appellable error for a judge to fail to address these fundamental purposes at all because they are each relevant to the purpose to be achieved by the imposition of a sentence ... The weight to be accorded to these matters in the consideration of any particular sentence is one upon which minds may legitimately differ.²⁰

¹⁵ *House v The King* (1936) 55 CLR 499, 505. Note that a Crown appeal on the grounds of manifest inadequacy should be a ‘rarity’: *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ).

¹⁶ Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005) 60–1.

¹⁷ (1994) 181 CLR 295, 306. See also *R v Knight* (1986) 40 SASR 479, 480 (King CJ).

¹⁸ *Markarian v The Queen* (2005) 228 CLR 357.

¹⁹ Kate Warner, Julia Davis and Helen Cockburn, ‘The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?’ (2017) 41(2) *Criminal Law Journal* 69, 72.

²⁰ *R v Stunden* [2011] NSWCCA 8, [111]–[112] (Garling J) (emphasis in original) (citations omitted) (*‘Stunden’*).

In New South Wales, as in Victoria, there is no single primary purpose. The legislative regimes in both jurisdictions set out a range of purposes that must be balanced and addressed according to their relevance and applicability to the particular case.²¹

The new Act is emphatic about the centrality of the primary purpose. In addition to setting out the primacy of community protection in s 3, this is repeated in s 9, which asserts: ‘For the avoidance of doubt, the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence.’ The legislative intent of the centrality of the primary purpose was clear in the second reading of the Sentencing Bill 2016 (SA) (‘Bill’), where the then Attorney-General, the Hon John Rau SC, quoted cl 4 of the Bill (s 3 of the Act) and said:

Every sentencing purpose and principle in the Act and, therefore, in the sentencing process that it controls, must be subject to that overriding consideration. The provisions of the Bill emphasise the primacy of this purpose at every turn.²²

Following the logic of *R v Stunden*,²³ it is arguable that a sentencing judge is falling into error if he or she does not address the primary purpose of sentencing in South Australia.

Even when judges adopt the language of the new Act, it is arguable whether the legislative reform has had a substantive effect on sentencing practices. Warner, Davis and Cockburn suggest that the implementation of sentencing purposes contained in s 5(1) of the *Sentencing Act* (Vic) led the judges of the County Court of Victoria to ‘adapt ... those purposes to fit into the patterns that were already established by traditional common law sentencing practice’.²⁴ Warner, Davis and Cockburn suggest that this might have the effect of rendering the legislative statement of sentencing purposes somewhat redundant. The extent to which this may also be true of South Australia is difficult to discern; the new Act makes it clear that protecting the safety of the community should be — and should be seen to be — the primary purpose in sentencing, and this should have an effect on sentencing practices.

B *The Communicative Function of Sentencing*

The legislated sentencing purposes can make a substantive contribution to sentencing practices by framing, and thereby shaping, the approach taken by the judge. Beyond the courtroom, a clear statement of sentencing purposes can also serve an important communicative function and contribute to public understanding of sentencing practices. Promulgating the law in such a way that it is accessible and understandable to the public is vital for several reasons. At a fundamental level, adherence to the rule

²¹ *Sentencing Act* (NSW) (n 2) s 3A; *Sentencing Act* (Vic) (n 2) s 5(1).

²² South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7884 (John Rau, Attorney-General) (‘*Hansard*’).

²³ *Stunden* (n 20).

²⁴ Warner, Davis and Cockburn (n 19) 84–5.

of law requires that those who are subject to laws are able to understand their reach and application.²⁵ But the importance of effective communication goes far beyond this, since public attitudes have an impact upon the effective and efficient administration of criminal justice.²⁶ Warner et al suggest that public attitudes to sentencing are significant for three key reasons: because of the contribution these attitudes make to public confidence in the criminal justice system; because ‘it is generally accepted that sentencing policy and practice should be responsive to public opinion’; and because ‘perceptions of public opinion can force changes to the law’.²⁷

Studies have indicated general public dissatisfaction with sentencing policy and practices, chiefly centred around a perceived leniency on the part of sentencing judges.²⁸ However, research also demonstrates that a greater degree of familiarity with particular cases and the policy behind individual sentencing decisions leads to higher rates of public approval of the sentences imposed.²⁹ Studies carried out by

²⁵ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37–9.

²⁶ Julian Roberts and Mojca M Plesničar, ‘Sentencing, Legitimacy, and Public Opinion’ in Gorazd Meško and Justice Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Springer, 2015) 33.

²⁷ Kate Warner et al, *Gauging Public Opinion on Sentencing: Can Asking Jurors Help?* (Trends and Issues in Crime and Criminal Justice Report No 371, 16 March 2009) 1 (‘*Gauging Public Opinion on Sentencing*’).

²⁸ Nicola Marsh et al, *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council* (Report, Sentencing Council (UK), August 2019) 4; Carolyn Black et al, *Public Perceptions of Sentencing: National Survey Report* (Report, Sentencing Council (Scotland), September 2019) 12; Natalie Gately et al, ‘The Prisoners Review Board of Western Australia: What Do the Public Know about Parole?’ (2017) 28(3) *Current Issues in Criminal Justice* 293, 295; Geraldine Mackenzie et al, ‘Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing’ (2012) 45(1) *Australian and New Zealand Journal of Criminology* 45, 53; Lorana Bartels, Robin Fitzgerald and Arie Freiberg, ‘Public Opinion on Sentencing and Parole in Australia’ (2018) 65(3) *Probation Journal* 269, 272.

²⁹ Austin Lovegrove, ‘Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community’ [2007] (October) *Criminal Law Review* 769, 776; Kate Warner and Julia Davis, ‘Using Jurors to Explore Public Attitudes to Sentencing’ (2012) 52(1) *British Journal of Criminology* 93, 96–7; Kate Warner and Julia Davis, ‘Involving Juries in Sentencing: Insights from the Tasmanian Jury Study’ (2013) 37(4) *Criminal Law Journal* 246, 248–9; Kate Warner and Caroline Spiranovic, ‘Jurors’ Views of Suspended Sentences’ (2014) 47(1) *Australian and New Zealand Journal of Criminology* 141, 142–3, 145–8; Warner et al, *Gauging Public Opinion on Sentencing* (n 27) 4; Kate Warner et al, *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study* (Trends and Issues in Crime and Criminal Justice Report No 407, 10 February 2011) 3 (‘*Public Judgement on Sentencing*’); Kate Warner et al, ‘Are Judges Out of Touch?’ (2014) 25(3) *Current Issues in Criminal Justice* 729, 741 (‘Are Judges Out of Touch?’); Kate Warner et al, ‘Measuring Jurors’ Views on Sentencing: Results from the Second Australian Jury Sentencing Study’ (2017) 19(2) *Punishment and Society* 180, 186 (‘Measuring Jurors’ Views on Sentencing’).

Warner et al, drawing on the views of jurors who have taken part in the proceedings, demonstrate broad congruence between the views of those jurors and sentencing judges in relation to most crimes.³⁰ Widespread knowledge and understanding is therefore key to public support. Julian Roberts and Mojca M Plesničar are correct to state that ‘the sentencing system must be communicated to the public in an understandable fashion in order to avoid erroneous expectations. The mere existence of sound sentencing principles is insufficient to ensure a high degree of legitimacy.’³¹

Unfortunately, several factors mean that research into, and public dissemination of, sentencing practices in South Australia are disadvantaged relative to comparable jurisdictions. First, there is the recent disestablishment — and non-replacement — of the South Australian Sentencing Advisory Council, which was originally set up in 2012.³² A body such as this is a common feature of comparable criminal justice systems, with larger jurisdictions generally having higher-profile, better-funded and more influential advisory bodies. The Victorian Sentencing Advisory Council (‘Council’), for example, has a statutory footing under pt 9A of the *Sentencing Act* (Vic). The Council’s functions are set out in s 108C and include the provision of advice, the conduct of research, policy development, and public engagement and education.³³

Second, recent changes to the provision of crime-related statistics and research publications have diminished their availability and also, seemingly, their compilation. The former South Australian Office of Crime Statistics and Research (‘OCSAR’) no longer exists, and accessing work undertaken and published by OCSAR, which was previously available online, now depends on making a request to the Justice Policy and Analytics group in the Attorney-General’s Department.³⁴

³⁰ Warner et al, *Gauging Public Opinion on Sentencing* (n 27); Warner et al, *Public Judgement on Sentencing* (n 29); Warner et al, ‘Are Judges Out of Touch?’ (n 29); Warner et al, ‘Measuring Jurors’ Views on Sentencing’ (n 29). There is some divergence, notably in relation to certain sexual offences committed against children under the age of 12, where the jurors considered the judges’ sentences too lenient: Warner et al, ‘Measuring Jurors’ Views on Sentencing’ (n 29) 189–90.

³¹ Roberts and Plesničar (n 26) 34.

³² South Australia’s short-lived Sentencing Advisory Council was set up under the Weatherill Labor government in 2012, but was defunded and thus effectively disestablished by the incoming Marshall Liberal government in 2018: Sentencing Advisory Council, *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* (July 2013) iv; Government of South Australia, Department of Treasury and Finance, *State Budget 2018–19: Budget Measures Statement* (Report, 4 September 2018) 18.

³³ The Sentencing Advisory Councils in New South Wales, Victoria and Tasmania carry out analogous functions.

³⁴ ‘Crime and Justice Data’, *Government of South Australia Attorney-General’s Department* (Web Page) <<https://www.agd.sa.gov.au/justice-system/crime-and-justice-data>>.

Third, although sentencing remarks from the District Court and Supreme Court of South Australia are published on the website of the Courts Administration Authority, they are only made available for four weeks after publication.³⁵ Access beyond this period depends upon making a successful request to the Courts Administration Authority and may involve paying a fee.

Fourth, South Australia is disadvantaged relative to other jurisdictions due to the lack of a publicly available sentencing benchbook, such as those that exist in New South Wales, Victoria and Queensland.³⁶ In New South Wales, there is also the Judicial Commission, a statutory function of which is to ‘disseminate information and reports on sentences imposed by courts’.³⁷

Without wishing to overstate its potential effect, it could be argued that the promulgation of the primary purpose in the new Act provides a focal point for the discussion of sentencing, in a way that more complex or multi-faceted expressions of its function do not. It was clearly intended that the new Act would increase public understanding of sentencing; part of the second reading speech reads:

The criminal law should be accessible so that it is written in language that is capable of being understood by citizens of reasonable literacy. That means that it must address not only an audience of lawyers, but also an audience of average citizens.³⁸

The new Act embodies a clear legislative intent to increase the clarity and accessibility — and thus public understanding — of sentencing practice, but it should be noted that South Australia is the only Australian jurisdiction that does not issue explanatory memoranda alongside legislation.³⁹ In any event, it is unlikely that a large proportion of the public will engage directly with statutory sentencing provisions. Instead, the primary source of information is likely to be the media, which are apt to focus on extreme cases in a way that could increase public scepticism and fuel the demand for harsher penalties.⁴⁰ Although it may be fanciful to imagine that the legislative

³⁵ The sentencing remarks from the Magistrates Court of South Australia are not publicly available at all: ‘Sentencing Remarks’, *Courts Administration Authority of South Australia* (Web Page) <<http://www.courts.sa.gov.au/SentencingRemarks/Pages/default.aspx>>

³⁶ Judicial Commission of NSW, *Sentencing Bench Book* (rev ed, 2019); Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2020); Michael Shanahan DCJ, *Benchbook on Sentencing* (Supreme Court Library Queensland, rev ed, 2017).

³⁷ *Judicial Officers Act 1986* (NSW) s 8(1)(b).

³⁸ *Hansard* (n 22) 7888 (John Rau, Attorney-General).

³⁹ For views on how inadequacies/idiosyncrasies in the South Australian legislative process may also hinder public engagement in the lawmaking process, see Sarah Moulds and Laura Grenfell, ‘Youth Treatment Orders Bill Highlights Ad Hoc Approach to Rights-Scrutiny of Bills’ (2019) 41(4) *Law Society of South Australia Bulletin* 36.

⁴⁰ Roberts and Plesničar (n 26) 35, 47.

primary purpose will impact media reporting in a tangible way, stating the primary purpose is a good starting point for a public conversation about the role and aims of criminal sentencing, and does at least portray an accessible and strong message about what the sentencing exercise is trying to achieve. The potency of the primary purpose therefore depends upon developing an understanding of how sentencing can protect the safety of the community and communicating this effectively.

C *Community Protection in Sentencing*

The new Act does not provide a definition of what is meant by ‘to protect the safety of the community’, nor guidance as to how it might be achieved, and this ambiguity is problematic. Looking to the sentencing regimes of other jurisdictions offers some limited assistance, but also demonstrates the distinctiveness of the South Australian approach. Community protection is cited in most sentencing statutes across Australia, where it often appears as one of a number of unranked sentencing purposes.⁴¹ The same is true of the common law that undergirds these statutory purposes.⁴²

In addition to this undifferentiated role, the sentencing regimes of Victoria and Western Australia give added prominence to community protection. In these jurisdictions, the means by which community safety is to be protected is construed narrowly, focussing on the direct threat posed by offenders perceived to be dangerous and on their incapacitation. The *Sentencing Act* (Vic) refers to the protection of the community as one of its generalised ‘sentencing guidelines’,⁴³ and also uses the concept as a key determinant in deciding the length of the term of imprisonment imposed upon a ‘serious offender’ who is being sentenced for a ‘relevant offence’;⁴⁴ s 6D of the *Sentencing Act* (Vic) states:

If under section 5 the Supreme Court or the County Court in sentencing a serious offender for a relevant offence considers that a sentence of imprisonment is justified, the Court, in determining the length of that sentence—

- (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

⁴¹ *Sentencing Act* (ACT) (n 2) s 7(1)(c); *Sentencing Act* (NSW) (n 2) s 3A(c); *Sentencing Act* (Vic) (n 2) s 5(1)(e). In Queensland and Tasmania, protecting the community is ‘a paramount’ or ‘a primary’ consideration: *Sentencing Act* (Qld) (n 2) s 3(b); *Sentencing Act* (Tas) (n 2) s 3(b).

⁴² *Veen [No 2]* (n 5) 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

⁴³ *Sentencing Act* (Vic) (n 2) s 5(1)(e).

⁴⁴ A ‘serious offender’ is defined under s 6B(3) of the *Sentencing Act* (Vic) (n 2) as one of the following: a serious arson offender; a serious drug offender; a serious sexual offender; or a serious violent offender. Each of those terms are defined in s 6B(2). A ‘relevant offence’ is defined in s 6B(3) as one of the following: an arson offence in the case of a serious arson offender; a drug offence in the case of a serious drug offender; a sexual offence in the case of a serious sexual offender; or a serious violent offence in the case of a serious violent offender.

- (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

Therefore, the Victorian regime makes provision for the court to *over-punish* in these circumstances, to impose a sentence of imprisonment that is ‘longer than that which is proportionate to the gravity of the offence’ where the sentence is imposed in order to achieve the ‘principal purpose’ of ‘the protection of the community from the offender’.⁴⁵

The Western Australian sentencing legislation also makes the connection between community protection and the incarceration of the offender, stating in s 6(4) of the *Sentencing Act 1995* (WA) (*‘Sentencing Act (WA)’*):

A court must not impose a sentence of imprisonment on an offender unless it decides that—

- (a) the seriousness of the offence is such that only imprisonment can be justified; or
- (b) the protection of the community requires it.

It is notable that these Victorian and Western Australian provisions intimately and exclusively connect community protection to imprisonment and to the immediate threat posed by the offender. This places the focus on incapacitation as the means by which to protect the community, and explicitly (in the case of Victoria) or implicitly (for Western Australia) endorses the imposition of a disproportionately long sentence of imprisonment where it is considered necessary in order to protect the community from the offender. In other words, in both Victoria and Western Australia, an assessment of protecting the safety of the community looks only to the threat posed by the offender and can only operate to inflate the sentence.

It is worth noting that there are features of the new Act that point towards a link between imprisonment and community protection. For instance, s 10(2) of the new Act comprises a provision analogous to s 6(4) of the *Sentencing Act* (WA): a sentence of imprisonment is to be used only where it is necessitated by the ‘seriousness of the offence’, or where ‘it is required for the purpose of protecting the safety of the community’. In addition, and as noted above, the sentencing purpose of incapacitation is not explicitly included under the new Act and this omission may suggest that the purpose of community protection therefore stands in its stead.

⁴⁵ For a contemporary account of the provisions, see Richard G Fox, ‘Legislative Comment: Victoria Turns to the Right in Sentencing Reform’ (1993) 17(6) *Criminal Law Journal* 394. For an account of judicial reluctance to use the provisions, see Elizabeth Richardson and Arie Freiberg, ‘Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria’ (2004) 4(1) *Criminal Justice* 81; Warner, Davis and Cockburn (n 19) 83–4.

However, there are numerous reasons to suppose that the meaning of ‘to protect the safety of the community’ under the new Act is significantly more expansive. Unlike the Victorian and Western Australian examples offered above, it must be remembered that in South Australia the primary purpose applies to the sentencing exercise in respect of *all* offences and offenders. Since the majority of offenders are convicted of an offence for which imprisonment is either not available or is unlikely to be imposed, it follows that the concept of community safety applies to more than just incapacitation.⁴⁶ It would be strange indeed if the generalised ‘primary purpose’ and ‘paramount consideration’ of sentencing applied only to a minority of offenders.

An expansive reading of the protection of community safety is evident in the parliamentary debates that preceded the enactment of the new Act, where parliamentarians evinced a desire to move away from imprisonment as a punishment for non-violent offenders and to increase the opportunities for rehabilitation and reintegration of offenders.⁴⁷ This is also supported by aspects of the consultation exercises carried out during the drafting and carriage of the new Act. In a public factsheet released alongside the Bill, it was noted: ‘If the offender is spared [imprisonment], they are more likely to be rehabilitated, increasing public safety and providing better outcomes for the whole community.’⁴⁸ This approach was echoed in the second reading of the Bill:

[I]n introducing the sentencing option of intensive correction orders, the legislation de-emphasises immediate custodial orders in favour of community based correction for non-violent and non-dangerous offenders. The provision of a wider variety of sentencing options promotes alternatives to expensive and sometimes criminalising imprisonment.⁴⁹

This passage illustrates an understanding of the reductive way in which community safety might be construed and recognises the potentially deleterious impact of over-incarceration policies that make re-offending more likely.⁵⁰

D *What Is Community Safety, and How Is It Best Achieved?*

The application of the primary purpose to sentencing the full range of offending in South Australia demands more than a narrow concentration on the immediate threat posed by a serious violent offender, and imprisonment as the sole appropriate

⁴⁶ The Australian Bureau of Statistics reports that 9% of offenders convicted in the period 2018–19 were sentenced to ‘custody in a correctional institution’: Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) tbl 32.

⁴⁷ South Australia, *Parliamentary Debates*, Legislative Council, 18 May 2017, 6774 (Tung Ngo).

⁴⁸ Attorney-General’s Department (SA), *Transforming Criminal Justice: New Sentencing Principles and Options* (Factsheet, 25 August 2016) 2.

⁴⁹ *Hansard* (n 22) 7883 (John Rau, Attorney-General).

⁵⁰ See *Yardley v Betts* (1979) 22 SASR 108, 113.

response. Protecting the safety of the community should be given an expansive meaning and significance. If this is to be addressed by sentencing judges, questions arise around the scope and definition of community safety, and how best to achieve its protection. The first of these challenges is definitional: what (or who) is the community, and what does it mean to protect its ‘safety’? Once these definitional issues have been resolved, the second question is empirical: how is protecting the safety of the community best achieved?

1 *The Definitional Question*

The question of what constitutes the community is not addressed by the legislation beyond noting that it can be construed ‘as individuals or in general’.⁵¹ Since this formulation is inclusive, it leaves open a broad definition of the term, taking in former and potential future victims of crime, and the families and communities in which, and with whom, they reside. Although it is perhaps not something that was in the minds of legislators, it should be noted that offenders are also members of the community, and thus the primary purpose may need to have regard for their safety. This could have implications inter alia for the imprisonment of vulnerable offenders. Save this point, the concept of ‘community’ is relatively uncontroversial, but this leads to questions around what is meant by ‘safety’.

In common with the narrow reading adopted in the Victorian and Western Australian legislation discussed above, protecting the safety of the community could connote protection from the immediate threat of a violent offender, with this protection achieved through the imposition of a (possibly disproportionately long) sentence of imprisonment. This may be reasonable in the case of a minority of dangerous offenders but is too narrow in light of the discussion above around the universality of the primary purpose.

According to a more expansive view, community safety might be read as akin to promoting the welfare of the community. However, even the most ardently progressive advocates of penal policy and criminal justice reform would have to recognise the limitations of sentencing practices in this respect. A more measured and circumspect view, therefore, might recognise the effects of criminal offending as the relevant social harm with which the new Act is concerned, and protecting the safety of the community as effectively synonymous with crime reduction. Contemporaneous policy initiatives addressed at reducing reoffending (such as the South Australian Department for Correctional Services’ ‘10 by 20’ initiative)⁵² reinforce this intermediate view, which seems more in keeping with the legislative intent. It is also a more realistic purpose for sentencing practices. As Brennan J stated in *Channon v The Queen*

⁵¹ *Sentencing Act* (SA) (n 2) s 3.

⁵² See Department for Correctional Services (SA), *A Safer Community by Reducing Reoffending: 10% by 2020* (Report, December 2016).

[t]he necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.⁵³

2 *The Empirical Question*

If this connection between protecting community safety and crime reduction is accepted, achieving the former becomes an empirical question. That is to say, the efficacy of different approaches can be measured against their effect and this in turn can shape sentencing practices to further the primary purpose of protecting the safety of the community. In its examination of the deterrent effect of imprisonment, the Victorian Sentencing Council stated:

If a sentencing purpose is intended to result in a reduction in crime, then in order to determine what weight should be given to that purpose, it is critical to examine the evidence of whether or not — or the extent to which — that goal of crime reduction is achieved.⁵⁴

This is not to say that answers to this empirical question are or will be easily found, and it is beyond the scope of this article to recommend particular forms of punishment as optimal. The utility of a focus on protecting the safety of the community as the primary purpose of sentencing is that it directs the enquiry towards the evidence. Wide-ranging research has been, and continues to be, undertaken into the effectiveness of different punishment options, sometimes coalescing under banners such as ‘what works’ or ‘smart’ sentencing and at other times existing as discrete studies into the effects of particular sentencing outcomes and punishments.⁵⁵

These studies look to perennial difficulties, such as the challenges involved in predicting the ‘dangerousness’ of an individual,⁵⁶ and the link between sentence severity and deterrence.⁵⁷ They point to the lack of evidence for imprisonment’s

⁵³ *Channon v The Queen* (1978) 20 ALR 1, 5.

⁵⁴ Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence* (Report, Sentencing Advisory Council, April 2011) 2.

⁵⁵ Maria Sapouna et al, *What Works to Reduce Reoffending: A Summary of the Evidence* (Report, Justice Analytical Services (Scotland), 8 May 2015) 96–8; Peggy Fulton Hora, ‘Tough on Crime Is Not Smart on Crime’ (2013) 8 *Insight* 18, 21.

⁵⁶ Michael Tonry, ‘Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again’ (2019) 48(1) *Crime and Justice* 439.

⁵⁷ Andrew von Hirsch, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999).

effectiveness in reducing recidivism,⁵⁸ and suggest that the experience of imprisonment may be criminogenic.⁵⁹ Research highlights the deleterious effects of short sentences of imprisonment,⁶⁰ and the benefits and negative outcomes of decreasing incarceration rates.⁶¹ The benefits of decarceration include limiting the damage caused by imprisonment,⁶² which has a heightened effect on the Indigenous population, who are imprisoned at a far higher rate than the non-Indigenous population.⁶³ This damage reaches beyond the incarcerated individual and can have a devastating effect on communities.⁶⁴

While its effectiveness as a means by which to achieve community safety is contested, it is clear that imprisonment is a costly option, and significantly more so than alternatives.⁶⁵ The effectiveness of these alternatives is also contested. For instance,

⁵⁸ Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38(1) *Crime and Justice* 115; Francis T Cullen, Cheryl Lero Jonson and Daniel S Nagin, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 91(3) *The Prison Journal* 48S.

⁵⁹ José Cid, 'Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) 6(6) *European Journal of Criminology* 459.

⁶⁰ Georgina Eaton and Aidan Mews, *The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending* (Analytical Series, Ministry of Justice (UK), 2019). In 1995, Western Australia became the first Australian jurisdiction to abolish short prison sentences, being those less than three months. This has since been expanded to cover sentences of less than six months' imprisonment: *Sentencing Act 1995* (WA) s 86.

⁶¹ Brett Garland et al, 'Decarceration and Its Possible Effects on Inmates, Staff, and Communities' (2014) 16(4) *Punishment and Society* 448.

⁶² The damage attributed to the experience of incarceration includes harm to mental and physical health, to family and other relationships and to future housing and employment opportunities: John Irwin and Barbara Owen, 'Harm and the Contemporary Prison' in Alison Lieblich and Shadd Maruna (eds), *The Effects of Imprisonment* (Routledge, 2005) 94; Julie Moschion and Guy Johnson, 'Homelessness and Incarceration: A Reciprocal Relationship?' (2019) 35(4) *Journal of Quantitative Criminology* 855; Alec Ewald and Christopher Uggen, 'The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012) 83.

⁶³ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 21–2.

⁶⁴ Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

⁶⁵ Anthony Morgan, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Research Report No 5, Australian Institute of Criminology, 2018).

studies have examined the effects of good behaviour bonds on recidivism,⁶⁶ and suggested that the rehabilitation prospects of offenders at a low risk of recidivism might be negatively affected by strict supervision practices.⁶⁷ The use of suspended sentences of imprisonment has been criticised,⁶⁸ leading to a cessation in their use, most recently in New South Wales.⁶⁹

Further research has considered the potential benefits yielded by the use of alternatives to mainstream punishments, such as problem-solving courts,⁷⁰ restorative justice,⁷¹ and justice reinvestment initiatives.⁷² Such research provides — sometimes conflicting — evidence about the effects and effectiveness of different criminal justice processes and outcomes, and can be used to inform sentencing practices; its continuance and use to inform sentencing practices are key to protecting community safety.

III THE CASUALTIES OF A COMMUNITY SAFETY-LED APPROACH

It has already been explained that community safety in the new Act must be construed more broadly than in terms of the immediate threat posed by the offender, since that is only likely to apply to a small minority of offenders. In a system in which protecting the safety of the community is the universal primary purpose of sentencing, the concept must in principle extend to all, or at least the majority of, sentencing decisions. This raises questions of how the primary purpose will interact

⁶⁶ Suzanne Poynton, Don Weatherburn and Lorana Bartels, ‘Good Behaviour Bonds and Re-Offending: The Effect of Bond Length’ (2014) 47(1) *Australia and New Zealand Journal of Criminology* 25.

⁶⁷ Christopher T Lowenkamp and Edward J Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders* (Topics in Community Corrections Report, 2004).

⁶⁸ Arie Freiberg, ‘Suspended Sentences in Australia: Uncertain, Unstable, Unpopular, and Unnecessary?’ (2019) 82(1) *Law and Contemporary Problems* 81; Lorana Bartels, ‘The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles’ (2007) 31(2) *Criminal Law Journal* 113.

⁶⁹ Through repeal of s 12 of the *Sentencing Act* (NSW) (n 2): *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 [14].

⁷⁰ For a recent review of the operation of problem-solving courts in Queensland, see Arie Freiberg et al, *Queensland Drug and Specialist Courts Review* (Final Report, November 2016). See also Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009).

⁷¹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Report No 127, Australian Institute of Criminology, 18 February 2014).

⁷² Matthew Willis and Madeleine Kapira, *Justice Reinvestment in Australia: A Review of the Literature* (Research Report No 9, Australian Institute of Criminology, 2018); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, June 2013).

with the secondary purposes set out in s 4 of the new Act, the common law principles set out in s 10 (principally proportionality and the implied requirement for consistency), and the extent to which the principal sentencing purpose may erode the increasingly prominent role played by victims in sentencing.

A W[h]ither the Secondary Purposes of Sentencing?

In its response to the consultation process undertaken before the new Act was introduced, the Law Society of South Australia expressed concerns about the elevation of community safety as a priority above all the other aims of sentencing, stating that ‘no sentencing consideration should be given primacy over another. We assert that in each case judicial discretion should be exercised by judicial officers.’⁷³ This concern reflects a view also expressed by the High Court: that sentencing may have a number of aims; that these may sometimes conflict with each other; and that the sentencing judge is in the best position to decide which purpose(s) should apply in a given case.⁷⁴

The new Act does not give much guidance as to the relationship between the primary purpose of protecting the safety of the community and the secondary purposes listed in s 4. The primary–secondary distinction and the assertion in s 9 that the primary purpose is ‘the paramount consideration’ might suggest that the secondary purposes will only be relevant to a sentencing decision where there is no conflict with the primary purpose. However, this ostensibly straightforward hierarchical relationship is not without difficulties in practice. For instance, it may be difficult to argue that the primary purpose must take precedence where its pursuit points weakly towards one course of action, while one or more of the secondary purposes point strongly in another. In other words, it is arguable that the primacy afforded to protecting the safety of the community is not absolute, but a matter of degree that depends upon the relative strength of other, potentially opposing, considerations.

In some cases, this will not be a material concern, since the primary and secondary purposes will align to guide a particular result. Take, for example, hypothetical Offender A, who has been convicted of a violent and premeditated offence which caused serious harm to the victim and is the latest in a line of similar offences committed by Offender A. For Offender A, the imposition of a lengthy sentence of imprisonment may simultaneously accord with the primary purpose under s 3 of the new Act (to protect the safety of the community) and each of the secondary purposes listed under s 4:

- (a) to ensure that the defendant—
 - (i) is punished for the offending behaviour; and
 - (ii) is held accountable to the community for the offending behaviour;

⁷³ Law Society of South Australia, Submission to Attorney-General of South Australia (13 September 2016) 2 [9] <https://www.lawsocietysa.asn.au/pdf/Submissions/L%20130916_%20Sentencing%20_Bill.pdf>.

⁷⁴ *Magaming v The Queen* (2013) 252 CLR 381 (‘*Magaming*’).

- (b) to publicly denounce the offending behaviour;
- (c) to publicly recognise the harm done to the community and to any victim of the offending behaviour;
- (d) to deter the defendant and others in the community from committing offences;
- ...
- (e) to promote the rehabilitation of the defendant.

The sentence of imprisonment may promote rehabilitation insofar as imprisonment may be the only or most effective means by which to ensure that the offender engages with programs that can address the underlying causes of the offending and help to effect behaviour change. Overall, there is a straightforward and relatively obvious alignment of the primary and secondary purposes, and imprisonment can be justified according to each of them separately. Moreover, achieving the secondary purpose often serves to further the primary purpose of protecting community safety. For example, if the imposition of a prison sentence successfully achieves one or both of the secondary purposes of deterrence and rehabilitation, this also serves to protect community safety by reducing the incidence of this type of crime.

In other cases, however, achieving alignment of the purposes will be more difficult — or even impossible — since the primary purpose may conflict with one or more of the secondary purposes. This can be illustrated by hypothetical Offender B, a young person of previously good character, who has been found guilty of causing death by negligent driving. Offender B has caused significant harm, and the imposition of a lengthy prison sentence might be justified according to the secondary purposes of retribution, accountability, denunciation and the recognition of harm done to the community and to the victims.⁷⁵ However, it is less clear that this will serve the remaining secondary purposes of deterrence and rehabilitation, and crucially nor is it clear that it will serve the primary purpose of protecting the safety of the community.

The seriousness of the offence that Offender B has committed is reflected in the applicable maximum penalties. Under s 19A(2)(a)(i) of the *Criminal Law Consolidation Act 1935* (SA), the offence of ‘causing death or harm by use of vehicle or vessel’ is punishable by up to 15 years’ imprisonment (or life imprisonment for an aggravated offence). In addition, the offender can be disqualified ‘from holding or obtaining a driver’s licence for 10 years or such longer period as the court orders’.⁷⁶ However, the offence that Offender B has committed is often difficult to sentence, chiefly because of the difficulty involved in assessing the culpability of a person whose conduct may be attributable to a momentary lapse in concentration, but which

⁷⁵ *Sentencing Act* (SA) (n 2) s 4.

⁷⁶ *CLCA* (n 12) s 19A(2)(a)(i).

has led to catastrophic consequences.⁷⁷ This type of case was discussed in the parliamentary debates during the second reading of the Bill,⁷⁸ and opposition Member of the Legislative Council, The Hon Andrew McLachlan, said of the balance to be struck when sentencing: ‘We must be careful that the punishments that are inflicted in our name do not harden individuals into career criminals.’⁷⁹

The courts have wrestled with the difficulties these cases present for the sentencing calculation. In *R v Payne*,⁸⁰ the South Australian Court of Criminal Appeal declined to issue a sentencing guideline in relation to the offence, noting the wide range of culpability that it might involve. Although the Court accepted the need for deterrence in such cases, it did not accept that this would necessarily be achieved through the imposition of a long sentence of imprisonment, due to the circumstances in which such offences often occur.⁸¹ The Court stated that ‘whether an increased level of sentences would have any significant effect is doubtful’.⁸² The Court pointed to the potential benefits of restorative justice in such cases.⁸³ There may also be a role for problem-solving courts, which seek to reduce crime through bringing about behaviour change.⁸⁴

There are clearly tensions when it comes to trying to accommodate the primary and secondary purposes set out in the new Act. Notwithstanding these, severe punishment (most likely a sentence of imprisonment) might be justified for each of the hypothetical offenders described above on the grounds that it is necessary in order to maintain public confidence in sentencing and the operation of the criminal justice system more broadly. The importance of public education about sentencing as part of ensuring confidence in the operation of criminal justice was emphasised above, and it is possible to frame this as an aspect of community safety; for instance, a lack of confidence in the system might lead to an increase in vigilantism.

This expansive view of community safety highlights its potential flexibility, and this may be disadvantageous. If it is construed overly broadly, it is susceptible to the

⁷⁷ See *R v Payne* (2004) 89 SASR 49 (*‘Payne’*). See also the guideline judgment issued in relation to the equivalent offence in New South Wales in *R v Jurisic* (1998) 45 NSWLR 209.

⁷⁸ South Australia, *Parliamentary Debates*, Legislative Council, 16 May 2017, 6692 (Mark Parnell).

⁷⁹ *Ibid* 6687 (Andrew McLachlan).

⁸⁰ *Payne* (n 77).

⁸¹ The Court noted the following: ‘driver inexperience, immaturity, attitudes to alcohol and the belief, that one tends to encounter with young people, that “it cannot happen to me”’: *ibid* 63 [49].

⁸² *Ibid*.

⁸³ *Ibid* 60–1 [37], 66 [57].

⁸⁴ It has been suggested that ‘driving while intoxicated courts’ could be instituted in Australia, following a United States model: see Elizabeth Richardson, *A Driving while Intoxicated/Suspended List for Victoria* (Background Paper, Australian Centre for Justice Innovation, 23 June 2013).

criticism that it offers little direction to the sentencing exercise, and it may decrease its significance in sentencing practice. If it is considered that there is a lack of clarity around how the primary and secondary purposes should apply, this may lead to the appellate courts reasserting judicial discretion as the only outcome. The High Court did as much in redressing the balance in favour of discretion when it came to the operation of ‘standard non-parole periods’ in New South Wales in *Muldrock v The Queen*.⁸⁵

B *Proportionality*

A focus on the primary purpose of community safety may diminish the importance of other, competing sentencing purposes that under the new Act have been relegated to secondary purposes. A further notable casualty might be the principle of proportionality, which dictates that the punishment meted out to the offender should be proportionate to the crime committed. Proportionality has for some time held sway as the pre-eminent consideration in sentencing across Australia,⁸⁶ and it is maintained as a sentencing principle under s 10 of the new Act. Given the emphasis on the ‘primary purpose’ of protecting community safety as the ‘paramount consideration’, however, its pre-eminence must now be in question in South Australia.

A proportionate sentencing response from the criminal justice system will be neither too lenient nor too severe. This calculation is rooted in an assessment of the ‘objective seriousness’ of the offence,⁸⁷ and must also take into account the subjective features of the offender that bear on culpability. The calculation can be intractably complex, both when it comes to deciding the proportionate punishment for a given offence and between the relative seriousness of different types of offences (which is worse: defrauding an elderly pensioner of her life savings or committing an assault that causes a person to require surgery?).⁸⁸ These problems are exacerbated by the broad range of potentially applicable offender characteristics that might serve to aggravate or mitigate the offence, such as offending history and degree of planning. Mirko Bagaric has suggested that there are ‘more than 200 mitigating and aggravating factors in sentencing’.⁸⁹ If a proportionate punishment requires that the offender experience hardship proportionate to the harm caused by the offence, a further complication is that the subjective experience of punishment will vary from

⁸⁵ *Muldrock v The Queen* (2011) 244 CLR 120 (*‘Muldrock’*), in which the High Court overturned *R v Way* (2004) 60 NSWLR 168, which had placed much greater influence on the ‘standard non-parole period’ in the offences to which they apply.

⁸⁶ *Veen [No 2]* (n 5) 472, 486, 490–1.

⁸⁷ For a discussion by the High Court of what ‘objective seriousness’ is, see *Muldrock* (n 85) 132 [27]–[29].

⁸⁸ These are sometimes referred to as questions of ‘cardinal proportionality’ and ‘ordinal desert’, respectively: see Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16(1) *Crime and Justice* 55.

⁸⁹ Bagaric, ‘Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity’ (n 9) 157.

person to person.⁹⁰ Even without considering the effect of the primary purpose, the implementation of the principle of proportionality is inherently problematic, since there are many ways of thinking about what should affect offence seriousness — and concomitant offender culpability — for the purposes of proportionate sentencing.⁹¹

The High Court has endorsed the pre-eminence of proportionality, and it has been suggested that it is so ingrained into the thinking of sentencing judges that it often does not warrant mention in sentencing remarks.⁹² Despite its high profile, it is not constitutionally enshrined and parliaments are free to shape the discretion wielded by sentencing judges.⁹³ The new Act's focus on protecting community safety necessarily diminishes proportionality in sentencing in South Australia, as acknowledged in the second reading of the Bill:

This reform will be a reform of the way in which the courts sentence offenders and the results of that process. To take a major example, in requiring that '*The primary consideration of a court in sentencing a defendant for an offence must be the protection of the safety of the community (whether as individuals or in general)*', the legislation will require the court to de-emphasise the predominance of proportionality in fixing sentence (although it is still very relevant).⁹⁴

Given the concession in the second reading speech that it remains 'very relevant', it is probably safe to assume that proportionality will continue to be influential, but proportionality in sentencing is difficult to reconcile with the prioritisation of community safety. Unlike the latter, proportionality cannot be considered an empirical question, since it depends upon normative value judgements. It is concerned with a retrospective appraisal of the offender's desert as a justification for punishment, rather than the prospective question of what course of action will serve to enhance the protection of the safety of the community. Under a system that prioritises the latter, the disjunct might manifest in either of two ways: the imposition of a disproportionately *punitive* sentence (such as a long term of imprisonment) where the offender is deemed to be an unacceptable risk to public safety; or the imposition of a disproportionately *lenient* sentence where the rehabilitative prospects of the offender are high and the probability of recidivism low.

⁹⁰ Adam J Kolber, 'The Comparative Nature of Punishment' (2009) 89(5) *Boston University Law Review* 1565; Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109(1) *Columbia Law Review* 182.

⁹¹ Matt Matravers, 'The Place of Proportionality in Penal Theory: Or Re-Thinking Thinking about Punishment' in Michael Tonry (ed), *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press, 2019) 76.

⁹² Warner, Davis and Cockburn (n 19) 12.

⁹³ See generally *Magaming* (n 74). See also *Payne* (n 77) 57–8 [24]–[25].

⁹⁴ *Hansard* (n 22) 7883 (John Rau, Attorney-General) (emphasis in original).

C Consistency

The High Court has repeatedly asserted the importance of consistency in sentencing. In *Wong v The Queen*, Gleeson CJ stated that inconsistency could constitute ‘a form of injustice’⁹⁵ because

[L]ike cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.⁹⁶

Similarly, Mason J has said: ‘It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.’⁹⁷

Adherence to this ‘basic principle’ necessitates consistency on the part of sentencing judges; as Gleeson CJ states, the decision ‘ought to depend as little as possible upon the identity of the judge who happens to hear the case’.⁹⁸ Alongside proportionality, s 10 of the new Act maintains the common law principle of ‘parity’, and consistency is likely to remain a key consideration.⁹⁹ However, achieving consistency can be difficult for two important reasons. The first of these echoes the complexity of proportionality alluded to above: the myriad differences between cases means that achieving consistency in sentencing is inherently difficult, as it involves balancing often incommensurable considerations relating to the offence and the subjective features of the offender. The late Justice Scalia of the United States Supreme Court likened such exercises to ‘judging whether a particular line is longer than a particular rock is heavy’.¹⁰⁰ Navigating these complexities also led Lord Lane CJ of the Court of Appeal of England and Wales to describe sentencing as ‘an art and not a science’.¹⁰¹

The second complication is that the concept of consistency itself is open to interpretation, with a distinction commonly drawn between consistency of approach and consistency of outcome.¹⁰² Put simply, an assessment of consistency of approach will

⁹⁵ *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (‘Wong’).

⁹⁶ *Ibid.*

⁹⁷ *Walker v New South Wales* (1994) 182 CLR 45, 49 (citations omitted).

⁹⁸ *Wong* (n 95) 591 [6].

⁹⁹ Strictly construed, the parity principle applies to the sentencing of co-offenders, but it forms part of a larger expectation of consistency in sentencing arising out of the requirement that all should be treated as equal by the law.

¹⁰⁰ *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888, 897 (1988).

¹⁰¹ *Attorney-General’s Reference (No 4 of 1989)* [1990] 1 WLR 41, 46, quoted in Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) 49–50.

¹⁰² Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There’ (2013) 76(1) *Law and Contemporary Problems* 265, 270.

prioritise the consistent application of principles, whereas consistency of outcome tends to look to whether those who have committed similar offences have been treated similarly. As Sarah Krasnostein and Arie Freiberg explain, consistency of outcome is readily achieved through the use of ‘statistical grids of the type employed by the US federal courts or mandatory sentencing schemes’,¹⁰³ methods that are largely alien to Australian sentencing. In *Hili v The Queen*, the High Court suggested that consistency of outcome should not predominate over the more important consistency of approach.¹⁰⁴ The Court stated:

Consistency is not demonstrated by, and does not require, numerical equivalence ... It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes ... *The consistency that is sought is consistency in the application of the relevant legal principles.*¹⁰⁵

Adopting the primary purpose should promote consistency of approach to a greater extent than would be the case where there is not a single, overarching, paramount consideration. However, a focus on consistency of approach may erode the more visible measure of consistency of outcome. Justice Mason has noted that the appearance of inconsistency in sentencing may ‘lead to an erosion of public confidence in the integrity of the administration of justice’.¹⁰⁶ Although the primary purpose actually has the potential to improve the consistency with which sentencing judges approach their task, it is important that this is communicated effectively in order to maintain the legitimacy of the sentencing process.

D *Victims’ Interests*

A further aspect of sentencing practice that warrants consideration under a sentencing regime which has the primary purpose of protecting the safety of the community is the position of victims of crime. Recent decades have seen a relatively rapid expansion of opportunities for the involvement of victims in the adversarial criminal process.¹⁰⁷ The most pertinent from a sentencing perspective is the ‘victim impact statement’, which allows those who have been affected by crime a voice in the sentencing process. Section 10(1) of the *Victims of Crime Act 2001* (SA) states: ‘A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence.’

¹⁰³ Ibid 271.

¹⁰⁴ *Hili v The Queen* (2010) 242 CLR 520.

¹⁰⁵ Ibid 535 [48] (emphasis added).

¹⁰⁶ *Lowe v The Queen* (1984) 154 CLR 606, 610–11 (Mason J).

¹⁰⁷ See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 12–13.

The South Australian mechanism for making either a ‘victim impact statement’ or ‘community impact statement’ is set out in div 2 of the new Act. Under s 14(1), a victim of crime ‘who has suffered injury, loss or damage resulting from an indictable offence or a prescribed summary offence’ can tender a written statement to the court setting out ‘the impact of that injury, loss or damage on the person and the person’s family’. Further, s 15 makes provision for ‘[a]ny person’ to make a submission to the Commissioner for Victims’ Rights so that the Commissioner (or alternatively, the prosecutor) may submit a written ‘community impact statement’ during sentencing proceedings, pertaining to the effect an offence has had on the community. Except insofar as they may provide evidence of relevant harm, impact statements are not intended to have a substantive effect on sentence severity,¹⁰⁸ but they may contain recommendations as to an appropriate sentence.¹⁰⁹

The compatibility of the primary purpose with victims’ interests and the promotion of their productive participation in the sentencing exercise can be read in two ways. Since the primary purpose is concerned with reducing victimisation through promoting community safety, it is ostensibly compatible with the interests of victims. Moreover, the new Act specifically states that sentencing practice is to protect the community ‘as individuals or in general’.¹¹⁰ In some cases, therefore, where the offender poses an ongoing threat to the victim, the new Act reinforces the victim’s personal safety as paramount. Victim statements may also offer insights into the context of the offending that can assist in judging the likelihood of future offending. This can be important in reflecting on how best to promote community safety and how (if at all) this can inform the sentencing decision.

Where the primary purpose may not accord with the interests and wishes of some victims is in relation to the retributive aspects of punishment, which research shows to be one of the predominant reported victim (and victim-family) priorities.¹¹¹ As with consistency, this discrepancy correlates with a move away from proportionality as the pre-eminent organising principle of sentencing. Where a victim expresses the desire to see the offender punished, but the primary purpose points towards the potential for rehabilitation to be achieved through pursuing a ‘softer’ sentencing option, it might be perceived that the victim’s wishes are being unreasonably frustrated.

¹⁰⁸ For a discussion of the role of victim impact statements, see Julian V Roberts, ‘Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole’ (2009) 38(1) *Crime and Justice* 347. Research undertaken in South Australia has suggested that the implementation of victim impact statements did not have an effect on sentence severity, either in terms of likelihood of imprisonment or length of sentence: Edna Erez and Leigh Roeger, ‘The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience’ (1995) 23(4) *Journal of Criminal Justice* 363.

¹⁰⁹ *Sentencing Act* (SA) (n 2) s 16(2).

¹¹⁰ *Ibid* s 3.

¹¹¹ Tracey Booth, *Accommodating Justice: Victim Impact Statements* (Federation Press, 2016) 64.

IV CONCLUSION

Aligning sentencing with protecting the safety of the community as its primary purpose holds promise as a means to promote evidence-based sentencing. The intuitive appeal of the primary purpose as a central organising principle of criminal justice also lends itself to public education, which could serve to reinforce the legitimacy of the process. However, an inherent ambiguity in the new Act means that the relationship of the primary purpose to other, potentially competing sentencing priorities and principles, is unclear. This ambiguity risks undermining the utility of the primary purpose, and the lack of publicly disseminated research and information when it comes to sentencing in South Australia risks exacerbating community discontent around its practice. If the promise of the primary purpose is to be fulfilled, there is a need to take seriously the means by which community safety can be protected through sentencing practices, and to communicate this to the public.

THE RIGHT TO REASONS AND THE COURTS' SUPERVISORY JURISDICTION

ABSTRACT

In *Osmond*,¹ the High Court held that there is no common law rule that generally requires administrative decision-makers to give reasons for their decisions. This article adds to the body of literature arguing that this rule should be revisited. In this article, I argue that the constitutionally entrenched supervisory jurisdiction of ch III courts provides a basis to argue that the rule in *Osmond* needs to be reconsidered. This argument has three strands. The first strand is that giving reasons facilitates the courts' exercise of their supervisory jurisdiction, and hence reasoning analogous to *Pettitt v Dunkley* [1971] 1 NSWLR 376 may be applicable. The second strand is that the High Court's jurisprudence on the validity of legislation seeking to limit that jurisdiction has recognised that judicial review must be practically effective, and that a duty to give reasons would be consistent with such recognition. The final strand is that the High Court has conceptualised the supervisory jurisdiction as playing an accountability role, which lends constitutional support to the idea of a developing 'culture of justification'.

I INTRODUCTION

In *Osmond*, the High Court held that administrative decision-makers do not have a general duty to provide reasons for their decisions. This ruling has been the subject of much academic criticism. Commentators have raised three main arguments in support of decision-makers being required to give reasons.² The first is that the giving of reasons leads to better quality decisions by focusing a decision-maker's

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¹ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 ('*Osmond*').

² Genevra Richardson, 'The Duty to Give Reasons: Potential and Practice' [1986] (Autumn) *Public Law* 437, 445.

attention on the key issues that they need to consider.³ The second is that giving reasons facilitates appeals, whether that be an appeal to a court or merits review.⁴ The final main argument is that the rules of procedural fairness should require decision-makers to provide reasons. The thrust of that argument is that providing reasons is often necessary to ensure that the decision-making process is both apparently and actually fair.⁵

While *Osmond* remains good law,⁶ there has been increasing recognition that in some circumstances reasons do need to be provided. Chief Justice Gibbs' leading judgment in *Osmond* assumed (but did not decide) that, in 'special circumstances', principles of natural justice may require a decision-maker to give reasons.⁷ Some Australian judges have also suggested that the statute in question may require this result.⁸ However, an approach based on the individual circumstances of each case has its own difficulties. As Michael Taggart points out, this approach creates uncertainty as to what is required of decision-makers in particular cases.⁹ In addition, an approach based on special circumstances implies that reasons will not always be required, which means their benefits will not be universally obtained. Finally, as those categories of exceptions expand, there is a growing tension in maintaining that there is no general duty to provide reasons.¹⁰

³ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (Kirby J) ('*Palme*'); GT Pagone, 'Centipedes, Liars and Unconscious Bias' (2009) 83(4) *Australian Law Journal* 255, 261; Laurene Dempsey, 'Western Australia State Administrative Tribunal: A Long Time Coming — Worth the Wait' (2005) 13(1) *Australian Journal of Administrative Law* 47, 58; Margaret Allars, 'Of Cocoons and Small "c" Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004) 307, 318.

⁴ David Dyzenhaus and Michael Taggart, 'Reasoned Decisions and Legal Theory' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134, 148.

⁵ Justice Chris Maxwell, 'Is the Giving of Reasons for Administrative Decisions a Question of Natural Justice?' (2013) 20(2) *Australian Journal of Administrative Law* 76, 83–7.

⁶ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497–8 [43] (French CJ, Crennan, Bell, Gageler and Keane JJ) ('*Wingfoot*').

⁷ *Osmond* (n 1) 670. See also *Sydney Ferries v Morton* [2010] NSWCA 156, [78] (Basten JA) ('*Morton*').

⁸ *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 377 [25] (Handley JA), 396 [117] (Basten JA) ('*Vegan*').

⁹ Michael Taggart, '*Osmond* in the High Court of Australia, Opportunity Lost' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Perspectives* (Oxford University Press, 1986) 53.

¹⁰ See, eg, John Basten, 'Judicial Review: Recent Trends' (2001) 29(3) *Federal Law Review* 365, 381, citing *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531; *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery* [1994] 1 WLR 242.

While there is nothing unusual about a legal rule with exceptions, this article argues that the common law should develop a duty to provide reasons. This proposition has been argued before.¹¹ However, the novelty of my argument is that it relies on rules and values relating to the supervisory jurisdiction entrenched in ss 73 and 75(v) of the *Constitution*.¹² This article has three substantive parts. In Part II, I argue that the *Constitution* not only embodies formal rules, but also substantive values that can influence the development of the common law. In Part III, I develop the three core strands of the argument. The first strand is that decision-makers should be required to give reasons to facilitate the courts' exercise of their entrenched supervisory jurisdiction. The second strand is that the High Court has recognised that Parliament cannot legislate in a way that substantially curtails the supervisory jurisdiction. This reasoning may reflect a constitutional value that recognises that judicial review must be practically effective and not just available as a matter of form, which is furthered by the provision of reasons. The third strand is that these provisions of the *Constitution* embody values of accountability which support a 'culture of justification' in Australian public law.¹³ These last two strands deploy the method of reasoning that I outline in Part II. They rely on substantive values derived from the reasoning in constitutional cases concerning the entrenched supervisory jurisdiction, to argue that the common law should develop a duty to provide reasons. In Part IV, I rebut some responses that may be put against my argument. I leave for another day the question of what consequences may flow from a failure to provide reasons. However, unless and until the High Court further refines the concept of materiality, it is unclear how a failure to give reasons could amount to jurisdictional error because it is difficult to demonstrate how a failure to give reasons could have affected the outcome of the decision itself.¹⁴

II THE COMMON LAW AND THE *CONSTITUTION*

In this Part I seek to make two points. The first is that inherent in, and following from, the text of the *Constitution* are what I will call 'constitutional values'. The second point is that these constitutional values can influence the development of the common law, and not just in the paradigm case where the common law must develop to conform with the *Constitution*.

¹¹ See, eg, Matthew Groves, 'Before the High Court: Reviewing Reasons for Administrative Decisions' (2013) 35(3) *Sydney Law Review* 627, 631–2.

¹² Groves briefly mentioned this idea, but did not fully develop the argument: *ibid* 636–7.

¹³ Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 14. Taggart acknowledges that the term was first used in Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31.

¹⁴ See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ). Compare *Palme* (n 3) 250 [127]–[128] (Kirby J). See also John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85(5) *Australian Law Journal* 273, 299.

A Formal Rules and Substantive Values

My starting point is to draw a distinction between 'formal rules' and 'substantive values'. Drawing upon Patrick Atiyah and Robert Summers, a 'formal rule' is a reason or rule upon which courts are 'empowered or required' to base their decision.¹⁵ However, there are often economic, political, or social considerations that lie behind or explain these formal rules.¹⁶ These considerations are what I will call 'substantive values'. While I draw upon Atiyah and Summers' work, this is not a novel idea and was suggested as early as 1908 by Roscoe Pound.¹⁷

One example that illustrates this point in the *Constitution* is s 116. The formal rule contained in that section precludes Parliament from making laws establishing any religion or religious observance, or prohibiting the free exercise of any religion. When a case involving s 116 arises, the Court is required to determine whether the legislation in question is contrary to that section. In doing so, the Court is required to apply the formal rule in s 116, which means that legislation will not be invalid merely if it is morally objectionable (such as if it compels a person to do something contrary to their religion).¹⁸ However, it may be said that the formal constitutional rule in s 116 embodies the more general value of religious freedom. Therefore in *Evans v New South Wales*, the Court referred to s 116 in the context of suggesting that 'freedom of religious belief and expression' is 'generally accepted' in Australian society.¹⁹ Although it is not clear how this value affected the ultimate result in *Evans*, the Court appeared to suggest that the formal rule in s 116 supported the recognition of a broader substantive value of freedom of religious belief and expression, even though that section does not provide a general protection of religious freedom. Nonetheless, I propose to call this a 'constitutional value' because it apparently owes its existence at least in part to a formal constitutional rule.

While the distinction between formal rules and substantive values has a long history, traditional thinking about the *Constitution* may still be sceptical about the idea of substantive 'constitutional values'. This is because the *Constitution* is often thought of as being an example of 'thin' constitutionalism, in the sense that its focus is on establishing federal institutions and allocating power within the federation, rather than embodying fundamental values.²⁰ Certainly unlike equivalent instruments of

¹⁵ Patrick S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987) 2.

¹⁶ *Ibid* 5.

¹⁷ Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383, 385–6. See also Jack Beatson, 'Has the Common Law a Future' (1997) 56(2) *Cambridge Law Journal* 291, 298–9.

¹⁸ *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ).

¹⁹ *Evans v New South Wales* (2008) 168 FCR 576, 596 ('*Evans*').

²⁰ Elisa Arcioni and Adrienne Stone, 'The Small Brown Birds: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 60.

other countries, the *Constitution* lacks an explicit statement of constitutional values.²¹ However, Rosalind Dixon has argued that there are some substantive values that find support from the text, history and structure of the *Constitution*.²² While her focus is on how those values are deployed by courts when making constitutional decisions,²³ the necessary premise of that argument is that such values exist and are identifiable within our constitutional framework.²⁴

How do we determine the constitutional values that exist in relation to a formal constitutional rule? The simple answer is: with difficulty. Like many legal questions, the common law can and will admit many different answers. Justice Gordon, writing extra-curially, describes an example of this in the statutory context.²⁵ In *PGA v The Queen* ('*PGA*'), the High Court had to determine whether the common law recognised that sexual assault could occur between spouses.²⁶ All of the judges held that there was a historical rule that rape could not occur within a marriage because a wife gave irrevocable consent to her husband to engage in intercourse. However, the key question was whether that rule still existed in Australia in 1963, which is when the relevant conduct occurred.²⁷ The Court was referred to statutes conferring various rights on women, including the right to vote and own property, and also legislation extending the grounds on which a divorce could be obtained. The majority used these statutes to conclude that a wife could choose to revoke a term of the 'marriage contract' in the same way that she could exercise her right to dissolve that union. That right also flowed from the fact that these legislative changes meant that women were largely on equal terms as men.²⁸ On the other hand, Heydon J, in dissent, confined these statutes to their formal terms and did not find that they evinced broader substantive values that displaced this historical rule.²⁹ By analogy, the task of working out the constitutional values contained in a formal rule is not necessarily uncontroversial. Even when those values are identified, it is not always clear at what level of generality they should be expressed.³⁰ The surest guide, therefore, is a careful analysis of what the courts have said about these formal rules, and an examination of how far they extend.

²¹ Rosalind Dixon, 'Functionalism and Australia Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 3, 3.

²² *Ibid* 12–13.

²³ *Ibid* 4.

²⁴ See generally Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018), which contains a series of essays considering how these values should be identified and what some of them may be.

²⁵ See Justice Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What Is the Judicial Function' (2019) 42(1) *University of New South Wales Law Journal* 4, 10–13.

²⁶ (2012) 245 CLR 355.

²⁷ *Ibid* 364 [1]–[2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

²⁸ *Ibid* 384 [63]–[65].

²⁹ *Ibid* 395 [109], 399 [122] (Heydon J).

³⁰ GFK Santow, 'Aspects of Judicial Restraint' (1995) 13(2) *Australian Bar Review* 116, 143.

B *Role in Common Law Reasoning*

Assuming that these constitutional values are identified, can they be used to influence the common law? It is clear that the *Constitution* can influence the development of the common law. In *Lange v Australian Broadcasting Corporation* ('*Lange*'),³¹ the then Prime Minister of New Zealand commenced defamation proceedings against the Australian Broadcasting Corporation ('ABC'). The ABC argued that the relevant publications were protected by the defence of qualified privilege.³² The High Court ultimately held that this common law defence must 'conform' with the *Constitution* and the implied freedom of political communication,³³ and that therefore the defence must be expanded to protect communications relating to a political matter.³⁴

However, this method is not relevant here because I do not argue (and I do not think it can be argued) that the conclusion in *Osmond* demonstrates nonconformity with the *Constitution*. Having said that, it is reasonably clear that the *Constitution* can influence the common law even where the need for conformity does not *require* such a change. First, that is in fact what happened in *Lange*. Taken at its highest, the implied freedom of political communication only required the defence of qualified privilege to be made available with respect to government and political matters that affect the people of Australia.³⁵ However, the common law was extended further than this to also cover the United Nations and other countries.³⁶ Second, in the early 2000s Adrienne Stone developed her account of how the High Court's reasoning in *Lange* did not necessarily preclude the *Constitution* from guiding the direction of the common law even where it did not require a change.³⁷ This idea, which Stone called the 'guidance' or 'mere influence' model,³⁸ has received support from a number of later writers and has not been seriously doubted.³⁹ Finally, it has been argued that

³¹ (1997) 189 CLR 520 ('*Lange*').

³² *Ibid* 551.

³³ *Ibid* 566.

³⁴ *Ibid* 571.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 404–6; Adrienne Stone, 'The Common Law and the Constitution: A Reply' (2002) 26(3) *Melbourne University Law Review* 646, 648–50.

³⁸ Stone, 'The Common Law and the Constitution: A Reply' (n 37) 648.

³⁹ See, eg, Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30(2) *Federal Law Review* 217, 232; Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31(1) *Federal Law Review* 131, 145–9; Sir Anthony Mason 'Choosing Between Laws' (2004) 25(2) *Adelaide Law Review* 165, 168; WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79(3) *Australian Law Journal* 167, 180–1.

substantive values derived from statute can develop the common law.⁴⁰ An example of this has been outlined previously with reference to *PGA*. If that is correct, there is no reason in principle why a similar process of reasoning cannot be based on substantive values derived from the *Constitution*, especially given that the common law is subject to both the *Constitution* and legislation.

III CONSTITUTIONAL VALUES AND THE REQUIREMENT TO PROVIDE REASONS

In Part III, I develop the central argument of this article, which is that developments in constitutional law post-*Osmond* may provide a basis to reconsider that decision. This argument has three strands. The first strand is that administrative decision-makers should be required to provide reasons to facilitate the courts' exercise of their entrenched supervisory jurisdiction. In making that point I address the case law that suggests this logic is only applicable when judicial or quasi-judicial bodies are subject to statutory appeals. The second and third strands of the argument draw on substantive constitutional values in the manner outlined in Part II. The second strand of the argument is that the High Court's decisions in *Bodruddaza v Minister for Immigration and Multicultural Affairs* ('*Bodruddaza*')⁴¹ and *Graham v Minister for Immigration and Border Protection* ('*Graham*')⁴² reflect a substantive constitutional value that recognises that judicial review must be practically effective. The final strand is that the supervisory jurisdiction embodies notions of accountability, and that this provides support for a 'culture of justification' which can in turn support a duty to provide reasons.

A *Constitutional Entrenchment of a Minimum Judicial Review Jurisdiction*

The first strand of the argument relies on the existence of the courts' supervisory jurisdiction, rather than any substantive values underlying it. At the federal level, in *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*') the High Court stated that the jurisdiction conferred on the Court in s 75(v) to engage in judicial review for jurisdictional error cannot be taken away by Parliament.⁴³ While this is not a new idea,⁴⁴ a more novel development is the conclusion in *Kirk v Industrial*

⁴⁰ Gordon (n 25) 4; Pound (n 17) 385–6; Beatson (n 17) 298–9, 307–8, 312.

⁴¹ (2007) 228 CLR 651 ('*Bodruddaza*').

⁴² (2017) 263 CLR 1 ('*Graham*').

⁴³ (2003) 211 CLR 476, 511–12 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*').

⁴⁴ See, eg, *Waterside Workers' Federation of Australia v Gilchrist Watt and Sanderson Ltd* (1924) 34 CLR 482, 526 (Isaacs and Rich JJ), 531, 551 (Starke J); *Ince Bros and Cambridge Manufacturing Co Pty Ltd v Federated Clothing and Allied Trades Union* (1924) 34 CLR 457, 464 (Isaacs, Powers and Rich JJ); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd* (1914) 18 CLR 54, 68 (Barton J); *Federated Engine Drivers and Firemen's Association of Australasia v Colonial Sugar Refining Company Ltd* (1916) 22 CLR 103, 108 (Griffith CJ).

Court (NSW) ('*Kirk*').⁴⁵ In an influential judgment, the majority held that '[legislation] which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.⁴⁶ The Court reasoned that s 73 of the *Constitution* required there to be bodies fitting the description of state supreme courts, and at federation one of the 'defining characteristics' of such bodies was their jurisdiction to grant prohibition, certiorari, mandamus and habeas corpus in response to jurisdictional errors.⁴⁷

My argument is that the High Court's affirmation that the supervisory jurisdiction is entrenched means that administrative decision-makers should be required to give reasons to facilitate the courts' ability to engage in judicial review. This is a variation of Kirby P's reasoning in *Osmond* in the Court of Appeal. President Kirby found that one basis for the duty to give reasons is to facilitate the courts' ability to engage in judicial review.⁴⁸ Put another way, a failure to give reasons would render that review 'nugatory'.⁴⁹ President Kirby drew an analogy with the decision in *Pettitt v Dunkley*,⁵⁰ and in particular the judgment of Moffitt JA who held that a judicial officer is obliged to give reasons so far as is necessary to allow the case to be considered by an appellate court.⁵¹ Simply put, the force of Kirby P's reasoning has arguably increased in light of the High Court's recent affirmation that the courts' supervisory jurisdiction is inalienable at both a federal and state level. These developments may give rise to an argument that the High Court's decision in *Osmond* should be revisited.

In the High Court, Gibbs CJ highlighted three difficulties with Kirby P's reasoning on this point. Respectfully, I do not find these objections persuasive. The first was that there was 'no justification' for finding that rules applicable to judicial functions necessarily apply to administrative functions. This meant that the principle in *Pettitt v Dunkley* that judicial officers must give reasons to facilitate an appeal did not necessarily apply to administrative decision-makers.⁵² The second point was to draw a distinction between appeals and judicial review, as simply because a judge should give reasons when an *appeal* was possible did not necessarily mean that administrative decision-makers should do the same when *judicial review* is possible.⁵³ The final point was that extending the principle to require reasons to be given to facilitate

⁴⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*').

⁴⁶ *Ibid* 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁷ *Ibid* 580–1 [96]–[100].

⁴⁸ *Osmond v Public Service Board of NSW* (1984) 3 NSWLR 447, 467 (Kirby P).

⁴⁹ *Ibid* 467.

⁵⁰ [1971] 1 NSWLR 376 ('*Pettitt v Dunkley*').

⁵¹ *Osmond v Public Service Board of NSW* (n 48) 456 (Kirby P), citing *ibid* 388.

⁵² *Osmond* (n 1) 667 (Gibbs CJ), citing *Housing Commission (NSW) v Tatmar Pastoral Co* [1983] 3 NSWLR 378, 386 (Mahoney JA), though compare Hutley JA's observation at 381: 'A court must not nullify rights of appeal by giving no or nominal reasons, but there is no duty to expound reasons so as to facilitate appeals.'

⁵³ *Osmond* (n 1) 667 (Gibbs CJ).

judicial review would ‘undermine’ the rule that reasons do not form part of the record for the purposes of certiorari.⁵⁴

In terms of the first of Gibbs CJ’s reasons, it is true that the principles applying to judicial decision-making should not automatically apply to administrative decision-makers. However, that does not necessarily mean that the same principles cannot apply. For example in *Ridge v Baldwin*, the House of Lords held that principles of natural justice could apply to both judicial and administrative decisions.⁵⁵ In a similar vein, some writers have suggested that it is unclear why the obligation to provide reasons should be limited to judicial or quasi-judicial functions.⁵⁶

Although the duty of judicial officers to give reasons now appears to be justified on the basis of the institutional integrity of the court, rather than facilitating an appeal or review,⁵⁷ recent case law suggests a willingness to apply the reasoning in *Pettitt v Dunkley* to administrative decision-makers. In *Campbelltown City Council v Vegan* (‘*Vegan*’),⁵⁸ the New South Wales Court of Appeal held that the Appeal Panel constituted under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) was required to give reasons for their decision. For Handley JA, one reason for this was that the Act provided that a further medical assessment could be obtained if the evidence suggested that the assessment was wrong, or that the worker’s condition had changed. His Honour’s view was that the reasoning in *Pettitt v Dunkley* could apply to administrative decision-makers, and as such the Appeal Panel needed to give reasons to allow a further medical assessment to be obtained if thought necessary.⁵⁹ However, Basten JA referred to *Pettitt v Dunkley* and noted that ‘the justification for an obligation to give reasons is derived from the right of appeal granted in relation to an exercise of *judicial power*’.⁶⁰ Therefore for Basten JA, it was significant that the Appeal Panel exercised functions that were judicial in nature, even though those functions were not strictly of a ch III kind.⁶¹ That label was considered appropriate because the decision of the Appeal Panel involved the application of a statutory test to determine rights as between employer and employee.⁶²

⁵⁴ Ibid 666–7 (Gibbs CJ).

⁵⁵ *Ridge v Baldwin* [1964] AC 40, 75 (Lord Reid).

⁵⁶ Bruce Chen, ‘A Right to Reasons: *Osmond* in Light of Contemporary Developments in Administrative Law’ (2014) 21(4) *Australian Journal of Administrative Law* 208, 219.

⁵⁷ Luke Beck, ‘The Constitutional Duty to Give Reasons for Judicial Decisions’ (2017) 40(3) *University of New South Wales Law Journal* 923, 927, citing *Wainohu v New South Wales* (2011) 243 CLR 181, 225 [92] (Gummow, Hayne, Crennan and Bell JJ).

⁵⁸ (2006) 67 NSWLR 372 (‘*Vegan*’).

⁵⁹ Ibid 377 [22]–[30] (Handley JA).

⁶⁰ Ibid 393 [105] (Basten JA).

⁶¹ Ibid 396 [117]–[118] (Basten JA).

⁶² Ibid 394 [109] (Basten JA).

Subsequent cases have favoured the approach adopted by Basten JA and have found the characterisation of power as quasi-judicial as significant when determining whether there is an implied duty to give reasons.⁶³ However, their treatment of the requirement that decisions be 'quasi-judicial' or 'judicial in nature' suggests that the strict division between administrative and judicial decisions, advocated by Gibbs CJ in *Osmond*, is being blurred. This is because the characterisation of a decision as 'quasi-judicial' (or similar terminology) has been applied broadly. For a start, contrary to Basten JA's assertion in *Vegan*,⁶⁴ the decision of the Appeal Panel did not itself determine rights. The Appeal Panel dealt solely with 'medical disputes', which was defined in the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) to encompass disputes relating to factual matters that turned on the nature and severity of an impairment suffered by a claimant.⁶⁵ A dispute would reach the Appeal Panel if first, the Commission referred a medical dispute for assessment under pt 7 of the Act,⁶⁶ and second, an appeal was allowed to the Appeal Panel in relation to that assessment.⁶⁷ Once the Appeal Panel made its decision in relation to that medical dispute, it issued a certificate of assessment.⁶⁸ However, that certificate did not, by itself, determine the rights of the parties and the outcome of the claim. Rather, the ultimate dispute between the parties was resolved by the Commission (not the Appeal Panel), and was done by the Commission issuing a certificate of its determination.⁶⁹ When reaching its decision, the certificate of assessment furnished by the Appeal Panel is 'conclusively presumed' to be correct as to a prescribed list of matters, but is otherwise just evidence as to any other matter.⁷⁰ Therefore the assessment by the Appeal Panel did not by itself determine the rights of the parties; rather it is the decision of the Commission that did. Even though the Appeal Panel's certificate of assessment was conclusive in respect of matters related to the 'medical dispute', the outcome of the ultimate dispute was to be resolved by the Commission.

The significance of this is that to the extent that *Vegan* stands for the proposition that a decision needs to be 'quasi-judicial' before a duty to give reasons will be implied

⁶³ *Sherlock v Lloyd* (2010) 27 VR 434, 439 [21]; *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2012] NSWCA 15, [53] (Basten JA); *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 242 IR 318, 330 [45] (Basten JA) ('*Public Service Association and Professional Officers' Association*'); *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, 292 [46]; *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 365 ALR 86, 93 [26] (Basten JA); *NSW Land and Housing Corporation v Orr* (2019) 373 ALR 294, 307 [58]–[59] (Bell P).

⁶⁴ *Vegan* (n 58) 394 [109].

⁶⁵ *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 319. All references to the Act are to the version as it applied to resolving the dispute in *Vegan*.

⁶⁶ *Ibid* s 321.

⁶⁷ *Ibid* s 327.

⁶⁸ *Ibid* s 328(5).

⁶⁹ *Ibid* s 294.

⁷⁰ *Ibid* s 326.

in this way, that label may be applied liberally by the courts to encompass decisions that have some legal effect, even if they do not ultimately determine legal rights or obligations. Similarly, in *Public Service Association and Professional Officers' Association*, the Court found that the relevant decision was of a judicial type because it involved the application of a 'broad evaluative standard' which is similar to civil disputes determined by traditional courts.⁷¹ Although it is impossible to precisely define judicial power,⁷² applying an 'evaluative standard' is a very broad concept that would embrace a great number of administrative decisions as well as judicial ones. Finally, in *Minister for Health v A*, two judges (with White JA agreeing) apparently found it sufficient to imply a duty to give reasons on the basis that there was a statutory appeal mechanism.⁷³ None of the judgments expressly considered whether the power exercised by the Minister was judicial in nature. These cases suggest that the significance of the division between judicial and administrative bodies has diminished, both through the creation of a broad category of 'quasi-judicial' functions, and the implicit view in *Minister for Health v A* that characterising a body as 'quasi-judicial' may no longer be a prerequisite for implying a duty to give reasons.⁷⁴

The second of Gibbs CJ's reasons was that 'the principle that judges and magistrates ought to give reasons in any case in which an *appeal* lies from the decision' does not mean that administrative decision-makers must give reasons to facilitate *judicial review*.⁷⁵ This appears to be a distinction drawn between statutory appeals and judicial review. However, Gibbs CJ did not explain the significance of this distinction. The essential point in Moffitt JA's judgment in *Pettitt v Dunkley* was that judicial officers must give reasons to enable the appellate court to carry out an appeal if necessary.⁷⁶ It is unclear why statutory appeal rights should be treated differently from constitutionally entrenched judicial review in this regard. Although later cases have continued to insist that the existence of judicial review is insufficient to find an implied duty to give reasons, this conclusion is required by the High Court's decision in *Osmond*. In *Sydney Ferries v Morton* ('*Morton*'), Basten JA stated that if the existence of judicial review was significant in finding an obligation to give reasons, then 'it would be inconsistent with the general principle that there is no such obligation'.⁷⁷ Intermediate appellate courts of course cannot overrule the High Court. Therefore the continued insistence that the reasoning in *Pettitt v Dunkley* cannot apply to judicial review appears to be a distinction mandated by the High Court in *Osmond*, rather than one required by principle.

⁷¹ *Public Service Association and Professional Officers' Association* (n 63) 330 [45] (Basten JA).

⁷² *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ), 267 (Deane, Dawson, Gaudron and McHugh JJ).

⁷³ *Minister for Mental Health v A* [2017] NSWCA 288, [54] (Beazley ACJ), [169] (Sackville AJA).

⁷⁴ See also *Morton* (n 7) [79] (Basten JA).

⁷⁵ *Osmond* (n 1) 667 (Gibbs CJ) (emphasis added).

⁷⁶ *Pettitt v Dunkley* (n 50) 387.

⁷⁷ *Morton* (n 7) [80].

The last of Gibbs CJ's points can be dealt with briefly. It is unclear why the principle that reasons do not form part of the record would be undermined by a duty of administrative decision-makers to give reasons.⁷⁸ One possibility is that his Honour was concerned in ensuring that tribunals retained a genuine choice as to whether they incorporated reasons as part of the record.⁷⁹ Since the decision in *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*, there were a series of decisions that took an expansive approach as to what would constitute 'incorporating' reasons into the record.⁸⁰ In that context, the effect of requiring decision-makers to give written reasons is that the 'choice' as to whether reasons were incorporated in the record would become illusory, as courts would regularly find that they had been incorporated. If that is the correct reading of Gibbs CJ's reasoning, that concern has disappeared since *Osmond* was decided. In *Craig v South Australia*, the High Court rejected an 'expansive approach' to certiorari with the effect that the definition of the record could only be expended to include the reasons given for a decision through statutory intervention, and that reasons would not be incorporated into the record through merely incidental or introductory references to them.⁸¹ This means that a duty to provide reasons would not, on its own, necessarily expand certiorari's record because it would neither alter the definition of 'the record' at common law, nor automatically require that the reasons be incorporated as part of it.

In light of that, the argument that the reasoning in *Pettitt v Dunkley* cannot apply to administrative bodies is therefore not persuasive. The simplest explanation for why this position has persisted is that *Osmond* remains the law in Australia,⁸² and lower courts are therefore bound to follow it. However, it is open to the High Court to overrule it and find that the common law requires administrative decision-makers to give reasons to facilitate the exercise of the Court's entrenched supervisory jurisdiction.

B *Functional Entrenchment of Judicial Review*

The second strand of the argument for reconsidering *Osmond* relies on the reasoning in cases that have held that Parliament is constrained in the extent to which it can practically curtail the entrenched supervisory jurisdiction. The High Court's reasoning in these cases is consistent with a constitutional value recognising that judicial review must be practically effective so that courts can serve their function of enforcing the limits of power conferred by Parliament. This constitutional value can be deployed

⁷⁸ *Osmond* (n 1) 667 (Gibbs CJ), citing *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338, 352 (Denning LJ) ('*Northumberland*').

⁷⁹ *Northumberland* (n 78) 352 (Denning LJ).

⁸⁰ JW Shaw and FJ Gwynne, 'Certiorari and Error on the Face of the Record' (1997) 71(5) *Australian Law Journal* 356, 364; *Craig v South Australia* (1995) 184 CLR 163, 180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Craig*').

⁸¹ *Craig* (n 79) 180–2 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁸² *Wingfoot* (n 6) 497–8; [43] (French CJ, Crennan, Bell, Gageler and Keane JJ), cited recently in *Li v A-G (NSW)* (2019) 99 NSWLR 630, 624 [48] (Basten JA).

by the common law to shift the focus away from whether review is possible without reasons, to whether it is assisted by their provision.

From early in the 20th century, the High Court has recognised that the jurisdiction conferred by s 75(v) of the *Constitution* could not be removed by Parliament.⁸³ For example in *Australian Coal and Shale Employees Federation*,⁸⁴ the Court held that a provision stating that a decision shall not be ‘subject to prohibition, mandamus or injunction, in any court on any account whatever’ was ineffective in taking away the High Court’s jurisdiction under s 75(v).⁸⁵ However, what was less clear was the extent to which Parliament could limit or constrain that jurisdiction without baldly taking it away. In *Ince Brothers v Federation Clothing and Allied Trades Union* (*‘Ince Brothers’*), the joint judgment stated, in respect of s 75(v), that ‘appropriate legislation [can] limit the cases to which [prohibition] is applicable’.⁸⁶ In support of that proposition, their Honours cited *R v Nat Bell Liquors Ltd* (*‘Nat Bell Liquors’*).⁸⁷ It is not entirely clear what their Honours considered to be ‘appropriate legislation’, and the judgment in *Nat Bell Liquors* is not clear either. Their Honours’ discussion in *Ince Brothers* was in the context of the remedy of prohibition, whereas the decision in *Nat Bell Liquors* concerned certiorari.⁸⁸ In any case, the issue before the Privy Council was whether the legislation in question had the effect of altering the content of the record, rather than restricting the availability of certiorari (or any other remedy).⁸⁹ The notion that Parliament could impose some limitations on the Court’s jurisdiction under s 75(v) was also adverted to by Deane and Gaudron JJ in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*.⁹⁰ Their Honours stated that while the content of the supervisory jurisdiction could not be diminished, the legislature could prescribe procedural rules to be observed in its exercise.⁹¹

The lack of case law outlining these boundaries led Pincus J to observe in 1991 that it is not clear about the extent to which Parliament can pass legislation reducing the effectiveness of the jurisdiction under s 75(v).⁹² However, in more recent decisions, the High Court has held that legislation that has the ‘practical’ effect of removing the Court’s jurisdiction may also be invalid. This is significant because it shows that the *Constitution* protects the effectiveness of the jurisdiction in s 75(v) to some degree,

⁸³ See above n 39.

⁸⁴ *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 (*‘Australian Coal and Shale Employees Federation’*).

⁸⁵ *Ibid* 176 (Latham CJ), 178 (Rich J), 186 (Starke J), 186 (McTiernan J agreeing with Latham CJ), 192–3 (Williams J).

⁸⁶ (1924) 34 CLR 457, 464 (Isaacs, Powers and Rich JJ).

⁸⁷ [1922] 2 AC 128.

⁸⁸ *Ibid* 131 (Lord Sumner for the Court).

⁸⁹ *Ibid* 161–4.

⁹⁰ *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

⁹¹ *Ibid* 205.

⁹² *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484, 507.

and does not just guarantee that it exists. I will consider two decisions that illustrate this point: *Bodruddaza* and *Graham*. While these cases considered the validity of legislation limiting the federal supervisory jurisdiction entrenched in s 75(v), it is safe to assume that the same principles would apply to legislation affecting the supervisory jurisdiction of state courts.⁹³

In *Bodruddaza*, what was then s 486A of the *Migration Act 1958* (Cth) provided that an application to the High Court for a remedy granted in its original jurisdiction must be made within 28 days of the applicant being notified of the decision. The section provided that the High Court must not make an order allowing an application to be made outside of that period. The section also included provisions allowing for an extension of time in some circumstances.⁹⁴ While the joint majority judgment did not accept that a time limit to make an application under s 75(v) could never be imposed, their Honours held that a law could be invalid if, either directly or as a matter of practical effect, it curtailed or limited the right to seek relief under s 75(v) in a way that was inconsistent with 'the place of that provision in the constitutional structure'.⁹⁵ The consequence of this ruling is that s 75(v) of the *Constitution* does not merely protect the High Court's supervisory jurisdiction in the abstract. Rather, it also extends to ensuring that review is practically effective.

The second judgment that illustrates this point is *Graham*. In that case, the High Court held that s 503A(2)(c) of the *Migration Act* was invalid as it imposed a 'substantial curtailment' on the capacity of a court to exercise its jurisdiction under s 75(v). In short, the provision provided that in some circumstances the Minister could not be compelled to provide information relevant to the exercise of a discretionary power to a court or tribunal.⁹⁶ The majority held that s 75(v) meant that Parliament could not legislate to deny the courts the 'ability to enforce the legislative limits of an officer's power', with the question of whether there has been a transgression being 'one of substance, and therefore of degree'.⁹⁷ The majority held that the 'practical impact' of s 503A(2)(c) was to 'shield the purported exercise of power from review',⁹⁸ because if the Minister relied on material that the court could not see then it would not be possible to draw adverse inferences regarding the Minister's process of reasoning.⁹⁹ This 'substantial curtailment' was sufficient to render the provision invalid.¹⁰⁰

⁹³ See Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47(2) *Federal Law Review* 179, 182.

⁹⁴ *Bodruddaza* (n 41) 661 [17] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁹⁵ *Ibid* 671 [53].

⁹⁶ *Graham* (n 42) 18–19 [14]–[16] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

⁹⁷ *Ibid* 27 [48].

⁹⁸ *Ibid* 28–9 [52]–[53].

⁹⁹ *Ibid* 29 [54].

¹⁰⁰ *Ibid* 32 [64].

The formal rule embodied in *Bodruddaza* and *Graham* is that Parliament cannot enact legislation that has the practical effect of substantially curtailing the Court's jurisdiction in s 75(v). It is arguable that beyond this formal rule lies a substantive constitutional value that recognises that courts must be *practically* able to review the legality of a challenged decision. Put another way, the High Court has held that a form of review with substantial practical curtailments would not satisfy the supervisory jurisdiction mandated by s 75(v) (and potentially s 73). However, to reach that conclusion, there is an unexpressed premise that the jurisdiction entrenched by these provisions has a minimum practical content that is not satisfied by simply allowing an applicant to seek judicial review.¹⁰¹ The constitutional text does not necessarily require that outcome, however, the fact that the High Court has adopted this approach lends support to a constitutional value that acknowledges the significance of judicial review being practically effective. This distinction between review being available and practically effective was recognised in Edelman J's dissenting judgment in *Graham*. His Honour distinguished *Bodruddaza* on the basis that the case imposed a 'condition precedent' that entirely precluded review in some instances, whereas the legislation in *Graham* only 'regulated' the exercise of the Court's supervisory jurisdiction.¹⁰² On the other hand, the majority saw *Bodruddaza* as an analogous case,¹⁰³ indicating a rejection of Edelman J's 'narrow conception of the function of s 75(v)', which only prevented the legislature from 'abolishing' the constitutional writs in the sense that they are no longer available.¹⁰⁴

This constitutional value can be used to support a common law duty to provide reasons. As has been argued on a number of occasions, if a decision-maker gives reasons then this assists an application for judicial review.¹⁰⁵ The reasoning in *Bodruddaza* and *Graham* suggests that the supervisory jurisdiction entrenched in the *Constitution* is protected from legislative interference that purports to render it ineffective even if it does not entirely take it away. That reasoning means that in determining whether the common law should provide for a duty of decision-makers to provide reasons, focus may be shifted to the benefits that reasons provide, rather than trenchantly focussing on the fact that review is possible without them. In *Osmond*, Gibbs CJ suggested that the absence of reasons does not make review impossible, because, for instance, the court may be able to infer that they had no good reasons at all.¹⁰⁶ That is undoubtedly true, however it may be missing the point. If *Bodruddaza* and *Graham* are understood in the way that I have suggested, then Gibbs CJ's focus on the *possibility* of review would become less significant, because emphasis could

¹⁰¹ Cf *ibid* 44–5 [99] (Edelman J).

¹⁰² *Ibid* 50 [110].

¹⁰³ *Ibid* 27 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁰⁴ *Ibid* 50 [109] (Edelman J).

¹⁰⁵ See, eg, PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53(2) *Cambridge Law Journal* 282, 283.

¹⁰⁶ *Osmond* (n 1) 663–4. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J).

also be placed on the *effectiveness* of review being furthered if decision-makers are required to provide reasons.

In any event it is worth emphasising that I am not arguing that the decisions in *Bodruddaza* and *Graham* require the common law to develop in this way. Strictly speaking, the ratio that can be derived from these cases is that when determining whether legislation impermissibly denies the Court of its supervisory jurisdiction under s 75(v), it is necessary to consider the legislation's practical effect on the ability to enforce the limits of power conferred on an officer of the Commonwealth.¹⁰⁷ However, my argument is that the logic outlined in Part II above can be deployed to show how the reasoning in these cases that led to that conclusion can also support a common law duty to provide reasons. Therefore the question is whether *Bodruddaza* and *Graham* can be read as encapsulating substantive values that go beyond their formal ratio. I concede that it is possible that those cases may be read as not standing for any substantial values beyond what they actually decided. However, it is worth noting that the Court's judgment in *Graham* demonstrated a continuing commitment to the idea that s 75(v) may not only entrench a minimum jurisdiction of review, but also some substantive principles.¹⁰⁸ That point was illustrated by the majority's emphasis that the question in *Graham* required 'a return to first principles',¹⁰⁹ followed by an examination of a number of ideas including the rule of law.¹¹⁰ While the judgment did little to emphasise what these principles are, it at least suggests that the Court is alive to the idea that there are important principles that form the foundation of s 75(v), and that as a result the section goes further than merely providing that the Court has jurisdiction to engage in review. Those foundational principles may form a source of material that can influence the growth and development of the common law.

C Culture of Justification

The third strand of the argument for revisiting *Osmond* draws upon the 'culture of justification' concept first devised by Etienne Mureinik,¹¹¹ but later developed by other writers (most notably David Dyzenhaus).¹¹² This concept has been deployed to support the common law developing a duty to give reasons. The argument is

¹⁰⁷ *Graham* (n 42) 26 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁰⁸ Leighton McDonald, 'Graham and the Constitutionalisation of Australian Administrative Law' (2018) 91(1) *Australian Institute of Administrative Law Forum* 47, 50.

¹⁰⁹ *Graham* (n 42) 24 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

¹¹⁰ *Ibid* 24–6 [40]–[44].

¹¹¹ Mureinik (n 13).

¹¹² See, eg, David Dyzenhaus, 'The Legitimacy of Legislation' (1996) 46(1) *University of Toronto Law Journal* 129; David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14(1) *South African Journal on Human Rights* 11; David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5.

that Australian public law, and modern liberal democracies more generally,¹¹³ have developed to reflect a ‘culture of justification’. The developments that supposedly give rise to this culture include freedom of information legislation,¹¹⁴ the proliferation of statutory duties to give reasons,¹¹⁵ the establishment of tribunals such as the Administrative Appeals Tribunal,¹¹⁶ the *Administrative Decisions (Judicial Review) Act 1977* (Cth),¹¹⁷ the concept of natural justice,¹¹⁸ parliamentary scrutiny of proposed laws for rights compatibility,¹¹⁹ and (potentially) unreasonableness as a ground of judicial review.¹²⁰ Once that culture has been established, the argument is that the rule in *Osmond* cannot easily be reconciled with it, and that therefore it is susceptible to being overturned if formally challenged.¹²¹ What I want to add to this argument is to suggest that this ‘culture of justification’ can find some grounding in the High Court’s jurisprudence in relation to the entrenched supervisory jurisdiction.

It is necessary to explain a little further what is meant by a ‘culture of justification’. Mureinik originally only provided a cursory account of what this term meant, describing it as a ‘culture’ in which ‘every exercise of power is expected to be justified’ and where the leadership of the government depends on the ‘cogency’ of those justifications.¹²² However, Mureinik’s original focus was analytical rather than conceptual, in that his original work sought to demonstrate that the South African Bill of Rights¹²³ represented a shift towards a culture of justification, rather than providing a complete treatment of that concept.¹²⁴ The concept was developed further by Dyzenhaus, who suggested that the culture embodied the internalisation within a legal system of two aspirational ideals: participation and accountability.

¹¹³ Chief Justice Murray Gleeson, ‘Outcome, Process and the Rule of Law’ (2006) 65(3) *Australian Journal of Public Administration* 5, 12.

¹¹⁴ Grant Hooper, ‘The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?’ (2015) 41(1) *Monash University Law Review* 102, 112; Chen (n 56) 226.

¹¹⁵ Dyzenhaus, Hunt and Taggart (n 111) 29.

¹¹⁶ Hooper (n 114) 112; Chen (n 56) 226.

¹¹⁷ Hooper (n 114) 112.

¹¹⁸ Ibid 117–21; Janina Boughey, ‘The Use of Administrative Law to Enforce Human Rights’ (2009) 17(1) *Australian Journal of Administrative Law* 25, 27.

¹¹⁹ Rosalind Croucher, ‘Getting to Grips with Encroachments on Freedoms in Commonwealth Laws: The ALRC Freedoms Inquiry’ (2016) 90(7) *Australian Law Journal* 478, 485.

¹²⁰ Hooper (n 114) 125–8; Janina Boughey, ‘The Reasonableness of Proportionality in the Australian Administrative Law Context’ (2015) 43(1) *Federal Law Review* 59, 84–6; Swati Jhaveri, ‘The Survival of Reasonableness Review: Confirming the Boundaries’ (2018) 46(1) *Federal Law Review* 137.

¹²¹ Sir Anthony Mason, ‘Reply to David Dyzenhaus’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 52, 54; Taggart, ‘Australian Exceptionalism in Judicial Review’ (n 13) 16; Chen (n 55) 213–14.

¹²² Mureinik (n 13) 32.

¹²³ See *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2.

¹²⁴ Ibid 31–3.

Participation requires that individuals whose rights or interests are affected by state action should be able to participate in the political process to influence those actions, and accountability requires the state to justify its decisions when challenged.¹²⁵ Dyzenhaus, Hunt and Taggart went further and explained that accountability in this sense requires more than just a bare duty to provide reasons. Their view was that a culture of justification requires there to be 'good' reasons for the exercise of power, and there must be a mechanism to determine what constitutes a good reason.¹²⁶ In other words, a culture of justification cannot exist where a government is free to justify its actions on any basis whatsoever. In this sense, there is a difference between explanation and justification.¹²⁷ In a culture of justification, the rationale behind state action must be explained, and the rationale given must conform with the norms of that legal system that define what constitutes an adequate reason.

My point is that the High Court's account of the supervisory jurisdiction emphasises its accountability function, and therefore is consistent with the existence of a culture of justification. James Stellios has argued that s 75(v) was originally inserted into the *Constitution* by Inglis Clark to allocate jurisdiction between original and appellate jurisdiction, and that the accountability function was first raised in the convention debates quite late in the piece.¹²⁸ However, as he recognises, the accountability role of s 75(v) has dominated the High Court's analysis in recent years.¹²⁹ Thus, in *Plaintiff M68*, Gageler J explained that the purpose of s 75(v) was to ensure that officers of the Commonwealth could be restrained from acting unlawfully.¹³⁰ This supports the existence of a culture of justification because it provides that the actions of an officer of the Commonwealth must be lawful, and provides remedies to hold them accountable. In other words, the supervisory jurisdiction allows courts to determine whether an administrative decision is justifiable, with a decision being 'justifiable' if it is lawful. Importantly, judicial review's focus on the legality of administrative action is entirely consistent with Mureinik's culture of justification because he accepted the supremacy of Parliament. Therefore as Grant Hooper has suggested, a form of

¹²⁵ Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (n 111) 34–5.

¹²⁶ Dyzenhaus, Hunt and Taggart (n 111) 29. See also Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Bloomsbury Publishing, 2017) 262–3.

¹²⁷ Dyzenhaus, Hunt and Taggart (n 111) 29.

¹²⁸ James Stellios, 'Exploring the Purposes of Section 75(v) of the *Constitution*' (2011) 34(1) *University of New South Wales Law Journal* 70, 72. See also Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 99, 103–8.

¹²⁹ Stellios (n 128) 92.

¹³⁰ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 95 [126] (Gageler J), quoting *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

review that focuses on the legality of administrative action is not inconsistent with a culture of justification.¹³¹

At the state level, the accountability role of the supervisory jurisdiction has been made clearer by the reasoning in *Kirk*. There the High Court held that one of the ‘defining characteristics’ of state supreme courts as at federation was the ability to enforce limits on executive power by granting constitutional writs in cases of jurisdictional error.¹³² The weight of academic argument since *Kirk* is that the conclusion cannot be solely justified on the basis of legal history. Commentators have noted that it is doubtful whether the High Court’s statement about the legal position at federation was correct,¹³³ and in any case the Court did not articulate a criterion as to what makes a particular feature of a state supreme court a ‘defining characteristic’.¹³⁴ This means that the better reading of *Kirk* is that it also involved considerations of constitutional values and policy, rather than a mechanical consideration of legal history.¹³⁵ That point was made plain by the majority’s reasoning that allowing state parliaments to deprive state supreme courts of their supervisory jurisdiction would allow decision-makers to carry out their role in a way that strained the limits of the powers that Parliament has conferred on them.¹³⁶ This part of the reasoning clearly appeals to the accountability function of judicial review, rather than an historical analysis of state supreme courts.

The accountability function of the supervisory jurisdiction can be severely limited. In *Graham*, the majority noted that whether a law breaches the constitutional limitation by denying the High Court the ability to exercise its jurisdiction under s 75(v) is a question ‘of substance, and therefore of degree’.¹³⁷ This means that Parliament can validly legislate to impose some limitations on the Court’s ability to engage in judicial review. Parliament has also achieved that effect through the use of no-invalidity

¹³¹ Hooper (n 114) 110–11.

¹³² *Kirk* (n 45) 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹³³ Ronald Sackville, ‘The Constitutionalisation of State Administrative Law’ (2012) 19(3) *Australian Journal of Administrative Law* 127, 131; Oscar I Roos, ‘Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*’ (2013) 35(4) *Sydney Law Review* 781; Jeffrey Goldsworthy, ‘*Kable, Kirk*, and Judicial Statesmanship’ (2014) 40(1) *Monash University Law Review* 75, 97.

¹³⁴ Stephen McDonald, “Defining Characteristics” and the Forgotten “Court” (2016) 38(2) *Sydney Law Review* 207, 210; David Rowe, ‘State Tribunals within and without the Integrated Federal Judicial System’ (2014) 25(1) *Public Law Review* 48, 55.

¹³⁵ See Gabrielle Appleby and Anna Olijnyk, ‘The Impact of Uncertain Constitutional Norms on Government Policy: Tribunal Design after *Kirk*’ (2015) 26(2) *Public Law Review* 91, 96; Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of *Hickman*?’ (2010) 21(2) *Public Law Review* 92, 100.

¹³⁶ *Kirk* (n 45) 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Kirk* (n 45) 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Louis L Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70(6) *Harvard Law Review* 953, 963.

¹³⁷ *Graham* (n 42) 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

clauses, which specify that a decision will not be invalid merely because particular requirements have not been satisfied. In *Commissioner of Taxation v Futuris Corporation Ltd*, the High Court appeared willing to apply such a clause to conclude that noncompliance with statutory conditions would not be a jurisdictional error.¹³⁸ Legislative provisions of this kind can significantly impair the accountability function of judicial review by confining the 'limits' on power that the courts are required and permitted to enforce. However, it appears to be equally clear that no-invalidity clauses cannot have the effect of rendering every error as non-judicial.¹³⁹ The limits of that have not yet been clearly articulated by the High Court. What is clear, however, is that the courts will continue to have some accountability role to play in declaring and enforcing the limits of the law, even if Parliament has considerable scope to narrow what those limits are.

In short, the understanding that judicial review plays an important accountability function supports the existence of a 'culture of justification', and that culture sits uncomfortably with the decision in *Osmond*. It should be apparent that my argument relies on the full breadth of the concept of justification, in that judicial review is just one aspect of this rich conception of a legal culture that separately includes a duty to give reasons. Therefore one potential response is that even if the supervisory jurisdiction is consistent with a culture of justification, that does not necessarily prove that such a culture exists in its entirety. However, it is not necessary to prove that the supervisory jurisdiction supports a culture of justification on its own. As outlined above, commentators have pointed to a number of other developments that support the existence of such a culture. The High Court's jurisprudence on the entrenched supervisory jurisdiction does not need to sustain this strand of the argument on its own, and I do not suggest that it does. Rather, it represents another reason why it can be fairly said that accountability and justification are important principles in our legal system, and this affects the ongoing persuasiveness of *Osmond*.

IV ARGUMENTS IN RESPONSE

In Part IV, I respond to potential counter-arguments. The first argument I consider is the idea that the common law developing a duty to give reasons may be futile in light of statutory and related common law developments. The second and third arguments arise from Heydon J's judgment in *Minister for Home Affairs v Zentai* ('*Zentai*').¹⁴⁰ In that case the first respondent argued that the relevant decision-maker was required to give reasons because otherwise they would be empowered to make unreviewable decisions, which is contrary to the minimum standard of review prescribed

¹³⁸ (2008) 237 CLR 146, 156–7 [23] (Gummow, Hayne, Heydon and Crennan JJ).

¹³⁹ Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45(4) *Federal Law Review* 519, 537–8; Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21(1) *Public Law Review* 35, 37. This point is considered further at Part IV.C below.

¹⁴⁰ (2012) 246 CLR 213 ('*Zentai*').

by s 75(v).¹⁴¹ Justice Heydon was the only justice who considered this argument, and his Honour rejected it for two reasons. In this Part, I address those points to show that they do not preclude the entrenched supervisory jurisdiction from supporting a common law duty to give reasons.

A *A Futile Development?*

One potential counter argument is that there is no need for the common law to develop a duty of decision-makers to provide reasons. There are now a number of statutory provisions requiring decision-makers to provide reasons.¹⁴² Furthermore, given that the court may infer that a decision was unreasonable where it is not possible for a court to discern how the decision was reached,¹⁴³ decision-makers may be encouraged to provide reasons to guard against that inference being drawn even where there is no statutory duty to do so.¹⁴⁴ In light of these developments, it might be arguable that there is no need for the common law to develop in this way. I will make three points in response.

First, while obvious, it is worth mentioning that there are some statutory schemes that do not specify that reasons must be provided for a decision, and where decision-makers do not choose to provide reasons as a matter of course.¹⁴⁵ Even where decision-makers have a ‘convention’ or ‘practice’ of providing reasons without any obligation to do so, courts cannot compel decision-makers to provide reasons in the absence of a duty requiring them to do so.¹⁴⁶ Therefore a common law-based duty to provide reasons will have some practical impact. Indeed, given that this development would have to come from the High Court as it involves overruling *Osmond*, and the Court does not have jurisdiction to consider hypothetical questions of law, by definition such a case could only arise where an applicant has no other right to obtain the reasons for a decision. In that sense this development would not be entirely academic, though admittedly it may be relatively narrow given the proliferation of statutory schemes requiring that reasons be given.¹⁴⁷

¹⁴¹ Ibid 248 [93] (Heydon J).

¹⁴² See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

¹⁴³ *Minister for Immigration v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

¹⁴⁴ Ronald Sackville, ‘The Evolution of the Duty of Decision-Makers to Give Reasons’ (2013) 23(3) *Australian Journal of Administrative Law* 128, 136.

¹⁴⁵ See, eg, the cases cited in Part III.A where applicants sought reasons for a decision where there was no express statutory requirements to provide them. See also at Administrative Review Council, ‘Judicial Review in Australia’ (Consultation Paper, April 2011) 87 [4.113]–[4.114] which notes that there are statutory schemes where there is no duty to provide reasons.

¹⁴⁶ *A-G (NSW) v Quin* (1990) 170 CLR 1, 40 (Brennan J).

¹⁴⁷ Chen (n 56) 215.

Second, a common law duty to provide reasons would simplify and clarify the Court's approach to implying a duty to give reasons in the absence of an express legislative duty. As I have outlined above, the approach of implying a duty to give reasons where the decision in question is judicial or quasi-judicial in nature has raised questions that have not been clearly answered.¹⁴⁸ In short, it is unclear what principled basis justifies this implication being limited to only judicial or quasi-judicial decisions, and the Court's classification of decisions as quasi-judicial compared to administrative has not been entirely satisfactory. A broader common law duty to provide reasons would promote clarity by removing the need for courts to engage in the difficult (and perhaps elusive) exercise of classifying decisions as administrative or judicial.

Finally, the creation of a common law duty to provide reasons leads to the associated democratic benefits of requiring Parliament to squarely confront the choice as to whether reasons should be provided for an administrative decision. If the default common law position is that decision-makers must provide reasons, then a choice by Parliament that reasons should not be provided in a particular context will require the enactment of legislation to that effect. This will mean that Parliament will bear greater responsibility for that decision because it will have to actively intervene to remove the right of an applicant to receive a statement of reasons. This argument is analogous to the rationale for the principle of legality, which states that fundamental rights can only be abrogated by unambiguous language that makes it clear to the electorate what Parliament is doing.¹⁴⁹ Admittedly, the argument would apply with less force here, because assuming that a common law right to reasons is not classed as a fundamental right which the principle of legality would protect,¹⁵⁰ then it could be excluded by an implication drawn from a statute rather than unambiguous language. However this development would increase electoral accountability of Parliament, at least in cases where the right to reasons is displaced by an express statutory provision to that effect, because in those circumstances it will become clear where a duty to provide reasons has been excluded by legislation.¹⁵¹

B *Review is Not Impossible*

In *Zentai*, it was argued that decision-makers are required to provide reasons because otherwise their decisions will be unreviewable. Justice Heydon alone considered that argument, and rejected it on the basis that even if a decision-maker fails to provide reasons, that does not necessarily mean their decision is 'unreasoned' or 'unexaminable'.¹⁵² While his Honour acknowledged that the provision of reasons assists those seeking to challenge administrative decisions, they were not essential to

¹⁴⁸ See Part III.A above.

¹⁴⁹ Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 392–3.

¹⁵⁰ Indeed, the fact that for a significant period of time there was no such right strongly suggests against it being classed as a fundamental right.

¹⁵¹ *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 262 [106] (Kirby J).

¹⁵² *Zentai* (n 140) 248 [94] (Heydon J).

a challenge. His Honour instead pointed to a number of other mechanisms available to an applicant as an alternative to receiving a written statement of reasons.¹⁵³

That observation does not negate my argument. From the first respondent's written submissions in *Zentai*, it is apparent that they argued that there was a constitutional implication that reasons had to be given, with noncompliance having the effect of invalidating legislation.¹⁵⁴ For a constitutional implication to be drawn, the necessity or essentiality of that implication is a necessary precondition,¹⁵⁵ or at the very least a strong factor that supports drawing such an implication.¹⁵⁶ Hopefully, as should be clear by now, my argument is not that reasons are necessary for judicial review to be undertaken. Rather, my argument is that the entrenched supervisory jurisdiction provides a basis to argue that the common law should develop a prima facie requirement for administrative decision-makers to provide reasons. Being based on a common law development rather than a constitutional implication, this argument has the added benefit of allowing statutory overrule or the development of exceptions in cases where reasons are inappropriate.¹⁵⁷ Therefore it is not to the point that the courts can engage in judicial review even when decision-makers do not provide reasons for their decision.

In light of that, the more relevant point is Heydon J's reference to alternative mechanisms that an applicant can rely on to elicit a decision-maker's reasons. These include notices to produce, interrogatories, subpoenas requiring the decision-maker to give evidence, and cross-examination.¹⁵⁸ Arguably, the existence of these mechanisms means that the common law does not need to develop in the way that I have suggested because there are other ways that an applicant can elicit the reasons for a decision. The obvious response to this is that each of these alternatives pose problems. As Heydon J recognised, interrogatories and subpoenas can generally only be issued once proceedings have commenced.¹⁵⁹ Notices to produce require there to be a document answering the description of a statement of reasons — if there is no duty imposed on a decision-maker to give reasons, then there is no guarantee that such a document exists.¹⁶⁰ Although interrogatories can avoid that issue by allowing questions to be asked rather than documents produced, this may result in a statement of reasons being prepared after the fact in circumstances where the decision-maker is

¹⁵³ Ibid 248 [94].

¹⁵⁴ Charles Zentai, 'First Respondent's Written Submissions', Submissions in *Minister for Home Affairs v Zentai*, P56/2011, 10 February 2012, [43].

¹⁵⁵ Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23(1) *Federal Law Review* 37, 44.

¹⁵⁶ Daniel Reynolds, 'An Implied Freedom of Political Observation in the Australian Constitution' (2018) 42(1) *Melbourne University Law Review* 199, 206.

¹⁵⁷ Groves (n 11) 633.

¹⁵⁸ *Zentai* (n 140) 248–9 [94] (Heydon J).

¹⁵⁹ Ibid 248–9 [94].

¹⁶⁰ See, eg, *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts [No 2]* (2008) 251 ALR 80, 125 [169] (Buchanan J).

put on notice that their decision is being challenged. However, more fundamentally, all of these mechanisms are just alternative ways to obtain the reasons for a decision. In other words, pointing to these alternatives amounts to an implicit concession that reasons are in fact valuable. This assists, rather than undermines, the argument that the common law should develop to require decision-makers to provide those reasons.

C *The Role of Section 75(v)*

The other aspect of Heydon J's reasoning in *Zentai* is the conclusion that s 75(v) is only a grant of jurisdiction, and not a source of substantive law. His Honour held that this meant that it is not possible to derive an implication from it that all decision-makers must give reasons.¹⁶¹

Whether ch III of the *Constitution* can be the basis for substantive rights or substantive law depends on how one defines those terms. For example, speaking extra-curially, McHugh J has suggested that ch III does protect some substantive rights, which can be contrasted against procedural rights. His Honour defined a procedural right as 'a right of access to a method of enforcing substantive rights and duties'.¹⁶² From that definition, his Honour concluded that the decisions in *Kable v DPP (NSW)*¹⁶³ and *Chu Kheng Lim v Minister for Immigration*¹⁶⁴ were examples of *substantive* rights flowing from ch III,¹⁶⁵ because they did not fit that definition of *procedural* rights. Other authors have also considered these cases to be examples of rights protected by ch III.¹⁶⁶

It is clear then that the accuracy of Heydon J's assertion, and the correctness of any rebuttal, depends on how one defines 'substantive' law or rights. What I will attempt to do in this section is to justify that ch III, and in particular ss 73 and 75(v), can be considered by the common law to support the development of a duty of executive and administrative decision-makers to provide reasons. That justification requires two parts. The first part is that the substantive constitutional values flowing from the courts' supervisory jurisdiction can be deployed to support the development of a duty imposed on executive and administrative decision-makers. In other words, this part focuses on demonstrating that ss 73 and 75(v) (which concern ch III courts) can have implications for executive and administrative decision-makers. The second part of that justification is to show that those provisions can influence the development

¹⁶¹ *Zentai* (n 140) 249 [95] (Heydon J).

¹⁶² Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21(3) *Australian Bar Review* 235, 237.

¹⁶³ (1996) 189 CLR 51.

¹⁶⁴ (1992) 176 CLR 1 ('*Chu Kheng Lim*').

¹⁶⁵ McHugh (n 162) 247–9.

¹⁶⁶ Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2000) 20(3) *Australian Bar Review* 282, 284ff; Ashleigh Mills, 'Rights and Freedoms under the Australian Constitution: What Are They and Do They Meet the Needs of Contemporary Australian Society?' (2019) 93(8) *Australian Law Journal* 655, 662.

of a substantive duty, even though those provisions on their face merely establish the jurisdiction of the High Court.

The first part of the justification is relatively straightforward. Although ch III is titled ‘The Judicature’ and contains an ‘exhaustive statement’ of Commonwealth judicial power,¹⁶⁷ it also affects other branches of government. For example, the Commonwealth Parliament cannot legislate inconsistently with that exclusive grant of judicial power,¹⁶⁸ and neither the executive nor Parliament can authorise detention for a punitive purpose as that is an exclusively judicial function.¹⁶⁹ I submit, therefore, that there is no reason why ch III must be confined to affecting the role of the judiciary. If ch III supports the existence of constitutional values, they can be used to develop the common law in a way that in turn imposes obligations on executive and administrative decision-makers.

The second part of this justification is that even though the supervisory jurisdiction allows courts to enforce the limits of a decision-maker’s power, it may also have some role to play when determining the scope of the powers or duties that are conferred on decision-makers. Put another way, I argue that even though s 75(v) (and indirectly, s 73) provides the source of the courts’ jurisdiction to enforce the limits of a decision-maker’s power, that does not necessarily mean that they have no role to play in determining the scope of a decision-maker’s obligations.

First, s 75(v) and the corresponding supervisory jurisdiction of state courts should not be understood as simply entrenching a jurisdiction to engage in judicial review. In *Graham*, the High Court distinguished between laws which are invalid on the basis that they have the effect of denying the court jurisdiction under s 75(v), and laws cast as privative clauses which are valid if they can be read as expanding the scope of power conferred on a decision-maker.¹⁷⁰ That passage does not necessarily mean that s 75(v) (and the corresponding jurisdiction of state supreme courts) has no role to play when determining the duties of a decision-maker. The better view is that the supervisory jurisdiction can also condition the powers and duties of decision-makers, albeit the outer limits of that relationship are undefined. In *Plaintiff S157*, the High Court stated that there is an ‘entrenched minimum *provision* of judicial review’.¹⁷¹ The critical question is what exactly is entrenched. It has been argued that s 75(v) goes further than just protecting the Court’s jurisdiction to engage in judicial review, but also provides some limitations on Parliament’s power to legislate that compliance with a particular statutory condition is not jurisdictional. The argument goes that the plurality’s statements in *Plaintiff S157* that s 75(v) also provides ‘significant barriers’

¹⁶⁷ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁶⁸ *Chu Kheng Lim* (n 164) 26–7 (Brennan, Deane and Dawson JJ).

¹⁶⁹ *Minogue v Victoria* (2019) 372 ALR 623, 628 [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹⁷⁰ *Graham* (n 42) 26 [45]–[46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁷¹ *Plaintiff S157* (n 43) 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

to 'impair', 'avoid' or 'confine' review, suggest that some substantive principles of review may also be protected.¹⁷² It has been suggested that at a minimum, review cannot be excluded by legislation of a decision infected by fraud or bad faith.¹⁷³ The High Court has yet to address this question directly or precisely define what substantive values or grounds of review are entrenched. However, if that is accepted, then it follows that irrespective of what the empowering legislation says, decision-makers will be required to exercise their powers in the absence of fraud, bad faith, and other similar limits because of s 75(v). That means that the supervisory jurisdiction does more than just permit the courts to enforce limits on power, but it also has some role to play in defining the minimum scope of a decision-maker's obligations.

Second, legislative provisions conferring jurisdiction have been construed in some cases as also conferring substantive rights or liabilities. One example of this is 'double function' legislation, which occurs when a statute expressed to only confer jurisdiction or authority is construed to also create substantive rights or obligations.¹⁷⁴ More relevantly, in the cases discussed above in Part III.A (such as *Vegan*), the existence of an appeal mechanism has been relied upon to find an implied statutory duty to give reasons. While similar logic has not yet been applied to the constitutional conferral of jurisdiction, the key point is that Australian courts recognise the idea of developing substantive rights and duties from seemingly procedural or jurisdictional provisions.

It follows that the distinction between procedural and substantive rights may not be as airtight as is sometimes suggested. As such, even if ch III is properly described as a procedural grant of jurisdiction, that does not mean it cannot tell us anything about substantive rights. This logic is reflected in Gleeson CJ's claim that s 75(v) 'secures a basic element of the rule of law',¹⁷⁵ because while on its face that provision merely confers jurisdiction, in doing so it gives individuals a mechanism to protect their right to be free from unlawful interference by the government.¹⁷⁶ While in a later case *McHugh and Gummow JJ* expressed doubts about employing that analysis to give the rule of law an 'immediate normative operation',¹⁷⁷ that was in response to the specific suggestion that rule of law principles could justify granting relief under s 75(v) where officers of the Commonwealth fail to give effect to a legitimate expectation.¹⁷⁸ Therefore it appears that their Honours did not necessarily foreclose

¹⁷² Aronson, 'Between Form and Substance' (n 139) 537–8; Aronson, 'Commentary' (n 139) 37; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2016) 1057 [18.40].

¹⁷³ Aronson, 'Between Form and Substance' (n 139) 535.

¹⁷⁴ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165–6; Lee Aitken, 'Jurisdiction, Liability and Double Function Legislation' (1990) 19(1) *Federal Law Review* 31, 46–7.

¹⁷⁵ *Plaintiff S157* (n 43) 482 [5].

¹⁷⁶ See also Chief Justice Murray Gleeson, *Boyer Lectures 2000 — the Rule of Law and the Constitution* (ABC Books, 2000) 3.

¹⁷⁷ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72] (McHugh and Gummow JJ).

¹⁷⁸ *Ibid* 21 [65] (McHugh and Gummow JJ).

rule of law principles being used to develop the common law in an appropriate case. Expressed more generally, the possibility remains that the substantive values underlying ss 73 and 75(v) can be used to develop the common law.

V CONCLUSION

In short, this article adds to the growing body of literature that suggests that the High Court's decision in *Osmond* should be reconsidered. It does so by arguing that the supervisory jurisdiction entrenched in the *Constitution* can support the common law developing a duty of decision-makers to provide reasons for their decisions. One potential strength of this approach is that by grounding the argument in constitutional principles, it provides an opportunity to reconsider this question without having to overtly refer to policy considerations.

While there are strong arguments for overruling *Osmond*, it should be kept firmly in mind that only the High Court can take that step. Given the proliferation of statutory provisions requiring decision-makers to give reasons,¹⁷⁹ it may take some time before a suitable case arises where this question must be determined. Nonetheless, the question is still important because these statutory duties are not comprehensive.¹⁸⁰ While I agree that *Osmond* is unlikely to survive a direct challenge 'totally unscathed',¹⁸¹ only time will tell how the High Court will approach this question.

¹⁷⁹ Allars (n 3) 317.

¹⁸⁰ Janina Boughey, 'A(nother) New Unreasonableness Framework for Canadian Administrative Law' (2020) 27(1) *Australian Journal of Administrative Law* 43, 51.

¹⁸¹ Peter Cane, 'The Making of Australian Administrative Law' (2003) 24(2) *Australian Bar Review* 114, 129.

A DOCTRINAL AND FEMINIST ANALYSIS OF THE CONSTITUTIONALITY OF THE AUSTRALIAN CITIZENSHIP REVOCATION LAWS

ABSTRACT

This article examines the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the ‘2015 Amendment Act’) and the *Australian Citizenship Amendment (Citizenship Cessation Act) 2020* (Cth) (the ‘2020 Amendment Act’) (together, the ‘*Citizenship Revocation Laws*’). These Amendment Acts significantly extended the ways in which the Commonwealth government could deprive dual citizens of their Australian citizenship. This article argues that a classic doctrinal analysis of the *Citizenship Revocation Laws* does not give a clear answer as to their constitutionality. Rather, it results in two plausible but opposite outcomes. This article contends that this leaves space for other interpretive pathways and accordingly argues that a feminist approach could provide some useful guidance on the questions of constitutionality under consideration here. This feminist analysis suggests both that the *2015 Amendment Act* and *2020 Amendment Act* should be considered unconstitutional and, more generally, that Australian citizenship is inviolable.

‘Ha, banishment? Be merciful, say ‘death’;
For exile hath more terror in his look,
Much more than death. Do not say ‘banishment’.’¹

Romeo and Juliet

‘I guess to strip the citizenship from the terrorists who are
dual nationals is, if you like, the modern form of banishment’.²

The Hon Tony Abbott MP

* PhD Candidate in Law, University of Cambridge. I am very grateful to Professor Kim Rubenstein for her guidance on an earlier version of this article, and for her mentorship. I am also grateful to the two anonymous reviewers for their helpful suggestions.

¹ William Shakespeare, *The Oxford Shakespeare: Romeo and Juliet*, ed Jill L Levenson (Oxford University Press, 2000) 3.3 12–14.

² ‘Dual Nationals to Be Stripped’, *Lateline* (Australian Broadcasting Corporation, 2015) 0:2:24–0:2:31 <<http://www.abc.net.au/lateline/content/2015/s4261423.htm>>.

I INTRODUCTION

On 3 December 2015, the Commonwealth government passed the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (the ‘2015 Amendment Act’) which amended the *Australian Citizenship Act 2007* (Cth) (the ‘Citizenship Act’) and vastly extended the ways in which dual citizens could lose their Australian citizenship. In so doing, the government framed citizenship as a ‘responsibility’ not a ‘right’, and defined the concept of ‘allegiance’ narrowly.³ On 17 September 2020, the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (the ‘2020 Amendment Act’) was enacted, which replaced the ‘operation of law’ revocation of citizenship model in the 2015 Amendment Act with a citizenship deprivation model based on ministerial discretion. The 2015 amendments were passed with the support of both sides of Parliament, and with supporting polls from the Australian public, while the 2020 amendments received little public attention in the first place. Questions, however, still remain as to the limits on the Commonwealth government’s power to remove Australian citizenship.

This article examines what those limits, if there are any, might be. It first sets out the legal and normative conceptions of Australian citizenship and the effect of the *Citizenship Revocation Laws* on those conceptions. It then undertakes a doctrinal analysis of the constitutionality of those laws and demonstrates that a traditional constitutional analysis, drawing upon principles of statutory interpretation and legal precedent, does not provide adequate guidance in determining the Commonwealth government’s power to withdraw citizenship.⁴ A comprehensive review of, and justification for, the application of a feminist approach is not possible here. Instead, this article in turn puts forward the suggestion that a conceptual and historically-based feminist analysis of the issue, drawing on different and diverse branches of feminism, can help both to clarify the nature and existence of constitutional limits and provisionally support a conclusion that Australian citizenship is inviolable. If this conclusion is correct, then citizenship becomes an inappropriate target for government to manipulate in formulating the nation’s strategic and legislative plans.

There is an argument increasingly made that many areas of law can appropriately be subjected to a feminist method and critique, while remaining both ‘authentic’ and ‘legally plausible’,⁵ within mainstream thinking. The matter of citizenship deprivation has not yet been considered from a feminist perspective, despite such laws being

³ See Revised Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 1 (‘Revised Explanatory Memorandum 2015 Amendment Act’).

⁴ It should be noted that while this article focuses on answering the question of *whether* citizens can be deprived of their citizenship, and not questions as to *how* citizenship can be taken away.

⁵ Heather Douglas et al, ‘Introduction: Righting Australian Law’ in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 1.

increasingly commonplace around the world, and despite feminism's traditional concern with and critique of citizenship matters.⁶ This article attempts to rectify this.

II CONCEPTIONS OF AUSTRALIAN CITIZENSHIP AND THE *CITIZENSHIP REVOCATION LAWS*

A Legal and Normative Conceptions of Australian Citizenship

The concept of citizenship has been described as 'the key to so much that is at the heart of being Australian',⁷ as being at 'the heart of Australian politics',⁸ and as 'the cornerstone of our society and the bond which unites us as a nation'.⁹ Both legal and normative conceptions of citizenship are relevant in the Australian context.

The legal notion of citizenship concerns the formal legal status of people within a particular nation-state and, accordingly, encompasses issues such as the 'acquisition and loss of citizenship, the criteria for citizenship by application, dual or multiple citizenship and discrimination based upon citizenship status'.¹⁰ The normative conception sees citizenship as 'more than a passive belonging' to a nation-state, and understands it to be the substantive and active membership of a community.¹¹ Broadly, this conception considers the 'subjective experiences of participation and belonging'.¹² As Linda Bosniak has said, 'citizenship' is a term with 'an extraordinarily broad range of uses; it is invoked to characterise modes of participation

⁶ See below n 123 and accompanying text.

⁷ Sir Ninian Stephen, 'The First Half-Century of Australian Citizenship' in Kim Rubenstein (ed), *Individual, Community, Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 1, 2.

⁸ John Chesterman and Brian Galligan, 'Introduction' in John Chesterman and Brian Galligan (eds), *Defining Australian Citizenship: Selected Documents* (Melbourne University Press, 1999) 1, 1–2. See Baden Offord et al, *Inside Australian Culture: Legacies of Enlightenment Values* (Anthem Press, 2014) 41–2.

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2006, 9 (Russell Broadbent).

¹⁰ Kim Rubenstein, 'Epilogue: Reflections on Women and Leadership through the Prism of Citizenship' in Joy Damousi, Kim Rubenstein and Mary Tomsic (eds), *Diversity in Leadership: Australian Women, Past and Present* (Australian National University Press, 2014) 335, 335.

¹¹ Margaret Thornton, 'Embodying the Citizen' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 200; Kim Rubenstein, 'Citizenship in Australia: Unscrambling Its Meaning' (1995) 20(2) *Melbourne University Law Review* 503, 503–4, 517 ('Citizenship in Australia').

¹² Sasha Roseneil, 'Beyond Citizenship: Feminism and the Transformation of Belonging' in Sasha Roseneil (ed), *Beyond Citizenship: Feminism and the Transformation of Belonging* (Palgrave Macmillan, 2013) 1, 3.

and governance, rights and duties, identities and commitments, and statuses'.¹³ The normative conception identifies a 'citizen' as being a person who possesses not only legal power, but who also holds and wields 'social and political power'.¹⁴

While there is a disjuncture between the two conceptions, they can be linked. Citizenship, on both conceptions, is desirable and valuable,¹⁵ and there is an important sense in each formulation that citizenship is about membership and belonging. In the context of citizenship revocation, the two conceptions are especially linked by the fact that the normative can be dependent upon the legal status and, specifically, on the protection against deportation that comes with that status. The loss of legal citizenship involves the 'permanent removal from a person's place of residence, community, family, workplace and other bonds of settled life',¹⁶ amounting to, as Warren CJ in the Supreme Court of the United States has described it, 'the total destruction of the individual's status in organized society'.¹⁷

B *The Cessation of Citizenship Acts*

1 *The 2015 Amendment Act*

The *2015 Amendment Act* amended the *Citizenship Act* to provide that Australian citizenship could be lost in three circumstances, namely: (i) where a dual citizen committed prescribed (terrorist-related) conduct and did so while not in Australia, or where the dual citizen committed such conduct and left Australia before being tried;¹⁸ (ii) where a dual citizen either fought for, or served in, a declared terrorist organisation;¹⁹ or, (iii) where a dual citizen was convicted of one of the listed offences, and a prison sentence of at least six years was imposed.²⁰ In the first two circumstances, the citizenship loss was triggered automatically by the very conduct taking place and no conviction need first occur. In the third circumstance, citizenship loss

¹³ Linda Bosniak, 'Citizenship Denationalized' (2000) 7(2) *Indiana Journal of Global Legal Studies* 447, 450.

¹⁴ Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York University Press, 2010) 5; Rubenstein, 'Citizenship in Australia' (n 11) 517–8.

¹⁵ Román (n 14) 4; Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008) 96 ('*Gender and the Constitution*'). See generally Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) ch 1.

¹⁶ Ben Saul, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (30 June 2015) 5.

¹⁷ *Trop v Dulles*, 356 US 88, 101 (1958).

¹⁸ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) ('*2015 Amendment Act*') s 3 amending *Australian Citizenship Act 2007* (Cth) ('*Citizenship Act*') ss 33AA(1)–(2), (7).

¹⁹ *2015 Amendment Act* (n 18) s 4 amending *Citizenship Act* (n 18) ss 35(1)(b)(i)–(ii).

²⁰ *Citizenship Act* (n 18) s 35A(1)(a)–(b).

occurs where the relevant minister, or, rather where a ‘Citizenship Loss Board’ which ‘operates in secret according to its own rules’,²¹ makes a decision to revoke the person’s citizenship. The Revised Explanatory Memorandum expressly recognised the implications of revocation for both the legal and normative conceptions of citizenship, defining citizenship as the ‘full *and* formal membership of the Australian community’.²²

It is worth noting that the initial draft of the *2015 Amendment Act* conferred on the Commonwealth government more expansive powers with respect to citizenship deprivation than those which were ultimately set out in the final text of the Act. The initial text of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), for example, conferred on the relevant minister the power to strip the citizenship of a dual Australian citizen without there first being any charge or conviction made against that citizen. The relevant conduct for which citizenship loss could be triggered included a broad range of conduct such as, for example, the ‘destroying or damaging’ Commonwealth property.²³ The text of the initial Bill was revised, in part in response to the potential constitutional issues with the Bill raised by the Parliamentary Joint Committee on Intelligence and Security’s advisory report.²⁴ However, the enactment of the final *2015 Amendment Act* was nevertheless still described as ‘the most significant expansion of the grounds for citizenship loss in Australia since citizenship legislation was first entered into force’,²⁵ and as ‘one of the most important changes to Australian citizenship since the concept was introduced in 1948’.²⁶

²¹ George Williams, ‘Stripping of Citizenship a Loss in More Ways than One’, *Sydney Morning Herald* (online, 17 April 2016) <<http://www.smh.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>>; Sangeetha Pillai, ‘Citizenship-Stripping Reforms Open to Challenge in Spite of Safeguards’ [2016] (February) *Law Society of New South Wales Journal* 74, 75 (‘Citizen-Stripping Reforms’).

²² Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1 (emphasis added).

²³ Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (No 1) 2015 (Cth). See generally Margaret Harrison-Smith and Cat Barker, *Bills Digest* (Digest No 15 of 2015–16, 2 September 2015).

²⁴ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Report, September 2015).

²⁵ Pillai, ‘Citizenship-Stripping Reforms’ (n 21) 74.

²⁶ George Williams, ‘Citizenship Rights a Casualty of Terrorism’, *The Age* (online, 16 November 2015) <<http://www.theage.com.au/comment/george-williams-citizenship-rights-a-casualty-of-terrorism-20151114-gkz9gv.html>>. Prior to the passing of the *ACA Act*, Australian dual citizens could lose their Australian citizenship if they served in the armed forces of a country ‘at war’ with Australia. However, the executive never used that revocation power: Harrison-Smith and Barker (n 23) 4. Citizenship loss could also occur if citizenship was obtained fraudulently: *Citizenship Act* (n 18) ss 34, 34A, 35. Section 35 was repealed by *Australian Citizenship Amendment Act (Citizenship Cessation) Act 2020* (Cth) sch 1 cl 9.

The Commonwealth government justified the enactment of the *2015 Amendment Act*, and the differentiation between Australian citizens who hold another citizenship and those who do not, on the basis of national security and the need for a ‘multi-faceted approach’ to counter security threats.²⁷ The Commonwealth government did not, however, frame the loss of citizenship as being in any way a ‘punishment’, despite it being generally considered to be ‘an extraordinarily harsh’ one.²⁸ This framing was deliberate. If the revocation of citizenship was characterised as a ‘punishment’, then the *2015 Amendment Act* would immediately fall foul of the *Constitution*, as a Minister would be exercising judicial power, which the High Court has held can only be exercised by a Ch III Court.²⁹ Accordingly, the government framed the revocation of citizenship as being an administrative, and almost contractual law matter. Citizenship was set out as a concept that ‘does not simply bestow privileges or rights, but entails fundamental responsibilities’,³⁰ and that, when dual nationals commit specified terrorist-related conduct, they ‘betray Australia’,³¹ and should be taken to ‘have severed that bond and repudiated their allegiance to Australia’.³² Australian citizens, on this view, are not ‘punished’ when their citizenship is revoked. They have simply failed to fulfil their ‘responsibilities’ as citizens and must therefore be removed in order to protect other Australian citizens. These ideas were reiterated and built upon by key government ministers in public fora.³³

The Australian public appeared to accept those government justifications and the *2015 Amendment Act* was well received, even in its more extreme initial form. Polling conducted by Australia’s Fairfax Media found that 75% of people polled were in favour of the stripping of citizenship of those Australian citizens involved in terrorist

²⁷ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

²⁸ Shai Lavi, ‘Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach’ (2011) 61(4) *University of Toronto Law Journal* 783, 809; Shai Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’ (2010) 13(2) *New Criminal Law Review* 404, 425–6; Craig Forcese, ‘A Tale of Two Citizenships: Citizenship Revocation for “Traitors and Terrorists”’ (2014) 39(2) *Queen’s Law Journal* 551, 565.

²⁹ See *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 269–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*Boilermakers Case*).

³⁰ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton).

³² Revised Explanatory Memorandum 2015 Amendment Act (n 3) 1.

³³ See, eg, Dan Tehan, ‘To Be an Aussie is a Gift That Terrorists Seek to Destroy’, *Herald Sun* (online, 16 May 2015) <<http://www.heraldsun.com.au/news/opinion/to-be-an-aussie-is-a-gift-that-terrorists-seek-to-destroy/news-story/4006b90c4890b96fb8212dd1a34e8c0b>>; Dan Conifer, ‘Terror Citizenship Laws: Government Introduces to Parliament Bill to Strip Dual Nationals of Citizenship’, *ABC News* (online, 24 June 2015) <<http://www.abc.net.au/news/2015-06-24/government-introduces-citizenship-laws-bill-to-parliament/6569570>>.

activity,³⁴ and one editorial pointedly stated that ‘Prime Minister Tony Abbott knows he is on a vote winner with plans to strip Australian citizenship’.³⁵ When the final amendments passed ‘almost nobody care[d] about’ the legislation.³⁶

2 *The 2020 Amendment Act*

In response to a report produced by the Independent National Security Legislation Monitor (the ‘INSLM’) in 2019, the *2020 Amendment Act* was enacted. Specifically, the *2020 Amendment Act* responded to the INSLM’s recommendation that

[the] current ‘operation of law’ model, whereby a dual-national’s Australian citizenship is automatically renounced through their actions, be replaced by a Ministerial decision model, such that the Minister may take in to account a broader range of considerations in determining whether to cease an individual’s citizenship.³⁷

The *2020 Amendment Act*, accordingly, repealed ss 33AA, 35–35B and 36A of the *Citizenship Act* and inserted into that Act new sections — ss 36A–36L. The new sections, broadly speaking, provide that an Australian dual-citizen could lose their Australian citizenship, on the exercise of the Minister for Home Affairs’ discretion, if the dual-citizen was found to have acted in a manner inconsistent with their allegiance owed to Australia by

- engaging in specified terrorism-related conduct;
- fighting for, or being in the service of, a declared terrorist organisation outside Australia. A declared terrorist organisation is any terrorist

³⁴ James Massola, ‘Poll Shows Huge Support for Stripping Sole Nationals of Australian Citizenship’, *Sydney Morning Herald* (online, 6 July 2015) <<http://www.smh.com.au/federal-politics/political-news/poll-shows-huge-support-for-stripping-sole-nationals-of-australian-citizenship-20150706-gi6416.html>>.

³⁵ ‘Tony Abbott’s Cynical and Risky Citizenship Stripping Plans’, *Sydney Morning Herald* (online, 1 June 2015) <<http://www.smh.com.au/comment/smh-editorial/tony-abbotts-cynical-and-risky-citizenship-stripping-plans-20150601-ghe6xc.html>>.

³⁶ Michael Bradley, ‘How Can you Lose Your Citizenship? Let Me Count the Ways’, *ABC News* (online, 3 December 2015) <<http://www.abc.net.au/news/2015-12-03/bradley-how-can-you-lose-your-citizenship/6996496>>. Interestingly, Peter Prince notes with respect to *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (‘*Ame*’), which, as discussed further below involved the revocation of Australian citizenship from an Australian-PNG dual citizen, that that case ‘received little publicity’: see Peter Prince, ‘Mate! Citizens, Aliens and “Real Australians”: The High Court and the Case of Amos Ame’ (Research Brief No 4, Parliamentary Library, Parliament of Australia, 27 October 2005) 19.

³⁷ Revised Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 (Cth) 1 (‘Revised Explanatory Memorandum 2020 Amendment Act’); James Renwick, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Report No 7, 18 September 2019).

organisation within the meaning of paragraph (b) of the definition of a terrorist organisation in subsection 102.1(1) of the *Criminal Code*, that the Minister, by legislative instrument, declares is a declared terrorist organisation for the purposes of this section;

- engaging in conduct that results in conviction for a specified terrorism offence, and sentenced to a period of imprisonment of at least 3 years, or periods totalling at least 3 years.³⁸

The *2020 Amendment Act* provides that the Minister must be satisfied both that the conduct of the dual-citizen demonstrates a repudiation of their allegiance to Australia, and that it would be contrary to the public interest for the person to remain an Australian citizen.³⁹

III A DOCTRINAL ANALYSIS OF THE *CITIZEN REVOCATION LAWS*

Legal citizenship in Australia has traditionally, and predominantly, been governed by statute.⁴⁰ While the inclusion of the concept of citizenship in the *Constitution* had been advocated by some delegates at the Australasian Federal Convention Debates,⁴¹ no consensus was reached on the matter and it was ultimately dropped.⁴² The High Court has, however, found some protection for ‘citizenship’ in the *Constitution* by way of: (i) the Commonwealth government’s power to legislate with respect to naturalisation and aliens in s 51(xix) of the *Constitution*;⁴³ and, (ii) the phrase, ‘the people

³⁸ Revised Explanatory Memorandum 2020 Amendment Act (n 37) 1. See Australian Citizenship Amendment (Citizenship Cessation) Bill 2020 sub-div B (‘2020 Citizenship Cessation Bill’).

³⁹ See 2020 Citizenship Cessation Bill (n 38) ss 36B(1)(b)–(c), 36D(1)(c)–(d).

⁴⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) (‘*Lim*’); Kim Rubenstein and Niamh Lenagh-Maguire, ‘Citizenship and the Boundaries of the Constitution’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 143, 145.

⁴¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1767–8 (John Quick).

⁴² Sangeetha Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited’ (2013) 39(2) *Monash University Law Review* 569, 572 (‘Non-Immigrants’); Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: A Mere Legal Inference’ (1997) 25(2) *Federal Law Review* 295, 295 (‘Constitutional Convention Debates’); Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legalbooks, 1995) 957. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1782 (Josiah Symon).

⁴³ *Constitution* s 51(xix). Section 51(xix) works in parallel with s 51(xxvii), which gives the Parliament legislative power in relation to immigrants until they ‘[become] a member of the Australian Community’: *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 64 (Knox CJ).

of the Commonwealth' in s 24 of the *Constitution*.⁴⁴ Legal citizenship in Australia, therefore, is increasingly understood to have a 'constitutional dimension'.⁴⁵

These constitutional pathways to citizenship are examined here and, for each pathway, a more classic, formal methodology of legal interpretation, which draws on such sources as constitutional text, framers' intent, precedent and existing doctrine,⁴⁶ is undertaken. That analysis is completed with a view to yielding positive and persuasive answers to the issue at hand, namely, the constitutionality of the *Citizenship Revocation Laws*. It is demonstrated that such a methodology cannot provide a clear or determinate answer to the constitutional questions raised.

A *The Aliens Power*

Section 51(xix) of the *Constitution* provides that the Commonwealth Parliament shall have the power to make laws 'with respect to ... naturalization and aliens'. The overriding position at the Convention Debates was that the Parliament should have 'expansive legislative powers with respect to naturalisation and aliens'.⁴⁷ The High Court, despite the absence of any mention of citizenship in the section, has 'accepted, without deciding expressly'⁴⁸ that s 51(xix) is also the constitutional head of power under which the Parliament may legislate with respect to citizenship. The High Court has, however, placed some limits on how exactly the Parliament can regulate citizenship under this power.⁴⁹

The key limitation to the Parliament's power to legislate with respect to citizenship under the alien's power is the definition of 'alien'. The High Court has found that Parliament cannot simply create its own definition of 'alien' and extend s 51(xix) of

⁴⁴ *Constitution* s 24.

⁴⁵ See Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144; Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25(2) *Adelaide Law Review* 137; Pillai, 'Non-Immigrants' (n 42).

⁴⁶ Judith Baer, *Our Lives before the Law: Constructing a Feminist Jurisprudence* (Princeton University Press, 1999) 89; James Harris, 'Overruling Constitutional Interpretations' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 231, 232–3.

⁴⁷ Pillai, 'Non-Immigrants' (n 42) 578; Rubenstein, 'Constitutional Convention Debates' (n 42) 304; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1753, 1756 (Richard O'Connor).

⁴⁸ Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144.

⁴⁹ *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4], 341 [30] (Gleeson CJ) ('*Singh*'); *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38 [11] (Gleeson CJ and Heydon J), 46 [48] (Gummow, Hayne and Crennan JJ) ('*Koroitamana*'); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ) ('*Ex parte Te*'); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 40 [21] (Gleeson CJ, Gummow and Hayne JJ) ('*Shaw*'); *Hwang v Commonwealth* (2005) 222 ALR 83, 89 [18] (McHugh J) ('*Hwang*').

the *Constitution*, ‘to include persons who could not possibly answer the description of “aliens” in the ordinary meaning of the word’.⁵⁰ The High Court has generally considered that a person who holds Australian statutory citizenship cannot meet the description of an alien,⁵¹ and a majority of the High Court held, more recently, that Indigenous Australians cannot meet the description of ‘alien’.⁵² This finding with respect to Indigenous Australians was on the basis of the unique and deep relationship Indigenous Australians have with Australia.⁵³ As articulated by Gordon J,

[t]he constitutional term ‘aliens’ conveys otherness, being an ‘outsider’, foreignness. The constitutional term ‘aliens’ does not apply to Aboriginal Australians, the original inhabitants of the country. An Aboriginal Australian is not an ‘outsider’ to Australia.⁵⁴

Aside from these specific situations, the majority of the case law in the early 21st century suggests that whether or not a person is an alien within the meaning of s 51(xix) of the *Constitution* is determined by questions of allegiance.⁵⁵ As Elisa Arcioni describes it, allegiance has become ‘the marker of membership and therefore of non-alien status’.⁵⁶ Conversely, an alien is someone who does not owe allegiance to Australia. There are three key cases in which the High Court has investigated this

⁵⁰ *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ) (*‘Pochi’*). *Pochi* was subsequently affirmed by the Court in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), 192 (Gaudron J) (*‘Nolan’*); *Singh* (n 49) 329 [4]–[5] (Gleeson CJ); *Koroitamana* (n 49) 38–9 [11]–[14] (Gummow, Hayne and Crennan JJ), 49 [62] (Kirby J), 54–5 [81]–[82] (Callinan J); *Love v Commonwealth* (2020) 375 ALR 597, 600 [7] (Kiefel CJ), 609 [50] (Bell J), 618 [87] (Gageler J); 636–7 [168] (Keane J), 650–1 [236] (Nettle J), 673–4 [310] (Gordon J); 703–4 [433] (Edelman J) (*‘Love’*).

⁵¹ See, eg, *Shaw* (n 49) 53 [69] (Kirby J). *Shaw* overturned *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, where the High Court had held that long-term British immigrants could not meet the description of ‘alien’ on the basis that they held those rights, such as voting rights, held by those with Australian statutory citizenship. Cf *Ame* (n 36).

⁵² *Love* (n 50).

⁵³ *Ibid* 615 [74] (Bell J), 664 [272] (Nettle J), 671 [298] (Gordon J), 689–90 [391], 690–1 [394] (Edelman J). The dissenting judges held that being of Indigenous descent was irrelevant to whether or not a person was an ‘alien’ and that, given the plaintiffs did not have statutory citizenship and had the citizenship of another country, they were aliens within the meaning of s 51(xix) of the *Constitution*: see the judgments of Kiefel CJ beginning 598 [1], Gageler J beginning 616 [83] and Keane J beginning 632 [142].

⁵⁴ *Ibid* 670 [296].

⁵⁵ Pillai, ‘Non-Immigrants’ (n 42) 592. See, eg, *Singh* (n 49); *Koroitamana* (n 49). Matters of ‘absorption into the Australian community’ are no longer relevant: see Ebbeck (n 45).

⁵⁶ Elisa Arcioni, ‘Identity at the Edge of the Constitutional Community’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 42 (*‘Identity at the Edge’*).

concept of ‘allegiance’: *Singh v Commonwealth* (‘*Singh*’),⁵⁷ *Ame*,⁵⁸ and *Koroitamana v Commonwealth* (‘*Koroitamana*’).⁵⁹

In *Singh*, the majority found that the plaintiff, who had lived in Australia for her whole life, but who held Indian citizenship by descent, was an alien.⁶⁰ The plaintiff in that case lacked allegiance because she was not an Australian citizen, but her owing obligations to a foreign power (namely India) were also key to the finding that she lacked allegiance. Obligations to a foreign power were described by Gummow, Hayne and Heydon JJ as ‘the central characteristic of what is meant by “aliens”’.⁶¹

Unlike *Singh*, the decision in *Ame* concerned a plaintiff who held the legal status of Australian citizen. The High Court held in *Ame* that the plaintiff, a Papuan who had held formal Australian citizenship since birth, became an alien in 1975, as result of the operation of the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth).⁶² Those regulations stripped dual Australian-Papua New Guinea (‘PNG’) citizens of their Australian citizenship, following the enactment of the new *Constitution of the Independent State of Papua New Guinea*, which contained a prohibition on dual citizenship or, more precisely, a prohibition on the holding of ‘real foreign citizenship’ while holding a PNG citizenship.⁶³ The High Court again held that the owing of ‘allegiance to a foreign sovereign power’, here being those obligations the plaintiff owed to PNG, was a critical characteristic of alienage.⁶⁴ This was apparently so essential a characteristic that even a legal Australian citizen could be treated as an alien if they owed obligations to a foreign power. As Arcioni notes, *Ame* demonstrated that allegiance to Australia alone ‘was not sufficient to safeguard membership of the constitutional community’.⁶⁵

To justify the decision that an Australian citizen could be an alien, the judgments in *Ame* focused on the fact that the Commonwealth Parliament had always ‘denied the political rights normally linked to citizenship from Papuans — such as voting, jury

⁵⁷ *Singh* (n 49).

⁵⁸ *Ame* (n 36).

⁵⁹ *Koroitamana* (n 49).

⁶⁰ *Singh* (n 49) 400 [205] (Gummow, Hayne and Heydon JJ).

⁶¹ *Ibid* 399 [201]. See also Kim Rubenstein, ‘From Supranational to Dual to Alien Citizen: Australia’s Ambivalent Journey’ in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Post-National World: Australia and Europe Compared* (Federation Press, 2008) 38, 47 (‘From Supranational’).

⁶² *Ame* (n 36) 440–1.

⁶³ *Constitution of the Independent State of Papua New Guinea* ss 64–5; *Ame* (n 36) 448 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 464 (Kirby J).

⁶⁴ *Ame* (n 36) 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

⁶⁵ Arcioni, ‘Identity at the Edge’ (n 56) 43.

service, and freedom of movement in and out of the mainland'.⁶⁶ This, accordingly, meant that the Australian citizenship held by the plaintiff was only 'nominal', and 'not in fact or law full or real citizenship'.⁶⁷ It was, simply, 'a veneer of Australian citizenship' and a 'flawed citizenship' of a 'fragile and strictly limited character'.⁶⁸ This was itself recognised by PNG, which viewed Australian citizenship as not being 'real foreign citizenship' which would fall foul of the PNG *Constitution*.⁶⁹ Justice Kirby did emphasise *Ame's* limited precedential value and noted that it reflected 'an incident to the achievement of the independence and national sovereignty of a former Territory' and so, afforded 'no precedent for any deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law'.⁷⁰ However, the reasoning of the High Court in the more recent case of *Re Canavan* does share similarities with the Court's reasoning in *Ame*.⁷¹ The High Court in *Re Canavan* was not examining the aliens power, but rather the eligibility of certain Parliamentarians to sit in Parliament in light of s 44 of the *Constitution* which, in effect, prohibits dual citizens from sitting in Parliament. The High Court, in *Re Canavan*, held that Senator Nick Xenophon was not a dual citizen on the basis that his 'British Overseas Citizenship' was not a 'real' citizenship, because it did not encompass a right to enter or stay in the United Kingdom, nor, most interestingly, did it involve any obligation of loyalty (ie allegiance) being owed to the United Kingdom.⁷²

Koroitamana extended the ideas of allegiance presented in both *Singh* and *Ame*, namely, that there would be a lack of allegiance where obligations were owed to a foreign power.⁷³ While the plaintiffs in *Koroitamana* were entitled to Fijian citizenship, they did not, unlike the plaintiffs in *Singh* and *Ame*, actually hold that foreign citizenship.⁷⁴ Accordingly, the plaintiffs did not owe allegiance to a foreign power. This was not, however, held to be a distinguishing feature and the plaintiffs in

⁶⁶ Kim Rubenstein and Niamh Lenagh-Maguire, 'Thick and Thin Citizenship as Measures of Australian Democracy' in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy: Contemporary Questions* (Australian National University Press, 2014) 41 ('Thick and Thin Citizenship'); *Ame* (n 36) 449 [12], 457 [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 470 [73] (Kirby J).

⁶⁷ *Ame* (n 36), 471 [76] (Kirby J). See also Rubenstein and Lenagh-Maguire, 'Thick and Thin Citizenship' (n 66) 41.

⁶⁸ *Ame* (n 36) 474 [88], 483 [118] (Kirby J).

⁶⁹ *Constitution of the Independent State of Papua New Guinea* s 64.

⁷⁰ *Ame* (n 36) [117] 483.

⁷¹ *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* (2017) 263 CLR 284 ('*Re Canavan*').

⁷² *Ibid* 328–9 [132]–[133] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁷³ *Koroitamana* (n 49) 41–2 [28] (Gummow, Hayne and Crennan JJ).

⁷⁴ *Ibid* 53 [76] (Kirby J).

Koroitamana were found to be aliens.⁷⁵ This implies, as Sangeetha Pillai argues, that ‘allegiance to a foreign power’ is not a ‘determinative element of alienage’.⁷⁶ Rather, it is enough that there be an absence of allegiance to Australia.⁷⁷

The Commonwealth government, in the Revised Explanatory Memorandum for the *2015 Amendment Act*, stated that the relevant head of power supporting the *ACA Act* was the aliens power,⁷⁸ on the basis that the power can operate, in effect, to turn an Australian dual citizen into an alien. The Commonwealth government also, albeit implicitly, stated that the supporting head of power for the *2020 Amendment Act*, was similarly s 51(xix) of the *Constitution*.⁷⁹

The judicial precedents of *Singh* and *Ame* and, to an extent, *Koroitamana*, as set out above, demonstrate that a person will be an alien where that person owes obligations to a foreign power and, on that basis, lacks allegiance. These precedents in effect mean that there is a potential argument that all dual nationals, who, by definition, owe obligations to foreign powers, lack allegiance and are ‘aliens’ within the meaning of s 51(xix) of the *Constitution*. *Ame*, most significantly for the purposes of this argument, demonstrated that even the holding of formal Australian citizenship was not necessarily a barrier to finding a lack of allegiance and, therefore, alienage, in circumstances where obligations are owed by the citizen to a foreign power.⁸⁰ As Kim Rubenstein argues, ‘the consequence is that anyone who formally owes an obligation to a foreign power ... can be both citizens and aliens at the same time’,⁸¹ possibly eventuating in a dual citizen being

detained and possibly deported or removed to the country of their citizenship, even if they had spent their whole life in Australia and had no real connection to that country.⁸²

On this analysis, the *Citizenship Revocation Laws* find constitutional support in the aliens power on the basis that dual nationals lack the requisite allegiance and could be, therefore, validly deported as aliens. Both Gordon J and Edelman J in *Love*, however, cast doubt on whether dual citizens, for that status alone, could be considered aliens.⁸³ As the Court in *Singh* did not directly contemplate questions of dual citizenship, and the limited precedential value of *Ame* was emphasised throughout Kirby J’s judgment as not applying to those ‘other Australian citizens’

⁷⁵ Ibid 38–9 [14]–[16] (Gleeson CJ and Heydon J), 46–7 (Crennan, Gummow and Hayne JJ), 55 [82]–[83] (Kirby J), 56 [86] (Callinan J).

⁷⁶ Pillai, ‘Non-Immigrants’ (n 42) 592.

⁷⁷ Ibid.

⁷⁸ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2.

⁷⁹ Revised Explanatory Memorandum 2020 Amendment Act (n 37) 7.

⁸⁰ *Ame* (n 36) 458 [35].

⁸¹ Rubenstein, ‘From Supranational’ (n 61) 47.

⁸² Ibid.

⁸³ *Love* (n 50) 675 [317]–[318] (Gordon J), 703 [430] (Edelman J).

who hold ‘real citizenship’, there are potentially very salient differences between those precedents and the potential issues under the *Citizenship Revocation Laws*.

Of course, a clear textual argument is available to support the constitutionality of the *Citizenship Revocation Laws*, namely that there is no inherent limitation in the text of the ‘naturalisation and aliens’ power ‘that prevents that power being applied unilaterally to change a person’s status from non-alien to alien’.⁸⁴ In any case, the government’s key argument for constitutionality, as expressed in the Revised Explanatory Memorandums for both the *2015 Amendment Act* and the *2020 Amendment Act*, focused almost entirely on the *Koroitamana* precedent, which held that an absence of allegiance is sufficient to find alienage.⁸⁵ The *Citizenship Revocation Laws* took that legal precedent and extended it. Both Amendment Acts define allegiance, and thus, what constitutes a lack of allegiance, in a particular way, by drawing on the ordinary meaning of ‘allegiance’ and interpreting it as ‘the obligation of a subject or citizen to their sovereign or government; duty owed to a sovereign or state’.⁸⁶ On the basis of this definition, the Commonwealth government argued that when terrorist-related conduct occurs, the dual citizen may be taken to be in breach of his or her obligations to Australia, as having ‘severed th[e] bond’, and therefore, as lacking allegiance.⁸⁷ The dual citizen thus becomes a constitutional alien subject to deportation. If this definition of allegiance (and, accordingly, what constitutes an absence of allegiance) is indeed accepted as logical, then the constitutional validity of both the *2015 Amendment Act* and the *2020 Amendment Act*, at least on this point, is not in question. This is a plausible outcome, particularly in light of what Pillai describes as the High Court’s traditional ‘great deference to statutory concepts when determining whether the criteria for non-alienage are met’.⁸⁸

This reading of allegiance may, however, be oversimplified because a focus on allegiance as something ‘exclusive and insoluble’⁸⁹ to ‘a’ state is, arguably, a very ‘traditional and narrow’ way to consider the concept.⁹⁰ The High Court might take a more nuanced approach and read ‘allegiance’ as a term with ‘multiple legal,

⁸⁴ *Ame* (n 36) 441.

⁸⁵ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2; Revised Explanatory Memorandum 2020 Amendment Act (n 37) 7.

⁸⁶ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2, quoting *Macquarie Dictionary* (5th ed, 2009) ‘allegiance’.

⁸⁷ Revised Explanatory Memorandum 2015 Amendment Act (n 3) 2; Revised Explanatory Memorandum 2020 Amendment Act (n 37) 8.

⁸⁸ Pillai, ‘Non-Immigrants’ (n 42) 607. See also *Lim* (n 40) 54 (Gaudron J).

⁸⁹ Kim Rubenstein and Niamh Lenagh-Maguire, ‘More or Less Secure: Nationality Questions, Deportation and Dual Nationality’ in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 264, 265.

⁹⁰ Joshua Neoh, Donald R Rothwell and Kim Rubenstein, ‘The Complicated Case of Stern Hu: Allegiance, Identity and Nationality in a Globalised World’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised*

political and social meanings’,⁹¹ and one that is, therefore, not definable. On such a reading, a person can have many varying allegiances and it would be impossible for the government to define precisely what is meant by a lack of allegiance and what conduct may constitute it. Further, such a reading of ‘allegiance’ would bring into question how the *ACA Act* can only apply to dual nationals if it is ‘possible to have a connection to a country other than Australia, without that undermining one’s commitment to being a member of the Australian community’.⁹² In any case, the High Court, as argued by Helen Irving and Rayner Thwaites, ‘may consider it a different matter for the law to re-define citizens as aliens’ where the person otherwise meets ‘formal citizenship eligibility’.⁹³ Pillai supports this argument, saying the ‘Parliament cannot, through statute, convert a constitutional non-alien into an alien’.⁹⁴ The *ACA Act* may, on this line of analysis, be unconstitutional.

More generally, a close examination of the judgments and, therefore, of the state of precedent on the scope of the aliens power in the *Constitution* set out above, reveals a lack of unanimity in the decisions, and significant shifts with each case on important matters of principle. This helps to create significant uncertainty on the issue of the constitutionality of the *ACA Act* and how the High Court is likely to approach it.

B *The ‘People of the Commonwealth’*

Australian citizenship may also have another constitutional foundation in ‘the people of the Commonwealth’.⁹⁵ The phrase is found in s 24 of the *Constitution*, which provides that the ‘House of Representatives shall be composed of members directly

World (Cambridge University Press, 2014) 453, 476. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1012–3 (Edmund Barton).

⁹¹ Neoh, Rothwell and Rubenstein (n 80) 476; Karen Knop, ‘Relational Nationality: On Gender and Nationality in International Law’ in Thomas Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 89, 113.

⁹² Kim Rubenstein, ‘Dual Reasons for Dual Citizenship’ (1995) 3(3) *People and Place* 57, 57.

⁹³ Helen Irving and Rayner Thwaites, ‘Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)’ (2015) 26(3) *Public Law Review* 137, 145.

⁹⁴ Pillai, ‘Non-Immigrants’ (n 42) 593.

⁹⁵ This article focuses on the phrase itself and idea that the people are sovereign. Citizenship may also be protected because revocation would lead citizens to lose their ‘right to vote’ as encompassed in s 24 of the *Constitution*. However, that right is ‘contingent and conditional’: see Irving and Thwaites (n 93) 147; Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 91.

chosen by the people of the Commonwealth'.⁹⁶ The shorter phrases, the 'people',⁹⁷ and the 'electors',⁹⁸ are also found in the *Constitution*.

The idea that 'the people' recognises a constitutional Australian community 'has been hinted at by a number of High Court judges'.⁹⁹ As Sir John Quick and Sir Robert Garran set out, the phrase the 'people of the Commonwealth' may be 'the nearest approach in the *Constitution* to a designation equivalent to citizenship'.¹⁰⁰ This idea was drawn upon by McHugh J in *Hwang v Commonwealth* ('*Hwang*').¹⁰¹ In that case, the plaintiffs were born in Australia, but in immigration detention.¹⁰² They were, ultimately, considered to be 'unlawful non-citizens'.¹⁰³ Notably, McHugh J stated that citizenship was not just a legislative matter.¹⁰⁴ There seemed to be 'no doubt', in his Honour's mind, that at federation 'being one of "the people of the Commonwealth"' was recognised as synonymous with the concept of being a citizen of Australia'.¹⁰⁵

As Rubenstein and Niamh Lenagh-Maguire point out, the constitutional text itself does not 'classify the people to whom it applies in terms of their status as Australian citizens'.¹⁰⁶ Who 'the people' are remains undefined. Arcioni's examination has found that the High Court has 'generally avoided delving into the details of how membership of the constitutional "people" is determined'.¹⁰⁷ Several of the judgments in *Love* demonstrate a recent example of this very avoidance on the part of the High Court to say precisely who are 'the people'.¹⁰⁸ Justice McHugh's judgment in *Hwang* still remains perhaps the most detailed precedent on this question. His Honour said that it was in the Parliament's power to decide who constitutes 'the people', though this power was not an 'unlimited power to declare the conditions

⁹⁶ *Constitution* s 24.

⁹⁷ *Ibid* preamble, cl 5, ss 7, 53.

⁹⁸ *Ibid* ss 8, 30, 123, 128. The 'people' and 'electors' are 'not identical concepts' but, arguably, 'have converged': Elisa Arcioni, 'The Core of the Australian Constitutional People: "the People" as "the Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421, 421 ('The Core of the Australian People'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19 [21] ('*Rowe*').

⁹⁹ Pillai, 'Non-Immigrants' (n 42) 576. See, eg, *DJL v Central Authority* (2000) 201 CLR 226, 278 [135] (Kirby J) ('*DJL*'); *Love* (n 47) 683 [355] (Gordon J).

¹⁰⁰ Quick and Garran (n 42) 957.

¹⁰¹ *Hwang* (n 49).

¹⁰² *Ibid* 84 [3].

¹⁰³ See *Ibid* 84–5 [4]; See also Pillai, 'Non-Immigrants' (n 42) 599.

¹⁰⁴ *Hwang* (n 49) 89 [19].

¹⁰⁵ *Ibid* 87 [11].

¹⁰⁶ Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 144.

¹⁰⁷ Arcioni, 'Identity at the Edge' (n 56) 51.

¹⁰⁸ *Love* (n 50) 639 [178] (Keane J), 670 [295] (Gordon J), 705 [436] (Edelman J).

on which citizenship or membership of the Australian community depends'.¹⁰⁹ His Honour stated further that Parliament could not, for example, exclude 'those persons who are undoubtedly among "the people of the Commonwealth"', but could exclude persons among 'the people' for particular purposes, such as by restricting 'the qualification of electors of members of the House of Representatives'.¹¹⁰ The valid exclusion of both 'an entire class of British citizens resident in Australia' in *Shaw*,¹¹¹ and those Australian-Papuan citizens in *Ame*, may also give some indication that the meaning of 'undoubtedly among the people of the Commonwealth' should be understood to be narrow.

A formal legal analysis which draws upon the text of the *Constitution* and these precedents interpreting the phrase 'people of the Commonwealth' seems to also reveal an absence of a clear, determinate principle to provide guidance on the constitutionality of the *Citizenship Revocation Laws*.

Given the emphasis on the existence of a foundational, broad parliamentary discretion to determine 'the people' and the *Ame* precedent which demonstrated that legal citizenship is not a safeguard against being brought outside 'the people', it could very well be that the Parliament is entitled to determine that those dual nationals who have engaged in terrorist activity are not 'undoubtedly among the people' in light of their activities. The *Citizenship Revocation Laws* may be constitutionally valid.

There are, however, also strong grounds for distinguishing *Ame* and it may be that the statutory Australian citizenship held by dual nationals places them 'undoubtedly among the people'. As noted above, Kirby J emphasised the limited precedent value of *Ame* and indicated that there might be some constitutional protection for legal citizens. Justice Kirby went so far as to say that the deprivation of nationality would be 'such a common affront to fundamental rights that I would not, without strong persuasion, hold it to be possible under the *Constitution*'.¹¹²

As Peter Prince argues, the position of dual nationals is, in any case, highly distinguishable from the position of the Papuan plaintiff in *Ame*, given that dual nationals have 'real' statutory Australian citizenship which, he says, usually entails 'the right to freely enter the country, vote in elections and work in the public service'.¹¹³ He argues that, in light of this, dual nationals 'receive protection against deprivation of citizenship by their membership of the "people of the Commonwealth"'.¹¹⁴ Dual nationals would not only lose their legal citizen status if citizenship revocation

¹⁰⁹ *Hwang* (n 49) 88–9 [17]–[18].

¹¹⁰ *Ibid* 89 [18]. But Parliament's ability to restrict the qualification of electors is limited: see *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe* (n 98).

¹¹¹ Rubenstein and Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution' (n 40) 154; *Shaw* (n 49) 43 [31].

¹¹² *Ame* (n 36) 476–7 [96].

¹¹³ Prince (n 36) 11.

¹¹⁴ *Ibid*.

occurred but, significantly, also those rights held by citizens. The ‘right to vote’ is of particular note because, as discussed, it enjoys some constitutional protection. Pillai supports this, saying that it is, arguably, those who ‘escape the ambit of both the aliens and immigration powers’ (that is, legal citizens) who ‘could form part of the “undoubted people of the Commonwealth”’.¹¹⁵ Since the *Citizenship Revocation Laws* operate to take dual nationals outside of ‘the people of the Commonwealth’, they could, on this argument, be unconstitutional.

An examination of legislative precedent, however, might support the view that the *Citizenship Revocation Laws* are constitutional. As noted above, there were, before 2015, existing deprivation of citizenship provisions in the *Citizenship Act*, which would, if exercised, have had the effect of taking citizens outside the parameters of the ‘people of the Commonwealth’. Section 17 of the *Australian Citizenship Act 1948* (Cth), repealed in 2002, is of particular note. The section only applied to dual nationals. When Australian citizens obtained another nationality, they could, under this section, be removed from ‘the people’.¹¹⁶ Section 17 read:

- (1) A person being an Australian citizen who has attained the age of 18 years, who does any act or thing:
 - (a) the sole or dominant purpose of which; and
 - (b) the effect of which;

is to acquire the nationality or citizenship of a foreign country, shall upon that acquisition, cease to be an Australian citizen.
- (2) Subsection (1) does not apply in relation to an act of marriage.

However, s 17 received significant criticism, on the basis that the section, arguably, ‘fell beyond the limit of constitutional power’ because it excluded persons from being among ‘the people of the Commonwealth’.¹¹⁷ This was the opinion of Ron Castan, who advised the government in 1995 on the constitutional validity of s 17. The advice was tabled before Parliament in 2002.¹¹⁸ Policy arguments were also put forward to repeal s 17 at that time on the grounds that it was ‘outmoded and discriminatory’ and ‘anachronistic that one section of the Australian population should be disadvantaged

¹¹⁵ Pillai, ‘Non-Immigrants’ (n 42) 607.

¹¹⁶ *Australian Citizenship Act 1948* (Cth) s 17, repealed by *Australian Citizenship Amendment Act 2002* (Cth) sch 1.

¹¹⁷ Kim Rubenstein, ‘The Vulnerability of Dual Citizenship: From Supranatural Subject to Citizen to Subject?’ in Jatinder Mann (ed), *Citizenship in Transnational Perspective* 245, 249 (‘The Vulnerability of Dual Citizenship’).

¹¹⁸ Ron Castan, ‘The Australian Citizenship Act 1948: Section 17 Memorandum of Advice’ in Commonwealth, *Parliamentary Debates*, Senate, 14 March 2002, 787–96 (Nick Bolkus).

by a prohibition on accessing more than one citizenship'.¹¹⁹ Rubenstein pointed to this argument in her submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the *2015 Amendment Act*.¹²⁰

In any case, the idea that there may be some constitutional protection to be found in the phrase 'the people of the Commonwealth' has still only really been 'hinted at by a number of High Court judges',¹²¹ and the only strong precedent affirming the phrase remains the single judge decision in *Hwang*. There is therefore considerable scope for the High Court to reason broadly about the issue of the *Citizenship Revocation Laws*' constitutionality in reference to the phrase. In fact, Arcioni argues that this limited precedent has already led to a (wrongly) purposive approach. She says that the lack of definition in 'the people of the Commonwealth' has seen the High Court previously take into account such factors as cultural identity, race and 'historical geographic connection' to influence its decisions as to who 'the people' are.¹²² In the future, there arguably remains a 'real risk' that members of the judiciary will simply construct who the 'people' are to reflect themselves.¹²³ This again contributes to uncertainty on the issue of whether the *Citizenship Revocation Laws* are constitutional.

IV A FEMINIST APPROACH TO THE *CITIZENSHIP REVOCATION LAWS*

The above analysis has shown, in rough outline, that a more classic doctrinal analysis of the *Citizenship Revocation Laws* yields cogent arguments which can be made, based on text and precedent, on both sides of the issue. The absence of certainty or even of a strong indication of the likely outcome is particularly undesirable in light of the significant consequences for individuals and for communities that flow from the deprivation of citizenship. A space accordingly exists for other interpretive pathways. As Judith Baer states, classic constitutional law analysis does not necessarily exclude other methods of interpretation and 'the interpreter can combine a search for original meaning, a textual analysis ... and an effort to make interpretation responsive to change'.¹²⁴

A feminist approach is one such method of interpretation that can be employed alongside a doctrinal analysis, and this section will demonstrate this in the context of questions surrounding the constitutionality of the *Citizenship Revocation Laws*

¹¹⁹ Joint Standing Committee on Migration, Parliament of Australia, *Australians All: Enhancing Australian Citizenship* (September 1994) 206 [6.90]. See also Australian Citizenship Council, *Australian Citizenship for a New Century* (Report, February 2000) 60–6.

¹²⁰ Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (20 July 2015) 5.

¹²¹ Pillai, 'Non-Immigrants' (n 42).

¹²² Arcioni, 'Identity at the Edge' (n 56) 49–50.

¹²³ *Ibid* 50.

¹²⁴ Baer (n 46) 89.

This section first sets out what the taking of a ‘feminist approach’ or feminist method of interpretation entails, at least for the purposes of this article, and briefly justifies the taking of such an approach here. It then demonstrates how a feminist method of interpretation can sit alongside the hitherto doctrinal analysis of the *Citizenship Revocation Laws* and provide both guidance and answers to the question of the constitutionality of the Amendment Acts.

A *The Feminist Approach*

This article takes a feminist approach in a similar way to that taken in the Australian Feminist Judgments Project. That is, it seeks to draw upon a ‘feminist consciousness’, alongside a doctrinal analysis, in order to yield answers.¹²⁵ The drawing upon a ‘feminist consciousness’ does not involve taking a deeply theoretical or particularly critical feminist approach, nor does it involve the reinventing of, intervening in or attacking of existing judicial precedent.¹²⁶ It does not draw on a particular branch of feminism, but rather involves, as the below analysis with respect to the constitutionality of the *Citizenship Revocation Laws* demonstrates, drawing upon aspects of various branches of feminism. These branches include: liberal feminism, radical feminism, relational feminism, post-modern feminism and intersectional feminism. In this way, it would perhaps be more accurate to employ the plural of ‘feminists’ consciousnesses’ and ‘feminists’ approaches’. Margaret Davies, for example, suggests using the term ‘feminisms’ in her analysis, as the singular ‘feminism’ is not ‘unproblematic’ and might

suggest that there is a common theoretical approach shared by those of us who believe that women are marginalised and devalued in society and that we must work towards the eradication of such disadvantage and oppression.¹²⁷

Having said this, it is still of some use to give at least a rough description as to what, broadly speaking, the drawing upon of a ‘feminist consciousness’, for the purposes of this article at least, might involve. In this vein, it might be described as

a focus on gender as a central organising principle of social life; an emphasis on the concept of power and the ways that it affects social relations; and an unwavering commitment to progressive social change.¹²⁸

¹²⁵ See, eg, Douglas et al (n 5) 7; Rosemary Hunter, ‘An Account of Feminist Judging’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 42, 42–3.

¹²⁶ See Kate Fitz-Gibbon and Jane Maher, ‘Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?’ (2015) 23(3) *Feminist Legal Studies* 253, 263.

¹²⁷ Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 232.

¹²⁸ Susan Millns and Noel Whitty, ‘Public Law and Feminism’ in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish Publishing, 1999) 1, 1. See also Margaret Thornton, ‘The Development of Feminist Jurisprudence’ (1998) 9(2) *Legal Education Review* 171, 179–80; Rian Voet, *Feminism and Citizenship* (Sage Publications, 1998) 17.

And, it might generally involve, as Margaret Thornton discusses, an emphasis on discourse and on real, lived experience as important tools of interpretation and analysis.¹²⁹

This article does not seek to invoke a feminist consciousness or method on the basis that the *Citizenship Revocation Laws* particularly affect women. In fact, citizenship deprivation laws disproportionately affect men, given that men are most often charged with, and convicted of, terrorist offences.¹³⁰ Rather, a feminist approach is being used here to resolve the constitutional issues at hand because it can offer, as Susan Millns and Noel Whitty describe it, ‘the means to interrogate all aspects of modern public law and policy’.¹³¹ More precisely, Millns and Whitty suggest that a feminist method can provide two things, namely: (i) a proper, useful and potent critique of public law;¹³² and, (ii) a tool which can ‘re-vision’ the political as it seeks ‘to provide a normative framework for just relationships between the state and civil society’.¹³³ Davies, similarly, describes broadly that the application of, or at least the drawing upon of, ‘feminisms’ can have a ‘transformative purpose’ as feminism in all its forms ‘is always practical and political in the sense that it aims for a transformation of social relationships’.¹³⁴ The below application of a feminist approach to the issue of constitutionality will itself demonstrate these arguments for feminism to be correct.

Of course, there are many other persuasive and diverse critical theories that might, and do, make similar claims. The undertaking of a feminist approach in this article does not seek to exclude or deny that the application of other approaches, critiques or methods might not also yield interesting and plausible answers and guidance to the constitutional issue. It is, however, worth noting that there is another reason for specifically engaging with a feminist approach on this particular topic.

Feminists have a unique and significant history of analysing, debating and critiquing citizenship. Briefly, women have, on both legal and normative conceptions of citizenship, been historically viewed and treated as ‘second-class citizens’.¹³⁵ In the Australian context in particular, women have been, as noted by Patricia Crawford

¹²⁹ See Thornton, ‘The Development of Feminist Jurisprudence’ (n 128) 179–80; See also Janice Richardson and Ralph Sandland, ‘Feminism, Law and Theory’ in Janice Richardson and Ralph Sandland (eds), *Feminist Perspectives on Law and Theory* (Cavendish Publishing, 2000) 1, 7.

¹³⁰ See generally Andrew Lynch, George Williams and Nicola McGarrity, *Inside Australia’s Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015).

¹³¹ Millns and Whitty (n 128) 1.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Davies (n 127) 229.

¹³⁵ See generally Irving, *Gender and the Constitution* (n 15) 107; Voet (n 128) 11–12; Linda C McClain and Joanna L Grossman, ‘Introduction’ in Linda C McClain and Joanna L Grossman (eds), *Gender Equality: Dimensions of Women’s Equal Citizenship* (Cambridge University Press, 2009) 1, 4.

and Philippa Maddern, ‘the largest single category excluded from citizenship’.¹³⁶ Citizenship for women has been incomplete, partial, ambivalent and fragmented.¹³⁷ As Linda McClain and Joanna Grossman argue, the ‘gendered history of citizenship’ still continues to shape citizenship law and policy.¹³⁸ Citizenship has, accordingly, operated ‘as both an aspirational and an analytical concept’¹³⁹ for feminists who have, depending of course on the branch of feminism, demanded that ‘women too should be accorded the status of citizens’,¹⁴⁰ and that the very concept of citizenship and the citizen is male and should be deconstructed and rethought.¹⁴¹ The revocation of citizenship in any capacity and the ‘dramatic change in the balance of power’ it represents, is, and should be, of immediate and significant concern to feminists.¹⁴²

*B The Citizenship Revocation Laws and a Feminist Argument
for Unconstitutionality*

The strictly doctrinal analysis of whether the *Citizenship Revocation Laws* are constitutionally valid illustrated the centrality of the concept of ‘allegiance’. The issue of constitutionality was found to depend on how the concept of ‘allegiance’ is interpreted, with a narrow approach to ‘allegiance’ leading to a finding that the amendments are constitutional, and a broader, perhaps more fluid approach to the concept yielding the opposite conclusion. A feminist approach may be able to provide clearer guidance and insight as to how the High Court should interpret the ‘allegiance’ concept, if called upon to decide the issue.

The narrow notion of ‘allegiance’, which sees it as a singular concept that can be owed only to one country, is gendered and, specifically, male. ‘Allegiance’ in the narrow sense is usually understood to be demonstrated by performance and activity in the public sphere. The clearest example of this is, of course, to fight for one’s country

¹³⁶ Patricia Crawford and Philippa Maddern, ‘Conclusion’ in Patricia Crawford and Philippa Maddern (eds), *Women as Australian Citizens: Underlying Histories* (Melbourne University Press, 2001) 214, 215.

¹³⁷ Margaret Abraham et al, ‘Rethinking Citizenship with Women in Focus’ in Margaret Abraham et al (eds), *Contours of Citizenship: Women, Diversity and Practices of Citizenship* (Ashgate Publishing, 2010) 1, 4.

¹³⁸ McClain and Grossman (n 135) 4.

¹³⁹ Roseneil (n 12) 1.

¹⁴⁰ Alison M Jagger, ‘Arenas of Citizenship: Civil Society, the State and the Global Order’ in Marilyn Friedman (ed), *Women and Citizenship* (Oxford University Press, 2005) 91, 92.

¹⁴¹ Abraham et al (n 137) 8. See also Thornton, ‘Embodying the Citizen’ (n 11) 198.

¹⁴² Rubenstein, ‘The Vulnerability of Dual Citizenship’ (n 117) 255. See generally Catherine Albiston, Tonya Brito and Jane E Larson, ‘Feminism in Relation’ (2002) 17(1) *Wisconsin Women’s Law Journal* 1, 5; Uma Narayan, ‘Towards a Feminist Vision of Citizenship: Rethinking the Implications of Dignity, Political Participation and Nationality’ in Mary Lyndon Shanley and Uma Narayan (eds), *Reconstructing Political Theory: Feminist Perspectives* (Pennsylvania State University Press, 1997) 48, 63.

or to be active in the political arena. This is the sphere, and these are the activities, from which women have traditionally been, and often continue to be, not part of and actively excluded from. Alison Jagger, for instance, labels the activities of ‘fighting’ and ‘governing’ as both the primary obligations of citizenship and as ‘masculine’.¹⁴³ Ben Herzog and Julia Adams similarly note that women’s allegiance to the state has usually been thought to be of less importance than that of men because ‘loyalty and disloyalty’ have been ‘assessed with respect to military service and security issues from which women were traditionally excluded’.¹⁴⁴ As Irving explains more fully, the duties associated with allegiance are ‘those of defence (military and personal), paying taxes, performing military service where necessary, and defending the king’s person and honour’.¹⁴⁵ She describes that these duties, at least traditionally to be

attached to men and were not available to women. They were masculine duties, masculine tests of ‘belonging’ or identification. Women did not perform military service, and nor in many countries did they swear oaths of allegiance...the duties were conceptually male: the duties of persons with a public identity, duties that overrode family obligations or loyalties.¹⁴⁶

Women, as Baer notes, are traditionally confined to the private sphere ‘of marriage and family’,¹⁴⁷ and as Irving describes it, ‘the social role historically performed by women has tended to be excluded from definitions of the civic or public sphere’.¹⁴⁸ Allegiance, as understood in a narrow way, has thus operated to exclude women and the concept has in turn itself become gendered and male.

A feminist approach to the concept of allegiance accordingly calls for an understanding of the concept that is inclusive and fluid. Liberal feminists, for instance, are focused on women achieving the same rights and opportunities as men and. As Davies sets out, this branch of feminism generally advocates that

[w]omen should have the right to own private property, to litigate as independent citizens, to vote, to be educated, to hold public office, and in general to lead separate lives as rational individuals.¹⁴⁹

¹⁴³ Jagger (n 140) 92.

¹⁴⁴ Ben Herzog and Julia Adams, ‘Women, Gender, and the Revocation of Citizenship in the United States’ (2018) 5(1) *Social Currents* 15, 24. See also Meyer Kestnbaum, ‘Mars Revealed: The Entry of Ordinary People into War among States’ in Julia Adams, Elisabeth Clemens and Ann Shola Orloff (eds), *Remaking Modernity: Politics, History and Sociology* (Duke University Press, 2005) 249, 279.

¹⁴⁵ Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press, 2016) 40 (‘*Citizenship, Alienage, and the Modern Constitutional State*’).

¹⁴⁶ *Ibid.*

¹⁴⁷ Baer (n 46) 6.

¹⁴⁸ Irving, *Gender and the Constitution* (n 15) 91.

¹⁴⁹ Davies (n 127) 242.

Accordingly, it might be expected that liberal feminists argue that allegiance cannot be conceived of in such a way that only men can owe it and reap the consequent benefits. There must, on this feminist view, be ‘equality’ and women must also be able to demonstrate allegiance. If we in turn draw upon this liberal feminist approach and apply it to the specific issue of constitutionality here, we might argue that there must be ‘equality’ in the concept of allegiance and in how it is owed. Specifically, we might contend that there must be equality between solely Australian citizens and dual citizens, in that both kinds of citizens can and must be able to owe allegiance, despite the differences in how that allegiance might be owed.

We might also expect intersectional feminists, similarly, to argue that allegiance must not be understood in the conventional, narrow and, accordingly, ‘male’ way, though we might expect them to make this argument in a broader way than liberal feminists do and to view the concept as something fluid, multifaceted and plural. Intersectional feminists critique the essentialism of liberal feminists’ arguments and contend that

social identities and experiences of power are not just based on a male-female dichotomy, but also on divisions of race, ethnicity, sexuality, nationality, able-bodiedness, class, and so forth.¹⁵⁰

Intersectional feminists view identity as being informed by ‘a large number of social meanings and material conditions which all come into play, or intersect, in distinct ways for different groups of people’.¹⁵¹ Relational feminists, in a somewhat similar way, view people and identities as being situated in a ‘region of family relations, friendship, group ties, and neighbourhood involvement’.¹⁵²

If we draw upon both these feminist approaches and apply them to the concept of allegiance, we might argue that allegiance can be owed by different and diverse people (such as dual citizens) but also that to whom precisely allegiances are owed is undefined and diverse. As Joshua Neoh, Donald Rothwell and Rubenstein argue, perhaps unconsciously drawing upon these feminist approaches, people might have a variety of loyalties, worlds and spheres and fit uneasily into a legal regime which imposes a ‘limiting legal and political identity on the [individual]’.¹⁵³

Radical and post-modern feminists would similarly call for allegiance to be understood in a broad and inclusive way, though these approaches would arrive at that conclusion in a different way to, say, intersectional feminists. Radical and post-modern feminists view meaning as being formed through notions of hierarchy and exclusion, and they seek, in turn, to deconstruct such meaning.¹⁵⁴ We might expect, particularly in light of the earlier discussion in this section about allegiance, radical

¹⁵⁰ Ibid 268.

¹⁵¹ Ibid.

¹⁵² Knop (n 91) 92.

¹⁵³ Neoh, Rothwell and Rubenstein (n 90) 473.

¹⁵⁴ Davies (n 127) 293.

and post-modern feminists to deconstruct allegiance as an inherently hierarchical and exclusionary concept, which for instance, does not prioritise dual citizens who are more likely to be migrants to a country and in a greater position of vulnerability than sole citizens. These feminist approaches would thus also be likely to call for a pluralistic and fluid understanding of allegiance, as opposed to the narrow, singular and traditional understanding of the concept.

An historical feminist approach can aid a theoretical and conceptual one,¹⁵⁵ and it is worth setting out briefly women's historical denaturalisation, that took place both in Australia and around the world on the basis of the narrow and singular concept of allegiance.¹⁵⁶ The practice of 'marital expatriation' or 'dependent nationality' mandated an outcome whereby, when a woman married a foreigner, she would at the same moment lose her own citizenship and acquire his.¹⁵⁷ Irving has investigated this practice extensively and she describes the impact of this practice on women's normative, as well as legal, citizenship:

Maritally denaturalised women experienced the withdrawal of the protection of their former state; they were literally alienated. This experience was both formal (reclassification as an alien with all the consequent disabilities; loss of entitlement to a particular passport, loss of legal protection abroad) and existential (the loss of 'home', the experience of alienage).¹⁵⁸

By extension, in times of war, if a woman's husband was classified as an 'enemy alien', women were also classified as such. As Irving describes: 'In their own (now-former) country, the wives of enemy aliens, who, by marriage, were already "statutory" aliens, were transformed further into enemy aliens'.¹⁵⁹

The loss of citizenship on the part of women in this way was on the basis of a narrow and singular concept of allegiance. Women could not owe two allegiances. As Irving explains, 'multiple allegiances were considered impossible' and she describes:

¹⁵⁵ Thornton, 'The Development of Feminist Jurisprudence' (n 128) 184.

¹⁵⁶ Helen Irving, 'When Women Were Aliens: The Neglected History of Derivative Marital Citizenship' (Research Paper No 12/47, Sydney Law School, University of Sydney, July 2012) 2; Radha Govil and Alice Edwards, 'Women, Nationality and Statelessness: The Problem of Unequal Rights' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2016) 169, 178; Leti Volpp, 'Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage' (2005) 53(2) *University of California Los Angeles Law Review* 405.

¹⁵⁷ Tanja Sejersen, "'I Vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century' (2008) 42(3) *International Migration Review* 523, 539–40. See, eg, *Nationality Act 1920* (Cth) s 18; *Nationality Act 1936* (Cth) s 6(2).

¹⁵⁸ Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 239 (emphasis omitted).

¹⁵⁹ *Ibid* 124.

Married women were assumed to be allegiant to their husbands (notwithstanding the growing recognition of women's independent legal capacity in domestic national laws); women who married foreign men were, therefore, a dilemma for the international order of reciprocal citizenship recognition ... marital denaturalisation (and at least an assumption of reciprocal naturalisation) was, effectively, the solution. A man owed allegiance to, and therefore belonged to his own country; a woman owed allegiance to her husband, and therefore belonged to her husband's country.¹⁶⁰

Dual nationality would have been a 'bigamous marriage',¹⁶¹ and so, as Radha Govil and Alice Edwards explain, having 'only a single (and shared) nationality' meant that 'conflicts of loyalty' could be avoided.¹⁶² In the context of wartime, marriage to a foreigner was more explicitly viewed as 'an act of disloyalty' and, because 'women's allegiance was subjective and derivative', she was 'assumed also to share her husband's predisposition to disloyalty'.¹⁶³ Underlying these views was of course the assumption that women had a choice; women knew the consequences, with respect to their nationality, of marrying a foreigner and so they could always, in this knowledge, choose not to marry the foreigner.¹⁶⁴ As an aside, it is interesting in this vein to note the similarities between this assumption underlying marital denaturalisation and the discourse surrounding the *Citizenship Revocation Laws*, which framed citizenship revocation as, in effect, a 'choice', given that those charged and convicted of terrorist offences had a 'choice' in whether or not to engage in the prohibited conduct.

This practice, alongside campaigns for equal political rights, was targeted early on by growing feminist mobilisation.¹⁶⁵ As a result of the campaigns of women's groups, denaturalisation legislation was challenged in courts (albeit with little success), and the issue was discussed at various international conferences on nationality, such as at the League of Nations conference in 1930.¹⁶⁶ Irving explains how these efforts began to lead to governments' growing recognition that the revocation of citizenship of 'one of their "own"' was practically difficult. The practice often left (denaturalised) women without particular social benefits and property, and the resultant statelessness

¹⁶⁰ Ibid 73.

¹⁶¹ Thomas Aleinikoff and Douglas Klusmeyer, 'Plural Nationality: Facing the Future in a Migratory World' in Thomas Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 63, 63.

¹⁶² Govil and Edwards (n 156) 172.

¹⁶³ Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 122, 124.

¹⁶⁴ Ibid 45.

¹⁶⁵ Helen Irving, 'Gender and Constitutional Citizenship: Combining Historical, Theoretical and Doctrinal Perspectives' (2012) 6(3) *Gender Equality and Multicultural Conviviality Journal* 38, 42 ('Gender and Constitutional Citizenship'); David Martin, 'New Rules for Dual Nationality' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 34, 37.

¹⁶⁶ Irving, 'Gender and Constitutional Citizenship' (n 165) 44.

that occurred in some instances came with its own practical difficulties.¹⁶⁷ Governments felt it also, ‘culturally uncomfortable’ to treat women as enemy aliens during times of war ‘when loyalty had heightened content with harsh consequences for breach’.¹⁶⁸ The system of denaturalisation eventually ended, at least in Australia, in the late 1940s,¹⁶⁹ and today men and women have essentially ‘the same right to maintain their nationality in marriage and to pass it on to their children’.¹⁷⁰

As Irving and Thwaites state, ‘[w]e would not, for example, now accept that a woman’s marriage to a foreign man was sufficiently disallegiant to justify the revocation of her citizenship’.¹⁷¹ But what this historical analysis shows is that women’s legal citizenship in Australia was at a time precarious and was so on the basis of an understanding of the concept of allegiance as something narrow and singular, in the same way as the *Citizenship Revocation Laws* frame it. As Ediberto Román argues, a ‘global history of partial membership and subordinate rights cries out for a truly inclusive notion of citizenship’.¹⁷²

An approach to ‘allegiance’ that sees allegiance as something inclusive, diverse and multifaceted, and as something more than a single concept, accordingly, accommodates feminist arguments and concerns. Applying a feminist approach to the issue of the constitutionality of the *Citizenship Revocation Laws* would thus provide guidance to the hitherto doctrinal analysis of the Act and yield a finding that citizenship deprivation laws, such as the *Citizenship Revocation Laws* specifically, are not validly supported by the aliens power in s 51(xix) of the *Constitution* and that citizenship more broadly is inviolable.

The doctrinal analysis of whether the *Citizenship Revocation Laws* take Australian citizens outside the meaning of the phrase ‘the people of the Commonwealth’ demonstrated the importance of determining those who are ‘undoubtedly among the people’. A narrow approach to the meaning of ‘the people’ supports a conclusion that the *Citizenship Revocation Laws* are constitutionally valid and a more expansive approach entails the opposite conclusion.

The ‘people’ is, *prima facie*, a neutral and inclusive term. But this is illusory and the phrase is exclusive and, specifically, gendered and male. Suzanne Romaine, among others, argues that when gender-neutral terms ‘are introduced into a society still dominated by men, these words ... lose their neutrality’ and are ‘re-politicised by

¹⁶⁷ Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 125; Irving, ‘Gender and Constitutional Citizenship’ (n 165) 43.

¹⁶⁸ Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 125.

¹⁶⁹ Irving and Thwaites (n 93) 145.

¹⁷⁰ Randall Hansen and Patrick Weil, ‘Introduction: Dual Citizenship in a Changed World’ in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 1, 3.

¹⁷¹ Irving and Thwaites (n 93) 146.

¹⁷² Román (n 14) 152.

sexist language practices of the dominant group'.¹⁷³ Romaine points specifically to the term 'people' as an example of this and argues that it is, in fact, essentially male.¹⁷⁴ Irving applies this analysis to the Australian context, arguing that 'the people' as referenced in the *Constitution* never really included women.¹⁷⁵ The term 'people' in the *Constitution* was introduced into a society dominated by men.¹⁷⁶ Although Irving importantly points to the ways women, at least from the 1890s, played a role in the movement for federation and influenced constitutional drafting,¹⁷⁷ as Rubenstein notes in her analysis, no women participated in the Constitutional Conventions and the status of women only arose once in the discussion on citizenship.¹⁷⁸ Arcioni also describes the fact that Australian women, at the time of federation, were not considered to be part of 'the people', but were, rather, characterised as being only 'emerging' and 'potential members' of 'the people'.¹⁷⁹ More generally, the same criticisms that attach to the word and notion of 'citizen' also attach to the notion and phrase 'the people'. One such criticism is given by Stuart Hall and David Held, who for instance argue that there exists

an irreconcilable tension between the thrust to equality and universality entailed in the very idea of the 'citizen', and the variety of particular and specific needs, of diverse sites and practices which constitute the modern political subject.¹⁸⁰

It would now, of course, be unthinkable or at least deeply controversial and antagonistic, to exclude women from the meaning of 'the people of the Commonwealth'. Chief Justice Gleeson implicitly affirmed this in *Roach*,¹⁸¹ as did French CJ in *Rowe*.¹⁸²

¹⁷³ Suzanne Romaine, 'A Corpus-Based View of Gender in British and American English' in Marlis Hellinger and Hadumod Bußmann (eds), *Gender Across Languages: The Linguistic Representation of Women and Men* (John Benjamins, 2001) vol 1, 153, 169; Sandra Petersson, 'Locating Inequality: The Evolving Discourse on Sexist Language' (1998) 32(1) *University of British Columbia* 55, 59. See also Irving, *Gender and the Constitution* (n 15) 44; Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (Cambridge University Press, 2nd ed, 2013) 226.

¹⁷⁴ Romaine (n 173) 157. See also Petersson (n 173) 58; Katharine de Jong, 'On Equality and Language' (1985) 1(1) *Canadian Journal of Women and the Law* 119, 132.

¹⁷⁵ See, eg, Helen Irving, 'A Gendered Constitution: Women, Federation and Heads of Power' (1994) 24(2) *University of Western Australia Law Review* 186, 187–8.

¹⁷⁶ *Ibid.*

¹⁷⁷ Helen Irving, 'Who Are the Founding Mothers: The Role of Women in Australian Federation' (Papers on Parliament No 25, June 1995) 65.

¹⁷⁸ Rubenstein, 'Constitutional Convention Debates' (n 42) 298; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1794 (Josiah Symon).

¹⁷⁹ Arcioni, 'The Core of the Australian People' (n 98) 428, 430, 433, 447.

¹⁸⁰ Stuart Hall and David Held, 'Left and Rights' [1989] (June) *Marxism Today* 16, 17.

¹⁸¹ *Roach* (n 110) 173 [5]; David Brown, 'The Disenfranchisement of Prisoners: *Roach v Electoral Commissioner & Anor*' (2007) 32(3) *Alternative Law Journal* 132, 134.

¹⁸² *Rowe* (n 98) 19 [21]. See also *Langer v Commonwealth* (1996) 186 CLR 302, 342 (McHugh J).

Arcioni argues that the position of women as members of ‘the people’ ‘is now assured by the High Court’s reasoning’ in those decisions.¹⁸³ The restrictive approach that once excluded women from ‘the people’, however, is nonetheless what the *Citizenship Revocation Laws* do to other demographics, proposing in effect, that designated groups of people, such as those dual citizens designated by the Amendment Acts, can be excluded from the Commonwealth and its citizenry.

Along the same lines as the reasons set out above with respect to the notion of allegiance, we might expect a feminist approach to ‘the people’ to call for an inclusive, diverse and fluid understanding of the concept. Ruth Lister, for example, provides one such approach. She notes the difficulties with universal and seemingly neutral concepts, such as ‘citizen’, that, like ‘the people’, are ‘predicated on the very exclusion of women’, but says that feminists must still take on these concepts and transform them to be rounded and inclusive.¹⁸⁴ Davies similarly argues that intersectional feminism provides ‘a crucial method of challenging identities that are in some way normalised and taken for granted’.¹⁸⁵ We might, for instance, consider ‘the people’ to be inherently inclusive but a feminist approach, particularly an intersectional one or perhaps also a radical one, requires us to reconsider seemingly neutral phrases and identities and to transform them into fluid and diverse concepts that are truly inclusive of any and all. Importantly, as Irving notes, taking a more expansive approach to ‘the people’ in this way does not remove anyone else from being included in the concept. She notes that

[t]he extension of citizenship to others, or the fact that others hold citizenship, does not diminish a person’s enjoyment or entitlement (just as an increase in family membership does not erode a person’s status as a member, or diminish a family’s ‘family-ness’).¹⁸⁶

Accordingly, when a feminist consciousness is brought to bear on the issue of who are ‘undoubtedly among the people’, the term must be viewed as, in Irving’s words, ‘capable of expansion, inclusiveness and genuine neutrality’.¹⁸⁷ Interpreting the term as such still fits within, but provides further guidance to, the hitherto doctrinal analysis and yields a finding that dual Australian citizens cannot be removed from the constitutional ‘people’. On this view, the *Citizenship Deprivation Laws* fall foul of the *Constitution* and Australian citizenship may indeed be inviolable.

¹⁸³ Arcioni, ‘The Core of the Australian People’ (n 98) 447.

¹⁸⁴ Ruth Lister, *Citizenship: Feminist Perspectives* (Springer, 2nd ed, 2003) 195; Ruth Lister, ‘Citizenship Engendered’ (1991) 11(32) *Critical Social Policy* 65; Ruth Lister, ‘Dilemmas in Engendering Citizenship’ (1995) 24(1) *Economy and Society* 35. See also C Lynn Smith, ‘Is Citizenship a Gendered Concept?’ in Alan Cairns et al (eds), *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (McGill-Queen’s University Press, 1999) 137.

¹⁸⁵ Davies (n 127) 269.

¹⁸⁶ Irving, *Citizenship, Alienage, and the Modern Constitutional State* (n 145) 273.

¹⁸⁷ Irving, *Gender and the Constitution* (n 15) 107.

V CONCLUSION

This article demonstrated that the application of a formal doctrinal analysis to answer questions about the constitutionality of the *Citizenship Revocation Laws* may yield two plausible but opposite outcomes. It argued that a feminist consciousness may validly and persuasively be applied to, and provide further guidance for, a doctrinal analysis. A feminist approach, sitting alongside a doctrinal analysis, was shown to provide a more plausible and cogent conclusion, namely that the *Citizenship Revocation Laws* are not unconstitutional and that Australian citizenship is inviolable.

IS THE TAIL WAGGING THE DOG? FINDING A PLACE FOR ADR IN PRE-ACTION PROCESSES: PRACTICE AND PERCEPTION

ABSTRACT

Alternative Dispute Resolution ('ADR') processes, particularly mediation, have been integrated into court and tribunal processes in various ways. Civil courts increasingly require parties to engage in pre-action dispute resolution protocols prior to the issue of proceedings. These initiatives take various forms, and have varying degrees of success. In 2018 the authors undertook an extensive evaluation of the impact of pre-action protocols in the South Australian Supreme and District Courts. This culminated in a report that has subsequently informed reform to the relevant pre-action processes in South Australia in 2020. This article develops a particular aspect of the inquiry: the impact that lawyers may have on the take-up and efficacy of mediation in a pre-action setting. It focusses on a less explored element of the pre-action ADR debate — the possible reasons for reluctance around pre-action engagement within the legal profession. The article concludes that there are a number of influences — systemic, preferential, and professional — relating to the timing, content, and nature of such processes, which have a significant impact on achieving change in this area.

I INTRODUCTION

Research suggests that most civil disputes are resolved before entry into any court or tribunal system.¹ Most parties will either negotiate an outcome or give up without ever seeking to litigate. An increasing emphasis on mandatory Alternative Dispute Resolution (ADR) before commencing court and tribunal proceedings

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¹ Naomi Burstyner et al, 'Using Technology to Discover More about the Justice System' (2018) 44(1) *Rutgers Computer and Technology Law Journal* 1, 4–5; Naomi Burstyner et al, 'Why Do Some Civil Cases End up in a Full Hearing: Formulating Litigation and Process Referral Indicia through Text Analysis' (2016) 25(4) *Journal of Judicial Administration* 257, 258 ('Why Do Some Civil Cases End up in a Full Hearing?').

continues to reduce the number of disputes entering the court and tribunal system. For example, mediation as an early or pre-action requirement has been introduced in many jurisdictions, including Australia and the UK, as a way to encourage timeliness and efficiency in the civil justice system.² As a result, those disputes that do end up in the litigation system form a very small minority of the overall number of disputes in society. Once within the litigation system, traditional trial processes account for the determination of an even smaller proportion of disputes.³

Parties have always been able to negotiate disputes before embarking on litigation, and many of them do so. Civil justice reform increasingly focuses on an additional layer, the early use of facilitated negotiations through forms of ADR as a strategy to keep disputes out of the legal system, but there are differing views relating to the timing, value and efficiency of ADR interventions. For example, some consider using an ADR process such as mediation at a pre-action stage of limited utility as evidence has not yet been gathered or exchanged.⁴ Others consider that early ADR can be of assistance, even if settlement does not directly result, because it may narrow the factual and legal issues in dispute.⁵ These views represent different perspectives relating to the objectives of ADR processes: first, as primarily a dispute resolution opportunity; and second, as a ‘triage’ style case management strategy that can be used to narrow or clarify disputed issues and plan any necessary future steps. This second objective relates more to improving the management of complex disputes as they proceed through court,⁶ rather than to resolve a dispute.

There are other more philosophical concerns that are based on perceptions of the litigation system rather than understandings about the objectives of ADR processes. For example, mandatory ADR requirements, pre-action or otherwise, have often been regarded as controversial by some lawyers and judges because of concerns that access to justice will be threatened by ADR.⁷ This is promoted by the acceptance

² See Tania Sourdin, ‘Resolving Disputes without Courts?’ (2013) 32(1) *The Arbitrator and Mediator* 25, 30–2.

³ Burstyn et al, ‘Why Do Some Civil Cases End up in a Full Hearing?’ (n 1) 259.

⁴ Patricia Bergin, ‘The Global Trend in Mediation; Confidentiality; and Mediation in Complex Commercial Disputes an Australian Perspective’ (Speech, Mediation Conference, Hong Kong, 20 March 2014) 12–13 [26]–[28] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Bergin_20140320.pdf>.

⁵ See generally Tania Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes outside Courts* (Report, Australian Institute of Judicial Administration, 2012) (*Exploring Civil Pre-Action Requirements*).

⁶ Patricia Bergin, ‘The Objectives, Scope and Focus of Mediation Legislation in Australia’ (Speech, The Hong Kong Mediation Council, 11 May 2012) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf>. See also Ryan Murphy and Tania Sourdin, ‘Skilled Mediators and Workplace Bullying’ (2019) 29(3) *Australasian Dispute Resolution Journal* 146.

⁷ See generally Sourdin, *Exploring Civil Pre-Action Requirements* (n 5).

of an underlying adversarial philosophy that suggests that parties should be able to conduct their cases as they see fit. A more pragmatic and related perspective is that litigation is contextual and fluid, and therefore forcing parties to negotiate in particular time frames or formats is counterproductive.

This article discusses one area identified in a 2018 review conducted by the authors into pre-action protocols in the Supreme and District Courts of South Australia ('Review') — the impact of lawyer attitudes to pre-action ADR use. In particular, the authors examine the diverse factors which may inform lawyers' attitudes to ADR take-up, and consider whether it is the legal profession, rather than other elements of the justice sector, that are driving the agenda in relation to pre-action requirements. Following a discussion of issues and research relating to ADR use, the authors evaluate some of the commentary received over the last few months of the review process. In this regard, the article considers what might be driving perceptions that seem to be at odds with theory and research and that perhaps reflect a narrow and idiosyncratic view of the role of ADR in civil dispute resolution.

The authors conclude that irrespective of the particular protocols in place, there is significant influence by the legal profession on the uptake of pre-action protocols or mediation, and that the attitude of the legal profession is a critical factor in the take-up and success of any initiatives to embed pre-action ADR in civil litigious disputes.

This article proceeds in three parts. First, the available literature and empirical research identifying the key issues of concern in undertaking mediation early in legal processes are summarised, focussing on timing, effectiveness, cost and value. Second, the additional issues of concern and the ideas identified by lawyers during the review process are discussed. Third, discussion of preferences and perceptions are explored in the context of cultural and systemic influences that might be informing lawyer attitudes to the timing and value of early mediation in court process. Finally, the authors conclude that while, in principle, there is broad support for pre-action processes within the legal profession, there are systemic cultural and practical influences that must be considered when designing and implementing such opportunities.

II BACKGROUND AND REVIEW FINDINGS

Many civil court jurisdictions require parties to engage in some form of communication before issuing proceedings. In South Australia, both the Supreme and District Courts have, for some time, required applicants to state their claim via a reasoned offer in a letter of demand, and required respondents to respond to that letter with a reasoned offer.⁸ In 2014, rules were introduced that required parties in medical negligence and construction disputes to engage in a more detailed series

⁸ *Supreme Court Civil Rules 2006* (SA) r 33; *Uniform Civil Rules 2020* (SA) rr 61.7, 61.9 ('UCR').

of pre-action steps, including a mandatory meeting between lawyers and parties to attempt to resolve the case before issuing proceedings.⁹ These protocols mandated a series of party-directed communications and offers; however, they stopped short of requiring mediation.

In 2018, the Law Foundation of South Australia and the Supreme Court of South Australia funded a review of the impact of these pre-action protocols in the District and Supreme Courts of South Australia. The primary focus of the Review was to gauge the use, impact and perceived value of the processes introduced in 2014. While the 2014 pre-action protocols did not mandate any form of mediation, the value of mandatory pre-action mediation (as exists in some other jurisdictions) was high on the agenda in civil justice reform. The Review offered an opportunity to investigate both the impact of the 2014 protocols, and perceptions about the value of mediation as part of the pre-action process. Part of the Review involved a consideration of stakeholders' attitudes to pre-action mediation as an addition to the existing protocols. The results of the Review were published in 2018 in a report written by the authors of this article and Madeline Muddle.¹⁰

The Review methodology comprised a literature review, the creation of an expert advisory group to design the survey methodology, and preliminary data collection from lawyers and insurers in medical negligence and construction practice. Data was collected from the South Australian District and Supreme Court case files from 2014 to 2018. An online survey of the legal profession, including barristers and solicitors, was undertaken, as well as interviews with applicants, respondents, solicitors, barristers, and judicial officers.¹¹

The key findings were thematically grouped covering cost, timeliness, fairness and justice, effectiveness, and attitudes and behaviour. The Review supported retaining the existing structure for pre-action protocols, and strongly recommended strengthening the protocols to include pre-action mediation.¹² It is not the purpose of this article to reiterate the findings of the Review. However, in exploring the drivers of attitudes to pre-action mediation, the following broad summary is useful: for legal practitioners, it is important that legal services are efficient and cost-effective and processes that are perceived to offer value in terms of a litigation process are prioritised over those that are more focussed on dispute resolution. Mandatory ADR at particular (non-flexible) times was resisted because it was perceived to be costly without offering benefit because of poor timing. Conversely, in those cases where protocols were used, compliance did not generally increase the cost of proceedings. Overly litigious and combative behaviour was identified as a negative factor in any ADR process. Of concern was the frequent failure to comply with the protocols: both solicitors and judicial officers reported compliance with the protocols being the exception rather

⁹ *Supreme Court Civil Supplementary Rules 2014* (SA) ch 3 pt 2.

¹⁰ Tania Sourdin, Madeline Muddle and Margaret Castles, *The Evaluation of Specific Pre-Action Processes in South Australia* (Report, October 2018).

¹¹ *Ibid* 4 [1.13].

¹² *Ibid* xiv.

than the rule, with enforcement of the protocols by judicial officers occurring rarely and only on request of the parties.¹³

The Review concluded that increased compliance with the protocols would be more likely if there was targeted and more rigorous enforcement. The Review recommended that there was significant evidence to suggest that pre-action mediation was a viable option, particularly in the case of medical negligence disputes, but would require both management and supervision to support compliance.

In 2020, the South Australian civil court rules, including pre-action protocol requirements, were revised,¹⁴ and now reflect some of the outcomes of the Review. Therefore, the current pre-action protocols differ from those that were the subject of the Review. The 2020 revision requires parties and solicitors in any civil proceeding to engage in a pre-action meeting, with specific outcomes required such as attempted settlement or the mapping out of the evidence and other material required for trial.¹⁵ The *Uniform Civil Rules 2020 (SA)* ('Rules') provide a more directed and structured process of engagement between parties, and encourage, but do not require, mediation at the pre-action stage.

III FACTORS IN DETERMINING THE TIMING OF ADR

A Timing and the Concept of Ripeness

The timing of any ADR process has been acknowledged in past ADR literature as an important factor in the eventual resolution of any dispute, and at times has been linked to the concept of 'ripeness'.¹⁶ Ripeness refers to the presence of factors that may make the parties more likely to reach agreement, or may make mediation more appealing.¹⁷ Ripeness can also refer to a broader range of factors, including the parties' emotional, financial or organisational readiness to negotiate, and the extent to which legal representatives are satisfied that factual and legal issues are sufficiently clear to enable an informed view of the risks of litigation and settlement options. It might relate to clarity in terms of understanding the substantive issues, or to the emotional state of the disputants, for example, whether a grieving process has commenced or been completed (in respect of a lost relationship, asset, opportunity, etc) or whether financial, commercial or other impacts have settled.¹⁸ However, these factors may be less important than previously thought. It is clear, for example, that many pre-action

¹³ Ibid 94–5 [6.7].

¹⁴ *UCR* (n 8) ch 7 pt 1.

¹⁵ Ibid r 61.12.

¹⁶ Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Thomson Reuters, 1st ed, 1995) 118.

¹⁷ International Institute for Conflict Prevention and Resolution, *ADR Suitability Guide (Featuring Mediation Analysis Screen)* (Report, 2006) 12.

¹⁸ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 97, 128.

ADR schemes that apply in commercial and other areas result in early settlement.¹⁹ Similarly, early ADR researchers such as Stephen Goldberg, Frank Sander and Nancy Rogers indicated that it is not necessary for all legal and evidentiary issues to be apparent and readily addressed to enable processes such as mediation to succeed.²⁰ Ripeness may therefore be a question of perception rather than a critical factor in terms of selecting an appropriate time for an ADR intervention.

In relation to court and tribunal referrals to ADR, different courts and tribunals adopt different approaches, with some opting for early ADR referral and others opting for late referral.²¹ Early referral may not be productive if the parties have not had enough time to investigate issues and obtain advice. However, it has been suggested that ‘when disputes are not subject to an early ADR process, they may take longer to resolve when a process is eventually used’.²² In addition, the longer a case is litigated may have an impact on the likelihood that ADR will result in a resolution. This is because ‘adversarial’ court-related processes may polarise disputants and make them more inclined to behave in an oppositional manner.²³ One study, conducted by Patricia Bergin in New South Wales, did, however, suggest that in certain types of cases (complex commercial) later referral may be appropriate.²⁴ Some reforms in both New South Wales and Victoria have been focussed on encouraging and requiring parties to exchange evidence at an earlier point, partly because this may result in earlier referral to ADR through improving the parties’ capacity to make informed decisions about risk and opportunity.²⁵

It is probable that ripeness should be considered in the context of any referral process; however, it should also be weighed against the cost savings that may occur in early referral. It may be that re-referral mechanisms, which can be triggered after

¹⁹ See *ibid* 124; Tania Sourdin, ‘Using Alternative Dispute Resolution to Save Time’ (2014) 33(1) *The Arbitrator and Mediator* 61, 66 (‘Using ADR to Save Time’).

²⁰ Stephen B Goldberg, Frank EA Sander and Nancy H Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Little, Brown and Co, 2nd ed, 1992) 353.

²¹ See Tania Sourdin and Naomi Burstyner, ‘Justice Delayed is Justice Denied’ (2014) 4(1) *Victoria University Law and Justice Journal* 46; Sourdin, ‘Exploring Civil Pre-Action Requirements’ (n 5) 124; Sourdin, ‘Using ADR to Save Time’ (n 19); Timeliness Project Team, *The Timeliness Project, Background Report* (Report, Monash University, October 2013) 11–35, 235–37.

²² Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 127. See also discussion relating to time factors in Tania Sourdin, ‘Evaluating Alternative Dispute Resolution (ADR) in Disputes about Taxation’ (2015) 34(1) *The Arbitrator and Mediator* 19, 23–4.

²³ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 127.

²⁴ See PA Bergin, ‘The Right Balance between Trial and Mediation: Vision, Experiences and Proposals’ (Speech, Court of Cassation, Rome, 19 October 2012) 15 [46] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.10.19.pdf> (‘The Right Balance between Trial and Mediation’).

²⁵ See *Civil Procedure Act 2010* (Vic); *Civil Procedure Act 2005* (NSW).

a determination that a matter is not ripe, are necessary. Careful consideration of the information needed to indicate ripeness is also necessary, in light of findings that the parties can resolve even complex cases with less than complete legal case preparation.²⁶

B *Costs and Trial Date*

In the past, some mediation referral programs have cited the stage which the case has reached and the extent of time pressure for resolution as important factors in determining appropriateness for mediation.²⁷ This may be partly because, in some instances, disputants need to incur costs to appreciate the issues involved in the litigation, and need to factor ongoing costs into their capacity to continue to litigate. Also, as one respondent to a survey relating to the Commercial Division of the Supreme Court of New South Wales noted, '[t]he higher level of legal costs helps to focus a party's mind on the "reality" of expensive, time-consuming litigation'.²⁸

Awareness of legal costs and other potential costs (eg loss of opportunity and profit costs, costs in stress, management and time costs) can be important in terms of providing an incentive to negotiate or mediate. For those within the litigation system, the provision of hearing dates and the reality presented as a result of interlocutory events may provide a 'sword of Damocles'.²⁹ The Review identified some support for the perception that in litigated matters, parties were more likely to consider negotiation once a hearing date was set and hearing was imminent.³⁰

Some literature places importance on the 'extent of time pressure for resolution' as a factor influencing the appropriateness for mediation or some other form of ADR.³¹ This might be related to the notion that, at times, potential litigants will only become inclined to settle once they see how taxing a litigation or arbitration process might be. An influential factor could include a realisation of the mounting cost and energy investment as litigation progresses, giving rise to an incentive to try to resolve the

²⁶ Goldberg, Sander and Rogers (n 20) 353.

²⁷ See Stuart Rabner and Glenn A Grant, *Civil CDR Program Resource Book* (Book No 2, New Jersey Courts, September 2011) 1-3-1-4 <<https://www.njcourts.gov/courts/assets/civil/civilcdrresourcebook.pdf?c=7gj>> where it was assumed that '[t]he earlier that assessment can be made, the greater the likelihood of reducing litigation time and cost': at 1-3.

²⁸ A survey respondent in Tania Sourdin, 'An Evaluative Study of the Commercial Division of the Supreme Court of New South Wales' (PhD Thesis, University of Technology Sydney, 1996) 140.

²⁹ *Ibid.*

³⁰ Sourdin, Muddle and Castles (n 10) 46 [3.43].

³¹ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128 [5.5].

dispute.³² One early study on interstate disputes highlighted the curvilinear relationship between when the mediation occurs and the duration of dispute.³³

The authors' analysis suggests that there is not one propitious period per conflict, but two. The data demonstrates that conflict management at the very outset of the dispute has a much higher probability of leading to a quick end to the dispute than an effort that starts just a bit later. It does not take long for the disputes to become entrenched in the minds and actions of the participants, and the findings regarding duration dependence indicate that ongoing disputes can indeed become entrenched. The effectiveness of conflict management experiences a low point during an intermediate period of prolonged disputes.³⁴ If the dispute is not resolved early, efforts to reach an agreement during this intermediate period are not likely to prove effective, and, in fact, mediation may appear to be counterproductive. Another point is reached later in the life of a conflict where diplomacy, again, becomes increasingly effective. One of the inferences drawn from this is that expectations should be lowered during this intermediate period, though efforts should not necessarily be curtailed.³⁵

Some more recent studies by the Australian Centre for Justice Innovation have shown that later referral to ADR may impact on settlement and that late referral to ADR may mean that settlement is less likely.³⁶

C *Readiness for Negotiation*

In terms of referral, once a matter is within a court system, there are again differing professional views about how much evidence should be available before mediation can be attempted. For example, lawyers may consider that mediation is more useful after discovery has taken place or after the most relevant evidence has been exchanged. A major problem in commercial litigation has been the cost of discovery (or disclosure) of documents before trial. Bergin has, for example, noted that

[t]he discovery process has also been identified as a reason for not sending matters to mediation. Parties have suggested that it would be premature and counter-productive to send a matter to mediation prior to the parties seeing the documents of their opponents.³⁷

³² See Sourdin and Burstyner (n 21); Sourdin, 'Using ADR to Save Time' (n 19); Timeliness Project Team (n 21).

³³ Patrick M Regan and Allan C Stam, 'In the Nick of Time: Conflict Management, Mediation Timing, and the Duration of Interstate Disputes' (2000) 44(2) *International Studies Quarterly* 239.

³⁴ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128.

³⁵ Regan and Stam (n 33) 256–7.

³⁶ See Sourdin and Burstyner (n 21); Sourdin, 'Using ADR to Save Time' (n 19); Timeliness Project Team (n 21).

³⁷ Bergin, 'The Right Balance between Trial and Mediation' (n 24) 16 [48].

The number of documents that can be subject to discovery can vary, with some jurisdictions now having little focus on discovery (for example the Supreme Court of New South Wales or the Federal Court of Australia³⁸) and the documents ‘discovered’ might be as few as 30 or more than 30,000. However, generally, a much smaller proportion of that number are actually relevant in trial. The resources needed to evaluate these documents, and determine whether or not the documents are useful, can be significant in terms of money and time. In addition, whilst this process may be necessary to determine the strength of the evidence, it is perhaps less helpful in terms of reaching early pragmatic resolution.

A single referral point, whether that be pre-action or at some other stage, is unlikely to work for every case, particularly if there is insufficient evidence to inform assessment of merit. Yet the pursuit of evidence may be so costly and time-consuming that parties become more entrenched and committed to the litigation and are less inclined to settle.

D *Mandatory versus Voluntary ADR Process*

Many court-related pre-action initiatives have been introduced within Australia which are intended to encourage or require the early resolution of disputes without the need to commence proceedings in courts or tribunals. They are designed to lower costs, encourage cooperation between disputants and avoid litigation wherever possible. For example, the *Civil Dispute Resolution Act 2011* (Cth) requires parties to file a ‘genuine steps’ statement setting out what attempts have been or could be taken to resolve the dispute, with specific reference to both facilitation and negotiation.³⁹

A drawback of voluntary models is that, without referral, the choice of process can be left to the disputants and their lawyers who may not choose ADR processes (or any processes) that can help resolve a dispute and save cost and time. Concerns about ripeness may result in opportunities for ADR intervention to pass. Poor understanding of process possibilities and resistance to early negotiation may influence take-up of suitable processes.

According to a large recent empirical research project about the use of pre-action requirements, their effectiveness is contingent on participants’ compliance with requirements and this can be supported by education, sanctions, incentives and other processes to support compliance.⁴⁰ Another finding was that there should

³⁸ *Uniform Civil Procedure Rules 2005* (NSW) r 21. The discretion must be exercised having regard to ss 56 and 57 of the *Civil Procedure Act 2005* (NSW) and *Federal Court Rules 2011* (Cth) r 20.14. The Federal Court’s revised regime for discovery was adopted in 2011. If a party wishes to receive documents from another party (or a third party) they must seek the Court’s permission. See also Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management CPN-1*.

³⁹ *Civil Dispute Resolution Act 2011* (Cth) s 4 (*‘Civil Dispute Resolution Act’*).

⁴⁰ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) ch 3.

be exceptions to any ADR referral, that is, not all disputes should be diverted from courts.⁴¹

IV ADDITIONAL DATA FROM THE SOUTH AUSTRALIAN REVIEW

The Review explored attitudes to the requirement of pre-action protocols that parties engage in, and also explored attitudes to the timing and use of mediation as a formal process before or during the litigation process.

The results of this investigation provide valuable additional information about what is driving attitudes and behaviours towards pre-action arrangements and early mediation. Whilst mediators, judicial officers and lawyers appear to agree that the settlement of a civil dispute is almost always a better option than a judicial hearing,⁴² there are significantly different perspectives about the nature and timing of the processes to be used to support settlement. There was also notable resistance to any sense of imposed time frames for achieving these steps, and to any suggestion that mediation be mandated in the pre-action stage.

Mediation theory suggests that an interest-based facilitative process convened early, may well enable the parties to better understand their legal rights and options, decide what they want to achieve and move towards mutual agreement early on. The ‘stick’ of significant legal costs and time savings is a clear motivator, as is the potential achievement of better outcomes (by reference to a broader range of indicators than litigation can offer). Lawyers and judges may have differing views, with some considering that it is premature to attempt to resolve a dispute until pleadings and document exchange are complete. Some practitioners and members of the judiciary suggest that parties will not settle a dispute until a trial date is set. There is also a clear perception amongst some within the profession that there is no point attempting serious settlement discussions or using ADR processes such as mediation until most of the facts and expert evidence is available.⁴³ This is because prior to that time, neither party has the legal certainty to undertake risk assessment as part of a negotiation. Such perceptions reflect an understanding that ADR is a risk assessment process that will fit in to the litigation process at a predictable point, driven by the steps in litigation rather than a view that it is an independent process with more diverse objectives and potential outcomes.

Such perceptions could be dismissed as out-of-date and old fashioned, the result of habits and cultures perpetuating practices of the last century. Many of these perceptions do indeed reflect the typical experience of litigation in the late 20th century (with which both authors are familiar) when ADR was often perceived as a novelty and, at best, a last-ditch attempt to resolve a dispute shortly before trial. However, despite the passage of decades, these perceptions appear to continue to influence

⁴¹ Ibid ch 2, ch 6.

⁴² Sourdin, Muddle and Castles (n 10) 27–8.

⁴³ Ibid 46.

perspectives of ADR in disputes where litigation is a factor. Exploring views about mediation amongst lawyers, judges and others involves considering factors that are linked to the cultures that exist in the legal domain, as well as factors that may be linked to negotiation tactics and understandings. One important aspect is the influence that lawyers representing parties have in facilitating or limiting the use of mediation. The authors suggest that there are both strategic legal and more subtle cultural reasons behind this phenomenon.

A Proximity of the Court Door

Feedback from lawyers and judges in South Australia suggests that the proximity of the court door (in other words, the hearing date) is perceived to be a critical factor in terms of settlement behaviour, suggesting that as the reality (and costs) of trial near, parties are pushed into a 'now or never' decision-making mode.⁴⁴ The proximity and inevitability of trial (with the accompanying cost, stress, and risks) is likely to be a factor in terms of ADR take-up. The authors did not, however, explore the psychological drivers behind this phenomenon. Data suggests that the later attempts at negotiation are left, the less likely a satisfactory outcome will be reached.⁴⁵ However, it is noted that aspirations of success, the downplaying of negative factors, and a failure to recognise the diverse costs of pushing on until the last minute are also the sort of issues that a facilitative mediator or dispute counsellor would invite parties to think about in any mediation. It is also worth mentioning that last-minute attempts to settle are not the same as deliberately or strategically determining the moment to negotiate, and presupposing that a fully contested hearing outcome is inevitable overlooks the value of having these conversations earlier.

Research undertaken as part of the Review suggests that participants agreed in principle to mediation as a process and a valuable option in some cases.⁴⁶ However, there was also a strong sense that 'lawyers know best' in terms of responses from legal practitioners. This is hardly surprising: if a case is commenced in court, the stakes and the costs are high. Proving or disproving liability is a game of evidence, strategy and exhaustive factual evaluation. This very work is what will either underpin an effective negotiation or inform decisions to proceed to trial. In this context, ripeness for mediation turns on the availability and content of persuasive factual information and legal argument before parties are prepared to engage in negotiation and persuasion in a mediated setting. However, it is clearly influenced by the legal approach to resolution which may unconsciously privilege risk and prospects of success more than the interests of the parties and their potential capacity in terms of effective negotiation.

⁴⁴ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128.

⁴⁵ Sourdin and Burstynier (n 21) 48.

⁴⁶ Sourdin, Muddle and Castles (n 10) 106 [6.47].

B *High or Low Stakes Disputes*

The view of participants in the Review was that lower stakes cases tended to be more suited to mediation than high stakes cases.⁴⁷ There is neither evidence nor experience to suggest that lower (financial) stake cases are more likely to settle at mediation than more significant claims. However, consideration of the role and influence of lawyers does suggest why this might be a common perception.⁴⁸

In the context of medical negligence disputes, there is an understandable perception among respondents that the applicant should be able to prove their case, and that a robust response in defence of often complex questions of causation and liability is developed before settlement options can be considered. This is not least because some medical negligence disputes are worth millions of dollars and can have serious negative reputational and other impacts on multiple respondents. Evaluation of risk is a necessary precursor to settlement, and is not something that can be undertaken easily or early, particularly if reputation, public perception, punitive or regulatory intervention, or administrative pressure on multiple stakeholders is likely. This can be contrasted with a claim where the stakeholders are a customer and a service provider, who may both anticipate outcome and risk and make early decisions about what options can be acceptable. In such situations, there is more certainty and the parties are more in control of what they will offer to finalise the dispute.

It makes sense to assume that disputes worth a great deal of money (in comparison to the respondent's resources, or the applicant's need) may be more difficult to resolve without a compelling reason, and for respondents, this reason will often be the predicted likelihood of doing worse in a trial. If insurers are involved there may be other financial and commercial interests influencing these decisions. There may also be factors relating to the abrogation of decision-making, such as a reluctance within an organisation to resolve at an early stage without the benefit of clear legal advice.

Another perception is that mediation is valuable in the case of self-represented litigants ('SRLs'). This is a reflection of the confusion that SRLs experience and the consequential impact on the progress of the case. This perception is, however, not uniform across Australia and indeed in some jurisdictions, SRLs were excluded from mediation processes until relatively recently.⁴⁹ However, many now consider that represented parties are likely to benefit from an impartial third party working with both parties to assist SRLs to identify and evaluate options and engage with the represented party in an independently managed process. This perhaps relates to a concern raised in the Review related to the issues presented by self represented applicants or those represented by inexperienced lawyers.⁵⁰

⁴⁷ Ibid 59 [3.86].

⁴⁸ Ibid 105 [6.44]–[6.45].

⁴⁹ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 183.

⁵⁰ Sourdin, Muddle and Castles (n 10) 55–6 [3.72]–[3.73].

C *Complexity and Enforcement of Protocols*

Clear messaging coming from the investigation conducted as part of the Review was that the timeframes and rules around the protocols were too complex.⁵¹ Described by the authors as ‘medium touch’, the protocols set out a series of detailed steps (including communication of claims/defence, exchange of key documents and a meeting between parties) subject to stated timelines. There are numerous steps around these three discrete phases, which may explain the common observation by investigation participants that they understand what to do (being repeat players in the field) but that new or interstate practitioners have no idea and do not comply.

Although there is a perception of complexity, participants interviewed as part of the Review concluded that the costs of compliance with pre-action protocols in South Australia did not make a noticeable difference to cost.⁵² In light of the above comments concerning ripeness for litigation, it may also be that having finally prepared to commence litigation, lawyers see this sort of pre-action engagement as an untimely and ineffective repetition of what will happen in the first few months of litigation. The underlying issues may not simply be that the processes are complex, but that the inflexible (and short) time limits and precise sequencing of the steps limit flexibility in any attempts to reach pre-trial resolution.

In relation to enforcement of the protocols, the clear message from participants in the survey (both lawyers and judges) was that judicial officers did not actively enforce protocols, and would only intervene to consider compliance if one of the parties complained.⁵³ This was sometimes seen as encouragement to only pay lip service to the protocols.⁵⁴ This might reflect a view that the parties themselves need to be responsible for negotiation and settlement, which occurs in the private sphere, and that the courts are therefore engaged and interested in preparing a matter for trial. Whilst this conceptual division of responsibility might make sense in terms of philosophy and funding, it is probably not very realistic. It seems that lawyers and litigants alike do need prompting and support to effectively engage in resolution initiatives, and if the court is genuinely concerned in playing a leadership role in this regard, additional attention to compliance is necessary. It also reflects the reality reported by judicial officers that they did not have the time to engage in this form of case management.⁵⁵

According to a large recent empirical research project about the use of pre-action requirements,⁵⁶ their effectiveness is contingent on participants’ compliance with requirements and this can be supported by education, sanctions, incentives and processes to support compliance. Leadership from the courts in both promoting and

⁵¹ Ibid.

⁵² Ibid 56 [3.74], 68 [4.27].

⁵³ Ibid 94–5 [6.7].

⁵⁴ Ibid 56 [3.75].

⁵⁵ Ibid 117 [7.28], 119 [7.33].

⁵⁶ Timeliness Project Team (n 21).

enforcing these processes would seem to be a necessary part of this process. This is supported by other research emphasising the importance of visible compliance processes to entrench the use of the processes.⁵⁷

V LEGAL CULTURE AND SYSTEM INFLUENCES ON ATTITUDES TO ADR

Twenty-first century litigation in Australia is a highly structured, directed, and focussed process, one primary aim of which is to ensure that a matter is ready for trial via judicial determination.⁵⁸ This inevitably involves the creation of a well-argued case theory supported by documentary and other evidence. The ‘pieces’ of litigation — the pleadings, the facts, the documents, the evidence, and the witnesses — are all carefully curated, with only those allegations, facts, and evidence that are admissible in court and supportive of the case captured in the process. In South Australia, as in most other states in Australia, the process is highly regimented, with specific and inflexible rules about the content of pleadings, the relevance of documents, and the requirements for expert reports. Pleadings are designed to be accusatory — consisting of allegations that state the parties’ best case, often something of an ambit claim. Documents are evaluated in terms of what they prove, rather than what they might say about the parties and their circumstances. Irrespective of any preference for negotiation, the process is highly adversarial with both parties presenting their best (legal) case as robustly as possible. This adversarial nature of litigation commences at the pre-action stage when detailed notices of claim or defence are required from both parties before pleadings are commenced. In view of this objective, it is unsurprising that the focus is on making a case ready for hearing rather than resolving a matter, and results in both parties and lawyers adopting a positional stance.

Writing on this phenomenon in 2010, Don Peters suggests that the highly competitive nature of legal practice, coupled with suspicion about the motives of other participants, tends to provoke non-collaborative engagement.⁵⁹ He suggests that lawyers are culturally resistant to flexible and non-rules-based processes, which are antithetical to the analytical and rules-based framework of most legal work and that through training and inclination, lawyers are minded to translate complex issues into a simple framework for litigation, which does not work well for more flexible processes.⁶⁰ Olivia Rundle, reporting on research conducted in 2007–08, suggests

⁵⁷ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 169.

⁵⁸ The *UCR* (n 8) states several goals, including the efficient resolution of disputes, proportionality, and fairness: at r 1.5. The current view is to encourage parties to engage in self-directed resolution processes early, and if these do not work, to then focus on preparation for trial. This reflects the idea that the parties will still be in a position to seek ADR but that the court will not provide that opportunity.

⁵⁹ Don Peters, ‘It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers’ Resistance to Mediating Commercial Disputes’ (2010) 9(4) *Richmond Journal of Global Law and Business* 381, 410.

⁶⁰ *Ibid.*

that lawyers tend to view preparation for mediation as similar to preparing for trial,⁶¹ and that a ‘law-focussed, settlement-driven, lawyer-in-charge’ approach prevails in court-annexed mediation processes.⁶² If this is so, it goes some way to explaining the reluctance to mediate: preparing for a trial (as opposed to a facilitated discussion) is time-consuming and costly, and if mediation is seen as analogous to a trial, lawyers may be understandably reluctant to engage in such a process if they are not substantially prepared on law and fact.

Viewed together, these explanations suggest a cultural disconnect from facilitative, interest-based processes coupled with a default position of putting forward the best legal case, rather than exploring broader outcomes irrespective of the legal position. This is perhaps exacerbated by the increased emphasis on using mediation processes to resolve the dispute and/or to narrow the legal, procedural and evidentiary issues in advance of a hearing. Such goals may tend to co-opt the mediation process into a court management role and in doing so, frame the process as another fact-based, rights focussed negotiation on the path to trial.⁶³

A Framing the Dispute

For many lawyers, the ‘normal’ development of a potentially litigious matter will involve consulting the client, preparing statements, gathering evidence and evaluating prospects of success, well before any formal pre-litigation exchange takes place. During this phase, it is more likely that parties (particularly applicants) have developed a positive view of their case and are already framing it in terms of blame, recompense, legal rights and wrongdoings. This framing or narrative creation may not be conducive to productive, interest-based discussion and exploration,⁶⁴ and can be contrasted with the requirements of a typical commercial ADR clause which would commonly require initiation of communication that at least partly includes some negotiation and solution-finding, shortly after the dispute arises.

In view of the well-established choreography that has developed in respect of many civil cases, it is understandable that a pre-action process may, so close to the initiation of proceedings, be seen as a hurdle to be crossed, rather than an opportunity for serious discussion and genuine negotiation.⁶⁵ Once an applicant decides to commence proceedings, parties are likely to anticipate that pleadings will clarify issues of liability and quantum in detail and may have preference for doing so via formal, court related documentation rather than through a process involving pre-action letters and

⁶¹ Olivia Rundle, ‘Lawyers Preparation for Court Connected Mediation: The Supreme Court of Tasmania’ (2013) 32(1) *University of Tasmania Law Review* 20, 35.

⁶² Olivia Rundle, ‘Lawyers’ Perspectives on “What is Court-Connected Mediation for?”’ (2013) 20(1) *International Journal of the Legal Profession* 33, 33.

⁶³ *Ibid.*

⁶⁴ William LF Felstiner, Richard L Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...’ (1981) 15(3) *Law and Society Review* 631, 641.

⁶⁵ Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 117.

negotiation or mediation. The reliance on court-related documentation is more likely to be a preferred approach in view of the short timeframes in which respondents may have to respond to formal claims or the issuing of proceedings.⁶⁶ This leaves little time for anything other than a defence to the allegations, rather than any careful thought about resolution processes or options.

The Review concluded that there were issues in terms of compliance with pre-action protocols for medical negligence and construction disputes and it seems clear that the processes were used inconsistently.⁶⁷ The protocols were used in less than 50% of medical negligence claims, although there was evidence that repeat players in both medical negligence and construction claims were more likely to comply with the protocols, but often regarded the protocols as a hurdle rather than an opportunity to focus on resolution.⁶⁸ There may be a range of reasons behind a reluctance to engage in such pre-action processes. One observation is that lawyers understand that in excess of 95% of civil cases in medium and higher tier courts that are initiated will not go to trial, and fully anticipate that most cases will either settle, or result in a default judgment or a withdrawal. However, they may consider that initiating litigation is necessary to drive such outcomes.

There may also be powerful cost incentives for lawyers to delay settlement. If this is the situation, cost incentives and sanctions, provided that they are contemporaneous, may support some pre-action engagement. Money, and the simplistically accurate presumption that lawyers make more money from a contested preparation and trial than early mediation is also sometimes posited as a reason for lower uptake, as are charging models in which mediation is a less costly step than quick turnover document preparation.⁶⁹ Whilst there is no avoiding this factor in terms of pre-action ADR uptake, this article reflects on best practices, not decisions motivated by extrinsic goals. In addition, it is important to note that many cases do settle before court proceedings are commenced,⁷⁰ and sometimes the cases that go forward are necessarily difficult and so may not be so easily resolved at an early stage.

As noted above, the role of lawyers is critical in terms of the timing of settlement-related processes and whether there is compliance with pre-action requirements. In this regard, most lawyers, both in general and as interviewed and polled in the

⁶⁶ In South Australia, the timeframe for responding to a general pre-action document is within 21 days (or 30 days for a personal injury claim): *UCR* (n 8) r 61.2. The timeframe for filing a defence is within 28 days after the service of the claim: at r 65.1(1).

⁶⁷ Sourdin, Muddle and Castles (n 10) 104 [6.41].

⁶⁸ *Ibid* ch 6–7.

⁶⁹ Bryan Clark, *Lawyers and Mediation* (Springer, 2012) 43.

⁷⁰ Sourdin, Muddle and Castles (n 10) 39 [3.18]. Feedback from construction lawyers suggests that only about 4% of claims made result in litigation. It might be that these are cases that have some element of difficulty. Higher numbers were estimated by medical negligence lawyers: at 40 [3.19].

Review, appeared to be, in principle, in favour of ADR.⁷¹ Despite some initial resistance, courts and tribunals have gradually, but consistently, incorporated ADR into processes, sometimes as a compulsory step,⁷² and sometimes as an option.⁷³ However, despite this, early mediation is not necessarily supported (and may be resisted) and where ADR is undertaken, lawyers may not engage in the processes in a way that supports settlement.

B *Issues of Timing*

In his extensive survey of lawyers and ADR in the United Kingdom, Bryan Clark makes a series of observations, supported by data, suggesting that lawyers ordinarily determine the timing and efficacy of mediation. Clark suggests first, that when lawyers are involved, there is a statistically lower uptake of mediation than when parties are not represented.⁷⁴ Clark suggests that whilst in principle enthusiasm for mediation is high, in reality, lawyers are consistently resistant other than when legislation mandates mediation.⁷⁵ The reasons for this include fears about ‘disingenuous use of the process by opponents’, as well as concerns about the efficacy of the process.⁷⁶

Second, Clark notes that in the lawyer-client dynamic, lawyers tend to sit higher in the hierarchy and thus exert more control and direction over clients.⁷⁷ Coupling innate resistance to mediation with this power dynamic might explain a preference not to use or encourage mediation until such time as the lawyer is comfortable that they are sufficiently (legally) informed to assess risks, rather than focussing on the best time to engage in mediation from the perspective of the client’s diverse needs and interests. This concern is echoed by Rundle, who notes the ease with which lawyers might modify the expectations of their clients to fit a legalistic view of the role of mediation.⁷⁸ One applicant, in response to the Review, noted:

If the lawyer had said ‘we are worried about costs, let’s have a mediation with the other side’, I would have jumped at that. I didn’t know it was a possibility. I just expected the process the lawyer was taking was the normal process.⁷⁹

⁷¹ Clark (n 69) 29.

⁷² See, eg, the Equal Opportunity Commission and the South Australian Employment Tribunal.

⁷³ See, eg, the Magistrates Court of South Australia.

⁷⁴ Clark (n 69) 30.

⁷⁵ Ibid 33.

⁷⁶ Ibid 30.

⁷⁷ Ibid 37. Clark points out that the greater the control and power of the client, the less likely the lawyer is to be able to exert this type of control.

⁷⁸ Rundle (n 61) 37.

⁷⁹ Sourdin, Muddle and Castles (n 10) 83 [5.29].

The Review also noted that at the time of the investigation there was little readily available information about pre-action processes or the purpose and function of mediation on court websites, leaving parties mostly dependent upon their lawyers for information.⁸⁰

Ignorance is another factor that Clark explores. He suggests that poor understanding of process coupled with cultural resistance may be contributing factors.⁸¹ The authors also suggest that ignorance or a lack of understanding about process options is a significant factor in some jurisdictions in Australia. Mediation for example can be a distinctive facilitative process which can be contrasted with ‘conferencing’ which is often evaluative. In the Australian context, conferencing can involve the canvassing and evaluation of parties’ positions and shuttle negotiation focussing on compromise and finding the ‘right’ settlement sum, that can be facilitated by senior members of the bar or retired judges. This may be seen as the norm by many practitioners who have only experienced this type of engagement when engaged in an ADR process. In superior civil courts, such conferencing processes may be defined as mediation with more facilitative processes seldom being used.⁸² Rundle points out the preference for lawyers to argue the case in a legalistic, rights-based framework in mediation just as they would in a court or arbitration.⁸³ Data from past studies also support the conclusion that processes may not resemble the more facilitative and interest-based industry supported models of mediation as lawyers continue to act in an adversarial manner.⁸⁴ Against this background, it is understandable that lawyers might consider there is nothing particularly unique about mediation that will shift the status quo.

Legal practitioners deal with risk in the legal context, inevitably framed in terms of the pinnacle of litigious engagement, the trial. Lawyers seek information about what evidence will support their client’s position in the context of a litigated outcome — they are concerned about facts and evidence and the persuasive interpretation and presentation of both. Lawyers are trained to seek outcomes that fit within legal parameters as an indicator of a fair result.⁸⁵ They also want to know what the other party will rely upon. From the perspective of a litigation lawyer, the perception might be that quite a lot of factual information needs to be known and tested before considering settlement options. In the normal course of litigation, this information is generally not all going to be available until some months into the process. In South Australia, as in most other jurisdictions in Australia, the pleadings set out the factual allegations and the legal structure of the case. This is then supplemented by the discovery and exchange of documents, which can be evaluated to determine the

⁸⁰ Ibid 95 [6.9].

⁸¹ Clark (n 69) 46.

⁸² Tania Sourdin and Nikola Balvin, ‘Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project’ (2009) 20(3) *Alternative Dispute Resolution Journal* 142.

⁸³ Olivia Rundle, ‘Lawyers’ Participation in Mediation and Professional Ethical Disposition’ (2015) 18(1) *Legal Ethics* 46, 51.

⁸⁴ See generally Sourdin and Balvin (n 82).

⁸⁵ Rundle (n 61) 34.

strategy and strength of claim, and the taking of witness statements to support facts asserted, which is sometimes supplemented by obtaining expert evidence. Legal professionals in the Review frequently commented on the need for the process to be completed to ensure sufficient information and independent assessment is available in order to consider resolution.⁸⁶ Further, that respondents indicated that they would need very persuasive evidence of risk to be interested in early resolution before evidence is available on liability.⁸⁷ This was a consistent concern in the Review, particularly in relation to medical negligence disputes, but equally applicable to a range of negligence or breach of contract cases. For example, one participant commented that:

Whether you are a plaintiff or a defendant, there is a process you have to go through to be in a position to resolve a file ... in terms of getting instructions and being in a position to give advice that the matter needs to be resolved ... and having some expert support, something I can argue about ... You can't have an informal conference before you have had an opportunity to look at those issues. Often, they are complicated. You may have a question of liability, a question of causation, and a question of quantum.⁸⁸

Lawyers, as part of their law school training and post-law school experience, may consider that advising clients about settlement in the absence of such material is fraught with doubt and risk. Other professionals, who may make decisions more readily against a background of uncertainty, may not perceive risk in the same way. Lawyers in undertaking this unconscious analysis, may not consider factors outside the narrow litigation framework that could include the interests of the clients or the potential for imaginative and flexible (non-legal) solutions.⁸⁹ Kathy Douglas and Becky Batagol suggest that despite explicit guidance on the need for collaboration and non-adversarial approaches to mediation by the Law Council of Australia,⁹⁰ lawyers continue to be adversarial and thus obstructive to the core goals of mediation,⁹¹ and may be reluctant to permit clients to speak freely in mediation for fear they will say something that compromises the legal case.⁹²

Lawyers may, due to training, culture, or other reasons, simply default to adversarial behaviour. These matters were explored in the Productivity Commission report into

⁸⁶ Sourdin, Muddle and Castles (n 10) 58 [3.83]–[3.84], 60 [3.90], 105 [6.44].

⁸⁷ Ibid 98 [6.21].

⁸⁸ Ibid 58 [3.83].

⁸⁹ Rundle (n 61) 37.

⁹⁰ See Law Council of Australia, *Guidelines for Lawyers in Mediations* (August 2011) guideline 6.

⁹¹ Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 763.

⁹² Ibid 766.

justice access arrangements in 2014,⁹³ and noted by respondents to the Review who outlined examples of particularly aggressive or obstructive behaviour.⁹⁴ However, it seems that such instances are not the norm, and that most lawyers endeavour to engage in good faith, albeit ‘not perfectly’.⁹⁵ In this regard, increasingly there are calls for a greater focus on non-adversarial and more collaborative principles to underpin legal education, including strong arguments for teaching ADR as a foundation for legal studies that might effectively shift some of these cultural preferences in the future.⁹⁶

C Litigant Influence

Litigants also play a role in determining mediation suitability and outcomes. Jeffrey Rachlinski discusses this dilemma in terms of risk evaluation by litigants, suggesting that people are poor at making choices about compromise when risk and uncertainty are high.⁹⁷ He also notes that in a purely economic decision-making model, litigants will make choices based on the predicted rate of returns and risk.⁹⁸ However, litigant choices cannot only be explored in this context, as clearly procedural justice is also relevant. Fairness perceptions, as well as perceptions relating to psychological satisfaction, may be relevant.⁹⁹ Unlike mathematical risk evaluation, such considerations are contextual and unique to each person. Rachlinski suggests that the way that the choice is framed will influence how these issues are factored into decision-making by parties.¹⁰⁰ Related to this is an ‘invested resources’ approach that litigants adopt; the more resources are committed (legal costs, disbursements, time, emotion, distress), the more the client balances the possible settlement offers against the resources invested.¹⁰¹ An offer that might have been accepted at an early stage is likely not to be as attractive at a later stage when it is balanced against additional costs incurred. This is exacerbated if the lawyer has over-promised in the early stage of litigation,¹⁰² leaving the client with the impression that they are going to do better than is realistically likely, and that mediation somehow translates as ‘getting less’.¹⁰³ Although a

⁹³ Productivity Commission, *Access to Justice Arrangements Inquiry Report* (Report No 72, September 2014) 216, 247–54, 306, 420.

⁹⁴ Sourdin, Muddle and Castles (n 10) 96 [6.12]–[6.13].

⁹⁵ *Ibid* 95 [6.10].

⁹⁶ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014); Kathy Douglas, ‘The Evolution of Lawyers’ Professional Identity: The Contribution of ADR in Legal Education’ (2013) 18(2) *Deakin Law Review* 315, 316.

⁹⁷ Jeffrey Rachlinski, ‘Gains, Losses, and the Psychology of Litigation’ (1996) 70(1) *Southern California Law Review* 113, 118–19.

⁹⁸ *Ibid* 122.

⁹⁹ *Ibid* 117.

¹⁰⁰ *Ibid* 125; Tom R Tyler, ‘What Is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22(1) *Law and Society Review* 103, 124.

¹⁰¹ See generally Rachlinski (n 97).

¹⁰² Peters (n 59) 400.

¹⁰³ *Ibid* 402.

mediated resolution may therefore be framed in terms of ‘compromise’ and ‘win-lose’ comparisons, at least two respondents to the Review noted the value of the mediation process as a reality check to clients in understanding the complex road ahead.¹⁰⁴ Another respondent suggested that the ‘judicial air’ of a mediator can be useful in explaining matters to a difficult client.¹⁰⁵

These emotional and economic drivers demonstrate how difficult it can be for people to consider options and make decisions. A facilitative mediation process, that focusses on these issues and on imaginative outcomes that could be achieved as an alternative to litigation, might be a necessary circuit breaker. If, however, legal advisers continue to adopt an adversarial, conservative and ‘legally certain’ stance, it is less likely that such factors will be explored.

The following scenario illustrates the interplay of issues that might influence decision-making in a mid-value personal injury claim:

Dana suffers an injury in a fall from a hospital bed shortly after surgery. She suffers distressing injuries: torn stitches; sprains and bruising; and ongoing minor hip pain. The hospital agrees that there was a fall and that there were injuries as described by Dana but does not really know the nature or extent of the hip pain, whether it preceded the fall, or indeed whether it is serious.

Dana and the hospital could mediate early, before any detailed investigation is done. Dana may be seeking information or an apology, or she may consider that she requires some ongoing support or care. Importantly, she can hopefully find out what happened, and hear the hospital’s genuine response to the accident. Objectively, one would think that resolution at this point is possible and desirable from a cost and timesaving perspective. However, the hip injury may be more complicated. Dana knows her hip hurts when she does a lot of walking or bending. She alone knows whether or not it was like that before. She can determine whether she wants to risk detailed investigation and commence proceedings to determine that point. The hospital may have a limited knowledge of the circumstances that Dana currently faces without some articulation of her claim and expert medical examination. Once this process starts, the hospital may play a minimal role when an insurer steps in, and the insurer is unlikely to be disposed towards settlement except for a sum that reflects its risk. If the medical evidence is ambivalent it may be very difficult for the hospital or insurer to frame any settlement offer.

In this example, the early mediation scenario is likely to be no more than a risk-based offer process. If Dana assumes that the injuries will resolve, this may meet her needs. If not, she must decide whether to accept any offers against the risk of ongoing disability, and the risk and costs of further litigation steps. It is less attractive for the hospital which might be prepared to settle the minor injuries, but not overpay on an unproven injury claim.

¹⁰⁴ Sourdin, Muddle and Castles (n 10) 84 [5.32].

¹⁰⁵ *Ibid* 139 [7.104].

If an early resolution is not achieved, the parties are likely to be engaged in the costly and time-consuming process of expert reports for months or years. Costs, particularly of independent medical experts, will escalate, which will place pressure on Dana who is not as well-resourced as the hospital.

This scenario is exponentially complicated if Dana's surgery was a hip replacement. Determining damages will turn on whether the operation was successful and the likely outcome of the operation without the complicating factor of the fall, all of which are uncertainties that are almost indeterminable. The resolution of this case may ultimately not turn on fact and evidence, but on risk and capacity to fund the case.

This scenario, simplistic as it is, suggests that there are different points where an ADR process might be useful. The first might be very early, the second after the pleadings and some exchange of documents has taken place, and the third after all the evidence is obtained. However, there seems to be a natural 'no-go' zone between a settlement based on interests and expediency, and one based on detailed evaluation of merit. This accords with the research conducted by Patrick Regan and Allan Stam who suggest that the timing of ADR (early, mid, or late litigation) has a significant impact on the time taken to resolve the issues, with early and late ADR being the most influential.¹⁰⁶ Stories of applicants who aim high in litigation only to recoup little more than their legal costs abound in legal circles. What prevented those parties settling earlier? Might it be that lawyers are not prepared to propose an appropriate process this early? Are the applicant's lawyer thinking 'if the evidence is strong, she'll get \$1.2 million, so we can't advise her to settle for \$120,000'? Are the parties themselves naively holding out for a significant payout? Or are they frozen in indecision because of the complexity of the choices to be made? To the extent that psychological decision-making challenges are at play, perhaps support beyond that which a lawyer can provide would assist the parties. From a respondent's perspective, an insurer may take the view that a claim is less likely to be pursued if it is vigorously defended (particularly if an applicant has limited resources) or consider that delay could be advantageous as it might result in the claim not being pursued because of the applicant's health or other issues.

The attitude of parties, often driven by their legal representatives, is frequently shaped by the adversarial evidence-based tradition of civil justice in Australia. This requires some consideration of broader perceptions relating to justice delivery. For example, decisions about timing may rely on a presumption that the primary purpose of courts is the determinative resolution of disputes, and that the processes adopted will be geared for that purpose. However, changed perspectives about what comprises the 'justice system' are relevant in terms of mediation timing. The government, as well as theorists, have recognised that justice involves a broader concept than merely the adversarial court system and that adjudicative court processes form only a part of the justice system.¹⁰⁷ In this sense, ADR can be seen as complementary to judicial

¹⁰⁶ Regan and Stam (n 33) 257.

¹⁰⁷ Tania Sourdin, 'A Broader View of Justice?' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 25 ('A Broader View of Justice?').

adjudication, rather than a step in broader adversarial process. Whilst some concerns about this broader view of justice exist, and might be expressed in terms of ADR preferentially inhabiting a separate realm from the justice system,¹⁰⁸ the convergence debate has been strengthened by academics and prominent government reports which endorse the notion that ADR and the court system are co-dependent in their mutual goal of justice for all Australians.¹⁰⁹

D *Locating Justice*

In Australia, justice is found within and outside of the court system and mandatory referral to ADR is relatively common.¹¹⁰ Where commentators have raised the concern that ADR is at risk of displacing judicial adjudication, to the detriment of users, it might be noted that justice is delivered because ‘ADR may simply remove some disputes from the queue that forms as people wait to litigate’ and ‘if they do not reach agreement, they can re-join the queue’, and further that ‘access to justice and the courts is enhanced through the use of ADR as those disputants that require judicial determination are able to access it’.¹¹¹ In addition, the broader view of justice includes the endorsement of ‘personal obligations to resolve disputes before enabling access to judicial adjudication except where this is not appropriate’.¹¹² As such, the broader justice system necessarily implies the inclusion of pre-action protocols, requirements and schemes. However, this imposition of personal responsibility on litigants and their representatives may be compromised by a lack of understanding of processes and willingness to engage.

The authors note that pre-action approaches are not the only time to support mandatory referral to ADR. However, both courts and policymakers have gradually moved to identifying the pre-action area as a useful starting point for negotiation, based on the idea that bringing parties together early may bear fruit.¹¹³ However, there is also the risk that the more processes are integrated into the traditional justice system, the more they may be seen merely as a step in that process rather than as a discrete model for resolving disputes. Concepts relating to the timing and location of ADR are important in discussing attitudes to mediation when litigation is anticipated or in train, but if mediation is co-opted as another legal process through court, its role and potential may be constrained by situating it in a predominantly legal evaluative dynamic.

¹⁰⁸ See, eg, Hazel Genn, ‘What is Civil Justice for: Reform, ADR, and Access to Justice’ (2012) 24(1) *Yale Journal of Law and the Humanities* 397, 397.

¹⁰⁹ Access to Justice Taskforce, Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009); Productivity Commission, *Access to Justice Arrangements* (Report No 72, September 2014) 1, 5.

¹¹⁰ Sourdin, ‘A Broader View of Justice?’ (n 107) 19.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ See generally Sourdin, *Exploring Civil Pre-Action Requirements* (n 5).

There have been various approaches to embedding settlement attempts in pre-action stages, with differing degrees of complexity and compulsion. At the federal level, legislation requires parties to ‘take genuine steps’ to resolve a dispute at the pre-action stage, while retaining discretion to select the measures chosen.¹¹⁴ Other states have varying (primarily rules-based) procedures, with a preference for pre or early action engagement in the first instance.¹¹⁵ South Australia adopts a ‘medium touch’ approach, setting out detailed criteria and mandating particular opportunities for pre-action engagement.¹¹⁶

Whilst there are various protocols for different types of matters, in broad terms, the new uniform civil court rules adopted in 2020 mandate the exchange of pre-action letters of offer between parties,¹¹⁷ and require parties and their representatives to meet face to face to discuss resolution before issuing proceedings.¹¹⁸ There are also much more robust procedures requiring judicial officers to review compliance with pre-action steps, and to award costs penalties for non-compliance.¹¹⁹ These reforms are valuable because they require in person communication in a negotiation setting and set consequences for failure to comply.

VI SYSTEMIC REFORM AND PERCEPTIONS OF ADR

It is clear that limited, early ADR is not popular amongst some legal professionals, however it is unclear whether it is lawyers, courts, judges or parties such as insurers who are most oppositional. In this context, the authors note that legal practitioners may express in principle approval, while in practice may resist early ADR. Judges appear to be much more amenable to complex and detailed step-by-step processes that support early communication by parties, but so far seem less committed to enforcing early ADR engagement, relying on the parties to make these decisions.¹²⁰ Both groups draw on much the same sources of professional experience to inform their views. As previously suggested, there are strong cultural and professional ways of seeing the world in legal practice, which appear to have a visible influence in this context. Where the experience of mediation reflects an understanding of a mediation model that involves mediator evaluation, shuttle negotiation, or the legal and evidentiary analysis of the facts, there is likely to be little understanding or acceptance of mediation as a facilitative and open-ended process that encourages consideration of diverse options and opportunities. The authors question whether

¹¹⁴ *Civil Dispute Resolution Act* (n 39) s 4.

¹¹⁵ Tania Sourdin, Margaret Castles and Madeline Muddle, ‘Pre-Action Requirements in Medical Negligence Matters’ (2018) 7(2) *Journal of Civil Litigation and Practice* 77, 82–3.

¹¹⁶ Sourdin, Muddle and Castles (n 10) 81.

¹¹⁷ *UCR* (n 8) r 61.7.

¹¹⁸ *Ibid* r 61.12.

¹¹⁹ *Ibid* rr 61.13, 61.14, 61.15.

¹²⁰ Sourdin, Muddle and Castles (n 10) 118.

such perceptions and experience are retarding change against the tide of research and positive experience around the use of ADR in other jurisdictions.¹²¹ Whilst it is relevant that failure to adopt initiatives will likely spell their doom (as may be the case with the current iteration of pre-action protocols in South Australian courts) it is suggested that robust leadership and enforcement of reform by the courts may be valuable and necessary.

Sensitivity to the concerns of lawyers will be important in achieving cultural and structural change. Concerns that mediation may become an additional procedural hurdle in terms of access to justice, which may result in additional time and cost expenditure, warrants consideration. However, the increased use of pre-action requirements and growing data about multi-option systems suggests that early mediation process use can be effective even in very complex commercial disputes, particularly if mediation is used to support dispute management. That is, the mediation process may not be solely focussed on resolution, but on dispute management, dispute counselling and dispute analysis. Using mediation in this way can enable both ADR and litigation-focussed options to work in harmony so that these processes are effective, just, and do not impose undue cost or other burdens on litigants.

In order for pre-action processes to work well, it is suggested that they require: mechanisms for triaging and ‘dispute counselling’; the use of (and growth of) resources such as educative agencies; legal centres and online resources; a shift in focus for stakeholders of the greater justice system; and stronger obligations on participants (disputants and their lawyers) to undertake these processes in a genuine way. In addition, it may be that cultural shifts are required in some jurisdictions so that client interests as well as legal rights can be explored within a broader dispute resolution framework, with an acceptance that mediation may have valid benefits as both a triage and a settlement-oriented process. Points at which ADR can be promoted can be flexible — if not early, then at a time when the preparation done will be useful in a negotiation context. In this regard, an option is to move the mediation style engagement to a point after pleadings are filed and key documents exchanged. This would not avoid the significant cost of those processes, with consequent negative impact on amenability to settlement, but may at least situate ADR at a point where some cost and time savings can be made. It might also equip lawyers with the supporting evidence that they need to be confident when making recommendations about settlement.

Multi-option justice systems are another possibility. South Australian civil courts are very far from a true multi-option system, although the Magistrates Court has made significant inroads with access to mediation and diverse court experts. Multi-option possibilities include lay ‘triage’ processes, focussing on finding a suitable ADR process for the parties,¹²² as well as other court information services.¹²³

¹²¹ See, eg, Douglas and Batagol (n 91).

¹²² Charles Ruhlin and Harry Scheiber, ‘Umpiring the Multi-Option Justice System’ (1996) 80(2) *Judicature* 58, 58.

¹²³ *Ibid.*

Canada's multi-options justice system is centred in court facilities but not focussed on trials.¹²⁴ One Canadian task force recommended the need for a change in orientation on the part of stakeholders to justice, being lawyers, judges, court administrators and clients and an emphasis that the goals should be early problem solving and dispute resolution, with the trial is the last resort.¹²⁵ Whilst stakeholders in the South Australian justice system would not disagree with this proposition, the discussion in this article suggests that there are cultural and systemic barriers to achieving these goals.

In order for it to work efficiently and effectively, a multi-option justice system must be able to rely on objective referral. Whilst the ultimate decision might be left to the party and perhaps their lawyer, they need to be directed in some way, to ensure adequate consideration of issues and that the process pursued is fair and saves them time and money. However, currently the use of facilities is at the discretion and will of parties and their lawyers, and inaccurate understandings of what mediation entails may not reflect the breadth of processes available. Whilst traditionally lawyers have acted as 'gatekeepers', it is clear that this role might be more effectively serviced by a form of 'dispute counselling' or a Dispute Resolution Advisor ('DRA') process.¹²⁶ The National Alternative Dispute Resolution Advisory Council described 'dispute counselling' as

a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.¹²⁷

This process might involve a face-to-face meeting, or may rely on the use of telephone or online processes.¹²⁸ The proliferation of pre-action processes adds emphasis to the notion that dispute counselling or DRA approaches will be important into the future.¹²⁹ Dispute counsellors might also investigate issues in dispute, contact other parties and act as advocates for parties seeking services. They may also provide advice about issues and options.¹³⁰ Dispute counsellors may also be mediators, and it is probable that 'early' mediation in this context, which includes dispute analysis components as well as management, can be effective in terms of reducing time and cost. Lay

¹²⁴ Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Report, 1996) 31.

¹²⁵ *Ibid* 31.

¹²⁶ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 197 ('*Alternative Dispute Resolution*').

¹²⁷ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (Glossary of Terms, September 2003) 6, quoted in Sourdin, 'A Broader View of Justice?' (n 107) 198.

¹²⁸ Sourdin, *Alternative Dispute Resolution* (n 126) 197.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

triage advisors may be appropriate in smaller claims, with more experienced advisors allocated in bigger cases. This would greatly expand the resources available to parties and lawyers to make difficult decisions before they become overly entrenched, and overcome some of the narrower understandings of the options available.

VII CONCLUSION

There are interconnected threads woven through this discussion. Abstract support of ADR in principle requires proactive support to manifest in practice. More robust and explicit rules around the approach to pre-action negotiation, including expectations of bona fide participation and good faith, are clearly on the agenda in Australia,¹³¹ as is the potential benefit of courts reviewing and assessing the adequacy of engagement with the pre-action steps. In state jurisdictions in Australia, there are various requirements that encourage would-be litigants to use courts as a ‘last resort’,¹³² but research and experience suggest that litigants may need more proactive support and, in the case of lawyers, a different mindset to fully achieve this goal. There are barriers to the take-up of early processes, including cost, reluctance to commit to compromise without adequate information, risk aversion, and the cultural privileging of analytical, legally-focussed preferences in resolving disputes. The role of the courts in supporting and demanding compliance with early resolution processes is also an important factor. Review of literature and experience shows a diverse range of dispute resolution options across Australia, the United States and Canada, suggesting that lawyers may not be best placed to explore and select processes, the diversity of which may test lawyers’ skill sets, given the predominant focus on legal adversarial analysis of cases in most litigation.¹³³

There clearly are, and indeed have been for many years, a diversity of approaches to encouraging early resolution and managing access into the court system. The Review, and this article, provide a summary of some of the relatively cautious steps forward in South Australia. Early adopters of mandatory referral to mediation, the courts in South Australia have moved slowly since, and indeed, practice today is not to refer unless both parties agree. This suggests that mediation at any stage in the process is still viewed with caution, if not occasionally with mild alarm. What has changed is that the caution today reflects concern about the timing, utility and cost of mediation. If one guiding conclusion can be gleaned from the Review, it is that there are strong arguments for third party engagement with parties in the early stages of litigation or at a pre-litigation stage, not only to explore options, but in recognition of the deeply ingrained cultural and professional perspectives that lawyers might bring to these processes, and which might otherwise result in adversarial excesses.

¹³¹ See Tania Sourdin, ‘Good Faith, Bad Faith: Making an Effort in Dispute Resolution’ (2013) 2(1) *DICTUM: Victoria Law School Journal* 19. See also Tania Sourdin, ‘Civil Dispute Resolution Obligations: What is Reasonable?’ (2012) 35(3) *University of New South Wales Law Journal* 889.

¹³² Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 39–40.

¹³³ Rachlinski (n 97) 172.

REGULATING THE INFLUENCERS: THE EVOLUTION OF LOBBYING REGULATION IN AUSTRALIA

ABSTRACT

Although lobbying is integral to democratic representation, there are concerns regarding the undue influence of professional lobbyists, which may ultimately lead to corrupt conduct by lobbyists and/or officials. In recent times, there has been an increasing emphasis on legal regulation in order to address the democratic risks of lobbying. This article develops a conceptual framework to evaluate lobbying regulation based on the form of regulation, the standards it imposes, and compliance processes. It explores the history and evolution of lobbying regulation in Australian federal and state jurisdictions. The author identifies three distinct phases of lobbying regulation in Australia: the initial phase of minimalist executive regulation; stronger executive regulation of third party lobbyists; and finally, the rise of legislative regulation of third party lobbyists. It is shown that within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation remains narrowly focussed due to the effective advocacy of lobbyists.

I INTRODUCTION

Over the past 30 years, commercial lobbying in Australia has ‘grown from a small industry of a few hundred employees’ to become a lucrative ‘multi-billion dollar a year industry’.¹ Third party or commercial lobbyists are paid professionals who are engaged by clients to make representations to influence public officials on their behalf,² while in-house lobbyists are those that seek to influence public officials on behalf of their employer. Lobbying activity is variegated and occurs

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¹ Julian Fitzgerald, ‘The Need for Transparency in Lobbying’ (Discussion Paper No 16/07, Democratic Audit of Australia, September 2007) 2.

² Darren Halpin and John Warhurst, ‘Commercial Lobbying in Australia: Exploring the Australian Lobbying Register’ (2016) 75(1) *Australian Journal of Public Administration* 100, 110.

between government and those external to government, as well as within government (department to department), and across the federal tiers. A Senate Committee in 2008 received evidence indicating that there are approximately 4,000 lobbyists in the broader community.³ If in-house lobbyists are included, an estimate in 2012 indicates that there are about 5,000 lobbyists in the system.⁴ However, the federal Lobbyist Register shows a much lower number as it only applies to third party lobbyists, which means that only approximately 20% of lobbyists are required to register under the scheme.⁵ As of August 2020, the federal Lobbyist Register indicates that 579 individual lobbyists are employed by 266 firms.⁶ Of the 579 lobbyists, 39% (225) are former government representatives,⁷ that is, former politicians, senior public servants or ministerial advisers. This shows that there is a revolving door between government and lobbyists due to the extensive and beneficial networks developed by public officials. The top 10 lobbying firms (by number of lobbyists) in 2014 employed between 10 and 21 lobbyists each, who together had about 20% of lobbyists in the entire industry.⁸ Beyond this impressionistic sketch, there is little clarity as to precisely how many lobbyists there are, how they are structured, and how they operate.

The opacity concerning both third party and in-house lobbying in Australia, in fact, points to its vexed role. On the one hand, there is no doubt that lobbying — communication with public officials aimed at influencing public decision-making⁹ — is essential to the proper workings of democracies. As the British Neill Committee on Standards in Public Life recognised, ‘[t]he democratic right to make representations to government — to have access to the policy-making process — is fundamental to the proper conduct of public life and the development of sound policy’.¹⁰ Similarly, the Western Australian Corruption and Crime Commission (‘WACCC’) emphasised that

³ Ibid 101, referring to evidence provided before the Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Knock, Knock: Who’s There? The Lobbying Code of Conduct* (Report, 3 September 2008).

⁴ Senate Finance and Public Administration References Committee, *The Operation of the Lobbying Code of Conduct and the Lobbyist Register* (Report, 1 March 2012) 10 [2.20]–[2.21] (‘*Operation Inquiry*’).

⁵ Evidence to Senate Finance and Public Administration References Committee, Parliament of Australia, Canberra, 21 February 2012, 19 (David Solomon). See Senate Finance and Administration References Committee, *Operation Inquiry* (n 4).

⁶ ‘The Lobbyist Register’, *Attorney-General’s Department* (Web Page) <<https://lobbyists.ag.gov.au/register>>.

⁷ Ibid.

⁸ Halpin and Warhurst (n 2) 105.

⁹ This corresponds with the definition used by the Organisation for Economic Co-operation and Development (‘OECD’), which has defined ‘lobbying’ as ‘solicited communication, oral or written, with a public official to influence legislation, policy or administrative decisions’: OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency through Legislation* (OECD Publishing, 2009) 18 (‘*Volume 1*’).

¹⁰ Committee on Standards in Public Life, *Reinforcing Standards: Sixth Report of the Committee on Standards in Public Life* (Report, 2000) 86.

[t]he right to influence government decisions is a fundamental tenet underpinning our system of government and a form of political participation that helps make ‘the wheels of government’ turn. When managed according to ‘the public interest’, lobbying has not only a legitimate but also an important role to play in the democratic process.¹¹

At the same time, democracies can also be undermined by lobbying. As the Organisation for Economic Co-operation and Development (‘OECD’) has observed, ‘[l]obbying is often perceived negatively, as giving special advantages to “vocal vested interests” and with negotiations carried on behind closed doors, overriding the “wishes of the whole community” in public decision-making’.¹²

There are three main purposes in regulating lobbying. The first is to prevent corrupt behaviour by lobbyists and public officials. The second is a broader notion of political equality in ensuring the fairness of government policymaking and decision-making processes by increasing transparency in the disclosure of lobbying activities. This is aimed at reducing the incidence of secret lobbying by vested interests and reducing the risk of regulatory capture by government. The prevention of corruption and increased transparency leads to the third main purpose of improving the quality of government decision-making and policymaking in ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests.¹³ This in turn will increase public confidence in the integrity of political institutions.

Lobbying has the potential to lead to corrupt conduct by both lobbyists and government officials, as brought to light by inquiries by the New South Wales Independent Commission Against Corruption (‘ICAC (NSW)’) and the WACCC, that led to multiple findings of misconduct against lobbyists and public officials.¹⁴ As recently as 2019, ICAC launched a public inquiry into lobbying regulation

¹¹ Procedure and Privileges Committee of the Legislative Assembly, Parliament of Western Australia, *Inquiry Conducted Into Alleged Misconduct by Mr John Edwin McGrath MLA, Mr John Robert Quigley MLA and Mr Benjamin Sana Wyatt MLA* (Report No 5 of 2008, 10 June 2008) 44 [141].

¹² OECD, *Volume 1* (n 9) 9.

¹³ Richard L Hasen referred to this as the ‘national economic welfare rationale’, that lobbyists threaten national economic welfare by rent-seeking, ie ‘devot[ing] resources to captur[e] government transfers, rather than putting them to a productive use’. ‘[L]obbyists tend to lobby for legislation that is itself an inefficient use of government resources’, eg lobbying to keep an obsolete weapons program: Richard L Hasen, ‘Lobbying, Rent-Seeking, and the Constitution’ (2012) 64(1) *Stanford Law Review* 191, 197.

¹⁴ See, eg, New South Wales Independent Commission Against Corruption (‘ICAC (NSW)’), *Investigation into the Conduct of Ian MacDonald, Ronald Medich and Others* (Report, July 2013); ICAC (NSW), *Investigation into the Conduct of the Hon Edward Obeid MLC and Others Concerning Circular Quay Retail Lease Policy* (Report, June 2014); ICAC (NSW), *Investigation into the Conduct of Moses Obeid, Eric Roozendaal and Others* (Report, July 2013).

(Operation Eclipse), as it identified lobbying as a potential corruption risk,¹⁵ following its previous lobbying investigation in Operation Halifax in 2010.¹⁶ The recent revelations that a One Nation political candidate and senior adviser sought political donations from the United States’ (‘US’) National Rifle Association and the Koch brothers in exchange for seeking to water down Australian gun laws provides a strong impetus to examine more closely the regulation of lobbying in Australia.¹⁷

Lobbying may lead to corruption if it sways public officials to decide issues other than on their merits, or leads to the dishonest or partial exercise of public officials’ functions, in breach of public trust.¹⁸ There are several lobbying activities that represent a corruption risk and may produce outcomes contrary to the public interest, including providing ‘cash for access’ to public officials, or making prohibited donations to political parties, particularly those that disguise the true identity of vested interests.¹⁹ A further dubious practice is astroturfing, ie where wealthy vested interests hide behind ‘pseudo grass-roots groups (“astro-turf” groups)’,²⁰ and utilise social media or ‘fake news’ to project the appearance of genuine community support or opposition to an issue, with the ‘intent to mislead decision-makers’.²¹

Beyond quid pro quo corruption, where a payment or inducement is directly made in exchange for an official act, the need to regulate lobbying stems from issues of fairness. There is the potential for regulatory capture, where governments may be

¹⁵ ICAC (NSW), ‘New ICAC Public Inquiry into Lobbying to Start 5 August’ (Media Release, 18 July 2019). See Yee-Fui Ng and Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in New South Wales: A Discussion Paper for the New South Wales Independent Commission Against Corruption* (Report, April 2019).

¹⁶ ICAC (NSW), *Investigation into Corruption Risks Involved in Lobbying* (Report, November 2010) (‘*Investigation into Corruption*’); ICAC (NSW), *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (Report, May 2010).

¹⁷ Paul Karp, ‘One Nation’s James Ashby Filmed Seeking \$20m from NRA to Weaken Australia’s Gun Laws’, *The Guardian* (online, 26 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/26/one-nations-james-ashby-filmed-lobbying-for-20m-in-nra-donations-to-weaken-australias-gun-laws>>.

¹⁸ ICAC (NSW), *Operation Eclipse: Lobbying Access and Influence in NSW* (Interim Paper, October 2019) 4, 16.

¹⁹ ICAC (NSW), *The Regulation of Lobbying, Access and Influence in NSW: A Chance to Have Your Say* (Report, April 2019) 9 (‘*Have Your Say*’). Such issues have arisen in an ongoing investigation by the Victorian Independent Broad-Based Anti-Corruption Commission (‘IBAC’), Operation Sandon, where it was alleged that councillors ‘accepted undeclared payments, gifts or other benefits, including political donations, in exchange for favourable council outcomes’: Transcript of Proceedings, *Operation Sandon Investigation* (IBAC, Robert Redlich QC, 18 November 2019) 1 (Michael Tovey QC).

²⁰ A Paul Pross and Robert P Shepherd, ‘Innovation Diffusion and Networking: Canada’s Evolving Approach to Lobbying Regulation’ (2017) 60(2) *Canadian Public Administration* 153, 169.

²¹ ICAC (NSW), *Have Your Say* (n 19) 9.

granting preferential access and influence to certain groups, who are better resourced and are able to hire well-connected lobbyists to advance their own self-serving agenda. This leads to the danger that government officials will decide issues, not on their merits or the desires of their constituencies, but according to the wishes of certain vested interests — what a High Court majority in *McCloy v New South Wales* called ‘clientelism’.²² This skewing of government decision-making away from the public interest corrodes the quality and integrity of the democratic system.

The regulation of lobbying sits within a broader context of an intricate, interlocking integrity framework for Ministers, Members of Parliament (‘MPs’), and senior public servants, including ministerial standards, political donations legislation, conflict of interest provisions, and post separation employment regulations. These regulatory frameworks may overlap. For instance, lobbyists may seek to improperly influence Ministers by making donations to political campaigns, which is a breach of both ministerial standards and political finance rules. This integrity framework is intended to ensure that Ministers, MPs and senior public servants do not behave corruptly, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice, so that ‘each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose’.²³ If public officials act with probity, this will lead to a more transparent and ethical government.

To date, legal regulation has had little role in dealing with the centrality and risks of direct lobbying to democracies, that is, direct communication with public officials through conduct that could include negotiation, interaction, provision of additional information, making submissions and media management (as distinct from indirect lobbying such as political advertisements). This is changing. The OECD, for one, has through a series of publications called for more robust legal regulation of lobbying.²⁴ There is a small but growing number of countries that have enacted legal regulation of lobbying, including recent legislation by major democracies such as the United Kingdom (‘UK’) (2014), Ireland (2015), and Scotland (2016).²⁵ Indeed, Australia is

²² *McCloy v New South Wales* (2015) 257 CLR 178, 204 [36] (French CJ, Kiefel, Bell and Keane JJ).

²³ James Spigelman, ‘The Integrity Branch of Government’ (Lecture Series, Australian Institute of Administrative Law, Sydney, 29 April 2004) 6–7.

²⁴ See OECD, *Volume 1* (n 9); OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* (OECD Publishing, 2012) (‘Volume 2’); OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD Publishing, 2014).

²⁵ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK); *Regulation of Lobbying Act 2015* (Ireland); *Lobbying (Scotland) Act 2016* (Scot) (‘*Lobbying (Scotland) Act*’). See also Transparency International, *International Standards for Lobbying Regulation: Towards Greater Transparency, Integrity and Participation* (Report, 2015).

one of the pioneers on this count, being the third country in the world to adopt legal regulations on lobbying in 1983.²⁶

Yet there is not a great deal of literature on the regulation of lobbying in Australia.²⁷ In part, this may be attributable to the limited data sets available to researchers on lobbying activity, given the narrow coverage of Australian lobbying regulation that is restricted to third party lobbyists, which excludes up to 80% of those who lobby government.²⁸ Accordingly, the existing literature tends to focus on lobbying tactics and strategies, and there is limited scholarship identifying the systemic trends in lobbying regulation in Australia.²⁹ The latter is also somewhat dated as it does not cover the most recent — and significant — developments in lobbying regulation; the Queensland reforms introduced in 2009,³⁰ and the new systems introduced in New South Wales ('NSW') in 2014,³¹ South Australia ('SA') in 2015,³² Western Australia ('WA') in 2016,³³ and the Commonwealth in 2018.³⁴

It is this gap that this article seeks to address. It first provides — in Part II — a conceptual framework for analysing the regulation of lobbying that centres upon

²⁶ The first national regulations of lobbying in the world were adopted in the United States in 1946, with Germany also being an early adopter in 1951: John Hogan, Gary Murphy and Raj Chari, 'Regulating the Influence Game in Australia' (2011) 57(1) *Australian Journal of Politics and History* 102, 102 ('Regulating the Influence Game in Australia').

²⁷ See, eg, *ibid* 102; John Warhurst, *Behind Closed Doors: Politics, Scandals and the Lobbying Industry* (University of New South Wales Press, 2007) ('*Behind Closed Doors*'); Mark Sheehan and Peter Sekules (eds), *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Publishing, 2012); Julian Fitzgerald, *Lobbying in Australia: You Can't Expect Anything to Change if You Don't Speak Up* (Rosenberg Publishing, 2006) ('*Lobbying in Australia*'); Halpin and Warhurst (n 2). For comparative literature, see Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: A Global Comparison* (Manchester University Press, 2010); Raj Chari, John Hogan and Gary Murphy, 'Report on the Legal Framework for the Regulation of Lobbying in the Council of Europe Member States' (Study No 590/2010, European Commission for Democracy through Law, 31 May 2011).

²⁸ Finance and Administration Committee, Parliament of Queensland, *Oversight of the Queensland Integrity Commissioner 2012 and Review of Lobbyists Code of Conduct* (Report No 26, March 2013) vi.

²⁹ John Hogan, Raj Chari and Gary Murphy, 'Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?' (2011) 11(1) *Journal of Public Affairs* 35.

³⁰ *Integrity Act 2009* (Qld).

³¹ *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW) amending *Lobbying of Government Officials Act 2011* (NSW). See Joo-Cheong Tham and Yee-Fui Ng, *Regulating Direct Lobbying in New South Wales for Integrity and Fairness* (Report, August 2014).

³² *Lobbyists Act 2015* (SA).

³³ *Integrity (Lobbyists) Act 2016* (WA).

³⁴ *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITSA*').

three dimensions: the form of such regulation; the standards it imposes; and its compliance processes. Utilising this framework, three phases of the legal regulation of lobbying are identified in Part III: (1) 1983–2006: minimalist executive regulation of third party lobbyists; (2) 2007–09: stronger executive regulation of third party lobbyists; and (3) 2009–16: the emergence of legislative regulation of third party lobbyists. Building upon this analysis, the final part of the article will analyse and explain the variation of legal regulation between the Australian jurisdictions. It is argued that within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation in Australia remains narrowly focussed due to the effective advocacy of lobbyists.

II A CONCEPTUAL FRAMEWORK FOR THE REGULATION OF LOBBYING

The regulation of lobbying can be understood according to three key dimensions: the *form of regulation*; the *standards* that regulation imposes; and its *compliance processes*.

A Form of Regulation

Regulation is a protean term that has been applied differently across disciplinary boundaries. Robert Baldwin, Colin Scott and Christopher Hood argue that there are three main conceptions of regulation: (1) regulation as ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, . . . , for monitoring and promoting compliance with these rules’; (2) regulation as ‘all the efforts of state agencies to steer the economy’; and (3) regulation as ‘all mechanisms of social control — including unintentional and non-state processes’.³⁵ While the legal conception of regulation focuses on the first two elements of direct and intentional interventions ‘involving binding standard-setting, monitoring, and sanctioning . . . exercised by public-sector actors on . . . private-sector actors’, the third element of ‘all mechanisms of social control’ explicitly incorporates the element of non-intentionality.³⁶ Based on this broader conception of regulation, this article identifies three main forms of lobbying regulation: (1) informal regulation through the broader political process; (2) self-regulation by the lobbyists and the lobbied; and (3) legal regulation of lobbying.

The first form, *informal regulation through the broader political process* (competitive party politics, elections, media scrutiny) is a form of indirect regulation. This has potential advantages in terms of legitimacy, with the principle of popular sovereignty extending not only to the outcomes of the political process (policies and laws), but also

³⁵ Robert Baldwin, Colin Scott, and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 3–4.

³⁶ Christel Koop and Martin Lodge, ‘What is Regulation? An Interdisciplinary Concept Analysis’ (2017) 11(1) *Regulation & Governance* 95, 97, 105.

to how politics is conducted (including lobbying). Indeed, Australian constitutional law recognises this by conferring substantial autonomy upon the Commonwealth Parliament in relation to the regulation of elections,³⁷ which is given legislative form through the *Commonwealth Electoral Act 1918* (Cth). It prescribes requirements regarding a range of matters including compulsory voting,³⁸ electoral divisions,³⁹ registration of political parties,⁴⁰ and review of decisions.⁴¹

There are potential benefits to informal regulation through the broader political process in terms of effectiveness. The loss of office through the ballot box can act as a powerful sanction against conduct that is viewed adversely by the electorate, and it is possible that political norms generated through political deliberation and debate will prove to be more durable than those norms imposed by legal regulation. However, this only applies to a narrow category of the lobbied, that is, those who are elected officials.

Putting aside the general shortcomings of the broader political process when it is working effectively (its bluntness, its inability to deal effectively with issues that are not priorities for the majority of the electorate), the most significant objection with respect to lobbying is that its key mechanisms have little ‘bite’. This is because lobbying tends to be conducted in secret and, as such, the publicity that is required for effective control through the broader political process is typically absent. Thus, the non-targeted nature of this informal regulation means that it does not effectively constrain the behaviour of lobbyists.

In the absence of mandated transparency, informal regulation of lobbying through the political process, therefore, occurs only in a cursory fashion. Invocations of such limitations can often be a legitimating device for another form of regulation — *self-regulation by the lobbyists and the lobbied*, where lobbyists collectively and consensually agree to abide by certain standards, or alternatively, where government officials agree to avoid conflicts of interest with lobbyists without external policing. For instance, the Australian Professional Government Relations Association, which was established in 2014 as a professional association for consulting and in-house government relations practitioners in Australia, has a Code of Conduct that its members have to abide by as a condition of membership. There are disciplinary procedures within the Association for breaches of the Code, with sanctions including membership suspension or cancellation.⁴² In Europe, there are elaborate

³⁷ Joo-Cheong Tham, ‘Political Participation’ in Adrienne Stone and Cheryl Saunders (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 979, citing *Smith v Oldham* (1912) 15 CLR 355; *Judd v McKeon* (1926) 39 CLR 380.

³⁸ *Commonwealth Electoral Act 1918* (Cth) s 245.

³⁹ *Ibid* pt IV.

⁴⁰ *Ibid* pt XI.

⁴¹ *Ibid* pt X.

⁴² ‘Code of Conduct’, *Australian Professional Governmental Relations Association* (Web Page) <<http://www.apgra.org.au/code-of-conduct>>.

self-regulatory lobbying regimes, such as that of the Society of European Affairs Professionals, which includes a Code of Conduct, education and training, and disciplinary procedures within the Society that incorporate private or public reprimands, or alternatively suspension or expulsion from the Society, which is publicly published on their website.⁴³

There are, of course, benefits from those directly involved in lobbying developing norms for such activity.⁴⁴ Self-regulation by lobbyists and the lobbied is, however, bedevilled by a systemic conflict of interest — those responsible for self-regulation are the same as those who could benefit from lobbying being conducted in ways that undermine the democratic process (through lack of transparency, unfair access and influence, and corruption). In addition, self-regulatory schemes are by nature voluntary, meaning that their coverage may not be comprehensive. For example, Conor McGrath found that self-regulation only applied to around 20–25% of the lobbying industry in the UK.⁴⁵ Further, ensuring compliance within a self-regulatory regime is a challenge as the principal sanction is merely expulsion from the self-regulatory association, membership of which was voluntary in the first place.

The turn to the third form of regulation of lobbying — *legal regulation* — has been prompted by various scandals and controversies, as we will see in Part III. Legal regulation can be promulgated by the legislature (legislative regulation) and/or by the executive (executive regulation).⁴⁶ The benefit of legal regulation is that it ameliorates the shortcomings of regulation through the broader political process and self-regulation by the lobbyists and the lobbied in terms of legitimacy and conflicts of interest, as it introduces independent standards and a third party as regulator to police the system. There are, however, risks to adopting a legal approach to regulating lobbying: legal regulation may detract from the ability of the public to constitute democratic politics and do so in a manner that further distorts the political process (including by favouring one group of lobbyists over another).⁴⁷ It may also prove to be ineffectual as there is certainly no assurance that a legal standard will be accompanied by adequate compliance. The extent to which legal regulation of lobbying can

⁴³ OECD, *Volume 2* (n 24) 47.

⁴⁴ See generally Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

⁴⁵ Conor McGrath, 'Transparency, Access and Influence: Regulating Lobbying in the UK' (Meeting Paper, American Political Science Association 2009 Annual Meeting, 13 August 2009) 13.

⁴⁶ Judicial regulation could also occur where actions of lobbyists or the lobbied violate administrative sanctions or criminal law.

⁴⁷ See Committee on Standards in Public Life, *Standards in Public Life: First Report of the Committee on Standards in Public Life* (Report Vol 1, May 1995), 35–6 ('*First Report*'); William Dinan, 'Learning Lessons? The Registration of Lobbyists at the Scottish Parliament' (2006) 10(1) *Journal of Communication Management* 55, 56; Margaret F Brinig, Randall G Holcombe and Linda Schwartzstein, 'The Regulation of Lobbyists' (1993) 77(2) *Public Choice* 377; Scott Ainsworth, 'Regulating Lobbyists and Interest Group Influence' (1993) 55(1) *The Journal of Politics* 41.

be legitimate and effective goes beyond the question of legal form and very much turns on the standards such regulation imposes and its compliance processes.

B *Standards of Regulation*

A key aspect of the standards imposed by the regulation of lobbying is their coverage of lobbyists and the lobbied. In terms of lobbyists, a variety of individuals, groups and organisations engage in lobbying, including: third party or professional lobbyists; government relations staff of corporations; directors of corporations; technical advisers who lobby as a part of their principal work for clients (eg, architects, engineers, lawyers, accountants); representatives of peak bodies and member organisations; churches; charities and social welfare organisations; community-based groups and single interest groups; MPs; local councillors; head office representatives of political parties; and citizens acting on their own behalf or for their relatives, friends or local communities.⁴⁸ Coverage of lobbyists, therefore, can be narrow or broad: at one end its scope could be restricted to third party lobbyists, and at the other end it could extend to all those engaged in lobbying activity (whether as ‘repeat players’ or otherwise). Similarly, coverage of the lobbied can be narrow or broad. It could be restricted to senior governmental decision-makers (such as Ministers) or extend to all those who hold public office (including non-government MPs).

A further aspect of lobbying standards concerns the *object of regulation*. One option is to target the behaviour and actions of lobbyists themselves, while the other is to target the behaviour and actions of the lobbied, eg government officials. This article argues that ideally both lobbyists and the lobbied should be subject to regulation, as this will enable data to be triangulated to crosscheck and verify the information provided by each party, and more easily detect omissions, thus enhancing the effectiveness of disclosures. Closely related to this is another key aspect of lobbying standards, which is the *conduct required of those subject to these norms*. Broadly speaking, we can distinguish here between standards pertaining to the actual activity of lobbying (eg, the obligation not to misuse confidential information), and those in relation to transparency such as disclosure obligations.

Governments seeking to regulate the market of access and influence through lobbying have several regulatory options in their toolkit. The most radical approach is to ban certain aspects of lobbying activity entirely, either for ‘moral, ethical, strategic or other “public interest” grounds’,⁴⁹ particularly for lobbying activities that are most likely to lead to quid pro quo corruption. For instance, in terms of lobbyists, there are bans on the ability of lobbyists to receive success fees that exist in certain Australian jurisdictions,⁵⁰ which can be justified because fees contingent on success

⁴⁸ ICAC (NSW), *Investigation into Corruption* (n 16) 22.

⁴⁹ Terence Daintith, ‘Regulating the Market for MPs’ Services’ [1996] (Summer) *Public Law* 179, 180.

⁵⁰ See, eg, *Lobbying of Government Officials Act 2011* (NSW) ss 14–16; *Lobbyists Act 2015* (SA) s 14; *Integrity (Lobbyists) Act 2016* (WA) ss 20–2.

give lobbyists an incentive to engage in potentially unethical or corrupt behaviour in order to secure their remuneration.

In terms of the lobbied, in a number of jurisdictions MPs are banned from receiving remuneration for parliamentary speeches, questions, motions, the introduction of a Bill, or amendment to a motion or Bill, as this enables interest groups to utilise money to monopolise a scarce parliamentary resource. Consequently, this may lead to a conflict of interest between the MP's personal financial advancement and the public interest.⁵¹ This is illustrated by the repeated 'cash for questions' scandals that have engulfed MPs in the UK, which have resulted in public consternation and parliamentary inquiries:⁵² salutary examples of MPs being unduly influenced to use their parliamentary duties to secure personal pecuniary benefit.

In addition, there are bans on post separation employment for government officials both in Australia and overseas, where certain government officials (such as Ministers, their advisers, and senior public servants) are prohibited from working for lobbyists in their portfolio area for a certain period,⁵³ although these are not well enforced in Australia.⁵⁴ The post separation employment bans are to prevent corruption by combating the use of confidential information by former government officials, as well as reducing the risk that well-funded industry groups may approach Ministers while they are still in office with promises of lucrative positions after politics if their grants or applications are approved.⁵⁵

⁵¹ See Daintith (n 49).

⁵² Donald Macintyre, 'Cash-for-Questions MPs Suspended by Commons', *The Independent* (online, 21 April 1995) <<https://www.independent.co.uk/news/uk/politics/cash-for-questions-mps-suspended-by-commons-1616440.html>>; Rebecca Lefort, 'Four Labour MPs Implicated in "Cash for Influence" Scandal', *The Telegraph* (online, 21 March 2010) <<https://www.telegraph.co.uk/news/politics/labour/7490787/Four-Labour-MPs-implicated-in-cash-for-influence-scandal.html>>; Committee on Standards in Public Life, *First Report* (n 47); Committee on Standards in Public Life, *Standards in Public Life: Local Public Spending Bodies* (Report Vol 1, May 1996) ('*Second Report*').

⁵³ For example, the 'cooling off period' at the Commonwealth level is 18 months for Ministers taking up lobbying positions in their former portfolio area and 12 months for ministerial advisers and senior public servants: 'Lobbying Code of Conduct', *Attorney-General's Department* (Web Page, 28 November 2019) <<https://www.ag.gov.au/integrity/publications/lobbying-code-conduct>>; Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* (30 August 2018). Canada has a five-year post separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being third party or in-house lobbyists: *Lobbying Act*, RSC 1985 (4th Supp), c 44, s 10.11 ('*Lobbying Act* (Canada)').

⁵⁴ Ng and Tham (n 15) 32.

⁵⁵ Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), E19/0417 Peter M Hall QC, 7 August 2019) 148T, 149T (Yee-Fui Ng).

These bans on specific lobbying activities seek to reduce the risk of narrow quid pro quo corruption, where public officials receive a direct or indirect benefit in order to advance the causes of narrow vested interests, which then detracts from the public interest and the integrity and legitimacy of democratic governance.

Further, the regulation of lobbying activity can also include both positive and negative ethical requirements imposed on lobbyists through Codes of Conduct. For example, the *NSW Lobbyists Code of Conduct* prescribes ethical standards of behaviour such as the requirement to disclose any conflicts at meetings and the requirement to provide true and accurate information.⁵⁶ It also includes negative stipulations such as the prohibition on lobbyists engaging in misleading and corrupt conduct.⁵⁷ Likewise, codes of ethical conduct for the lobbied (eg, Ministers and public servants) can require compliance with the Lobbyists Codes of Conduct.⁵⁸

Besides bans on the most pernicious of lobbying activities that are likely to lead to quid pro quo corruption and the imposition of ethical requirements, another prevalent regulatory approach is to provide increased transparency of lobbying activities. This takes the form of registers of lobbyists and varying levels of disclosure requirements of lobbying activities across jurisdictions. Increased transparency will enhance the fairness of the democratic system by correcting the information asymmetry that may develop where lobbyists can hide their activities behind closed doors.

Disclosure requirements for lobbyists could include a once off disclosure by lobbyists who register their details, regular periodic confirmation of lobbyists' details, and/or more extensive disclosure of each lobbying contact undertaken. An example of extensive disclosures can be seen in Scotland, where the lobbying register has a searchable database that includes detailed information about each lobbying contact with government officials, including precisely who they met, the subject matter, which legislation they were lobbying in relation to, and what they were hoping to achieve with the meeting.⁵⁹

⁵⁶ *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW) sch 1 pt 2 ('*NSW Lobbyists Code of Conduct*').

⁵⁷ *Ibid* sch 1 cl 7.

⁵⁸ For example, the Ministers should ensure that dealings with lobbyists are conducted consistently with the Lobbyists Code of Conduct, so that they do not give rise to a conflict between public duty and private interest. Federal Ministers are required to report any breaches: Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* (n 53) 10–11 cl 8. The Queensland Code of Conduct for public servants provides that public servants will ensure any engagement with lobbyists is properly recorded and ensure that business meetings with persons who were formerly Ministers, Parliamentary Secretaries or senior government representatives are not on matters those persons had official dealings with in their previous employment in accordance with government policy: Public Service Commission (Qld), *Code of Conduct for the Queensland Public Service* (1 January 2011) cl 4.2(b).

⁵⁹ See 'Welcome to the Lobbying Register', *The Scottish Parliament* (Web Page) <<https://www.lobbying.scot/>> ('Scottish Parliament Lobbying Register').

Transparency requirements can also be mandated for the lobbied, including the disclosure of lobbying activity via disclosure of ministerial diaries. For example, in Queensland, ministerial diaries are required to be disclosed on a monthly basis, providing information about the name of the organisation or person the Minister has met with and the purpose of the meeting.⁶⁰

The requirement to disclose lobbying contacts, as implemented in Queensland (as well as Canada and Scotland),⁶¹ or the disclosure of ministerial diaries, as required in NSW and Queensland,⁶² enables civil society and opposing interest groups to be aware of who is lobbying government and for what purpose (provided that the disclosures are timely and provide a meaningful level of detail). This will enable other interest groups to engage in counter lobbying and put forward their opposing views, which will furnish government officials with a more diverse range of views to inform their decision-making. As a result, the quality and integrity of government policy-making and decision-making will be enhanced.

C *Compliance Processes*

As to compliance processes, these are closely associated with the form of the regulation. Regulation through the broader political process institutes the electorate as the entity responsible for compliance (with political norms). The sanctions available for noncompliance are both drastic and limited: there is the ultimate sanction of loss of office, but that only applies to those standing for election (a particular section of the lobbied). Self-regulation by lobbyists and the lobbied, with its absence of governmental intervention, posits the lobbyists and/or the lobbied as the arbiter of standards, with the sanction of peer disapproval. For legal regulation, the options are more diverse. The compliance processes of such regulation could, in fact, be based on a mix of governmental intervention, stakeholder input, and industry self-management in the form of co-regulation, with the legal regulation merely stipulating

⁶⁰ Diary entries exclude personal, electorate or party political meetings or events, media events and interviews and information contrary to public interest (eg, meetings regarding sensitive law enforcement, public safety or whistleblower matters): The Queensland Cabinet and Ministerial Directory, 'Ministerial Diaries', *Queensland Government* (Web Page, 31 August 2020) <<https://cabinet.qld.gov.au/ministers/diaries.aspx>>.

⁶¹ See 'Lobbying', *Queensland Integrity Commissioner* (Web Page, 20 June 2019) <<https://lobbyists.integrity.qld.gov.au/ContactLog.aspx>> ('Queensland Lobbying'); *Lobbying (Scotland) Act* (n 25) s 6; Scottish Parliament Lobbying Register (n 59); 'Advanced Registry Search', *Office of the Commissioner of Lobbying of Canada* (Web Page, 30 July 2020) <<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/advSrch?lang=eng>>.

⁶² The Queensland Cabinet and Ministerial Directory (n 60); Department of Premier and Cabinet (NSW), Premier's Memorandum M2015-05, *Publication of Ministerial Diaries and Release of Overseas Travel Information* (2015) ('Memorandum M2015-05').

the obligations (but not providing separately for compliance processes).⁶³ Alternatively, legal regulation could provide for criminal and administrative penalties in place of, or sitting alongside, these other sanctions. It could also provide for a dedicated agency responsible for ensuring compliance. Here there are two main options: a government agency (departmental supervision) or a statutory authority (supervision by statutory authority).

Taken together, this framework emphasising the forms of regulation, standards of regulation, and compliance processes, provides an analytic lens to conceptualise the broad spectrum of options in regulating lobbying as summarised in the table below:

Table 1: Typology of Lobbying Regulation

Form of Regulation	Broader Political Process	Self-Regulation	Legal Regulation
Standards of Regulation	Coverage of lobbyists Coverage of the lobbied Object of regulation (lobbyists/the lobbied) Conduct of lobbyists/the lobbied		
Compliance Processes	Adverse media coverage	Peer disapproval	Administrative and criminal penalties
Compliance Authority	Electorate	Lobbyists	Government agency/ independent statutory authority

Drawing on this conceptual framework, the next section will examine how the legal regulation of lobbying has evolved in Australia.

III PHASES OF LEGAL REGULATION OF LOBBYING IN AUSTRALIA

Although paid lobbyists have operated in Australia for many decades, their lobbying has only been subject to dedicated legal regulation since 1983.⁶⁴ Before then, lobbyists were either not regulated at all, or otherwise self-regulated internally at the individual firm level. There was no collective industry body to set standards to self-regulate the conduct of their members, nor any external regulatory authority that policed their behaviour.⁶⁵ This meant that lobbyists were given free rein to conduct their activities without any governmental supervision.

⁶³ See Ian Bartle and Peter Vass, 'Self-Regulation and the Regulatory State: A Survey of Policy and Practice' (Research Report No 17, Centre for the Study of Regulated Industries, October 2005).

⁶⁴ Halpin and Warhurst (n 2) 101; Sheehan and Sekules (n 27) 10.

⁶⁵ For a discussion on self-regulation: see Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146.

The first phase of legal regulation of lobbying only existed at the Commonwealth level and can be characterised as a minimalist executive model. This was followed by the second phase of executive regulation taken up by the Commonwealth and states, with very similar models in each jurisdiction. Several jurisdictions have since moved forward to the third phase of legislative regulation.

A 1983–2006: Minimalist Executive Regulation of Third Party Lobbyists

The first ever regulation of lobbyists in Australia was adopted at the federal level in 1983 by the Hawke Labor government.⁶⁶ This took the form of two registers of lobbyists: a general register for domestic lobbyists and a separate register for lobbyists representing foreign governments or their agencies, accompanied by guidelines for Ministers regarding their dealings with lobbyists.⁶⁷ The registers contained the names and addresses of lobbyists and their clients, and lobbyists were required to register each time they either accepted a brief or engaged a new client.

This executive regulation was introduced in response to the scandal generated by the Combe-Ivanov affair,⁶⁸ where prominent lobbyist David Combe established a relationship with Soviet diplomat Valery Ivanov, who turned out to be a spy for the Soviet government. This explains the separate lobbyist register established for those dealing with foreign governments. A legislative scheme was considered by the Cabinet, but it was decided that executive schemes offered more flexibility and it was argued that overseas legislative schemes were ineffective due to complex definitional problems, such as who is to be regarded as a lobbyist.⁶⁹

Nevertheless, the Hawke executive lobbyist registration scheme was widely considered to be a failure due to its defective compliance processes.⁷⁰ The flawed assumption seemed to have been that nominal executive regulation would result in adequate compliance. The registers were not made public and were only available to Ministers and government Departments on a ‘need to know’ basis.⁷¹ This was interpreted strictly, with a shadow Minister denied access and a Minister being told that he had to inspect the register at the Department.⁷² The shadow Minister who was denied

⁶⁶ *Regulation of Lobbyists* (Cabinet Minute, Amended Decision No 2570, 5 December 1983) <<http://recordsearch.naa.gov.au/SearchNRRetrieve/Interface/ViewImage.aspx?B=31406136>> (‘Cabinet Minute Amended Decision No 2570’).

⁶⁷ *Ibid*; Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3273 (Kim Beazley).

⁶⁸ For an account of this affair: see Warhurst, *Behind Closed Doors* (n 27) 22–3.

⁶⁹ Cabinet Minute Amended Decision No 2570 (n 66). See also Parliament of Australia, *Lobbyists and the Australian Government and Parliament: A Discussion Paper* (Report, September 1983).

⁷⁰ Fitzgerald, *Lobbying in Australia* (n 27) 108–9; Warhurst, *Behind Closed Doors* (n 27) 25–6.

⁷¹ Cabinet Minute Amended Decision No 2570 (n 66).

⁷² John Warhurst, ‘Locating the Target: Regulating Lobbying in Australia’ (1998) 51(4) *Parliamentary Affairs* 538, 545.

access denounced the scheme as ‘a sham and virtually useless, particularly to the press, the Parliament and those who want to put government decision-making under scrutiny’.⁷³ With such a lack of transparency, regulation through the broader political process has no purchase. Moreover, registration by the lobbyists was voluntary, and although Ministers and Commonwealth officials were prohibited from dealing with unregistered lobbyists, this was not enforced.⁷⁴ All these features warrant the characterisation of this regime as minimalist.

In 1996, the newly elected Howard Coalition government abolished the scheme, arguing that the registers were not being used.⁷⁵ Instead, a section was inserted in a guide for Ministers issued by then Prime Minister John Howard, requiring Ministers and Parliamentary Secretaries to ensure that dealings with lobbyists did not give rise to a conflict between public duty and private interest.⁷⁶ This change signalled a shift in focus from standards dealing with transparency to those based on conflicts of interest. This difference sat alongside key continuities that reflected a minimalist approach. The removal of the lobbyist registers could be said to be a break from the past and a marked decline in regulatory intensity, as it removed all forms of direct regulation of lobbyists. Compliance processes depended upon a model of self-regulation, with the onus principally placed on Ministers and Parliamentary Secretaries to ensure that their dealings with lobbyists were appropriate, and the Prime Minister having the (political) ability to sanction for departures from the guide.⁷⁷ As details of lobbying activities were not publicised, regulation through the broader political process had little or no impact.

B 2007–09: Stronger Executive Regulation of Third Party Lobbyists

More than a decade later, controversy surrounding the lobbying activities of former WA Premier Brian Burke, his former ministerial colleague Julian Grill, and former Senator Noel Crichton-Browne prompted a round of regulation directed at third party lobbyists, that is, those who conduct lobbying activities on behalf of a third party client.⁷⁸ Burke, Grill, and Crichton-Browne were aggressive lobbyists with an

⁷³ Ibid 546.

⁷⁴ Fitzgerald, *Lobbying in Australia* (n 27) 108–9; Warhurst, *Behind Closed Doors* (n 27) 25–6.

⁷⁵ Warhurst, *Behind Closed Doors* (n 27) 27–8.

⁷⁶ Prime Minister John Howard, ‘A Guide on Key Elements of Ministerial Responsibility’ (Guide, December 1998) cl 5.

⁷⁷ Ibid.

⁷⁸ See Commonwealth Government, *Lobbying Code of Conduct* (2008) cl 3.5 (‘2008 Lobbying Code of Conduct (Cth)’). The Commonwealth *Lobbying Code of Conduct* was updated in 2019. New South Wales Government, *NSW Government Lobbyist Code of Conduct* (4 February 2009) cl 3 (‘2009 Lobbyist Code of Conduct (NSW)’). The *NSW Lobbyists Code of Conduct* (n 56) is now contained in *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation* 2014 sch 1. Queensland Government, *Lobbyists Code of Conduct* (12 September 2013) cl 5 (‘Lobbyists Code of Conduct (Qld)’). Department of the Premier and Cabinet (SA), *The Lobbyist Code*

extensive network of ministerial, party and bureaucratic contacts. They exploited these contacts to obtain confidential information and influence governmental decisions for the purposes of their lobbying activities. These activities led to findings of misconduct against various public officials by the WACCC⁷⁹ and prompted the resignations of four Ministers.⁸⁰

Following the controversy, the WA government put into place a new scheme of executive regulation of lobbying in 2007.⁸¹ The *WA Contact with Lobbyists Code* created for the first time a public register of lobbyists, established rules for contact between lobbyists and Ministers, Parliamentary Secretaries, ministerial staff and public sector employees, and established standards of conduct for lobbyists who wished to be included on the register of lobbyists.⁸² Then Premier Alan Carpenter expressly linked the introduction of the register to the activities of Burke, Grill, and Crichton-Browne, and announced a ban on them being registered as lobbyists under the new scheme.⁸³

This form of lobbying regulation was subsequently adopted by the federal⁸⁴ and other state⁸⁵ governments in the following two years, exhibiting a direct policy transfer between jurisdictions. The lobbying registration schemes and Codes of

of Conduct 2009 (1 December 2009) cl 3 ('2009 Lobbyist Code of Conduct (SA)'). The SA *Lobbyist Code of Conduct* was updated in 2014. Tasmanian Government, *Tasmanian Government Lobbying Code of Conduct* (2009) cl 3 ('Lobbying Code of Conduct (Tas)'). Victorian Government, *Victorian Government Professional Lobbyist Code of Conduct* (1 November 2013) cl 3.4 ('Professional Lobbyist Code of Conduct (Vic)'). Western Australian Government, *Contact with Lobbyists Code* (2008) cl 3 ('2008 Contact with Lobbyists Code (WA)'). The WA *Lobbyists Code of Conduct* is now contained in *Integrity (Lobbyists) Act 2016* (WA) s 16.

⁷⁹ Corruption and Crime Commission (WA), *Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health* (Report, 25 January 2008) 5 ('Report on the Alleged Misconduct Involving Dr Neale Fong'); Corruption and Crime Commission (WA), *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (5 October 2007) 101 ('Report on Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup').

⁸⁰ Warhurst, *Behind Closed Doors* (n 27) 60.

⁸¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 March 2007, 329–30 (Alan Carpenter).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *2008 Lobbying Code of Conduct* (Cth) (n 78). The Commonwealth Lobbyist Register and *Lobbying Code of Conduct* were introduced without fanfare as part of an overall political accountability package tackling political donations, government communications, and campaign advertising: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2008, 34 (Melissa Parke).

⁸⁵ *2009 Lobbyist Code of Conduct* (NSW) (n 78); *Lobbyists Code of Conduct* (Qld) (n 78); *2009 Lobbyist Code of Conduct* (SA) (n 78); *Lobbying Code of Conduct* (Tas) (n 78); *Professional Lobbyist Code of Conduct* (Vic) (n 78).

Conduct introduced by these jurisdictions were broadly similar, being schemes of executive regulation involving a lobbyist register and a Code of Conduct. Lobbyists were obliged to register their details and agree to abide with a Code of Conduct set by the government. As the schemes in the Commonwealth and the states essentially replicate each other, they will be discussed concurrently.

In terms of the standards laid down by these schemes, their scope is relatively narrow, covering only third party lobbyists, defined under the registers as any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client.⁸⁶ As to the conduct required of those third party lobbyists, the first set of obligations are directed to increased transparency. Third party lobbyists are required to register their details on a lobbyist register. Only registered lobbyists can lobby government representatives. Broadly speaking, government representatives include Ministers, Parliamentary Secretaries, ministerial advisers and senior public servants,⁸⁷ but exclude MPs and local government officials.

The standards under these schemes also subject third party lobbyists to obligations going beyond those of disclosure. These obligations are provided under the various Codes of Conduct that require third party lobbyists to engage with government representatives in an appropriate manner, including prohibiting corrupt or dishonest conduct and requiring full disclosure of their interests.⁸⁸ Lobbyists who breach the Code of Conduct can be removed from the register.

⁸⁶ *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.5; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3; *Lobbyists Code of Conduct* (Qld) (n 78) cl 5; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 3; *Lobbying Code of Conduct* (Tas) (n 78) cl 3; *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 3.4; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 3.

⁸⁷ Under the registers in Victoria, SA, WA and the Commonwealth, ‘government representatives’ included Ministers, Parliamentary Secretaries, ministerial advisers and senior public servants. In Tasmania, ‘government representatives’ included Ministers, Parliamentary Secretaries, MPs of the political party (or parties) constituting the executive government, ministerial advisers and agency heads appointed under the *State Service Act 2000* (Tas). In one respect, the coverage of the Tasmanian scheme was narrower than the other jurisdictions, as it did not cover all senior public servants, but instead only covered the agency heads; in another respect, it was broader as it covered MPs of the party of the government of the day. See *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.3; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3; *Lobbyists Code of Conduct* (Qld) (n 78) cl 5; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 3; *Lobbying Code of Conduct* (Tas) (n 78) cl 3; *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 3.2; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 3.

⁸⁸ *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 8; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 7; *Lobbyists Code of Conduct* (Qld) (n 78) cl 3; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 8; *Lobbying Code of Conduct* (Tas) (n 78) cl 8; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 5.

In terms of compliance processes, there is a definite shift away from the secretive approach of the previous era. The publicly available information through the registers provides the possibility of regulation through the broader political process. The schemes also provide for a dedicated agency to ensure compliance with two distinct approaches taken. Departmental supervision is provided under the Commonwealth, SA, and Tasmanian schemes,⁸⁹ while the schemes in Victoria and WA are supervised by statutory agencies — specifically public sector commissioners.⁹⁰

These executive schemes were not seen by commentators to be adequately strong in terms of coverage and enforcement. Then Greens Party Leader Bob Brown criticised the federal Code for being unenforceable and stated that the Code ‘should be toughened up and made into law’,⁹¹ whilst academic John Warhurst argued that the scheme was ‘too timid and too narrow’.⁹² As mentioned above, the narrow coverage of the schemes to third party lobbyists exempted from regulation up to 80% of those who lobby the government.⁹³ In addition, the nature of executive schemes based on ‘soft law’, such as aspirational Codes of Conduct, means that enforcement measures are weaker than those available under legislation, with the principal sanction being deregistration from a register that was never complete in the first place. Such weak enforcement mechanisms may not deter improper or unethical behaviour.

C 2009–16: *The Emergence of Legislative Regulation of Third Party Lobbyists*

The third phase of lobbying regulation in Australia is legislative regulation, as reflected by legislation introduced in Queensland (2009), NSW (2014), SA (2015), WA (2016), and the Commonwealth (2018).⁹⁴ Victoria and Tasmania remain regulated by executive schemes, although Victoria introduced an additional register

⁸⁹ The schemes were administered by the Department of the Prime Minister and Cabinet and now the Attorney-General’s Department at the Commonwealth level. The Department of Premier and Cabinet administered the schemes in SA, NSW, and Tasmania. See *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.7, 6, 9; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3, 9; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 9; *Lobbying Code of Conduct* (Tas) (n 78) cl 9.

⁹⁰ *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 9; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 8.

⁹¹ Hogan, Murphy and Chari, ‘Regulating the Influence Game in Australia’ (n 26) 107, quoting Damien Murphy, ‘New Lobbying Rules for Former Government Insiders’, *The Sydney Morning Herald* (online, 14 May 2008) <<https://www.smh.com.au/national/new-lobbying-rules-for-former-government-insiders-20080514-gdsdk4.html>>.

⁹² Hogan, Murphy and Chari, ‘Regulating the Influence Game in Australia’ (n 26) 107, citing John Warhurst, Submission No 4 to Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Inquiry into the Lobbying Code of Conduct* (8 April 2008) 4.

⁹³ Finance and Administration Committee, Parliament of Queensland, *Oversight of the Queensland Integrity Commissioner 2012 and Review of the Lobbyists Code of Conduct* (Report No 26, March 2013) vi.

⁹⁴ *FITSA* (n 34); *Electoral and Lobbying Legislation Amendment Act 2014* (NSW); *Lobbyists Act 2015* (SA); *Integrity (Lobbyists) Act 2016* (WA).

for in-house government affairs directors who have held specified roles in government or a political party.⁹⁵

As opposed to the second phase of executive regulation where the Commonwealth and states essentially replicated similar schemes, the five jurisdictions that have adopted legislative regulation have forged their own paths, which the author has classified into three main streams: (1) the innovative models (Queensland and NSW); (2) the codified executive model (SA and WA); and (3) the selective model (the Commonwealth).

1 *The Innovative Models*

NSW and Queensland have both adopted innovative legislative models to regulate lobbying that have greatly increased the standards of regulation in terms of disclosure and enforcement mechanisms. As the schemes have unique elements, these will be discussed separately.

(a) *Queensland*

Queensland was the first Australian jurisdiction to regulate lobbying legislatively. Like the previous schemes of executive regulation, the Queensland legislative scheme mandates a lobbyist register and Code of Conduct.⁹⁶

In terms of the standards of regulation, the coverage imposed by the scheme in relation to lobbyists is similar to previous executive regulation, that is, the Queensland register only covers third party lobbyists,⁹⁷ which is a significant limitation as it excludes the bulk of the lobbyist population. However, there is broader coverage of public officials under the Queensland register. In addition to Ministers, Parliamentary Secretaries and ministerial advisers, the Queensland register also includes all public sector officers (instead of just senior public servants), local government lobbying, as well as lobbying of certain opposition Members.⁹⁸ Success fees are banned in Queensland and are subject to a maximum penalty of 200 penalty units (\$26,690).⁹⁹

⁹⁵ *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 5.1(e). The *Professional Lobbyist Code of Conduct* (Vic) requires the registration of government affairs directors who have held the position of National or State Secretary, Director or Deputy or Assistant Secretary, director of a registered political party, who are former Ministers or Parliamentary Secretaries of a state or Commonwealth government; who have been a Chief of Staff, Senior Adviser or Adviser in the private office of a Commonwealth or state Minister or Parliamentary Secretary; Victorian Public Sector Commissioner, 'Register of Government Affairs Directors, *Victoria State Government* (Online Register) <<https://www.lobbyistsregister.vic.gov.au/lobbyists-register/index.cfm?event=whoIsOnRegister>>.

⁹⁶ *Lobbyists Code of Conduct* (Qld) (n 78) cl 3.

⁹⁷ *Integrity Act 2009* (Qld) s 41.

⁹⁸ *Ibid* ss 42, 44–47B.

⁹⁹ *Ibid* s 69.

Like the schemes of executive regulation, lobbyists are obliged to operate consistently with a Code of Conduct that sets out expected standards of behaviour.

A major change is the enhancement of disclosure provisions. In an unprecedented step, third party lobbyists are required to inform the Queensland Integrity Commissioner, within 15 days after the end of every month, details of every lobbying contact, including the name of the registered lobbyist, whether the lobbyist complied with the Code of Conduct in arranging the contact, the date of contact and client of the lobbyist, the title and/or name of the government or opposition representative, and the purpose of contact.¹⁰⁰ This information is made publicly available on the Integrity Commissioner's website. The disclosure regime thus promotes transparency in publishing details of each and every lobbying contact with public officials. This facilitates regulation through the broader political process, enabling the media and interested public to scrutinise the records and make further investigations. Disclosure requirements under the previous executive scheme are also preserved in relation to lobbyists providing their details, keeping them updated, as well as annually confirming their details and lack of serious convictions or imprisonment of more than 30 months.¹⁰¹ In addition, ministerial diaries are published in Queensland on a monthly basis, providing information about the name of the organisation or person, and the purpose of the meeting.¹⁰² However, the quality of diary disclosures is poor, with some entries simply listing 'other' or 'meeting', which does not provide any illumination about the subject matter discussed or the purpose of the meeting.¹⁰³

The Queensland legislative scheme also strengthened the compliance model. The scheme is administered by the Integrity Commissioner, an independent officer of the Queensland Parliament.¹⁰⁴ The Integrity Commissioner is responsible for maintaining the register and monitoring compliance by lobbyists, government and local government with the *Integrity Act 2009* (Qld) and the Code.¹⁰⁵ The Commissioner can impose a broader range of administrative sanctions on lobbyists compared to

¹⁰⁰ Ibid s 68(4); *Lobbyists Code of Conduct* (Qld) (n 78) cl 4.

¹⁰¹ *Integrity Act 2009* (Qld) ss 49(3), 50, 51, 53. These details include the lobbyist's name and business registration particulars; for each person employed, contracted or otherwise engaged by the lobbyist to carry out a lobbying activity, the person's name and role; and if the person is a former senior government representative or a former opposition representative, the date the person became a former senior government representative or a former opposition representative: see *Integrity Act 2009* (Qld) s 49(3).

¹⁰² Diary entries exclude personal, electorate or party political meetings or events, media events and interviews and information contrary to public interest (eg, meetings regarding sensitive law enforcement, public safety or whistle blower matters): The Queensland Cabinet and Ministerial Directory (n 60).

¹⁰³ Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), E19/0417 Peter M Hall QC, 7 August 2019) 154T, 157T (Yee-Fui Ng).

¹⁰⁴ *Integrity Act 2009* (Qld) s 6(2).

¹⁰⁵ Ibid ss 7(1)(c), 49(1).

other jurisdictions, including issuing a warning or suspending the registration of a lobbyist for a reasonable period, in addition to cancelling their registration.¹⁰⁶

There is, however, cause to doubt the efficacy of enforcement of lobbying provisions. The former Queensland Integrity Commissioner, Richard Bingham reported that his regulation of lobbying in 2014–16 was low, partly due to lobbyists strategically restructuring their businesses to offer consulting services rather than direct lobbying, meaning that they no longer fell within the statutory definition of third party lobbyists.¹⁰⁷ The government decided not to expand the ambit of the lobbyists covered by the scheme and instead reduced funding to the Commissioner to regulate lobbying issues.¹⁰⁸

The Queensland scheme is thus a pioneering one in Australia, as the first legislative lobbying scheme. It sets up an independent oversight system in the form of an Integrity Commissioner, who is an officer of Parliament. Lobbyists are required to disclose a broader set of information to the Integrity Commissioner compared to other jurisdictions, including details of all lobbying activity, and this information is made publicly available, which promotes transparency. However, the ambit of the scheme remains narrow, ie confined to third party lobbyists, which limits its efficacy. In addition, the enforcement of the scheme may not be optimal, as lobbyists are able to evade regulation by restructuring their businesses.

(b) NSW

The enactment of the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW) transformed lobbying regulation in NSW. This legislation was prompted by a general ICAC (NSW) investigation into the lobbying industry, as well as ICAC investigations involving former Labor Ministers Eddie Obeid and Ian Macdonald that found multiple instances of corruption by both public officials and the lobbyists involved. Obeid was ultimately sentenced to five years' imprisonment for misconduct in a public office.¹⁰⁹ The investigations also ended the political careers of 10 Liberal MPs following evidence of systematic failure in political funding that rewarded corruption.¹¹⁰

¹⁰⁶ Ibid ss 62, 66, 66A(2).

¹⁰⁷ Queensland Integrity Commissioner, *Annual Report 2015–16* (Annual Report, 2016) 6 (*Annual Report 2015–16*).

¹⁰⁸ Ibid.

¹⁰⁹ Lucy Carter and Kathleen Calderwood, 'Eddie Obeid Sentenced to Five Years' Jail for Misconduct in Public Office', *ABC News* (online, 16 December 2016) <<http://www.abc.net.au/news/2016-12-15/eddie-obeid-sentenced-five-years-jail-misconduct-public-office/8122720>>.

¹¹⁰ Yee-Fui Ng, 'After Operation Spicer, what more needs to be done to Clean Up Political Donations in NSW?', *The Conversation* (online, 30 August 2016) <<https://theconversation.com/after-operation-spicer-what-more-needs-to-be-done-to-clean-up-political-donations-in-nsw-64547>>.

The NSW scheme includes a register of lobbyists and Code of Conduct, but in addition to the previous executive scheme it incorporates certain offences under the *Lobbying of Government Officials Act 2011* (NSW) ('*Lobbying Government Officials Act*'). Alongside the legislative scheme, there is also an executive requirement for Ministers to disclose publicly their diaries, including meetings with lobbyists.

Under the new scheme, the compliance regime has been strengthened. The scheme is administered and enforced by a statutory authority: the NSW Electoral Commission ('NSWEC').¹¹¹ With the coercive power to compel documents and information, the NSWEC has ample powers to enforce the *Lobbying Government Officials Act*.¹¹² The NSWEC also has a range of administrative sanctions at its disposal; it may cancel or suspend the registration of a third party lobbyist if they breach the *Act* or Code, or fail to update information on the Register.¹¹³

The NSW scheme also provides for a novel compliance mechanism. The NSWEC is required to maintain a Lobbyists Watch List, which is a public document published on the same website as the Lobbyist Register, listing any third party or other lobbyists who have breached the *Lobbying Government Officials Act* or Code.¹¹⁴ This is a pioneering mechanism to 'name and shame' errant lobbyists and to enable stronger controls to be implemented for lobbyists who have previously breached their obligations, as lobbyists on the Watch List are subject to stricter controls by regulating the conduct of the lobbied. Codes of Conduct of government officials may specify special procedures for communication by officials with lobbyists on the Watch List.¹¹⁵ The Premier's Memorandum on the Code provides that the lobbying activities of entities on the Watch List are to be subject to strict meeting protocols, that is, having two NSW government officials present during any communication with the lobbyist.¹¹⁶ One of those officials is required to take notes of the communications with the lobbyist and provide the notes to the agency head.¹¹⁷ Premier's Memoranda are a form of executive self-regulation, and much depends on how the Premier enforces these standards politically.

In addition to bolstered compliance mechanisms, the standards of regulation have also improved significantly. Coverage of the *NSW Lobbyists Code of Conduct*

¹¹¹ *Electoral and Lobbying Legislation Amendment Act 2014* (NSW) sch 3 pt 4 s 19, amending *Lobbying of Government Officials Act 2011* (NSW).

¹¹² *Electoral and Lobbying Legislation Amendment Act 2014* (NSW) sch 3 pt 4 s 19(2), amending *Lobbying of Government Officials Act 2011* (NSW); *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 110A as repealed by *Electoral Funding Act 2018* (NSW) s 157. The power to compel documents was given to the Election Funding Authority, whose role was replaced by the NSWEC by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW).

¹¹³ *Lobbying of Government Officials Act 2011* (NSW) s 9(7).

¹¹⁴ *Ibid* s 12.

¹¹⁵ *Ibid* s 12(2).

¹¹⁶ Premier's Memorandum M2014-13, *NSW Lobbyists Code of Conduct* (2014) 2.

¹¹⁷ *Ibid*.

(‘*NSW Code*’) has been expanded to apply to both third party and other lobbyists (broadly defined as any other individual or body that lobbies government officials), meaning that all individuals and corporations seeking to influence governmental policy and legislation are covered by the NSW regime. The coverage of the *NSW Code* is hence broader than other jurisdictions, which are confined to third party lobbyists. There is a disjuncture, however, with the coverage under the register of lobbyists with only third party lobbyists coming within its scope.¹¹⁸

Additional disclosure requirements apply to the lobbied as well. The Premier’s Memorandum requires all Ministers to publish extracts regularly from their diaries detailing scheduled meetings held with stakeholders, including third party lobbyists.¹¹⁹ The Department of Premier and Cabinet (NSW) administers the publication of diaries, and will notify the Premier if the Memorandum is not complied with. The Premier is then able to reprimand the errant Minister and request that they comply or face the displeasure of the Premier. This approach, however, does not cover lobbyists who explicitly target and meet with ministerial advisers and public servants rather than Ministers. Yet these government officials are logical targets for lobbyists, as they often have great power and influence in decision-making and policymaking due to their privileged positions within the Westminster advisory system.¹²⁰ There is strong justification to require disclosure of lobbying interactions between ministerial advisers and public servants who are senior, as well as those who provide significant public policy advice or make significant decisions. There may be less justification, however, to subject more junior public servants and ministerial advisers to extensive disclosure requirements, as they would generally not be targets for lobbyists. The Queensland regime that obligates lobbyists to disclose each and every lobbying contact provides for more fulsome disclosure requirements.¹²¹ At any rate, the quality of diary disclosures has been poor, with minimal to non-existent information about the purpose of the lobbying contact.¹²²

Certain lobbying activities are prohibited by the *Lobbying Government Officials Act*. It is an offence for a former Minister or former Parliamentary Secretary to lobby

¹¹⁸ *Lobbying of Government Officials Act 2011* (NSW) s 9.

¹¹⁹ The extracts must disclose the organisation or individual with whom the meeting occurred, details of any registered lobbyists present, the name of the lobbyists’ client, and the purpose of the meeting: Memorandum M2015-05 (n 62).

¹²⁰ Yee-Fui Ng, *The Rise of Political Advisors in the Westminster System* (Routledge, 2018) 75; Yee-Fui Ng, *Ministerial Advisors in Australia: The Modern Legal Context* (Federation Press, 2018) 48–53.

¹²¹ Furthermore, diary disclosures in NSW are currently limited to scheduled meetings with external stakeholders who are seeking to influence government policy or decisions, but do not cover official events, town hall meetings, and community functions, where lobbying frequently happens. By contrast the diary disclosures in Queensland include these events, and thus provides more comprehensive data: see *The Queensland Cabinet and Ministerial Directory* (n 102).

¹²² Evidence to the Independent Commission Against Corruption (NSW), Sydney, 7 August 2019 in *Operation Eclipse*, 154T, 157T (Yee-Fui Ng).

a government official in relation to an official matter dealt with by them in their portfolio responsibilities during the 18 months before they ceased to hold office.¹²³ The maximum penalty for this offence is 200 penalty units (\$22,000).¹²⁴ The Act also bans success fees being paid to, or received by, a lobbyist,¹²⁵ with a maximum penalty of 500 penalty units for corporations (\$55,000) or 200 penalty units for individuals (\$22,000).¹²⁶ Similar to other jurisdictions, the *NSW Code* prohibits lobbyists from engaging in misleading, dishonest, corrupt or unlawful conduct, and requires lobbyists to provide true and accurate information.

The NSW scheme is thus unique in Australia, with stricter standards for both lobbyists and government officials dealing with lobbyists. Alongside the legislative scheme, there is a requirement for Ministers to disclose their diaries publicly, including meetings with lobbyists, which adds a further layer of transparency. The Lobbyists Watch List is an innovation that potentially provides for enhanced compliance through public scrutiny of lobbyists on the list and strict meeting protocols. In addition, the *NSW Code* is broader than other Australian jurisdictions, incorporating all lobbyists seeking to influence government officials rather than just third party lobbyists. Furthermore, there is independent oversight of lobbying regulation through a statutory authority: the NSWEC.

2 *The Codified Executive Model*

The SA and WA lobbyist legislation both merely codify the previous executive scheme and introduce stricter penalties.¹²⁷ Both schemes are still limited to third party lobbyists, and the compliance regime for each jurisdiction remains the same: the register is still managed by the Chief Executive of the Department of the Premier and Cabinet in South Australia,¹²⁸ and the Public Sector Commissioner in WA.¹²⁹

The standards of regulation are slightly tightened, as lobbying activities in SA and WA are more restricted, with sanctions imposed for giving and receiving success fees,¹³⁰ as well as for engaging in lobbying except in accordance with the registration requirements (\$30,000 or imprisonment for 2 years for individuals and \$150,000 for a body corporate in SA,¹³¹ and a \$10,000 fine in WA¹³²). In WA, a penalty of

¹²³ *Lobbying of Government Officials Act 2011* (NSW) s 18.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* s 15.

¹²⁶ *Ibid.*

¹²⁷ *Lobbyists Act 2015* (SA); *Integrity (Lobbyists) Act 2016* (WA).

¹²⁸ *Lobbyists Act 2015* (SA) ss 3, 10.

¹²⁹ *Integrity (Lobbyists) Act 2016* (WA) ss 3, 10.

¹³⁰ *Lobbyists Act 2015* (SA) s 14; *Integrity (Lobbyists) Act 2016* (WA) ss 20–2.

¹³¹ *Lobbyists Act 2015* (SA) s 5.

¹³² *Integrity (Lobbyists) Act 2016* (WA) s 8.

\$10,000 also applies to those who supply false or misleading information to the Commissioner.¹³³

3 *The Selective Model*

At the Commonwealth level, the legislation regulating lobbying activity is selectively targeted at combating foreign influence, with the vast majority of lobbyists still remaining under executive regulation.

The introduction of the foreign agent register for lobbyists was sparked by allegations of Chinese interference in Australian politics. In particular, Labor Senator Sam Dastyari was forced to resign after it was revealed that he advocated in favour of China's position on the South China Sea against his own party's policy, following a meeting with a Chinese lobbyist, Huang Xiangmo.¹³⁴ Dastyari later travelled to Huang's home to warn him that his phone might be tapped. These incidents sparked the introduction of then Prime Minister Malcolm Turnbull's foreign interference legislative package, including creating a new public register for agents acting on behalf of a foreign principal through the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('FITSA').¹³⁵ Turnbull stated that '[f]oreign powers are making unprecedented and increasingly sophisticated attempts to influence the political process, both here and abroad'.¹³⁶

The FITSA deals with persons and entities who lobby on behalf of foreign principals and requires them to be registered as foreign agents.¹³⁷ Details of individuals and entities lobbying Commonwealth public officials or seeking to influence Commonwealth political or governmental processes on behalf of foreign principals are required to be published on a public register administered by the Attorney-General's

¹³³ Ibid s 24.

¹³⁴ Aaron Patrick, 'Sam Dastyari is a Chinese "Agent of Influence": Ex-Intelligence Chief', *The Australian Financial Review* (online, 4 December 2017) <<https://www.afr.com/politics/sam-dastyari-is-a-chinese-agent-of-influence-exintelligence-chief-20171203-gzxktb>>.

¹³⁵ The foreign interference package also included laws banning foreign political donations and increasing offences for foreign interference and espionage: *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth); *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

¹³⁶ Claire Bickers, 'Foreign Interference: Malcolm Turnbull Launches Fiery Attack on Sam Dastyari in Question Time', *News.com.au* (online, 5 December 2017) <<https://www.news.com.au/national/politics/foreign-interference-malcolm-turnbull-launches-fiery-attack-on-sam-dastyari-in-question-time/news-story/36f7732cddf516bd81ce607cc72170bc>>.

¹³⁷ FITSA (n 34) ss 22–3. See 'Foreign Influence Transparency Scheme Public Register', *Attorney-General's Department* (Web Page) <<https://transparency.ag.gov.au/>>.

Department,¹³⁸ which represents departmental regulation. This is a selective legislative approach that only targets a small category of lobbyists.

In terms of compliance processes, the *FITSA* gives the Attorney-General's Department a large range of enforcement measures. The Secretary of the Attorney-General's Department has broad powers to require a potential registrant to provide information if it reasonably suspects that person to be liable to registration.¹³⁹ Furthermore, the Secretary may require *any* person to give them information and documents if they reasonably believe the person (whether a registrant or not) has information 'relevant to the operation of the scheme'.¹⁴⁰ It is not an excuse to claim that the information may incriminate the person.¹⁴¹ Failure to comply with these notices may result in six months' imprisonment,¹⁴² while providing false or misleading information may lead to three years' imprisonment.¹⁴³ The Secretary may consequently issue a 'Transparency Notice' ('TN'), which allows the Department to declare that a person is a foreign principal.¹⁴⁴ If the Secretary remains satisfied of this fact after the person has made submissions, the Secretary *must* make the TN public on a website.¹⁴⁵

Penalties for failure to apply for or renew registration are imprisonment from 12 months to 5 years, depending on whether the omission was intentional or reckless, if the person knew they had to register, and whether the registrable activity was actually undertaken.¹⁴⁶ Similar penalties apply for informing the Secretary that the person ceases to be liable when this is not true.¹⁴⁷ Penalties for failure to fulfil one's responsibilities under the *FITSA*, such as by failing to keep or destroy records, range from 60 penalty units (\$13,320) to 2 years' imprisonment respectively.¹⁴⁸ These are very comprehensive compliance mechanisms that can be deployed to enforce the legislation.

D Overview

In the first phase of regulation, only the Commonwealth regulated lobbying. This first phase of regulation from 1983 to 2006 can be characterised as minimalist. The Hawke government period involved a voluntary and private register without

¹³⁸ See generally Chris Draffen and Yee-Fui Ng, 'Foreign Influence Registration Schemes in Australia and the United States: The Scope, Risks and Limitations of Transparency' (2020) 43(4) *University of New South Wales Law Journal* 1100.

¹³⁹ *FITSA* (n 34) ss 45–6.

¹⁴⁰ *Ibid* s 46.

¹⁴¹ *Ibid* s 47.

¹⁴² *Ibid* s 59.

¹⁴³ *Ibid* s 60.

¹⁴⁴ *Ibid* s 14A(1).

¹⁴⁵ *Ibid* s 43(2A).

¹⁴⁶ *Ibid* s 57.

¹⁴⁷ *Ibid* s 57A.

¹⁴⁸ *Ibid* ss 58, 61.

enforcement, while the Howard government period dispensed with all lobbyist registration requirements. Although Howard did introduce for the first time a Ministerial Code of Conduct that required Ministers to avoid conflicts of interest with their dealings with lobbyists, this essentially left the responsibility to Ministers to manage their relations with lobbyists.¹⁴⁹ The secretive nature of the Hawke and Howard schemes, combined with the lack of enforcement, meant that it was essentially up to the lobbyists and government officials to individually self-regulate their own behaviour. Following this, in the second phase, the executive model introduced in WA was adopted in a similar form by the Commonwealth and the other states, exhibiting direct regulatory transfer across jurisdictions.

Finally, in the legislative regulation phase, there was a fracturing and disaggregation of legislative schemes across jurisdictions, with each adopting their own regulatory framework. What we can see from the new legislative models is a general trend towards more stringent regulation of lobbying. This is consonant with the history of evolution of lobbying rules in Canada and the US, where each iteration of lobbying legislation imposed more rigorous rules over time.¹⁵⁰ There are three main models of legislative regulation: the ‘innovative models’ exhibited in Queensland and NSW, that include new structural or operational innovations; the ‘codification model’ exhibited in SA and WA, that merely replicates existing executive schemes, albeit with tougher penalties; and the ‘selective model’ at the federal level that only targets those who lobby on behalf of foreign principals. Victoria and Tasmania have lagged behind and have remained with schemes of executive regulation, although Victoria has introduced an additional register for in-house government affairs directors. These regulatory schemes are summarised in Table 2.

IV THE CONVERGENCES AND DIVERGENCES OF LOBBYING REGULATION ACROSS THE AUSTRALIAN FEDERATION: AN EXPLANATORY ACCOUNT

So, how are we to account for the regulatory changes that have occurred within the Australian federal system, and the departures in direction in legal regulation between the jurisdictions?

The first observation that can be made is that drastic changes to the lobbying schemes in Australian jurisdictions have tended to be in direct response to crises and scandals. The first ever lobbying regulation in Australia, in the form of the Commonwealth executive register, was introduced by the Hawke Government following a scandal involving a Soviet spy.¹⁵¹ Similarly, the trigger for the second phase of lobbying regulation via executive regulation was the findings of misconduct by the WACCC stemming from the shady activities of former Premier Burke, former Minister Grill

¹⁴⁹ Prime Minister John Howard (n 76).

¹⁵⁰ Chari, Hogan and Murphy, *Regulating Lobbying: A Global Comparison* (n 27) 102.

¹⁵¹ Warhurst, *Behind Closed Doors* (n 27) 22–3.

Table 2: Lobbying Regulation in Australian Jurisdictions

	NSW	Commonwealth	Victoria	SA	WA	Tasmania	Queensland
Lobbying regime	Law	Law (foreign influence)/ Administrative	Administrative	Law	Law	Administrative	Law
Code of conduct	✓	✓	✓	✓	✓	✓	✓
Lobbyists covered	Third party (register), Third party and other lobbyists (Code of Conduct)	Lobbyists for foreign principals (legislative)/ Third party (administrative)	Third party lobbyists and government affairs directors that have held specified positions	Third party	Third party	Third party	Third party
Revolving door bans	✓ 18 months for Ministers and Parliamentary Secretaries	✓ 18 months for Ministers and Parliamentary Secretaries, 12 months for senior public servants	✓ 18 months for Ministers and Cabinet Secretaries, 12 months for Parliamentary Secretaries, senior public service executives, and ministerial staff	✓ 2 years for Ministers, 12 months for Parliamentary Secretaries, ministerial staff and public servants	✓ 1 year for MPs, senior public service executive	✓ 12 months for Ministers, Parliamentary Secretaries and agency heads	✓ 2 years for senior government representatives i.e. Ministers, ministerial staff, councillors, opposition representatives, senior public service executives
Administrative responsibility	NSW Electoral Commission	Department of the Prime Minister and Cabinet	Public Sector Commissioner	Department of Premier and Cabinet	Public Sector Commissioner	Department of Premier and Cabinet	Integrity Commissioner

continues

Table 2: Lobbying Regulation in Australian Jurisdictions *continued*

	NSW	Commonwealth	Victoria	SA	WA	Tasmania	Queensland
Sanctions	Suspension or deregistration, named on public Watch List (additional meeting protocols apply)	Deregistration	Deregistration	Deregistration; an offence against <i>Lobbyists Act 2015</i> (SA) also constitutes corruption for the purposes of the <i>Independent Commissioner Against Corruption Act 2012</i> (SA)		Deregistration	Warning by Integrity Commissioner, suspension or deregistration
Meetings with lobbyists	Ministerial diaries published	X	X	X	X	X	Ministerial diaries published. Lobbyists required to report monthly to the Integrity Commissioner details of every lobbying contact, including, the date, client, title and/or name of government or opposition representative, the purpose of contact. Information published on Commissioner's website.

and former Senator Crichton-Browne, discussed above.¹⁵² Legislative regulation in NSW¹⁵³ was triggered following the resignation of the Premier and 10 MPs over the ICAC investigation ‘Operation Spicer’, which also led former Minister Obeid to be sentenced to five years’ imprisonment for misconduct in public office.¹⁵⁴

The trigger for legislative regulation in Queensland¹⁵⁵ followed from extensive public consultation on large-scale integrity reforms for the State,¹⁵⁶ which exhibited a desire to undertake far-reaching accountability reforms. The discussion paper from that consultation remarked that Queensland had come a long way 20 years after the explosive Fitzgerald Inquiry into corruption in the police service and public sector, which uncovered large-scale corruption that led to the resignations and imprisonments of various former Ministers and officials.¹⁵⁷ Thus, the indirect trigger for Queensland’s legislative regulation of lobbying was an explosive scandal that resonated through the State for several decades, leading to wide scale integrity reforms.

By contrast, the more lacklustre codification of the executive schemes in WA and SA did not reflect any scandals, and thus did not introduce any radical changes to the pre-existing scheme. Based on these trends, if further scandal and controversy erupts in a jurisdiction, we might expect to see further reform and tightening of lobbying regulation.

Unique issues can also be observed in the federal sphere. A predominant concern at the Commonwealth level seems to be the influence of foreign actors on Australian democracy. As mentioned above, the first regulation of lobbyists in the Hawke era involved two executive registers of lobbyists: a general register for domestic lobbyists and a separate register for lobbyists representing foreign governments or their agencies, based on a scandal involving a Soviet spy. The more recent

¹⁵² Corruption and Crime Commission (WA), *Report on the Alleged Misconduct Involving Dr Neale Fong* (n 79) 5; Corruption and Crime Commission (WA), *Report on Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (n 79) 101.

¹⁵³ *Electoral and Lobbying Legislation Amendment Act 2014* (NSW).

¹⁵⁴ See Yee-Fui Ng, ‘After Operation Spicer, what more needs to be done to Clean Up Political Donations in NSW?’, *The Conversation* (online, 30 August 2016) <<https://theconversation.com/after-operation-spicer-what-more-needs-to-be-done-to-clean-up-political-donations-in-nsw-64547>>; Carter and Calderwood (n 109).

¹⁵⁵ *Integrity Act 2009* (Qld).

¹⁵⁶ See Queensland Government, *Response to Integrity and Accountability in Queensland* (Report, November 2009); Queensland Department of the Premier and Cabinet, *Discussion Paper: Integrity and Accountability in Queensland* (Report, August 2009).

¹⁵⁷ Queensland Department of the Premier and Cabinet (n 156). See ‘Players in a Vast Drama’, *Courier Mail* (online, 14 May 2007) <<https://www.couriermail.com.au/news/players-in-a-vast-drama/news-story/9271190b1c687ec7a76571395f6421b0?sv=7d60de3363144b968d3a60ad3dfff7ca>>.

legislative public register for lobbyists representing foreign interests was in response to a scandal involving Senator Dastyari, who was forced to resign following revelations about his dealings with a Chinese lobbyist.¹⁵⁸ Having a register of foreign agents is ultimately founded in the concern that decisions regarding the direction of one's nation should be driven by those who will ultimately be affected by those decisions: citizens and residents. The language often employed is that of preserving a country's self-determination and national sovereignty.¹⁵⁹ Although the focus is on overseas interests affecting Australian officials, foreign agent registration schemes are driven by the same underlying concerns as domestic lobbying — the prevention of corruption and undue influence of public officials. As foreign affairs traditionally take place at the federal level, the issue of foreign influence seems to be a preoccupation of the Commonwealth government.

A further question is why certain regulatory choices were made in constructing the standards of regulation of lobbyists in Australia. The coverage of lobbyists required to register in all Australian jurisdictions is confined to third party lobbyists. This means that a large proportion of lobbyists are not covered by regulation, such as those that operate in-house as employees, peak groups, and community groups. Such restrictive coverage fails to provide proper transparency of government decision-making in terms of direct lobbying by 'repeat players'. For instance, Dr David Solomon — former Queensland Integrity Commissioner — estimated that the Queensland regime, which only extended to third party lobbyists, covered 'only a small proportion — perhaps 20 per cent — of the corporate lobbying that does occur'.¹⁶⁰ Such restrictive coverage also constitutes unfair treatment of third party lobbyists, as there is no justifiable basis for distinguishing their direct lobbying activities from those by other 'repeat players' (eg, in-house lobbyists). By contrast, comparable jurisdictions that have a long history of regulating lobbyists, such as Canada and the US, cover both third party and in-house lobbyists.¹⁶¹

The justification for confining the register to third party lobbyists, from the Hawke era to the present, has been that for third party lobbyists it is not clear which interests they represent, whereas for in-house lobbyists it is obvious who they represent, thus a register was not required for those that work in-house.¹⁶² This is a very narrow reading of the purpose of regulating lobbying, which as discussed above, has broader purposes of preventing corruption and enhancing political equality through transparency, enabled through public disclosure.

¹⁵⁸ Patrick (n 134).

¹⁵⁹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations* (Interim Report No 2, March 2017) ix.

¹⁶⁰ David Solomon, 'Ethics, Government and Lobbying' (Speech, Transparency International Seminar, 21 June 2013) 5.

¹⁶¹ *Lobbying Act* (Canada) (n 53) ss 5, 7 (Canada); *Lobbying Disclosure Act 1995*, 2 USC § 1602(10) (2007) ('*US Lobbying Disclosure Act*').

¹⁶² Cabinet Minute Amended Decision No 2570 (n 66) 7.

The cause of this narrow reasoning being actively deployed to justify regulation limited to third party lobbyists, from the initial regulation in the Hawke era in 1983¹⁶³ which has continually been reiterated throughout the years,¹⁶⁴ is due to the effective advocacy of lobbyists and public relations firms, as well as lawyers and community groups, who have managed to keep the ambit of regulation narrow in their own self-interest. In the last 30 years, lobbyists have been active and vociferous in campaigning about the level of regulation they should be subject to, and have made numerous submissions to government about the appropriate scope of regulation in their best interests, that is, minimal regulation.¹⁶⁵ This is hardly surprising as it is the nature of their profession to lobby effectively to achieve beneficial outcomes for the party they represent — in this case themselves.

Yet the question of who should be covered by lobbying regulation goes to the normative question of significance, that is, whether they undertake a significant level of activity that warrants closer public scrutiny. If the coverage of lobbyists is too narrow, regulation is ineffective to achieve the purposes of political equality and the prevention of corruption, as it does not encompass those who undertake significant lobbying activities. If too many individuals and groups are caught within the regulatory framework, including those that approach government for minor or personal matters that are not of interest to the wider public, it could create a burden on small bit players and obscure the major players.

To confine the categories of lobbyists to significant players, the coverage of lobbyists can be narrowed based on the intensity of lobbying activity, for instance, the amount or percentage of time spent lobbying, or the amount of money spent or income received from lobbying activities. For example, in the US, there are two main thresholds that need to be met before the requirement to register is triggered. The first is based on the level of lobbying activities, where a person is only required to register if they make more than one lobbying contact for the client over the course of its representation, and the lobbying activities consume at least 20% of that person's time for that client over a three-month period.¹⁶⁶ The other requirement is based on differential financial thresholds for third party and in-house lobbying firms, based on how much they earn

¹⁶³ Ibid 7–9.

¹⁶⁴ The Commonwealth Special Minister of State outlined the rationale for the federal lobbyist code of conduct: 'The objective of the code is not to make every company whose staff or executives visit a Minister sign a register. Rather it is to ensure Ministers and other Government representatives know whose interests are being represented by lobbyists before them and to enshrine a code of principles and conduct for the professional lobbying industry': see Commonwealth, *Parliamentary Debates*, Senate, 13 May 2008, 1510 (John Faulkner). See also Senate Finance and Public Administration References Committee (n 4) 7–10; Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), Peter M Hall QC, 6 August 2019) 111T (Annabelle Warren).

¹⁶⁵ See eg Cabinet Minute Amended Decision No 2570 (n 66) 8–9.

¹⁶⁶ *US Lobbying Disclosure Act* (n 161) § 1602(10).

or spend on lobbying activities.¹⁶⁷ In Canada, a similar element of significance is required, where only persons whose lobbying activities constitute a significant part of their duties are required to register, which has been interpreted to be greater than 20% of employee duties.¹⁶⁸

Another approach could be tiered regulation based on risk, such as adopting a risk assessment framework to assess whether each person should register, or alternatively, to determine higher risk industries (eg, property developers and the gambling and mining industries), which are then subject to more onerous regulation. Certain low risk groups could also be exempted from regulation, such as charities or not-for-profit organisations. This was the approach taken for electoral funding in NSW, where property developers, tobacco businesses, and the liquor and gambling industry are banned from making political donations.¹⁶⁹

Finally, compliance and enforcement processes remain key to a successful system of lobbying regulation. *The Guardian* has reported dismal enforcement efforts by Australian regulators, where not a single lobbyist has been punished for breaching rules in the past five years federally, or in Victoria, WA, Queensland, or SA.¹⁷⁰ In 2018, the Commonwealth Auditor-General found that the Department of the Prime Minister and Cabinet, which oversaw the federal Lobbyist Register at the time, had not suspended or removed the registration of a single lobbyist since 2013, despite identifying at least 11 possible breaches.¹⁷¹ The Auditor-General recommended that the Prime Minister's Department assess risks to compliance with the Code and provide advice on the ongoing sufficiency of the current compliance management framework.¹⁷² The Secretary of the Department of the Prime Minister and Cabinet responded that they considered their role to be merely administrative rather than regulatory: 'As you are aware, the Lobbying Code of Conduct, as established in 2008 and continued by successive Governments, is an administrative initiative, *not* a regulatory regime'.¹⁷³ This weak enforcement points to a need for an independent regulator administering a legislative scheme, rather than the responsibility residing

¹⁶⁷ Ibid § 1603(a)(3)(A)(i).

¹⁶⁸ *Lobbying Act* (Canada) (n 53) ss 7, 10(1). See 'A Significant Part of Duties ("The 20% Rule")', *Office of the Commissioner of Lobbying of Canada* (Web Page, July 2009) <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00115.html>>.

¹⁶⁹ *Electoral Funding Act 2018* (NSW) s 51.

¹⁷⁰ Christopher Knaus, 'Not a Single Lobbyist Punished for Rule Breaches in Five Years', *The Guardian* (online, 18 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/18/not-a-single-lobbyist-punished-for-rule-breaches-in-five-years>>.

¹⁷¹ Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (Report No 27, 14 February 2018) <<https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>>.

¹⁷² Ibid.

¹⁷³ Stephen Easton, 'PM&C Shrugs off Audit of Toothless Federal Lobbying Rules', *The Mandarin* (online, 15 February 2018) <<https://www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/>> (emphasis in original).

within a government department that does not have sufficient independence from the core executive.

The implementation of the more selective federal scheme, *FITSA*, has also faced criticism. By November 2019, the scheme had resulted in only one notice (requiring information to satisfy the Secretary whether a person is liable to register under the scheme under s 45) being sent out to a potential registrant, despite sending out more than 1,500 letters.¹⁷⁴ The Attorney-General was forced to defend the scheme after former Prime Minister Tony Abbott was asked to join the register, with respect to an address he was to make at the inaugural Australian Conservative Political Action Conference, an organisation founded by the American Conservative Union and linked to the US Republican Party, in August 2019.¹⁷⁵ Event organiser Andrew Cooper was the only person to have received a notice under s 45 from the Secretary. Both Abbott and Cooper strongly declined to cooperate with the request, causing the Attorney-General to clarify that he ‘expect[s] [the Department] to demonstrate a focus on the most serious instances of noncompliance’.¹⁷⁶ While *FITSA* does not ostensibly ‘target any particular country, nationality or diaspora community’,¹⁷⁷ the Australian government appears to have had particular actors in mind when formulating the *Act*, none of which are likely to have been Abbott. Although it is too early to make a definitive evaluation about the Attorney-General’s Department’s long-run enforcement of *FITSA*, the apparently muddled early enforcement of the legislation leaves much to be desired.

By contrast to other Australian jurisdictions, since the NSWEC became responsible for regulating lobbyists on 1 December 2014, it has undertaken a number of compliance actions, where five matters of potential breaches of the *NSW Code* were subject to a compliance review or investigation. All resulted in no further action. In addition, during 2017–18, a number of registered lobbyists received warnings (45), had their registration suspended (four) or cancelled (one), or were placed on the Watch List (four) for failing to confirm their registered details were up to date.¹⁷⁸ This may indicate that an independent statutory authority may take a more active

¹⁷⁴ Anthony Galloway, ‘Foreign Interference Scheme Targets Just One Potential Agent of Influence’, *The Sydney Morning Herald* (online, 28 November 2019) <<https://www.smh.com.au/politics/federal/foreign-interference-scheme-targets-just-one-potential-agent-of-influence-20191127-p53ep5.html>>.

¹⁷⁵ Max Koslowski, ‘Foreign Influence Laws Won’t Change After Tony Abbott Targeted, Porter says’, *The Sydney Morning Herald* (online, 5 November 2019) <<https://www.smh.com.au/politics/federal/foreign-influence-laws-won-t-change-after-tony-abbott-targeted-porter-says-20191105-p537m5.html>>.

¹⁷⁶ Janet Albrechtsen and Joe Kelly, ‘Tony Abbott Declares: I’m not an Agent of Foreign Influence’, *The Australian* (online, 1 November 2019) <<https://www.theaustralian.com.au/nation/politics/tony-abbott-declares-im-not-an-agent-of-foreign-influence/news-story/da7994187fc74acd6797c3d5918b77a0>>.

¹⁷⁷ Revised Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth) 9.

¹⁷⁸ Ng and Tham (n 15) 42.

role in ensuring compliance with the regulatory regime compared with departmental supervision. Although the Queensland regime is overseen by an independent statutory officer, the Integrity Commissioner, as discussed in Part III, lobbyists have been able to evade the regime by restructuring their businesses. Furthermore, the Queensland regime is poorly funded, leading to no enforcement actions being taken.¹⁷⁹ Thus, other key aspects of effective enforcement include sufficient funding of the regulatory body and setting up standards of regulation without loopholes.

In short, enforcement of the lobbying schemes has been patchy across jurisdictions, with largely minimal enforcement, with the exception of NSW. A reason for the lacklustre enforcement could be that departmental supervision is less effective as departmental officials may regard themselves as mere administrators, rather than regulators that actively enforce statutory regimes. By contrast, independent statutory authorities are separate from the core executive, and may take a more active role in monitoring and enforcing compliance with the legislation, as can be seen in NSW. In addition, the level of funding provided to regulators may also affect compliance outcomes, which is a salutary lesson from the Queensland experience.

V CONCLUSION

Australia is one of the world's pioneers in regulating the activity of lobbyists. This article has developed a typology of lobbying regulation based on the form of regulation, the standards it imposes, and compliance processes. In terms of the form of regulation in Australia, it can be seen that there has been a gradual move from executive regulation towards legislative regulation. The standards of lobbying have also increased over time, as Codes of Conduct that promote ethical behaviour are accompanied by legislative requirements that mandate registration and impose obligations on lobbyists, such as bans on success fees. Finally, the compliance processes vary across jurisdictions, with some jurisdictions moving to an independent statutory authority, whereas others remain with departmental regulation.

Three phases of Australian regulation of lobbying can be discerned since dedicated regulation was adopted in the early 1980s: the initial phase of minimalist executive regulation (1983–2006), stronger executive regulation of third party lobbyists (2007–09), followed by the rise of legislative regulation of third party lobbyists (2009–16). It has been shown that lobbying regulation in Australia has gradually evolved and intensified over time as a response to various crises and controversies. Within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation remains narrowly focussed on third party lobbyists, who amount to only 20% of the total lobbyist population, meaning that there is no transparency about the activities of major repeat players in the system. This is due to the effective advocacy of lobbyists over the years, who have successfully argued for a narrow purpose of regulating lobbying that is limited

¹⁷⁹ Queensland Integrity Commissioner, *Annual Report 2015–16* (n 107) 6.

to identification of the interests being represented by lobbyists. However, this article has argued that there are broader purposes of regulating lobbying, that is, to prevent corruption and to promote political equality, which justifies a broader regulatory scope beyond third party lobbyists.

As part of the impetus to improve the declining public faith in democracy and political institutions in Australia,¹⁸⁰ governments should seek to regulate the strong influence of vested interests and influence peddlers that can drown out other less resourced and connected voices within our democracy. Reform of lobbying regulation in Australia to enhance the scope of its coverage and the level of disclosure of lobbying activity will shine the light of transparency in an area currently hidden in the shadows, reduce the risk of corruption by lobbyists and public officials, and ultimately promote the democratic norms of political equality and fairness.

¹⁸⁰ The most recent Australian election study found that only 59% of Australians are satisfied with democracy, and trust has reached its lowest level on record, with only 25% believing people in government can be trusted: Sarah Cameron and Ian McAllister, *The 2019 Federal Election: Results from the Australian Election Study* (Report, December 2019) 15–16.

REFLECTIONS ON PADDY IRELAND ON COMPANIES

ABSTRACT

The purpose of the paper is to engage in a searching analysis of Paddy Ireland's scholarship in the field of company law. Ireland works within a broad theoretical and methodological framework. His scholarship owes a debt to Marx. This article will judge how successfully he has woven Karl Marx into the fabric of his analytical framework. Key articles will be extracted from Ireland's body of work, and examined critically to determine the degree of success he has achieved in incorporating Marx into his critique of the modern company. Ireland will however take a back seat in parts of the narrative. In effect, some of his central ideas will be picked up and extended. The aim of this article is to pay respect to Ireland but note he operates in a sphere of contested ideas, and his treatment of some important issues needs sifting through a different lens. The arc of the modern company will be explored through a different conceptual structure to the one employed by Ireland. This process should be seen as supplementing rather than detracting from Ireland's indelible contribution to our knowledge of the modern company.

I INTRODUCTION

For a brief spell in the late decades of the 20th century, many academics in numerous fields regarded Karl Marx as an important intellectual ancestor. These academics followed in Marx's tracks by utilising a theoretical framework that looked at the underlying structures and contradictions of society to discover the essence of social relations. The collapse of the Soviet Union and triumph of post-modernism and neoliberalism spelt the end of the burst of influence of Marxism in the academy.¹

The legal academy experienced a dip in the role and influence of Marxist theory. Only at the University of Kent did Marxism retain a core of supporters. Even at Kent Law School, it was one person who, more than any other thinker, drew on insights from the Marxist tradition. He was the flag-bearer for importing aspects of Marxist thinking into legal studies. When Marxism lost its fashionable edge, this legal scholar ploughed on through the decades producing high quality articles that picked

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¹ Perry Anderson, *A Zone of Engagement* (Verso, 1992) 282; Perry Anderson, *The Origins of Postmodernity* (Verso, 1999) 29, 31.

up on aspects of Marx's theory to provide innovative ways of seeing company law from a historical materialist perspective. The influence of Marxist theory is threaded through Paddy Ireland's body of work.

This article will consider Ireland's impact on Marxist legal scholarship in the field of company law. The article is in three parts. The first part will engage in a critical analysis of Ireland's view of the forces underpinning the rise of the limited liability company. The second part will examine Ireland's theory of the company as applied to the separate legal entity doctrine. The third part will analyse Ireland's interpretation of those who predominate at the summit of the company. At each stage, Ireland's enriching of company law scholarship will be acknowledged, but the task will be to gauge whether his work adheres to the Marxist tradition on the nature of the company form. Ireland, however, will not always be central to the narrative. At times, this article will depart from analysis of Ireland. Ireland operates in a sphere of contested ideas and his animating principles will in places be countered by a different paradigm. The overarching aim is to throw into sharp relief the link between the economic structure and the incorporated company.

Marx was the catalyst for enabling Ireland to understand that company law is a product of capitalism. Ireland took from Marx the proposition that the form of organisation for production underpins the legal structure that emerged to facilitate the operation of the capitalist system. Any cogent evaluation of Ireland is posited on quantifying his success in aligning his output with Marx's history of the company. To what degree Ireland's framework of analysis accurately mirrors Marx's structuralist theory is of cardinal importance. Ireland's scholarship must be judged according to his fidelity to Marx's concept of the company. It was Marx who pioneered the excavation of the inner logic of capitalist relations and opened the window that enabled Ireland to develop his theoretical insights. Of course, it is not the case that Ireland is expected to be simply his master's voice. Any deepening and developing of Marx's concept of the company is an important exercise. The work of Perry Anderson and Geoffrey de Ste Croix on the ancient world is a good example of two Marxist scholars making an addition to the study of antiquity.² Drawing on the hallmarks of the theoretical tradition founded by Marx can, as Anderson and de Ste Croix show, facilitate new pathways of understanding the relations of production and power. Exploring whether Ireland drew successfully on Marx's company theory and expanded the frontiers of knowledge in his field of study is of prime importance. It will be argued he has had mixed success in this venture.

Marx wrote no extensive tract on the origins of the modern company. What he had to say on the topic was compressed and limited in detail. Yet, what he stated was rich with perceptive insights. In *Capital: Volume III*, Marx noted that, in the early stage of capitalism, the growth in the scale of production eventually clipped the wings of

² Perry Anderson, *Passages from Antiquity to Feudalism* (NLB, 1977); Perry Anderson, *Lineages of the Absolutist State* (NLB, 1977); Geoffrey de Ste Croix, *The Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests* (Duckworth, 1983).

individual entrepreneurship.³ Individual capitalists became increasingly unable to fund projects requiring heavy capital investment. The company form was developed to marshal large capital investment funds. Competitive individualism had driven the growth in production. Competitive rivalry shifted to the company form. Henceforth, the acid of competition was unleashed within the shell of the corporate form and triggered an increase in the concentration of production.⁴ Quite simply, the size of the plant and capital invested per worker increased and intense competition led to small businesses morphing into large companies. Marx presciently grasped that the future belonged to giant firms.⁵ Following Marx's death and in his editorial notes in *Capital: Volume III*, Friedrich Engels noted that in England the chemical industry exhibited empirical evidence of Marx's thesis that free competition would in time be replaced by monopoly firms.⁶ The unfolding of the market economy was creating the conditions for the concentration of production and centralisation of capital that would result in weaker competitors being put out of business, and a monopoly such as the one in the chemical industry emerging.⁷ Engels grasped that small business was being squeezed, and Marx had bequeathed a compelling explanatory framework of how the relentless accumulation of capital would reconfigure business associations. Those who followed in Marx's tracks produced expansive treatises that highlighted how social reality had vindicated Marx's prophetic view of the company form. In the early 20th century, Nikolai Bukharin, Rudolf Hilferding and Vladimir Lenin produced theoretical works that captured an age dominated by industrialists carving out monopoly power. Their works further discussed industry and banks coalescing to produce a financial oligarchy spearheading the drive to turn national companies into multinational enterprises.⁸ Marx noted that capitalism's competitive drive had led it to 'nestle everywhere, settle everywhere, establish connections everywhere'.⁹ Bukharin, Hilferding and Lenin noted the outcome of this process was a globalised economy spearheaded by giant companies. The boardroom ruled the world.

All these thinkers stood on the shoulders of Marx and developed the frontiers of knowledge regarding the theory of the history of the company. In Ireland's case, the question is: how closely has his theory of the company followed the work of Marx and his illustrious successors? What, in sum, has been his contribution to understanding the laws of the company underpinning the operation of a capitalist

³ Karl Marx, *Capital: Volume III* (Penguin, 1981) 568.

⁴ Ibid 567. See also Karl Marx, *Capital: Volume I* (Electric Book, 2000) 897.

⁵ Marx, *Capital: Volume III* (n 3).

⁶ Marx, *Capital: Volume III* (n 3) 569. See also Friedrich Engels, *Anti-Dühring: Herr Eugen Dühring's Revolution in Science* (Progress Publishers, 1969) 317.

⁷ Marx, *Capital: Volume III* (n 3) 568–9; Samuel Hollander, *Friedrich Engels and Marxian Political Economy* (Cambridge University Press, 2011) 163–4.

⁸ Nikolai Bukharin, *Imperialism and World Economy* (Merlin Press, 1972) 71; Rudolf Hilferding, *Finance Capital: A Study of the Latest Phase of Capitalist Development* (Routledge & Kegan Paul, 1985) 191; Vladimir Lenin, *Imperialism: The Highest Stage of Capitalism* (Lawrence & Wishart, 1948) 51 ('*Imperialism*').

⁹ Karl Marx and Friedrich Engels, *The Communist Manifesto* (Oxford University Press, 1992) 6.

economy? Has he successfully utilised the classical tradition of Marxism to depict legal structures or add novel twists that enrich its conceptual categories? Or, has he operated with a theoretical framework that bears some resemblance to Marxism but, in the final analysis, is a departure from the history of the company pioneered by Marx and built upon by his successors? All these questions will be interrogated in the following sections.

II THE MAVERICK BEGINS HIS WORK

To chart the trajectory of Ireland's theoretical framework it is germane to begin with his earliest works. In the early 1980s, at the outset of his career, Ireland produced two articles on the same theme.¹⁰ In these two articles, Ireland grappled with the issue of the process that led to the company becoming the dominant organisational unit of British industry. He notes that initially 19th century legislators intended the incorporated company and limited liability to be restricted to public joint stock companies, but its ambit was stretched to include not only private joint stock companies but also sole traders and small partnerships.¹¹ Following the *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47 ('*Companies Act 1856*') business associations of seven or more persons were permitted to incorporate and adopt the company legal form if they so desired.¹²

According to Ireland, the liberal provisions of the *Companies Act 1856* were taken advantage of by partnerships and individual business owners.¹³ The ostensibly restrictive aims of the *Companies Act 1856* were outflanked by small fry keen to benefit from incorporation. The will of legislators was outwitted by entrepreneurs employing the dubious practice of using dummy shareholders to reach the seven persons required to tick the box for incorporated status.¹⁴ Just how the British went from having one of the most conservative legal regimes for organising business in Europe to the most liberal through the mechanism of a legislative burst of activity is one of the great stories of corporate history. The upshot of the enacted legislation was the establishment of a permissive regulatory regime that allowed small private-based businesses to adopt the company legal form. This practice was judicially validated by the House of Lords in the well-known case *Salomon v Salomon & Co Ltd* ('*Salomon*') in 1897.¹⁵

¹⁰ Paddy Ireland, 'The Triumph of the Company Legal Form, 1856–1914' in John Adams (ed), *Essays for Clive Schmitthoff* (Professional Books, 1983) 29 ('The Triumph of the Company Legal Form'); PW Ireland, 'The Rise of the Limited Liability Company' (1984) 12 *International Journal of the Sociology of Law* 239.

¹¹ Ireland, 'The Rise of the Limited Liability Company' (n 10) 242.

¹² Ireland, 'The Triumph of the Company Legal Form' (n 10) 33.

¹³ *Ibid* 31.

¹⁴ *Ibid* 49.

¹⁵ [1897] AC 22.

The first major piece of companies legislation was passed in 1844: the *Joint Stock Companies Act 1844*, 7 & 8 Vict, c 110 ('*Companies Act 1844*'). It was the pioneering general incorporation statute. The *Companies Act 1844* created the circumstances for allowing any business association of 25 or more persons to incorporate.¹⁶ The principle of limited liability for shareholders in registered companies was adopted in 1855 in the *Limited Liability Act 1855*, 18 & 19 Vict, c 133 ('*Limited Liability Act*'). The *Companies Act 1856* permitted associations of seven or more persons to incorporate. That was a radical step forward and its origins still intrigue. In the two articles that set out to illuminate the issues involved in the triumph of the company legal form, it is puzzling, given his Marxist theoretical framework, that Ireland fails to explore at length the changes to the structure of property relations that led to the *Companies Act 1844*. Equally frustrating is Ireland's bypassing of important factors that culminated, in 1856, in limited liability being granted to small private-based businesses. After all, the company form was mooted as a vehicle of the future, designed to facilitate the development of large firms.¹⁷ Ireland, in his early work, only manages to provide a partial insight into the origins of the limited liability company. In fairness to Ireland, the frenetic burst of statutory changes in the mid-19th century presented an imposing challenge to anyone seeking to analyse the genesis of the limited liability company. But the exacting nature of the theoretical challenges cannot exculpate Ireland from not shining a penetrating light on changing property relations underpinning legislative changes to the company form. It raises a flag in relation to the theoretical approach he adduces to guide his scholarship.

Ireland refers to the legislative desire in 1844 to bestow incorporated status on joint stock companies because their size and free transferability of shares left them open to speculators who engaged in fraud.¹⁸ This standpoint was aired in the prelude to the introduction of the *Companies Act 1844*. William Gladstone chaired a company law reform committee ('Gladstone Committee') which reported that legislation should introduce a method of incorporation that would curb fraudulent activities.¹⁹ Clearly, Ireland is not mistaken in calling attention to the parliamentary aim of minimising malpractices being a feature of the first general incorporation statute. But the foundations of the legislation went beyond protecting innocent investors from vulture capitalists. Ireland needed to probe deeper in order to bring to the surface the range of forces shaping legislative action. Instead there is a studied silence from him on the objective socio-economic relations shaping legal changes. Ireland sidesteps any thorough examination of the mid-19th century British production process, the corresponding class structure and the groups that spearheaded the incorporation drive. Furthermore, he provides a thin analysis of how the legal form was twisted by the *Companies Act 1856* to invest partnerships and sole traders with the capacity

¹⁶ Ireland, 'The Triumph of the Company Legal Form' (n 10) 33; Ireland, 'The Rise of the Limited Liability Company' (n 10) 242.

¹⁷ Marx, *Capital: Volume III* (n 3) 567.

¹⁸ Ireland, 'The Rise of the Limited Liability Company' (n 10) 241–2; Ireland, 'The Triumph of the Company Legal Form' (n 10) 32.

¹⁹ Tom Hadden, *Company Law and Capitalism* (Weidenfeld and Nicolson, 1972) 14.

to switch to an incorporated status allied with limited liability.²⁰ Ireland focuses attention on how, in the aftermath of the *Companies Act 1856*, the grant of limited liability only needed seven registered persons, and the unseemly legacy of this step. That is a plausible point, but his account of the *Companies Act 1856* is not linked to its 1844 predecessor, and this factor is largely responsible for the narrow basis of his analysis. There is no sense in Ireland of the dialectical unity between the *Companies Act 1844* and *Companies Act 1856*. In brief, he could have depicted how an array of forces operated between 1844 and 1856 to pressure the State to add limited liability to the 1844 achievement of general incorporation.

A more complex argument could have been used to pinpoint the major groups that drove both the 1844 legal changes and the additional changes that followed in 1855, and then the further genuflection to liberal individualism in 1856. The existence of a correspondence between the economic infrastructure and the factors forcing changes in the legal sphere is too often absent in Ireland's account. Ireland's earliest works are tarnished by economic thought being pitched at a muted level. The focal point is too often aimed at the level of a political narrative of embryonic incorporation disconnected from economic analysis. There is only the spectral shadow of Marx's influence on developing the conceptual foundations of the company. Ireland failed to call on Marx's economic theory with its corpus of concepts on the genesis of the joint stock company, and how this could have been utilised to throw light on how new forms of economic domination galvanised the shaping of state policy regarding legislation which liberalised the company form.

There is plenty of scope for exhuming the myriad factors at play in the victory of incorporation in 1844, and the reasons why, within several years, it was followed by the vesting of limited liability. But the guiding principle in any discussion is the combination of political and economic forces that promoted the advance of the company legal form and the causal chain responsible for its ascent to the apex of British business. At the same time, an excavation of the legislative moves can paint a broader picture than Ireland achieves for why partnerships and sole traders were able to jump on the bandwagon of the limited liability company.

If the purpose of theory is to delve below the surface structure and illuminate inner relations rather than outward appearances, then 19th century England offers rich evidence of deep structures at work shaping legal change. The expansion of capitalist production and the accumulation process were starting to outstrip the age of individual entrepreneurship.²¹ Even as early as *Capital: Volume I*, Marx noted how the usurping of the individual capitalist by collective capitalists — pooling their capital together under the umbrella of the economic joint stock company form — was a crucial stage in the evolution of property relationships.²² The appearance of collective capital

²⁰ Ireland, 'The Triumph of the Company Legal Form' (n 10) 34.

²¹ AL Morton, *A People's History of England* (International Publishers, 1979) 398.

²² Michel De Vroey, 'Part I: The Corporation and the Labor Process: The Separation of Ownership and Control in Large Corporations' (1975) 7(2) *Radical Political Economics* 1, 2.

housed within the joint stock company was, as Marx recognised, the upshot of competitive individualism. It brought in its wake a thinning of the ranks of sole owners of property, as rising fixed costs and an increase in the scale of production opened up a new epoch in economic history.²³ England led the way in the 19th century, and its mechanised mills and factories gave it a competitive edge in output per unit of capital that lasted up to the end of the century.²⁴ However, England's hegemony was challenged at the very dawn of industrialisation. Eric Hobsbawm notes that England was the industrial country *par excellence*, but Belgium, France, Germany and the United States ('US') were recording impressive industrial growth figures.²⁵ Economic power segues into political supremacy. The passing of the *Representation of the People Act 1832*, 2 & 3 Wm 4, c 45 began the process of placing political power in the hands of industrial capitalists.²⁶ The State as the protector and guardian of the interests of the ruling elite played its role in assisting the expansion of the economic structure by devising a legal form to match the expanding English mode of production. Over time, the bourgeois state responding to a changing economic landscape began to invest certain businesses with the privilege of incorporation. A *Circular to British Bankers* on 14 February 1840 noted that incorporated status had been sanctioned by specific Acts of Parliament to cover canal building and railways, projects that required large pools of joint stock capital.²⁷ However, other branches of trade requiring increasing capital sums were not being granted the same legal basis.²⁸ The growing concentration and centralisation of capital was spurring the need to relax the law and permit general incorporation. It was the huge funds required to finance the railways that focused the minds of the political class on the necessity of creating new laws to regularise the activities of joint stock companies.²⁹

Looked at through the long lens of history, a medley of forces combined to pressure Robert Peel's Conservative government to accede in 1844 to recognise the joint stock company as a valid instrument for organising capital. The inception of the modern corporation heralded the changing nature of production under capitalism.³⁰ The competitive struggle engendered by the necessity for each unit of capital to maximise profit fostered mechanisation and organisational innovation.³¹ This was amplified by a growing sophisticated division of labour, and a strict hierarchical organisation

²³ Marx, *Capital: Volume I* (n 4) 901.

²⁴ Michel Beaud, *A History of Capitalism 1500–1980* (Macmillan Press, 1984) 84–5.

²⁵ EJ Hobsbawm, *The Age of Capital 1848–1875* (Charles Scribner's Sons, 1975) 39–40.

²⁶ Morton (n 21) 392.

²⁷ Andrew Gamble and Gavin Kelly, 'The Politics of the Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2000) 21, 30–1.

²⁸ *Ibid.* 31.

²⁹ *Ibid.*

³⁰ Marx, *Capital: Volume I* (n 4) 900.

³¹ John Eaton, *Political Economy* (International Publishers, 1977) 91–2.

of the production process.³² The company form of organisation unleashed the full powers of technology, and allowed economies of scale to thrive.³³ Railways drew attention to the daunting sums required in the mid-19th century for large scale capital investments. Rande W Kostal writes that “[N]o individual, not even a Rothschild,” the *Railway Examiner* observed, “could undertake a great railroad”.³⁴ Marx stated:

The world would still be without railways if it had had to wait until accumulation had got a few individual capitals far enough to be adequate for the construction of a railway. Centralisation, on the contrary, accomplished this in the twinkling of an eye, by means of joint-stock companies.³⁵

David Harvey avers that centralisation of capital ‘plays a vital role in regulating the changing organization of production under capitalism’.³⁶ It hastens accumulation, and this boils down to an advance in technology, and a boost to the size of business entities.³⁷ In simple terms, the rate of reinvestment of capital dictates the tempo of economic growth. Joint stock companies embodied the compulsion to pool finance to achieve the higher rates of investment that were necessary for capitalist development. This economic transformation exerted a deep influence on the enactment of the *Companies Act 1844*, which established a regulatory regime that allowed business entities to adopt the company legal form. In the years 1834 to 1836 a staggering £70 million was raised to fund railway construction.³⁸ As railways began to blanket Britain, they acted as an economic accelerator. The mid-19th century ‘was the age of the railway which trebled the production of coal and iron in twenty years and virtually created a steel industry’.³⁹ The pressure for the emergence of joint stock companies and general incorporation began to grow in the wool industry as the demand for fresh capital to build new mills rocketed.⁴⁰ Ironically, as the modern factory began to dominate the landscape, small industry inserted itself into the interstices of the economy and sections of it benefited from the economic uplift.⁴¹ Large firms constantly threatened to obliterate or merge with smaller entities, but small capital clung on and it had political supporters. The political resilience of small industry was to be exhibited in its capacity to achieve entry into the ranks of those cloaked with the company legal form.

³² David Harvey, *The Limits to Capital* (Basil Blackwell, 1982) 139; Marx, *Capital: Volume I* (n 3) 549.

³³ Harvey (n 32) 276.

³⁴ RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press, 1994) 14.

³⁵ Marx, *Capital: Volume I* (n 4) 901.

³⁶ Harvey (n 32) 139.

³⁷ *Ibid.*

³⁸ Morton (n 21) 398.

³⁹ Eric Hobsbawm, *Industry and Empire* (Penguin, 1975) 71.

⁴⁰ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge University Press, 2000) 175.

⁴¹ Chris Harman, *A People’s History of the World* (Bookmarks, 1999) 319.

Casino capitalism was part of the backdrop to the triumph of general incorporation. A joint stock mania in 1835 and 1836, promoted by lawyers setting up sham companies, produced severe losses for persons ‘of small property’.⁴² This depredation of members of the share buying public was something tangible for politicians to grasp, and it gave an added impetus for general incorporation. The assumption was general incorporation would dampen the market chicanery experienced during the periodic boom and bust business cycle.⁴³ Fraudulent speculators of the sort driving the growth of sham companies in the 1830s were at best bit actors in the move to the inception of the company legal form. The origins of the rise of general incorporation went much deeper than a populist response to opportunist lawyers seeking fast returns. In sum, Ireland gives too much emphasis to fraud being the catalyst for the *Companies Act 1844* bestowing incorporated status on joint stock companies. In taking this tack, Ireland sidesteps examination of the mid-19th century British production process, the role of the centralisation of capital and the changing ratio of wealth and power within the ranks of capital as the key indicia spearheading the incorporation drive. The role of the State was also crucial. It provided the rules and regulatory mechanisms embodied in general incorporation to reflect the changing structure of production relations that was the hallmark of mid-19th century Britain. The major legacy of Marx was an economic theory that illuminated the operation of a capitalist mode of production. Ireland sidestepped tapping into this economic analysis and the result was a restricted vision of the origins of the *Companies Act 1844*. The lack of scrutiny of the economic structure of capitalism was the Achilles heel of Ireland’s earliest works on the company form. It is mystifying that Ireland provides scant attention to economic forces and their role in legal change. It is a gap that implies a departure from Marxist modes of thinking on the company form.

Strangely, Ireland has little to say about the origins of the *Companies Act 1856*, which brought into being a radical individualist model of limited liability. In both of his early works, Ireland comments on how the parliamentary architects of limited liability rejected the view that those engaged in partnerships and sole traders would be able to switch smoothly to the company legal form with limited liability.⁴⁴ Contrary to the public proclamations of a segment of politicians, opponents of limited liability pointed out that partnerships and sole traders would be able to abuse the intent of the 1856 legislators and legally create limited companies. The sceptics proved right. The *Companies Act 1856* enabled associations of seven persons to incorporate.⁴⁵ The sceptics understood that there was no reason stopping an individual from giving a single share to six others and thus achieving the required seven to form a limited liability company.⁴⁶ The legislative intent of the *Companies Act 1856* was

⁴² Kostal (n 34) 21.

⁴³ Harris (n 40) 287.

⁴⁴ Ireland, ‘The Rise of the Limited Liability Company’ (n 10) 242; Ireland, ‘The Triumph of the Company Legal Form’ (n 10) 34.

⁴⁵ Ireland, ‘The Rise of the Limited Liability Company’ (n 10) 242; Ireland, ‘The Triumph of the Company Legal Form’ (n 10) 35–8.

⁴⁶ Ireland, ‘The Rise of the Limited Liability Company’ (n 10) 243; Ireland, ‘The Triumph of the Company Legal Form’ (n 10) 35.

circumvented as the limited company form came to be used by all business forms including joint stock companies and sole traders and partnerships.⁴⁷ What Ireland has to say about the *Companies Act 1856* is of limited value. His political Marxism concentrates on surface phenomena and is silent on the seismic socio-economic forces that underpinned the triumph of the charge for limited liability.

The struggle for the unqualified victory of limited liability was capped with success in 1856. The liberalisation of the *Companies Act 1844* in 1855, pushed further in 1856, was played out against a backdrop of conflicting ideas. The Gladstone Committee in 1844 was set up in the wake of an outbreak of frauds and malpractices being perpetrated on investors and it argued limited liability was superfluous as there was no shortage of investment capital outlets.⁴⁸ The great liberal John Stuart Mill believed that many undertakings required capital sums beyond the pockets of all but the wealthiest individuals, and the principle of limited liability would facilitate the conduct of business.⁴⁹ In his account of the 1844 triumph of free incorporation, Ireland failed to pick up on modifications to the relations of production as the catalyst of legislative change. With the 1856 campaign for untrammelled limited liability, Ireland's lack of economic analysis again weakens his exploration of the mainsprings of legislative action. A fierce intra-class battle on the topic of limited liability occupied the ruling elite of England between 1844 and 1856.⁵⁰ Tensions came to the fore in the battle between large and small capital. A state of hostility exists between these fractions of capital. Marx enunciated the omnipresence of rivalry within the realm of capital. The law of the markets exacerbates friction, for it dictates each unit of capital constantly must seek to expand the productive forces or fall by the wayside, and this phenomenon results in a situation that 'gives capital no rest and continually whispers in its ear: "Go On! Go On!"'⁵¹ This dynamic produces an internecine struggle for survival, within the ranks of capital. Modern history has been on the side of large capital in this battle, but small capital clings on in the face of a burgeoning concentration of capital. To avoid intra-capital conflict destabilising the social system state intervention is required.

The stabilising role of the State was graphically on display during the prelude to the 1856 inception of limited liability. The State had to mediate between large concerns that wanted to stifle small business obtaining incorporated status and limited liability.⁵² The desire to stifle competition resulted in bigger businesses seeking to

⁴⁷ Ireland, 'The Rise of the Limited Liability Company' (n 10) 243; Ireland, 'The Triumph of the Company Legal Form' (n 10) 37.

⁴⁸ Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 45.

⁴⁹ Gamble and Kelly (n 27) 33.

⁵⁰ PL Cottrell, *Industrial Finance 1830–1914* (Methuen, 1980) 50. See also John Saville 'Sleeping Partnership and Limited Liability, 1850–1856' (1956) 8 (3) *The Economic History Review* 432, 433.

⁵¹ Robert Tucker, *The Marx-Engels Reader* (WW Norton, 1972) 186.

⁵² McQueen (n 48) 123.

confine general incorporation to the existing figure of 25 members.⁵³ By sticking to the figure of 25, many small concerns would be excluded from progressing to limited liability. A blowback against the campaign to fetter small business developed. A small business lobby group comprising intellectuals and politicians talked up the benefit of a permissive company legal form as a method of rejuvenating entrepreneurialism.⁵⁴ Lord Palmerston and Robert Lowe (a key figure at the Board of Trade responsible for company law oversight) advocated ‘setting free small capitals’ by vesting them with limited liability status.⁵⁵ Small scale and local manufacturing capital was still a significant force in mid-19th century Britain.⁵⁶ It was under intense pressure from large concerns benefitting from ever lower unit costs of production, but it was a sector that was to show it was not bereft of political clout.⁵⁷ The multiplicity of small firms was the factor that prepared the ground for partnerships and sole traders to batten on to the company legal form and limited liability in the 1850s. They were the backbone forging the introduction of the *Companies Act 1856* that set seven members as the benchmark for obtaining general incorporation and limited liability.⁵⁸

Small firms remained one of the pillars of British industry well into the 19th century and beyond.⁵⁹ Their political power was not negligible. The mid-19th century was a transition stage when the ‘basis of wealth changed from merchant and agricultural capitalism to industrial capitalism’.⁶⁰ The class structure was a shifting mosaic that made it difficult to gauge. Classes were rising and falling but small business had far more political heft than was to be the case as the 20th century wore on. In sum, classes tended to merge into one another in the mid-19th century. Even in large factories, mills and coal pits, there were clusters of small-scale self-employed workers.⁶¹ They were involved in sub-contracting work.⁶² Britain was at a turning point in the mid-19th century with blurred class lines. When Ireland turns to note the role of small business, he restricts himself to noting it adopted the company legal form to allay insecurities about suffering losses and bankruptcy.⁶³ This is a narrow interpretation. Contrary to Ireland, small capital was brimming with agency. Its owners had political friends in high places protecting their interests, and the

⁵³ Ibid 81.

⁵⁴ Ibid.

⁵⁵ Ibid 82.

⁵⁶ PJ Cain and AG Hopkins, *British Imperialism: Innovation and Expansion 1688–1914* (Longman Group, 1993) 40 (*‘British Imperialism: Innovation and Expansion’*).

⁵⁷ Ibid.

⁵⁸ Gamble and Kelly (n 27) 33; McQueen (n 48) 83–4.

⁵⁹ Maurice Dobb, *Studies in the Development of Capitalism* (Routledge & Kegan Paul, 1963) 264–5.

⁶⁰ Tony Lane, *The Unions Make Us Strong: The British Working Class, Its Trade Unionism and Politics* (Arrow Books, 1974) 38.

⁶¹ Ibid 40.

⁶² Ibid.

⁶³ Ireland, ‘The Rise of the Limited Liability Company’ (n 10) 247; Ireland, ‘The Triumph of the Company Legal Form’ (n 10) 44.

Companies Act 1856 is testimony to their political and legal strength. The political elite was wedged. It made soothing noises that limited liability would be outside the ambit of partnerships and sole traders but in practice, as Lord Palmerston and Lowe exemplified, legislators refused to turn a deaf ear to small business lobbying to achieve the company form and limited liability.⁶⁴ By steering between the claims of large and small capital, the political elite strove to mitigate tensions within the various fractions of capital.

Intensifying economic rivalry with the US and continental powers such as France was enlisted as another factor by those calling for the barrier to the company form and limited liability to be lowered.⁶⁵ British industry right up to World War I was held in a state of suspended animation by the stultifying role of small firms in the national economy. The rise of Germany and the US and their expansionary colonial policy coincided with their social formations moving towards an updated capitalism symbolised by the adoption of merging banking and industrial capital to usher in the age of large-scale conglomerates.⁶⁶ The age of economic imperialism was dawning. The struggle for world markets was intensifying, and the response of spokespersons for small capital within Britain was to seek the adoption of limited liability for all types of business.⁶⁷ It was asserted that liberalising the granting of limited liability would give a fillip to modernisation, and make Britain more internationally competitive.⁶⁸ It was a bizarre argument, but it helped tilt the scales towards small business gaining limited liability in 1856. The influence of the small firm in Britain and its hijacking of the company legal form with limited liability proved pernicious. The ease of incorporation and limited liability that was won in the course of the tumultuous years between 1844 and 1856 enabled small firms to cling on to their existence.⁶⁹ However, at this time, the expropriation of their businesses would have quickened the pace of triumph of the large firm, and enabled British industry to match the technological advances and productivity of German and US corporate behemoths.⁷⁰ The rate of economic development of the rising imperial powers was outstripping Britain, and the emergence of giant firms within their boundaries handed them a competitive advantage that began, as Lenin noted, to be expressed in a realignment of the international economy.⁷¹ The power of an empire founded in an earlier epoch was in decline. Its inter-imperialist rivals were anxious to expand their spheres of

⁶⁴ McQueen (n 48) 82–4.

⁶⁵ Ibid 84.

⁶⁶ Michael Barratt Brown, *After Imperialism* (William Heinemann, rev ed, 1970) 83–4; John Foster, 'British Imperialism and the Labour Aristocracy' in Jeffrey Skelley (ed), *The General Strike, 1926* (Lawrence & Wishart, 1976) 7; Hobsbawm, *Industry and Empire* (n 39) 214; Hilferding (n 8) 225.

⁶⁷ McQueen (n 48) 84.

⁶⁸ Ibid.

⁶⁹ Cain and Hopkins, *British Imperialism: Innovation and Expansion* (n 56) 112.

⁷⁰ Ibid.

⁷¹ Lenin, *Imperialism* (n 8) 95–6.

influence.⁷² Uneven economic development with its imperial peers put Britain at a disadvantage, and it became a tempting target for more robust competitors. Britain's position as a fading colossus was an important aspect that promoted a legal revamp of business entities, but it was a strategy that failed to halt the march to World War I that repartitioned world markets.⁷³ Ireland took no account of the global changes in the capitalist mode of production in the course of the 19th century, and the economic studies of thinkers like Lenin, and this omission narrowed the ambit of his history of the evolution of the company legal form. In *Capital: Volume III*, in another innovative step, Marx went below the surface of property relationships and depicted the hidden abode of production as the factor differentiating appearance from the true essence.⁷⁴ In his evaluation of the *Company Act 1844*, *Limited Liability Act* and *Company Act 1856*, Ireland focuses on surface appearance. By eschewing examining the structural economic forces responsible for the enactment of a series of legislative steps Ireland departs from the Marxist tradition. His framework of analysis is interesting, but it is outside the ambit of the political economy model of Marxism.

III THE FOUNDATIONS OF THE COMPANY

In this section, the spotlight will be on Ireland documenting the economic phenomena responsible for the emergence of the separate legal personality doctrine. In brief, at a later stage of his career, Ireland returned to the topic of the victory of incorporation in 1844. Earlier, he provided a thin analysis of this aspect of company history. Ireland then returned to the issue and proposed that the legal reconfiguration of shares opened the way to a general incorporation regime that suited the needs of those he terms rentier investors. In his revisionist pursuit of the reason for the origin of the separate legal entity doctrine, Ireland explored how the share was legally transformed to accommodate owners wishing to break their daily connection to their assets and become passive shareholders, leaving control of their enterprises to managers. How effectively Ireland details the revamping of the juridical form to benefit rentiers and a managerial elite is a central motif of this part of the article. In effect, Ireland, in adopting this theoretical framework, retreated from his earlier viewpoint. He developed a novel approach to explain why the 1844 campaign for legal personhood was capped with success. Ireland's intellectual progress on this topic highlights the fact there was an epistemological rupture between his early and later work.

All Ireland's future work was built on the theoretical foundations that were laid down in a 1987 article he co-authored with two colleagues, Ian Grigg-Spall and Dave Kelly.⁷⁵ This piece represented a qualitative breakthrough. Ireland was at the height

⁷² Ibid 104.

⁷³ Ibid 4.

⁷⁴ Marx, *Capital: Volume III* (n 3) 927.

⁷⁵ Paddy Ireland, Ian Grigg-Spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 149.

of his intellectual powers. In future, he would take incremental steps forward but fundamentally, his subsequent work stood on the conceptual foundations developed in the 1987 piece. Although co-authored, Ireland's hand is clear to see in the theoretical analysis utilised. The categories employed in this article were to become the guiding principles of Ireland's theory of companies. His 1987 effort shows Ireland examining the taproot of the doctrine of separate legal personality with fresh eyes.

At the outset Ireland states that the joint stock company can 'be properly understood only in the context of an analysis of the various forms taken by capital'.⁷⁶ By positing the joint stock company as an economic form, Ireland separates that component part from the legal form embodying incorporation. Note is made that since *Salomon* in 1897, incorporation has been summed up as signifying 'the complete separation of the company and its members'.⁷⁷ Ireland stresses that the conventional view is that the concept of the complete separation of the company and its members is a 'function of the legal act of incorporation'.⁷⁸ For Ireland this misleading interpretation fails to anatomise the deeper forces responsible for the concept of the company entity. In Ireland's revisionist view, the circumstances that led to shares being treated as a separate form of property distinct from any direct link to the assets of joint stock companies was the pathway that led to the triumph of the separate legal entity concept.⁷⁹ Ireland notes that before the mid-19th century, the business and shareholder were bound together.⁸⁰ Ownership and control was an indissoluble bond. Ireland argues the company entity was forged in the mid-19th century and, given its definitive expression in *Salomon*, has to be viewed through the prism of 'the changing economic and legal nature of the joint stock company share'.⁸¹ In effect, Ireland provides a distinctly singular explanation for the emergence of legal personhood. His interpretation is an advance on his earlier analytical standpoint, but it is at odds with the classic Marxist view that pinpoints the growing mid-19th century concentration and centralisation of capital as the phenomenon responsible for relaxing the law and permitting general incorporation. In this scenario the joint stock company was an expression of the growth of collective capitalist forms of property, as enterprises began to cease being independently owned and passed into collective capitalist control. Ireland's mistake is to focus on the phenomenal form of shares driving the advent of the company entity. His framework of analysis departs from a structuralist analysis. For Marx, capital was not a thing embodied in instruments like shares, but a social relationship.⁸² A change in economic relations expressed in the centralisation of production sparked the inception of the joint stock company. The business and shareholder were separated by the transformation of property relationships, and it was this step that was responsible for any change to

⁷⁶ Ibid.

⁷⁷ Ibid 150, citing LCB Gower, *Modern Company Law* (Stevens & Sons, 1963) 100.

⁷⁸ Ireland, Grigg-Spall and Kelly (n 75) 151.

⁷⁹ Ibid.

⁸⁰ Ibid 150.

⁸¹ Ibid 151.

⁸² Marx, *Capital: Volume I* (n 4) 1096.

the nature of shares in the mid-19th century. The change in the internal organisation of those controlling businesses sparked the physical assets passing to the company form, and this process did allow shares to be treated as a separate form of property. But Ireland puts the horse before the cart. First, property relations changed within the shell of the company form, and second, the nature of the share changed to reflect the economic landscape being reconfigured.

The doctrine of separate corporate personality is a linchpin of company law. It operates as a shield insulating shareholders from being held ‘personally responsible for any obligations incurred by the corporation’.⁸³ To elucidate the forces responsible for the rise of the modern doctrine of separate personality is thus clearly important. The core of Ireland’s thesis is that the share, by changing its legal status, became an autonomous form of property. This outcome snapped the bonds that had connected the shareholder legally to their economic property in joint stock companies.⁸⁴ And to understand the separate personality doctrine, with its complete separation of company and members, account has to be taken, avers Ireland, of ‘the historical processes whereby the share and other similar titles to revenue emerge as legally recognised autonomous forms of property’.⁸⁵ In the 18th and early 19th centuries, Ireland notes that shares in joint stock companies ‘were viewed as equitable interests in the property of the company’.⁸⁶ And while a share was regarded as an equitable stake in the company’s assets, shareholders were closely identified with the company entity.⁸⁷ This arrangement began to splinter from the 1830s as the judicial interpretation of shares was revamped.⁸⁸ By the mid-19th century the link between shares and assets of companies was cut and the company form was recognised in law as an independent entity, separate from shareholders.⁸⁹ The turning point was *Bligh v Brent* (‘*Bligh*’),⁹⁰ in which it was decided that ‘shareholders in incorporated joint stock companies had interests only in the profits of companies and no interest whatsoever in their assets’.⁹¹ Henceforth, following the *Companies Act 1844*, company law legislatively facilitated shareholders seeking to eschew any role in management, and instead set them free to focus on siphoning profits from their shares and bonds.⁹² The judicial arm of the English State apparatus gave its blessing in *Bligh* to the severing of any link with the management side of the business, and for shareholders to henceforth treat their shares as an autonomous form of property. Shares became legal objects that guaranteed the profits flowed into the pockets of those that had

⁸³ Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Between the Lines, 2002) 10.

⁸⁴ Ireland, Grigg-Spall and Kelly (n 75) 153.

⁸⁵ *Ibid* 153–4.

⁸⁶ *Ibid* 152.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ (1837) 2 Y & C Ex 268; (1836) 160 ER 397.

⁹¹ Ireland, Grigg-Spall and Kelly (n 75) 152.

⁹² *Ibid* 158–9.

become disconnected from the production process. Ireland's standpoint is influenced by Crawford Macpherson, who argued that the change in viewing property as a right to revenue and income, rather than rights in material things such as physical plant and raw materials, was part and parcel of a maturing capitalist economy.⁹³ Granted, the importance of the role of property as a right to revenue increased with the rise of the joint stock company. But to extend that point to claiming the changing legal interpretation of shares produced the company entity is mistaken. Marx was closer to the mark when he noted that the emergence of the joint stock company liberated the owners of wealth from the administrative affairs of business.⁹⁴ This development, Marx added, was coupled with hired servants rather than owners of money capital running the company whilst the shareholders reaped the benefit of their investments.⁹⁵ Henceforth, money capitalists garnered the profits whilst being freed of legal responsibilities. But Marx viewed changes in property relationships as the mainspring for the separation of ownership from the day to day administrative control of companies.⁹⁶ That is a different epistemological argument to the one posited by Ireland.

After this 1987 article Ireland never again went into such complex theoretical territory when excavating the company structure. Ireland came away from this article satisfied that he had cast light on the forces responsible for shareholders becoming disempowered absentee figures on the company landscape. For Ireland, there was a continuum that stretched from general incorporation to the achievement of limited liability. It was all part of the process of rentier investors clamouring to prioritise their pursuit of revenue and income, and their actions being rubber stamped by the State. What Ireland learnt from exploring the roots of the modern separate legal entity doctrine would form the basis of his future work. Having highlighted how shares became legal objects in their own right, Ireland could weave this key development into throwing light on the progression of general incorporation and limited liability.⁹⁷ In his eyes it was just a small step from rentiers cutting the link between shares and assets via incorporation to a juridical form being implemented in 1856 that placed a shield between the company and investors and granted so many benefits including eschewing company debts. Also, Ireland had an intellectual rationale for explaining the rise of joint stock companies, and how they became characterised by a separation between the owners and administrators of capital.⁹⁸

⁹³ Crawford Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and Ronald Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University, 1975) 114.

⁹⁴ Marx, *Capital: Volume III* (n 3) 567–8.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) *Cambridge Journal of Economics* 837, 842 ('Limited Liability').

⁹⁸ *Ibid.*

Even as late as 2018, at a fully mature stage of development in his thinking, Ireland presses the case for the *Companies Act 1844* being required to protect rentiers.⁹⁹ There is a glimmer of reality in Ireland's argument that the transformation of the share would enable money capitalists to exclude themselves from playing any managerial role in the corporation. He refers to these capitalists — whose function is simply to watch their capital gains and dividends grow — as rentiers.¹⁰⁰ Ireland states the hallmark of rentiers is that they 'played little active part in management and treated their shares as mere rights to revenue'.¹⁰¹ He is, though, incorrigible on rentier investors being at the forefront of every push to revamp company law in the 19th century. In 2010, when Ireland again raised the topic of the emergence of easily available legal personality in 1844, he lapsed into the past and stated its advent was a product of government seeking to protect rentiers from fraud perpetrated by share swindlers.¹⁰² Once again Ireland prioritised parliamentary conduct and vulture capitalists as critical agencies of change rather than focusing on objective economic relations shaping legal changes. Ireland has persisted in perceiving rentiers as the engine house of legal changes to the company form and limited liability. For someone committed to the historical materialist tradition, he sails very close to obscuring the key tenets that constitute the core of Marxist analysis. In remorselessly accentuating the role of rentiers, Ireland misses the point that the joint stock form and legal changes impacting on its evolution all came from the birth of a new age of collective property relations that arose from the dynamics of the concentration and centralisation of capital. These developments did not abolish the nexus between ownership and control. There was no dissolution of the grip of capital on productive forces. Private property and the power that flows from it were not superseded. Reflecting correctly on 19th century developments, Lenin forthrightly noted: 'scattered capitalists are transformed into a single collective capitalist'.¹⁰³ In brief, a new stage of capitalism was beginning to unfold in the 19th century and Ireland's work was not capturing fresh developments in the history of the company.

The *Company Act 1844* and *Company Act 1856* benefited an embryonic fraction of the capitalist class who were on the way to the summit of the social structure and were far from being only interested in dividend yields. Ireland's interpretation of legislative changes is to some degree inspired by Marx, but it lacks his credo that economic life in the form of a mode of production and property are the nucleus of history. The consecration of new legal forms in the mid-19th century had its economic origins in changing patterns of property ownership.

⁹⁹ Paddy Ireland, 'Efficiency or Power? The Rise of the Shareholder-Oriented Joint Stock Corporation' (2018) 25(1) *Indiana Journal of Global Legal Studies* 291 ('Efficiency or Power?').

¹⁰⁰ Ireland, Grigg-Spall and Kelly (n 75) 158.

¹⁰¹ *Ibid.*

¹⁰² Ireland, 'Limited Liability' (n 97) 843.

¹⁰³ Vladimir Lenin, 'Imperialism: The Highest Stage of Capitalism' in Vladimir Lenin (ed), *Collected Works* (Progress Publishers, 1964) vol 22, 214.

A shareholder losing the appetite for controlling their capital is the quintessence of Ireland's description of rentiers. This miscalculation results in Ireland supporting the thesis of managerial capitalism. His studies result in the adoption of a political standpoint antithetical to Marxism. Ireland's argument provides support for the view that passive shareholders, solely interested in the size of their dividends, became insulated from managers who stepped in to occupy the commanding heights of the company. The logic of Ireland's concept of the separate legal entity doctrine is that those with shares became disconnected from any control over their property. He eliminates from consideration that the separate legal entity doctrine was a product of historical necessity underpinned by a farrago of factors driven by changes to the structure of economic property. Moreover, just because the assets pass to the company, it is not a signal that owners of wealth are displaced from controlling enterprises.

Ireland's work fails to consider how, at the time, when shares were being legally reinterpreted, the capitalist class was split by economic interests. Various shades of capital were engaged in a fierce contest to climb to the apex of society. A promethean set of socio-economic factors combined to shape the mid-19th century shifts in the company legal form. It was not the case that all shareholders relinquished their power to managers and focused on counting their money. For example, Clive Beed notes that there was a separation of ownership and control but it was supportive of those accumulating large blocks of shares.¹⁰⁴ These magnates of capital were content to let managers govern the company, whilst using economic power to exert their rule over directors.¹⁰⁵ For example, a strategic bloc of one to five per cent of shares in a company vested shareholders with the voting rights necessary to determine the composition of company boards.¹⁰⁶ Managers were subordinate to wealthy investors. Elite shareholders were not passive investors under the thrall of the separation of assets and shares in limited liability companies. Hilferding spelt out that, through devices like holding companies, elite shareholders exerted control over a vast litany of enterprises coordinated by limited strategic shareholdings.¹⁰⁷ The separate legal entity doctrine suited the capital accumulation needs of ultra-rich shareholders intent on owning and controlling empires of capital. This situation is far removed from Ireland's vision of parasitical rentiers only interested in private enrichment and content to benefit from legal changes that passed control of their assets to managers. Rentiers were not the dominant fraction of capital, and this became even clearer as the 19th century unfolded. Towards the end of the 19th century, the role of rentiers and small manufacturers declined sharply. As Hobsbawm notes, a seismic shift in property relations was underway in all the developed capitalist states.¹⁰⁸ The realignment of property relations was to combine the power and prestige of banking and industrial capital. The age of finance capital dawned as the intertwining of banking

¹⁰⁴ Clive Saunders Beed, 'The Separation of Ownership from Control' in Michael Gilbert (ed), *The Modern Business Enterprise* (Penguin, 1972) 141.

¹⁰⁵ *Ibid* 148.

¹⁰⁶ *Ibid* 140–1.

¹⁰⁷ Hilferding (n 8) 225.

¹⁰⁸ Hobsbawm, *Industry and Empire* (n 39) 130–1.

and industrial capital created large scale enterprises that combined economic and political power.

Rentiers had many of the characteristics of a petty bourgeois class. Certainly, Ireland oversimplifies their role in economic and legal history. Hobsbawm makes the telling point that in mid-19th century Britain there were ‘170,000 persons of rank and property without visible occupation’.¹⁰⁹ He identifies this group as a class of rentiers and says they were mainly women, and ‘a surprising number of them unmarried ladies’.¹¹⁰ Their wealth, in the form of stocks and shares, was a product of past generations of accumulated capital. The women — either because they could not or no longer needed to be ‘associated with the management of property or enterprise’ — lived off their dividend earnings and the capital gains from rising stock prices.¹¹¹ They were classic rentiers, and were reliant on money managers controlling their investments. Rentiers remind one of the character Betsey Trotwood in Charles Dickens’ novel *David Copperfield*.¹¹² This scattered body is given an elevated position by Ireland well beyond their power and ability to influence the State to structure legal rules on their behalf.

Marx’s treatment of the separation of ownership and control thesis placed the emphasis on shifts in the production process.¹¹³ Marx illuminated that the growing socialisation of production, spurred by the expanded scale of factory capitalism, created the conditions for the stratification of the leading personnel at the peak of the company.¹¹⁴ The task of contributing investment funds provided scope for financiers to flourish, whilst the factory capitalist commanded the production process.¹¹⁵ The financiers were rewarded by accruing dividends from their share capital and loans, whilst the factory owner obtained their income from their control over the plant and equipment and supervising production.¹¹⁶ The economic surplus was shared by two fractions of capital. In time banks and industry merged, capping events that began unfolding in the mid-19th century. A financial oligarchy expanded under the umbrella of the banking sector. Family controlled merchant banks — such as Rothschild & Co and Barings Bank — distributed loan capital, and handled their own share portfolios, whilst being linked with a network of wealthy investors.¹¹⁷ As growing amounts of capital were required the factory capitalist yielded individual economic ownership and blended their wealth with that of financiers in order to fund the updated machinery required to wage the competitive war.¹¹⁸ Ireland is so keen to capture

¹⁰⁹ Ibid 119.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Charles Dickens, *David Copperfield* (Bradbury & Evans, 1850).

¹¹³ Marx, *Capital: Volume III* (n 3) 493, 498.

¹¹⁴ Ibid 567–8.

¹¹⁵ Ibid.

¹¹⁶ Ibid 498.

¹¹⁷ Niall Ferguson, *The House of Rothschild: The World’s Banker* (Penguin, 2000) xxiv.

¹¹⁸ Marx, *Capital: Volume III* (n 3) 567.

the role of rentiers driving legal reform through the need to protect themselves from fraud, or sketching the changing nature of shares to transform the legal structure, that he misses the rise of large firms and a corresponding financial oligarchy being the true benefactors of the rise of the limited liability company. Rentier investors were part of the economic wave that led to mid-19th century company law reforms, but they were small fry regarding the birth of incorporated status and limited liability.

Ireland's focus on the role of rentier investors in the triumph of the company legal form misses the changing patterns in the economy, the rich character of the relations between different fractions of capital and the inter-imperialist angle in the battle for the historical emergence of general limited liability in the mid-19th century. The intertwining fractions of capital making up the British ruling elite in the mid-19th century is absent from Ireland's economic and legal history. The lack of precision on the changing structure of economic relationships results in a static model of capitalism. The hidden abode of production is elided as the structural force driving legal change. His theoretical framework is dominated by his habit of conflating social phenomena to prioritise rentiers, and leaves him unable to articulate the farrago of forces at the British apex of power in the mid-19th century, when the shape of company law was being defined. In making rentiers the axis of legal changes, Ireland is undertaking a form of analysis far removed from the Marxist tradition on the history of the company form. Thus, it can be argued, his account of landmark legal changes lacks a rich and accurate historical context. His failure to get the balance right on the forces underpinning the triumph of the limited liability company was to have a detrimental impact on his analysis of the structure of the 20th century capitalist power bloc that was situated at the commanding heights of the economy.

IV THE SUMMIT OF THE CORPORATION

It can be argued that Ireland's partial insight into the nature of capitalism poses intractable problems for his work. The flawed analysis evident in his earlier work haunts his post-1987 work. Decades passed and Ireland ploughed on, perpetuating a mistaken view regarding those who sit at the commanding heights of the modern company. The economic logic of the market, and its chameleon nature, failed to be taken as the focal point of interest and that resulted in a less than compelling analysis of every stage of capitalism that he explored. Shortcomings in Ireland's theory of the company become manifest when assessing power within the contemporary company. The 20th century witnessed, in advanced capitalist countries, the fusion of industrial and banking capital. Ireland's static model of the company failed to address this phenomenon that emerged in embryonic form in the 19th century. He compounds his errors by articulating the view that, in the 21st century, rentiers retained their hegemonic role, and that moves to promote the organisational structure of the company were bent on serving their interests.¹¹⁹

¹¹⁹ Ireland, 'Efficiency or Power?' (n 99) 295.

Questions about Ireland's affinity to the Marxist standpoint regarding issues central to the operation of business enterprises cast a shadow over his work. Given his status, it is necessary to explore how Ireland has applied his class analysis of the company form in the latter stages of his career and judge its efficacy. In sum, even in the autumn of his scholarship, apart from rentiers no other fraction of capital receives any space in Ireland's concept of what constitutes power at the apex of the modern company. Ireland projects the hegemonic image of a parasitic group of investors who have voluntarily handed over their rights to managers who occupy the cockpit of the company. Frozen history best describes the transhistorical perspective of Ireland. For Ireland, ever since the company reforms of the mid-19th century, rentiers and managers have been the major bloc in company life. He is so intent on describing the rentiers as a passive entity that he ends up excluding them from having either the capacity or intent to have an input in company policy. Strategies are implemented to bolster rentiers but they themselves have no agency in company machinations. In effect, Ireland brushes out of contemporary history a comprehensive depiction of the capitalist class, for the rentiers are the only capital-owning members that he investigates.

In a 1999 article, Ireland speaks of professional managers who are paid to run enterprises whilst shareholders are functionless rentiers.¹²⁰ He describes how shareholders were money capitalists standing outside the company and the production process.¹²¹ So insistent is Ireland on this theme that he reiterates his theory of what is the economic state of the company when he asserts that

shareholders are money capitalists, external to companies and to the production process itself. Disinterested and uninvolved in management, and, in any case, largely stripped (in law as well as in economic reality) of genuine corporate ownership rights, the shareholder is, as Berle and Means pointed out, 'not dissimilar in kind from the bondholder or lender of money'.¹²²

In 2000, Ireland reiterates his distribution of power thesis regarding the modern company when he argues the fact that rentiers were

passive owners of titles to revenue, external to companies as productive units, was further reflected in the gradual transfer of power within joint stock companies from general meetings and shareholders to boards of directors and managers ...¹²³

¹²⁰ Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *Modern Law Review* 32, 42 ('Company Law').

¹²¹ Ibid.

¹²² Ibid 47, citing AA Berle and GC Means, *The Modern Corporation and Private Property* (Harcourt Brace, rev ed, 1967) 45.

¹²³ Paddy Ireland, 'Defending the *Rentier*: Corporate Theory and the Reprivatisation of the Public Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2000) 141, 147.

By 2010 Ireland was promoting the view that rentiers were driving the globalisation of the Anglo-American company form. He noted:

[T]he triumph of the corporate legal form was more the product of the growing political power and needs of *rentier* investors than it was of economic imperatives, an argument that might easily be extended to the current attempts to universalise corporate law in its resolutely shareholder-oriented Anglo-American form.¹²⁴

In a 2018 article, Ireland announced that rentiers were driving governance practices across the globe.¹²⁵ They were pursuing a trans-border policy to universalise the company legal form gained in 19th century Britain. The problem is that, apart from lofty predictions, Ireland provides no detail on the measures being taken by contemporary rentiers or their representatives to institute the vision of a shareholder-oriented Anglo-American juridical form on a global scale. We get no sketch of the mechanisms rentiers are utilising to transform their business interests into legal policy. There is evidence of legal imperialism. For example, China has a company law framework resembling the Anglo-American form, and governance mechanisms have been introduced to assuage foreign shareholders.¹²⁶ But it is multinational companies seeking to use China as an export platform that have crafted a legal regime benefiting foreign investors.¹²⁷ In league with the World Trade Organisation, multinational companies spearheaded a host of laws beneficial to foreign investors.¹²⁸ Passive rentier investors played no role in formulating the Chinese business legal regime. Behind the façade of their imposing headquarters based in metropolitan states, multinational companies are controlled by elite shareholders. This group owns strategic shareholdings in a web of global companies, and they watch over their empire of capital. Warren Buffett is no sleeping rentier; he is a shareholder activist with an eye-watering portfolio of investments. Ireland's focus on rentiers driving legal imperialism is misplaced. Buffett brings to mind the finance capitalists that Hilferding described when he averred that strategic share stakes in powerful companies enable magnates of capital to shape the policy landscape.¹²⁹

For Ireland, different company theories circle around Adolf Berle and Gardiner Means' managerialist interpretation of the separation of ownership and control, and the pursuit of a global Anglo-American shareholder primacy model.¹³⁰ Managers in

¹²⁴ Ireland, 'Limited Liability' (n 97) 838.

¹²⁵ Ireland, 'Efficiency or Power?' (n 99) 295.

¹²⁶ Nicholas Calcina Howson and Vikramaditya S Khanna, 'The Development of Modern Corporate Governance in China and India' in M Sornarajah and J Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 513, 544, 546.

¹²⁷ Leo Panitch and Sam Gindin, *The Making of Global Capitalism: The Political Economy of American Empire* (Verso, 2012) 293, 296–7.

¹²⁸ *Ibid* 293–4.

¹²⁹ Hilferding (n 8) 119–20.

¹³⁰ Berle and Means (n 122).

Ireland's scenario are morphing into a globalised managerial class bent on pursuing rentier aims. Ireland's company governance paradigm is of interest to Marxists, but his take on the export of the Anglo-American company model bearing the imprint of rentiers is a mistaken assumption. The Anglo-American model Ireland speaks of will also face a sustained challenge in an age when Paul Kennedy's thesis about the rise and fall of empires is particularly pertinent to the decline of the US.¹³¹ Future global crises will take their toll and spell problems for those intent on transplanting the Anglo-American model.

A puzzling feature of Ireland's work is the way he was swayed by Berle and Means' liberal theory that capital has surrendered its power to managers.¹³² His theoretical standpoint can result in contradictory perspectives. This quirk is evident in an article Ireland wrote in 2005.¹³³ In this article, Ireland presents an array of wealth data drawn from UK and US sources that pinpoint the reality of a narrow elite in both countries owning the bulk of shares. Ireland states his aim in this article is to 'lift this particular veil and to elucidate the make-up of the shareholder class'.¹³⁴ This is a definitive advance in Ireland's scholarship and opens up the prospect of him shining an empirical light on the dominant fraction of the capitalist class in modern society. However, as an article that promises to expose the composition of the shareholder class, it fails to deliver. Time and again in the article, Ireland presents impressive economic data that reveals the stratospheric scale of share inequality in the UK and US. Yet he sheds almost no light on the groups that constitute the economic elite. Ireland has nothing to say on the non-institutional owners of the biggest parcels of shares in the UK and US. He quite rightly points to the equities share owned by institutional investors, but on private individuals or groups he is silent.¹³⁵ We get tantalising glimpses of the state of affairs, such as when Ireland notes the US concentration of wealth boils down to 'the top one per cent of families owning 38 per cent of total marketable wealth and the top 20 per cent of families 83 per cent'.¹³⁶ He adds that the 'wealthiest one per cent of Americans still held (directly and indirectly) over a third of corporate equity ... In contrast, the bottom half of the population accounted for only 1.4 per cent'.¹³⁷ At the end of the article, speaking about the contemporary period of share ownership, all that Ireland can summon up is the assertion that government policies operate in favour of 'creditor and rentier interests'.¹³⁸ That key figures among the US inner circle owning large tracts of shares are not rentiers, but the modern equivalent of the titans of the Robber Baron age, is left unexplored.

¹³¹ Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict From 1500 to 2000* (Fontana Press, 1990).

¹³² Ireland, 'Limited Liability' (n 97) 851.

¹³³ Paddy Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68(1) *Modern Law Review* 49 ('Shareholder Primacy').

¹³⁴ *Ibid* 52.

¹³⁵ *Ibid* 57.

¹³⁶ *Ibid* 59, citing EN Wolff, *Top Heavy* (New Press, 2002) 1–3.

¹³⁷ Ireland, 'Shareholder Primary' (n 133) 61.

¹³⁸ *Ibid* 78, quoting P Gowan, *The Global Gamble* (Verso, 1999) 8–18.

The primacy of John D Rockefeller, John Morgan, Solomon Guggenheim and Cornelius Vanderbilt has been replaced by Jeff Bezos, Bill Gates, Warren Buffett, Lawrence Ellison, Mark Zuckerberg and others at the apex of the current American pyramid of power. These titans are far removed from the rentiers that Ireland likes to talk about. To describe them as disinterested and uninvolved in management and bereft of ownership prerogatives is implausible. Bezos, for example, controls Amazon and has a personal fortune of USD189 billion.¹³⁹ He is as far removed from being a rentier as Rockefeller or Morgan were in their heyday.

Time has stripped away whatever influence rentiers once exerted. The role of rentiers was profoundly impacted upon by the Great Depression of 1873–96. Ireland avers that a keynote of this long economic depression was overproduction and falling profitability.¹⁴⁰ Within Britain ‘there was a gradual and significant fall in the real rate of return on industrial capital’.¹⁴¹ Ireland’s commentary on the economic impact of this crisis is perceptive, but the tragedy is that he only provides a miniaturist view. He fails to extend his analysis to the impact of the Great Depression on the ranks of the British ruling elite, and how the slump triggered changes within the leading personnel of capital.

The result of the profitability crisis and overproduction was the ushering in of a new stage of capitalism, and with it, a changing of the guard within the top stratum of the capitalist class. The advent of finance capital signalled a change in the social relations of property in Britain.¹⁴² Ireland’s image of rentiers being tied to managers in an ownership and control duet that has lasted up to the contemporary age loses any analytical power when consideration of the impact of the post Great Depression years is taken into account. Prior to the Great Depression, rentiers were minor players. After the crisis years, rentiers slipped even further in the ranks of capital. The age of the giant firm dawned. Key mergers in the industrial sector were sparked by the Great Depression. Lever Brothers, J & P Coats Ltd and Vickers Limited were just a few of the firms to grow by amalgamation.¹⁴³ Following in the wake of developments in Germany and the US, banking capital and industrial capital in Britain began to merge. In 1914 there were 130 railway companies in Britain. After 1924, there were four.¹⁴⁴ Banks went from being the humble middlemen they were at an earlier phase of capitalism to powerful monopolies that had the bulk of the money capital held by

¹³⁹ Rupert Neate, ‘Family Fortunes of Wealthy Increase as Super-Rich Ride Coronavirus Storm’, *Guardian* (online, 16 July 2020) <<https://www.theguardian.com/news/2020/jul/16/family-fortunes-of-wealthy-increase-as-super-rich-ride-coronavirus-storm>>.

¹⁴⁰ Ireland, ‘The Rise of the Limited Liability Company’ (n 10) 249.

¹⁴¹ *Ibid.*

¹⁴² On the nature of finance capital see Bukharin, *Imperialism and World Economy* (n 8); Hilferding (n 8); Lenin, *Imperialism* (n 8).

¹⁴³ Barratt Brown (n 66) 83.

¹⁴⁴ Hobsbawm, *Industry and Empire* (n 39) 215.

capitalists under their command.¹⁴⁵ The first decade of the 20th century witnessed significant mergers in the banking sector.¹⁴⁶ Five banks came to dominate the field. By 1924, the Big Five banks (Midland Bank Plc, National Provincial Bank, Lloyds Bank, Barclays and National Westminster Bank) ruled the British High Street.¹⁴⁷ In 1914, Britain was the least concentrated of the great industrial powers, but by 1939 it was one of the most concentrated.¹⁴⁸ As banks and industry drew closer, financiers promoted the scrapping of excess capacity and rationalisation in enterprises that built up overdrafts.¹⁴⁹ Banks became underwriters for flotations in major businesses.¹⁵⁰ The advent of finance capital was responsible for creating a power bloc within the capitalist class. The primary groupings of finance capital comprised the top stratum of the capitalist class.¹⁵¹ This new ruling elite comprising the merger of industrial capital with banks became the focus of economic and political power.¹⁵² Interlocking directorates, where individuals sat on banking and industrial companies, forged the bonds of this new elite.¹⁵³ Rentiers were just sideline observers of this great socio-economic transformation.

In contrast to a new phase of capitalism emerging during the deep economic crisis and producing radical changes within the economic elite, Ireland posits the disappearance of the ruling class. Key indicia of private property relationships vanish into a social vacuum in Ireland's work. Ireland avers that

the modern depersonified corporation represents not merely a dilution of shareholder corporate property rights but the demise of the means of production as private property to which notions of 'ownership', with their connotations of exclusivity and exclusion, are applicable.¹⁵⁴

On this issue, Ireland has confused changes in the structure of property ownership with the alleged abolition of capital as private property. To achieve clarity on this crucial issue one turns to Charles Bettelheim and not Ireland. Bettelheim notes how the agents of possession or company managers who have the ability to put the means

¹⁴⁵ Albert Szymanski, *The Logic of Imperialism* (Praeger, 1981) 36, citing Vladimir Lenin, 'Imperialism: The Highest Stage of Capitalism' in Vladimir Lenin (ed), *Selected Works* (Foreign Languages Publishing House, 1960) vol 1, 732–3, 736.

¹⁴⁶ Chris Harman, *Explaining the Crisis* (Bookmarks, 1984) 53–4.

¹⁴⁷ Hobsbawm, *Industry and Empire* (n 39) 215.

¹⁴⁸ *Ibid* 214.

¹⁴⁹ Peter Cain and Antony Hopkins, *British Imperialism: Crisis and Deconstruction 1914–1990* (Longman Group, 1993) 14–15.

¹⁵⁰ *Ibid* 16.

¹⁵¹ Sam Aaronovitch, *The Ruling Class: A Study of British Finance Capital* (Greenwood Press, 1979) 75.

¹⁵² *Ibid*.

¹⁵³ *Ibid* 40–1.

¹⁵⁴ Ireland, 'Company Law' (n 120) 55.

of production into operation are to be distinguished from the agents of property.¹⁵⁵ The agents of possession are subordinated to the agents of property, or, in the case of the company, the managers are a secondary force to shareholders. Quite simply, a shareholder's property is an economic relation that empowers the shareholder to dispose of the products obtained with the help of the means of production.¹⁵⁶ Bettelheim's framework of analysis is particularly germane in the case of shareholders with sizeable blocks of shares. Large shareholders appropriate more of the value produced in the production process. Appropriating large scale profits from production facilitates the growth of the top stratum of the business elite. This elite combines banking and industrial wealth.

John Scott has put successive generations of the business dynasties of north east England under a spotlight to elucidate the contours of the top stratum of the capitalist class. These budding magnates began modestly enough. Their original capital base in the 18th century was located within coal, glass, iron and lead industries.¹⁵⁷ These early ventures were financed by local merchants and landowners.¹⁵⁸ In the 19th century the successful north east England family groups diversified into the expanding engineering and shipbuilding industries and showed a fledgling interest in becoming financiers.¹⁵⁹ They then became dominant forces in local railway, water and gas companies.¹⁶⁰ Overseas imperial ventures in mining, rubber and metals added to their fortunes.¹⁶¹ The Cookson and Pease families had a variety of businesses and then segued into banking.¹⁶² Together with the Ridley, Joicey, Priestman, Clayton and Straker families, the Cookson and Pease firms 'formed the core of a network of local dynasties'.¹⁶³ The families were linked together by 'interweaving shareholdings and interlocking directorships'.¹⁶⁴ These family dynasties moved onto the national scene and took advantage of the rise of finance capital. Finance capital embodies the fusion of banking and industrial capital. Members of the family dynasties sat on the boards of both industrial and banking concerns.¹⁶⁵ The Pease and Ridley families were represented on the board of Lloyds Bank.¹⁶⁶ The Pease and Clayton families were on the Barclays board, whilst the Riddleys were on the board of National Provincial

¹⁵⁵ Charles Bettelheim, *Economic Calculation and Forms of Property*, tr John Taylor (Routledge & Kegan Paul, 1976) 69.

¹⁵⁶ *Ibid.*

¹⁵⁷ John Scott, *Who Rules Britain?* (Polity Press, 1991) 73.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid* 74.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid* 75.

¹⁶⁶ *Ibid* 75–6.

Bank.¹⁶⁷ Shareholder primacy takes on a whole new meaning when consideration is taken of the financial oligarchy that rules through strategic holdings in industry and banks. Rentiers have no place in Scott's analysis of the anatomy of power of British society. They figure nowhere in his dissection of the dynamics of power within the ruling class, and the accumulation patterns over generations that led to the triumph of business dynasties.

Ireland's failure to discern the emergence of a new economic stage of capitalism following the crisis of 1873–96, and the reorganisation of capital it sparked, has had ramifications for his depiction of the company legal landscape. It led Ireland to focus on the theme that the contemporary company scene is one in which functionless rentiers have overseen the transfer of power within joint stock companies from general meetings and shareholders to boards of directors and managers.¹⁶⁸ Professional managers have taken on duties eschewed by rentiers. Ireland acknowledges that rentier investors have held on to the right to vote in general meetings and fiduciary duties are still based on acting for the best interests of shareholders: but that exhausts the rights of capital owners.¹⁶⁹ Characterising all shareholders as largely impotent within the modern company is the touchstone responsible for Ireland working within a mistaken theoretical framework.

In contrast to Ireland, Harry Glasbeek scrutinises the internal operation of modern companies and finds the shareholders are not a powerless legal body. The primacy of shareholders is evident across a range of vital issues. In brief, the legal weaponry provided to shareholders is multifarious. It includes the right to vote for the appointment and dismissal of directors and, whilst shareholders have given up the power to control and direct daily operations,

they have the right to exercise veto power over major decisions that would affect the very nature of the corporation in which they have invested — they have the right to vote on the sale of the substantial assets of the corporation, of a take-over of the corporation or a merger or a scheme of arrangement that would see the corporation change its essence ...¹⁷⁰

The shareholders are the single group that is provided with membership of the company, and this is reflected by all profits being directed towards them. If the shareholders are unhappy with the direction or future of the company they can make a quick exit.¹⁷¹ Legal responsibilities stop at the door of the company. Limited liability, combined with the separate legal entity concept, ensures the company is 'held responsible for any obligations, debts and administrative or criminal sanctions incurred as

¹⁶⁷ Ibid 76.

¹⁶⁸ Ireland, 'Company Law' (n 120) 43.

¹⁶⁹ Ibid 48.

¹⁷⁰ Harry Glasbeek, 'Piercing on Steroids' (2014) 29(3) *Australian Journal of Corporate Law* 233, 235.

¹⁷¹ Ibid.

a consequence of its pursuit of profits'.¹⁷² In effect, shareholders are legally immune from company misbehaviour and, if scandals occur and new standards are called for, the regulators respond by saddling directors and senior officers with new duties.¹⁷³ The directors take the rap and more regulatory requirements whilst shareholders get off scot-free and bank their profits.¹⁷⁴ Such is the reality of the separation between managers and those with economic property. This facilitative legal landscape is ideal for a profitmaking system controlled by the finance capitalists that rule the company roost. They benefit from loose regulation whilst ruling directors.

In his 2010 article, Ireland shows he understands the lack of legal restraints on shareholders but he sticks rigidly to the viewpoint that they have been stripped of power.¹⁷⁵ He argues that the joint stock company shareholder

now no longer entails liabilities, and also increasingly no longer carries obligations or responsibilities, for managing power was increasingly vested by companies (through the provisions of the standard statutory articles) in boards of directors.¹⁷⁶

Ireland skips looking at substance and instead he focuses on legal niceties. Ireland refuses to examine links between directors and controlling shareholders. Directors are often proxies for those who have the reins of economic power firmly in their hands. And with his relentless focus on rentiers, it escapes Ireland's notice that the advent of finance capital has entailed a new power bloc to emerge and that this elite is now the top stratum of the capitalist class. It must be stated Ireland makes a telling point in his 2018 article. He notes the move towards financial property being warehoused in financial institutions such as hedge funds. He states this has 're-empowered financial property owners, including shareholders, as a class'.¹⁷⁷ He makes no reference to hedge funds and other financial institutions being vehicles offering private services to an economically powerful elite. Hedge funds are a creature of modern finance capital; they are an ancillary of finance capital. If Ireland were to excavate the role of hedge funds in the future it would be a positive step, for it offers the potential for him to drop his emphasis on rentiers and examine the make-up of the capitalist class at a more forensic level than he has done up to this point.

¹⁷² Ibid.

¹⁷³ Ibid 246.

¹⁷⁴ Ibid.

¹⁷⁵ Ireland, 'Limited Liability' (n 97) 846.

¹⁷⁶ Ibid.

¹⁷⁷ Paddy Ireland, 'From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism' (2018) 29(1) *King's Law Journal* 3, 21.

V CONCLUSION

This article has been both a tribute to and critique of the company scholarship of Paddy Ireland. At the outset, the article spelt out how Marxism suffered a fall in influence within the legal academy. Ireland's work incontrovertibly highlights that this was a loss and articulates that Marxism is an invaluable method for dissecting the history and legal structure of the company. Across the years, and ignoring the waxing and waning of academic fashion, Ireland has produced a body of work that, despite its theoretical shortcomings, has given space to Marx's method and in the process illuminated the conceptual foundations of modern company law. Despite its qualities, the fundamental issue remains one of whether Ireland's work has employed the full range of Marx's theoretical analysis of the history of the company. In brief, has Ireland's work probed deeply enough to unravel whether the company legal form truly expresses the economic content of the social relations of property ownership embodied within the modern company?

It has been argued that Ireland's work falls short on this score. It is an exaggeration to claim that rentiers were the Gordian knot linking the legal form with economic property. Far more promethean forces than that conjured up by Ireland were responsible for general incorporation and limited liability. The legal superstructure responded to the concentration and centralisation of capital, and this process threw up the hegemony of new fractions of capital. Rentiers were a component part of the capitalist class but Ireland exaggerates their role. Banks and industrial capitalists were the first violinists. Rentiers were minor members of the orchestra. When banks and industry combined their forces, rentiers fell even further in the pecking order. Ireland's conceptual flaws have resulted in overestimating the role of rentiers in achieving the limited liability company, and this has led to misconceptions of the contemporary ruling class that controls companies. It is a matter of regret that Ireland failed to capitalise on the deepening and developing of Marx's conception of the company by thinkers like Bukharin, Hilferding and Lenin. They updated Marx's theoretical analysis of the history of the company and provided the tools for anatomising the ruling elite and the juridical nature of the limited liability enterprise. The major argument in this article has been directed at highlighting that Ireland, in his body of work, has fallen short in theorising the linkage between the company legal form and the economic structure of capitalism. The economic and legal arena are not separate spheres and whether it be the rise of the limited liability company, the economic factors driving the separate legal entity doctrine or the power structure within the ranks of contemporary capital, Ireland's theoretical analysis has failed to capture fully the dynamics that shape core characteristics of the company entity.

Gail Pearson*

THE RESIGNATION OF THE THIRD INDIAN LAW COMMISSION: WHO MAKES LAW?

ABSTRACT

Codes of law are meant to provide a coherent whole within a given taxonomy of law. The code is a very old idea; think Justinian. In the English context, Jeremy Bentham revived the idea at the end of the 18th century. The systematisation of law in a code, by high-level principles or rules, contrasts with the organic evolution of law through decisions made on particular disputes by courts. The British worked on the possibility of codes within two frames: codes for Britain and codes for the Empire. This article looks at a particular moment in making the first commercial code for India, the *Indian Contract Act 1872* (India). The resignation of the Law Commissioners who had initially drafted that Act raises a question where there is an intersection of law and history, namely where should authority to make law lie?

I INTRODUCTION

In July 1870, the majority of the members of the third Indian Law Commission resigned. Its members had been appointed in England in 1861 by Queen Victoria to draft substantive law for India.¹ Their will had been thwarted by the government of India. The subject of the quarrel was a proposed code of law for India to encompass contracts, sale of moveables, indemnity and guarantee, bailment, agency and

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¹ The term ‘substantive law’ is drawn from Jeremy Bentham’s distinction between substantive and adjectival law. The proposal to draft a substantive law was made by the second Indian Law Commission set up in 1853. In 1856, the second Indian Law Commission recommended a substantive civil law for India based on English law, to govern all classes of persons (including Hindus and Muslims), and ‘prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions, and usages of the population’: United Kingdom, *Second Report of Her Majesty’s Commissioners Appointed to Consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India* (Report No 2036, 1856) 8 (‘Second Report’).

partnership. In short, the chief requirements for a modern commercial law.² Contract law was part of a bigger private law project.³

The resignation signalled a shift in the approach to lawmaking in India. The *Indian Contract Act 1872* (India) (*‘Indian Contract Act’*) was the first successful codification of private law obligations in the common law world and widely influential as a source of statutory rules for contracts.⁴ It was drafted in part by judges and will soon be 150 years old. We inherit many of our law-making processes from the 19th century world. One that we do not, is the practice of judges drafting legislation.⁵

The background to the four Indian Law Commissions (collectively, the ‘Commission’) tasked with drafting laws, was increasing intensity of British control of India. The first Commission was a British parliamentary response to the East India Company which had taken on a role in the Mughal legal system and courts, and transformed itself from a trading company. It linked to the *Saint Helena Act 1833*,⁶ which established the power of the Governor-General to pass legislation for all of British India and reduced the role of the East India Company to be primarily administrative. That Commission ended in 1843, but another was appointed in 1853 when the Parliament again renewed the *East India Company Charter Act 1813*.⁷ Unlike the first, this second Commission and later the third Commission, appointed in 1861, met in London, not India. The fourth Commission was appointed in 1875, meeting in India. Not all Commissioners had a judicial background.

² This was the *Indian Contract Act 1872* (India) (*‘Indian Contract Act’*).

³ In addition to codifying the general law of contract, the *Indian Contract Act* includes special contracts. This is because it was conceived as part of one overarching code for civil law.

⁴ For instance, the *Contracts Act 1950* (Malaysia) is based on the *Indian Contract Act*. On sales, part of which were governed by the *Indian Contract Act* until 1930, see Gail Pearson, ‘Relevance of Mackenzie Chalmers to Australian Law’ (2011) 85(2) *Australian Law Journal* 97; Gail Pearson, ‘Reading Suitability against Fitness for Purpose: The Evolution of a Rule’ (2010) 32(2) *Sydney Law Review* 17.

⁵ For contemporary judicial comment on judges who drafted statutes, see discussion of the *Statute of Frauds 1677*, 29 Car 2, c 3 and the Lord Chancellor in *Pipikos v Trayans* (2018) 265 CLR 522, 580–2 [152]–[155] (Edelman J). I am grateful to Associate Professor Andrew Godwin for drawing this to my attention.

⁶ 3 & 4 Wm 4, c 85 (*‘Saint Helena Act 1833’*). Also titled *Charter Act 1833* and *Government of India Act 1833*, but it maintains the short title of *Saint Helena Act 1833* as per the *Statute Law Revision Act 1948*, 11 & 12 Geo 6, c 62, s 5, sch 2. As this provision has been repealed, the short title is authorised by the *Interpretation Act 1978* (UK) s 19(2). On the significance of the Act see Joshua Ehrlich, ‘The Crisis of Liberal Reform in India: Public Opinion, Pyrotechnics, and the Charter Act of 1833’ (2018) 52(6) *Modern Asian Studies* 2013

⁷ 53 Geo 3, c 5. Also titled *Charter Act 1813*.

The first Commission was a failure. Though it drafted reports, nothing was enacted.⁸ The events of 1857 altered the impetus of government, dislodging the East India Company, and establishing Crown rule.⁹ This led to an increase in legislative activity, including the *Code of Civil Procedure 1859* (India), the *Indian Penal Code 1860* (India), *Code of Criminal Procedure 1861* (India) and the *Indian High Courts of Judicature Act 1861*,¹⁰ passed by the British Parliament. They had all been drafted by the first and second Commissions.¹¹ It was only at this point that attention turned to substantive law, the job of the third Commission. The fourth Commission reviewed and carried forward the work of the third Commission.¹² Scholars have given attention to the first Commission and the Penal and Procedure Codes as a touchstone of legal modernisation and an emblem of imperial relations.¹³ There has been less notice of the subsequent Commissions and private law obligations.¹⁴

Although there are earlier traces of the idea of a code of law for India, it was articulated clearly by Rajah Rammohun Roy and subsequently by Thomas Babington Macaulay in the 1830s.¹⁵ Roy and Macaulay envisioned different things. The aristocratic social reformer, Roy, educated in the classical tradition of India (including

⁸ The *Indian Penal Code 1860* (India), published in 1837, was not enacted until 1860.

⁹ The variously termed War of Independence, Rebellion or Mutiny occurred in 1857.

¹⁰ 24 & 25 Vict, c 104.

¹¹ Mahendra Pal Jain, *Outlines of Indian Legal and Constitutional History* (Universal Law Publishing, 8th ed, 2006); Whitley Stokes, *Anglo-Indian Codes* (Clarendon Press, 1887).

¹² See, eg, *Negotiable Instruments Act 1881* (India). The third Commission reported on promissory notes, bills of exchange and cheques. This was also subject to a Select Committee and consultation process, something not welcomed by the Commissioners: see Letter Marked Confidential from William Macpherson, Indian Law Commission, to Mountstuart Elphinstone Grant Duff, 16 January 1869 (BL IOR L/PJ/5/428) ('Letter dated 16 January 1869').

¹³ See, eg, Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge University Press, 2010); David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 513.

¹⁴ Cf Stelios Tofaris, 'A Historical Study of the Indian Contract Act 1872' (PhD Thesis, University of Cambridge, 2011); Justice JD Heydon, 'The Origins of the Indian Evidence Act' (2010) 10(1) *Oxford University Commonwealth Law Journal* 1.

¹⁵ Rajah Rammohun Roy, *Exposition of the Practical Operation of the Judicial and Revenue Systems of India: And of the General Character and Condition of Its Native Inhabitants, as Submitted in Evidence to the Authorities in England* (Smith, Elder and Co, 1832) 43–5; Select Committee on the Affairs of the East India Company, *Report from the Select Committee on the Affairs of the East India Company: With Minutes of Evidence in Six Parts and an Appendix and Index to Each* (House of Commons Paper No 735, Session 1831–32) vol 5 ('*Report from the Select Committee on the Affairs of the East India Company*'); United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 1833, vol 19, col 479–550, 509 (James Buckingham) ('House of Commons *Hansard*').

Persian, the language of Mughal administration), wanted a civil code based on existing Hindu, Muslim and English law to assist judges and improve administration. There were both Indian and English judges in the complex court system. Macaulay, a deputy in the Board of Control which oversaw the East India Company from London, and Member of Parliament, wanted a single code as an adjunct to government and a check on power. He talked himself into a dual appointment on the Governor-General's Council and as first Indian Law Commissioner. Macaulay was soon making grandiose statements that knowledge of the 'Shasters and Hedaya [would] be useless' once his code, which was still to be drafted, was in place.¹⁶ Tension in views about the value, or otherwise, of pre-existing law and norms continued to play out in events leading to the resignation.¹⁷

The third Indian Law Commissioners resigned for a number of reasons. From the record, we can identify their frustration with the failure and delays in enacting legislation in India,¹⁸ the changes in India to the text of legislation proposed by the Commissioners, and a view that the 'legislators' in India were taking too much notice of 'the native'.¹⁹ From a commercial lawyer's point of view, the dispute was about title or property in goods, and from a jurisprudential perspective, the correct placement of a particular remedy (specific performance) as substantive or adjectival law — the Benthamite descriptors. From a political standpoint, it was about the distribution of powers between different arms of government. For an historian, they resigned for these and other reasons. The context of the resignation raises questions of despotism; who is the competent authority to make law; legal science; universality

¹⁶ Thomas Babington Macaulay, 'Minute by the Hon'ble TB Macaulay, dated the 2nd February 1835' (Minute, 2 February 1835) [30] <http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html>.

¹⁷ Gail Pearson, 'Consultation for a Code: Nineteenth-Century Consultation on the Proposed Commercial Laws' in N Jayaram (ed), *Ideas, Institutions, Processes: Essays in Memory of Satish Sabarwal* (Orient BlackSwan, 2014) 115.

¹⁸ The third Indian Law Commission resigned in 1870: 'File on Resignation of the Indian Law Commission' (Minute, 14–20 July 1870) (BL IOR L/PJ/5/438) ('File on Registration of the Indian Law Commission'). James Fitzjames Stephen attributed the resignation to delay: James Fitzjames Stephen, 'Codification in India and England: Opening Address of the Session 1872–3 of the Law Amendment Society' (1872) 1(11) *Law Magazine and Review* 963, 971.

¹⁹ The resignation correspondence appears to have been destroyed or altered. Partially decipherable handwritten letters of July 1870 between Henry Maine, Edward Ryan and H Anderson suggest Maine was in discussion with the Commissioners, that the Commissioners were rash in making a statement about favouring 'the native', and that the India Office was happy to oblige in deleting an offending sentence from the correspondence: File on Registration of the Indian Law Commission (n 18). Historically, Sir John Jervis took offence at having to refer proposals back to India: United Kingdom, *Parliamentary Debates*, House of Commons, 21 July 1856, vol 143, col 1121–71 (Vernon Smith). John Macleod had published a pamphlet in 1857 on the supposed autonomy of the Legislative Council of the Governor-General: EI Carlyle, 'John Macpherson Macleod' in Katherine Prior (ed), *Oxford Dictionary of National Biography* (Oxford University Press, rev ed, 2004).

of law; and whether a proper role for law, as recently put by Commissioner Kenneth Hayne in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, is to meet community expectations, and eliminate legislative complexity ridden with exceptions.²⁰

There is a further narrative. At the same time as the Commissioners were drafting codes of law for India, some of their members were involved in preparatory work in digesting laws to prepare codes of law for the United Kingdom ('UK').²¹ Success or failure in India would reflect on their work for Britain.

This is a story at the intersection of law and history. This article analyses the authority for lawmaking under four heads: the judges; the UK government; the government of India; and the community.²² There was a shift in tone from the sweeping statements of the 1830s to the post-1857 statements and action on law for India. The British did not wish to interfere in a way that unsettled the country and they required acceptable law. Consultation within India, not unlike an exposure draft process used today, became standard for commercial laws. Far from being useless, knowledge of Hindu and Muslim law and commercial norms contributed to the usefulness of responses to proposed legal rules. The Benthamite ideal of universal law was one thing; universal acceptance of another's authority to make and control law was another. The resignation marked recognition that commercial law rules could not be foisted onto India without attention to Indian governance and norms.

II THE JUDGES

We can start from two points here: Jeremy Bentham or controlling power in India.

Bentham rejected the common law and the role of judges and judicial decision-making, seen famously in his declaration that judges make the law (as if for a dog).²³

²⁰ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 456, 494.

²¹ See below n 35.

²² I am not using community in the sense usually understood in India. See, eg, Surinder S Jodhka, 'Community and Identities: Interrogating Contemporary Discourses on India' (1998) 47(2) *Sociological Bulletin* 254.

²³ Jeremy Bentham, *Truth Versus Ashhurst: Or, Law as It Is, Contrasted with What It Is Said to Be* (R Carlile, 1823), cited in HJ Randall, 'Jeremy Bentham' (1906) 22(3) *Law Quarterly Review* 311, 317. A fuller quotation is: '[i]t is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him. This is the way you make laws for your dog, and this is the way the judges make law for you and me': 'Truth Versus Ashhurst', *Bentham Project* (Web Page, 2020) <<https://www.ucl.ac.uk/bentham-project/truth-versus-ashhurst>>.

Bentham posited a code as providing certainty and intelligibility as to what a person could or could not do compared with the opaqueness of ‘judge-made Law’.²⁴

Alternatively, we can start with British attempts to constrain the East India Company in the late 1820s by controlling a small Crown court with limited jurisdiction within Calcutta: the Supreme Court of Judicature at Fort William at Calcutta (Kolkata) (‘Supreme Court’). At this point, the Governor-General-in-Council had the power to make law within the territories of the Company in India,²⁵ but these laws had to be accepted by the judges of the Supreme Court who were also accused of exceeding their jurisdiction. The Supreme Court, established in 1774 by the *Regulating Act of 1773*, 13 Geo 3, c 63, derived its authority from the British Crown. It was distinct from the *Suddar* or *Adalat* courts dating from 1772 which perpetuated Mughal traditions. Lord William Bentinck’s proposal was for a Legislative Council subordinated to the English Parliament and also for a code of law, the idea being that a code of law would restrain the judges.²⁶

When we get to the later debates on the desirability of codes for India, a common theme to justify codes was the lack of quality judges in all the multitude of courts in India. English judges in India were insufficiently experienced to develop the common law; many were not qualified to practice in the UK.²⁷ They were individuals exercising some kind of judicial function who had no legal training, with many depending on interpretations of law by Indian lawyers which were said (by Roy) to be inconsistent.²⁸ Contradictorily, arguments against codification for Britain were led by some judges who strongly resisted changes to the common law and, presumably, did not view themselves as unqualified.²⁹ So, there were views that because judges could not make law for India but could make or declare law for the UK, that a code

²⁴ The Juridical Society, *Papers Read Before the Juridical Society: 1855–1858* (V & R Stevens & GS Norton, 1858) 213.

²⁵ Select Committee on the Affairs of the East India Company, *Appendix to the Report on the Affairs of the East India Company Vol V: Legislative Councils, A New System of Courts of Justice and a Code of Laws, in British India* (House of Commons Paper No 320E, Session 1831) 79, 97 (‘*Appendix to the Report on the Affairs of the East India Company*’). There were issues about the English inhabitants.

²⁶ *Ibid* 54.

²⁷ East India (Judges), *Return of the Judges Now Presiding in All the Law Courts in India: Distinguishing Those Who Were Entitled to Practise at the Bar in England, Ireland, or Scotland, from Those Who Have No Such Legal Qualification* (House of Commons Paper No 556, Session 1867).

²⁸ Roy (n 15); *Report from the Select Committee on the Affairs of the East India Company* (n 15) 726.

²⁹ On judicial opposition to codification in England because it threatened the common law method and the central role of judicial reasoning, see Lindsay Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners 1833–45’ (2000) 18(2) *Law and History Review* 397; Michael Lobban, ‘How Benthamic Was the Criminal Law Commission?’ (2000) 18(2) *Law and History Review* 427.

of law would be more useful for India than for Britain, and that British judges could draft legislation for India.³⁰

Who were the Law Commissioners charged with drafting codes of law for India? The first Commission, initially headed by Macaulay (a friend to both Roy and Bentham), did not include judges.³¹ As Macaulay took up the new post as Law Member to the Governor-General-in-Council in 1834, this Commission actually sat in India.³² Subsequent Commissions included a strong contingent of judges. There was some overlap between the second and third Commissions.³³

The relevant judges were Sir John Romilly, Sir John Jervis, Sir William Erle, Robert Lush and Sir Edward Ryan. Romilly, later Lord Romilly, was on both the second and third Commissions. He was Master of the Rolls, a senior judge in Chancery, and from

³⁰ But note that English judges in Bombay such as James Mackintosh and Erskine Perry supported legal reform in both the UK and India.

³¹ The role of Law Member on the Legislative Council of the Governor-General was created with the *Saint Helena Act 1833*. Macaulay had been called to the Bar but did not have a legal career. JM Macleod, also later on the third Law Commission, was an East India Company linguist and civil servant initially in Madras. He was involved in drafting the Penal Code which included illustrations and may have influenced the third Law Commission to adopt illustrations in the *Indian Contract Act* to supplement legislative rules. He was appointed to the Privy Council in 1871. On the purpose of illustrations, see: Lord Macaulay, *Speeches and Poems: With the Report and Notes on the Indian Penal Code* (Houghton, Osgood and Company, 1878) 313–29, 352; TB Macaulay, JM Macleod, GW Anderson and F Millett, *Indian Law: A Copy of the Penal Code Prepared by the Indian Law Commissioners and Published by Command of the Governor-General of India in Council*, 14 October 1837 (House of Commons Paper No 673, Session 1837–38).

³² The position of Law Member and Chair of the Indian Law Commission was originally distinct. Macaulay was in India by the end of 1834. It is suggested Macaulay took up the role in India because it paid well. The Commission was to investigate ‘the Nature and Operation of all Laws whether Civil or Criminal, written or customary, prevailing and in force in any Part of the said Territories, and whereto any Inhabitants of the said Territories, whether *Europeans* or others, are now subject’: Frederick Arnold, *The Public Life of Lord Macaulay* (Tinsley Brothers, 1863) 176, 177, 180; *Saint Helena Act* (n 6) s 53.

³³ The second Commission was appointed in 1853. Its focus was courts and procedure. Better facilities were the reason given for sitting in England. In any case, those appointed were highly unlikely to have agreed to spend any considerable time in India. The Commissioners were Sir John Romilly, Sir John Jervis, Sir Edward Ryan, Charles Hay Cameron, John McPherson McLeod, John Abraham, Francis Hawkins, Thomas Flower Ellis, and Robert Lowe (later Lord Sherbrooke). The third Commission was appointed in 1861, again chaired by Romilly. The other Commissioners were Sir William Erle, Sir Edward Ryan, Robert Lowe, Sir James Shaw Willes and John Macpherson Macleod. WM James and J Henderson became Commissioners later. The Commission Secretary was Sir William Macpherson.

a Benthamite family as his father was Sir Samuel Romilly.³⁴ Jervis was Chief Justice of the Court of Common Pleas and central to the reform of English local courts. He was on the second Commission. Erle, to become Chief Justice of the Common Pleas and a Privy Councillor, Sir James Shaw Willes also on Common Pleas, and Lush, later Lord Justice Lush, of the Queen's Bench and the Privy Council, were on the third Commission. Ryan, a former Chief Justice in Calcutta, and friend to Macaulay, was on both the second and third Commissions.

The top British judges in law and equity were drafting codes for India. These judges were also closely involved with law reform and codes in the UK.³⁵ They were invested in a project that could be described as an experimental laboratory or a substitute for what was also proving stubbornly unsuccessful for the UK. In the third Commission, they drafted detailed rules on contract which did not always replicate the law as found in the common law in Britain.³⁶ Their rules were designed as an improvement, not a vulgarisation of British law.

The third Commission led by the British judges resigned because they did not want anyone, lest of all those in India, to interfere with the rules they drafted. They were arguing for scientifically devised rules.³⁷ They resigned, alleging that laws in India were being made by an unelected, unrepresentative body: the Executive Council. It is ironic that the first Commission had affirmed the sentiment: '[t]he discretion of a judge is the law of tyrants'.³⁸

³⁴ The Master of the Rolls presided over the Rolls Court that existed from 1833–81. The office of Master of the Rolls continues in name, though the office is now a presiding member of the England and Wales Court of Appeal: 'History of the Master of the Rolls', *Magna Carta Today* (Web Page) <<https://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/history-of-the-master-of-the-rolls/>>.

³⁵ Romilly set up the Chancery Commission and the Statute Law Consolidation Commission. Jervis chaired a series of enquiries into procedure in the common law courts. Erle was a Judicature Commissioner. Lush was a member of the English Criminal Code Committee. Ryan was a member of the English Commission on Criminal Procedure. Lowe, Willes and Maine were on the Digest of the Law Commission.

³⁶ They did not replicate the *Statute of Frauds 1677*, 29 Car 2, c 3 requiring contracts to be in writing. They modified the doctrine of consideration, rejected gradations of bailment, proposed a general standard of care, and eliminated the distinction between penalties and liquidated damages. They proposed a controversial rule on passing ownership in goods. As Whitley Stokes points out, some rules, as eventually passed, departed from civil, English, Hindu and Muslim law: Stokes (n 11) 624–5. The bailment rule in s 165 of the *Indian Contract Act* states: '[i]f several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary'. They were well aware of European and proposed United States' codes.

³⁷ Letter dated 16 January 1869 (n 12).

³⁸ East India (Indian Law Commission), *Copies of Special Reports of the Indian Law Commissioners* (House of Commons Paper No 272, Session 1845) "On Civil Judicature in the Presidency Towns" 108.

III THE UK GOVERNMENT

Constraining tyranny or despotism had been a prime reason for establishing a Commission to make codes of law for India in the first place. The Benthamites had rejected judge-made law in preference for a code, the Sovereign had appointed judges as Commissioners, and the judges tasked with drafting that law had resigned. Should the UK government have had the authority with respect to the details of code — in our case, commercial law rules?

In 1833, Macaulay debated the renewal of the Charter for the East India Company.³⁹ His conundrum was how to bring good government without bringing free government, and how to provide security against oppression without representative government.⁴⁰ How to graft the blessings of the ‘natural fruits of liberty’ onto ‘despotism’ and check abuses?⁴¹ For Macaulay, law was the answer and reform would balance the competing interests of the Supreme Court and the Governor-General. And a code was the answer to law:

Having given to the Government supreme legislative power, we next propose to give to it for a time the assistance of a Commission for the purpose of digesting and reforming the laws of India, so that those laws may, as soon as possible, be formed into a code.⁴²

Macaulay was unfazed by absolutist government in India compared with representative government in England. A code made by an absolutist government in India was an answer to arbitrary judge-made law. At the same time, the ‘Imperial Parliament’ was to be the ‘umpire’.⁴³

The Crown gained authority after 1857 and in 1861, the *Indian Councils Act 1861* (India) reserved to the Queen the right to disallow any law passed by the Governor-General. In an early skirmish involving law reform, the Secretary of State (a role which replaced the President of the Board of Control) wrote to the Governor-General pointing out that the power ‘to control and direct the action of the Government of India’ that had once been held by the East India Company, was now held by the Secretary of State — it had not been ‘taken away or curtailed’.⁴⁴ The Secretary

³⁹ House of Commons *Hansard* (n 15) 509.

⁴⁰ *Ibid* 512–13.

⁴¹ *Ibid* 513.

⁴² *Ibid* 530. Macaulay was not the first to propose codes for India.

⁴³ *Ibid* 528. Section 41 of the *Saint Helena Act 1833* still gave the Board of Directors of the East India Company power to disallow any Act of the Indian legislature within one year. But the Company was subject to control of the Parliament.

⁴⁴ Letter from the Secretary of State for India to the Governor-General of India, 31 March 1865, [9], reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (BL IOR PP LVI 1876 *East India Legislation*) (‘Letter dated 31 March 1865’). This concerned the Civil Procedure Code which had been drafted by the second Commission and was being considered by the Select

of State equated Bills of the Indian government with government Bills in the UK Parliament. He chided the Governor-General for sharing despatches with his Council when it included additional members for making legislation.⁴⁵

When the tussle began with Sir Henry Maine, the Law Member on the Governor-General's or Viceroy's Executive Council, the Law Commissioners believed the UK government should decide whether or not to adopt their reports, with or without modification. They said if the 'local' Legislative Council was the 'fitter body', the Commission could not be 'justified'.⁴⁶

The British Secretary of State for India backed the Law Commissioners. He directed a procedure for code lawmaking. In India, it should involve only the Legislative Council ie, the Governor-General-in-Council, and confidential advice from local judges or administrators. It should not involve a Select Committee.

The following, directed by the Secretary of State, should be the procedure for code lawmaking. The Secretary of State sends a proposed law to the Viceroy. Any local judicial or administrative advice, if required, should be confidential. The proposal should then be considered in Council. Any doubts should be communicated to the Secretary of State. The Secretary of State would consult the Law Commissioners. The law would be returned to the Viceroy in the desired shape. The law would then be introduced into the Council for making laws and regulations. The Viceroy would use all measures to pass the law as a government measure. There was an exception for a 'strong unforeseen objection'.⁴⁷

The sticking point for both Maine and later James Fitzjames Stephen, who succeeded him, was the opportunity to discuss the drafts sent from the Law Commissioners in a Select Committee (which had wider membership than the Legislative Council), circulate a proposed law for comment within India and communicate directly with the Law Commissioners.⁴⁸ They did not want the Secretary of State to be legislator and the Council 'a mere instrument'.⁴⁹

Committee of the Governor-General-in-Council: Letter from Governor-General of India to the Secretary of State for India in Council, 15 December 1864 (BL IOR PP LVI 1876 *East India Legislation*) ('Letter dated 15 December 1864').

⁴⁵ Letter dated 31 March 1865 (n 44).

⁴⁶ Letter dated 16 January 1869 (n 12).

⁴⁷ Letter from Argyll, Secretary of State for India to the Governor-General of India, 18 March 1869, [2], reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (National Archives of India (NAI) Home Legislative A Department May 1872, No 600) ('Letter dated 18 March 1869').

⁴⁸ HS Maine, 'Minute by the Honourable HS Maine on the Indian Contract Bill' (NAI Home Legislative A Department May 1872, No 579, 11 September 1868) (BL IOR PP LVI 1876 *East India Legislation*) ('Minute by the Honourable HS Maine on 11 September 1868'); James Fitzjames Stephen, 'Procedure in Making Laws No 5' (Minute, 11 February 1870) 109 (BL IOR /V/27/100/6) ('Procedure in Making Laws No 5').

⁴⁹ Letter from the Government of India to the Secretary of State for India, 22 March 1870 (NAI Home Legislative A Department May 1872, No 601) (BL IOR PP LVI 1876 *East India Legislation*) ('Letter dated 22 March 1870'). See also below n 64.

By contrast, John Stuart Mill, supporter of the Company and sometime opponent of the Secretary of State, had earlier put the matter differently. He said that the government in England could not hand over its ‘sacred trust to a few despots, armed with the whole power of the stronger country’.⁵⁰ His solution was for the UK Parliament to legislate for India and then direct the Legislative Council to pass the law or have no role at all.⁵¹ Mill believed the government of India incapable of governing and the Law Commissioners more competent and qualified.

There were three contenders for despot: the Secretary of State, aided by the Law Commissioners; the Governor-General ie, Viceroy; and law. The Secretary of State and Governor-General were accountable. There was ‘representation’ of a sort in the UK as a check on power — though the Parliament took very little interest in India. Law itself might stand in for the Commissioners. Radhika Singha argued for law as despotism⁵² — and unless law is intelligible and knowable, reflects social norms, and is allied to legal reasoning within court systems to properly resolve disputes, it *may* be. The argument for a code as despotism might have been stronger, *but for* the process in India for formulating its rules.

IV THE GOVERNMENT IN INDIA

The government in India did not want law foisted upon it.⁵³ Six years before the Commissioners resigned, the Governor-General had warned of embarrassing conflict if the government in India were forced to halt a properly introduced Bill due to ‘orders from home’.⁵⁴ At this point, the Secretary of State wished for ‘harmonious action’ and ‘the well-being of that vast and important empire’.⁵⁵ At the same time, he insisted that his despatches on legislative matters should not go beyond the Governor-General-in-Council to a Select Committee.⁵⁶ But the question of whether

⁵⁰ John Stuart Mill, ‘Minute by Mr John Stuart Mill’ (Minute), reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (BL IOR PP LVI 1876 *East India Legislation*) (‘Minute by John Stuart Mill’). This undated Minute was possibly in the context of proposed amendments to the Code of Civil Procedure passed in 1859. See above n 44.

⁵¹ *Ibid.*

⁵² Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press, 1998).

⁵³ The UK Parliament had first conferred legislative power on the Governor-General-in-Council in India in 1772 and all legislative power on the Governor-General-in-Council with the *Government of India Act 1833 (Saint Helena Act 1833)*: MD Chalmers, ‘The Indian Statute Book’ (1897) 2(1) *Journal of the Society of Comparative Legislation* 299, 302, 304.

⁵⁴ This was in the context of postponing the Civil Procedure Code: Letter dated 15 December 1864 (n 44) [9].

⁵⁵ Letter dated 31 March 1865 (n 44) [16].

⁵⁶ *Ibid.*

the government of India could legislate on its own responsibility or would be forced to adopt legislation did not go away.

The resignation of the third Commission involved a quarrel over the relative powers of the Secretary of State and the Governor-General-in-Council. It was also a quarrel over who could talk directly with whom. Could the Select Committee in India communicate directly with the Commissioners in the UK? Could the government in India canvas those in India (British and Indian), who may have useful opinions on particular rules?

The actual process in India for considering a proposed law did not accord with UK expectations of how this should happen. In India, there was ‘real power in the discussion’ of the proposed codes, but not until drafts were sent to a Select Committee.⁵⁷ A Select Committee included English and Indian business interests in addition to the civil service members.⁵⁸ The Select Committee discussed Bills with the aid of comments from the Law Member and opinion from an exhaustive consultation process in India. Mill thought this simply wasted time and resulted in premature criticism.⁵⁹

Maine produced copious commentary for the Indian Contract Bill.⁶⁰ He was frustrated by the inability of the Law Member or Select Committee in India to communicate directly with the Commissioners in the UK.⁶¹ If the Select Committee could not communicate directly with the Commissioners as Maine proposed via the Indian Legislative Secretary (who would correspond with the Secretary of the Law Commission), he had a solution. Either the Commissioner’s legislation was a draft for the Indian legislature to work on, or the Secretary of State should ask Parliament to declare the Commissioner’s proposals to be law at once, possibly subject to amendment by the Council for making laws and regulations.⁶² Maine said ‘[t]he first

⁵⁷ Letter dated 22 March 1870 (n 49).

⁵⁸ Minute by the Honourable HS Maine on 11 September 1868 (n 48).

⁵⁹ Minute by John Stuart Mill (n 50).

⁶⁰ Notes by Mr Maine (15 July 1867, 23 July 1867, 25 July 1867, 27 July 1867, 14 August 1867), reproduced in House of Commons, *East India (Contract Law): Copies of Papers Showing the Present Position of the Question of a Contract Law for India and of All Reports of the Indian Law Commissioners on the Subject of Contracts* (House of Commons Paper No 239, Session 1867–68) 91, 94, 95, 97, 99 (‘*East India (Contract Law)*’); Draft Indian Contract Bill 1867 (India) (‘Draft Indian Contract Bill’); Sir Henry Maine, ‘Statement of Objects and Reasons’, *Gazette of India* (New Delhi, 9 July 1867) (‘Statement of Objects and Reasons’). During this period of discussion by the Council, there were also comments from the Governor-General and from other members, especially Major-General Sir Henry Marion Durand: Sir Henry Maine, ‘Minute by the Honourable HS Maine on 9 April 1868’ (NAI Home Legislative A Department May 1872) app S1 (‘Minute by the Honourable HS Maine on 9 April 1868’).

⁶¹ Minute by the Honourable HS Maine on 11 September 1868 (n 48).

⁶² *Ibid.*

result will, I am convinced, be ultimately most offensive to the Law Commissioners; the last, I am informed, is viewed with distrust by the authorities most responsible for the good government of India'.⁶³

The Commissioners were aggrieved that the authorities in India treated their reports as mere drafts criticised by subordinates, that some rules were 'publicly condemned' and revised by a Committee of the Legislative Council, and that the style and language of the code was ultimately decided by the Council.⁶⁴ The Commissioners regarded Maine's views on certain technical matters as unjustified. They criticised those who debated their drafts, believing they should have been treated as government Bills. The Commissioners said the government of India misapprehended its relationship with the Commissioners and issued a challenge at the beginning of 1869: 'If the local Council, acting in its legislative capacity, is the fitter body to decide on these subjects, the existence of the Indian Law Commission cannot be justified.'⁶⁵

Stephen, who replaced Maine as Law Member by the end of 1869, also commented extensively on the process of lawmaking. He rejected the procedure directed by the Secretary of State as it circumvented a Select Committee and gave primacy to the Commissioners. The Select Committee discussed drafts clause by clause — if the Governor-General-in-Council had to do this, it would create a heavy burden and be detrimental to other work.⁶⁶ Stephen put the matter succinctly in 1870 prior to the Commissioners' resignation: if there were no legislative discretion in India, he said, the Secretary of State would be invested 'with the character of the legislator for British India, and would convert the Legislative Council into a mere instrument to be used by him for that purpose'.⁶⁷

Stephen raised another problem if proposed legislation was not fully discussed. If matters were not debated in a Select Committee, not only would there be no input from non-officials with knowledge and wide experience of 'every part of the country', they would be unlikely to participate in lawmaking at all.⁶⁸ In the end, Stephen was quite blunt in his declaration of March 1870: 'We are responsible for the enactment of those drafts into laws, and that responsibility appears to us to carry with it the right of deciding upon the form in which Acts are to come before your Grace for final approval or rejection.'⁶⁹

The Commissioners then resigned and the Secretary of State continued to assert the subordination of the government of India, noting it was no different from other 'dominions where the authority of the legislating body is derived from the Crown,

⁶³ Ibid.

⁶⁴ Letter dated 16 January 1869 (n 12).

⁶⁵ Ibid.

⁶⁶ Procedure in Making Laws No 5 (n 48).

⁶⁷ Ibid.

⁶⁸ Letter dated 22 March 1870 (n 49) [6].

⁶⁹ Ibid [10].

and is not founded on the principle of popular representation'.⁷⁰ Yet, as acknowledged by the Secretary of State, Bills may require modification due to 'local circumstances, the habits or the prejudices of the people'.⁷¹ This was a significant departure from the earlier stance.

Stephen also threatened to resign if any remaining Commissioners or a new Commission was put over his head.⁷² The government of India was conciliatory, stating that it had never disputed the principle of 'final control'.⁷³ The Secretary of State wanted legislation passed quickly to address the issue of delay. Stephen did not want this. He wanted the opportunity to put his stamp on the legislation and in particular take advantage of the hot weather recess in Simla to do this.⁷⁴ Stephen indeed made a number of changes to definitions and arrangement of clauses. He wrote another report for the Select Committee, and the *Indian Contract Act* was passed in 1872 and forwarded to the UK.⁷⁵ Through this time, Stephen remained in correspondence with the Secretary of State, boosting his own capacity and belittling the Commissioners, but he did not burn any bridges.⁷⁶

V LEGISLATIVE DESIGN

Through July and August of 1867 in India, Maine, the Law Member on the Council, and the Governor-General disputed the correct place for a set of rules on the remedy of specific performance. Maine said they were not 'substantive law', should not be in the contract law, and as adjectival law should go into the Code for Civil Procedure when it was revised.⁷⁷ The report of the Commissioners on contract law

⁷⁰ Letter from the Secretary of State for India to the Governor-General of India, 24 November 1870, [14] ('Letter dated 24 November 1870').

⁷¹ Ibid [15].

⁷² Letter from James Fitzjames Stephen to George Campbell, Duke of Argyll, 10 January 1871.

⁷³ Letter from the Governor-General of India to the Secretary of State for India, 1 February 1871, [2].

⁷⁴ James Fitzjames Stephen, 'Recasting of the Earlier Parts of the Indian Contract Bill' (Minute No 32, 29 October 1871) (BL IOR /v/27/100/6) ('Recasting of the Earlier Parts of the Indian Contract Bill').

⁷⁵ Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership, *Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership* (Report No 602, 22 February 1870) ('*Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership*').

⁷⁶ Letter from James Fitzjames Stephen to George Campbell, Duke of Argyll, 12 October 1871 ('Letter dated 12 October 1871').

⁷⁷ Statement of Objects and Reasons (n 60); *East India (Contract Law)* (n 60).

was in the form of a code of ‘substantive law’,⁷⁸ and characterised as ‘scientific’.⁷⁹ Maine believed that in this instance they had it wrong. He rejected the suggestion that placement was merely a ‘technical’ question, noting that ‘[s]cientific faults are of great importance in our codes, which are destined, I am sure, to exercise great influence on English jurisprudence’.⁸⁰

Substantive law was the reason for the third Commission. The distinction between substantive and adjectival law, attributed to Bentham,⁸¹ influenced John Austin (and also Romilly and Mill) who later rejected this distinction.⁸² The first Commission adopted the terms ‘adjective’ or procedural law, and substantive law.⁸³ They borrowed the terms to wrestle with questions of *lex loci* and competing legal systems, and to resolve, for India, the ‘intricate, [expensive] and dilatory’ approach to justice involved in two sets of courts — law and equity.⁸⁴ Although focused on the judicial structure and court procedure, the second Commission explicitly advocated substantive law for all as the law of India, naming contract law in particular.⁸⁵

Maine first omitted the specific performance clauses from the draft Bill.⁸⁶ The Governor-General wanted them in the Bill, saying they could be debated. Maine compromised, saying they could go in the Bill but at the end — out of deference to the Commissioners. The result was that the Governor-General agreed to omit them.⁸⁷

⁷⁸ Other laws were also styled as codes, such as the *Indian Penal Code 1860* (India), the *Code of Criminal Procedure 1973* (India) and the *Code of Civil Procedure 1908* (India).

⁷⁹ Letter from Argyll, Secretary of State for India to Governor-General of India, 24 November 1870 (BL IOR PP LVI 1876 *East India Legislation*).

⁸⁰ *East India (Contract Law)* (n 60) 98.

⁸¹ See, eg, Albert Kocourek, ‘Substance and Procedure’ (1941) 10(2) *Fordham Law Review* 157, 157; Thomas O Main, ‘The Procedural Foundation of Substantive Law’ (2010) 87(4) *Washington University Law Review* 801, 804.

⁸² See generally John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832); Philip Schofield, ‘Jeremy Bentham and Nineteenth-Century Jurisprudence’ (1991) 12(1) *Journal of Legal History* 58, 68.

⁸³ East India (Indian Law Commission), *Copies of the Special Reports of the Indian Law Commissioners* (House of Commons Paper No 585, Session 1842) 13 (‘*Copies of the Special Reports of the Indian Law Commissioners No 585*’). See also a report in this source on substantive law or civil law for all in the mofussil not subject to Hindu or Muslim law, and also a *lex loci* theory: at 439.

⁸⁴ *Copies of the Special Reports of the Indian Law Commissioners No 585* (n 83) 462–3. The term ‘substantive law’ is used in the draft *lex loci* legislation: East India (Indian Law Commission), *Copies of the Special Reports of the Indian Law Commissioners* (House of Commons No 14, Session 1847) 699.

⁸⁵ *Second Report* (n 1) 8.

⁸⁶ Draft Indian Contract Bill (n 60).

⁸⁷ The matter was fully discussed in the Legislative Council: Note by His Excellency the Governor-General (NAI Home Legislative A Department No 4, 16 August 1867). See also *East India (Contract Law)* (n 60) 50, 101. The Draft Bill as published in the Gazette did not include them.

For the Governor-General, the question was not a theoretical one of the correct category of law, but a practical one. In addition to substantive or procedural law, the specific performance rules raised another question of legislative design: exceptions to a general rule. They did not apply to cultivation contracts.⁸⁸ The circumstances of cultivators forced to grow indigo had already been the subject of a Royal Commission.⁸⁹ The Governor-General believed the real objection was not a technical one, but the use of exceptions.⁹⁰

The Commission received the full correspondence on Maine's views on these remedial rules as substantive law, sent first to the Secretary of State.⁹¹ Only a few years earlier, the Commissioners had objected to procedural legislation being postponed.⁹² They rejected Maine's view that specific performance was adjectival and should not be in a code of substantive law, and proceeded to devote a whole report to the matter. They were adamant that 'the proper place for the clauses relating to the specific performance of contracts is in the Code of Substantive Law and not in the Code of Procedure'.⁹³ They said that 'rights and liabilities' and their enforcement were substantive law, and the 'mode' of their enforcement was procedural law.⁹⁴ Their argument referred to international authority and works of jurisprudence.⁹⁵

⁸⁸ See *East India (Contract Law)* (n 60) with the *Second Report* (n 1) s 52. See also *East India (Contract Law)* (n 60) 4, 18. Enforcing cultivation of indigo contracts was highly controversial: Minute by the Honourable HS Maine on 9 April 1868 (n 60). Enforcement of cultivation and labour contracts for indigo cultivation had been the subject of a Royal Commission: Imperial Legislative Council of India, *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Laws and Regulations 1867: With Index* (Office of Superintendent of Government Printing, 1868) vol 6. See also Letter from Governor-General-in-Council to Secretary of State Home Legislative, 9 January 1869 (BL IOR L/PJ/3). This letter refers to a report by the judges of the Small Causes Court of Champaran on the nature of indigo suits in that court.

⁸⁹ See WS Seton-Karr, *Report of the Indigo Commission Appointed under Act XI of 1860: With the Minutes of Evidence Taken Before Them* (Report, 1860).

⁹⁰ Note by Mr Maine (27 July 1867), reproduced in *East India (Contract Law)* (n 60) 97. There was a further 'evil' problem involving debt and land set out by Maine whereby unexecuted decrees were hoarded, traded and used for 'monstrous oppression'. Maine had also earlier drafted revisions to the Code of Civil Procedure to address this, which had been rejected by the Secretary of State: at 97–8.

⁹¹ *East India (Contract Law)* (n 59) 101–2.

⁹² See discussion above.

⁹³ Romilly (Law Commissioners), *Fourth Report* (Report, 18 December 1867), reproduced in *East India (Contract Law)* (n 60) 100.

⁹⁴ *Ibid.*

⁹⁵ The references were to the New York Code of David Dudley Field (drafted but not passed), to Austin (see above n 82), and to Mr Justice Story, another American and legal author, specifically to Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (Hilliard, Gray & Company, 1836) vols 1–2. The Commissioners said they treated specific performance as substantive law: *India (Contract Law)* (n 60) 102.

They believed the omitted sections embodied ‘rules of law’ based on ‘principles of jurisprudence’ of ‘universal application’ which would be ‘equitable and beneficial for all classes of the inhabitants of India’.⁹⁶ This invoked the intellectual authority of Bentham. The Commissioners led by Romilly were contesting a fundamental tenet of the code lawmaking process with Maine. They did not prevail.⁹⁷ In response to the Commissioners’ report, Maine wrote a minute analysing both Bentham and Austin on substantive and adjectival law and argued that in Austin’s schema, specific performance would also fit into procedural law.⁹⁸

The background to locating the specific performance rules and creating exceptions in a statute was to protect ‘ryots’ (tenant cultivators), and avoid the risk of inflaming planters, often English, who may have wished to enforce their cultivation contracts for indigo and other crops. This was a matter of social context. Further questions of local knowledge and norms, but not representation, remained.

VI COMMUNITY NORMS

The achievement of the *Indian Contract Act* is that it created a code of civil or commercial, as distinct from criminal, law that is applicable to all persons irrespective of other affiliations — religion, race, region or gender. The Commissioners had drafted rules that could cure confusion of applicable rules in the UK and applicable jurisdiction and rules in India. They were more interested in rules of universal application, not rules suitable for the circumstances of India.

But this is not entirely what happened. Remember, the Law Member was Maine. He had already written the book *Ancient Law*, about how the spread of Roman law in Europe had forestalled the organic development of the law.⁹⁹ The common law, which develops through precedent and principle expounded by judges, is viewed as organic. It is said to express the needs of the people and juridify normative values. Could a code drafted in the UK by English jurists and debated in India do this? Mill, who had little interest in Indian debate, thought all that was necessary was knowledge of India from books.¹⁰⁰

⁹⁶ *East India (Contract Law)* (n 60) 102.

⁹⁷ Subsequent Select Committees confirmed the omission of specific performance. New legislation was drafted in 1875 and became the *Specific Relief Act 1877* (India).

⁹⁸ Minute by the Honourable HS Maine on 9 April 1868 (n 60).

⁹⁹ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (John Murray, 1861).

¹⁰⁰ Mill stated: ‘But legislation, in many of its parts, is to a great degree an affair of general principles; and the local knowledge which it requires is such as can be obtained from books and records, or from a past residence in the country: it is not necessary that the legislators should reside there at the present time; and from the variety of personal endowments, it will occasionally happen that the persons, or some of the persons, best qualified to legislate for India, will be resident in England’: Minute by John Stuart Mill (n 50) 17.

In India, universal application meant something more than an aspiration for the whole of civilisation. It involved common jurisdiction and rejecting different laws for different persons. Before Macaulay, when codes were considered, an underlying question was whether they should embrace all inhabitants or inscribe distinctions between Muslims, Hindus and others.¹⁰¹ The Calcutta judges expressed both views.¹⁰² Though regarding it strategic to omit references to a code, the Governor-General at the time thought one code for all was inevitable and mused on a Legislative Council that was not ‘representative’ but included the interests of both British merchants and wealthy Indians.¹⁰³ Sir Charles Grey, a Judge, and Ryan, also a Judge and later Law Commissioner, believed ‘it would *not* be difficult to put ... the law of contracts, upon one footing for all descriptions of persons in India’.¹⁰⁴ They did not wish to impose British law but to establish a system of law ‘best adapted’ to the country.¹⁰⁵ Even so, when the second Commission proposed a complete code of substantive law for India based on English law — yet revised and reframed to accord with ‘enlightened jurisprudence’ and ‘the customs and prejudices of the natives’ — two of the Commissioners rejected this as overly ambitious.¹⁰⁶ Still, this is what Maine and Stephen achieved for the *Indian Contract Act*.

Indian norms should be taken into account, according to Maine. The Benthamite Commissioners had provided something that was more than a statement of English law and much less than law infused by Indian practice. Maine believed that people in India would take a greater interest in the *Indian Contract Act* than in the other codes. The view that legislating required input from those impacted by law, not just officials, was not new. This was not at odds with the view that a code would overcome the problems of unqualified or insubordinate judges, clarify and modernise the law, and make that law certain and accessible. It is a partial answer to law as despotism. Maine rejected the utter subordination of the Indian legislative process to Britain.

¹⁰¹ In 1806, a proposal for a ‘special code’ envisaged three sets of laws: Select Committee on the Affairs of the East India Company, *Minutes of the Evidence Taken before the Select Committee on the Affairs of the East India Company* (House of Commons Paper No 735 (VI), Session 1831–32) 147.

¹⁰² *Appendix to the Report on the Affairs of the East India Company* (n 25) 57, 77, 95, 97.

¹⁰³ Lord WC Bentinck stated in relation to the debate: ‘If any addition were made to the existing established authorities, which I consider for the present to be inexpedient, I should infinitely prefer native gentlemen, whose rank in society and great wealth seem to entitle them to the distinction; while the Council itself would derive from their knowledge of the character, manners and feelings of the natives, that information which the most experienced Europeans so imperfectly possess.’: *Appendix to the Report on the Affairs of the East India Company* (n 25) 101.

¹⁰⁴ *Appendix to the Report on the Affairs of the East India Company* (n 25) 111–12 (emphasis added).

¹⁰⁵ *Ibid* 169, 186.

¹⁰⁶ *Second Report* (n 1) 11.

Yet he has been interpreted as providing a mere liberal ‘alibi of empire’.¹⁰⁷ His claim for the importance of Indian ideas and practices to the Indian Contract Bill is less a reification of custom and more a recognition of values to the integration of law and to a compact (however imperfect) between the governed and governing.

From September 1867, Maine ensured that the Indian Contract Bill (minus the specific performance clauses) was distributed to official India, with instructions for further circulation, including to businesspeople. Comments arrived throughout 1868. Although most of those who made submissions on the Bill were British, there was a strong showing from Indian commentators. All submissions discussed rules and customs in great detail. There was little consensus among commentators on whether there was a pre-existing contract law, or on details of many rules. The submissions addressed the differences between Muslim, Hindu and English law and drew on relevant texts and treatises, which were often written by Englishmen.¹⁰⁸ Those consulted commented at length, sometimes in contradiction with each other, on synchronicity and divergence of intended rules from English law and from Hindu and Muslim law. There were limits to consultation, but for those who read and chose to comment on the proposals, there was opportunity to provide a detailed account of their expectations of the proposed contract law, state what they approved of, and set out differences of opinion on particular rules.

One issue in particular was important: whether a person in possession of goods (including stolen goods), who was not the owner, could pass property in those goods to another person (the *nemo dat quod non habet* rule).¹⁰⁹ In Bombay, it would have been a scandal if it became necessary to tell a person that their stolen camel, traced to another, was no longer their property.¹¹⁰ In Madras, the rule was not considered necessary to trade, would encourage theft, and judges warned of ‘mere doctrinaire legislation framed without a sufficient knowledge of or regard for the wants of the people’.¹¹¹ In Bengal, ‘[a]ll the Native gentlemen who [FL Beaufort] consulted on

¹⁰⁷ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010) 177. Mantena does not discuss the *Indian Contract Act* in any detail.

¹⁰⁸ Pearson (n 17).

¹⁰⁹ Clause 75 of the Indian Contract Bill read: ‘The ownership of goods may be acquired by buying them from any person who is in possession of them: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.’ In the Law Commissioners’ original text, prior to the omission of the specific performance rules, this was found in s 81. For a detailed account, see Gail Pearson, ‘A Cattle Lifter’s Bill: The Nemo Dat Rule and the Indian Contract Act’ (2015) 89(1) *Australian Law Journal* 31.

¹¹⁰ Letter from William Wedderburn, Under-Secretary to the Government of Bombay, to the Secretary to the Government of India, 10 May 1868 (NAI Home Legislative A Department May 1872 No 589).

¹¹¹ Letter from Charles Collett, Judge of the High Court of Judicature at Madras, to the Chief Secretary to Government, 12 June 1868 (NAI Home Legislative A Department No 591).

the subject [were] opposed to the rule'.¹¹² They considered it 'unsuited to the habits, manners, and customs of the country' and 'likely to do more harm than good'.¹¹³

Maine linked community norms, law and morality. He highlighted the tension between the legal principles enunciated by English judges as Commissioners and the 'results' in India 'pointed at by personal experiences of this country and its people'.¹¹⁴ While people might not have had much to say about the earlier codes, he predicted this rule would disturb many:

For the first time, in preparing a contract law for the whole of ... India, the Commissioners address themselves to a subject on which the course of legislation may be strongly affected by Native usage, Native opinion and by the local peculiarities of the country. It is no doubt perfectly true ... that there is a scantiness of substantive contract-law in India. There are, in fact, vast gaps in that law which might be filled up by almost any rules ... But it does not follow that in respect of certain limited branches of contract-law, there may not exist obstinate prejudices and tenacious customs ... It is positively asserted by persons of the highest authority that a rule of great generality proposed by the Commissioners is sure to shock the moral judgment of the Natives.¹¹⁵

This question of the *nemo dat* rule — whether a buyer acting in good faith could gain title from any seller in the possession of the goods — illustrates the value of the consultation process to understanding community expectations and values and incorporating these through legal rules. The opposition of local opinion would make it difficult to enact the Commissioners' rule. Maine was not the only person to comment on morality.¹¹⁶

The proposals of the Commissioners would have given title to any buyer from any seller, even a thief, and turned India into a giant market overt. The initial Select Committee put forward an entirely opposite rule that favoured the owner, not the buyer.¹¹⁷ Maine, who was not present for this part of the process, believed this new version would paralyse trade and commerce. His solution was to send all the opinions to the Law Commissioners, who, asserting the importance, substance,

¹¹² Letter from FL Beaufort, Judge in 24 Pergunnahs, to the Under-Secretary to the Government of Bengal, 12 June 1868 (NAI Home Legislative A Department No 592).

¹¹³ Ibid.

¹¹⁴ Minute by the Honourable HS Maine on 11 September 1868 (n 48).

¹¹⁵ Ibid.

¹¹⁶ Letter from R West, Acting Judge in Canara, to William Wedderburn, Under-Secretary of the Government of Bombay (BL IOR Home Department Proceedings No 730, 27 November 1867).

¹¹⁷ The Select Committee proposed that the rule be that '[t]he ownership of goods [could not] be acquired by buying them from any person who is in possession of them, even though the buyer acts in good faith and under circumstances which are such as to raise a reasonable presumption that the person in possession has a right to sell them': Minute by the Honourable HS Maine on 11 September 1868 (n 48).

and arrangement of their rules, rejected the view that their contentious rule was unsuitable for India, and could not contemplate any revisions.¹¹⁸ The Secretary of State, wishing to do the impossible and reconcile the ‘high authority’ of the Commissioners and ‘freedom of discussion’ in India, directed the lawmaking process.¹¹⁹ He instructed the government in India to adopt the Commissioners’ rule.¹²⁰ The result was that nothing happened. Maine left India. Stephen took over, and at first the clause was omitted altogether.¹²¹ Stephen redrafted the Bill.¹²² There was to be no giant market overt rule for India where any buyer could gain title, but a rule where a buyer could not gain better title than the seller, with some careful exceptions.¹²³ Stephen was critical of the technical acumen of the Commissioners.¹²⁴ He provided a superior arrangement and definitions for the *Indian Contract Act*.

The Commissioners’ proposal and the initial Select Committee’s counterproposal had been controversial. They were rejected due to careful consideration of opinions on existing practices and how a proposed rule would work. A better, carefully nuanced rule was crafted for India and became the basis for later English rules. Even the UK government had come around: it was important to trust wisely chosen experts, but it may be ‘unwise to apply to ... [the people of India] without modification, even the soundest principles of jurisprudence’.¹²⁵ But yet the principle of subordination remained.

VII CONCLUSION

The resignation of the Commissioners cleared the way to legislate the *Indian Contract Act* according to Indian procedures. The Imperial State still imposed norms drawn from a different sphere, and yet these also incorporated norms drawn from India. The State provided rules based on, but not limited to, English law, from which it departed in many instances. In the eventual *nemo dat* rule, the norms of the country

¹¹⁸ Letter dated 16 January 1869 (n 12).

¹¹⁹ Letter dated 18 March 1869 (n 47) [1].

¹²⁰ *Ibid.*

¹²¹ *Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership* (n 75).

¹²² Note by Honourable JF Stephen (House of Commons Paper No 608, Session 1871) (NAI Home Legislative A Department No 605); *Recasting of the Earlier Parts of the Indian Contract Bill* (n 74). Stephen continued to consider the already gathered voluminous local opinion but did not undertake a further consultation. See *Imperial Legislative Council of India* (n 88) vol 6.

¹²³ Section 108 of the *Indian Contract Act*, repealed in 1930, stated: ‘No seller can give to the buyer of goods a better title to those goods than he has himself except in the following cases ...’.

¹²⁴ On the definition of a contract, see Letter dated 12 October 1871 (n 76): ‘They copied the definition from Evans on Pothier.’

¹²⁵ Letter dated 24 November 1870 (n 70).

with its own regulation of commerce had been put ahead of the business interests of London. Yet the *Indian Contract Act* as a whole was closer to Bentham's ideal of universal principles relevant to the whole world than Austin's approach to a code, which was to codify pre-existing law and make codes for the relevant community, in this case, India. Pre-existing law was uncertain. There was no agreed law — despite the immense effort in India that had gone into attempting to describe law. Each of our actors exercised a different type of authority: the judges, positional and intellectual; the Secretary of State, derived ultimately from imperfect 'representation' in a totally different country from India; the government in India, from the UK and 'experience'; and those who commented at length on the Bill, from expression of community or normative expectations. The *Indian Contract Act* applied to all and facilitated transactions within a legal framework anchored with Indian norms. It was arranged to reduce legislative complexity. The *Indian Contract Act* served Imperial and Indian interests. Amended over time, it is India's law today.

TRANSGENDER AND INTERSEX ATHLETES, PROFESSIONAL SPORT AND THE DUTY TO ENSURE WORKER HEALTH AND SAFETY: CHALLENGES AND OPPORTUNITIES

ABSTRACT

The participation of transgender and intersex athletes is one of the most contested issues in professional sport today. Discrimination law is the lens through which the issue most commonly is debated, and gender diversity policies framed. Frequently missing from the debate (as it is from much discussion of sport generally) is the application of work health and safety ('WHS') law. Yet, as this article establishes, WHS law applies to professional sport, and the duties it imposes on sport governing bodies and clubs require them to mitigate proactively the risks to physical and psychological health and safety that are associated with the participation of transgender and intersex athletes, and from the development and implementation of their gender diversity policies. This article's examination reveals that while viewing the participation of transgender and intersex athletes in professional sports through the prism of WHS law is challenging, it presents sport governing bodies, clubs and transgender, intersex and cisgender athletes with a valuable avenue for addressing this complex issue in a more constructive and balanced manner.

I INTRODUCTION

Few institutions maintain a binary male-female segregated structure more rigidly than sporting institutions. This is particularly the case at the elite level where over the past 60 years, sport governing bodies such as the International Olympic Committee ('IOC') and World Athletics (formerly the International

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Association of Athletics Federations (‘IAAF’)) have mandated various forms of sex-testing to maintain their binary sex-segregated structures.¹ These structures define male and female sex by reference to traditional biological (anatomical, chromosomal and hormonal) characteristics. However, developments in both science and societal attitudes are challenging segregated systems organised around a traditional and binary understanding of sex.

Two of the most prominent challenges to sports’ sex-segregated binary come from intersex and transgender persons.² ‘Intersex’ is an umbrella term for persons born with atypical combinations of male and female sex characteristics.³ Some of these combinations are anatomical and visible, such as the presence of both male and female genitals. Others are found in chromosomal and hormonal characteristics and are hidden, including from the persons themselves. One such condition is ‘hyperandrogenism’, where women have high levels of androgens (male sex hormones) such as testosterone.⁴

Whereas intersex conditions generally involve incongruity among biological characteristics, transgender is an incongruity between one’s biological sex characteristics and gender identity, such that their gender identity does not match the sex assigned to them at birth.⁵ In the sporting context, transgender issues generally come to the

¹ For a history of gender testing in sport, see Seema Patel, *Inclusion and Exclusion in Competitive Sport: Socio-Legal and Regulatory Perspectives* (Routledge, 2015) 85–8; Adam Love, ‘Transgender Exclusion and Inclusion in Sport’ in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sport, Gender and Sexuality* (Routledge, 2014) 376–82.

² The language used to describe sex and gender identity can differ across cultures and audiences, and shift over time. The terms and definitions used in this article reflect those in common usage in Australia (and elsewhere) today. See, eg, Victorian Equal Opportunity and Human Rights Commission, *Trans and Gender Diverse Inclusion in Sport: Complying with the Equal Opportunity Act 2010* (Guideline, May 2017) 5–6 (‘VEOHRC’); Erin E Buzuvis, ‘Transsexual and Intersex Athletes’ in Melanie L Sartore-Baldwin (ed), *Sexual Minorities in Sport: Prejudice at Play* (Lynne Reiner Publishers, 2013) 55, 56–9.

³ VEOHRC (n 2) 6; See also Sheila Cavanagh and Heather Sykes who observe that developments in scientific sex-testing have ‘revealed subtle differences between male and female genders, as opposed to clearly delineated “opposite” sexes’: Sheila L Cavanagh and Heather Sykes, ‘Transsexual Bodies at the Olympics: The International Olympic Committee’s Policy on Transsexual Athletes at the 2004 Athens Summer Games’ (2006) 12(3) *Body & Society* 75, 81. That sex is not necessarily binary also has been recognised in legislation that provides for people officially to alter the sex assigned to them on birth to a descriptor other than ‘male’ or ‘female’: see, eg, *Births, Deaths and Marriages Registration Act 1996* (Vic).

⁴ While testosterone is commonly understood to be a male sex hormone, women also produce it naturally. See ‘Testosterone: What It Does and Doesn’t Do’ *Harvard Health Publishing* (Web Page, 29 August 2019) <<https://www.health.harvard.edu/drugs-and-medications/testosterone--what-it-does-and-doesnt-do>>.

⁵ VEOHRC (n 2) 6; Buzuvis (n 2) 56.

fore when a transgender person has undergone a process to transition to the gender with which they identify, and then seeks to compete in competition with the gender with which they identify.

A major issue confronting sports' governing bodies around the world is how to deal with these 'exceptions' to their traditional sex-segregated structures. Policy-makers and sport governing bodies that have sought to tackle this difficult issue have invariably done so primarily through the dual prisms of human rights and competitive fairness — seeking, on the one hand, to provide transgender and intersex athletes with an inclusive environment that provides them with the opportunity to compete free from discrimination and, on the other hand, to provide cisgender⁶ athletes with a fair and equitable competitive environment.⁷ Missing from much of this discussion is the application of work health and safety ('WHS') duties and principles.

The purpose of this article is to examine the application of statutory WHS duties to the risks emanating from the participation of transgender and intersex athletes in their sports. The article begins in Part II by providing an overview of the relevant legislative and policy background before introducing the reader in Part III to the case study through which the application of WHS laws will be examined, namely the Australian Football League's ('AFL') management of transgender athlete Hannah Mouncey's desire to play in its professional women's competition. The situation involving the AFL and Mouncey provides an interesting case study. First, being an inherently dangerous contact sport that places high demands on its athletes, Australian rules football provides fertile ground from which to examine the issue. Further, being the largest and arguably most dominant sporting code in the country, the AFL's management of transgender issues influences community perceptions and the practices of other sporting organisations.⁸ Part IV of this article then explains the application of statutory WHS laws to professional sports and the bodies that govern it, before examining their application to the participation of transgender and intersex athletes in Part V. This examination reveals that the opportunities from viewing the participation of transgender and intersex athletes in professional sports through the prism of WHS law outweigh its challenges. This presents sport governing bodies, clubs and transgender, intersex and cisgender athletes with a potentially valuable avenue for shifting the debate about transgender and intersex participation away from the moralism of competing rights to a more constructive discussion about safety focused on risks and solutions.

⁶ 'Cisgender' refers to persons whose gender identity exclusively aligns with their sex as recorded at birth: VEOHRC (n 2) 6.

⁷ For a discussion and critique of these different perspectives, see Pam R Sailors, 'Transgender and Intersex Athletes and the Women's Category in Sport' [2020] *Sport, Ethics and Philosophy*, 1.

⁸ A study released by business information analysts IBISWorld that found that the AFL is the largest sporting competition in Australia measured by revenue, spectators and attendance rates: Glenda Kwek, 'AFL Leaves Other Codes in the Dust', *The Sydney Morning Herald* (online, 26 March 2013) <<http://www.smh.com.au/data-point/afl-leaves-other-codes-in-the-dust-20130326-2grkp.html>>.

II LEGISLATIVE AND POLICY BACKGROUND

In Australia, the only guidance issued by government authorities addressing the legal issues arising from the participation of transgender and intersex athletes in sport have been issued by agencies responsible for administering anti-discrimination legislation.⁹ Not surprisingly, their guidance adopts the approach and principles enshrined in the legislation they administer. This legislation prohibits discrimination on the ground of sex or gender identity, but allows for a range of exemptions to protect sports' legitimate objectives.¹⁰ These objectives generally are framed in terms of ensuring fair competition; facilitating progression to elite level competition; and facilitating the participation and ability to compete of a particular sex. Australia's major sport governing bodies, in turn, have largely developed their policies governing the participation of transgender and intersex athletes in the context of, and within the framework provided by, these anti-discrimination laws.¹¹

As noted above, the application of WHS law and principals has been missing from this discussion. That this is the case should not come as a surprise. As I have observed in earlier works, the intersection of WHS law and professional sport largely is absent

⁹ See, eg, Australian Human Rights Commission, *Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport* (Guidelines, June 2019); VEOHRC (n 2); Australian Capital Territory Human Rights Commission, *Everyone Can Play: Guidelines for Local Clubs on Best Practice for Inclusion of Transgender and Intersex Participants* (Guidelines, April 2017). Only the AHRC Guidelines acknowledge that sporting organisations also have responsibilities to protect athlete health and safety: at 11.

¹⁰ *Sex Discrimination Act 1984* (Cth) s 42; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1977* (NSW) s 38P; *Anti-Discrimination Act 1992* (NT) s 56; *Anti-Discrimination Act 1991* (Qld) s 111; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1998* (Tas) s 29; *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (WA) ss 35, 35AP. The Court of Arbitration for Sport ('CAS') also applies the same approach. For example, in *Semenya*, CAS started from the position that discrimination on the grounds of sex or gender identity is prohibited, but that 'differential treatment ... is valid and lawful if it is a necessary, reasonable and proportionate means of attaining a legitimate objective' (in that case, ensuring fair competition in the female category of elite competitive athletics): *Mokgadi Caster Semenya v International Association of Athletics Federations* (Arbitral Award, Court of Arbitration for Sport, CAS 2018/0/5794, 2018) 114 [548] ('*Semenya*').

¹¹ See, eg, the policies of the members of the Coalition of Major Professional and Participation Sports: Australian Football League, *Gender Diversity Policy — Elite Football* (1 October 2020) ('*2020 Policy*'); Cricket Australia, *CA Inclusion of Transgender & Gender Diverse Players in Elite Cricket Policy* (August 2019); Football Federation Australia, *National Member Protection Policy* (July 2016); National Rugby League, *Member Protection Policy* (July 2015); Netball Australia, *Member Protection Policy* (July 2017); Rugby Australia, *Participation Policy*; Tennis Australia, *Member Protection Policy* (February 2019).

from WHS and sports law texts and other scholarly and practitioner literature.¹² For many, sport is not work and sportspeople are not workers. As Hayden Opie and Graham Smith point out, that one ‘plays’ sport carries with it the implication that it is something one does when not working.¹³ Dennis Hemphill similarly observes that participants are described as ‘players’ not ‘workers’ and the playing field is not described as their workplace.¹⁴ However, as this article will establish, professional athletes are workers to whom those that employ or engage them owe WHS duties.¹⁵ Any suggestions to the contrary were dispelled in Australia with the successful prosecution in 2016 of the Essendon Football Club (a professional club in the AFL) for breaching the *Occupational Health and Safety Act 2004* (Vic) over the club’s undocumented and uncontrolled players’ supplements program.¹⁶

The relevance of WHS law to the participation of transgender and intersex athletes has been brought into stark relief by World Rugby’s new policy banning transgender women on the basis that their physique, muscle mass and strength pose a safety risk to other (cisgender) female athletes.¹⁷ Its relevance also is evidenced by the decisions of the Court of Arbitration for Sport (‘CAS’) which noted the psychological harm caused to intersex athletes by policies governing their inclusion,¹⁸ and by the case of transgender footballer Hannah Mouncey who withdrew from the Australian Football League women’s competition (‘AFLW’) because of the psychological impact that complying with its Diversity Policy was having on her.¹⁹

¹² Eric Windholz, ‘Team-Based Professional Sporting Competitions and Work, Health and Safety Law: Defining the Boundaries of Responsibility’ (2015) 43(4) *Australian Business Law Review* 303, 304–5.

¹³ Hayden Opie and Graham Smith, ‘The Withering of Individualism: Professional Team Sports and Employment Law’ (1992) 15(2) *University of New South Wales Law Journal* 313, 317.

¹⁴ Dennis Hemphill, ‘“Think It, Talk It, Work It”: Violence, Injury and Australian Rules Football’ (2002) 19(1) *Sporting Traditions* 17, 18.

¹⁵ See Part IV below.

¹⁶ WorkSafe Victoria, ‘Essendon Football Club’, *Prosecution Result Summaries and Enforceable Undertakings* (Web Page) <<https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings>>. See also Eric Windholz, ‘In Charging Essendon, WorkSafe Puts All Sport on Notice’, *The Conversation* (online, 10 November 2015) <<https://theconversation.com/in-charging-essendon-worksafe-puts-all-sport-on-notice-50396>>.

¹⁷ World Rugby, *Transgender Guideline* (Guideline, October 2020) <<https://playerwelfare.worldrugby.org/?documentid=231>>.

¹⁸ *Dutee Chand v Athletics Federation of India (AFI) and the International Association of Athletics Federations (IAAF)* (Arbitral Award, Court of Arbitration for Sport, CAS 2014/A/3759, 2015) (‘Chand’); *Semenya* (n 10). See below nn 118–19 and accompanying text.

¹⁹ *2020 Policy* (n 11). See Part III below.

III AUSTRALIAN RULES FOOTBALL AND THE CASE OF HANNAH MOUNCEY

Australian rules football is Australia's indigenous game.²⁰ It is a sport played with great skill, physicality and speed — with the full body contact of American football (absent the padding), the tackling of rugby, and the speed and continuous flow of play of association football (soccer). It also is a sport played by persons of varying sizes and physiques. For example, in the top tier elite women's competition recent players have varied in height from 158–94 cm and in weight from 50–95 kg. Australian rules football also is one of Australia's most dangerous sports, with the second highest number of sports injury hospitalisations, and the fifth highest rate of injury hospitalisation per participant.²¹ Australian rules football has traditionally been a male-dominated sport. The first state-based men's leagues date back to the 1870s, and the sport has been played on a full-time professional basis by men since the early 1980s. One of the state-based leagues — the Victorian Football League — became the AFL in 1990. Women too have played football for over 100 years. However, state-based women's leagues only emerged in the 1980s, and women's football only became national and professional (and only on a part-time basis) in 2017 with the formation of the AFLW.²² The AFLW is administered by the AFL and is contested by a subset of clubs from the men's competition.

In the lead up to the AFLW's inaugural season in 2017, it was decided that a draft would be held to ensure the equitable distribution of available talent among the fledgling clubs. Hannah Mouncey, a (then) 190 cm tall and 100 kg transgender woman, announced her intention to nominate for the draft. At the time, Mouncey was competing in the Australian Capital Territory's AFL women's competition.

On the day before the AFLW draft, the AFL released a statement announcing that Mouncey was ineligible to be drafted.²³ The statement is a curious document because

²⁰ Australian rules football generally is thought to be an amalgam of rugby and possum skin 'ball' games which were played by Australia's indigenous population. The sport in its current form can trace its origins back to the late 1800s when its rules were codified and the first organised leagues formed: Roy Hay, 'A Tale of Two Footballs: The Origins of Australian Football and Association Football Revisited' (2010) 13(6) *Sport in Society* 952.

²¹ Australian Institute of Health and Welfare, *Hospitalised Sports Injury in Australia, 2016–17* (Web Page, February 2020) <<https://www.aihw.gov.au/getmedia/1f7b097d-b486-42f8-a05d-4e29cdcfbcf1/aihw-injcat-211.pdf.aspx?inline=true>>. Cycling has the highest number of sports injury hospitalisations; and wheeled motor sports, roller sports, equestrian activities and rugby have higher rates of injury hospitalisation per participant.

²² For an overview of the history of women in Australian rules football see Brunette Lenkić and Rob Hess, *Play On! The Hidden History of Women's Australian Rules Football* (Echo Publishing, 2016).

²³ 'AFL Releases Statement on Hannah Mouncey Decision', *Triple M* (online, 17 October 2017) <<https://www.triplem.com.au/story/afl-releases-statement-on-hannah-mouncey-decision-63469>> ('*Triple M*').

it did not actually explain the reasons why Mouncey was ruled ineligible. Rather, it explained the process employed in reaching the decision, and the information taken into account. With respect to process, the statement identified the composition of the decision-making body (which was notably devoid of medical or safety experts) and emphasised the steps taken to afford Mouncey procedural fairness. With respect to the information taken into account, the statement said that the decision was guided by the Victorian Equal Opportunity and Human Rights Commission guidelines²⁴ and that the decision-making body ‘carefully considered all the information provided by Hannah, as well as the available data on transgender strength, stamina, physique along with the specific nature of the AFLW competition’, and ‘took into account the stage of maturity of the AFLW competition, its current player cohort and Ms Mouncey’s individual circumstances’.²⁵

Missing from the statement was an explanation of the intellectual process by which the decision was made; one that identified the facts considered material and connected those facts in a logical manner to the decision made. It is clear from the decision though, that Mouncey’s ‘strength, stamina [or] physique’ relative to those of the player cohort at the time was central to the decision. As Catherine Ordway and Allistar Twigg observe, the decision suggested that ‘AFLW players [were] not yet at a sufficient level of “strength, stamina or physique” to be able to play with or against Mouncey’.²⁶

So what was it about Mouncey’s 190 cm tall, 100 kg frame that gave cause for concern? The decision-making body’s reference to ‘strength, stamina [or] physique’ was a reference to one of the exceptions to the prohibition on gender discrimination in the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic).²⁷ Both statutes allow for persons of one sex, gender identity, or of intersex status, to be excluded from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.²⁸ The provision’s original purpose was to ensure that women were not disadvantaged in competitions that rely on strength, stamina or physique. As the report of the 1992 Inquiry into Equal Opportunity and Equal Status for Women in Australia observed, ‘[a]t the time the legislation was enacted it was felt that if mixed-sexed competitions were to become widespread

²⁴ VEOHRC (n 2).

²⁵ *Triple M* (n 23).

²⁶ Catherine Ordway and Allistar Twigg, ‘By Excluding Hannah Mouncey, the AFL’s Inclusion Policy Has Failed a Key Test’, *The Conversation* (online, 19 October 2017) <<https://theconversation.com/by-excluding-hannah-mouncey-the-afls-inclusion-policy-has-failed-a-key-test-85900>>.

²⁷ *Sex Discrimination Act 1984* (Cth) s 42; *Equal Opportunity Act 2010* (Vic) s 72.

²⁸ Note there are jurisdictional differences in how this provision is drafted and what it requires. In Queensland and the Northern Territory, the ‘strength, stamina or physique’ exception is cast in terms of reasonableness. For example, the *Anti-Discrimination Act 1991* (Qld) s 111(1) provides: ‘A person may restrict participation in a competitive sporting activity to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity’.

and replace separate sex competitions women may win fewer contests and receive less recognition'.²⁹ Allowing for fair competition also was the cited rationale for extending the provisions to permit discrimination on the grounds of gender identity or intersex status.³⁰ Presumably, the decision-making body considered that Mouncey's strength, stamina and physique provided her with an unfair competitive advantage over her cisgender competitors.³¹

If Mouncey's 'strength, stamina or physique' were a potential source of competitive advantage, might it not also be a potential source of risk to the health and safety of other players? Leading AFLW player Daisy Pearce thought so. She said of Mouncey: 'I think there's some concern about her size and whether that poses mainly a safety risk', a risk that Pearce said would be heightened by Mouncey's limited skill level and the prospect she could be coached to be physical, aggressive and to 'throw [her] weight around'.³² Similarly, leading sports and media lawyer Justin Quill observed: 'In making this decision, the AFL would have been really concerned about the health and safety of the other women in the AFLW competition.'³³ Health and safety within the AFLW competition is an important and growing issue, with data from the AFLW's first two seasons revealing AFLW players are more susceptible to injury than male players.³⁴

²⁹ Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Report, April 1992) 142–3 [6.7.17].

³⁰ See, eg, Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) [81]; Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 40.

³¹ An anomaly in the AFL's decision is that it allowed Mouncey to continue to compete in the lower level competitions in which she was presently competing without dominating. Why Mouncey's strength, stamina or physique posed a risk to the competitive fairness of the elite competition and not lower level competitions is not immediately clear. Surely, the elite competition has players with the greater strength, fitness and skills required to compete successfully against Mouncey? The contradiction (some argue hypocrisy) inherent in the decision was criticised by many commentators: see, eg, Ordway and Twigg (n 26); David Mark, 'AFLW's Decision on Transgender Footballer Hannah Mouncey for 2018 Draft Full of Contradictions', *ABC News* (online, 19 October 2017) <<https://www.abc.net.au/news/2017-10-18/contradiction-in-the-hannah-mouncey-aflw-decision/9060968>>; Samantha Donovan, 'Hannah Mouncey's Coach Dismisses Critics Who Say Transgender Players Will Have an Unfair Advantage', *ABC News* (online, 14 February 2018) <<https://www.abc.net.au/news/2018-02-14/mounceys-coach-dismisses-calls-about-unfair-advantage/9445400?pfmredir=sm>>.

³² 'Daisy Pearce Says Hannah Mouncey Could be "a Safety Risk" if Allowed to Play in the AFLW', *Sporting News* (online, 8 June 2018) <<https://www.sportingnews.com/au/afl/news/daisy-pearce-says-hannah-mouncey-could-be-a-safety-risk-if-allowed-to-play-in-the-aflw-transgender/d6ad73v27azd14dy03rorhaq3>>.

³³ Mark (n 31).

³⁴ Kate O'Halloran, 'AFLW Players are 9.2 Times More Likely to Injure their Knees than Male Players. Here's Why', *ABC News* (online, 6 March 2019) <<https://www.abc.net.au/news/2019-03-05/rates-of-knee-injury-for-aflw-players-are-way->

When the AFL ruled Mouncey ineligible for the AFLW draft, it did not have a gender diversity policy. It stated at the time that Mouncey's experience would 'substantially inform the development of the AFL's transgender policy and procedure for future players at the elite level'.³⁵ That policy was first released in August 2018 ('*2018 Policy*'), then revised in 2020 ('*2020 Policy*').³⁶ It is to that Policy, which I refer to in general as the *AFL Gender Diversity Policy*, and its application to Mouncey that this article now turns.

A *The AFL Gender Diversity Policy*

The AFL Gender Diversity Policy ('*Policy*') applies to all transgender and non-binary persons seeking to participate in the AFL's elite men's and women's competitions.³⁷ The *Policy* states that its aim is to provide a framework for their safe inclusion and that it seeks to strike 'an appropriate balance ... between the interests of inclusion and ensuring a fair competition for all'.³⁸ The *Policy* is framed through the prism of anti-discrimination legislation. The *Policy* notes that legislation prohibits discrimination in sport, and that it is taking advantage of an exception that permits gender-based discrimination 'where the relative difference in strength, stamina or physique of a trans or non-binary player is significant in the sense that it has an appreciable affect [sic] on their ability to compete'.³⁹ The *Policy* also notes that utilising this exception requires an evidence-based assessment.⁴⁰

above-male-players/10866434>; Sarah Black, 'AFLW: Concussion, ACL Injuries Highlighted', *AFL Media* (online, 26 September 2018) <<https://www.afl.com.au/news/2018-09-26/aflw-concussion-acl-injuries-highlighted>>; Nick Bowen, 'Women "Five Times More Likely" to Tear ACL', *AFL Media* (online, 12 February 2018) <<https://www.afl.com.au/news/2018-02-12/women-five-times-more-likely-to-rupture-acls>>.

³⁵ *Triple M* (n 23).

³⁶ Australian Football League, *Gender Diversity Policy: AFLW and AFL* (August 2018) ('*2018 Policy*'). The *2018 Policy* has since been revised: see *2020 Policy* (n 11). The *2020 Policy* is substantially the same as the *2018 Policy*. The main change is the *2020 Policy* elaborating on the 'exceptional circumstances' that must exist for a trans or non-binary person's participation to be considered an unacceptable safety risk. See below nn 107–109 and accompanying text. Part III.A refers to the *2018 Policy* as it applied to Hannah Mouncey, with corresponding references to the *2020 Policy*.

³⁷ The *2018 Policy* defines 'non-binary' as persons identifying as having no gender, or a gender that is in-between or fluctuates between the categories of 'man' and 'woman': *2018 Policy* (n 36) 11. The *2020 Policy* defines 'non-binary' as persons with 'gender identities that do not sit within, outside of, across or between the spectrum of the male and female binary': *2020 Policy* (n 11) 19. Neither policy applies to intersex persons, whom the Policies state will be addressed in a future policy: *2018 Policy* (n 36) 5; *2020 Policy* (n 11) 7.

³⁸ *2018 Policy* (n 36) 4; *2020 Policy* (n 11) 4.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

In applying the exception, the *Policy* differentiates between, on the one hand, transgender women and non-binary persons seeking to participate in the elite women’s competition and, on the other hand, transgender men and non-binary persons seeking to participate in the elite men’s competition. The eligibility requirements imposed on each differ and are summarised in Table 1.

Table 1: AFL Gender Diversity Policy Eligibility Requirements

Male to female transgender and non-binary persons seeking to participate in the AFL Women’s Competition ⁴¹	Female to male transgender and non-binary persons seeking to participate in the AFL Men’s Competition ⁴²
1. Comply with all AFL rules and regulations 2. No unacceptable safety risks 3. AFL approval in accordance with the <i>AFL Gender Diversity Policy</i>	1. Comply with all AFL rules and regulations 2. No unacceptable safety risks

As can be seen, the first two requirements are the same, namely to comply with all AFL rules and regulations (including the AFL’s anti-doping code and its rules with respect to testosterone), and that no unacceptable safety risks arise out of their (potential) participation. With respect to safety risks, the *Policy* states that risks to the safety of both the gender-diverse player and other players should be assessed in accordance with appropriate risk management procedures where necessary.⁴³

Where the application of the *Policy* differs, however, is that transgender women and non-binary persons seeking to participate in the elite women’s competition need to obtain AFL approval in accordance with the *Policy*. No similar requirement is imposed on transgender men or non-binary people competing in the elite men’s competition, the AFL having concluded they do not possess the potential for relevant competitive advantage over cisgender players.⁴⁴

So what does a transgender woman or non-binary person need to do to obtain AFL approval in accordance with the *Policy*? First, they must maintain a level of testosterone at or below 5 nanomoles per litre for at least two years, and have the medical reports to substantiate this.⁴⁵ Second, they must submit 24 months of physiological data relevant to their strength, stamina and physique. These include data pertaining to height, weight, bench press, squat, vertical jump and 20 m sprint and 2 km run times.⁴⁶ They also need to submit themselves to further physiological testing, if

⁴¹ 2018 *Policy* (n 36) 6; 2020 *Policy* (n 11) 9.

⁴² 2018 *Policy* (n 36) 9; 2020 *Policy* (n 11) 15.

⁴³ 2018 *Policy* (n 36) (transgender women: at 6; transgender men: at 9); 2020 *Policy* (n 11) (transgender women: at 9; for transgender men: at 15).

⁴⁴ 2018 *Policy* (n 36) 9; 2020 *Policy* (n 11) 16.

⁴⁵ 2018 *Policy* (n 36) 6; 2020 *Policy* (n 11) 10.

⁴⁶ Ibid.

requested by the AFL.⁴⁷ This aspect of the *Policy* has been criticised for failing to provide transgender athletes sufficient certainty, as their eligibility is subject to review at any time.⁴⁸

The information provided by the athlete is then considered by an AFL sub-committee, together with any other information considered relevant by the sub-committee. This other information could include information relevant to player safety, any third-party data about the transgender woman or non-binary person's participation in other competitive sports, data obtained from cisgender players in the preceding two seasons, and any other research, evidence or information about the inclusion of gender-diverse people in competitive sport.⁴⁹ The *Policy* directs the sub-committee to refuse approval 'if there is a relevant, and significant, disparity in [the person's] strength, stamina or physique ... which may reasonably be regarded to give rise to an unreasonable competitive advantage'.⁵⁰ Should such an assessment be made, there then follows a process designed to provide the gender-diverse person with an opportunity to respond with additional information before a final decision is made. There also is an opportunity for the gender-diverse person to seek a review of the final decision by the AFL's General Counsel.⁵¹ Importantly, the *Policy* directs that a final decision not to approve a gender-diverse person should not be disclosed to third parties without the person's consent, and that all personal and health information provided by the gender-diverse person should be treated in strict confidence.⁵²

B *Hannah Mouncey's Experience of the AFL Gender Diversity Policy*

Having been ruled ineligible for the AFLW's inaugural 2018 draft, Mouncey again nominated for the 2019 draft. This time, however, Mouncey withdrew from the draft a few weeks before it was conducted.⁵³ Mouncey stated that her decision to withdraw was not based on a failure to meet the AFL's medical and physiological conditions, and posted documents online showing she had maintained the requisite testosterone level for two years.⁵⁴ Rather, Mouncey attributed the decision to the psychological impact the process was having on her, in particular the blood testing requirements.

⁴⁷ Ibid.

⁴⁸ Daryl Adair, 'The AFL's Gender Diversity Policy Remains an Apprehensive Work in Progress', *The Conversation* (online, 19 September 2018) <<http://theconversation.com/the-afls-gender-diversity-policy-remains-an-apprehensive-work-in-progress-102904>>.

⁴⁹ *2018 Policy* (n 36) 7; *2020 Policy* (n 11) 11.

⁵⁰ *2018 Policy* (n 36) 7. The *2020 Policy* also fills a gap in the *2018 Policy* by making clear that the sub-committee also may refuse approval if the person's (potential) participation gives rise to an unacceptable safety risk: *2020 Policy* (n 11) 12.

⁵¹ *2018 Policy* (n 36) 8; *2020 Policy* (n 11) 13. Third parties do not have the right to request a review of the decision.

⁵² *2018 Policy* (n 36) 9; *2020 Policy* (n 11) 17.

⁵³ Dan Harrison, 'Transgender Footballer Hannah Mouncey Withdraws from AFLW Draft', *ABC News* (online, 10 September 2018) <<https://www.abc.net.au/news/2018-09-10/transgender-footballer-hannah-mouncey-withdraws-from-aflw-draft/10221730>>.

⁵⁴ Ibid.

Mouncey described ‘the toll of doing this’ as ‘being far too great’ and ‘enormous’.⁵⁵ She also attributed *mala fides* to the AFL in its application of the *Policy*, stating: ‘The AFL has treated me like shit, with every effort made to wear me down to a point where I couldn’t continue’ and that it ‘cares only for its corporate image above all else’.⁵⁶ The AFL, for its part, made no comment with respect to Mouncey’s decision to withdraw, or in response to her criticism of its conduct.⁵⁷

For a number of commentators, Mouncey’s withdrawal was not a surprise.⁵⁸ The AFL *Policy* was criticised for subjecting transgender women athletes to onerous, invasive and potentially never-ending testing. As Liam Elphick observed:

The physical testing and stringent requirements under this policy are likely to either turn trans female and non-binary footballers away from the AFLW, force them into hiding their gender history, or keep them at lower state league levels.⁵⁹

Hannah Mouncey’s experience reveals two health and safety risks that can arise from the participation of transgender and intersex athletes in professional sport. The first and most obvious is the risk of physical harm from larger and stronger transgender women athletes competing against comparatively smaller and weaker cisgender athletes.⁶⁰ The second is the risk of psychological harm that can arise from the manner in which gender diversity policies are implemented. This was a risk to which the CAS was alert in its decision in *Semenya*, upholding the then IAAF’s *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* (‘DSD Regulations’).⁶¹ The CAS Panel expressed ‘grave concerns as to the future practical application of the DSD Regulations’, and strongly encouraged the IAAF to address the difficulties associated with complying with the DSD Regulations, including the possibility that affected athletes may inadvertently, and through no fault of their own, be unable consistently to maintain natural testosterone levels below the specified threshold.⁶²

There also is a potential third risk, namely, of psychological harm from the process of developing a gender diversity policy in the first place. Pam Sailors refers to the

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ ‘Transgender Player Withdraws from AFLW Draft’, *AFL Media* (online, 10 September 2018) <<https://www.afl.com.au/news/124278/transgender-player-withdraws-from-aflw-draft>>.

⁵⁸ See, eg, Christiane Barro, ‘Experts Slam AFL’s Transgender Policy’, *The New Daily* (online, 23 September 2018) <<https://thenewdaily.com.au/sport/afl/2018/09/23/afl-gender-diversity-policy/>>.

⁵⁹ Ibid.

⁶⁰ On this logic, transgender male players also face physical safety risks from participating with larger and stronger cisgender male players.

⁶¹ *Semenya* (n 10).

⁶² Ibid 159–60 [620]–[624].

debate about transgender and intersex athlete participation as ‘vigorous, sometimes vicious’.⁶³ For transgender athletes, the mere fact there is a need for a separate policy that differentiates them from other athletes challenges their identity and sense of self-worth. Some have reported feeling uncomfortable and fearful expressing their views on policies related to their inclusion.⁶⁴ It also can be challenging for cisgender athletes. Absent policies that address the safety risks associated with the participation of transgender and intersex athletes, cisgender athletes may feel their concerns (and by extension, themselves) are devalued by the process.⁶⁵ Some cisgender athletes also report feeling silenced out of fear of appearing intolerant or politically incorrect.⁶⁶ As Belinda Smith, Melanie Schleiger and Liam Elphick observe, there is an ‘entrenched moralism’ in anti-discrimination debates with even those seeking a deeper understanding of the nature and causes of the issue sometimes being characterised as ‘morally culpable and “guilty” of racism, sexism or other ‘ism’s’.⁶⁷

So how should sport governing bodies address these risks? This question is the focus of the next two Parts.

IV WHS LAWS AND SPORT GOVERNING BODIES

International law recognises a right to ‘safe and healthy working conditions’.⁶⁸ This right has been enshrined in domestic law in nearly all countries.⁶⁹ In Australia, it is enshrined in legislation at both the federal and state and territory levels. The following analysis is based on the national *Work Health and Safety Act 2011* (Cth) (*‘WHS Act’*).⁷⁰

⁶³ Sailors (n 7).

⁶⁴ Sarah Teetzel, ‘Athletes’ Perceptions of Transgender Eligibility Policies Applied in High-Performance Sport in Canada’ in Eric Anderson and Ann Travers (eds), *Transgender Athletes in Competitive Sport* (Routledge, 2017) 68–79.

⁶⁵ See above nn 32–3 and accompanying text. I thank one of the reviewers for raising this point.

⁶⁶ Teetzel (n 64).

⁶⁷ Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32(2) *Australian Journal of Labour Law* 219, 230.

⁶⁸ See, eg, *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 7(b). See also *International Labour Organisation Convention Relating to Occupational Health and Safety No 155*, C155 (entered into force June 1981).

⁶⁹ See International Labour Organisation, ‘Country Profiles on Occupational Health and Safety’ (Web Page) <<https://www.ilo.org/safework/countries/lang--en/index.htm>>.

⁷⁰ In Australia, regulation of WHS is primarily a state responsibility. Each State has its own WHS regulatory regime, as does the Commonwealth. Recent efforts to harmonise these regimes have produced near identical Work Health and Safety Acts and Regulations at the Commonwealth level, and in Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia and Tasmania.

The *WHS Act* has the objectives of ensuring the health and safety of workers and workplaces. To achieve this purpose, the *WHS Act* imposes a series of duties on persons and entities whose acts or omissions are capable of affecting the health, safety and welfare of persons at work. Those who owe duties include: persons (or entities) conducting a business or undertaking; officers of those entities; workers; persons with management or control of workplaces; designers, manufacturers, suppliers and importers of plant and substances used at the workplace; and other persons at the workplace.⁷¹ Of these, the primary duty is owed by persons conducting a business or undertaking ('PCBUs'). It is instructive to set out the primary duty in full:

19 Primary duty of care

- (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
 - (a) workers engaged, or caused to be engaged by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking
- (2) A person conducting a business or undertaking must 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.⁷²

The analysis in this article is done by reference to the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*') that applies to businesses licensed to self-insure under the Comcare scheme and workers for the Commonwealth government. The Commonwealth Act is representative of Australian jurisdictions that have adopted the model WHS laws. Victoria and Western Australia are the only jurisdictions not to have implemented the harmonised laws, although Western Australia is currently consulting on implementing elements of the harmonised laws. In most areas, the Victorian and Western Australian laws lead to similar outcomes as the harmonised laws. For a discussion of the harmonisation process and major outputs, see Eric Windholz, 'The Harmonisation of Australia's Occupational Health and Safety Laws: Much Ado About Nothing?' (2013) 26(2) *Australian Journal of Labour Law* 185.

⁷¹ WHS duties are concurrent and overlapping. Each duty-holder must comply with its duties to the extent it has the capacity to control and influence the matter even if another duty-holder has the same duty: *WHS Act* (n 70) s 16.

⁷² *Ibid* s 19. In addition, the *WHS Act* also imposes a series of other, more specific duties on PCBUs for the benefit of workers. These include duties to ensure, so far as is reasonably practicable: the provision of a work environment that is without risk to health and safety, the safety of plant, structures and systems of work; the safe use of substances; the provision of adequate welfare facilities; provision of adequate information, instruction, training and supervision to enable work to be performed safely and without risk to health; to monitor the health of workers and conditions at the workplace: at s 19(3). Additionally, there is a duty to engage and consult workers on health and safety issues, again to the extent reasonably practicable: at s 47.

A number of questions arise in determining the application of this provision to the participation of transgender and intersex athletes in professional sport generally, and in the AFL in particular. First, is sport ‘work’? Second, are sport governing bodies and clubs ‘PCBUs’? Third, are professional sportspersons — and aspiring professional sportspersons — persons to whom WHS duties are owed? And fourth, if the above questions are all answered in the affirmative, what do these duties require of sport governing bodies (as PCBUs)? Let us address each question in turn.

A *Is Sport ‘Work’?*

Somewhat surprisingly, ‘work’ is not defined in the *WHS Act*. Nor have courts had cause to consider its meaning in this context.⁷³ The word, therefore, needs to be given its ordinary meaning. ‘Work’ is ordinarily defined to mean the ‘application of mental or physical effort to a purpose’⁷⁴ or ‘exertion directed to produce or accomplish something’.⁷⁵ Professional athletes’ training and preparation for, and participation in, the sporting contest — undertaken for the purpose of winning the contest — fall within these definitions of ‘work’. Their activities also satisfy the criteria identified by Safe Work Australia (the national work health and safety regulator) for determining if an activity is work for the purposes of the *WHS Act*, namely: (1) their activities involve physical and mental effort and the application of particular skills for the benefit of another person (ie, their club, supporters and sponsors); (2) they are paid for the activities;⁷⁶ (3) the activities form part of an ongoing process or project (ie, their and their club’s quest to win the sporting competition); (4) their activities

⁷³ In other contexts, courts have recognised that professional sport is work, and being a professional sportsperson is a trade. As much is evident in cases where professional sportspersons have argued successfully that competition imposed labour market controls (eg, drafts) can constitute a common law restraint of trade. See, eg, *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242; *Hall v Victorian Football League* [1982] VR 64; *Buckley v Tutty* (1971) 125 CLR 353. See also *Walker v Crystal Palace Football Club Ltd* [1910] 1 KB 87, 93 in which Farwell LJ stated that ‘[i]t may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work’; and *Re Adamson; Ex parte West Australian National Football League* (1979) 143 CLR 190, 211 in which Barwick CJ said his Honour could ‘see little difference between the presentation of a theatrical spectacle and the presentation for reward of the spectacle of a football match played by professionals as a major source of their income and of the income of the promoter’.

⁷⁴ *Australian Oxford Dictionary* (2nd ed, 2004) ‘work’.

⁷⁵ *Macquarie Dictionary* (4th ed, 2005) ‘work’. This definition was quoted with approval by Martin CJ in *Barlow v Heli-Muster Pty Ltd* (Supreme Court of the Northern Territory, Martin CJ, 5 February 1997) [14].

⁷⁶ It is not necessary for the purposes of this article to consider whether sportspeople who are not paid for their labour are engaged in ‘work’ for the purposes of WHS laws. Suffice to observe that first, volunteers are included in the definition of ‘worker’: *WHS Act* (n 70) s 7(1)(h). Second, in other contexts, courts have held that monetary reward is a strong indicator, but not a necessary component, of work: *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472; *Minister for Immigration, Local Government and Ethnic Affairs v Montero* (1991) 31 FCR 50, 58.

are controlled by another person (ie, coaching, medical, fitness and other staff); and (5) all this occurs as part of a formal and structured arrangement (ie, their participation in the competition).⁷⁷

B *Are Sport Governing Bodies and Clubs ‘PCBUs’?*

PCBU is defined broadly to mean a person conducting a business or undertaking whether alone or with others, and whether or not for profit or gain.⁷⁸ While neither ‘business’ nor ‘undertaking’ is defined in the legislation, ‘business’ is generally understood to be an activity undertaken for the purpose of making a profit or gain, and an ‘undertaking’ is generally understood to be an activity that is non-commercial in nature.⁷⁹ It also is implicit in both terms that they have a degree of organisation, system and possibly continuity.⁸⁰

The definition of PCBU is broad enough to cover both the sporting clubs that employ or otherwise engage the athletes, and the sport governing bodies that administer the competitions in which they compete and influence and direct the activities of participating clubs and their athletes. While many clubs and sport governing bodies are not-for-profit organisations (including the AFL), they nevertheless operate for gain (which is reinvested into the club and/or sport) and according to commercial principles. They also operate with great sophistication. Sport governing bodies in particular control every important aspect of the competitions they administer. The AFL, for example, determines which clubs and athletes play in their competitions; when and under what circumstances; the rules of those competitions; as well as the rules and policies according to which individual clubs and athletes compete and conduct themselves. These rules cover a broad range of topics including doping, illicit drugs, gambling, respect and responsibility, vilification and discrimination and, most relevantly, gender diversity.⁸¹ Thus, while a club owes WHS duties with respect to its athletes’ health and safety and may develop policies to govern the participation of transgender and intersex athletes at their club, in most professional sports they (and their athletes) are guided and bound by the diversity policies of their sport’s governing body. Therefore, it is the approach and policies of sport governing bodies on which the rest of this article focuses.

⁷⁷ Safe Work Australia, *The Meaning of ‘Person Conducting a Business or Undertaking’* (Interpretive Guideline, 2011) <<https://www.safeworkaustralia.gov.au/collection/interpretive-guidelines-model-work-health-and-safety-act>>.

⁷⁸ *WHS Act* (n 70) s 5. Person ‘includes a body politic or corporation as well as an individual’: *Acts Interpretation Act 1901* (Cth) s 2C.

⁷⁹ Safe Work Australia (n 77).

⁸⁰ *Ibid.*

⁸¹ The AFL’s rules and policies can be found on its website: ‘Policies’ *Australian Football League* (Web Page) <www.afl.com.au/clubhelp/policies>.

*C Do Sport Governing Bodies Owe WHS Duties to
(Aspiring) Professional Athletes?*

PCBUs owe duties to two types of persons: ‘workers’ (s 19(1)) and ‘other persons’ (s 19(2)). Looking first at workers, PCBUs owe duties to workers who they engage or cause to be engaged, and workers whose activities they influence or direct.⁸² This latter category of workers whose activities they influence or direct makes it unnecessary for the sport governing body to be the employer of athletes for duties to attach. It suffices that they influence or direct the athlete’s activities. And as has been observed, the AFL (and most other sport governing bodies) does this to a high level of prescription. It is thus clear that the AFL owes duties to athletes competing in its competitions.

But what about aspiring athletes — those nominating to be drafted — such as Hannah Mouncey? This is where the duty to ‘other persons’ is relevant. Sport governing bodies owe a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from the manner with which it conducts its competitions. This would include aspiring athletes who have nominated for the AFL draft. The AFL draft is part of the AFL’s business or undertaking. Persons nominating for the draft submit to the rules and policies of the AFL draft, where rules and policies are designed specifically for them. This would include the *AFL Gender Diversity Policy*.⁸³ In this situation, WHS laws apply to impose on the AFL a duty to ensure those rules and policies do not put the health and safety of persons nominating for the draft at risk.

D What Does the WHS Act Require of Sport Governing Bodies?

WHS duties require PCBUs (in our case, sport governing bodies) to ensure the health and safety of workers (in our case, athletes) and other persons (in our case, aspiring athletes submitting themselves to a draft) by doing what is reasonably practicable in the circumstances. The guidance and case law on the duties is extensive. It is not possible in an article of this size — nor is it necessary — to explain the duties’ many intricacies. It suffices for our purposes to focus on its key features.

The first key feature is the duties’ beneficial (as opposed to punitive) nature. Courts have emphasised that duty-holders should approach their obligations cognisant that WHS law is a ‘remedial measure passed for the protection of the worker ... [and] should not be construed so strictly as to deprive the worker of the protection which

⁸² ‘Worker’ is defined broadly to mean a person who carries out work in any capacity for a PCBU: *WHS Act* (n 70) s 7.

⁸³ *2018 Policy* (n 36) states that it applies to persons nominating for the AFLW draft and the AFL (men’s) draft: at 6, 9. The *2020 Policy* (n 11) states that trans women and non-binary persons can only apply for approval in accordance with the Policy during the time period AFLW draft nominations are open: at 9.

Parliament intended that he should have'.⁸⁴ This is reinforced by s 17 of the *WHS Act* which provides that workers and other persons should be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances, and that a duty imposed on a person to ensure health and safety requires the person: (a) to eliminate risks to health and safety so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate those risks, to minimise them so far as is reasonably practicable.

The second key feature is the breadth of the duties. It has already been discussed that they are owed by PCBUs (and not just employers) and apply to workers and other persons (not just employees). The duties also apply to all work carried out as part of the PCBU's business or undertaking. In the case of professional athletes, this would include, in addition to participating in (and training and preparing for) the contest, ancillary activities such as attending public relations, community and charitable events. The duties also are inchoate in the sense that for a breach to have occurred, it is not necessary for there to have been an incident or injury. Exposing persons to risks to their safety or health can give rise to a breach, even if the persons are not subsequently injured or become ill.⁸⁵ And nor can PCBUs avoid responsibility by arguing that the person to whom the duty is owed consented to the risk and associated dangers. Statutory WHS duties cannot be contractually excluded.⁸⁶ On the contrary, the more dangerous the activity being undertaken, the greater should be the level of diligence and vigilance exercised to ensure a safe working environment is provided.⁸⁷ Further, and importantly in the context of our discussion, the duty extends to ensuring both the physical and psychological health of workers and other persons.⁸⁸ The inclusion of psychological health is important. A sport governing body's responsibility extends to risks that affect the physical and/or psychological health of current athletes, and aspiring athletes who have nominated for the draft.

⁸⁴ *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ). See also *Stratton v Van Driel Ltd* (1997) 87 IR 151, 155 (Byrne J); *R v Irvine* (2009) 25 VR 75, 91–2 [90] (Neave JA).

⁸⁵ The Essendon Football Club was successfully prosecuted under the *Occupational Health and Safety Act 1984* (Vic) without the prosecution having to establish that a particular player was injured as a result of its supplements program: Windholz (n 16). See also *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149, 158–9; *WorkCover Authority (NSW) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182, 201 [68] (Walton J); *Abigroup Contractors Pty Ltd v WorkCover Authority (NSW)* (2004) 135 IR 317, 336–7 [57]–[58].

⁸⁶ *WHS Act* (n 70) ss 14, 272. See also *Kondis v State Transport Authority* (1984) 154 CLR 672; *Chaston v Sacco Builders Pty Ltd* [2008] NSWIRComm 152, [37]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 552 [10].

⁸⁷ *WorkCover Authority (NSW) v Manildra Park Pty Ltd* [2007] NSWIRComm 35 [12]. See also *WorkCover Authority (NSW) v Police Service (NSW) [No 2]* (2001) 104 IR 268.

⁸⁸ *WHS Act* (n 70) s 4.

The third key feature is that duty-holders are required to do what is ‘reasonably practicable’ in the circumstances.⁸⁹ Risk management is central to the ‘reasonably practicable’ calculus (and thus complying with WHS duties).⁹⁰ Section 18 of the *WHS Act* provides when determining what is ‘reasonably practicable’, duty-holders must take into account and weigh up all relevant matters including: the likelihood of the hazard or risk occurring; the degree of harm that might result from the hazard or risk; the availability and suitability of ways to eliminate or minimise the risk; and the costs associated with doing so. Courts also consistently have held that duty-holders are required to undertake the key steps of a risk management process, namely: hazard identification, risk assessment, identification and implementation of control measures to eliminate or minimise those risks, and monitoring and enforcement of those control measures.⁹¹

The fourth key feature is the duty to consult with workers. WHS duties enliven a number of consultation and representation provisions designed to give the persons for whose benefit the duties are owed — in this case, the athletes — a meaningful voice on health and safety matters.⁹² These include obligations to consult on health and safety issues,⁹³ to establish Health and Safety Committees with athlete representation,⁹⁴ and the right of athletes to elect Health and Safety Representatives (‘HSRs’) to represent them on health and safety matters.⁹⁵ It also should be pointed out that the PCBU’s obligation to ensure a safe workplace extends to ensuring the safety of the consultation processes themselves, and that those consultation processes do not put workers health and safety at risk.

It was observed earlier that there are a number of potential health and safety risks emanating from the inclusion of transgender and intersex athletes in professional sport. These include risks to physical safety arising from their participation, risks to psychological health from the process of developing policies to govern their participation, and risks to the psychological health of transgender and intersex athletes in particular from having to satisfy those special policies. It is to the challenges and

⁸⁹ ‘Reasonably practicable’ is the feature most often in dispute in WHS prosecutions, and about which most has been written. For a comprehensive examination of how courts interpret ‘reasonably practicable’, see Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (Lawbook, 3rd ed, 2012) 263–312.

⁹⁰ Elizabeth Bluff and Richard Johnstone, ‘The Relationship Between “Reasonably Practicable” and Risk Management Regulation’ (2005) 18(3) *Australian Journal of Labour Law* 197.

⁹¹ Johnstone, Bluff and Clayton (n 89) 295 [4.435] and the cases cited therein.

⁹² These provisions impose duties on PCBUs, which in the case of professional sports we have seen include both the clubs that engage the players and the sport governing bodies: see above nn 78–81 and accompanying text. Importantly, the *WHS Act* (n 70) requires that they co-operate in the discharge of their consultation obligations: at s 46.

⁹³ *WHS Act* (n 70) s 49.

⁹⁴ *Ibid* s 75.

⁹⁵ *Ibid* ss 50–69.

opportunities that arise from managing these risks in accordance with WHS law that the article now turns.

V WHS LAWS AND GENDER-DIVERSE ATHLETES: CHALLENGES AND OPPORTUNITIES

The preceding analysis has established that WHS laws impose on the bodies that govern professional sporting competitions statutory duties to ensure the health and safety of both athletes competing in those competitions, and aspiring athletes nominating to be drafted into them. Professional sport enjoys no special exemptions or privileges when it comes to WHS law. What WHS law requires of persons involved in professional sporting competitions is determined by reference to the same legal principles that apply to other industries and work. This is in contrast to anti-discrimination laws that create sporting exemptions from the general law within which discriminatory behaviour is acceptable.

Of course, what the law requires and how it is practised and enforced are not always the same. It has been observed that the application of WHS law to sport largely is absent from the scholarly literature.⁹⁶ It also is an area where WHS regulators are reluctant to involve themselves.⁹⁷ WorkSafe Victoria's successful 2016 prosecution of the Essendon Football Club over its undocumented and uncontrolled supplements program is the exception, not the rule.⁹⁸ This general reluctance is likely to be heightened in the sensitive area of transgender and intersex participation.⁹⁹ Overcoming this reluctance and lack of recognition is the first (and arguably largest) challenge in applying WHS laws to the participation of transgender and intersex athletes in professional sport. This article aims to meet that challenge.

The second challenge is managing the health and safety risks associated with their participation in accordance with WHS law. In examining this challenge, this article differentiates between three types of risks: (1) risks to physical safety; (2) risks to psychological health generally; and (3) risks to psychological health specific to the development and implementation of policies governing transgender and intersex athletes' participation.

⁹⁶ See above n 12 and accompanying text.

⁹⁷ Eric Windholz, 'Professional Sport, Work Health and Safety Law and Reluctant Regulators' (2015) 11(1) *Sports Law eJournal* 1–25.

⁹⁸ See above n 16 and accompanying text.

⁹⁹ If, as Smith, Schleiger and Elphick observe, WHS regulators are reluctant to recognise workplace sexual harassment as a WHS issue, they are even less likely to recognise transgender participation in professional sport as one: Smith, Schleiger and Elphick (n 67).

A *Risks to Physical Safety*

It has been argued that cisgender women athletes could be at greater risk of physical harm and injury if they compete in sports with larger and stronger transgender and intersex athletes.¹⁰⁰ This is the basis of World Rugby's ban on transgender women. According to a report prepared for World Rugby, transgender women who transition after male puberty retain 'significant' physical advantages over cisgender women — even after they take steps to lower their testosterone levels. These advantages include being 30–40% stronger and more powerful and 10–15% faster.¹⁰¹ Importantly, the report concludes these advantages create at least a 20–30% greater risk of injury for cisgender female rugby players competing against transgender female players.¹⁰²

The science underpinning the report is heavily contested, not least because the report's conclusions are based on comparing cisgender men with cisgender women, cisgender men being used as a proxy for transgender women.¹⁰³ However, even if one were to accept the science at face value, a decision to ban all transgender women based on it raises many questions from a WHS perspective.

The gender status or identity of an individual does not create any inherent danger or risk to safety. Rather, disparities in strength and/or physique may do so, depending on the sport.¹⁰⁴ A strength and/or physique disparity is likely to create or exacerbate safety risks in sports that involve physical contact between competitors. In combat sports such as boxing, wrestling and karate — where the object is to physically suppress the opponent — the risks posed by strength and/or physique disparities arguably are more significant and may warrant some mitigation. However, risks emanating from disparities in strength and physique also exist between cisgender athletes competing in these sports. Combat sports mitigate these risks — not by excluding athletes of certain strengths and physiques — but through the creation of weight divisions that seek to match athletes based on size and strength.

Risks from disparities in strength and physique also arise in contact and collision sports such as Australian rules football and rugby where aggressive physical contact is permitted under the rules and occurs continuously throughout the game. It is

¹⁰⁰ See above nn 33–4 and accompanying text.

¹⁰¹ World Rugby (n 17) 2.

¹⁰² *Ibid* 2–3.

¹⁰³ Sean Ingle, 'Trans Women Face Potential Women's Rugby Ban Over Safety Concerns', *The Guardian* (online, 20 July 2020) <<https://www.theguardian.com/sport/2020/jul/19/transwomen-face-potential-womens-rugby-ban-over-safety-concerns>>.

¹⁰⁴ The terms 'strength and/or physique' are used here borrowing from the exemption in discrimination legislation. Physique captures size (including height and weight). Of course, strength and physique are not the only determinants of physical risk in sport. Also important is an athlete's skill level that determines their ability to control how they deploy their physique and strength. It will be recalled that part of the concern with Mouncey's participation related to her size combined with her limited skill level: see above n 32 and accompanying text.

possible that a larger and stronger transgender or intersex athlete could pose a safety risk to smaller cisgender athletes (and vice-versa), especially if the larger athlete sought to use their size as a tactical weapon, something that was suggested could occur in the case of Hannah Mouncey.¹⁰⁵ However, these sports attract persons of different strengths and physiques, and a team's success often can depend upon a skilful blending of these differences. To exclude bigger and stronger transgender and intersex athletes from these sports on safety grounds would create a precedent that would argue for the exclusion of equally big and strong cisgender athletes — remembering that, from a safety perspective, it is the disparity in size and strength that is relevant, not the source of the disparity.¹⁰⁶ In these sports, the risks from disparity in strength and physique are mitigated and managed through the rules of the sport. This was made clear in the AFL's *2018 Policy* which stated that the rules of the sport (including those dealing with rough conduct, unsafe play and other on-field disciplinary matters) are designed to ensure the safety of all AFLW and AFL (men's) players, including gender-diverse and cisgender players.¹⁰⁷ It is also clear in the *2020 Policy* that while a trans or non-binary person may be excluded on the basis that their participation poses an unacceptable safety risk, such an exclusion would only arise in 'exceptional circumstances' involving a significant disparity in physique that cannot be managed safely within the rules of the sport.¹⁰⁸ Importantly, the *2020 Policy* states it 'will not arise simply from the proposed participation of a gender diverse person'.¹⁰⁹ The AFL's 'exceptional circumstances' approach stands in stark contrast to World Rugby's blanket ban.

And finally, there are non-contact sports where direct physical contact between athletes is rare, but in which athletes propel projectiles at one another. Cricket and hockey are examples of such sports. Here too, any risk from such activities also exists between cisgender athletes of different strengths and physiques, and is managed through the rules of the sport, the use of protective equipment and the discretion of officials.¹¹⁰

So far this article has been talking about the risks posed by transgender women competing against cisgender women. On the same logic, there also is risk to smaller, less strong transgender men competing against larger and stronger cisgender men. The *AFL Gender Diversity Policy* correctly requires safety risks from the participation of

¹⁰⁵ See above n 32 and accompanying text.

¹⁰⁶ Transitioning gender is not the only source of strength and physique disparities. Most are genetic. They also can arise from training, the use of supplements (legal and illegal), and even surgery.

¹⁰⁷ *2018 Policy* (n 36) 9.

¹⁰⁸ *2020 Policy* (n 11) 12.

¹⁰⁹ *Ibid.*

¹¹⁰ See, eg, Cricket Australia (n 11) cl 10 that states: 'Umpire adjudication (such as the application of dangerous and unfair bowling laws) and the use of protective equipment are long standing and effective means of ensuring the health, safety and wellbeing of players'.

both transgender women and men in their competitions to be assessed.¹¹¹ However, World Rugby's ban does not apply to transgender men competing against other cisgender men. Transgender men will be allowed to play provided they pass a physical assessment and sign a 'written acknowledgement and acceptance ... of the associated risks of playing contact rugby with males who are statistically likely to be stronger, faster and heavier than them'.¹¹² While such acknowledgements may be effective to exclude or limit civil liability, they are problematic from a WHS law perspective. As has been observed, WHS law does not permit duty-holders to contract out of their statutory obligations in this manner, nor is a worker's acceptance of risk a defence.¹¹³ WHS law is unlikely to countenance a policy that allows transgender men to choose to accept the higher safety risks that the sport governing body feels compelled to remove from women's sport.

This analysis reveals that blanket exclusions and special entry requirements are not warranted or necessitated by on-field risks that may emanate from any disparity in strength or physique that may arise from the participation of transgender or intersex athletes. Rather, the inclusion of larger and/or stronger transgender women athletes, in particular, should serve as a proxy for all larger and stronger outliers. To the extent that larger and stronger athletes (transgender or cisgender) may pose a physical safety risk, it is best to address that risk within the general policies and rules of the sport — not through blanket bans.

B *Risks to Psychological Health*

This article has observed that sport governing bodies' WHS duties extend to ensuring (so far as is reasonably practicable) that athletes are not exposed to risks to their psychological health arising from the conduct of their competitions. Athlete psychological health is an issue that has gained recent prominence with a number of high profile Australian athletes taking leaves of absence to deal with mental health issues.¹¹⁴ Research demonstrates that elite athletes are vulnerable to a range of mental health problems related to, among other things, injury, overtraining, burnout and performance expectations and anxieties.¹¹⁵ Risks to an athlete's psychological health also can arise from the inappropriate behaviour of other persons with whom they interact while at work. As Richard Johnstone observes:

This primary duty of care clearly requires a PCBU to ensure, as far as is reasonably practicable, that all workers carrying out work for the business or

¹¹¹ See above n 43 and accompanying text.

¹¹² World Rugby (n 17) 21.

¹¹³ See above n 86 and accompanying text.

¹¹⁴ For an overview of the issue in the AFL: see Brent Hedley, 'Mental Health: Q&A' *AFL Players Association* (Web Page, 27 July 2018) <<http://www.aflplayers.com.au/article/common-mental-health-qas/>>.

¹¹⁵ Simon M Rice et al, 'The Mental Health of Elite Athletes: A Narrative Systematic Review' (2006) 46(9) *Sports Medicine* 1333.

undertaking are not exposed to the risk of bullying or harassment by the PCBU, by fellow workers, or by third parties such as customers or clients.¹¹⁶

Racism (in the AFL men's competition) and sexism (in the AFLW competition) are forms of inappropriate behaviour that have recently blighted the competitions, and adversely affected the psychological health of players.¹¹⁷ The AFL, like many sport governing bodies, has taken a strong stance against such behaviours, including by exposing and sanctioning perpetrators and, where appropriate, referring them to the police for investigation.¹¹⁸ A similar approach would need to be adopted with respect to sexist or transphobic behaviours directed at transgender or intersex players entering its ranks.

However, the WHS duties go further than just addressing specific behaviours. They extend to providing a system of work that is safe, both physically and psychologically.¹¹⁹ Creating a supportive and inclusive workplace environment fosters psychological safety,¹²⁰ and a psychologically safe workplace is particularly important in the context of transgender and intersex participation in sport. Research establishes that psychologically safe workplaces can strengthen gender identity and people's concept of self and self-image, whereas psychologically unsafe workplaces can result in athletes suffering psychological withdrawal, stress, anxiety and depression.¹²¹

For this reason, most professional sports have developed a series of policies that seek to create a safe and inclusive environment in which transgender and other gender-diverse persons are treated fairly and with dignity and respect, and in which discrimination, harassment and abuse on the basis of gender identity are not tolerated.¹²² However, the test of whether such an environment exists is not determined by words on the pages of carefully drafted and lawyer-settled policies. The courts

¹¹⁶ Richard Johnstone, 'The Australian Regulatory Framework for Preventing Harassment and Bullying' in L Lerouge (ed), *Psychosocial Risks in Labour and Social Security Law: A Comparative Legal Overview from Europe, North America, Australia and Japan* (Springer, 2017) 253, 256.

¹¹⁷ See the player comments in Eric Windholz, 'The AFL and Its Clubs Must Continue To Expose and Sanction Online Trolls, It's the Law', *The Conversation* (online, 29 March 2019) <<https://theconversation.com/the-afl-and-its-clubs-must-continue-to-expose-and-sanction-online-trolls-its-the-law-114293>>.

¹¹⁸ *Ibid.*

¹¹⁹ This is one of the more specific duties imposed on PCBUs: see above n 72.

¹²⁰ 'Preventing Work-Related Stress: For Employers in the Private Sector' *WorkSafe Victoria* (Web Page, June 2009) <<https://www.worksafe.vic.gov.au/resources/preventing-work-related-stress-employees-private-sector>>.

¹²¹ George B Cunningham et al, 'Psychological Safety and the Expression of Sexual Orientation and Personal Identity' in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sport, Gender and Sexuality* (Routledge, 2014) 406.

¹²² See above n 11.

have made clear that ‘paper systems are not enough’.¹²³ It is the lived experience that counts. The manner in which policies are developed and implemented determines WHS compliance. This brings us to gender diversity policies specifically.

C Gender Diversity Policy Risks

Gender diversity policies are one of the policies sports have developed to create a safe, fair and inclusive environment. It will be recalled this was the express intention of the *AFL Gender Diversity Policy*. Yet, as observed in the case of Hannah Mouncey, her lived experience is that the AFL excluded her, and imposed a toll on her psychological health in the process.¹²⁴ This also has been the lived experience of numerous other athletes, with *Chand* and *Semenya* offering two of the most prominent examples.¹²⁵ The CAS decisions ruling on their challenges to the IAAF’s hyperandrogenism regulations contain several references to the ‘psychological harm’ and ‘serious psychological consequences’ athletes can suffer when investigated in accordance with the regulations. In *Chand*, the decision noted the existence of such psychological impacts, stating that Chand ‘often breaks down because of the way her sexual identity, honesty and ability to procreate have been questioned’.¹²⁶ Further, in *Semenya*, the CAS Panel acknowledged the psychological distress that can arise from the implementation of the regulations, even when conducted with due care and sensitivity.¹²⁷

This article has observed that a sport governing body’s WHS duties extend to risks to psychological health. This includes risks to psychological health emanating from the process of developing and implementing a gender diversity policy.¹²⁸ This means that when developing such a policy, sport administrators are required to consider the psychological health of transgender, intersex and other gender-diverse athletes whose sporting futures — and gender identities — they are adjudicating upon, as well as the psychological health of those with and against whom they will compete.

How safely to develop and implement a gender diversity policy will vary according to the nature of the sport, its organisation and circumstances. There is no one-size-fits-all approach. However, a number of principles can be gleaned from WHS law and practice to inform the process. First, WHS law directs sport governing bodies to eliminate or mitigate risks emanating from their activities to the extent reasonably practicable. So the first question is whether the policy (and its attendant risks) can be eliminated. This article has discussed how the gender status or identity of an

¹²³ *Sydney County Council v Coulson* (1987) 21 IR 477, 480. See also *Inspector Kumar v Ritchie* [2006] NSWIRComm 323; *WorkCover Authority (NSW) v Daly Smith Corporation (Aust) Pty Ltd* [2004] NSWIRComm 349; *WorkCover Authority (NSW) v Coster* [1997] NSWIRComm 154.

¹²⁴ See above nn 53–9 and accompanying text.

¹²⁵ *Chand* (n 18); *Semenya* (n 10).

¹²⁶ *Chand* (n 18) 78 [387].

¹²⁷ *Semenya* (n 10) 154 [600]–[601].

¹²⁸ See above nn 63–6 and accompanying text.

individual does not create any inherent danger or risk to safety. Rather, it is disparities in strength and/or physique that may, depending on the sport. To the extent that larger and stronger athletes (transgender, intersex or cisgender) may pose a health and safety risk, it is best to address that risk by amending the rules of the sport to engineer out (or at least minimise) the risks at their source (to employ more mainstream WHS parlance).¹²⁹ A separate gender diversity policy is not necessary to address physical safety risks.

But if the need for a gender diversity policy cannot be eliminated because, for example, considerations of competitive fairness necessitate it — which is an assumption being made, not a conclusion being accepted, as the contested debate on this issue is beyond the scope of this article — then the obligation upon sport governing bodies is to minimise the risks emanating from the policy to the extent reasonably practicable. It has been established that the *AFL's Gender Diversity Policy* is very prescriptive and onerous in its requirements. The data required to be provided is extensive, the testing required to produce it is invasive, and the length of time over which it must be provided is long.¹³⁰ In Hannah Mouncey's case, it proved to be too stressful. This raises the question of whether the *Policy* is a case of over-regulation. Does ensuring competitive fairness require the sport to put transgender and intersex athletes through such a rigorous and potentially psychologically damaging process, especially when there already may exist large disparities in strength, stamina or physique amongst cisgender athletes who are not required to undergo similar testing?¹³¹ The assessment of competitive risks drives and informs the development of policies to address those risks. An over-estimation of, or over-reaction to, those risks can lead to an overly prescriptive and strict diversity policy that, in turn, generates its own health and safety risks. The WHS duty to mitigate risk operates to suggest that such policies should err on the side of under-regulation, not over-regulation, and for the softening (if not removal) of some of the policy's more onerous requirements.

The psychological risks of a gender diversity policy also can be mitigated by effective consultation. This article has established that WHS duties enliven a series of consultation and representation provisions.¹³² These offer the opportunity to address issues concerning the participation of transgender and intersex athletes through a lens less tainted with the moralism that Smith, Schleiger and Elphick suggest attach when the issue is debated through the prism of anti-discrimination law, and which they argue 'operate[s] to stifle open and constructive inquiries about workplace cultures and practices, which are the types of inquiries needed to develop deeper understandings of the natures and causes of discrimination and harassment'.¹³³ Conducted well, health and safety consultation provides a framework through which both gender-diverse and

¹²⁹ See above nn 107–110 and accompanying text.

¹³⁰ See above n 45–7 and accompanying text.

¹³¹ See Buzuvis (n 2) 69. It should be noted that while most sports' policies are invasive (eg, requiring monitoring and maintenance of testosterone levels), not all are as onerous as the AFL's policy with respect to physiological testing.

¹³² See nn 92–5 and accompanying text.

¹³³ Smith, Schleiger and Elphick (n 67) 230.

cisgender athletes can give voice to their concerns in a psychologically safe environment, without fear of negative consequences to self-image, status or career.¹³⁴ It also enables the discussion to be transitioned away from issues specific to transgender and intersex athletes, to a broader discussion about athlete health and safety and the risks associated with outliers — be they transgender, cisgender or intersex. This, in turn, provides an opportunity to deal with the participation of transgender and intersex athletes in a non-discriminatory manner.

VI CONCLUSION

This article has examined the vexed and often divisive matter of transgender and intersex athlete participation in professional sport through the lens of WHS laws. This examination revealed a number of potential health and safety risks emanating from the inclusion of transgender and intersex athletes in professional sport. These include risks to physical safety arising from their participation, risks to their psychological health from a sexist or transphobic environment, and risks to psychological health from the development and implementation of gender diversity policies. The examination also revealed that sport governing bodies (and clubs) have statutory WHS duties that oblige them to eliminate or minimise these risks to the extent reasonably practicable.

Applying these duties to sports that are inherently risky is a complex and challenging task. Applying them to the participation of transgender and intersex athletes in sport is even more challenging and complex. At the same time, however, WHS law presents sport governing bodies, clubs and athletes — transgender, cisgender and intersex — with a valuable avenue to pivot the discussion away from the moralism of a debate grounded in competing rights to a focus on risks and solutions grounded in a debate about safety. This, it is submitted, can only be a good thing.

¹³⁴ WA Kahn, 'Psychological Conditions of Personal Engagement and Disengagement at Work' (1990) 33(4) *Academy of Management Journal* 692, 708, cited in Cunningham (n 121) 406–15.

*Martin Hinton**

A FINAL BAIL REVIEW¹

The door to the courtroom opens to the cry, ‘All stand.’

‘Once more into the fray,’ I think to myself, then enter.

I make my way to the centre of the Bench, turn to the bar table, bow and sit.

‘Call the matter on,’ I command.

‘In the matter of Michael Smith and the Queen,’ a voice declares. Appearances follow.

This is a review of the decision of a magistrate refusing Michael Smith bail. Michael Smith is not the applicant’s real name. I have not used his real name for the obvious reason.

As counsel for Michael Smith makes ready to speak, I look across at the flat screen on the wall. There sits Michael Smith in an audiovisual link suite somewhere in one of the State’s institutions. Thin, wiry, with long black hair, just off his collar. He is obviously Aboriginal.

Counsel for Mr Smith commences her submissions.

Mr Smith is 17 years old. He has been charged with serious criminal trespass and theft. I look up, my interest piqued. I had not had the opportunity to read the papers. I was rostered in the short notice list and it had been a hectic week. In fact, I felt very much like a ‘short order cook’ during the dinner rush with numerous pots and pans all on the heat at the same time. It was not that I minded being extra busy — I did not — it was just that I was so busy that I was not as prepared as I would have preferred. Still, counsel prepare on the basis that judges have not had the opportunity to familiarise themselves with the papers, and, fortunately, on this I can rely.

My mind returns to the matter at hand. ‘Why is Michael Smith in custody?’ I ask myself. No doubt the charges were serious but, the presumption of bail aside,² in my experience it was most unusual for a youth to be denied bail for breaking into premises and stealing something. I assumed Michael had not broken into residential premises. Had he done so, the statement of the offence would have included that fact

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¹ Martin Hinton, ‘A Bail Review’ (2019) 40(1) *Adelaide Law Review* 187; Martin Hinton, ‘Another Bail Review’ (2019) 40(3) *Adelaide Law Review* 627.

² *Bail Act 1985* (SA) s 10(1).

and if someone was home, it would have been an aggravated offence. So, I thought, he must have broken into something like a shed, shop or factory — perhaps even a school.

Break-ins are common offences amongst youths, particularly break-ins involving non-residential premises. Rarely does such offending result in the refusal of bail, or even detention upon plea, or conviction. A break-in or two as a youth, accompanied by the theft of small, readily consumable items, does not indicate a first step in a life committed to crime. Even if the youth has convictions for drug use, drunkenness, theft, graffiti, perhaps joy-riding and other street crimes, it is likely that the criminogenic factors in operation and the youth's attitude are amenable to change. As a community we know this all too well. We have established specialist courts for dealing with the young and specialist services because we know that the young remain open to assistance and guidance.³ Knowing this, how the system treats the young is critical to forging positive relationships allowing for attitudinal and behavioural change to occur. No doubt there are some youths who test the patience and skills of the mostly saintly, but they are the exception. We cannot imagine a system where we compromise on the care, protection and education of our youth and ignore our responsibility for putting opportunity in their way. Accepting this, detention must be reserved for the exceptional case.

My mind dwells on these things a moment longer. With all we know about over-representation,⁴ the link between the imprisonment of Aboriginal youths and the imprisonment of Aboriginal adults,⁵ intergenerational trauma⁶ and the failure of the

³ See generally *Youth Court Act 1993* (SA); 'Youth Court of South Australia', *Courts Administration Authority of South Australia* (Web Page, 2012) <<http://www.courts.sa.gov.au/OurCourts/YouthCourt/Pages/default.aspx>>.

⁴ The Royal Commission into Aboriginal Deaths in Custody reported that as at 30 June 1989, the proportion of the adult Aboriginal population in prison was 15 times greater than the proportion of the adult non-Aboriginal population in prison: *Royal Commission into Aboriginal Deaths in Custody* (National Reports, April 1991) vol 1, ch 9, 9.3.1 ('*Royal Commission*'). As at 30 June 2019, Aboriginal and Torres Strait Islander prisoners accounted for 28% of the total Australian prisoner population: Australian Bureau of Statistics, *Prisoners in Australia, 2019, Aboriginal and Torres Strait Islander Prisoner Characteristics* (Catalogue No 4517.0, 30 June 2019).

⁵ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 73, 486.

⁶ *Ibid* 79–81. See generally Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62(6) *International Social Work* 1522; Beverley Raphael, Patricia Swan and Nada Martinek, 'Intergenerational Aspects of Trauma for Australian Aboriginal People' in Yael Danieli (ed), *Intergenerational Handbook of Multigenerational Legacies of Trauma* (Springer, 1998) 327.

Closing the Gap strategy⁷ to bring about widespread and lasting change in the lives of Aboriginal people, there had better be a good reason for Michael Smith being in custody. I can feel my agitation rising.

It is tempting as a judge, when one's sensibilities are challenged, to launch into an aggressive cross-examination of counsel. No matter how impatient one is to get to the heart of the matter, it is seldom helpful to let one's impatience and agitation show. I check myself, turning instead to the papers for the detail.

Michael is in Year 12. He lives in Amata, a remote Aboriginal community in the north-west of South Australia on the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands').⁸ English is not his first language. I stop reading and look up at the young man on the flat screen. I hold up one hand.

'Hold on, hold on,' I say.

Counsel stops talking.

'Do we need an interpreter for Mr Smith?'

Counsel looks at me blankly, then discloses that she has not spoken with Michael. Instructions had been provided by another solicitor from the office who was nowhere to be seen. I turn my gaze back to the screen. Michael had not flinched. He was looking straight ahead, not obviously engaged.

'Are you Michael Smith?' I ask. He nods, once, but as if unsure.

'Michael, do you speak English?'

'Yep.'

'Have you been able to understand what your lawyer has been saying?'

'She my lawyer?'

'Yes. Did another lawyer come and see you?'

'Yep.'

⁷ See 'What We Know', *Closing the Gap* (Web Page) <<http://www.closingthegap.gov.au/>>. See also Australian Government, *Closing the Gap: Report 2020* (Report, 2020) 11, 13; Fiona Stanley, Daniel McAullay and Sandra Eades, 'Closing the Gap Measures Need to Be Changed. Here's How', *The Conversation* (online, 19 June 2020) <<https://theconversation.com/closing-the-gap-measures-need-to-be-changed-to-improve-outcomes-heres-how-140728>>.

⁸ Anangu Pitjantjatjara Yankunytjatjara, 'The Amata Community', *APY Communities* (Web Page, 2020) <<https://www.anangu.com.au/en/sa-communities/amata>>.

‘Well that lawyer told this one what to say for you, ok?’

He nods.

‘Do you know why we are here?’

He nods.

‘Can you tell me why we are here?’

I am unsure whether I should ask this question. It could prompt a statement Michael might later regret. However, seeing as counsel did not flinch, I quickly throw off my concern. In any event, he does not seem the type to ‘run off at the mouth’.

‘‘Cos I got locked up. I want out.’

‘Can I just ask you, at school does the teacher speak in English or in language?’

‘English.’

I leave it there. I figure if Year 12 lessons are conducted in English, Michael should have sufficient command of the language to understand generally what is going on. I also plan on explaining to him in plain English whatever I decide and why. That is a habit of mine, irrespective of who is in the dock. I have always thought that it does the administration of justice no credit that judges rarely speak directly to the people most affected by what has happened or is happening. I know that counsel will speak to their client and explain what has occurred, but the dignity invested by a judge taking a moment to speak to the people most affected can only positively contribute to the administration of justice and the perception of the court’s humanity and connection to the community.

Why lock up a 17-year-old from a remote community?

I turn back to counsel. ‘Can you tell me what the police say Mr Smith has done?’

‘Mr Smith and two of his mates, who are both also youths, broke into the community store. They stole three mobile telephones, sunglasses and chocolate.’

‘And?’ I ask, thinking there had to be more.

‘They were arrested within an hour of doing so and Mr Smith has been in custody ever since.’

‘Was the property recovered?’

‘The chocolate, your Honour, was long gone, but the phones and sunglasses were recovered and, luckily, remained in a resaleable condition.’

‘When did this occur?’

‘About 10 weeks ago.’

‘Was any damage caused to the store?’

‘Some minor damage to a lock on a window.’

‘Did he apply for police bail?’

The questions are flowing thick and fast but, hopefully, not aggressively or such as to betray my impatience or agitation.

‘He did, your Honour, but that was refused and he was transported first to Coober Pedy, then on to Port Augusta and then down to Adelaide.’

‘Are his co-accused in custody?’

‘No, both were granted bail when this matter was last before the Youth Court.’

‘When was that?’

‘Two weeks ago.’

‘Did Mr Smith apply for bail on that occasion?’

‘Yes, your Honour, but his application was refused on the basis that he did not have a suitable place of residence to which he could be bailed.’

‘Let me get this straight. He has been in custody for 10 weeks for breaking into a store, causing negligible damage, and stealing items recovered and resaleable, with the exception of a handful of chocolate bars. Is that the position?’

‘That’s about it, your Honour.’

Try as I might to deliver this summation without any hint of prejudgment, agitation or annoyance, I doubt I succeeded.

My mind begins to whirl. On what I know, the repeated denial of bail makes no obvious sense.

‘Does he have any previous convictions?’

‘Yes.’

‘Ah-ha,’ I think to myself.

An antecedent report is handed up. I run my eye down the document. Michael first came into contact with the law as a 14-year-old when he stole a bicycle in Port Augusta. When he was 15, he had been convicted twice of property damage and

once for fighting, and when 16, was convicted of possessing cannabis and carrying an offensive weapon. I look up.

‘What was the weapon?’

‘A waddy.’⁹

‘Where did that occur?’

Counsel is unsure of the exact location, but it was somewhere on the APY Lands.

The APY Lands is a vast area of over 100,000 square kilometres in the far north-west of South Australia. It is occupied by around 3,000 people of Aboriginal descent spread over a number of communities like Amata.¹⁰ Collectively the Aboriginal occupants are known as the Anangu,¹¹ although there are a number of language groups including the Ngaanyatjarra, the Pitjantjatjara and the Yankunytjatjara.¹² Many of the people who live on the APY Lands continue to speak their own language and live according to traditional law and custom.¹³

I reflect on this a moment longer. A waddy. There could be many reasons why a young Aboriginal man who lives on the APY Lands would have a waddy in his possession, none of which would necessarily be criminal.

I turn back to counsel. My mind has travelled off on a tangent.

‘Is Mr Smith initiated?’ I ask.

Counsel cannot answer.

Again, I turn to the flat screen.

‘Michael, have you been through the law?’

‘Yes, boss.’

⁹ A waddy is formally defined as a ‘heavy wooden ... club’: *Macquarie Dictionary* (online at 8 September 2020) ‘waddy’ (def 1).

¹⁰ See Regional Anangu Services Aboriginal Corporation, ‘APY Lands Communities’, *Working with the Community (Community-ngka Tjunga Wakaringanyi)* (Web Page) <<https://www.rasac.com.au/working-with-apy-communities/apy-lands-communities>>.

¹¹ Parks Australia, ‘Anangu Culture’, *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/>>.

¹² Ibid; ‘About Us’, *Anangu Pitjantjatjara Yankunytjatjara* (Web Page, 2020) <<https://www.anangu.com.au/en/about-us>>.

¹³ Parks Australia (n 11).

Boss. Aboriginal men from the APY Lands commonly call whitefellas in positions of authority boss. I am caught in two minds in the instant. On the one hand, being called boss smacked of a history of repression by those who thought themselves superior. I do not care to perpetuate this. On the other hand, respect for the law and the Court as an institution is important generally. I let it pass hoping that I have not contributed to the ethnocentric tendencies of our institutions.¹⁴

It is February. I recall being told in another case that February to March can be an important time for Men's and Women's Business.¹⁵ In the same case I had learned that Men's Business, and when and where it was to occur, was not something that could be reduced to some kind of program that may find its way into a whitefella's annual planner. It was a matter for the old men to decide who, what, where, when and for how long.

'You missing Men's Business?' I ask.

He nods. Nothing more is volunteered.

My understanding of the *tjukurpa* is very imperfect. I have not been privileged to be admitted to the knowledge, practice and understanding of its breadth and depth. However, I have come to know that for those initiated, the *tjukurpa* is bigger than the law. My poor understanding is that it is indispensable to identity, status, role and relations, defining the individual, claiming them and giving them purpose and meaning.¹⁶ Central to this is the relationship to, and responsibility for, the land.¹⁷

'Where's your country?'

'Amata.'

'It's more than that,' I think to myself.

'Where are you meant to be now?'

'Home, maybe.'

¹⁴ *Royal Commission* (n 4) vol 2, ch 12. See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor & Francis, 2015).

¹⁵ See Parks Australia, 'Men's and Women's Business', *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/mens-and-womens-business/>>; 'Men's and Women's Business', *Deadly Story* (Web Page) <https://www.deadlystory.com/page/culture/Life_Lore/Ceremony/Men_s_and_Women_s_Business>.

¹⁶ Parks Australia, 'Tjukurpa', *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/tjukurpa/>>.

¹⁷ *Ibid.*

I had also come to appreciate that for a traditional Aboriginal man, Men's Business and the *tjukurpa* is not like a course of study at university that culminates in a graduation ceremony and the conferral of a qualification. It is a journey, lifelong, spiritual and more. Again, my knowledge and understanding are limited.

'What about school?'

He shrugs.

Fair enough. It was a dumb question betraying my whiteness. Try as I do to learn and understand, too often I unthinkingly fail to appreciate difference and diversity. For an initiated man — and whilst Michael was a youth in Court, he was a man elsewhere — school and Year 12 were not necessarily high on the list of priorities. My question betrayed the values and priorities of my culture; values and priorities that, I had to remind myself, were not always subscribed to by others.

My thinking quickly travels to a film I have recently seen — *In My Blood It Runs*.¹⁸ The main character is a primary school boy who can speak three languages but struggles with his schoolwork. He is a self-described 'bush kid' that you quickly warm to. Whilst the dominant culture tends to see his poor performance in school as a shortcoming, the film shows the cultural richness in his life that gives him purpose and meaning.¹⁹ The question that the film raises is why can the dominant culture not embrace and accommodate the cultural richness of Aboriginal Australia? I understand that the issues that arise where cultures meet and share the same space are complex, but the film demonstrates powerfully that different ways can provide a no less loving and fulfilling life than that which the dominant culture suggests we should all aspire to. The film has affected my thinking.

'Is there a suitable residence now available for Mr Smith?'

'There is, your Honour.'

An address in Ernabella, another community on the APY Lands,²⁰ is supplied.

'Perhaps I should hear from the Crown.'

¹⁸ *In My Blood It Runs* (Closer Productions, 2019).

¹⁹ *Ibid.* See also *Royal Commission* (n 4) vol 2, ch 10, 10.2.3; Michael J Halloran, 'Cultural Maintenance and Trauma in Indigenous Australia' (Conference Paper, Australian and New Zealand Law and History Society Conference, 2–3 July 2004) 10. On the misunderstanding of Aboriginal culture see generally Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 15.

²⁰ Anangu Pitjantjatjara Yankunytjatjara, 'The Pukatja Community', *APY Communities* (Web Page, 2020) <<https://www.anangu.com.au/en/sa-communities/pukatja-ernabella>>.

It is not a question. I have heard enough. It is time for the Crown to justify Michael Smith's ongoing detention on remand.

Perhaps I should hear from the Crown. As counsel I had heard that statement from the Bench more than I cared to remember. Often it signals doom. At the very least, a difficult grilling may be expected.

The prosecutor stands, collects himself, and states, 'Mr Smith was denied bail for his own protection.'

If this was an advocacy course, such a statement would attract high praise from any instructor. In one fell swoop it neutralises the force of the applicant's submissions and sets the argument on a fresh course. It takes me aback, causing me to sit silently and let the prosecutor proceed.

He explains that the break-in occurred under cover of darkness in the early hours of a Thursday morning, and, once discovered at opening time, resulted in the community store being closed whilst the police were summoned. There being only one store in Amata, the people in the community could not buy anything. Worse still, it was payday so people wanted to stock up and could not. Agitation quickly turned to anger. The offenders were identified and a mob went looking for them to give them a hiding. When the police arrived, Michael and his co-accused broke cover and surrendered. As mentioned, they were taken into custody for their own protection and Michael had been in custody ever since.

My mind drifts. What if police had not been able to attend? Would the community have taken over? Should we trust the community to administer justice in matters like this that affect only the Anangu? Would that mean sanctioning corporal punishment? Why is dragging a 17-year-old youth hundreds of kilometres away to a detention centre for months any more just and merciful? These are large questions to which I do not know the answer. Do I add to the burden of colonisation by putting such questions out of my mind? Surely one way of relieving intergenerational trauma is to hand back power to communities like Amata? Why not have an Anangu court dispensing a form of justice that bridges cultures, is acceptable to both, and is linked to the national integrated judicial system? Large questions that will involve a lot of talking. Questions for legislators and policymakers, not judges. Questions that in a courtroom have no immediate relevance.

My mind snaps back to the case at hand.

I do not know much about Amata. I have never been there. But I do know that on a day-to-day basis the community store in a remote community is a focal point for the residents. Clearly the closure of the store because of the break-in caused significant inconvenience, angering some. How widespread and deeply felt that anger was, I do not know. What I do know is that things were bad enough for the police to remove Michael and his co-accused from the community. I also know that the police station in Amata is small with only four resident officers, hardly enough if things in the community get very heated, especially as help is a couple of hours' drive away.

'How long was the store closed?'

‘Three or four hours, your Honour; just long enough for a check to be made of what was missing, and for one of the officers who had crime scene training to check for fingerprints and take photographs.’

As it transpired, by the time the officers finished at the store, Michael and his co-accused were well on their way to Coober Pedy in a police troop carrier. Now Michael was in Adelaide, 15 hours or more by car from home. A 15-hour drive in Europe would take you through several different countries. The position is no different here. Whilst a 15-hour drive saw Michael still in South Australia, depending on the route the police took, he could have passed through the country of the Antikirinya,²¹ the Arabana,²² the Kokatha,²³ the Banggarla,²⁴ the Nukunu,²⁵ and, the Kaurna.²⁶ Perhaps for Michael, it was like driving from Warsaw to Calais. What is certain is that he was a long, long way from his family and his country. In Adelaide he might have a few visitors, a few relatives who had come to the city. But his day-to-day life in detention would be so very different to life on the APY Lands. This could not be a positive experience.

I am suddenly reminded of the Aboriginal and Torres Strait Islander Youth Justice Principle (‘Principle’).²⁷ A recent report detailing the pilot inspection of the Adelaide Youth Training Centre (*Kurlana Tapa*)²⁸ suggested the elements of the Principle had not yet adequately permeated systems and services in this State.²⁹

²¹ ‘Antikirinya’, *Mobile Language Team* (Web Page) <<http://mobilelanguageteam.com.au/languages/antikirinya/>>.

²² ‘Arabana (Arabunna)’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/arabana-arabunna/>>.

²³ ‘Kokatha’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/kokatha/>>.

²⁴ ‘Barngarla’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/barngarla/>>.

²⁵ ‘Nukunu’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/nukunu/>>.

²⁶ ‘Kaurna’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/kaurna/>>.

²⁷ The Aboriginal and Torres Strait Islander Youth Justice Principle details culturally sensitive supports that Aboriginal and Torres Strait Islander youth are entitled to whilst in custody: *Youth Justice Administration Regulations 2016* (SA) reg 5. For example, it requires that ‘assessment, case planning and decision-making in respect of an Aboriginal or Torres Strait Islander youth includes consultation with relevant Aboriginal and Torres Strait Islander people or organisations to assist the youth’: at reg 5(c).

²⁸ The Adelaide Youth Training Centre is a South Australian detention facility for young people between the ages of 10–18: see ‘Adelaide Youth Training Centre: Kurlana Tapa’, *Government of South Australia* (Web Page, 3 June 2019) <<https://www.sa.gov.au/topics/rights-and-law/young-people-and-the-law/adelaide-youth-training-centre>>. *Kurlana Tapa* ‘means New Path in the language of the Kaurna people of the Adelaide Plains’: Alan Fairley, Belinda Lorek and Jessica Flynn, *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre (Kurlana Tapa Youth Justice Centre)* (Report, Training Centre Visitor, Government of South Australia, June 2020) 6.

²⁹ Fairley, Lorek and Flynn (n 28) 23, 38–9, 87.

‘What is the Crown’s attitude to Mr Smith being bailed to the address in Ernabella?’

‘We oppose that course.’

‘Why?’

‘Two reasons. First, it is proposed that he live with an uncle who has an extensive criminal history, and, second, there is no effective means of supervising him in Ernabella.’

The uncle’s antecedent report is handed up. The prosecutor takes me through a list of prior convictions running to some four pages for a man who, I am told, is in his forties. His offending also started as a youth. In fact, his early offending is not unlike Michael Smith’s — convictions for low level public order offending, theft, minor assaults and property damage abound. Initially he was fined, but fines soon made way to short periods of imprisonment. The offending continued as he aged, but remained largely of the same order. Small periods of imprisonment became longer as the system lost patience. At two points, significant periods of imprisonment had been imposed for significant assaults. Obviously, the antecedent report did not tell the full story of this man. I wondered if he was a traditional man. I wondered to what extent drink was involved in his offending. Perhaps he was a senior *wati* caught in the clash of cultures.³⁰ What impact had colonisation had on his life? Was he a victim of racism and institutional bias?

‘What happened to Mr Smith’s co-accused?’

‘Both were bailed to live with relatives in Port Augusta.’

Further discussion follows about the inability of the authorities to locate a suitable residence for Michael. The topic then switches to the substantive proceedings and when it is likely they will be finalised. It seems to me that a guilty plea is on the cards and a sentence no more punitive than the 10 weeks Michael had already spent in custody likely. In fact, it is highly likely that the sentence will be community-based with care and correction as the goal, and was always likely to be. Standing back and considering all the circumstances, to deny Michael bail is not in the interests of justice. It definitely is not in his best interests.

‘Why can’t he just go back to Amata?’

‘He’s at risk.’

‘How do you know that? Have you received an update from the officers in Amata or someone in the community?’

³⁰ A *wati* is an ‘initiated man’: Wilf H Douglas, *An Introductory Dictionary of the Western Desert Language* (ECU Publications, 2011) 105.

‘No, your Honour.’

‘The alleged offending occurred almost three months ago. Within hours of the store re-opening wouldn’t the initial anger have dissipated? And within days whatever inconvenience was caused would have been forgotten, wouldn’t it? Is he truly at risk?’

I sneak a glance at the flat screen. Michael is shaking his head.

‘Those are my instructions,’ states the prosecutor, signalling that he has nothing more.

‘Just before you sit down ...’

‘Yes your Honour.’

‘Have the authorities exhausted all possibilities with Michael’s family? And in referring to his family, I don’t mean in the European sense.’

The answer is negative. Chances are the authorities were not even aware of the extended family to which Michael belonged.

I turn to Michael’s counsel.

‘Have you got any information on the risk to Michael should he return to Amata?’

‘No.’

‘Can you tell me anything about his family in Amata?’

I learn that Michael’s father is in prison and his mother is somewhere in the Northern Territory.

‘But what about aunts and uncles?’ Counsel does not have the answers.

I think quickly.

‘If I leave the Bench and order that the Court be vacated, except for you, and further order that the link to the detention centre remain open so that you can speak to your client, do you think you might be able to take instructions on the risk to him as he understands it if he returns home, to whom the Court might speak to confirm any opinion your client may have, and whether he has any aunties or uncles in Amata that he might stay with for the duration of his time on bail?’

Counsel wisely runs with the invitation. Before adjourning I tell the prosecutor that I would also benefit from anything the officers at Amata might be able to tell me, should he be able to contact them, before telling Michael that I intend to leave the Bench so that he can speak to his lawyer.

I adjourn for 45 minutes.

We reconvene promptly three-quarters of an hour later. I am hopeful.

Defence counsel tells me that Michael is happy to be bailed back to Amata and does not think anyone will carry through on the threat to give him a hiding.

‘Is there anyone in Amata that he can live with?’ I ask.

‘His Aunt Jenny.’

‘Have you spoken to Aunt Jenny yourself?’

‘Yes, in the last twenty minutes.’

‘What did she tell you?’

I am told that Aunt Jenny is happy to have Michael live with her.

‘Did Aunt Jenny say anything about the mood of the community and whether, if Mr Smith went back, he would be at risk?’

No, is the answer, but counsel did not ask her about this.

The prosecutor advises that there has been a rotational change in the officers stationed at Amata. None of those currently posted to the community were there when Michael and his co-accused are said to have broken into the community store. They are in no position to help. All they can say is that things are quiet in Amata, and that life seems to be going on as usual. The prosecutor adds that part of the APY Lands have been closed to outsiders because Men’s Business is taking place and many of the men in Amata have gone.

I pause to think; I have no doubt that Aunt Jenny is happy to have Michael stay with her. The Aboriginal notion of family and responsibility for family members is deeply ingrained and is always at the forefront of an Aboriginal person’s thinking. Something grave would have to happen for her to reject him. Had I spoken to Aunt Jenny, I would have asked about the mood of the community and how people might react if Michael Smith returned.

Again, my mind began to whirl. Michael, like most Aboriginal offenders who live on the APY Lands, is disadvantaged in the criminal justice system because of the remoteness of his country. Remoteness and the relative sparsity of population mean less resources are available to the person charged, and less options for a court considering bail, than are available in the city or larger rural towns. And then there is the question of the access that people who live on the APY Lands have to lawyers and the ability lawyers have to take instructions, gather evidence and to find witnesses. Whilst there are specialist Aboriginal legal organisations, funding is often limited and

the services on offer, correspondingly limited.³¹ To this must be added the paucity of programs and the relative non-availability of supervision for those who might be eligible for bail, community-based sentences and parole. In these respects, the system opens itself up to allegations of unequal treatment and worse. My mind returns to the idea of Anangu courts and the involvement of the Anangu in bail and community-based programs.

My mind runs on. Recent research undertaken by the Australian National University demonstrates that amongst the non-Indigenous population of Australia, there is an implicit negative bias against Indigenous Australians which is likely to result in the racist treatment of Indigenous Australians.³² This bias is unconscious. It may be described as a collective negativity that impacts upon all outcomes for Indigenous Australians at all levels. If this is right, the odds of Michael receiving equal treatment are against him. The same study finds an absence of bias by Indigenous Australians against Indigenous Australians.³³ It seems to me yet another argument for Anangu courts.

‘Do you have Aunt Jenny’s telephone number?’ I ask.

Hesitatingly, defence counsel says yes. I had noticed there was a cordless telephone on the bench occupied by my associate.

‘Do either of you object if I call Aunt Jenny?’ Neither counsel stirs.

I dial the number. A woman answers. I tell her who I am and why I am calling. She sounds unimpressed and inconvenienced. I ask her whether she knows Michael Smith and if she is happy for Michael to live with her in Amata if he is released on bail. She tells me that he is her nephew and that she is happy to have him. I ask her if he is likely to get a hiding if he returns. She says not. I tell her that I have been told that some people wanted to give him a hiding. She tells me that things are good now. I impress upon her that I would not want to see Michael get hurt if he goes back.

‘Nah, nah, he’ll be alright with me,’ she says. She sounds strong and confident.

I ask whether she is prepared to help me make sure that Michael stays out of trouble and attends Court. She assures me he will listen to her.

Before terminating the call, I ask counsel if they have any questions for Aunt Jenny. None. I thank her, tell her it is likely that Michael will be back in Amata soon and that that

³¹ Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015–2020* (Final Report, February 2019) 85.

³² Siddharth Shirodkar, ‘Bias against Indigenous Australians: Implicit Association Test Results for Australia’ (2020) 22(3–4) *Journal of Australian Indigenous Issues* 3, 5.

³³ *Ibid* 14.

she can expect a call letting her know if and when he is coming. I return the phone to my Associate and turn back to the bar table. I invite any further submissions. None are made.

I announce that I intend to grant Michael bail on the condition that he live with his Aunt Jenny in Amata. The prosecutor does not speak against my decision, but requests a condition that Michael not associate with or contact his co-accused. He also mentions that the Department of Correctional Services would like the bail agreement to include a condition that Michael must attend school. I am tempted to do so, but check myself. I do not want bail revoked because Michael failed to turn up for school, and I do not want him to miss Men's Business because of a condition in a bail agreement that he must go to school. I do not include the condition.

The bail conditions are settled, but still I am troubled. If the men are away, will the lure for Michael to join them not be strong? Very strong? If he does, he will breach his bail agreement by failing to reside with his aunt and may be returned to custody. Does the Court have to wait for Men's Business to finish? Should it? How do I accommodate the traditional ways and yet discharge my duty?

'When is Michael next due in Court?'

Defence counsel responds, telling me that the Magistrates Court circuit to the APY Lands is due in Amata on the coming Friday. It is now Tuesday afternoon. It occurs to me that if Michael is on a bus tomorrow morning, he will arrive in Amata in time to appear in Court.

'What do you envisage will happen on Friday?'

'We will apply for the matter to be adjourned for three months and bail to be varied to allow Michael to attend Men's Business.'

'Do the magistrates commonly make such orders?'

'They do.'

'And is bail answered?'

More often than not, is the answer.

Counsel further informs me that some of the Elders attend Court and that they have been known to reinforce what the magistrate says about coming back. Sometimes people are a week or two late, I am told, but generally they answer. I am also told that the Anangu know that to fail to answer bail will make things difficult for others. I am not sure what to think of this. Has the dominant culture forced the less dominant culture into submission yet again, or is this indicative of a meeting of minds? Is it a step toward embracing diversity and most importantly the culture of the First Australians? It is, but it is hardly worth celebrating. Michael Smith has served 10 weeks in

detention because of where he lives. Surely we can do better. As it has in the past,³⁴ the *Uluru Statement from the Heart* invades my thinking:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.³⁵

³⁴ Hinton, 'A Bail Review' (n 1) 197–8; Hinton, 'Another Bail Review' (n 1) 639.

³⁵ Referendum Council, *Uluru Statement from the Heart* (26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-from-the-heart>> (emphasis in original).

IN THESE UNCERTAIN TIMES: (A LACK OF) OVERSIGHT OF THE *BIOSECURITY ACT 2015* (Cth)

I INTRODUCTION

In his second reading speech for the Biosecurity Bill 2014 (Cth) ('Bill'), Barnaby Joyce said that '[i]t is expected that the human health provisions contained in the bill will be seldom used. However it is important that legislative powers are available to manage serious communicable diseases should they occur'.¹ While the relevant provisions of the *Biosecurity Act 2015* (Cth) ('Act') have been used much sooner than anyone would have hoped, the latter part of the statement remains true. The first case of COVID-19² in Australia was confirmed on 25 January 2020.³ The World Health Organisation declared COVID-19 a public health emergency on 30 January 2020 and a pandemic on 11 March 2020.⁴ A human biosecurity emergency was declared under the Act on 18 March 2020,⁵ giving the Minister for Health ('Minister') incredibly broad powers to prevent and control COVID-19.⁶ At the time of writing in September 2020, the human biosecurity emergency period seems unlikely to end any time soon. Hence, it is worthwhile becoming acquainted with these 'strange and foreign' powers, as the Commonwealth Attorney-General Christian Porter put it.⁷ The actions taken under the Act appear to be responsible and proportionate, but that is a credit to the government, not the Act. Emergency situations need quick and decisive action, and the legislation that empowers that action necessarily has to be broad since the most appropriate response to an emergency, especially one as varied

* LLB (Hons) candidate; BEc (Adv); Student Editor, *Adelaide Law Review* (2020).

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2014, 13429 (Barnaby Joyce, Minister for Agriculture).

² COVID-19 is also referred to as SARS-CoV-2, coronavirus, or novel coronavirus.

³ Department of Health (Cth), 'First Confirmed Case of Novel Coronavirus in Australia' (Media Release, 25 January 2020).

⁴ 'Events as They Happen', *World Health Organisation* (Web Page, 17 June 2020) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>>.

⁵ *Biosecurity Act 2015* (Cth) s 475 ('*Biosecurity Act*'); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) ('*Biosecurity Emergency Declaration*').

⁶ *Biosecurity Act* (n 5) ss 477(1), 478(1).

⁷ 'Biosecurity Control Orders Will Be "Strange and Foreign": Porter', *RN Breakfast with Fran Kelly* (ABC Radio National, 3 March 2020) 00:01:42 <<https://www.abc.net.au/radionational/programs/breakfast/biosecurity-control-orders-will-be-strange-and-foreign/12019658>>.

as a pandemic, is difficult to predict at the time of drafting. Oversight of the Act is provided by a patchwork of parliamentary committees, experts, and potentially judicial review. In these uncertain times, a more comprehensive and transparent accountability system would ensure the Australian public do not merely have to hope that the powers under the Act have been exercised responsibly.

II THE LEGISLATIVE SCHEME

A *Human Biosecurity Emergencies*

A human biosecurity emergency can only be declared in relation to a listed human disease.⁸ The power to do so is provided by s 42 of the Act:

42 Listing human diseases

- (1) The Director of Human Biosecurity may, in writing, determine that a human disease is a listed human disease if the Director considers that the disease may:
 - (a) be communicable; and
 - (b) cause significant harm to human health.

On 21 January 2020, the *Biosecurity (Listed Human Diseases) Determination 2016* (Cth) was amended to include the ‘human coronavirus with pandemic potential’ as a listed disease.⁹

Chapter 8 pt 2 of the Act deals with human biosecurity emergencies. Section 475 of the Act provides the power to declare that a human biosecurity emergency exists and specifies the criteria that must be satisfied in order to make that declaration:

475 Governor-General may declare that a human biosecurity emergency exists

- (1) The Governor-General may declare that a human biosecurity emergency exists if the Health Minister is satisfied that:
 - (a) a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and
 - (b) the declaration is necessary to prevent or control:

⁸ *Biosecurity Act* (n 5) s 475(3)(a).

⁹ *Biosecurity (Listed Human Diseases) Determination 2016* (Cth) s 4(h).

- (i) the entry of the listed human disease into Australian territory or a part of Australian territory; or
- (ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

...

Requirements for human biosecurity emergency declaration

- (3) A human biosecurity emergency declaration must specify:
 - (a) the listed human disease to which the declaration relates; and
 - (b) the nature of the human biosecurity emergency and the conditions that gave rise to it; and
 - (c) the period during which the declaration is in force.
- ...
- (4) A human biosecurity emergency period:
 - (a) must not be longer than the period that the Health Minister considers necessary to prevent or control:
 - (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
 - (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; and
 - (b) in any case, must not be longer than 3 months.

On 18 March 2020, the Governor-General made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) ('Declaration').¹⁰ It declared that a human biosecurity emergency existed and would be in force for three months,¹¹ ending on 17 June 2020.¹²

¹⁰ *Biosecurity Emergency Declaration* (n 5) ss 3, 4, 7.

¹¹ *Ibid* s 7(b).

¹² Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) 1 ('Variation Explanatory Statement').

The Governor-General is also given the power to ‘vary a human biosecurity emergency declaration to extend the human biosecurity emergency period for a period of up to 3 months’,¹³ more than once if necessary.¹⁴ Section 476(1) of the Act requires the Minister to be satisfied of the same conditions as in s 475(1), with the minor change that s 476(1)(a) instead refers to the *continuing* threat and harm. On 15 May 2020, the Governor-General made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) (‘Variation’), which varied the Declaration and extended the emergency period until 17 September 2020.¹⁵ While this is more than three months from the date the extension was made, it is three months from the original end date. The wording of s 476 is ambiguous as to whether the extension operates from the date of the variation or the original end date. The Explanatory Memorandum for the Bill says that whether the period should be varied should be assessed ‘at the end of the human biosecurity emergency period’, which seems to suggest the former interpretation is correct.¹⁶ It therefore stands to reason that the Variation may have been improperly made.

Once a human biosecurity emergency has been declared, the Minister can determine requirements (‘determinations’) and give directions during that period under ss 477 and 478 of the Act, respectively. Both determinations and directions have the same foundation. The Minister must be satisfied that the determination or direction is necessary

- (a) to prevent or control:
 - (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
 - (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; or
- (b) to prevent or control the spread of the declaration listed human disease to another country; or
- (c) if a recommendation has been made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease — to give effect to the recommendation.¹⁷

¹³ *Biosecurity Act* (n 5) s 476.

¹⁴ *Ibid* s 476(3).

¹⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) sch 1.

¹⁶ Explanatory Memorandum, *Biosecurity Bill 2014* (Cth) 293 (‘Explanatory Memorandum’).

¹⁷ *Biosecurity Act* (n 5) ss 477(1), 478(1).

Before giving a determination or a direction, the Minister must also be satisfied that:

- it is likely to be effective in, or to contribute to, achieving the purpose for which it is to be made;
- it is appropriate and adapted to achieve the purpose for which it is to be made;
- it is no more restrictive or intrusive than is required in the circumstances; and
- the period during which it is to apply is only as long as is necessary.¹⁸

For determinations, the Minister must also be satisfied ‘that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances’.¹⁹ Both determinations and directions may be made ‘despite any provision of any other Australian law’.²⁰

Neither determinations nor directions are defined in the Act. However, the relevant sections do give examples of what the Minister may do for each. The examples for determinations include:

- (a) requirements that apply to persons, goods or conveyances when entering or leaving specified places;
- (b) requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places;
- (c) requirements for specified places to be evacuated;
- (d) if a recommendation has been made as referred to in paragraph (1)(c) — requirements for the purposes of giving effect to the recommendation.²¹

At the time of writing, seven determinations have been made under s 477(1). They demonstrate the breadth of the Minister’s powers. They regulate: entering remote communities;²² increasing public confidence and uptake in the COVIDSafe app;²³

¹⁸ Ibid ss 477(4), 478(3).

¹⁹ Ibid s 477(4)(d).

²⁰ Ibid ss 477(5), 478(4).

²¹ Ibid s 477(3).

²² *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (Cth)* (‘Remote Communities Determination’).

²³ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Public Health Contact Information) Determination 2020 (Cth)* (‘COVIDSafe Determination’). The COVIDSafe app logs close contact with other phones that have the app installed to aid in tracking the spread of COVID-19: ‘COVIDSafe App’, *Australian Government Department of Health*

preventing Australian citizens and permanent residents from leaving Australia;²⁴ restricting trading for retail outlets at international airports;²⁵ preventing price gouging of essential goods;²⁶ and requiring cruise ships not to enter Australian waters and requiring those in Australian waters to leave.²⁷

The examples of what directions the Minister can give include:

- (a) a direction to a person who is in a position to close premises, or prevent access to premises, to do so;
- (b) a direction for the purposes of giving effect to or enforcing a requirement determined under section 477;
- (c) if a recommendation has been made as referred to in paragraph (1)(c) — a direction for the purposes of giving effect to the recommendation.²⁸

Directions, unlike determinations, do not have to be in writing,²⁹ and if they are not in writing, they are not a legislative instrument.³⁰ As such, there is no publicly available collection of all of the directions the Minister has given. This makes it difficult to determine what the Minister is using directions for and how many have been given, or if the Minister is using this power at all.

The Explanatory Statement for the Declaration undertakes that ‘[t]he Australian Government has established protocols for the exercise of emergency powers under the Act to ensure that the emergency powers are used only where necessary to protect

(Web Page, 24 August 2020) <<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>>; Josh Taylor, ‘Covidsafe App: How Australia’s Coronavirus Contact Tracing App Works, What it Does, Downloads and Problems’, *The Guardian* (online, 15 May 2020) <<https://www.theguardian.com/australia-news/2020/may/15/covid-safe-app-australia-how-download-does-it-work-australian-government-covidsafe-covid19-tracking-downloads>>.

²⁴ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) (‘*Overseas Travel Ban Determination*’).

²⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Retail Outlets at International Airports) Determination 2020* (Cth).

²⁶ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (Cth).

²⁷ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020* (Cth) (‘*Cruise Ships Determination*’).

²⁸ *Biosecurity Act* (n 5) s 478(2).

²⁹ *Ibid* s 572(1).

³⁰ *Ibid* s 572(2).

the health of Australians'.³¹ However, those protocols do not seem to be publicly available.

Contravening a determination or direction that applies to a person is an offence.³² The maximum penalty is imprisonment for five years, 300 penalty units (presently \$66,600),³³ or both.³⁴ The Explanatory Memorandum for the Bill acknowledged that the penalty is higher than the Commonwealth guide stipulates,³⁵ but says it is justified because of the need for determinations and directions to be followed.³⁶

B *Human Biosecurity Control Orders*

Chapter 8 pt 2 is meant to be for 'the large scale direction of people during an emergency, rather than for the management of individuals'.³⁷ Managing individuals is done using ch 2, primarily through the imposition of human biosecurity control orders.³⁸ Apart from the power to list human diseases being located in ch 2,³⁹ chs 2 and 8 are separate. Both ss 477 and 478 specifically prohibit using determinations or directions to impose some of the most extreme parts of human biosecurity control orders,⁴⁰ including orders requiring decontamination,⁴¹ medical examination,⁴² and vaccination or treatment.⁴³ Those powers can only be used against individuals who meet the more stringent test for a human biosecurity control order.⁴⁴ However, there are still some very serious orders in ch 2 that are not excluded, including detention.⁴⁵

³¹ Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) 3 ('Declaration Explanatory Statement').

³² *Biosecurity Act* (n 5) ss 479(3)–(4).

³³ *Crimes Act 1914* (Cth) s 4AA ('*Crimes Act*').

³⁴ *Biosecurity Act* (n 5) ss 479(3)–(4). If a body corporate contravenes a determination or direction, the court may impose a maximum pecuniary penalty of 1,500 penalty units (presently \$333,000): *Crimes Act* (n 33) s 4B(3).

³⁵ Attorney-General's Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, 9 January 2013).

³⁶ Explanatory Memorandum (n 16) 295–6.

³⁷ *Ibid.*

³⁸ *Biosecurity Act* (n 5) ss 60–7.

³⁹ *Ibid* s 42.

⁴⁰ *Ibid* ss 477(6), 478(6).

⁴¹ *Ibid* s 89.

⁴² *Ibid* s 90.

⁴³ *Ibid* s 92.

⁴⁴ *Ibid* s 60. A human biosecurity control order can only be imposed on an individual if: they have 'one or more signs or symptoms of a listed human disease'; or the individual has been exposed to either 'a listed human disease' or 'another individual who has one or more signs or symptoms of a listed human disease'; or the individual has failed to comply with entry requirements: at s 60(2).

⁴⁵ *Ibid* s 103.

III NO END IN SIGHT

The human biosecurity emergency period can only go for three months at a time⁴⁶ but there is no limit to the number of times it can be extended.⁴⁷ While every extension needs to fulfil the criteria in s 476(1) of the Act, it does not seem like COVID-19 will ever have trouble meeting them. The Explanatory Statement for the Variation said that three months is an appropriate amount of time to extend the human biosecurity emergency period ‘to manage the medium and longer term response to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia’.⁴⁸ As long as COVID-19 is still out in the world, it is very easy to say there is a risk of emergence, establishment or spread. In the Explanatory Statements for the Declaration and Variation, one of the main reasons given for why the criteria are satisfied is that there is currently no vaccine for COVID-19.⁴⁹ While there are many vaccines in development at the time of writing, with some claiming to be potentially ready in the near future,⁵⁰ others are sceptical about the ability for a vaccine to be developed any time soon, or at all.⁵¹ Therefore, it seems like the human biosecurity emergency period will keep being extended for some time yet. None of this is to say that the Variation was a bad thing. Nor is it a bad idea to take a long-term view in limiting COVID-19. At the time of writing, in September 2020, Australia has had a surge of cases,⁵² and the worldwide number of daily new cases continues to grow.⁵³ It is therefore important to acknowledge that these powers will be around for a while.

IV SOME CHECKED POWER

With powers this broad, which will be used for some time yet, you would hope they are subject to some oversight. A recurring phrase in ch 8 is that ‘[a] determination

⁴⁶ Ibid s 475(4)(b).

⁴⁷ Ibid s 476(3).

⁴⁸ Variation Explanatory Statement (n 12) 3.

⁴⁹ Ibid 1; Declaration Explanatory Statement (n 31) 1.

⁵⁰ Fergus Walsh, ‘Coronavirus: Encouraging Results in Vaccine Trials’, *BBC* (online, 16 July 2020) <<https://www.bbc.com/news/health-53426367>>.

⁵¹ Byram W Bridle and Shayan Sharif, ‘Fast COVID-19 Vaccine Timelines Are Unrealistic and Put the Integrity of Scientists at Risk’, *The Conversation* (online, 16 June 2020) <<https://theconversation.com/fast-covid-19-vaccine-timelines-are-unrealistic-and-put-the-integrity-of-scientists-at-risk-139824>>.

⁵² Nick Evershed et al, ‘Covid Map Australia: Tracking New Cases, Coronavirus Stats and Live Data by State’, *The Guardian* (online, 15 September 2020) <<https://www.theguardian.com/australia-news/datablog/ng-interactive/2020/sep/15/coronavirus-australia-map-cases-covid-19-tracking-stats-live-data-update-by-state-suburb-postcode-how-many-new-active-case-numbers-today-statistics-corona-deaths-death-toll>>.

⁵³ The Visual and Data Journalism Team, ‘Coronavirus: Six Months After Pandemic Declared, Where Are the Global Hotspots?’, *BBC* (online, 15 September 2020) <<https://www.bbc.com/news/world-51235105>>.

made under this section is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply'.⁵⁴ The Explanatory Statement for the Declaration says that the Act 'provides for the Declaration to be non-disallowable to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia's human health'.⁵⁵ Non-disallowance is also meant to ensure that the length of the human biosecurity emergency period is dictated by science, not politics.⁵⁶ Both of these justifications are reasonable: a quick response to the pandemic is one of the key factors of success for countries that have flattened the curve;⁵⁷ and making COVID-19 a political issue is one of the reasons why the United States currently leads the world in COVID-19 cases.⁵⁸ However, even if the determinations cannot be disallowed, there is still a place and a need for scrutiny.

A Human Rights Scrutiny

The Parliamentary Joint Committee on Human Rights ('PJCHR') examines all bills and legislative instruments for human rights compatibility.⁵⁹ Legislative instruments that are not subject to disallowance do not need to produce a human rights statement of compatibility.⁶⁰ As a result, none of the determinations have one. However, the PJCHR noted that since these determinations can have a significant impact on human

⁵⁴ *Biosecurity Act* (n 5) s 42(3). See also at ss 475(2), 476(2), 477(2). Disallowance is a process through which either House of Parliament can repeal a legislative instrument: *Legislation Act 2003* (Cth) s 42. Legislative instruments are not subject to disallowance if an Act declares that s 42 does not apply in relation to any instrument made under that Act or section: at s 44.

⁵⁵ Declaration Explanatory Statement (n 31) 3.

⁵⁶ Explanatory Memorandum (n 16) 293.

⁵⁷ See, eg, Ali Younes, 'How Jordan Is Flattening Its COVID-19 Curve', *Al Jazeera* (online, 23 April 2020) <<https://www.aljazeera.com/news/2020/04/jordan-flattening-covid-19-curve-200422112212466.html>>; Linda Hsieh and John Child, 'What Coronavirus Success of Taiwan and Iceland Has in Common', *The Conversation* (online, 29 June 2020) <<https://theconversation.com/what-coronavirus-success-of-taiwan-and-iceland-has-in-common-140455>>; 'Coronavirus: How New Zealand Relied on Science and Empathy', *BBC* (online, 20 April 2020) <<https://www.bbc.com/news/world-asia-52344299>>.

⁵⁸ Tasha Wibawa, 'Wearing a Mask in the United States Is Political, but Republicans Are Speaking Out as Coronavirus Cases Grow', *ABC News* (online, 1 July 2020) <<https://www.abc.net.au/news/2020-07-01/coronavirus-masks-are-political-in-us-donald-trump-rejects-them/12403962>>; Pew Research Center, *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns* (Report, 25 June 2020); 'Coronavirus Pandemic: Tracking the Global Outbreak', *BBC* (online, 15 July 2020) <<https://www.bbc.com/news/world-51235105>>.

⁵⁹ 'Parliamentary Joint Committee on Human Rights', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/joint_humanrights>.

⁶⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).

rights, they should be accompanied by statements of compatibility, regardless of the lack of legal obligation.⁶¹

In light of this, the PJCHR sought a response from the Minister for four of the determinations made under s 477 which it identified as limiting certain human rights, such as the freedom of movement.⁶² The PJCHR emphasised that rights can be limited, as long as the limitation is proportionate to the countervailing right the determination affects, and requested that the Minister explain how the determinations achieve this.⁶³ The Minister gave one response which was intended to cover all of the determinations made under s 477.⁶⁴ The PJCHR observed that the Minister's response was somewhat lacking, with the Minister not addressing several of the concerns the PJCHR had raised in its earlier reports, such as the potentially disproportionate impact the remote communities determination would have on Aboriginal and Torres Strait Islander peoples.⁶⁵ The PJCHR also said that the Minister did not substantially address the balancing of conflicting human rights.⁶⁶ Despite these issues, the PJCHR accepted that the determinations were in accordance with human rights law.⁶⁷ In his statement, the Minister assured the PJCHR that human rights compatibility was an important consideration when making the determinations.⁶⁸ The PJCHR thanked the Minister for that statement but asked that all future determinations be 'accompanied by a detailed statement of compatibility'.⁶⁹ For the two determinations amended since that report was made, neither had human rights statements of compatibility.⁷⁰ The PJCHR is right to insist that the effect of the determinations on human rights

⁶¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report of COVID-19 Legislation* (Report No 5, 29 April 2020) 4 ('PJCHR Report No 5').

⁶² *Ibid* 6–12, 19–21; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 6, 20 May 2020) 2–15 ('PJCHR Report No 6'). The four determinations were: *Remote Communities Determination* (n 22); *COVIDSafe Determination* (n 23); *Overseas Travel Ban Determination* (n 24); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No 1) 2020* (Cth), later amended by *Cruise Ships Determination* (n 27).

⁶³ PJCHR Report No 5 (n 61) 9, 12, 21; PJCHR Report No 6 (n 62) 4.

⁶⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 7, 17 June 2020) 16 n 8.

⁶⁵ *Ibid* 17–18.

⁶⁶ *Ibid* 24.

⁶⁷ *Ibid* 18–19, 24.

⁶⁸ *Ibid* 17, 23.

⁶⁹ *Ibid* 24.

⁷⁰ Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Retail Outlets at International Airports) Amendment (No 1) Determination 2020* (Cth); Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Repeal Determination 2020*.

should be stated publicly and that the Minister should take the lead. Even if the correct balance is struck between competing human rights in the determinations, it would still be beneficial for the determinations to be accompanied by statements of compatibility so that these considerations are discussed openly and honestly.

B *Technical Scrutiny*

Considering there is a question mark over the validity of the Variation, it would be beneficial if the more technical aspects of the determinations were scrutinised. The Senate Standing Committee for the Scrutiny of Delegated Legislation ('Scrutiny Committee') has not assessed any of the determinations because they are exempt from disallowance.⁷¹ This is not unique to COVID-19; the Scrutiny Committee's role is to examine legislative instruments that *are* subject to disallowance.⁷² However, the kinds of factors the Scrutiny Committee considers are all issues that should be assessed for the determinations. For example: whether the drafting is clear; whether the instrument is constitutionally valid; and, particularly relevant, whether the instrument was made in accordance with the Act.⁷³ Even if they cannot be disallowed, assessing them still promotes accountability, since that information can be used by other forms of oversight, like the media or potentially judicial review. These powers are too broad to be left unchecked. The Scrutiny Committee should follow the PJCHR's lead and scrutinise the determinations.

C *Expert Scrutiny*

These powers are subject to oversight in the form of consultation with experts, but even then, only barely. A disease can only be listed by the Director of Human Biosecurity,⁷⁴ defined as the person who occupies the position of Commonwealth Chief Medical Officer,⁷⁵ a position usually held by a medical doctor.⁷⁶ The Director of Human Biosecurity must consult with the chief health officers of each state and

⁷¹ 'Scrutiny of COVID-19 Instruments', *Parliament of Australia* (Web Page, 10 July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

⁷² 'Role of the Committee', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Role_of_the_Committee>.

⁷³ *Ibid.*

⁷⁴ *Biosecurity Act* (n 5) s 42(1).

⁷⁵ *Ibid* s 544(1).

⁷⁶ The last five Chief Medical Officers have been medical doctors: 'Top Job for Professor Brendan Murphy', *Health Victoria* (Web Page, August 2016) <<http://www.health.vic.gov.au/healthvictoria/aug16/prof.htm>>; 'Professor Chris Baggoley AO', *Flinders University* (Web Page) <<https://www.flinders.edu.au/alumni/our-alumni/alumni-stories/professor-chris-baggoley>>; 'Professor James Bishop AO', *The University of Melbourne* (Web Page) <<https://mdhs.unimelb.edu.au/engage/community/awards-and-honours/professor-james-bishop-ao>>; 'John Horvath', *Business News* (Web Page) <<https://www.businessnews.com.au/Person/John-Horvath>>; 'Professor

territory and the Director of Biosecurity before listing a disease.⁷⁷ Consultation before listing the disease acts as a gatekeeping mechanism, since none of the powers in ch 8 can be accessed without it. However, while requiring a person with health qualifications to list the disease helps, the legislation only requires that certain people be consulted, not that they have to approve of the listing. Further, this is a kind of ‘one and done’ form of oversight. Once the disease has been listed, there is no further consultation required to assess whether it should remain listed. Lastly, the Governor-General and the Minister are not required to consult any other person before exercising any of the powers in ch 8. The Explanatory Statement for the Declaration lists the people who were consulted before the Declaration was made and states that the Minister will exercise the emergency powers based on the advice of the Director of Human Biosecurity or the Australian Health Protection Principal Committee.⁷⁸ However, there is no obligation to do so under the Act. Considering the Minister does not need to have any particular qualification related to health or science,⁷⁹ a requirement to consult with experts would help ensure the powers were exercised responsibly. While the Act was likely drafted on the assumption that the Minister would get advice from experts in their Department, given how broad these powers are, it would be better if the Act was amended to make that assumption an explicit requirement.

V MERITS AND JUDICIAL REVIEW

If neither the legislature nor the experts can fully ensure the powers of the Act are being used properly, then merits or judicial review might yet save us. None of the ch 8 powers are classified in the Act as ‘reviewable decisions’,⁸⁰ which can be subject to both internal and external merits review.⁸¹ However, reviewable decisions are all decisions that impact individuals or small groups, such as the decision ‘[t]o vary, or refuse to vary, a permit authorising goods to be brought or imported into Australian territory’.⁸² The Act requires the decision-maker to give written notice that a reviewable decision has been made to ‘the relevant person’,⁸³ a concept that would be very difficult to apply to determinations. Therefore, it is not necessarily a cause for concern that the broad ch 8 powers are excluded from this particular type of review.

Emeritus Richard Alan Smallwood AO, *The University of Melbourne* (Web Page) <<https://mdhs.unimelb.edu.au/engage/community/awards-and-honours/professor-emeritus-richard-alan-smallwood-ao>>.

⁷⁷ *Biosecurity Act* (n 5) s 42(2).

⁷⁸ Declaration Explanatory Statement (n 31) 3.

⁷⁹ See, eg, ‘Hon Greg Hunt MP’, *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=00AMV>.

⁸⁰ *Biosecurity Act* (n 5) s 574.

⁸¹ *Ibid* ss 576, 578.

⁸² *Ibid* s 574 item 5.

⁸³ *Ibid* s 575.

The Explanatory Memorandum notes that a section not being listed as a reviewable decision does not prevent or limit it being subject to judicial review.⁸⁴ Delegated legislation can usually be judicially reviewed.⁸⁵ However, a potential obstacle is justiciability — the question of whether the subject matter of the dispute is appropriate to be resolved by a court in judicial review. Decisions for which many interlocking policy issues are considered, referred to as ‘polycentric’ decisions, are non-justiciable.⁸⁶ In *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*, the Full Court of the Federal Court found that the Cabinet’s decision to nominate Kakadu National Park to be world heritage listed was non-justiciable since the Cabinet’s decision required balancing the competing interests of the environment, Aboriginal people, growing the economy by mining, and the private interests of the applicant.⁸⁷ Statutory-based powers are usually, but not always, considered justiciable.⁸⁸ The determinations seem like they might be considered polycentric, considering they balance factors like public health, freedom of movement, private business interests and privacy. However, individual determinations rarely engage all of these considerations and it is unclear whether only having two or three of these factors would make the decision non-justiciable. The scope of justiciability remains uncertain,⁸⁹ so whether judicial review would be available for the determinations is similarly unclear.

If the determinations are justiciable, then failing to comply with the formal requirements of the Act when making the delegated legislation can result in invalidity.⁹⁰ Hence, this may be another way of getting a more technical assessment of the determinations. However, the delegated legislation will only be found invalid if the requirements in the Act are mandatory, rather than directory.⁹¹ Further, courts have, in the past, been reluctant to find delegated legislation invalid for this reason.⁹² The requirement that the human biosecurity emergency period can only be extended for three months at a time seems like it would be classified as mandatory, as it is a substantial limitation rather than a procedural requirement. Therefore, if the court interprets s 476 differently to the Minister, the court would likely find the Variation invalid.

⁸⁴ Explanatory Memorandum (n 16) 338.

⁸⁵ *South Australia v Tanner* (1989) 166 CLR 161, 173.

⁸⁶ *Phosphate Resources Ltd v Commonwealth* (2003) 128 FCR 570, 577 [21] (French J). See also Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92(2) *Harvard Law Review* 353, 394–5.

⁸⁷ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278–9.

⁸⁸ *A-G (NSW) v Quin* (1990) 170 CLR 1, 33.

⁸⁹ Geoffrey Lindell, ‘Justiciability’ in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 392.

⁹⁰ *Watson v Lee* (1979) 144 CLR 374.

⁹¹ *Ibid* 377–8 (Barwick CJ), 384 (Gibbs J), 386 (Stephen J), 411 (Aicken J).

⁹² *Ibid* 381–2 (Barwick CJ), 385 (Gibbs J).

Where the primary Act requires consultation, a failure to consult prior to making the delegated legislation can result in invalidity, but consulting and then acting contrary to the advice likely will not.⁹³ Hence, judicial review cannot be used to make the Minister follow the advice he is given, but it can ensure the consultation was done.

If the determinations are justiciable, then judicial review may be an alternative way of ensuring the determinations were made in accordance with the Act. However, it is incredibly unlikely that this accountability mechanism will actually be used. Judicial review is notoriously expensive. There is also little benefit to any potential applicant; even if a court finds, for example, that the Variation is invalid, the Governor-General will almost certainly make a new, valid one within hours. In combination with the uncertainty of whether the determinations are even subject to judicial review, the practical aspects of judicial review make it a rather weak form of scrutiny for the determinations.

VI CONCLUSION

On 3 September 2020, the Governor-General made another variation, extending the human biosecurity emergency period until 17 December 2020.⁹⁴ In all likelihood, Australians will continue to live under a human biosecurity emergency period for a long time. The emergency powers under the Act, by all accounts, are needed and have been helpful in preventing and controlling the spread of COVID-19. The government needs broad powers that can be used quickly to stop the spread of something as fast moving as COVID-19. However, just because the powers are needed and seem to have been used responsibly does not mean that oversight is not still important. These determinations are subject to oversight for the most part, but only through a patchwork of legislative, expert, and judicial scrutiny, with the availability and effectiveness of each type varying significantly. A clearer and more comprehensive oversight system is needed.

First, the government should adopt the PJCHR's recommendation and include a statement of compatibility for all determinations going forward. Second, the Scrutiny Committee should, like the PJCHR, scrutinise these determinations, even if they are disallowable, for a much more cost-effective way of ensuring technical compliance. This will also strengthen the other method of assessing compliance with the Act — judicial review — since a potential applicant is more likely to bring an action if they have indirect confirmation from the Scrutiny Committee that their challenge is likely to be successful. Third, all directions the Minister makes under s 478 should be compiled and made publicly available. Fourth, the Minister and the Governor-General should be legislatively required to consult with experts before exercising the powers in ch 8. Last, the protocols that the Minister has promised to

⁹³ *Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide* (1975) 11 SASR 504, 544–8.

⁹⁴ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No 2) Instrument 2020* (Cth).

follow when making these determinations should be published so that the last form of potential scrutiny, the media, may have a chance to publicly pressure compliance if it is lacking.

The running theme of the Act is that there is a hope, but not a requirement, that the powers are used responsibly. It is hoped that determinations and directions are made correctly and responsibly so that there is no need for them to be disallowed. It is hoped that the Minister follows the established protocols and acts to protect the health of the Australian community. It is hoped that the Minister will exercise their power to create determinations and directions based on the advice of their departmental advisors and those they consult. But in these uncertain times, we need more than hope. We need effective oversight.

HEARTBEAT IN THE HIGH COURT: *LOVE V COMMONWEALTH* (2020) 375 ALR 597

I INTRODUCTION

Approaching its 30-year anniversary, the decision of the High Court in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*') remains at the core of Australian legal consciousness,¹ not merely as a consequence of the Court's recognition of native title in that case.² Having rejected the myth of terra nullius,³ Brennan J held that questions now arising as to the basis of the sovereignty of the Commonwealth were non-justiciable.⁴ The *Uluru Statement from the Heart* is a reminder that these questions remain unresolved,⁵ and constitutional reform is the subject of present debate.⁶ While such reform remains for the consideration of Parliament, the High Court has made an important contribution to post-*Mabo [No 2]* jurisprudence in *Love v Commonwealth* (2020) 375 ALR 597 ('*Love*'). In a decision comprising seven individual judgments,⁷ a 4:3 majority held that Aboriginal people⁸ are beyond the

* LLB (Hons) candidate (Adel); Student Editor, *Adelaide Law Review* (2020).

¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').

² *Ibid* 43, 57 (Brennan J, Mason CJ and McHugh J agreeing at 15), 86 (Deane and Gaudron JJ).

³ *Ibid* 38–42.

⁴ *Ibid* 32. See also Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture, Law and Colonisation* 13, 18; Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19(1) *Melbourne University Law Review* 195, 197–8.

⁵ Referendum Council, 'Uluru Statement from the Heart' (First Nations National Constitutional Convention, 26 May 2017) <<https://ulurustatement.org/the-statement>>. The *Uluru Statement from the Heart* calls for 'the establishment of a First Nations Voice enshrined in the *Constitution*', and a 'Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'.

⁶ See, eg, Megan Davis et al, 'The Uluru Statement' [2018] (Autumn) *Bar News* 41. See also Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Project' (Speech, Sydney, 18 July 2019) <<http://www.upholdandrecognise.com>>; Robert French, 'Voice of Reason Not Beyond Us', *The Australian* (online, 31 July 2019) <<https://www.theaustralian.com.au/commentary/voice-of-reason-not-beyond-us/news-story/1e1715b36c7eeb49f3f1b98c3c37774>>.

⁷ This decision was the first in over a decade comprising seven individual judgments. See *HML v The Queen* (2008) 235 CLR 334. Cf Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554.

⁸ This term is used respectfully as an all-encompassing term for Aboriginal and Torres Strait Islander peoples.

reach of the ‘aliens power’, conferred by s 51(xix) of the *Constitution*.⁹ As such, persons who are held to satisfy the legal test of Aboriginality cannot lawfully be detained or deported from Australia under ss 189 and 198 of the *Migration Act 1958* (Cth) (‘*Migration Act*’).¹⁰ In so holding, the majority articulated the ‘deeper truth’ of the decision in *Mabo [No 2]*: the common law recognises the powerful spiritual and metaphysical connection of Aboriginal people with country.¹¹ The decision in *Love* has not been without controversy, however. Fierce public scrutiny of the Court has erupted (perhaps not witnessed to such an extent since its decisions in *Mabo [No 2]* and *Wik Peoples v Queensland*)¹² with criticism of perceived ‘judicial activism’,¹³ and calls for the appointment of ‘capital C conservatives’ to the Court upon the approaching retirement of Justices Nettle and Bell.¹⁴

This case note seeks to locate a through line in the majority and dissenting reasons. It analyses the Court’s approach to interpreting s 51(xix), arguing that the minority’s strict legalism was misplaced, ultimately favouring the approach of Gordon J and Edelman J. Further, it dispels the minority’s concerns with drawing constitutional distinctions based on race,¹⁵ arguing that this view is blind to the legacy of colonialism.

⁹ *Love v Commonwealth* (2020) 375 ALR 597, 615 [74], 616 [81] (Bell J), 664 [272], 667 [279], 668 [284] (Nettle J), 670 [296], 679 [335], 685 [364], 687 [373]–[374] (Gordon J), 692 [398], 715 [467] (Edelman J) (‘*Love*’).

¹⁰ *Ibid* 668 [285] (Nettle J), 670 [293], 689 [390] (Gordon J).

¹¹ *Ibid* 669 [289], 679–80 [340] (Gordon J), 710 [451] (Edelman J).

¹² *Wik Peoples v Queensland* (1996) 187 CLR 1. In this decision, the Court held that native title is not extinguished by grants of pastoral lease: at 122 (Toohey J), 155 (Gaudron J), 202–3 (Gummow J), 242–3 (Kirby J). In the aftermath, then Deputy Prime Minister Peter Fischer suggested that only ‘capital C conservative’ judges should be considered for future appointments: see, eg, David Bennett, ‘What “Capital-C”?’ (2008) 27(1) *University of Queensland Law Journal* 23, 23. The appointment of Justice Callinan in 1998 is regarded by some as having been motivated by such considerations: see, eg, Greg Taylor, ‘Justice Callinan’s Contribution to the Law of Torts’ (2008) 27(1) *University of Queensland Law Journal* 91, 91–2.

¹³ See, eg, ‘Concerns High Court Has Descended into “Activism”’, *Sky News* (online, 20 February 2020) <https://www.skynews.com.au/details/_6134044694001>. On the ‘elusive’ notion of judicial activism, see Robert French, ‘Judicial Activists: Mythical Monsters?’ (2008) 12 *Southern Cross University Law Review* 59. Broadly speaking, judicial activism is a term used to describe the departure by a judge from the accepted ‘judicial function’, by taking into account considerations external to the applicable law: at 60–1.

¹⁴ See, eg, Olivia Caisley and Nicola Berkovic, ‘“Activism” Puts Focus on High Court Vacancies’, *The Australian* (online, 19 February 2020) <<https://www.theaustralian.com.au/nation/politics/activism-puts-f...high-court-vacancies/news-story/9cb395e022d2950d638b5e303d0d9c0c>>. But see George Williams, ‘There Is No Place for Politics in the Appointment of High Court Judges’, *The Australian* (online, 15 March 2020) <<https://www.theaustralian.com.au/commentary/there-is-no-place-fo...f-high-court-judges/news-story/cb079fb6b8670df86d34ca7995c4c4a4>>.

¹⁵ *Love* (n 9) 608 [44] (Kiefel CJ), 628 [126], 630 [133] (Gageler J), 646–7 [217] (Keane J).

Overall, while the implications of the decision in *Love* are uncertain, it is suggested that the decision gives further force to the campaign for constitutional reform,¹⁶ as a judicial expression of the unique constitutional position of Aboriginal people.

II BACKGROUND

A Facts

There were two special cases stated for the opinion of the Court.¹⁷ The plaintiff in the first special case, Daniel Love, is a citizen of Papua New Guinea, his place of birth.¹⁸ Mr Love is not an Australian citizen,¹⁹ but has resided continuously in Australia since 1985, holding a permanent residency visa since 1994.²⁰ He is descended from members of the Kamilaroi nation, identifies as a member of that nation,²¹ and is recognised as a member by one Kamilaroi Elder.²² In May 2018, Mr Love was sentenced to 12 months' imprisonment for assault causing bodily harm.²³ A delegate of the Minister for Home Affairs ('Minister') cancelled Mr Love's visa,²⁴ and in August 2018 he was taken into immigration detention on suspicion of being an unlawful non-citizen,²⁵ to await deportation from Australia.²⁶ This decision was revoked,²⁷ and Mr Love was released in September 2018.²⁸

¹⁶ See above nn 5–6 and accompanying text.

¹⁷ Hereinafter, the 'Love proceeding' and 'Thoms proceeding'.

¹⁸ *Love* (n 9) 598 [2] (Kiefel CJ), 610 [55] (Bell J), 647–8 [222] (Nettle J).

¹⁹ See *Australian Citizenship Act 2007* (Cth).

²⁰ *Love* (n 9) 598 [2] (Kiefel CJ), 647–8 [222] (Nettle J).

²¹ Also 'Gamilaraay', 'Gamilaroi' or 'Gomeroi'. The traditional lands of the Kamilaroi nation extend from northern New South Wales to southern Queensland: Hilary Smith, 'Kamilaroi, Gamilaraay, or Gomeroi?', *Winanga-Li* (Web Page, November 2018) <<https://winanga-li.org.au/index.php/yaama-gamilaraay/kamilaroi-gamilaraay-or-gomeroi/>>; Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Gamilaraay/Gamilaroi/Kamilaroi', *AIATSIS Collection* (Web Page) <<https://collection.aiatsis.gov.au/austlang/language/d23>>.

²² *Love* (n 9) 598–9 [3] (Kiefel CJ), 616 [79] (Bell J), 647–8 [222] (Nettle J).

²³ *Criminal Code Act 1899* (Qld) s 339 ('*Criminal Code* (Qld)'). See *Love* (n 9) 633 [153] (Keane J), 649 [228] (Nettle J).

²⁴ *Migration Act 1958* (Cth) s 501(3A) ('*Migration Act*'). The Minister must cancel a visa that has been granted to a person if 'the Minister is satisfied that the person does not pass the character test'. A person with a 'substantial criminal record' does not pass the character test: at s 501(3A). A person has a substantial criminal record 'if the person has been sentenced to a term of imprisonment of 12 months or more': at ss 501(6)(a), (7)(c).

²⁵ *Ibid* s 189. 'Unlawful non-citizen' includes a person whose visa has been cancelled: at s 15.

²⁶ *Ibid* s 198. See *Love* (n 9) 598 [2] (Kiefel CJ), 633 [153] (Keane J), 649 [228] (Nettle J).

²⁷ *Migration Act* (n 24) s 501CA(4).

²⁸ *Love* (n 9) 649 [228] (Nettle J), 692 [397] (Edelman J).

The plaintiff in the second special case, Brendon Thoms, is a citizen of Aotearoa/New Zealand, his place of birth.²⁹ Mr Thoms is not an Australian citizen.³⁰ He held a special category visa, and has resided permanently in Australia since 1994, continuously since 2003.³¹ He identifies as, and is recognised as, a member of the Gunggari People.³² He is a holder of native title.³³ In September 2018, Mr Thoms was sentenced to 18 months' imprisonment for assault causing bodily harm,³⁴ and the Minister cancelled Mr Thoms' visa.³⁵ He was taken into immigration detention, where he remained at the time of the High Court's decision.³⁶

B *Issues and Applicable Law*

Only one question of law was stated for the opinion of the Court, namely, whether the plaintiffs were 'aliens' within the meaning of s 51(xix) of the *Constitution*.³⁷

Section 51(xix) states:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xix) naturalization and aliens ...³⁸

The applicable principle was laid down by Gibbs CJ in *Pochi v Macphee* ('*Pochi*').³⁹ While s 51(xix) confers the power to determine who shall be treated as 'aliens',⁴⁰ 'the

²⁹ Ibid 598 [2] (Kiefel CJ), 610 [55] (Bell J), 649 [229] (Nettle J).

³⁰ Ibid 598 [2] (Kiefel CJ), 649 [229] (Nettle J).

³¹ Ibid 598 [229] (Nettle J).

³² Also 'Kunggari'. The traditional lands of the Gunggari People surround the Maranoa River in south-west Queensland: 'Gunggari Country', *Gunggari Native Title Aboriginal Corporation RNTBC* (Web Page) <<http://www.gunggariabc.com.au/gunggari-country/>>. See *Love* (n 9) 689 [387] (Gordon J), 713–4 [462] (Edelman J).

³³ *Love* (n 9) 598–9 [3] (Kiefel CJ), 634 [158] (Keane J), 649 [229] (Nettle J), 689 [387] (Edelman J). See *Kearns v Queensland* [2012] FCA 651 (Reeves J); *Foster v Queensland* [2014] FCA 1318 (Rangiah J).

³⁴ *Criminal Code* (Qld) (n 23) s 339(1). See *Love* (n 9) 650 [235] (Nettle J).

³⁵ *Love* (n 9) 598–9 [2] (Kiefel CJ), 650 [235] (Nettle J). See above n 24 and accompanying text as to the cancellation of Mr Thoms' visa under the *Migration Act* (n 24).

³⁶ Ibid 650 [235] (Nettle J).

³⁷ Ibid 647 [221] (Nettle J).

³⁸ *Constitution* s 51(xix).

³⁹ *Pochi v Macphee* (1982) 151 CLR 101 ('*Pochi*').

⁴⁰ See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 400 [7] (Gleeson CJ) ('*Re Patterson*').

Parliament cannot, simply by giving its own definition of “alien”, expand the power ... to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’.⁴¹

The *Migration Act* is enacted under s 51(xix).⁴² Thus, if the plaintiffs were beyond the reach of the aliens power, the statutory provisions authorising their detention and deportation would be read down so as not to apply to them.⁴³ Ultimately, the Court was to determine whether Mr Thoms could lawfully be kept in immigration detention and deported from Australia. While Mr Love had been released from detention, the issue was live in proceedings instituted by Mr Love against the Commonwealth for false imprisonment.⁴⁴

Antecedent to the question stated was the issue as to whether the plaintiffs were Aboriginal, as a matter of law. In argument,⁴⁵ the plaintiffs adopted the tripartite legal test of Aboriginality set out by Brennan J in *Mabo [No 2]*:

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people.⁴⁶

III DECISION

Justice Bell, Nettle J, Gordon J and Edelman J held that persons held to satisfy the legal test of Aboriginality set out in *Mabo [No 2]* are not ‘aliens’ within the meaning of s 51(xix). Chief Justice Kiefel, Gageler J and Keane J dissented. Applying the tripartite test adopted in argument by the plaintiffs, the majority agreed that Mr Thoms was Aboriginal, as a matter of law.⁴⁷ The Court was unable to determine this issue on

⁴¹ *Pochi* (n 39) 109 (Gibbs CJ, Mason J agreeing at 112, Wilson J agreeing at 116).

⁴² *Love* (n 9) 598–9 [3] (Kiefel CJ), 631–2 [139] (Gageler J). See *Migration Act* (n 24) long title, s 4; *Re Patterson* (n 40) 443 [156] (Gummow and Hayne JJ).

⁴³ *Acts Interpretation Act 1901* (Cth) s 15A.

⁴⁴ *Love* (n 9) 692 [397] (Edelman J).

⁴⁵ The Commonwealth made no submissions on this issue in either proceeding, which it considered to be ‘irrelevant’ to the determination of the question of law: *ibid* 608–9 [49] (Bell J). See also at 689 [388] (Gordon J), 713 [461] (Edelman J).

⁴⁶ *Mabo [No 2]* (n 1) 70. See also *Commonwealth v Tasmania* (1983) 151 CLR 1, 274 (Deane J) (*‘Tasmanian Dam Case’*).

⁴⁷ *Love* (n 9) 608–9 [49] (Bell J), 669 [288] (Nettle J), 689 [387] (Gordon J), 713–4 [462] (Edelman J).

the material before it with respect to Mr Love,⁴⁸ however, and the Love proceeding was remitted to the Federal Court for further argument.⁴⁹

A Majority

Perhaps the only ratio to be extracted from the majority reasons is the ultimate answer to the question stated in the special cases, as was contemplated by Bell J: ‘although we express our reasoning differently, we agree that Aboriginal Australians ... are not within the reach of the “aliens” power’.⁵⁰ The majority did, however, join on several initial findings. Their Honours rejected suggestions that the constitutional expression ‘aliens’ is synonymous with the statutory expression ‘non-citizen’.⁵¹ The *Pochi* test necessarily shifted the enquiry away from statutory citizenship. It was possible, as a matter of principle, for there to exist a status of ‘non-citizen, non-alien’.⁵² Their Honours also departed from the view that previous decisions of the Court had established the indicia of ‘alienage’,⁵³ most relevantly, allegiance to a foreign power.⁵⁴ Those decisions were confined to their facts.⁵⁵

Importantly, the majority held that the common law recognises the unique spiritual and metaphysical connection of Aboriginal people with country.⁵⁶ Although not expressed by the Court in *Mabo [No 2]*,⁵⁷ such recognition was implicit in the Court’s recognition of native title in that case.⁵⁸ Traditional laws and customs, the continuing

⁴⁸ Justice Bell and Gordon J regarded the Commonwealth’s conduct of the proceeding on this issue as amounting to acceptance of Mr Love’s case: *ibid* 616 [79]–[80] (Bell J), 689 [388] (Gordon J). Justice Edelman agreed that there was ‘no contest’ as to the Aboriginality of Mr Love, and it was ‘plainly open’ to conclude that he satisfied the legal test in the absence of any contrary argument: at 713–4 [462] (Edelman J). Chief Justice Kiefel and Gageler J (in obiter), as well as Nettle J, considered there to be insufficient evidence to decide this issue: at 604 [24] (Kiefel CJ), 627 [120] (Gageler J), 647 [221] (Nettle J). Justice Keane held that it was unnecessary to reach a decision: at 632–3 [147] (Keane J).

⁴⁹ It is not evident that any judgment has been handed down in this proceeding at the time of writing.

⁵⁰ *Love* (n 9) 616 [81] (Bell J).

⁵¹ *Ibid* 612 [64] (Bell J), 657 [252] (Nettle J), 670 [295], 672 [304] (Gordon J), 690–1 [394] (Edelman J).

⁵² *Ibid*.

⁵³ *Ibid* 610–1 [58] (Bell J), 657 [253]–[255], 659 [260] (Nettle J), 676 [321] (Gordon J), 702–3 [429] (Edelman J).

⁵⁴ *Singh v Commonwealth* (2004) 222 CLR 322, 398 [200] (Gummow, Hayne and Heydon JJ) (‘*Singh*’).

⁵⁵ *Love* (n 9) 611 [59] (Bell J), citing *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38–9 [14] (Gummow, Hayne and Crennan JJ) (‘*Koroitamana*’). See also *Love* (n 9) 676 [321] (Gordon J).

⁵⁶ *Love* (n 9) 614 [71] (Bell J), 663 [269] (Nettle J), 669–70 [289]–[293], 671 [298], 679 [337] (Gordon J), 691 [396] (Edelman J).

⁵⁷ *Ibid* 608 [45] (Kiefel CJ).

⁵⁸ *Ibid* 663 [269] (Nettle J), 669 [289], 679–80 [340] (Gordon J).

observance of which gives rise to native title rights and interests under the *Mabo [No 2]* doctrine,⁵⁹ ‘do not exist in a vacuum’.⁶⁰ Rather, they are ‘part ... of one indissoluble whole’,⁶¹ encompassing Aboriginal people and country.

For Bell J, it followed that Aboriginal people ‘cannot be said to belong to another place’,⁶² which her Honour accepted was incongruent with alienage.⁶³ The notion of belonging was further articulated by Edelman J. His Honour revisited the Convention debates, noting that the meaning of the term ‘aliens’ at Federation, although ‘in flux’,⁶⁴ was essentially being ‘foreign ... to a political community’.⁶⁵ As Aboriginal people became subjects of the Crown upon the reception of the common law,⁶⁶ Edelman J considered that it would be ‘bizarre’ if they could now be treated as aliens,⁶⁷ particularly in light of historical developments such as the 1967 constitutional referendum,⁶⁸ and the enactment of the *Racial Discrimination Act 1975* (Cth) and *Native Title Act 1993* (Cth).⁶⁹ Rather, Aboriginal non-citizens were ‘belongers’ to Australia.⁷⁰

Justice Gordon proceeded from a similar understanding of the term ‘aliens’.⁷¹ Her Honour noted that the sovereign authority of the Commonwealth is delimited by territory. Thus, membership of the Australian polity necessarily has a territorial dimension.⁷² It is this same territory, ‘the same lands and waters’,⁷³ with which Aboriginal people have a recognised connection. It followed that Aboriginal people are part of ‘the people’ of Australia.⁷⁴

⁵⁹ See *Mabo [No 2]* (n 1) 57.

⁶⁰ *Love* (n 9) 663 [269] (Nettle J), quoting *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

⁶¹ *Love* (n 9) 669 [290] (Gordon J), quoting *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 (Blackburn J).

⁶² *Love* (n 9) 217 [74] (Bell J).

⁶³ *Ibid* 614 [71] (Bell J).

⁶⁴ *Ibid* 692–3 [400]–[401] (Edelman J).

⁶⁵ *Ibid* 689 [390], 696–7 [409] (Edelman J). See also at 680 [343] (Gordon J).

⁶⁶ *Ibid* 697 [411] (Edelman J).

⁶⁷ *Ibid* 689–90 [391] (Edelman J).

⁶⁸ See Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth, 2015) ch 2.

⁶⁹ *Love* (n 9) 710 [452] (Edelman J). See also at 628–9 [126] (Gageler J), 683–4 [355]–[360] (Gordon J).

⁷⁰ *Ibid* 690–1 [394], 691 [396] (Edelman J).

⁷¹ *Ibid* 670 [296] (Gordon J). Her Honour posited that ‘[t]he constitutional term “aliens” conveys otherness, being an “outsider”, foreignness’.

⁷² *Ibid* 681 [348] (Gordon J).

⁷³ *Ibid* 681–2 [349] (Gordon J).

⁷⁴ *Ibid* 682 [353] (Gordon J). See *Constitution Preamble*, ss 7, 24.

Justice Nettle held that, as a consequence of the centrality of country, a person cannot effectively *be* a member of an Aboriginal society if they are not present in Australia.⁷⁵ Thus, subjecting Aboriginal people to liability to deportation from Australia, a corollary of the status as an alien, would amount to an abrogation of the common law's recognition of connection with country.⁷⁶ Significantly, his Honour took one step further than the other members of the majority, holding that the Crown in right of the Commonwealth owes Aboriginal people a 'unique obligation of protection',⁷⁷ and Aboriginal people reciprocally owe 'permanent allegiance' to the Crown.⁷⁸ This was necessarily inconsistent with alienage, as 'informed by centuries of legal history and political theory'.⁷⁹

B *Minority*

The minority accepted that 'aliens' is synonymous with 'non-citizen'.⁸⁰ While the category of 'non-citizen, non-aliens' was accepted by the Court 'for a short time',⁸¹ its decision in *Shaw v Minister for Immigration and Multicultural Affairs* ('*Shaw*') had rejected such a category.⁸² Plainly, it was open to Parliament to treat the plaintiffs as aliens,⁸³ and '[j]udicial intervention ... [was] not constitutionally justified'.⁸⁴ Their Honours also held that, given the importance of the sovereign's power to determine membership of the polity,⁸⁵ accepting the plaintiffs' argument 'would be to attribute ... [to Aboriginal people] the kind of sovereignty which was implicitly rejected in *Mabo [No 2]*'.⁸⁶ A person's 'status ... as a "non-citizen, non-alien" would

⁷⁵ *Love* (n 9) 663–4 [271] (Nettle J).

⁷⁶ *Ibid* 664 [272] (Nettle J).

⁷⁷ *Ibid* 664 [272], 667 [278]–[279] (Nettle J).

⁷⁸ *Ibid* 667 [279] (Nettle J). His Honour was the only member of the Court to accept this argument, on which the Court had invited submissions from the parties following the hearing of the special cases. The Commonwealth subsequently filed a Notice under s 78B of the *Judiciary Act 1903* (Cth), and the State of Victoria intervened in support of the plaintiffs. See *Love* (n 9) 613 [67] (Bell J). See also Attorney-General (Vic), 'Submissions for Attorney-General for the State of Victoria (Intervening)', Submission in *Love v Commonwealth*, B43/2018, 22 November 2019.

⁷⁹ *Love* (n 9) 653 [245] (Nettle J). See also at 653–4 [246] (Nettle J).

⁸⁰ *Ibid* 600–1 [9], 602 [18] (Kiefel CJ). See also at 620–2 [93]–[98], 630 [132] (Gageler J), 632–3 [147], 637 [169] (Keane J).

⁸¹ *Ibid* 606 [39] (Kiefel CJ), citing *Re Patterson* (n 40) 412 [52] (Gaudron J), 437 [136] (McHugh J), 493–4 [308] (Kirby J), 518 [377] (Callinan J).

⁸² *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ('*Shaw*').

⁸³ *Love* (n 9) 599 [5] (Kiefel CJ), 629 [130] (Gageler J), 645 [210] (Keane J).

⁸⁴ *Ibid* 629 [130] (Gageler J).

⁸⁵ *Ibid* 599–600 [6], 601 [14] (Kiefel CJ), 619–20 [91], 621 [97] (Gageler J).

⁸⁶ *Ibid* 604 [25] (Kiefel CJ). See also at 628 [125] (Gageler J), 642–3 [197]–[199] (Keane J).

follow from a determination [of membership] by the Elders'.⁸⁷ Their Honours also expressed concern as to the 'race-based constitutional limitation on legislative power' arising from acceptance of the plaintiffs' argument.⁸⁸ Chief Justice Kiefel and Gageler J added that the majority's articulation of the common law's recognition of connection with country was not an 'accepted method ... of constitutional interpretation'.⁸⁹ The minority appeared to doubt, however, whether such recognition was even implicit in the decision in *Mabo [No 2]*,⁹⁰ the significance of which could not be extended beyond the Court's recognition of native title.⁹¹

IV COMMENT

A Broken Bones

The most significant fracture within the Court was as to the Court's very function in s 51(xix) jurisprudence. For Kiefel CJ, echoed by Gageler J,⁹² the question stated in the special cases was 'apt to mislead as to the role of this Court ... It would usurp the role of the Parliament'.⁹³ Justice Nettle responded, quoting *Singh v Commonwealth*: the fact '[t]hat Parliament has [purportedly] made a law ... with respect to aliens presents the *constitutional question* for resolution; it does not provide an answer'.⁹⁴

There is more to be said about this fundamental disagreement as to the Court's function, and it is not proposed to provide an exhaustive discussion in this case note. The following, however, may briefly be noted. Chief Justice Kiefel and Gageler J appeared to be concerned with the fact that, contrary to settled application of the overarching principle espoused by Fullagar J in *Australian Communist Party v Commonwealth*,⁹⁵ there was no contest in *Love* as to the power of Parliament to

⁸⁷ Ibid 604 [25] (Kiefel CJ). See also at 631 [137] (Gageler J).

⁸⁸ Ibid 628–9 [126], 630 [133] (Gageler J). See also at 608 [44] (Kiefel CJ), 639 [178] (Keane J).

⁸⁹ Ibid 600–1 [8]–[9], 604–5 [27]–[32] (Kiefel CJ). See also at 629 [128] (Gageler J).

⁹⁰ Ibid 607 [42] (Kiefel CJ), 643 [202] (Keane J).

⁹¹ Ibid 605 [31] (Kiefel CJ), 641 [192] (Keane J).

⁹² Ibid 618 [87]–[88] (Gageler J).

⁹³ Ibid 599 [4] (Kiefel CJ).

⁹⁴ Ibid 678 [330] (Nettle J), quoting *Singh* (n 54) 383 [153] (Gummow, Hayne and Heydon JJ) (emphasis in original).

⁹⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*'). His Honour famously pronounced:

The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

pass a law.⁹⁶ With respect, this was a narrow application of the law. Admittedly, in *Pochi*, Gibbs CJ spoke of Parliament ‘giving its own definition of “aliens”’,⁹⁷ his Honour referring to a statutory definition enacted in the *Migration Act*, as amended at the time. This definition has since been removed,⁹⁸ yet the principle enunciated by Gibbs CJ remains authoritative and immutable: the aliens power cannot be extended ‘to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’.⁹⁹ Indeed, the Court is also concerned with ‘substance’ in s 51(xix) jurisprudence,¹⁰⁰ namely, the *application* of laws passed under s 51(xix) to particular persons, purportedly extending the scope of the aliens power to include those persons, validly or not.¹⁰¹ Unless the authority of *Pochi* is to be re-examined, a course neither proposed nor taken by Kiefel CJ and Gageler J, it is submitted that the majority view is to be preferred.

There was also a schism within the Court as to preferred methods of constitutional interpretation. Although the minority did not engage with s 51(xix) in detail, their Honours’ legalism in applying the decision in *Shaw* to reject the category of ‘non-citizen, non-aliens’ was misplaced.¹⁰² As Gordon J noted, there was ‘no binding authority’ on the question stated in the special cases.¹⁰³ *Shaw*, and the earlier decision in *Nolan v Minister for Immigration and Ethnic Affairs* (‘*Nolan*’),¹⁰⁴ concerned the changing constitutional status of non-Aboriginal British subjects.

Justice Gordon and Edelman J engaged in an evolutionary originalist interpretation of s 51(xix), their Honours highlighting the unsettled meaning of ‘aliens’ at Federation,¹⁰⁵ and drawing upon the common law and Convention debates to locate its

⁹⁶ *Love* (n 9) 600 [7] (Kiefel CJ), 618 [87]–[88] (Gageler J).

⁹⁷ *Pochi* (n 39) 109 (emphasis added).

⁹⁸ *Ibid* 106. See *Love* (n 9) 676–7 [323]–[325] (Nettle J).

⁹⁹ *Pochi* (n 39) 109.

¹⁰⁰ See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10). On the Court’s general concern with ‘matters of substance as well as of form’ in constitutional jurisprudence, see *Crump v New South Wales* (2012) 247 CLR 1, 26 [60] (Heydon J).

¹⁰¹ *Love* (n 9) 678 [330] (Nettle J). See also *Singh* (n 54) 329 [4] (Gleeson CJ), 372 [118] (McHugh J), 429 [305] (Callinan J).

¹⁰² On legalism, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ) (‘*Engineers Case*’). See also Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16(1) *Federal Law Review* 1, 4–5; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 170–82.

¹⁰³ *Love* (n 9) 670 [294] (Gordon J). See also at 657 [255], 660 [262]–[263] (Nettle J).

¹⁰⁴ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 (‘*Nolan*’).

¹⁰⁵ *Love* (n 9) 671–2 [301]–[303] (Gordon J), 692–3 [400]–[401] (Edelman J).

‘essential meaning’.¹⁰⁶ Contrary to the assertions of the minority, this approach was compatible with the Court’s essential/non-essential originalism in *Shaw* and *Nolan*.¹⁰⁷ Those decisions rested upon the significance of historical developments, namely, the enactment of the *Australia Acts*,¹⁰⁸ and broader ‘retreat of Empire’.¹⁰⁹ While these developments were apt to demonstrate the changing ‘practical designation’ of the term ‘aliens’ with respect to non-Aboriginal British subjects, the events discussed in *Love* reinforced the term’s *inapplicability* to Aboriginal people.¹¹⁰ Indeed, not only has the last century involved the emergence of the independent Australian nation,¹¹¹ it has equally been marked by the growing recognition of First Nations peoples and culture as integral to the Australian identity.

B ‘Judicial Activism’: *A Pas de Deux*

Although regarding the plaintiffs’ argument as being ‘[m]orally and emotionally engaging’, but ‘not legally sustainable’,¹¹² the minority’s objection to drawing constitutional distinctions based on ‘race’ (described as being an objection ‘of principle’)¹¹³ appeared itself to rest upon policy considerations. Indeed, race is not a concept foreign to the *Constitution*.¹¹⁴ For Keane J, the 1967 referendum ‘brought about a situation in which Aboriginal people were no longer singled out’.¹¹⁵ Accepting the plaintiffs’ argument, therefore, was ‘not consistent with fundamental notions of equality’, and his Honour queried whether all Aboriginal people ‘would ... embrace the rank paternalism that suffuses this argument’.¹¹⁶ Justice Bell contended

¹⁰⁶ Ibid 680–1 [342]–[345] (Gordon J), 692 [399], 695–7 [405]–[410] (Edelman J).

¹⁰⁷ *Nolan* (n 104) 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), cited in *Shaw* (n 82) 54 [71]–[71] (Kirby J). See also at 41 [23]–[24] (Gleeson CJ, Gummow and Hayne JJ). This theory of constitutional interpretation contends that, although the ‘essential’ meaning of a term was fixed at Federation, its ‘practical designation’ may change to accommodate legal and societal developments. See generally Williams, Brennan and Lynch (n 102) 194–202.

¹⁰⁸ *Australia Act 1986* (Cth); *Australia Act 1986* (UK), cited in *Love* (n 9) 682 [352], 684 [359] (Gordon J).

¹⁰⁹ *Love* (n 9) 621 [97] (Gageler J).

¹¹⁰ See above nn 68–69 and accompanying text.

¹¹¹ See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (Windeyer J) (*‘Payroll Tax Case’*).

¹¹² *Love* (n 9) 629 [128] (Gageler J). See also at 600 [8] (Kiefel CJ), 639 [178] (Keane J).

¹¹³ Ibid 630 [133] (Gageler J).

¹¹⁴ See, eg, *Constitution* s 51(xxvi). Justice Gordon and Edelman J highlighted the centrality of ‘race’ to s 51(xix) at Federation, as elucidated by the Convention debates: *Love* (n 9) 680 [343] (Gordon J), 689 [390], 696–7 [409] (Edelman J). Cf at 608 [44] (Kiefel CJ). See generally Robert Dubler, ‘Race and the Constitution’ (2002) 76(7) *Australian Law Journal* 456.

¹¹⁵ *Love* (n 9) 639 [180] (Keane J).

¹¹⁶ Ibid 646–7 [217] (Keane J).

that the majority's decision was 'not offensive' in any such way.¹¹⁷ Justice Edelman added: 'To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference.'¹¹⁸

This disagreement within the Court fell along the same lines as the public debate surrounding the reforms proposed in the *Uluru Statement from the Heart*.¹¹⁹ Here, the work of Will Kymlicka is instructive. Kymlicka argues that 'group-differentiated rights' are not corrosive for the liberal egalitarian polity; rather, they should be viewed as productive, as an expression of 'a desire for integration' by a historically excluded minority group.¹²⁰ The *Uluru Statement from the Heart* itself contemplates this thinking, against the historical backdrop of colonialism and dispossession: 'We seek constitutional reforms to empower our people and take a *rightful place* in our own country.'¹²¹

This is not to dismiss the minority's disquiet entirely. Indeed, there remain broader questions as to the appropriateness of courts determining the Aboriginality of a person as a matter of law.¹²² The minority reasons articulated such concerns as arising from potential issues of proof in future cases.¹²³ While the tripartite test rests primarily upon the determination of membership by the relevant Aboriginal nation, cases in which the court is required to interrogate the issue are indeed likely, if not unavoidable. The Love proceeding was one such instance, the High Court remaining undecided as to whether recognition by one Kamilaroi Elder was sufficient to

¹¹⁷ Ibid 614 [73] (Bell J).

¹¹⁸ Ibid 710–1 [453] (Edelman J).

¹¹⁹ See above nn 5–6 and accompanying text. Then Prime Minister Malcolm Turnbull suggested that the *Uluru Statement from the Heart* call for a Voice to Parliament was inconsistent with individual equality: Calla Wahlquist, 'Indigenous Voice Proposal "Not Desirable", Says Turnbull', *The Guardian* (online, 26 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>>. This view was criticised by some Aboriginal people. See, eg, Sean Gordon, 'Indigenous Rejection: Turnbull Government's Rejection of Uluru Statement from the Heart Indefensible', *ABC News* (online, 27 October 2017) <<https://www.abc.net.au/news/2017-10-27/decision-to-reject-uluru-statement-is-indefensible/9093408>>.

¹²⁰ Will Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Oxford University Press, 1995) 175–7.

¹²¹ *Uluru Statement from the Heart* (n 5) (emphasis in original). See also Stan Grant, 'Chance for Morrison to Give a Voice to the Quietest Australians of All', *The Canberra Times* (online, 27 May 2019) <<https://www.canberratimes.com.au/story/6182412/chance-for-morrison-to-give-a-voice-to-the-quietest-australians-of-all/>>.

¹²² See, eg, Marcia Langton, 'Hysteria over High Court's Ruling Is Hateful and Wrong', *The Australian* (online, 14 February 2020) <<https://www.theaustralian.com.au/inquirer/hysteria-over-high-cour...-is-hateful-and-wrong/news-story/034fe0a7a578ef76b17da6e01338f3bc>>.

¹²³ *Love* (n 9) 604 [24]–[25] (Kiefel CJ), 631–2 [139] (Gageler J), 642 [196] (Keane J).

satisfy the tripartite test.¹²⁴ The Federal Court was recently required to rule on the Aboriginality of a person without evidence of biological descent.¹²⁵ As Nettle J noted, however, ‘difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term ... There is nothing new about disputed questions of fact’.¹²⁶

Overall, considerations of policy and practicality informed both the majority and minority judgments in *Love*. This raises some doubt as to the credibility of one-sided allegations of ‘judicial activism’, which were levelled at the majority in the aftermath of the decision.¹²⁷ Evidently, the minority reasons were no exhibition of strict constitutional positivism either.

V CONCLUSION

Despite the intrigue surrounding the High Court’s decision in *Love*, it remains to be seen how significant the decision will prove to be. As Megan Davis has noted, ‘there are not too many blackfellas who are born overseas and need a visa to come back home’.¹²⁸ Plainly, the decision must be confined to its facts, as is apparent from its early judicial treatment.¹²⁹ In any event, Parliament may attempt to legislate around the decision, a possibility contemplated by three members of the Court,¹³⁰ and subsequently echoed by the Commonwealth Attorney-General.¹³¹

¹²⁴ See, eg, *Love* (n 9) 604 [24] (Kiefel CJ), 689 [388] (Gordon J).

¹²⁵ *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416, [200]–[236] (Anderson J) (*McHugh*).

¹²⁶ *Love* (n 9) 668 [281] (Nettle J).

¹²⁷ See above n 13 and accompanying text.

¹²⁸ Megan Davis, ‘The High Court and the “Aliens” Power’, *The Saturday Paper* (online, 15 February 2020) <<https://www.thesaturdaypaper.com.au/opinion/topic/2020/02/15/the-high-court-and-the-aliens-power/15816852009396>>. See also *Love* (n 9) 289 [456] (Edelman J). Cf at 631–2 [139] (Gageler J).

¹²⁹ *McHugh* (n 125) [191]; *Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 33, [36], [41]–[42] (Logan, Wigney and Gleeson JJ).

¹³⁰ Justice Gageler suggested that legislation ‘targeted’ at Aboriginal people in this context might be supported by the immigration power conferred by s 51(xxvii) of the *Constitution*, or the race power conferred by ss 51(xxvi): *Love* (n 9) 632 [140] (Gageler J). Justice Nettle held some doubt as to whether such legislation ‘would be within the ambit of Commonwealth legislative power’: at 668 [283] (Nettle J). Justice Gordon ruled that the question ‘need not be decided’: at 687 [373] (Gordon J).

¹³¹ Paul Karp and Calla Wahlquist, ‘Coalition Seeks to Sidestep High Court Ruling That Aboriginal Non-Citizens Can’t Be Deported’, *The Guardian* (online, 12 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/12/coalition-seeks-to-sidestep-high-court-ruling-that-aboriginal-non-citizens-cant-be-deported>>.

There are strands of reasoning, however, that may be productive of future developments. *Love* establishes that *Mabo [No 2]* has significance beyond its recognition of native title.¹³² Justice Gordon made clear that the existence of native title was merely ‘one legal consequence’ flowing from the ‘deeper truth’ of *Mabo [No 2]*.¹³³ That Aboriginal people are beyond the scope of the power conferred by s 51(xix) of the *Constitution* is now another, and there may still be further consequences to be uncovered by future cases. Another seed that has been planted is Nettle J’s recognition of the ‘unique obligation of protection’ owed to Aboriginal people by the Crown in right of the Commonwealth,¹³⁴ which may represent the beginning of a shift in Australian law towards acceptance of a broader fiduciary obligation in this context.¹³⁵

Although the Court remained within the boundaries of justiciability established in *Mabo [No 2]*,¹³⁶ perhaps a more immediate implication stems from the common law’s recognition of connection with country, as articulated in *Love*. Not only did the Court’s decision rest upon this connection, so too does the *Uluru Statement from the Heart*:

This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.¹³⁷

Parliament should take the Court’s decision, a declaration of the unique constitutional position of Aboriginal people, and build upon it. Three years on from the *Uluru Statement from the Heart*, the time for constitutional reform must surely be approaching, when this unique position will at long last be formally recognised.

¹³² See above n 3 and accompanying text.

¹³³ *Love* (n 9) 684–5 [363]–[364] (Gordon J). See also at 663 [269] (Nettle J).

¹³⁴ See above nn 77–78 and accompanying text.

¹³⁵ The only judicial recognition of such an obligation in Australia came from Toohey J in *Mabo [No 2]*: see *Mabo [No 2]* (n 1) 203 (Toohey J). It is settled law in Canada: *Guerin v The Queen* [1984] 2 SCR 335.

¹³⁶ That is, the non-justiciability of questions as to the acquisition of sovereignty over Australia by the Crown: see *Love* (n 9) 661–2 [264] (Nettle J), 683 [356] (Gordon J).

¹³⁷ *Uluru Statement from the Heart* (n 5) (emphasis in original).

**AFTER THE ‘HURLY-BURLY HAS DIMMED OUTSIDE’:
MISLEADING AND DECEPTIVE CORFLUTES IN
GARBETT V LIU (2019) 375 ALR 117**

I INTRODUCTION

Throughout the 2019 Australian federal election campaign, the Australian Electoral Commission (‘AEC’) received over 500 complaints regarding election advertising, spanning unauthorised mass robocalls, fake eviction notices and unofficial how-to-vote cards.¹ On 18 May 2019 — election day — 22 complaints flowed from the hotly-contested federal electorates of Chisholm and Kooyong, where Liberal Party corflutes designed to look like AEC signs appeared across polling stations (‘the corflutes’).² The text — written in both traditional and simplified Chinese script — stated that the ‘correct way’ or ‘right way’ to vote was to place a ‘1’ next to the Liberal Party candidate on the ballot paper.³

Liberal Party candidates Gladys Liu and Josh Frydenberg (‘candidates’) won the seats of Chisholm and Kooyong, respectively. Chisholm constituent Vanessa Garbett and unsuccessful Kooyong candidate Oliver Tennant Yates (‘applicants’) challenged the candidates’ elections under s 329(1) of the *Commonwealth Electoral Act 1918* (Cth) (‘*Electoral Act*’).⁴ The applicants submitted that the printing and distribution of the corflutes showed that the candidates committed an illegal practice and sought ‘declarations and orders that [they] were not duly elected’.⁵ Using its jurisdiction as the Court of Disputed Returns (‘CDR’),⁶ the High Court of Australia (‘HCA’) referred the petitions for trial to the Federal Court of Australia (‘Court’).⁷ Sitting as the CDR, the Court determined in the joint judgment of Allsop CJ, Greenwood and Besanko JJ that the corflutes were ‘likely to mislead or deceive an elector in relation to the casting of a vote’ in contravention of s 329(1)⁸. Displaying the corflutes therefore

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¹ Christopher Knaus and Paul Karp, ‘Australian Electoral Commission Finds 87 Cases of Election Ads Breaching Law’, *The Guardian* (online, 22 May 2019) <<https://www.theguardian.com/australia-news/2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law>>.

² *Garbett v Liu* (2019) 375 ALR 117, 144 [108] (Allsop CJ, Greenwood and Besanko JJ) (‘*Garbett*’).

³ *Ibid* 119 [3].

⁴ *Commonwealth Electoral Act 1918* (Cth) s 329(1) (‘*Electoral Act*’).

⁵ *Garbett* (n 2) 119 [8].

⁶ *Electoral Act* (n 4) s 354(1).

⁷ *Garbett* (n 2) 119–20 [9].

⁸ *Ibid* 153 [153]; *Electoral Act* (n 4) s 329(1).

constituted an illegal practice.⁹ However, the Court confirmed that the elections of the candidates could not be declared void under s 360 as it was unlikely that the overall results were affected.¹⁰ The petitions were therefore dismissed.¹¹

*Garbett v Liu*¹² (*‘Garbett’*) offers a thorough blueprint for distinguishing between conduct that influences a voter’s (‘elector’s’) choice of candidate, and conduct that interferes with the casting of the elector’s vote. The former is characterised memorably by the Court as the ‘political hurly-burly in which robust debate takes place’,¹³ and remains free of the operation of s 329(1). The Court is clear, however, that once the ‘hurly-burly has dimmed outside’,¹⁴ actions interfering with an elector ‘giving effect’ to their choice fall within the section’s purview.¹⁵ Sections 329(1) and 362(3) of the *Electoral Act* create a legislative framework in which these considerations are protected.¹⁶ This case note considers that the Court discharged its obligations under ss 329(1) and 362(3), by distinguishing the implied freedom of political communication¹⁷ from conduct that infringes on the casting of a vote,¹⁸ while safeguarding and respecting the overall will of the majority in regard to their selection of a candidate. Nevertheless, I note that the potential interference with an albeit small group of electors and the casting of their votes is a disturbing revelation. Due to a lack of repercussions for the individual who authorised the corflutes, it is one which this determination is unlikely to deter in future.

II BACKGROUND

A *The Electoralates*

Chisholm and Kooyong are neighbouring electorates in Melbourne’s eastern suburbs. Both have a considerable number of electors who speak Mandarin and Cantonese and are able, presumably, to read Chinese script.¹⁹ Ms Liu and the Australian Labor Party’s (‘ALP’) Chisholm candidate Ms Jennifer Yang both campaigned and debated partially in Mandarin and Cantonese.²⁰

⁹ *Electoral Act* (n 4) s 352(1).

¹⁰ *Ibid* s 362(3)(a); *Garbett* (n 2) 157 [175].

¹¹ *Garbett* (n 2) 157 [176].

¹² *Ibid*.

¹³ *Ibid* 152 [152].

¹⁴ *Ibid* 128 [43].

¹⁵ *Ibid* 152 [152].

¹⁶ *Electoral Act* (n 4) ss 329(1), s 362(3).

¹⁷ See generally *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. Most recently, see *Comcare v Banerji* (2019) 372 ALR 42.

¹⁸ *Garbett* (n 2) 128 [43].

¹⁹ *Ibid* 142 [97].

²⁰ *Ibid* 142 [98].

B *Authorisation of the Corflutes*

The corflutes were drafted and printed on the instructions of Mr Simon Frost, then Acting State Director of the Victorian division of the Liberal Party, now senior advisor to Mr Frydenberg.²¹ Mr Frost had experience in 15 previous elections as a volunteer for the Liberal Party.²² In cross-examination, he admitted that it was his intention to ‘convey the impression’ that the corflutes were AEC corflutes.²³ Mr Frost approved an early draft of the corflute text that read ‘to make your vote count [Vote 1 Liberal]’.²⁴ He gave permission for the text to be altered but did not check the new translation.²⁵ There are three similar English translations for the version that appeared on election day. The first variation stated:

Correct voting method

On the green ballot paper, put 1 next to the Liberal Party candidate

And in the other boxes, fill in the numbers in sequence, from small to big ...²⁶

There is no compelling evidence to suggest that either candidate knew of, or authorised, the corflutes prior to election day.²⁷ As Mr Frost authorised the corflutes but was not a party to the proceeding, he was without legal representation.²⁸ Furthermore, despite his admission under cross-examination of his intention to make the corflutes look like AEC signs, his evidence that he did *not* intend to mislead any voters was not specifically tested in cross-examination.²⁹ However, the Court was presented with evidence that the corflutes were placed adjacent to AEC signage at multiple polling places in Chisholm and Kooyong (see Figure 1)³⁰ and accepted that ‘[i]t would be logical and reasonable to expect that if Mr Frost’s intention [to make the signs look like AEC corflutes] were ... understood by volunteers, then this would be done if possible’.³¹

²¹ Josh Taylor, ‘Liberal Official Admits Chinese Language Signs Were Meant to Look like They Came from the AEC’, *The Guardian* (online, 6 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/06/liberal-official-admits-chinese-language-signs-were-meant-to-look-like-they-came-from-aec>>.

²² *Garbett* (n 2) 143 [102], 156 [170].

²³ *Ibid* 144–5 [108].

²⁴ *Ibid* 145 [112].

²⁵ *Ibid* 146 [119].

²⁶ *Ibid* 119 [3].

²⁷ *Ibid* 149–50 [141], 155 [161]–[162].

²⁸ *Ibid* 157–8 [177].

²⁹ *Garbett v Liu [No 2]* (2020) 376 ALR 504, 509 [23] (Allsop CJ, Greenwood and Besanko JJ) (*‘Garbett [No 2]’*).

³⁰ *Garbett* (n 2) 146–7 [128].

³¹ *Ibid* 147 [129].



Figure 1: A Liberal Party Corflute (Left) and Official AEC Signage (Right) at a Polling Station in Chisholm³²

C The Petitions

While the corflutes appeared in five other electorates, the two petitions concerned only Ms Liu and Mr Frydenberg’s elections. The applicants argued that the corflutes contravened s 329(1) of the *Electoral Act* as they were likely to mislead or deceive an elector into believing they were official AEC publications,³³ and that a ‘1’ had to be placed next to the Liberal candidate in order for the elector’s vote to be valid.³⁴ If the Court were to establish a contravention of s 329(1), the applicants sought a declaration of the Court under s 360 that the candidates were not duly elected³⁵ or that the two elections were absolutely void.³⁶

D Applicable Legislation

Section 329 of the *Electoral Act* provides:

- (1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize

³² @lhilakari (Luke Hilakari) (Twitter, 18 May 2019, 8:48am AEST) <<https://twitter.com/lhilakari/status/1129526632245411841>>.

³³ *Garbett* (n 2) 150–1 [144].

³⁴ *Ibid.*

³⁵ *Electoral Act* (n 4) s 360(1)(v).

³⁶ *Ibid* s 360(1)(vii).

to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector *in relation to the casting of a vote*.

- (4) A person who contravenes subsection (1) commits an offence punishable on conviction:
- (a) if the offender is a natural person—by imprisonment for a period not exceeding 6 months or a fine not exceeding 10 penalty units, or both ...³⁷

An action contravening s 329(1) also constitutes an ‘illegal practice’, engaging ss 360, 362 and 363 of the *Electoral Act*.³⁸ Under s 360, the CDR is empowered to declare any election absolutely void,³⁹ or declare that any person who was returned as elected was not duly elected.⁴⁰

Section 362(3) of the *Electoral Act* constrains the CDR’s powers under s 360, and provides:

- (3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:
- (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate; or
- (b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;

unless the Court is satisfied that the result of the election was *likely to be affected*, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.⁴¹

When the CDR finds that a person has committed an illegal practice, s 363 requires the Chief Executive and Principal Registrar of the HCA to report the person who had committed an illegal practice under the *Electoral Act* to the Minister.⁴²

³⁷ Ibid s 329(1)–(4)(a) (emphasis added). There is no subsection (2) or (3); *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 item 159; *Electoral and Referendum Amendment Act 1984* (Cth) pt II item 5(a).

³⁸ *Garbett* (n 2) 123 [27].

³⁹ *Electoral Act* (n 4) s 360(1)(vii).

⁴⁰ Ibid s 360(1)(v).

⁴¹ Ibid s 362(3) (emphasis added).

⁴² Ibid s 363.

E *The Issues*

The Court separated its determination into four issues:

- (1) Were the corflutes likely to mislead or deceive an elector in relation to the casting of a vote?
- (2) Was anyone, and if so who, responsible for ... printing, publishing or distributing or causing, permitting or authorising the printing, publishing or distributing of the corflute?
- (3) Was the result of the election likely to be affected? and
- (4) Is it just to order the relief sought, if otherwise available?⁴³

Issues one, three and four will be discussed below as issue two is discussed in Part II (B) above.

III DECISION

A Likely to Mislead or Deceive in Relation to the Casting of a Vote?

The Court provided an interpretation of the terms ‘likely’ and ‘the casting of a vote’.

First, in the context of s 329(1), the Court distinguished between a likelihood to mislead or deceive in trade and commerce and the differing standards that apply in political discourse. While in the former case, misleading and deceptive conduct is legislatively prohibited,⁴⁴ a similar prohibition in the latter may impede the implied freedom of political communication in a robust democracy home to a range of political views and ideas.⁴⁵ The level of probability necessary to engage s 329(1) was defined with reference to *Goss v Swan*: ‘there must be a likelihood of misleading, not a mere possibility of it’.⁴⁶ The plurality was clear that the threshold did not reach a likelihood of ‘more probable than not’ nor one ‘on the balance of probabilities’;⁴⁷ instead, it was confirmed that s 329(1) would be engaged if ‘there is a *real* chance that an elector will be misled or deceived’.⁴⁸

Second, the Court distinguished the formation of a political view from the casting of a vote to give effect to that political view. In confirming that s 329(1) only applies to

⁴³ *Garbett* (n 2) 123 [28].

⁴⁴ *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

⁴⁵ *Garbett* (n 2) 126 [37].

⁴⁶ [1994] 1 Qd R 40, 41 (Derrington J).

⁴⁷ *Garbett* (n 2) 126 [40].

⁴⁸ *Ibid* 128 [43] (emphasis added).

the latter in order to preserve the robust and unconstrained level of debate democracies enjoy, the Court referred extensively to the HCA's judgment in *Evans v Crichton-Browne*.⁴⁹ There, three applicants challenged the election of the successful candidates under s 161(e), the precursor to s 329(1),⁵⁰ in relation to allegedly 'untrue or incorrect statements ... published in newspapers and telecast[s]' claiming that a vote for the Australian Democrats was effectively one for the ALP.⁵¹ The HCA confirmed that the operation of s 161(e) was to protect electors when they seek to 'record and give effect to the judgment which [they have] formed as to the candidate for whom [they intend] to vote, rather than with statements which might affect the formation of that judgment'.⁵² The advertisements fell into the second category, and were not constrained by s 161(e) as they did not interfere with the act of 'recording or expressing ... political judgment'.⁵³

To reach the determination that the corflutes were misleading and deceptive in contravention of s 329(1), the Court considered four factors.

First, the 'identical colour match'⁵⁴ and lack of factors to distinguish the corflutes as a Liberal Party sign gave the 'reasonable' impression that the corflutes were AEC signage.⁵⁵

Second, where the corflutes were adjacent to official AEC signage, the text implied that the AEC as an 'independent government agency' was directing electors to place a '1' next to the Liberal candidate as the 'way to cast a valid vote'.⁵⁶

Third, the plurality acknowledged that while it is 'difficult to imagine anyone who thought it was necessary to vote only for one specific candidate or party in order to cast a valid vote',⁵⁷ there was the potential for there to be a 'small group of electors who had a lack of interest or naivety, or lack of intelligence ... and whose choice of party was, by [the corflutes] ... influenced or changed'.⁵⁸ The Court made it clear that it was not connecting naivety or a lack of intelligence with the ability to read Chinese script, and that this ability was certainly not a 'mark of vulnerability'.⁵⁹

⁴⁹ (1981) 147 CLR 169 ('*Evans*').

⁵⁰ *Commonwealth Electoral Act 1918* (Cth) s 161(e), as amended by *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

⁵¹ *Evans* (n 49) 199 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

⁵² *Ibid* 204.

⁵³ *Ibid* 207.

⁵⁴ *Garbett* (n 2) 150 [142].

⁵⁵ *Ibid*.

⁵⁶ *Ibid* 150 [144].

⁵⁷ *Ibid* 151 [148].

⁵⁸ *Ibid*.

⁵⁹ *Ibid* 151 [147].

Fourth, the Court determined that corflutes adjacent to AEC signage were misleading and deceptive as to the casting of a vote, rather than in influencing an elector’s political judgment.⁶⁰ This was contrary to the submission that the corflutes’ ‘highly partisan message’⁶¹ lent itself to the latter category rather than the former.⁶² If the corflutes were branded as Liberal Party publications, it is likely that they would fall within the ‘political hurly-burly’ and therefore the latter category. The fact that they appeared as official signage from an independent government agency and directed electors to vote ‘1’ Liberal was

so utterly foreign and antithetical to the Australian electoral and political systems that [the text could not] be characterised as a statement in relation to the formation of a political judgment, but only as an interference in relation to the casting of the vote.⁶³

B Was the Election Result Affected?

The Court can only order an election void under s 360 following a contravention of s 329(1) if satisfied that the result of the election was likely to be affected.⁶⁴

The term ‘likely’ was considered by the Court in this context. Clearly, the standard is below that of definite ‘proof ... that the election was affected’,⁶⁵ and instead, that there was a ‘real chance that the result would be or was affected’.⁶⁶ The Court acknowledged that while it was impossible to be precise, ‘there was only a real chance of a handful of people being influenced’ by the text on the corflutes,⁶⁷ and certainly not enough to make a difference to the candidate elected: Ms Liu won the two candidate preferred result by 1,090 votes,⁶⁸ and Mr Frydenberg by over 11,000 votes.⁶⁹

C Relief

As the election results were unlikely to have been affected by the corflutes, it was inappropriate to void the elections of either candidate.⁷⁰ Mr Frost was directed to submit why the Principal Registrar of the HCA should not be informed of his role

⁶⁰ Ibid 153 [153].

⁶¹ Ibid 152 [149].

⁶² Ibid 152 [151].

⁶³ Ibid 152–3 [152].

⁶⁴ *Electoral Act* (n 4) s 362(3).

⁶⁵ *Garbett* (n 2) 131 [55].

⁶⁶ Ibid 140–1 [92].

⁶⁷ Ibid 156 [171].

⁶⁸ Ibid 155 [167].

⁶⁹ Ibid 156 [168].

⁷⁰ Ibid 157 [175].

in the illegal practice thus engaging s 363.⁷¹ In its February 2020 determination, *Garbett [No 2]*, the Court found a lack of evidence to ‘draw ... conclusion[s] about Mr Frost’s state of mind and knowledge’ regarding the relevant fault element of the offence,⁷² and the Principal Registrar was not informed.⁷³

IV COMMENT

A *A Robust Democracy*

In its judgment, the Court balances and protects the competing interests of three key concepts all crucial to a robust democracy: the implied freedom of political communication; the protection of the individual casting of a vote; and, the will of the majority.

The facts of *Garbett* occurred in an environment where over 60% of Australians believe that politicians have low honesty and integrity.⁷⁴ The Liberal Party’s 2019 ‘Death Tax’ and the ALP’s 2016 ‘Medi-scare’ campaigns had questionable levels of factual content and aimed to influence an elector’s choice of candidate.⁷⁵ Billionaire Clive Palmer’s 2019 ‘Shifty Shorten’ campaign (at a cost of \$60 million) was allegedly invested with the intention of swinging electors in the direction of the Liberal Party.⁷⁶ While these are examples of conduct taken to win or sway the elector’s vote in the political ‘hurly-burly’ and are not constrained by s 329(1), their misleading nature has the potential to decrease public trust in political advertising and institutions. *Garbett* acknowledges that campaigns of this nature are an element of the implied

⁷¹ Ibid 157–8 [177]; *Electoral Act* (n 4) s 363.

⁷² *Garbett [No 2]* (n 29) 510 [29].

⁷³ Ibid 510 [30]. See also Luke Henriques-Gomes, ‘Former Liberal Party State Director Won’t Be Referred to High Court over Chinese Election Signs’, *The Guardian* (online, 20 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/20/former-liberal-party-state-director-simon-frost-not-referred-high-court-chinese-election-signs>>.

⁷⁴ Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia* (Report No 1, Independent Commissioner Against Corruption New South Wales, December 2018) 10.

⁷⁵ Danny Tran, Michael Workman and Lachlan Moffet Gray, ‘Federal Election 2019: “Death Taxes” Scare Campaign Continues to Be Promoted, but Labor Says It’s Fake News’, *ABC News* (online, 9 May 2019) <<https://www.abc.net.au/news/2019-05-09/money-pumped-into-federal-election-death-tax-scare-campaign/11092802?nw=0>>; ‘Election 2016: George Brandis Attacks Labor’s “Disgraceful” Medicare Campaign’, *ABC News* (online, 3 July 2016) <<https://www.abc.net.au/news/2016-07-03/george-brandis-attacks-labor-medicare-scare-campaign/7565244>>.

⁷⁶ ‘Election 2019: Clive Palmer Says Scott Morrison Can Thank UAP’s Anti-Labor Ads for Result’, *ABC News* (online, 19 May 2019) <<https://www.abc.net.au/news/2019-05-19/election-2019-clive-palmer-says-uap-ads-gave-coalition-win/11128160>>.

freedom of political communication that features within a robust democracy; it is not the judiciary’s role to interfere here.

However, when conduct goes beyond a disingenuous approach and becomes deception that potentially affects the casting of an elector’s vote, the Court drew a strong line. Their Honours’ consideration shifted from respect for the implied freedom of political communication to one of ‘protection [of] the conclusory casting of the vote’.⁷⁷ In this respect, the corflutes adjacent to AEC signage were likely to have a misleading or deceptive effect on a ‘gullible or unintelligent’ elector under s 329(1): the elector may have arrived at the polling station intending to vote for an Independent candidate, for example, and upon seeing the corflute adjacent to the AEC signage, have placed the Liberal candidate first in order to ensure their vote was valid and the Independent second (perhaps assuming that the second preference would be the one counted as their intended vote). The Court’s finding that the corflutes fell within the purview of s 329(1) protects the right of electors to give effect to their political judgment.

In the second limb of the judgment the consideration shifts again. Given the secrecy of the individual ballot and the relatively small group that may have been duped by the sign, the Court’s dismissal of the petitions protected the will of the majority of Chisholm and Kooyong constituents to be represented by their elected candidate.

B *The Fate of Mr Frost*

The lack of repercussions — legal or reputational — for Mr Frost suggest that the Court’s decision may be unlikely to deter similar incidents in the future. Without impugning the Court’s legal reasoning, we are still left with the disquieting actions of an experienced political campaigner targeting a specific group of people and attempting to interfere with their political choice being given effect at the ballot box. The fact that it was done bespeaks the likelihood that there was some anticipated ‘advantage in doing so’.⁷⁸ In the tight contests that Chisholm and Kooyong were anticipated to be,⁷⁹ the votes of a small group of people could have made all the difference.⁸⁰ The fact that they *probably* did not is no real consolation.

Electoral advertising is often created, organised and authorised by individuals within a party’s operating division and not the candidates themselves. Here, the applicants brought the petitions against the candidates of both Chisholm and Kooyong, but not against Mr Frost. The applicants did not address the Court on ‘the engagement

⁷⁷ *Garbett* (n 2) 128 [43].

⁷⁸ *Ibid* 156 [170].

⁷⁹ ‘Liberals Close in on Victory in Chisholm, Morrison Secures Majority Government’, *SBS News* (online, 21 May 2019) <<https://www.sbs.com.au/news/liberals-close-in-on-victory-in-chisholm-morrison-secures-majority-government>>; Calla Wahlquist, ‘Kooyong: Climate Change Shakes Up the Election in Liberal Melbourne’, *The Guardian* (online, 10 April 2019) <<https://www.theguardian.com/australia-news/2019/apr/10/kooyong-climate-change-federl-election-melbourne-liberal-heartland>>.

⁸⁰ *Garbett* (n 2) 156 [170].

of the *Criminal Code* or ... [the] relevant fault element' of s 329(1).⁸¹ This led to the Court recognising that there was a lack of evidence to infer the fault element of intention. After hearing Mr Frost's submissions on why he should not be referred to the Minister regarding the misleading and deceptive corflutes, the Court decided in his favour: their Honours noted that 'there were many loose ends in his evidence, to a degree favourable to him',⁸² and that 'the proceeding [did not] ... allow any conclusion that Mr Frost acted in a way that may be said to amount to the committal of an offence'.⁸³

In doing so, the CDR distinguished between its jurisdiction to act in response to a contravention of s 329(1) under s 360 in comparison to s 363. When deciding whether to void an election under s 360, the CDR is able to exercise its power 'without being persuaded that a person satisfied the relevant fault elements' of s 329(1).⁸⁴ When deciding whether to *refer* the individual responsible for the conduct that has the potential to mislead or deceive voters, however, the Court stated that it can only act 'when it is persuaded that there is material from which it can be concluded that a person not only was responsible for the physical elements of a contravention of s 329(1), but also that the relevant fault element was satisfied'.⁸⁵ With respect, this approach is puzzling. A referral to the Minister under s 363 is not synonymous with a charge and much less a conviction of the offence. It is therefore unclear why the CDR must be fully satisfied of the individual's intention to mislead or deceive before referring them.

I submit that this interpretation of s 363 sets an almost insurmountable threshold for referral to the Minister where the person responsible for the contravention of s 329(1) is not the respondent to proceedings related to the section, especially if they appear as witnesses and without representation. This threshold curtails the CDR's effectiveness in holistically 'vindicat[ing] the policy of the [*Electoral Act*] which is to protect the democratic franchise',⁸⁶ by restricting the circumstances in which it can refer individuals who authorise publications that contravene s 329(1) to the Minister. *Garbett* may therefore fail to deter similar incidents from occurring in the future. The result in *Garbett* will also likely influence the choice of parties if a similar case is brought again.

V CONCLUSION

In *Garbett*, the Court made a two-limbed determination. First, it held that the corflutes when adjacent to official AEC signage were misleading and deceptive in relation to

⁸¹ *Garbett [No 2]* (n 29) 509 [22].

⁸² *Ibid* 510 [24].

⁸³ *Ibid* 510 [25].

⁸⁴ *Ibid* 510 [27].

⁸⁵ *Ibid* 510 [28].

⁸⁶ *Ibid* 510 [27].

the casting of a vote, contravening s 329(1) of the *Electoral Act*. Second, the election results in Chisholm and Kooyong were unlikely to have been affected by the corflutes. In doing so, the Court balanced the implied freedom of political communication, the individual right to give effect to political judgment and the will of the majority as per the relevant sections of the *Electoral Act*.⁸⁷ The Court’s subsequent decision in *Garbett [No 2]* not to refer Mr Frost to the Minister is unlikely to deter similar incidents from occurring again, especially where respondents to proceedings are the candidates themselves, rather than the individuals who authorised the misleading and deceptive advertising. While voiding the elections would have been unwarranted on the facts, there remains the potential that a group of electors had their individual right to franchise interfered with by the machinations of political advertising. This remains a sobering concern in the lead up to the next federal election.

⁸⁷ *Electoral Act* (n 4) ss 329, 362(3).

**‘A WITNESS OF TRUTH’:
THE COURT OF APPEAL’S CARDINAL SIN IN
PELL V THE QUEEN (2020) 376 ALR 478**

Note: this article addresses themes of child sexual assault which may be disturbing to some readers.

I INTRODUCTION

Some decisions of the High Court are worthy of comment because they involve a particularly difficult question of law, others because of their public interest. *Pell v The Queen* (2020) 376 ALR 478 (*‘Pell’*) is unquestionably an example of the latter. Few cases have attracted the public’s attention as much as *Pell*. From the initial charge to the hung jury, to the conviction and finally the appeals, the judicial process itself makes for fascinating examination. The process culminated in a unanimous decision of the High Court to acquit Cardinal George Pell, which left some feeling devastated,¹ and others vindicated.²

What is apparent from the judgment of the High Court is that this decision was not legally complex. Its place in criminal law textbooks will likely be confined to the confirmation and reapplication of an existing test, rather than the exposition of a new principle. Factually, on the other hand, the decision is complicated. A compelling complainant is contrasted with a body of traditional church practice and procedure which point to the offending being logistically improbable. For the jury, it appears the complainant’s evidence was enough. The High Court disagreed. The judgment is as much an analysis of the evidence as it is an emphatic rejection of the majority’s decision in the Victorian Court of Appeal. The High Court’s rejection of the majority’s application of the key test is particularly stinging.

Pell highlights a difficult tension in Australian criminal law, between society’s right to seek justice for historic sexual abuse offences, and a defendant’s right to have their

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¹ ‘George Pell: Church Abuse Victims Shocked as Cardinal Walks Free’, *The Guardian* (online, 7 April 2020) <<https://www.theguardian.com/australia-news/video/2020/apr/07/george-pell-church-abuse-victims-shocked-as-cardinal-walks-free-video>>.

² Chris Merritt, ‘George Pell Verdict: Victoria’s Flawed Justice System Must Be Fixed’, *The Australian* (online, 8 April 2020) <<https://www.theaustralian.com.au/commentary/george-pell-verdict-victorian-justice-system-is-the-biggest-loser-as-convictions-quashed/news-story/a3744bd98fff6d973250dc36a6cbc671>>.

guilt proven beyond reasonable doubt. Given sexual abuse often happens in private and within relationships of trust, cases of historic sexual abuse are usually alleged by one witness, who is also the purported victim.³ If the evidence of one witness, who is also a victim, cannot suffice to establish guilt beyond reasonable doubt, then what is the likelihood of historic sexual abuse claims ever succeeding? Further, when is it the court’s place to decide that 12 members of the public *must* have been mistaken?

This case note analyses the *Pell* decision. It assesses the changing role of the High Court in hearing criminal matters and questions the appropriateness of a jury in determining this case. Where a jury has made a determination of guilt, it considers the implications of a court substituting that decision for its own finding of what is rational.⁴ This case note discusses whether, moving forward, one ‘witness of truth’ can ever be held compelling enough to establish guilt beyond reasonable doubt. Finally, it contends that the Court’s rejection of the need for an appellate court to view recorded evidence requires further clarity.

II BACKGROUND

A Facts

In June 2015, former St Patrick’s Cathedral choirboy ‘A’ made a complaint to Victoria Police that he and another choirboy ‘B’ had been sexually assaulted by Pell in 1996.⁵ A and B were aged 13 years at the time.⁶ By the time A had made the complaint, B had ‘died in accidental circumstances’.⁷

On 29 June 2017, Pell was charged with five counts of sexual offending.⁸ The first offence was alleged to have been committed between 1 July and 31 December 1996 at St Patrick’s Cathedral.⁹ The case was that A and B had broken away from the procession following Sunday solemn mass and entered the priests’ sacristy.¹⁰

³ Bianca Klettke and Sophie Simonis, ‘Attitudes Regarding the Perceived Culpability of Adolescent and Adult Victims of Sexual Assault’ (2011) 26 *Aware* 7, 7; Kara Shead, ‘Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions’ (2014) 26(1) *Current Issues in Criminal Justice* 55, 56.

⁴ *Pell v The Queen* (2020) 376 ALR 478, 502 [127] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (*‘Pell’*).

⁵ *Ibid* 479 [2]. Pell is referred to as ‘the applicant’ in the decision of the High Court.

⁶ *Ibid* 481 [15].

⁷ *Ibid* 479 [2].

⁸ ‘George Pell, Catholic Cardinal, Charged with Historical Sexual Assault Offences’, *ABC News* (online, 29 June 2017) <<https://www.abc.net.au/news/2017-06-29/cardinal-george-pell-charged-sexual-assault-offences/8547668>>.

⁹ *Pell* (n 4) 479 [1].

¹⁰ *Ibid* 481–2 [15].

Once inside they found a bottle of red altar wine, which they began to drink.¹¹ Pell allegedly appeared in the doorway ‘saying, “[w]hat are you doing here?” or “[y]ou’re in trouble”’.¹² He allegedly proceeded to undo his trousers and belt, lower B’s head towards his penis and place his hands around B’s head (charge one).¹³ Then, Pell allegedly turned to A, lowered him to the ground and pushed his penis into A’s mouth (charge two).¹⁴ He then allegedly instructed A to take his pants off and began touching A’s penis (charge three) while using his other hand to touch his own penis (charge four).¹⁵ After this, A and B left the sacristy and rejoined the choir.¹⁶ A never discussed the incident with anyone, including B.¹⁷ In 2001, in response to a question from his mother, B said that he had never ‘been “interfered with or touched up” while in the Cathedral choir’.¹⁸

The second offence was alleged to have been committed between 1 July 1996 and 28 February 1997,¹⁹ but ‘[a]t least a month after the first incident’.²⁰ It was A’s evidence that after Sunday solemn mass, as he was processing with the choir along the sacristy corridor, Pell appeared, shoved him against the wall and painfully squeezed his genitals (charge five).²¹

Pell was installed as Archbishop of Melbourne in August 1996.²² The Cathedral was closed for renovations until the end of November 1996.²³ The only occasions on which Pell celebrated Sunday solemn mass in 1996 were 15 and 22 December.²⁴ The next occasion was on 23 February 1997.²⁵ The prosecution’s case was ‘that the first incident occurred on either 15 or 22 December 1996 and that the second incident occurred on 23 February 1997’.²⁶

According to Charles Portelli — Master of Ceremonies at the Cathedral at the time of the alleged offending — at the conclusion of Sunday solemn mass, Pell remained

¹¹ Ibid.

¹² Ibid.

¹³ Ibid 482 [16].

¹⁴ Ibid 482 [17].

¹⁵ Ibid 482 [18].

¹⁶ Ibid 482 [19].

¹⁷ Ibid.

¹⁸ Ibid 479 [2].

¹⁹ Ibid 479 [1].

²⁰ Ibid 482 [20].

²¹ Ibid.

²² Ibid 482 [22].

²³ Ibid.

²⁴ Ibid 483 [23].

²⁵ Ibid.

²⁶ Ibid 483 [25].

on the steps of the Cathedral for at least 10 minutes.²⁷ This was supported by other witnesses, including sacristan Maxwell Potter and alter server Daniel McGlone. According to Portelli, Pell was always accompanied back to the sacristy, usually by Portelli himself, but on occasion by Potter.²⁸ Potter confirmed that Pell would never return unaccompanied.²⁹ According to assistant organist Geoffrey Cox, the sacristy was ‘a “hive of activity” after Mass’.³⁰

B *Issue*

The case turned on whether there remained a reasonable doubt as to the occurrence of the offending such that Pell’s guilt was not established beyond reasonable doubt.³¹

C *Lower Courts*

The first trial took place between August and September of 2018.³² A’s examination-in-chief was pre-recorded and played to the jury.³³ A was then cross-examined in front of the jury, which was also recorded.³⁴ The first trial resulted in a mistrial after the jury was unable to reach a verdict.³⁵ Pell’s second trial began in November 2018. The pre-recorded examination-in-chief and the cross-examination recorded during the first trial were put before the second jury as A’s evidence.³⁶

On 11 December 2018, Pell was convicted by the second jury of five charges of sexual offending.³⁷ Chief Judge Kidd of the County Court of Victoria sentenced Pell ‘to a total effective sentence of 6 years’ imprisonment’ with ‘a non-parole period of 3 years and 8 months’.³⁸

²⁷ Ibid 491 [61].

²⁸ Ibid 494 [77].

²⁹ Ibid 494 [79].

³⁰ Ibid 495 [86].

³¹ Ibid 480 [7].

³² Mirko Bagaric, ‘George Pell’s Successful Appeal Hinged on the Tricky Question of Witnesses’, *ABC News* (online, 8 April 2020) <<https://www.abc.net.au/news/2020-04-08/george-pell-aquitted-high-court-sexual-abuse/12130064>>.

³³ *Pell v The Queen* [2019] VSCA 186, [31] (Ferguson CJ and Maxwell P) (*‘Pell (VSCA)’*).

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ *DPP v Pell (Sentence)* [2019] VCC 260, [1] (Chief Judge Kidd) (*‘Pell (Sentence)’*).

³⁸ Ibid [228]–[229].

Pell subsequently appealed to the Court of Appeal, which dismissed the appeal and upheld the conviction, by a 2:1 majority.³⁹ The majority, consisting of Ferguson CJ and Maxwell P, put themselves ‘in the closest possible position to that of the jury’,⁴⁰ and determined that ‘[t]aking the evidence as a whole, it was open to the jury to be satisfied of Cardinal Pell’s guilt beyond reasonable doubt’.⁴¹ The majority’s decision was underpinned by the finding that ‘[t]hroughout his evidence, A came across as someone who was telling the truth’.⁴² Justice of Appeal Weinberg’s dissenting judgment was as meticulous as it was long. His Honour ultimately determined that the ‘compounding improbabilities’,⁴³ generated by the evidence of the other witnesses, suggested that there was ‘a “significant possibility” that the applicant in this case may not have committed these offences’.⁴⁴

D *Relevant Law*

An appellate court must allow an appeal against conviction if it is satisfied that ‘the verdict of the jury is unreasonable or cannot be supported having regard to the evidence’.⁴⁵ In *M v The Queen*,⁴⁶ it was held that the court is required to ask ‘whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty’ (‘*M* test’).⁴⁷ The *M* test has been rephrased as ‘whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant’s guilt’.⁴⁸

III DECISION

A unanimous High Court granted special leave and allowed the appeal.⁴⁹ It was held that, notwithstanding the jury’s assessment of A as credible and reliable, the evidence, taken as a whole, did not exclude a reasonable doubt as to Pell’s guilt.⁵⁰ Critical to the decision was the evidence relating to: (i) Pell’s practice of remaining

³⁹ Pell appealed on three grounds. Grounds two and three related to alleged procedural failings at trial and were unanimously dismissed: *Pell* (VSCA) (n 33) [352] (Ferguson CJ and Maxwell P), [1180] (Weinberg JA). Ground one was the ‘unreasonableness’ ground which became the subject of the appeal to the High Court.

⁴⁰ *Ibid* [33] (Ferguson CJ and Maxwell P).

⁴¹ *Ibid* [351].

⁴² *Ibid* [91].

⁴³ *Ibid* [1060] (Weinberg JA).

⁴⁴ *Ibid* [1111], quoting *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 619 (Deane J) (‘*Chamberlain [No 2]*’).

⁴⁵ *Criminal Procedure Act 2009* (Vic) s 276(1)(a).

⁴⁶ (1994) 181 CLR 487.

⁴⁷ *Ibid* 493 (Mason CJ, Deane, Dawson and Toohey JJ).

⁴⁸ *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] (Hayne J) (emphasis in original).

⁴⁹ *Pell* (n 4) 502–3 [129].

⁵⁰ *Ibid* 490 [58].

on the Cathedral steps after mass; (ii) the long standing Church practice pursuant to which Pell would always be accompanied in the Cathedral; and (iii) the likelihood of other persons entering the sacristy during the alleged assaults.⁵¹

As to (i) and (ii), the Court noted that 'Portelli's evidence of having an actual recall of being present beside the applicant on the steps of the Cathedral as the applicant greeted congregants on 15 and 22 December 1996 was unchallenged'.⁵² So too was the evidence that Portelli accompanied Pell to the priests' sacristy.⁵³ While some witnesses provided evidence that Pell was, at times, alone in the sacristy corridor,⁵⁴ the Court held that this was 'a slim foundation for finding that the practice of ensuring that the applicant was accompanied while he was in the Cathedral was not adhered to'.⁵⁵ It did not, according to the Court, exclude the possibility that Portelli's recall was accurate.⁵⁶

As to (iii), the Court held that if A and B broke away from the procession and entered the sacristy corridor, 'it might reasonably be expected that they would have encountered the altar servers' or 'concelebrant priests in the sacristy corridor or the priests' sacristy'.⁵⁷ While there was a period 'of five to six minutes of private prayer time' following Sunday solemn mass, this was separate and 'distinct' from the period during which A and B entered the priests' sacristy.⁵⁸

Regarding the second alleged offence, the Court noted that

[t]he assumption that a group of choristers, including adults, might have been so preoccupied with making their way to the robing room as to fail to notice the extraordinary sight of the Archbishop of Melbourne dressed 'in his full 15 regalia' advancing through the procession and pinning a 13 year old boy to the wall, is a large one.⁵⁹

Ultimately, the evidence pertaining to the second alleged offence suffered 'from the same deficiency' as the first.⁶⁰ Therefore, 'there ... [was] a significant possibility that an innocent person has been convicted'.⁶¹ The High Court thus allowed Pell's appeal and ordered that he be acquitted.⁶²

⁵¹ Ibid 490 [57].

⁵² Ibid 495–6 [88].

⁵³ Ibid 498 [102].

⁵⁴ See, eg, comments regarding the evidence of choirboys Robert Bonomy, David Mayes and Anthony Nathan: *ibid* 497–8 [95]–[98], 498 [102].

⁵⁵ Ibid 498 [102].

⁵⁶ Ibid.

⁵⁷ Ibid 499–500 [110].

⁵⁸ Ibid 500 [111].

⁵⁹ Ibid 502 [124].

⁶⁰ Ibid 502 [125].

⁶¹ Ibid 502 [127].

⁶² Ibid 502 [129].

The High Court was critical of the approach taken by the majority in the Court of Appeal. The Court held that the majority's approach to the *M* test was driven by their Honours' subjective assessment that A was a compellingly truthful witness.⁶³ As such, the majority did not properly engage with the body of evidence which suggested that it was reasonably possible that A's account was not correct.⁶⁴

The Court also criticised the majority's suggestion that A's evidence was not uncorroborated. Contrary to the majority, the Court held that A's recollection of the interior layout of the priests' sacristy 'did not afford any independent basis for finding that ... he had been sexually assaulted by the applicant'.⁶⁵ Further, the Court held that the majority had, despite the requirement in the legislation,⁶⁶ failed to take adequately into account the forensic disadvantage experienced by Pell arising from the delay in being confronted by the allegations.⁶⁷

Finally, and perhaps most notably, the High Court criticised the Court of Appeal's decision to watch the recording of A's evidence. The Court held that an appellate court should only view the evidence in exceptional circumstances where 'there is something particular in the video-recording that is apt to affect ... [the court's] assessment of the evidence, which can only be discerned visually or by sound'.⁶⁸ This is not because historically there were no practical means of an appellate court viewing the evidence. Rather, the Court said, it is because

[t]he assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury ... [The] demarcation [between the province of the jury and the province of the appellate court] has not been superseded by the improvements in technology that have made the video-recording of witnesses possible.⁶⁹

IV COMMENT

A Special Leave and Overturning Jury Verdicts

Historically, the High Court very rarely granted special leave to appeal against a criminal conviction based purely on a question of fact.⁷⁰ In *Liberato v The Queen*, Mason ACJ, Wilson and Dawson JJ held that the High Court 'is not a court of criminal appeal and ... it will not grant special leave to appeal in criminal cases ... [when]

⁶³ Ibid 488 [46].

⁶⁴ Ibid 487 [41], 488 [46].

⁶⁵ Ibid 488–9 [50].

⁶⁶ *Jury Directions Act 2015* (Vic) ss 4A, 39.

⁶⁷ *Pell* (n 4) 496 [91].

⁶⁸ Ibid 485–6 [36].

⁶⁹ Ibid 486 [38].

⁷⁰ See, eg, *Warner v The Queen* (1995) 69 ALJR 557 (Brennan, Deane and Dawson JJ).

merely being asked to substitute for the view taken by the Court of Criminal Appeal a different view of the evidence’.⁷¹ While the appeal to the High Court in *Pell* may have been articulated as an appeal based on the misapplication of the *M* test rather than solely a question of fact, there is no doubt *Pell* was asking the Court to engage primarily in an analysis of the evidence. Regardless, the High Court has undoubtedly become more willing to grant special leave to appeal a criminal conviction.⁷²

Justice Michael Kirby, writing extra-curially, suggested that the High Court should make no apology for its increased involvement: ‘A final court that was not concerned about criminal law, practice and sentencing would have excised from its work a vital, quite possibly the most vital, part of the law of our community.’⁷³ The evidence before the High Court in *Pell* was such that it determined there was a reasonable chance that an innocent person had been convicted. Whatever your opinion of the role of an appellate court in overturning the verdict of a jury, assessing whether an innocent person has been convicted must be regarded as within the ambit of the High Court. For this reason, the High Court’s decision to grant special leave in this case was the correct one.

However, reviewing determinations of guilt becomes complicated in instances of trial by jury. This is not only because juries do not give reasons for their decisions, but also due to the fact that juries are an important component in the transparency of the courts and in upholding public confidence in the criminal justice system. Justice Brennan in *Chamberlain v The Queen [No 2]* observed that if courts were to overturn jury verdicts whenever they entertained a reasonable doubt, then ‘the function of returning the effective verdict would be transferred from the jury to the court — a course which would at once erode public confidence in the administration of criminal justice’.⁷⁴ Justice Dawson in *Whitehorn v The Queen* likewise said that the courts must approach the prospect of overturning jury verdicts ‘with caution and discrimination’.⁷⁵ A significant theme in the *Pell* decision is the apparent willingness of the Court to overturn a unanimous verdict by jury.⁷⁶

It is of note that the *Pell* judgment does not consider in its reasons a need for restraint in the overturning of jury verdicts, nor is there any acknowledgement of potential

⁷¹ *Liberato v The Queen* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson and Dawson JJ).

⁷² See, eg, Justice Michael Kirby, ‘Maximising Special Leave Performance in the High Court of Australia’ (2007) 30(3) *University of New South Wales Law Journal* 731, 747. In fact, *Pell* was the third case in six months in which special leave was granted and the accused acquitted. See also *Coughlan v The Queen* (2020) 377 ALR 1; *Fennell v The Queen* (2019) 373 ALR 433.

⁷³ Justice Michael Kirby, ‘Why Has the High Court Become More Involved in Criminal Appeals?’ (2002) 23(1) *Australian Bar Review* 4, 21.

⁷⁴ *Chamberlain [No 2]* (n 44) 603 (Brennan J).

⁷⁵ *Whitehorn v The Queen* (1983) 152 CLR 657, 688 (Dawson J).

⁷⁶ Gideon Boas, ‘The Pell Verdict: What Happens Now?’, *La Trobe University* (Blog Post, 9 April 2020) <<https://www.latrobe.edu.au/news/articles/2020/opinion/the-pell-verdict-what-happens-now>>.

implications for public confidence. In contrast, the Court of Appeal highlighted the importance of the jury as an institution, even acknowledging their combined broader life experience.⁷⁷ The jury provides an important check on the judiciary by involving laypeople in justice. A crucial part of the justice system is not only that justice is done, but also that it is *seen* to be done.⁷⁸

Suppose, for example, a victim comes forward alleging sexual abuse, and there are no direct witnesses to the offending other than the victim, as is usually the case. The perpetrator denies the conduct, as is usually the case. There are some minor details imperfectly recalled, as is usually the case. The perpetrator had interactions in public places that make offending seem unlikely, as is usually the case. If this victim is able to convince 12 independent members of the community that they are telling the truth, what grounds does a court have to say that those members must have been mistaken, and that ‘acting rationally’, would still have had reasonable doubt?

B *Recorded Evidence on Appeal: To View or Not to View?*

A key feature of the Court’s decision was criticism directed at the Court of Appeal’s viewing of A’s recorded testimony. The Court noted that an ‘appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses’.⁷⁹

1 *If Not Now, When?*

Restricting the viewing of the recording of evidence because it may influence the appellate court’s decision paints a bleak picture of the ability of an appeal court to understand its role in overturning a conviction.

The majority’s now incorrect decision in the Court of Appeal was not reached because their Honours viewed the recording; it was reached due to a misapplication of the *M* test. Acting correctly, the majority should have recognised that the jury found A to be credible and reliable, but nonetheless proceeded to assess the evidence as a whole to determine whether a reasonable doubt existed. This function, it is submitted, could have been performed equally as well by viewing the recording or simply reading the transcript. One only needs to read Weinberg JA’s dissent to find support for this proposition.⁸⁰

What the restriction aims to combat is ‘the highly subjective nature of demeanour-based judgments’.⁸¹ In argument before the Court, counsel for Pell couched the

⁷⁷ *Pell* (VSCA) (n 33) [103] (Ferguson CJ and Maxwell P).

⁷⁸ See, eg, Chief Justice JJ Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29(2) *University of New South Wales Law Journal* 147, 147.

⁷⁹ *Pell* (n 4) 486 [37].

⁸⁰ *Pell* (VSCA) (n 33) [663] (Weinberg JA).

⁸¹ *Pell* (n 4) 488 [49].

dangers of viewing the recording in terms of enabling the appellate court to ‘see for itself what happened to the blood vessels of the face of a witness when confronted with something’.⁸² In *SKA v The Queen*, French CJ, Gummow and Kiefel JJ noted the ‘potential for an undue focus upon the complainant as a witness’.⁸³ A demeanour-based assessment of the credibility of a witness is the function of the jury and such an assessment should not be made by an appellate court.

It is unclear what would amount to ‘something particular in the video-recording’ which, in the opinion of the Court in *Pell*, would warrant its viewing.⁸⁴ In *CSR Ltd v Della Maddalena*, Callinan and Heydon JJ viewed a recording because it ‘loomed so large’ in the judgment of the lower court.⁸⁵ But this cannot be the test; if it was, there would be a strong argument for the High Court to have viewed the recording in this instance. Greater clarity is needed to guide appellate courts as to the need to watch a recording of evidence. What are the characteristics in the evidence of a witness that necessitate audio or visual representation, but are not encapsulated in the jury’s function as the assessor of demeanour?

2 ‘Acting Rationally’

In overturning the jury’s verdict, is the Court not, in effect, substituting the jury’s role in the decision-making for its own? The Court decided that the 12 independent members of the community, who each came to their own finding of guilt beyond reasonable doubt, could not have done so had they been ‘acting rationally’.⁸⁶ Arriving at this finding without considering all the material which was before the jury to inform their decision-making is problematic.

In some respects, it appears unusual to declare that the assessment of the demeanour of witnesses is purely within the province of the jury, but that the subsequent decision made by the jury having regard to this assessment is not. This was especially so in *Pell*, given that the prosecution’s argument rested almost entirely on the testimony of A. Having viewed the testimony, the majority in the Court of Appeal determined that ‘A came across as someone who was telling the truth’.⁸⁷ This suggests that the assessment of A’s demeanour was an important factor in the majority’s determination of the weight to be given to A’s evidence.

⁸² Transcript of Proceedings, *Pell v The Queen* [2020] HCATrans 26, 566–7 (BW Walker QC).

⁸³ *SKA v The Queen* (2011) 243 CLR 400, 410 [29].

⁸⁴ See above n 68 and accompanying text.

⁸⁵ *CSR Ltd v Della Maddalena* (2006) 224 ALR 1, 47 [192] (Callinan and Heydon JJ).

⁸⁶ *Pell* (n 4) 486 [39].

⁸⁷ *Pell* (VSCA) (n 33) [91] (Ferguson CJ and Maxwell P).

C Can One 'Witness of Truth' Ever Be Sufficient?

Counsel for the prosecution in the Court of Appeal described A as 'a very compelling witness. He was clearly not a liar... [or] a fantasist. He was a witness of truth'.⁸⁸ The jury, it seems, was in agreement, as was the majority of the Court of Appeal. It is no insignificant feat to persuade 12 jurors as to the guilt of the accused beyond reasonable doubt, let alone to do so with only the testimony of one uncorroborated witness, more than 20 years after the alleged offending. One question which arises from the decision of the High Court is whether, moving forward, one sole 'witness of truth' will ever be held to be credible enough to establish guilt beyond reasonable doubt on appeal of a jury verdict.

The criminal justice system serves to determine the guilt and punishment of those proven to have breached the legal standards of behaviour. The consequences of such a finding are significant, including monetary fines, terms of imprisonment, social ostracisation, employment ramifications, and more. It is of the utmost importance that guilt is determined beyond reasonable doubt, because to level such consequences on an innocent person is state-sanctioned injustice. In the famous words of Sir William Blackstone, '[i]t is better that ten guilty persons escape than that one innocent suffer'.⁸⁹ A key protection against wrongful conviction is the mechanism of appealing to a higher court.

Sexual offending almost always has a degree of improbability, because it is abhorrent. Instinctively, we do not want to believe people in their right mind would ever behave so despicably, especially a person at the pinnacle of a church. Though the High Court acknowledged there is no legal requirement for evidence to be corroborated for a jury to find guilt beyond reasonable doubt,⁹⁰ in effect, it seems there may be such a requirement in practice.

The lack of corroboration of A's testimony was considered to contribute to the improbability of the offending having occurred.⁹¹ In some respects, this reasoning appears to align with the historical common law rule that the testimony of the victim of an alleged sexual assault was to be regarded as unreliable.⁹² Judges were required to warn juries of this fact and of the dangers of convicting someone based on uncorroborated evidence.⁹³ Legislation in all Australian jurisdictions has since abolished

⁸⁸ Ibid [90].

⁸⁹ See, eg, William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid R Prest et al (Oxford University Press, 2016) bk 4, 231.

⁹⁰ *Pell* (n 4) 489 [53].

⁹¹ Ibid 478–9 [50].

⁹² *Kelleher v The Queen* (1974) 131 CLR 534, 541 (Barwick CJ), 559–60 (Mason J).

⁹³ Australian Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114, October 2010) vol 2, 1311 [28.12].

this rule.⁹⁴ These reforms, in theory, increase the probability of conviction for sexual offences. It could be argued, however, that the High Court's reasoning in *Pell* suggested that the jury must have had a doubt as to Pell's guilt because the evidence was uncorroborated. If so, this raises issues of inconsistency with the statutory abolition of corroboration warnings.

Further, it was raised by Weinberg JA in the Court of Appeal that the sheer 'brazenness' made the offending so unlikely.⁹⁵ Is sexual offending not always brazen? How many improbabilities must accumulate before guilt beyond reasonable doubt cannot be established? Granted, in *Pell* there were many: Pell must have broken his ordinary course of conduct and not stood on the steps of the Cathedral for 10 minutes; he must not have been accompanied back to undress; the boys must not have been seen; and, no one could have walked in on the offending. But none of these improbabilities were impossible. It seems the fact that they were unlikely made establishing guilt beyond reasonable doubt unachievable. This case seems to convey that the testimony of only one witness is not capable of defeating numerous improbabilities.

D *Implications for Whether to Allow and Choose Trials by Judge Alone*

Pell has undoubtedly reignited the debate surrounding the role of the jury. How can a carefully chosen and appropriately directed jury deliberate on a verdict for five days only for the High Court to negative that verdict clinically and unanimously? This is especially so when, in the same judgment, the Court stressed the 'advantages that the jury brings to the discharge of its function'.⁹⁶ Conversely, it is hard to suggest that there should be *no* function for appellate courts to overturn jury findings or that a test, such as the *M* test, is the wrong mechanism to discharge that function. This necessarily brings the appropriateness of a jury determining this trial into question.

Trial by jury has always been a significant pillar of the justice system in determining guilt. Section 80 of the *Constitution* provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'.⁹⁷ In an impassioned statement, Deane J in *Kingswell v The Queen* described this section as 'not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases'.⁹⁸ By involving the laypeople in the determination of guilt, juries reinforce public confidence in the courts and the broader criminal

⁹⁴ See, eg, *Evidence Act 1995* (Cth) s 164; *Evidence Act 2011* (ACT) s 164; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1929* (SA) s 34L(5); *Evidence Act 2001* (Tas) s 164; *Evidence Act 2008* (Vic) s 164; *Evidence Act 1906* (WA) s 50; *Criminal Code Act 1899* (Qld) s 632; *Criminal Code Act 1924* (Tas) s 136.

⁹⁵ *Pell* (VSCA) (n 33) [1095] (Weinberg JA). See also at [641]–[642], citing *Fitzgerald v The Queen* (2014) 311 ALR 158 (Hayne, Crennan, Kiefel, Bell and Gageler JJ).

⁹⁶ *Pell* (n 4) 486 [37].

⁹⁷ *Constitution* s 80.

⁹⁸ *Kingswell v The Queen* (1985) 159 CLR 264, 298 (Deane J).

justice system. Despite this, had Pell been charged in nearly any other jurisdiction in Australia, he would have been able to apply for a trial by judge alone.⁹⁹

That is, of course, not to say the result would have been any different. In 1993 in New South Wales, 62.4% of trials by judge alone resulted in acquittal compared with 52.3% of jury trials. By 2014, acquittal rates were 33.3% for judge alone and 35.2% for jury trials.¹⁰⁰ Furthermore, a majority in the Court of Appeal determined that the conclusion reached by the jury was ‘open’ to them.¹⁰¹

Pell is, however, a very well-known figure and these allegations attracted the attention of society like few other cases. In sentencing Pell, Chief Judge Kidd noted that he was

to be punished only for the particular wrongdoing you have been convicted of on this Indictment, of sexually abusing two boys in the 1990’s, and only of that wrongdoing

...

As I directed the jury who convicted you in this trial, you are not to be made a scapegoat for any failings or perceived failings of the Catholic Church ... You have not been charged with or convicted of any such conduct or failings.¹⁰²

Despite this direction from the trial judge, it is easy to understand the scepticism associated with a trial by jury in this case. This is particularly so when the highest court in the country ultimately finds that the conclusion the jury reached was incorrect. In 1986, the New South Wales Law Reform Commission reported that ‘it may be that publicity which is adverse to the accused person is so prolonged and widespread that it is clearly impossible to eliminate its impact upon potential jurors’.¹⁰³ While there may not have been significant publicity regarding personal claims against Pell, the failings of the Catholic Church with respect to sexual abuse allegations have been well documented,¹⁰⁴ and it is easy to see why some may speculate as to the ability of a jury to assess the evidence in this case appropriately.

⁹⁹ See, eg, *Supreme Court Act 1933* (ACT) s 68B; *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Code 1889 Act* (Qld) s 720; *Juries Act 1927* (SA) s 7(1); *Criminal Procedure Act 2004* (WA) s 118.

¹⁰⁰ Peter Krisenthal, ‘Judge Alone Trials: Practical Considerations’ (Report, September 2015) app B <https://criminalcpd.net.au/wp-content/uploads/2016/09/Judge_alone_trials_in_NSW_peter_krisenthal.pdf>.

¹⁰¹ *Pell* (VSCA) (n 33) [300] (Ferguson CJ and Maxwell P).

¹⁰² *Pell (Sentence)* (n 37) [8]–[10].

¹⁰³ New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report No 48, 1986) 81 [7.3].

¹⁰⁴ See, eg, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 16, bk 2.

Perhaps cases of such notoriety are always going to generate criticism irrespective of the trier of the fact. However, had trial by judge alone been permitted in Victoria, at the very least the option would have been considered. If a global pandemic can force Victoria to permit trials by judge alone temporarily,¹⁰⁵ the decision in *Pell* should encourage the government to keep them.

V CONCLUSION

Perhaps the best description of *Pell* comes from the complainant himself:

There are a lot of checks and balances in the criminal justice system and the appeal process is one of them. I respect that.

It is difficult in child sexual abuse matters to satisfy a criminal court that the offending occurred beyond the shadow of a doubt.¹⁰⁶

Pell demonstrates that the High Court is willing to overturn a verdict of a jury where the Court believes the standard of proof, beyond reasonable doubt, is not satisfied. The Court in *Pell* determined that it was inappropriate for the Court of Appeal to view A’s testimony in assessing whether guilt beyond reasonable doubt had been established. The Court explained that it is the jury’s role to make demeanour-based assessments. However, there is a compelling argument that, for a court to overturn a jury verdict, it should review all the material which formed the basis of the jury’s decision. If a judgment on demeanour is relevant to deciding guilt, why should the court not itself review the evidence upon which demeanour was assessed when determining whether the jury was ‘acting rationally’?

If *Pell* had been heard in nearly any other jurisdiction of Australia, the defence would have been entitled to opt for trial by judge alone. The concern around juries being susceptible to public opinion and the media is a valid one, particularly in cases involving public figures. However, empanelling a jury involves placing in those individuals the authority to make a determination of guilt on the facts. For a court to discard their opinion, without being privy to their reasons, is of concern to public confidence. The decision in *Pell* once again brings into issue the appropriateness of an appellate court overturning a jury’s verdict, especially in circumstances where the complainant’s testimony was uncorroborated. Juries are a vital part of the justice system, and decisions such as this inevitably undermine their credibility.

Pell exposes a tension in criminal law between the right of society to have guilty persons convicted for historical sexual abuse, and the standard of proof being beyond reasonable doubt. The decision in *Pell* suggests that, in cases of alleged historical

¹⁰⁵ See *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 420D.

¹⁰⁶ ‘Witness J, Former Choirboy Who Accused George Pell, Says Case “Does Not Define Me”’, *ABC News* (online, 8 April 2020) <<https://www.abc.net.au/news/2020-04-08/george-pell-accuser-witness-j-reacts-to-high-court-judgment/12130684#>>.

sexual abuse where there is a degree of improbability and only one witness to the alleged offending, the prosecution's case will be at risk of failing to meet the requisite standard of proof. This is, however, simply the nature of historic sexual abuse. That being said, the right of the defendant to have their guilt proven beyond reasonable doubt is a cornerstone of the criminal justice system not to be undermined. Ultimately, these remain intractably hard cases, but the High Court's approach in dispensing what it perceived to be justice in *Pell*'s case carries the risk of making that same goal harder to achieve in others.

*John Gava**

***JESTING PILATE AND OTHER PAPERS AND
ADDRESSES BY THE RT HON SIR OWEN DIXON***

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SIR OWEN DIXON'S LEGACY

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Is the future of the law to be found by looking backwards or forwards? From what one might call a traditional perspective, it makes sense to look at the masters of the common law because the law of today owes its origins to the judges, lawmakers and scholars of the past. Most would agree that Sir Owen Dixon was one of the greatest judges Australia has produced, if not the greatest. But another tendency in Australian law and legal thought today is to focus on what can be done with the law and how it can be improved to overcome injustices and inefficiencies. From this perspective, spending time either reading Dixon or reading about Dixon misses the point by celebrating the past at the expense of the present and the future. So the answer to the opening question will likely tell you whether you will find these books interesting and important, or quaint and maybe even pointless.

This book review is not the place to describe and analyse these competing perspectives on law, let alone make judgments about the appropriateness of either. But recognising these different viewpoints does allow for understanding. For example, those with a more traditional bent should appreciate that those who do not share the veneration (if that is not too strong a word) of Dixon might not be perverse or ignorant; rather that those who concentrate on the future directions of law just do not see Dixon in the same way. And, similarly, the latter should not regard those with a

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traditional view of law and their respect of Dixon as being crusty old conservatives at odds with the present and in love with an imagined past.

I write as one who supports EP Thompson's description of the rule of law as 'an unqualified good',¹ and that the legalism associated with Dixon's view is one that should appeal to those on the left of the political spectrum as well as the right.²

So, what of these books? Susan Crennan and William Gummow's third edition of *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* ('*Jesting Pilate*')³ juggles the order of Dixon's essays from the first edition published in 1965. It adds Dixon's paper on 'The Separation of Powers in the Australian Constitution',⁴ deletes 'Sir Roger Scatcherd's Will in Anthony Trollope's "Dr Thorne"',⁵ and provides revised versions of Dixon's tributes to Franklin Delano Roosevelt and his advisor Harry Hopkins.⁶ This edition also contains Chief Justice Susan Kiefel's foreword⁷ and two substantial contributions by the editors with Crennan offering a discussion of 'Sir Owen Dixon: The Communist Party Case, Then and Now'⁸ and Gummow considering 'Sir Owen Dixon Today'.⁹ Sir Ninian Stephen provides a short biography of Dixon which is as good a biographical sketch as one could expect in 15 pages,¹⁰ while James Merralls¹¹ and SEK Hulme¹² offer short takes on the

¹ EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975) 267.

² See, eg, John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27(1) *Melbourne University Law Review* 186, 196–7.

³ Susan Crennan and William Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019).

⁴ *Ibid* 225–31.

⁵ Sir Owen Dixon, 'Sir Roger Scatcherd's Will in Anthony Trollope's "Doctor Thorne"' in Cazimir Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Lawbook, 1965) 71.

⁶ Crennan and Gummow (n 3) 94.

⁷ Chief Justice Susan Kiefel, 'Foreword by the Hon Susan Kiefel AC' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019).

⁸ Susan Crennan, 'Sir Owen Dixon: The Communist Party Case, Then and Now' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 17.

⁹ William Gummow, 'Sir Owen Dixon Today' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 48.

¹⁰ Sir Ninian Stephen, 'Address by Sir Ninian Stephen' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 2.

¹¹ James Merralls, 'The Rt Hon Sir Owen Dixon, OM, GCMG, 1886–1972' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 30.

¹² SEK Hulme, 'Sir Owen Dixon' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 40.

Dixon they knew. Merralls has, in addition, contributed a delightful piece on Dixon's library — both his books and the place they were housed in Dixon's home.¹³

In her discussion of the *Communist Party Case*,¹⁴ Crennan provides a detailed examination of Dixon's judgment, noting particularly the role played by the rule of law and judicial independence in the *Constitution*.¹⁵ Crennan's argument is premised on the notion that Dixon's judgment sits comfortably with what has been described by Ronald Sackville as the creation of a due process clause or 'a truncated bill of rights' that has been drawn from the High Court's understanding of the separation of powers in the *Constitution*.¹⁶ I have my doubts that Dixon would have viewed this development as consistent with the *Constitution* as he understood it.

Gummow's 'Sir Owen Dixon Today' provides an exhaustive and critical treatment of Dixon's legacy in Australian constitutional law.¹⁷ He outlines carefully where Dixon's views have had continuing influence and where the High Court has moved on, as it has done, for example, in dealing with s 92.¹⁸ While not questioning the accuracy of Gummow's analysis of Dixon's influence since his departure from the High Court, one can have doubts about the wisdom of some of the decisions of the Court after Dixon's departure. One only has to think of *Kable*,¹⁹ perhaps the worst reasoned of all High Court cases, or of the development of the implied constitutional freedom of communication. As Sackville notes, the test drawn by the High Court for the latter is vague and has led to the invalidation of both Commonwealth and state legislation in a distinctly counter-majoritarian fashion, replacing the considered and publicly discussed laws of elected parliaments in favour of the views of unelected judges.²⁰ When it is remembered that in Australia there never has been a real threat that the general population would be denied the capacity to discuss politics in a robust fashion, it becomes clear that one unfortunate consequence of this implied right is that it protects large media companies rather than the general population.

Have Dixon's writings aged well? I think that they have. Dixon was a fine writer who conveyed his meaning lucidly yet economically. Some of the papers are of historical

¹³ James Merralls, 'The Library of Sir Owen Dixon' in Susan Crennan and William Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019) 44.

¹⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

¹⁵ Crennan (n 8) 17.

¹⁶ Ronald Sackville, 'The Changing Character of Judicial Review in Australia: The Legacy of *Marbury v Madison*?' (2014) 25(4) *Public Law Review* 245, 257.

¹⁷ Gummow (n 9) 48.

¹⁸ *Ibid* 57.

¹⁹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

²⁰ Sackville (n 16) 260.

interest, especially his tributes to Roosevelt,²¹ Hopkins,²² and Felix Frankfurter.²³ During his two years as Australian Minister (Ambassador) to the United States, Dixon met frequently with the high and mighty of American politics and law, and thus provides an eyewitness account of these American statesmen and jurists. His accounts are not critical, but nor are they thoughtless panegyrics. Dixon's discussions of university education would make useful reading for the managerial class that now runs our universities.²⁴ He clearly valued education for its own sake and as a vehicle for developing informed and enquiring minds, and cultivated personalities. Dixon's papers on science and law show him as a person and a judge who welcomed the development of science as an aid to the dispensing of justice.²⁵ His was not a closed mind. Dixon's discussion of the chemical history of ink, and how knowledge of this, handwriting, and the composition of paper shows a Sherlock Holmes-like mastery of the scientific basis for, in this case, consideration of forgery.²⁶ Holmes had his command of cigarette ash; Rumpole had his blood stains; now, we have Dixon and ink.

There are also several papers on criminal law and an essay on the development of the law of homicide which is a wonderfully clear and concise description of the legal development of law in that area.²⁷ Dixon's treatment of the separation of powers and the more general relationship of the common law to the *Constitution* will have continuing relevance to these very real topics of constitutional concern in Australia. His papers on judicial method have been both influential and often misunderstood. I will discuss these in more detail below. An afternoon spent reading these papers would be time well spent for lawyers and non-lawyers.

This brings us to the second book, *Sir Owen Dixon's Legacy*.²⁸ This book comprises 13 chapters by various authors examining Dixon's contribution and legacy across constitutional law, judicial reasoning, administrative law, criminal law, real property law, contract law, feminism and the law, torts and defamation. All these articles are worth reading and all show real effort by the writers to look in-depth at Dixon's influence and legacy. It is not difficult to imagine that all will be the starting points for anyone looking for Dixon's impact and influence across all these areas of law. Consider *Sir Owen Dixon's Legacy* in combination with *Jesting Pilate*, and we have a formidable and high quality body of work examining Dixon's judging in particular areas of law, as well as more general discussions of topics such as the rule of law and judicial reasoning.

²¹ Crennan and Gummow (n 3) 87.

²² Ibid 94.

²³ Ibid 104.

²⁴ Ibid 264–7.

²⁵ Ibid 134–44.

²⁶ Ibid 137–8.

²⁷ Ibid 151–8.

²⁸ John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019).

In ‘Sir Owen Dixon and the Common Law Method’, Ruth Higgins provides a nuanced analysis of Dixon’s judicial style.²⁹ In essence, Higgins views Dixon’s legalism as manifesting a complex institutional attitude, the core of which is

a disposition of restraint, and a method of decision-making guided by external standards and principles found in a particular body of positive knowledge, acquired over long study, and directed towards ascertaining the correct answer the standards and principles yield.³⁰

For Higgins, a view that Dixon’s understanding of judging is, instead, a form of practice or a craft tradition and not at all the equivalent of an academic discipline,³¹ ‘understates the nature of the judicial role and overstates the contrast between these various disciplines’.³²

One way to appreciate the perhaps subtle differences between these views is to call in aid American baseball pitcher and amateur philosopher, Dennis Martinez. Readers of Stanley Fish will recall that he commenced an essay on theory and practice with a story in which a sports reporter, Ira Berkow, caught Martinez after the latter had spoken to his manager, Earl Weaver, just before the start of a game. The reporter asked Martinez what words of wisdom the manager had imparted. Martinez replied that he had been told to “[t]hrow strikes and keep ‘em off the bases,” ... and [he] said, “O.K.”.³³ Martinez added a clarifying note to the conversation: ‘[w]hat else could [Martinez] say? What else could [the manager] say?’³⁴

As Fish notes, expecting either the manager or Martinez to have discussed their tactics in the language of a philosopher misses the point of how this activity is conducted:

Clearly, what Berkow expected was some set of directions or an articulated method or formula or rule or piece of instruction, which Martinez could first grasp (in almost the physical sense of holding it in his hand or in some appropriate corner of his mind) and then consult whenever a situation seemed to call for its application. What Berkow gets is the report of something quite different, not a formula or a method or a principle — in fact, no guidance at all — simply a reminder of something that Martinez must surely already know, that it is his job to throw a baseball in such a way as to prevent opposing players from hitting it with a stick.³⁵

²⁹ Ruth CA Higgins, ‘Sir Owen Dixon and the Common Law Method’ in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon’s Legacy* (Federation Press, 2019) 8.

³⁰ *Ibid.* 9.

³¹ See, eg, John Gava, ‘When Dixon Nodded: Further Studies of Sir Owen Dixon’s Contracts Jurisprudence’ (2011) 33(2) *Sydney Law Review* 157, 159–61.

³² Higgins (n 29) 20.

³³ Stanley Fish, ‘Dennis Martinez and the Uses of Theory’ (1987) 96(8) *Yale Law Journal* 1773, 1773.

³⁴ *Ibid.*

³⁵ *Ibid.*

In other words, Fish uses this lively example to make a point: Martinez is engaged in a craft and not a scholarly endeavour. Martinez *does* rather than *theorising about doing*.

Judging can be considered to lie on a continuum between pure philosophy, for example, and a craft like playing baseball. Philosophers devote their lives to understanding and explaining what they think about philosophical questions and they do so by painstaking elaborations of arguments, careful descriptions of their base assumptions, and rigorous attention to the logical development of their arguments. Judges, by way of contrast, operate under severe time constraints and are controlled to a greater or lesser degree by the decisions of the past. These decisions might be poorly reasoned or display competing, maybe even contradictory, lines of authority and judges are forced, again to a greater or lesser degree, to make the law (and hence their decision in the case before them) 'fit' the times in which they live.

We can say for certain that judges are neither academic philosophers nor the judicial equivalent of baseball pitchers. They lie somewhere on the continuum between the two. What separates Higgins' view of what judges do from, for example, my own view, might be best described as saying that Higgins thinks that judges' work is closer to that of philosophers, while I think that it is closer to what Martinez did during his professional career.

Tanya Josev's contribution, '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council',³⁶ provides a wonderfully detailed analysis of Dixon's growing disenchantment with the English judiciary during the 1950s and '60s, culminating in *Parker v The Queen* ('*Parker*').³⁷ In *Parker*, Dixon declared that despite his instinctive preference for unity between Australian and English law, he could not follow the House of Lords' decision in *Director of Public Prosecutions v Smith* ('*Smith*').³⁸ Dixon's considerable influence and reputation was to aid the subsequent legislative and political moves to give the High Court independence from British courts.³⁹ Given Dixon's reverence for British institutions, and especially the law, the story that Josev tells is a gripping one. It shows where this reverence clashed with Dixon's greater ties to what he saw as the proper approach to the legal issues presented in *Smith* and *Parker*. There is almost something of Greek theatre in this tale, with Dixon being pushed and pulled by competing views that he held very strongly but could only end with him following one over the other; in this instance, he followed principle, logic and authority over what he saw as essentially poor judging and inappropriate changes to provocation and criminal law by British judges.

³⁶ Tanya Josev, '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 25.

³⁷ (1963) 111 CLR 610, 632 ('*Parker*').

³⁸ [1961] AC 290 ('*Smith*').

³⁹ Josev (n 36) 39.

Mark Leeming provides a robust claim that Dixon's decisions involving the application of s 109 of the *Constitution* were both highly influential and consistent with a legalist view of constitutional judging.⁴⁰ Leeming notes that just after his appointment to the High Court, and faced with politically charged legislation enacted by the Lang government in New South Wales,⁴¹ Dixon fashioned a new and long-lasting definition of s 109, one that is 'substantially the law which is applied almost a century later'.⁴² In addition, Dixon was able to do this without making a decisive break with earlier authority. Leeming quotes Geoffrey Sawer saying of Dixon that he 'brought to constitutional problems an analytical acuity which fitted well [with] the steady development of systematic reasoning from precedent in this field instead of the open reference to broad political principles',⁴³ which had characterised the High Court before Dixon's appointment.⁴⁴ Students of Dixon's judging and in particular his constitutional judgments would be well-advised to consider to what extent, if any, Leeming's claims can be extended to other areas of constitutional law considered by Dixon.

Peter Gerangelos' contribution looks at Dixon's influence in the High Court's recognition (or creation) of legislative and executive powers based on the notion of nationhood.⁴⁵ He notes that Dixon's decisions dealt with the former but that his influence might have extended to the more recent High Court decision in *Pape v Commissioner of Taxation*,⁴⁶ where for the first time 'a majority of the High Court gave recognition to an inherent non-statutory *executive* power based on "nationhood", incorporated in s 61 of the *Constitution*'.⁴⁷

For anyone concerned about expanding governmental power in Australia, Gerangelos provides a pessimistic view of the High Court's decisions in this area and raises genuine questions about how much Dixon's judgments have influenced this recent development.

⁴⁰ Justice of Appeal Mark Leeming, 'Fashioning the Keystone of the Federal Structure: Dixon's Influence on Section 109 of the Constitution' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 42.

⁴¹ *Ibid* 43.

⁴² *Ibid* 44.

⁴³ Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 321, quoted in Leeming (n 40) 55.

⁴⁴ Leeming (n 40) 55.

⁴⁵ Peter Gerangelos, 'Sir Owen Dixon and the Concept of "Nationhood" as a Source of Commonwealth Power' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 56.

⁴⁶ (2009) 238 CLR 1.

⁴⁷ Gerangelos (n 45) 57 (emphasis in original).

Matthew Stubbs presents a convincing description of the importance of Dixon's judgments in protecting judicial independence and the rule of law.⁴⁸ Dixon argued mightily for a complete separation of the judicial role from both executive and legislative intrusions, and Stubbs outlines rather well how he did this. Of course, in more recent times the High Court has effectively removed itself from what had been the staple of constitutional litigation: demarcation disputes over the extent of Commonwealth legislative powers. Chapter III has become the new scene of High Court endeavours which have largely taken the route of establishing a de facto 14th Amendment or due process clause in the *Constitution*. How much Dixon is to blame for this is something that Stubbs largely ignores, and wisely so, given his brief for this collection of essays.

As Neil Williams and Claire Palmer note, Australian administrative law was 'comparatively undeveloped' during Dixon's time on the High Court.⁴⁹ Nevertheless, they argue that Dixon's influence can be seen in modern Australian administrative law, especially in the crafting of the seminal *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁵⁰

Dixon seems to have had a distaste for criminal law but, as Tim James-Matthews argues, he was to have a significant impact on the development of criminal law in Australia.⁵¹ As he says:

Dixon made comparatively few interventions in the field of criminal law. However, those that he *did* make demonstrate the value of his characteristic jurisprudential rigour to the development of the criminal law and the law of evidence. In particular, Dixon's extra-curial interest in science precipitated a more modern approach to the criminal law which was distinctive at the time, and remains significantly influential today.⁵²

No one, I think, would be unhappy with such a legacy.

⁴⁸ Matthew Stubbs, 'Protecting Judicial Independence and the Rule of Law: Dixon's Chapter III Legacy' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 80.

⁴⁹ Neil Williams and Claire Palmer, 'An Enduring Influence: Sir Owen Dixon's Contribution to Administrative Law' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 98.

⁵⁰ *Ibid* 98–9.

⁵¹ Tim James-Matthews, 'Sir Owen Dixon on Criminal Law and the Law of Evidence' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 113.

⁵² *Ibid* 113 (emphasis in original).

Arthur Emmett's chapter on Dixon and the law of property does not attempt to measure directly the influence of Dixon on property law today.⁵³ Rather, he considers Dixon's appreciation of the fundamental ideas behind the common law of property. He further discusses how Dixon used these fundamental ideas in his judgments on primary applications and possession under the Torrens system,⁵⁴ severance of cotenancies,⁵⁵ licences,⁵⁶ Torrens title mortgages,⁵⁷ ownership of property in Australia by non-residents,⁵⁸ competing equitable interests and legal personal representatives.⁵⁹ For Emmett, the principles behind these decisions continue to represent property law in Australia.⁶⁰

Timothy Pilkington examines one of Dixon's most celebrated (and complex) contract law cases,⁶¹ *McDonald v Dennys Lascelles Ltd* ('*Dennys Lascelles*').⁶² While Pilkington accepts that Dixon's judgment clarified the law in important respects, he argues that the application of some of the principles outlined by Dixon are 'in need of further clarification'.⁶³ In particular, Pilkington is concerned with the situation where a contracting party is likely to incur reliance expenditure before each advance payment falls due, whether the right to recover an advance payment is best understood as arising from the parties' contract or from the law of restitution, and what are the implications arising from adopting a restitutionary view for a party who claims restitution despite having committed a fundamental breach.⁶⁴ As one who has devoted much time to understanding the development of Dixon's thinking about *Dennys Lascelles*,⁶⁵ I found much to learn from Pilkington's analysis of a particularly thorny area of law.

⁵³ Arthur R Emmett, 'Sir Owen Dixon's Insight into the Law of Real Property' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 130.

⁵⁴ *Ibid* 131–3.

⁵⁵ *Ibid* 133–4.

⁵⁶ *Ibid* 135–6.

⁵⁷ *Ibid* 137.

⁵⁸ *Ibid* 137–9.

⁵⁹ *Ibid* 139–43.

⁶⁰ *Ibid* 143.

⁶¹ Timothy Pilkington, 'Advance Payments and the Border of Contract and Restitution: *McDonald v Dennys Lascelles* Revisited' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 144.

⁶² (1933) 48 CLR 457 ('*Dennys Lascelles*').

⁶³ Pilkington (n 61) 144.

⁶⁴ *Ibid* 145.

⁶⁵ See John Gava, 'A Study in Judging: Sir Owen Dixon and *McDonald v Dennys Lascelles*' (2009) 32(1) *Australian Bar Review* 77.

Radhika Chaudhri provides another fine analysis of another famous Dixon judgment,⁶⁶ *Yerkey v Jones* ('*Yerkey*').⁶⁷ Chaudhri is interested to see 'whether Dixonian legalism's commitment to framing judgments to cohere with existing law perpetuates power structures and stymies the disruption required for feminist reform'.⁶⁸ Chaudhri's analysis of Dixon's understanding of legalism, of the facts and law in *Yerkey*, of the competing and overlapping feminist positions on law and legalism, and the actual effect of *Yerkey* in protecting women, is first-rate. She concludes that, not surprisingly, Dixon's method is 'fundamentally incompatible with the feminist objective of deconstructing harmful gender narratives'.⁶⁹ However, she adds that this need not be the end of the conversation for feminist scholars as Dixon's legacy is 'complex',⁷⁰ and his judgment in *Yerkey* worked to protect women's interests.⁷¹

John Eldridge's chapter considers the more general topic of contract law but does so through an examination of two significant cases,⁷² *Masters v Cameron*⁷³ and *Davis v Pearce Parking Station Pty Ltd*.⁷⁴ Eldridge argues that however well-known Dixon's judgments in these cases have proven to be, they have subsequently been misunderstood or mischaracterised.⁷⁵ For Eldridge, these cases provide a complex heritage:

[W]hile all would agree that Dixon's pronouncements on the law of contract have offered a great deal of guidance to later courts and jurists, those same pronouncements have at times been permitted to obscure the very principles which Dixon was seeking to illuminate.⁷⁶

Mark Lunney's examination of Dixon's tort judgments provides a succinct yet comprehensive analysis of Dixon and tort law.⁷⁷ As he notes, there are over 100 judgments where Dixon dealt with tort law (excluding defamation and the somewhat related

⁶⁶ Radhika Chaudhri, 'Sir Owen Dixon and *Yerkey v Jones*: Considering the Feminist Implications of Strict and Complete Legalism' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 163.

⁶⁷ (1939) 63 CLR 649 ('*Yerkey*').

⁶⁸ Chaudhri (n 66) 163.

⁶⁹ *Ibid* 181.

⁷⁰ *Ibid*.

⁷¹ *Ibid* 179.

⁷² John Eldridge, 'Sir Owen Dixon and the Law of Contract' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 182.

⁷³ (1954) 91 CLR 353.

⁷⁴ (1954) 91 CLR 642.

⁷⁵ Eldridge (n 72) 185.

⁷⁶ *Ibid* 193.

⁷⁷ Mark Lunney, 'Dixon's Tort Judgments: Master Craftsman or Competent Technician?' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 194.

area of workers' compensation cases).⁷⁸ Lunney finds that Dixon was wary of 'large generalisations' when deciding torts cases, instead giving 'attention to the specific liability rules the common law had accepted as providing remedies to injured parties'.⁷⁹ Lunney summarises Dixon's attitude as being one where judges

should not 'innovate' by reference to broad notions of justice or policy but by reference to the more limited role granted to them by the history of the judicial function and the law they inherited. This did not prevent change, but it did prevent change that paid little or no attention to what the law had been.⁸⁰

In the last chapter of this book, David Rolph looks at Dixon's contribution to Australian defamation law.⁸¹ Rolph tells us that Dixon was one of the few appointees to the High Court who had a substantial defamation practice at the Bar. He also notes that during Dixon's tenure there were 'a number of landmark defamation cases' decided by the Court.⁸² After concentrating his examination to the two areas of identification and the defences of privilege, Rolph summarises Dixon's impact on the Court in the following terms:

Dixon's contribution to Australian defamation jurisprudence ... is mixed, notwithstanding his expertise and experience in the area. The ongoing influence of his contribution to the law dealing with identification in defamation law cannot be doubted. However, even during his tenure on the High Court, Dixon was often unable to persuade his fellow judges to adopt his approach to cases involving privilege.⁸³

Anyone interested in Australian law will learn a lot from these two books.

⁷⁸ Ibid 194. In somewhat of a coincidence, my studies of Dixon's contract judgments identified 102 judgments that could be classified as dealing with contract law. See, eg, John Gava, 'When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence' (n 31) 159.

⁷⁹ Lunney (n 77) 213.

⁸⁰ Ibid 213–14.

⁸¹ David Rolph, 'Sir Owen Dixon's Contribution to Australian Defamation Jurisprudence' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 215.

⁸² Ibid 215.

⁸³ Ibid 216.

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