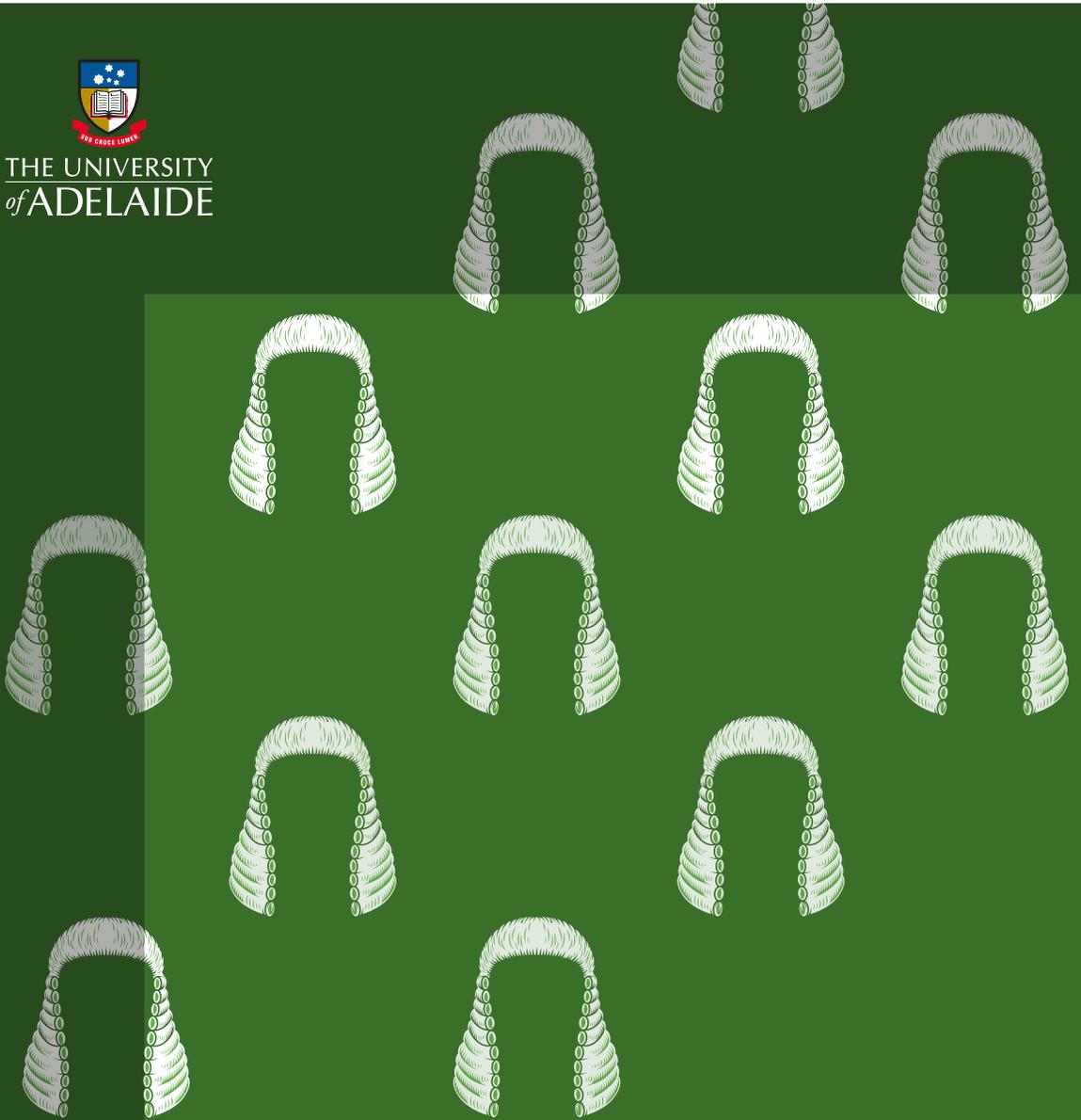




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Elizabeth Dallaston and Ben Mathews***

‘UNLAWFUL SEXUAL RELATIONSHIPS’: A COMPARATIVE ANALYSIS OF CRIMINAL LAWS AGAINST PERSISTENT CHILD SEXUAL ABUSE IN QUEENSLAND AND SOUTH AUSTRALIA

Note: this article contains descriptions of sexual acts involving children which may be disturbing to some readers.

ABSTRACT

Criminal laws in all Australian states and territories facilitate the prosecution of repeated or persistent child sexual abuse by allowing for a single charge that may be proved by evidence of multiple instances of abuse. One approach, pioneered in Queensland, is to create an offence where an adult ‘maintains an unlawful sexual relationship with a child’. In this article, we compare the recent implementation of this approach in South Australia with the Queensland law to illuminate ongoing difficulties in the drafting, interpretation, and operation of these laws and provide recommendations for future reform.

I INTRODUCTION

Some instances of sexual offending against a child involve a single event or circumstance, and these cases are dealt with through the operation of discrete criminal offences. However, other cases involve persistent, repeated offending against a child, involving multiple acts at different times and places. Australian states and territories have introduced criminal offences to facilitate the prosecution of repeated or persistent sexual abuse of a child, recognising the gravity of this offending, and its distinct dynamics, presentation, and requirements of proof. These offences were created to accommodate the demonstrated difficulties of prosecuting such cases, especially the requirement to provide particulars of specific criminal charges within an environment of multiple events over extended periods of time.

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State and territory jurisdictions have adopted different approaches to drafting these laws. In some jurisdictions, the offence is constituted by the commission of a specified sexual act against a child on a minimum of two or three occasions. Another approach, adopted in both Queensland and South Australia, is to create an offence where an adult 'maintains an unlawful sexual relationship with a child'¹ involving more than one unlawful act 'over any period'.

The purpose of this article is to undertake a comparative doctrinal analysis, examining the nature and operation of these laws in Queensland and South Australia. Although the Queensland offence has been identified as the most effective means of framing the law, this analysis shows that the operation of the Queensland offence since 1989 has relied on notions of sexual relationships as they normally occur between consenting adults, with the result that persistent child sexual abuse ('persistent CSA') that does not follow a similar pattern may fall outside its scope. More recent developments in the South Australian law have demonstrated a different approach that does not unduly restrict the application of the offence, and which better reflects the purpose of the provisions and an accurate understanding of the nature of persistent CSA. However, our analysis of the South Australian law demonstrates continuing problems in the drafting, interpretation, and operation of these laws, and forms the basis for recommendations for further reform that retains critical elements to ensure the efficacy and fairness of these laws, while avoiding intractable conceptual and terminological problems.

First, in Part II, we explain the rationale for these offences, before outlining the general principles in the legislative provisions in Queensland and South Australia, with some additional observations about normative criticisms of the laws in Part III. We then provide a historical and doctrinal synthesis of the development of the law in Queensland in Part IV, demonstrating the significant role of judicial interpretation, before turning in Part V to the position in South Australia since reforms to implement a Queensland-style offence were completed in 2017. Following this, in Part VI, we undertake a critical analysis of the law in Queensland and South Australia current to July 2020. Our analysis reveals that while the legislative provisions in these two States are broadly similar in content and purpose, judicial consideration indicates important differences in statutory interpretation which illustrate further conceptual, operational and terminological problems. Finally, we provide two conclusions and a recommendation for legislative reform.

¹ For the purposes of these provisions, in Queensland, a 'child' is under the age of 16 years: *Criminal Code Act 1899* (Qld) s 229B(1). In South Australia, a 'child' is '(a) a person who is under 17 years of age; or (b) a person who is under 18 years of age if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the adult in the relationship is in a position of authority in relation to the person who is under 18 years of age': *Criminal Law Consolidation Act 1935* (SA) s 50(12) ('CLCA'). This mirrors the age of consent in the respective states, which is 16 in Queensland, and 17, or 18 when the accused is in a position of authority, in South Australia: *Criminal Code Act 1899* (Qld) s 215; *CLCA* (n 1) ss 49(3), (5).

II BACKGROUND: THE RATIONALE FOR THE OFFENCE OF PERSISTENT SEXUAL ABUSE OF A CHILD

As a general principle of criminal law, particulars of an alleged offence must be provided to the accused with a sufficient degree of specificity to provide a fair opportunity to defend the charge.² In addition, for sentencing purposes, the nature, circumstances, and seriousness of the offending conduct must be identified.³ In the case of persistent CSA, it has not always been clear how the procedures of criminal trials should be applied in a way that achieves both fairness to the accused and criminal justice on behalf of victims. As will be seen below, statutory reforms have attempted to address the difficulties of framing criminal charges arising from evidence provided by complainants of acts of persistent CSA, which cannot be sufficiently particularised as individual acts.

The 1989 High Court case *S v The Queen* illustrates the difficulties faced by the courts prior to the enactment of persistent CSA offence provisions.⁴ At trial, the complainant gave evidence that she had been sexually abused by her father from the age of nine or ten until she was 17, including that from the age of approximately 14 until she left home at the age of 17, he had subjected her to sexual intercourse approximately every couple of months.⁵ The accused was charged and convicted of three counts of unlawful carnal knowledge, each particularised as an act of sexual intercourse to have occurred on an unknown date in each of three periods, roughly equivalent to the calendar years 1980, 1981, and 1982. The trial judge had accepted the Crown's position that no better particulars regarding the date or location of the offences could be provided.⁶ The majority of the Western Australian Court of Criminal Appeal dismissed an initial appeal against conviction, since the appellant was unable to identify a real opportunity for a defence that had been precluded by the lack of specificity.⁷ However, Brinsden J, while ultimately rejecting the grounds of appeal, identified the difficulty raised by an indictment in such a form:

In a nutshell the problem is this. The appellant having been convicted of three counts of unlawful carnal knowledge (incest), one in each year, and there having been, on the daughter's evidence, at least in every year three acts of intercourse, in respect of what act of intercourse in each year was the appellant convicted?⁸

² See, eg, *Johnson v Miller* (1937) 59 CLR 467, 497 (Evatt J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J); *S v The Queen* (1989) 168 CLR 266, 278 (Toohey J); *R v CAZ* [2012] 1 Qd R 440, 455 [40] (Fraser JA) ('CAZ').

³ *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Sentencing Act 1995* (NT) s 5(2)(b); *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c), (4), (6); *Sentencing Act 2017* (SA) s 11(1)(a); *Sentencing Act 1997* (Tas) s 11A; *Sentencing Act 1991* (Vic) s 5(2)(c); *Sentencing Act 1995* (WA) ss 6(1)–(2).

⁴ *S v The Queen* (n 2).

⁵ *S* (1988) 39 A Crim R 288, 289 (Brinsden J).

⁶ *S v The Queen* (n 2) 278 (Toohey J).

⁷ *S* (n 5).

⁸ *Ibid* 297.

On appeal, the majority of the High Court held that the convictions should be quashed and sent for retrial.⁹ The Court identified a range of issues that constituted a miscarriage of justice, including that:

- the lack of specificity impeded the defendant's capacity to raise an effective defence, for example, an alibi defence;¹⁰
- the complainant gave evidence of behaviour that could not be directly linked to a particularised charge, or that might have referred to one of a number of occasions, and it was uncertain how this evidence should be treated;¹¹ and
- it was unacceptable to allow conviction when individual jurors may not have identified the same occasions as constituting the relevant offences, since in that case the verdict would not be unanimous.¹²

In 1990, the Supreme Court of Western Australia applied the reasoning in *S v The Queen* to *Podirsky v The Queen*, quashing a rape conviction due to defects in particularisation of the offence.¹³ The Court recognised the potential injustice to defendants in trials where evidence of repeated acts is provided but cannot be clearly linked to a specific charge.¹⁴ However, the Court noted the quandary created for the criminal justice system by the effect of these principles on trials for persistent sexual offending:

[O]ne effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse ... the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.¹⁵

In response to these challenges, all Australian states and territories have introduced criminal offences to facilitate the prosecution of persistent CSA. These offences were first introduced between 1989 and 1999, with Queensland being the first, and

⁹ *S v The Queen* (n 2) 266, 278 (Dawson J), 283 (Toohey J), 288 (Gaudron and McHugh JJ).

¹⁰ *Ibid* 274–5 (Dawson J), 281 (Toohey J).

¹¹ *Ibid* 275 (Dawson J). For a discussion on propensity evidence, see at 279–80 (Toohey J). For a discussion on similar fact evidence, see at 287 (Gaudron and McHugh JJ).

¹² *Ibid* 276 (Dawson J).

¹³ (1990) 3 WAR 128, 128 (Malcolm CJ, Wallace and Walsh JJ).

¹⁴ *Ibid* 136.

¹⁵ *Ibid*.

New South Wales the last.¹⁶ However, despite these reforms, a satisfactory form of the offence has proved elusive.¹⁷ The operation of these laws has been the subject of reviews in both family violence and institutional abuse contexts, which have concluded that the requirement to provide particulars of separately charged acts still presents a substantial impediment to the prosecution of persistent CSA in most Australian jurisdictions, and that further reform is necessary to achieve the objective of the provisions.¹⁸

The argument for further reform parallels a more general critique that an inadequate understanding and conceptualisation of child sexual abuse in the criminal justice system impairs the ability of the state to respond with appropriate sanctions.¹⁹ Reform recommendations have used social science evidence to explain the high rates of attrition for child sexual abuse prosecutions, and to provide a guide for further reform of criminal laws and trial processes.²⁰ Social science evidence about the dynamics of persistent CSA and victims' recall of recurrent events confirms the insight of legislators and members of the judiciary that particularisation presents exceptional

¹⁶ *Crimes (Amendment) Act (No 3) 1991* (ACT) s 3; *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) sch 1 item 2; *Criminal Code Amendment Act (No 3) 1994* (NT) s 7; *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23; *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3; *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas) s 4; *Crimes (Sexual Offences) Act 1991* (Vic) s 3; *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.

¹⁷ Martine Powell, Kim Roberts and Belinda Guadagno, 'Particularisation of Child Abuse Offences: Common Problems when Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64, 65; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Final Report No 114, NSWLRC Final Report No 128, October 2010) vol 1, 1143; *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Parts III to VI* (Report, August 2017) ch 11 ('*Criminal Justice Report: Parts III to VI*'). See also Liesl Chapman, 'Review of South Australian Rape and Sexual Assault Law' (Discussion Paper, Government of South Australia, 2006) 30–45 <<https://web.archive.org/web/20120303041624/http://www.justice.sa.gov.au/publications/RapeLawReformDP.pdf>>; Australian Capital Territory Law Reform Commission, *Report on the Laws Relating to Sexual Assault* (Report No 18, April 2001) ch 2 [16]–[36]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children Part 2* (Report No 55, December 2000) ch 19.

¹⁸ *Family Violence: A National Legal Response* (n 17) 1142–5 [25.51]–[25.67]; *Criminal Justice Report: Parts III to VI* (n 17) ch 11.

¹⁹ Ben Mathews and Delphine Collin-Vézina, 'Child Sexual Abuse: Toward a Conceptual Model and Definition' (2019) 20(2) *Trauma, Violence, & Abuse* 131, 136.

²⁰ Antonia Quadara, 'Prosecuting Child Sexual Abuse: The Role of Social Science Evidence' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 261.

challenges in many cases of persistent CSA.²¹ For example, research into memory reveals that children are often unable to provide specific details about recurring past events; instead, what is retained is a general memory of the shared features of many experiences, rather than memories of particular details of individual events.²² This principle applies with particular force in the context of children's experiences of sexual abuse, due to both the general operation of memory and the added protective mechanisms that victims of such acts may adopt.²³ Given that sexual abuse typically occurs in clandestine circumstances with no witnesses, no physical evidence, and disclosure is commonly delayed, often the only direct evidence of an offence is the testimony of the complainant.²⁴ The result is that in many cases of repeated victi-

²¹ See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (Brian Austin), explaining that the original s 229B had been drafted

in recognition of the limited recall which many children, particularly those of tender years, have in respect of specific details such as time and dates of the offences and other surrounding circumstances. Numerous cases have arisen where it is abundantly clear that a consistent course of sexual interference has been undertaken in respect of a particular child who, although unable to recall with the precision of an adult, all the surrounding circumstances of the events, nonetheless can give clear, cogent and compelling evidence as to the identity of the perpetrator and the acts that were committed upon him/her on many occasions.

See also South Australia, *Parliamentary Debates*, House of Assembly, 4 May 1994, 1005 (Stephen Baker). Similar comments were made by the South Australian Deputy Premier on the reasoning behind the enactment of the original South Australian offence, which was in response to the

great difficulty in charging defendants where the allegations involve a long period of multiple offending. In some cases ... the child — or the adult recalling events which took place when he or she was a child — cannot specify particular dates or occasions when the offence is alleged to have taken place. The result is that defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time.

See also the judicial comments quoted above nn 8 and 15 and accompanying text.

²² *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Executive Summary and Parts I to II* (Report, August 2017) 238, 242–3 ('*Criminal Justice Report: Parts I to II*'); Jane Goodman-Delahunty, Mark A Nolan and Evianne L Van Gijn-Grosvenor, 'Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence' (Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017) ch 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, 60; Dayna M Woiwod and Deborah A Connolly, 'Continuous Child Sexual Abuse: Balancing Defendants' Rights and Victims' Capabilities to Particularize Individual Acts of Repeated Abuse' (2017) 42(2) *Criminal Justice Review* 206, 213–14.

²³ Goodman-Delahunty, Nolan and Van Gijn-Grosvenor (n 22) ch 6.

²⁴ *Criminal Justice Report: Parts I to II* (n 22) 169, 253. On non-disclosure and delayed disclosure, and the reasons for this frequently including fear induced by threats from the offender, see the summary in Ben Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' (2019) 88(1) *Child Abuse and Neglect* 337, 338–9.

misation, the complainant's evidence cannot support sufficient particularisation for criminal charges.

Most recently, the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') questioned 'whether a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse' when a judge or jury may accept that the accused has repeatedly sexually abused a child, but conviction is impossible because the evidence is not sufficient to distinguish individual instances of abuse.²⁵ The Royal Commission identified the Queensland form of the offence, 'maintaining a sexual relationship with a child', as a model for reform in other states, since

the Queensland offence, in making the actus reus the relationship rather than the individual occasions of abuse, provides the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence a complainant is more likely to be able to give.²⁶

This proposed reform has since been implemented in South Australia. In the sections that follow, we analyse the key features and criticisms of the Queensland-style persistent CSA offence and identify how recent developments in the South Australian law depart from the Queensland model.

III PERSISTENT CSA LAWS IN QUEENSLAND AND SOUTH AUSTRALIA

Queensland was the first Australian jurisdiction to introduce a persistent CSA offence, with the original offence coming into effect on 3 July 1989.²⁷ It was drafted in response to the recommendations of the *Inquiry into Sexual Offences Involving Children and Related Matters* by the Queensland Director of Prosecutions, DG Sturgess.²⁸ Sturgess addressed the legal challenges identified in cases similar to *S v The Queen*, and recommended a new offence that would occur when an adult 'enters into and maintains a relationship with a child of such a nature he commits a series of offences of a sexual nature with that child'.²⁹

Five years after Queensland first enacted its provision, South Australia created its first persistent CSA provision, effective from 28 July 1994.³⁰ This provision was also

²⁵ *Criminal Justice Report: Parts III to VI* (n 17) 65.

²⁶ *Ibid* 68.

²⁷ *Criminal Code Act 1899* (Qld) s 229B, as at 3 July 1989, as inserted by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23.

²⁸ DG Sturgess, Queensland Office of the Director of Prosecutions, *Inquiry into Sexual Offences Involving Children and Related Matters* (Interim Report, 1986) 69–72.

²⁹ *Ibid* 71.

³⁰ *CLCA* (n 1) s 74, as at 28 July 1994, as inserted by *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3.

an attempt to resolve the difficulties identified by the High Court in *S v The Queen*.³¹ In his second reading speech, the South Australian Attorney-General, Chris Sumner, noted that under the current law, 'defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time'.³² Sumner explained that the new offence, 'persistent sexual abuse of a child', was modelled after legislation in other states and territories that had created an offence of 'having a sexual relationship with a child'.³³ However, the provision did not use the term 'relationship'. Instead, 'persistent sexual abuse of a child' consisted of 'a course of conduct involving the commission of a sexual offence against a child on at least three separate occasions'.³⁴

Since 2017, the substance of the provision in South Australia has largely converged with that of Queensland. Both now provide that an adult who maintains an unlawful sexual relationship with a child is guilty of an offence,³⁵ and that conviction requires that the jury (or, in South Australia, the trier of fact) must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed.³⁶ The two fundamental principles underpinning the laws are the modification of the general criminal law requirement to provide particulars of the offence, and the removal of the requirement for extended jury unanimity. As the following sections explain, both of these elements are necessary to ensure the actus reus is effectively identified as an unlawful sexual relationship.

A Modification of Particularisation

The key feature shared across all states and territories is the express modification of the requirement to provide particulars of individual unlawful sexual acts.³⁷ This is currently expressed in both the Queensland and South Australian provisions as 'the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence',³⁸ and that 'the jury

³¹ South Australia, *Parliamentary Debates*, Legislative Council, 13 October 1993, 547 (Chris Sumner, Attorney-General). The original Bill lapsed and was passed by the subsequent Parliament. See the second reading explanation: South Australia, *Parliamentary Debates*, House of Assembly, 4 May 1994, 1005 (Stephen John Baker, Deputy Premier).

³² South Australia, *Parliamentary Debates*, Legislative Council, 13 October 1993, 547 (Chris Sumner, Attorney-General).

³³ *Ibid.*

³⁴ *CLCA* (n 1) s 74(2), as at 28 July 1994.

³⁵ *Criminal Code Act 1899* (Qld) s 229B(1); *CLCA* (n 1) s 50(1).

³⁶ *Criminal Code Act 1899* (Qld) s 229B(3); *CLCA* (n 1) s 50(3).

³⁷ *Crimes Act 1900* (ACT) ss 56(5)(a)–(b); *Crimes Act 1900* (NSW) ss 66EA(4), (5)(b); *Criminal Code Act 1983* (NT) s 131A(3); *Criminal Code Act 1899* (Qld) ss 229B(4)(a), (b); *CLCA* (n 1) ss 50(4)(a), (b); *Criminal Code Act 1942* (Tas) s 125A(4)(a); *Crimes Act 1958* (Vic) s 49J(4); *Criminal Code Act Compilation Act 1913* (WA) s 321A(5)(b). See generally Woiwod and Connolly (n 22) 210.

³⁸ *Criminal Code Act 1899* (Qld) s 229B(4)(a); *CLCA* (n 1) s 50(4)(a).

[or, in South Australia, trier of fact] is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence'.³⁹ This aspect of the provisions is intended to allow prosecution of persistent CSA offences despite what might otherwise be an inadequate degree of particularisation.

However, the effect of this aspect of the provisions was limited by the High Court of Australia in its 1997 decision *KBT v The Queen* ('*KBT*').⁴⁰ This decision concerned a conviction under the original Queensland provision, which at the time relevantly provided:

Maintaining a sexual relationship with a child under 16

229B.(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.

(1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.⁴¹

In the Court's view, since s 229B(1A) provided that conviction required proof of the doing of relevant acts on three or more occasions, this formed the actus reus of the offence, and it necessarily followed that a jury must be 'agreed as to the commission of the same three or more illegal acts'.⁴² Consequently, the Court held that even though the dates and exact circumstances of each of the three acts done during the period of the alleged relationship did not need to be particularised, the evidence must be sufficient for the jury to distinguish three separate acts or occasions: 'evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour' would not be sufficient.⁴³ The practical effect of s 229B(1A) and *KBT*

³⁹ *Criminal Code Act 1899* (Qld) s 229B(4)(b); *CLCA* (n 1) s 50(4)(b).

⁴⁰ (1997) 191 CLR 417 ('*KBT*').

⁴¹ *Criminal Code Act 1899* (Qld) s 229B, as at 26 March 1994. The provision at this date differs slightly from that originally enacted, reflecting editorial changes made in Reprint No 1 of the *Criminal Code Act 1899* (Qld), as authorised by the *Reprints Act 1992* (Qld) s 7, including the numbering of subsection (1A) and removal of words indicating gender: *Reprints Act 1992* (Qld) ss 24, 43.

⁴² *KBT* (n 40) 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

⁴³ *Ibid* 423.

was the imposition of much the same requirement for particularised acts that the provision was intended to avoid.⁴⁴

Although *KBT* concerned the Queensland offence, equivalent provisions in the other states and territories were substantially similar and therefore faced the same difficulty.⁴⁵ Under the original South Australian provision, the need to particularise distinct offences was removed: the charge was required to particularise when the alleged course of conduct began and ended, and the general nature of the conduct and sexual offences, but not 'the dates on which the sexual offences were committed, the order in which the offences were committed, or differentiate the circumstances of commission of each offence'.⁴⁶ However, significantly, the jury was required to agree on the 'material facts' of at least three separate incidents, even if they did not agree 'about the dates of the incidents, or the order in which they occurred'.⁴⁷ Because of this, the reasoning of the High Court in *KBT* regarding the need to delineate three underlying acts on which the jury could agree applied.⁴⁸ As a result, the offence was rarely charged by prosecutors since the provision failed to overcome the difficulties posed by the need to provide sufficient particulars.⁴⁹

B *Removal of the Requirement for 'Extended Jury Unanimity'*

Subsequently, several states and territories have expressly removed the requirement for 'extended jury unanimity'.⁵⁰ That is, the jury is not required to agree on which particular acts were committed in the course of the relationship. The Queensland provision was redrafted in 2002 to restore 'the original intention of the provision, that is, to focus on the unlawful relationship or course of conduct, rather than on the separate [specified] sexual acts comprising the relationship'.⁵¹ The redrafted offence provides that 'all the members of the jury must be satisfied beyond reasonable doubt that ... an unlawful sexual relationship with the child involving unlawful sexual acts existed',⁵² but that in relation to those acts the prosecution is not required to allege,

⁴⁴ Alannah Brown, 'A Comparative Study on the Offence of "Maintaining a Sexual Relationship with a Child" in the Northern Territory and Queensland' (2015) 39(3) *Criminal Law Journal* 148, 155; *Criminal Justice Report: Parts III to VI* (n 17) 18–20.

⁴⁵ Brown (n 44) 155; *Criminal Justice Report: Parts III to VI* (n 17) 18–20.

⁴⁶ *CLCA* (n 1) s 74(4), as at 28 July 1994.

⁴⁷ *Ibid* s 74(5)(b), as at 28 July 1994.

⁴⁸ Chapman (n 17) 35.

⁴⁹ South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1473 (Michael Atkinson, Attorney-General).

⁵⁰ *Crimes Act 1900* (ACT) s 56(5)(c); *Crimes Act 1900* (NSW) s 66EA(5)(c); *Criminal Code Act 1899* (Qld) s 229B(4)(c); *CLCA* (n 1) s 50(4)(c); *Criminal Code Act 1924* (Tas) s 125A(4)(c); *Criminal Code Act Compilation Act 1913* (WA) s 321A(11).

⁵¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 6 November 2002, 4443 (Rod Welford, Attorney-General); Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 4.

⁵² *Criminal Code Act 1899* (Qld) s 229B(3).

and the jury is not required to be satisfied of, particulars that would be necessary if an act was charged as a separate offence; and all members of the jury are not required to be satisfied about the same unlawful sexual acts.⁵³

229B Maintaining a sexual relationship with a child

- (1) Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime.

Maximum penalty — life imprisonment.

- (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
- (3) For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
- (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship —
 - (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
 - (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
 - (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.⁵⁴

The effect of these amendments is that the maintenance of an unlawful sexual relationship, and not the unlawful sexual acts, becomes the *actus reus* of the offence. All members of the jury must unanimously agree that an unlawful sexual relationship involving more than one unlawful sexual act existed, but they need not agree on *which* unlawful sexual acts had been proven.⁵⁵ This has permitted convictions to be upheld, for example, where a jury has accepted generalised evidence of multiple unlawful sexual acts and found the accused guilty of a relationship charge, but not of

⁵³ *Ibid* ss 229B(4)(a)–(c).

⁵⁴ *Criminal Code Act 1899* (Qld) s 229B(1)–(4), as amended by *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18.

⁵⁵ *CAZ* (n 2) 452 [33].

other charges relating to specific acts.⁵⁶ This achieves the primary policy objective of the provision. This substantive version of s 229B has been effective since 1 May 2003,⁵⁷ and was the version considered by the Royal Commission. Amendments to give the offence retrospective effect were passed in September 2020.⁵⁸

For similar reasons, South Australia's original offence, 'persistent sexual abuse of a child', was replaced in 2008 by a new offence named 'persistent sexual exploitation of a child'.⁵⁹ The new offence was intended to focus on 'acts of sexual exploitation that comprise a course of conduct (persistent sexual exploitation) rather than a series of separately particularised offences'.⁶⁰ This offence involved the commission of more than one act of sexual exploitation of a child over a period of at least three days, instead of the previous minimum of three occasions.⁶¹ An act of sexual exploitation was defined as an act in relation to the child that could, if properly particularised, be charged as a sexual offence.⁶² It was expressly stated that it was not necessary that each act be particularised.⁶³ However, the provision was silent regarding the matter of extended jury unanimity.

It was not clear that the redrafted offence overcame the shortcomings of the previous formulation.⁶⁴ South Australia's Director of Public Prosecutions, Adam Kimber, informed the Royal Commission that the new offence had enabled the prosecution of some matters that otherwise would not have been able to proceed due to the lack of particulars.⁶⁵ However, Kimber added that because the new offence retained the requirement for extended jury unanimity, this 'might, in theory, limit the utility of

⁵⁶ See, eg, *R v LAF* [2015] QCA 130; *R v WAB* [2008] QCA 107.

⁵⁷ Minor amendments were made by the *Criminal Code and Other Acts Amendment Act 2008* (Qld) ss 43, 120; *Health and Other Legislation Amendment Act 2016* (Qld) s 9; *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 95.

⁵⁸ *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 21, inserting *Criminal Code Act 1899* (Qld) s 746. This insertion gave retrospective effect to: *Criminal Code Act 1899* (Qld) s 229B, regarding acts committed before 3 July 1989; *Criminal Code Act 1899* (Qld) s 747, which provides similarly for the period 3 July 1989–30 April 2003; and *Criminal Code Act 1899* (Qld) s 748, which allows for proceedings to be started, and convictions and punishment to be imposed, 'as if section 229B had always applied': *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 21.

⁵⁹ *CLCA* (n 1) s 50, as at 23 November 2008, as inserted by *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 7.

⁶⁰ South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1474 (Michael Atkinson, Attorney-General).

⁶¹ *CLCA* (n 1) s 50(1), as at 23 November 2008.

⁶² *Ibid* s 50(2).

⁶³ *Ibid* s 50(4).

⁶⁴ See generally Marie Shaw and Ben Doyle, 'The "Age of Statutes" and Its Intersection with Fundamental Principles: An Illustration' (2019) 40(1) *Adelaide Law Review* 353, 357–9.

⁶⁵ *Criminal Justice Report: Parts III to VI* (n 17) 32–3.

this provision'.⁶⁶ The South Australian Court of Criminal Appeal applied the position in *KBT* to the redrafted provision, with the result that the acts of sexual exploitation were not required to be particularised, but the jury was required to reach a unanimous decision regarding at least two acts.⁶⁷ In *R v Johnson*, the South Australian Court of Criminal Appeal overturned a conviction of persistent sexual exploitation, holding that the evidence must enable the jury to 'delineate' at least two offences in order to agree unanimously on the commission of those two offences.⁶⁸ Although this may require a relatively low degree of particularity, evidence of 'vaginal sexual intercourse ... on many occasions over a period of two years' was not held sufficient in that case to enable a jury to delineate and agree upon the requisite two acts.⁶⁹ While agreeing that the appellant was entitled to an acquittal on the proper application of s 50, Sulan and Stanley JJ were moved to comment:

Unlike the Queensland provision, which has overcome the problem identified in *KBT* and the South Australian cases, the provision, as it exists in South Australia, in our view, does not reflect the intention of the legislature, as indicated in the Second Reaching Speech ... We consider that if it is the intention of the legislature to create an offence of persistent sexual exploitation involving the maintenance of a sexual relationship with a child, then consideration should be given to amending s 50 along similar lines to the Queensland provision.⁷⁰

This suggestion was implemented in 2017 when South Australia's provision was again replaced by a new offence, now named 'persistent sexual abuse of a child'.⁷¹ The legislation was passed with some urgency in order to address the consequences of the High Court decision *Chiro v The Queen*⁷² ('*Chiro*') for convictions under s 50 that were awaiting sentencing.⁷³ In *Chiro*, the majority of the Court held that a judge who did not ascertain which acts of sexual exploitation the jury were unanimously

⁶⁶ Ibid 33.

⁶⁷ See, eg, *R v M, BJ* (2011) 110 SASR 1, 28–9 (Vanstone J, Sulan J agreeing at 6 [1], White J agreeing at 41 [138]); *R v Little* (2015) 123 SASR 414, 417; *R v Johnson* [2015] SASCFC 170; *Hamra v The Queen* (2017) 260 CLR 479; *DL v The Queen* (2018) 266 CLR 1. See generally Shaw and Doyle (n 64) 357–9.

⁶⁸ [2015] SASCFC 170, [111] (Peek J, Sulan and Stanley JJ agreeing at [1]).

⁶⁹ Ibid [114].

⁷⁰ Ibid [11]–[12].

⁷¹ *CLCA* (n 1) s 50, as at 24 October 2017, as amended by *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6.

⁷² (2017) 260 CLR 425 ('*Chiro*'). The accused was a high school teacher and the complainant a student, and the jury had heard evidence of acts ranging from kissing on the mouth to oral and vaginal penetration. The view of the facts most favourable to the appellant, on which the High Court held he should have been sentenced, were that the acts agreed by the jury to have occurred were kissing in circumstances of indecency. On resentencing, the original sentence of 10 years was reduced to 3.5 years: *R v Chiro* [2017] SASCFC 144.

⁷³ South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8019 (Andrew McLachlan), 8024 (Kyam Maher); *Chiro* (n 72).

agreed upon was obliged to sentence on the view of the facts most favourable to the accused, regardless of the judge's views of the evidence and circumstances of offending.⁷⁴ The government took advantage of this opportunity to adopt a version of the model persistent CSA provisions recommended by the Royal Commission.⁷⁵ This version of the offence came into effect on 24 October 2017:

50 — Persistent sexual abuse of child

- (1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.

Maximum penalty: Imprisonment for life.

- (2) An *unlawful sexual relationship* is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
- (3) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.
- (4) However —
- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
- (b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts; and
- (c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.⁷⁶

This formulation of the offence is substantially similar to the current Queensland offence. It effectively modifies the requirement to provide particulars of individual unlawful sexual acts, and for jury unanimity regarding which acts were perpetrated

⁷⁴ *Chiro* (n 72) 451 (Kiefel CJ, Keane and Nettle JJ).

⁷⁵ South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8021 (Kyam Maher). See also *Criminal Justice Report: Parts III to VI* (n 17) 74; *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Parts VII to X and Appendices* (Report, August 2017) app H ('*Criminal Justice Report: Parts VII to X and Appendices*').

⁷⁶ *CLCA* (n 1) ss 50(1)–(4), as at 24 October 2017 (emphasis in original).

by the accused. In line with the Royal Commission's recommendation, it introduces the concept of an 'unlawful sexual relationship' to form the actus reus of the offence into South Australian law.

C 'Maintaining an Unlawful Sexual Relationship'

Since South Australia's reforms in 2017, the offences in both States provide that an adult who maintains an unlawful sexual relationship with a child is guilty of an offence,⁷⁷ and that conviction requires that the trier of fact must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed.⁷⁸ There are slight differences in the wording used to define an unlawful sexual relationship, but it is not clear that these differences are significant. The Queensland provision stipulates that an unlawful sexual relationship is 'a relationship *that involves* more than 1 unlawful sexual act over any period',⁷⁹ while South Australia's definition is 'a relationship *in which* an adult *engages* in 2 or more unlawful sexual acts with or towards a child over any period'.⁸⁰ This requires the same number of acts (at least two). However, it is not immediately clear whether there is a meaningful difference between 'a relationship' that *involves* unlawful acts (Queensland) and one *in which* the adult engages in acts (South Australia). In *R v M, DV* ('*M, DV*') Kourakis CJ of the Supreme Court of South Australia suggested that they are equivalent.⁸¹ Similarly, it is not clear that there is any substantive significance that the acts must be *with or towards* a child (South Australia).

Despite the convergence of the legislation in Queensland and South Australia, the nature and operation of these laws in each state has diverged. The differing operations of the law in each state do not appear to be founded in legislation, but in the construction of that legislation by the respective state supreme courts. The key concept that has been the subject of judicial consideration is a *relationship*, and what it means to *maintain* such a relationship. Analysis of the case law demonstrates significant differences in judicial interpretation and, consequently, the scope and operation of the laws in each state. In Queensland, conviction requires proof beyond reasonable doubt that the accused has maintained an unlawful sexual relationship, where a 'relationship' is a sexual relationship, and maintenance of that relationship is demonstrated by sexual contact that is *continuous and habitual*.⁸² In contrast, the construction of the law in South Australia requires proof only of a relationship, including a wide range such as ordinary familial or other relationships, and there is no requirement that continuity of *sexual* interactions be demonstrated.⁸³ Maintenance of a relationship requires only

⁷⁷ *Criminal Code Act 1899* (Qld) s 229B(1); *CLCA* (n 1) s 50(1).

⁷⁸ *Criminal Code Act 1899* (Qld) s 229B(3); *CLCA* (n 1) s 50(3).

⁷⁹ *Criminal Code Act 1899* (Qld) s 229B(2) (emphasis added).

⁸⁰ *CLCA* (n 1) s 50(2) (emphasis added).

⁸¹ (2019) 133 SASR 470, 474 [10] (Kourakis CJ) ('*M, DV*').

⁸² See below Part IV.

⁸³ See below Part V.

knowledge of all the circumstances that are said to constitute the relationship, which includes all non-sexual interactions and any positions of authority.⁸⁴

A notable feature of the Queensland law is that, while it places the maintenance of such a relationship at the core of the offence, no version of the offence has provided a comprehensive definition of that concept. This was presented to the Parliament in 1988 as a deliberate drafting choice to use 'ordinary everyday language',⁸⁵ readily understandable by members of the public. However, this drafting approach has introduced legal uncertainty, requiring substantial interpretation by the courts. The 2003 reforms introduced a partial definition: 'An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period'.⁸⁶ While this appears to define an 'unlawful sexual relationship', the term 'relationship' remains undefined, and in no version of the offence is it specified what it means to 'maintain' such a relationship. As will be seen in Parts IV and V below, the courts of each state have sought to interpret the 'inherently broad and imprecise concept'⁸⁷ of a relationship to delineate what conduct by an adult amounts to maintaining a sexual relationship with a child and is therefore punishable under the provisions.

D *Normative Critiques*

Persistent CSA laws have been the subject of several normative critiques. These are discussed here, with particular emphasis on the laws of Queensland and South Australia, to evince the tensions at the heart of socio-legal policy in this domain which persistent CSA laws attempt to navigate. First, they have been claimed to compromise fairness to the accused, breaching fundamental tenets of the criminal justice system and the rule of law. Second, a contrasting claim has asserted that restrictive judicial interpretation of the provisions, together with a requirement for prosecutorial approval, has limited their intended use. Consequently, an effective form of the offence is yet to be established in most jurisdictions. Third, provisions that use the terminology of a 'relationship' have been criticised as inappropriate, offensive and damaging, with judicial officers, scholars and advocates arguing the use of the concept is inappropriate in the context of child sexual abuse. We would add to this critique that use of the term 'relationship' has influenced the interpretation and operation of these provisions in ways that are legally and conceptually inappropriate.

1 *Compromising Fairness to the Accused*

The creation of persistent CSA offences aims to balance fairness to the accused against the rights of complainants with 'the specific needs and characteristics of

⁸⁴ Ibid.

⁸⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (Brian Austin).

⁸⁶ *Criminal Code Act 1899* (Qld) s 229B(2), as at 1 May 2003.

⁸⁷ *R v Kemp* [1997] 1 Qd R 383, 396 (Fitzgerald P).

the victims which the law is intended to protect'.⁸⁸ Some have claimed that the relaxation of the requirement to provide sufficient particulars of charges is prejudicial to defendants' rights to a fair trial.⁸⁹ For example, the Queensland offence has been characterised as

an offence carrying a maximum term of life imprisonment ... on the strength of a range of unparticularisable allegations about which the jury can be satisfied in a non-specific way and on a mixed basis [ie, without extended jury unanimity] ... [S]uch a provision might seem to many to be a long stride from the notion that an accused is entitled to know the substance of what is alleged with particularity and for guilt to require proof of that matter, and that matter alone, beyond reasonable doubt.⁹⁰

These claims have not been endorsed by judicial authorities. In *R v CAZ* ('CAZ'), the appellant argued that the Queensland provision so compromised fairness to the accused that it was constitutionally invalid on the basis that it required a District Court judge, exercising federal judicial power, to act contrary to Ch III of the *Commonwealth Constitution*.⁹¹ The appellant argued that the reduced particularisation requirement and removal of extended jury unanimity meant that the jury could 'effectively return a non-unanimous verdict contrary to the requirements for a trial by jury and a unanimous verdict under s 80 of the *Constitution*'; the return of such a verdict would be lacking the unanimity on 'each element of the offence' that is 'an essential feature of a jury trial'; and that a District Court judge presiding over a trial would be unable to 'ensure an accused's right to a fair trial where the practical effect of s 229B(4) means that there are no adequate protections or safeguards to protect the rights of the accused'.⁹²

The Queensland Court of Appeal disagreed, noting that a trial judge has a duty to ensure a fair trial, and retains the power to direct the prosecution to provide particulars if they see fit, and to adjourn the trial for that purpose.⁹³ In the Court's view, notwithstanding the provisions of s 229B, those particulars would include 'the essential allegations of fact made by the prosecution in sufficient detail to enable the defendant to understand and to meet the charge'.⁹⁴ Jury unanimity would be required

⁸⁸ Brown (n 44) 161. See also Pierrette Mizzi, 'Balancing Prosecution with the Right to a Fair Trial: The Child Sexual Abuse Reforms in NSW' (2019) 31(2) *Judicial Officers Bulletin* 11, 18; Woiwod and Connolly (n 22) 217; *Criminal Justice Report: Parts III to VI* (n 17) 68.

⁸⁹ See, eg, Christopher Boyce, 'Guilt by Disposition? S47A of the Crimes Act' (2000) 74(5) *Law Institute Journal (Victoria)* 58, 61; Andrew West, 'Maintaining Unlawful Sexual Relationships' (2013) 33(1) *Queensland Lawyer* 10, 11–14.

⁹⁰ West (n 89) 11.

⁹¹ *CAZ* (n 2).

⁹² *Ibid* 452 [34] (Fraser JA).

⁹³ *Ibid* 458 [47] (Fraser JA, Chesterman JA agreeing at 460 [57], White JA agreeing at 460 [58]).

⁹⁴ *Ibid* 458 [48].

on 'the essential allegation that the defendant maintained a sexual relationship with a child that involved more than one unlawful sexual act', even if the jurors did not agree on which unlawful sexual acts had been proved.⁹⁵

2 *Limited Effectiveness of Persistent CSA Provisions*

A second criticism has been that the laws have not resulted in sufficient substantive justice from victims' perspectives. In 2010, a consultation paper asked whether the existing offences had achieved their aims within the family violence context.⁹⁶ Many submissions revealed a view that the provisions were under-utilised and were not achieving their aim.⁹⁷ Submissions identified restrictive judicial interpretation of the offence provisions, notably in jurisdictions that had not implemented reforms since the decision in *KBT*, and the requirement in some states and territories to obtain approval from the Director of Public Prosecutions before laying a charge as barriers to their use.⁹⁸ The resulting report recommended further review of the 'utilisation and effectiveness of persistent sexual abuse type offences'.⁹⁹

Similarly, in 2017, the Royal Commission reviewed the performance of persistent CSA laws in the context of institutional abuse.¹⁰⁰ The Royal Commission's *Criminal Justice Report* explained that the offences were infrequently charged, except in Queensland and Tasmania.¹⁰¹ The main difficulty faced by the application of the offence in most states and territories was the failure to rectify the effect of *KBT* on extended jury unanimity. In the Royal Commission's view, the only jurisdiction that had successfully overcome this limitation was Queensland:

We consider that the Queensland offence, in making the actus reus the relationship rather than the individual occasions of abuse, provides the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence a complainant is more likely to be able to give.¹⁰²

The Royal Commission noted that convictions under the Queensland offence have been upheld by the Court of Criminal Appeal even when the jury had not convicted the accused of any individual offences charged on the same indictment.¹⁰³ Therefore, the Queensland framing of the offence appears to effectively and safely enable

⁹⁵ Ibid 459 [53].

⁹⁶ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks* (ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9, April 2010) 735.

⁹⁷ *Family Violence: A National Legal Response* (n 17) 1143–4.

⁹⁸ Ibid 1143–5.

⁹⁹ Ibid 1145–6.

¹⁰⁰ *Criminal Justice Report: Parts III to VI* (n 17) ch 11.

¹⁰¹ Ibid 30.

¹⁰² Ibid 68.

¹⁰³ Ibid 66, citing *R v LAF* [2015] QCA 130; *R v RAS* [2014] QCA 347; *R v WAB* [2008] QCA 107.

prosecution of persistent CSA offences that cannot be prosecuted as individual offences.¹⁰⁴ The Queensland approach was also preferred by many submissions.¹⁰⁵ The Royal Commission provided draft legislation, based on the Queensland law, which was intended to enact that position in the other states and territories.¹⁰⁶

Although this analysis supports a view that the effectiveness of the Queensland provision depends on the actus reus being an unlawful sexual relationship, it is not clear, so long as there is an actus reus distinct from individual acts, that it must be a *relationship*. The key limitation in other jurisdictions is the failure to overcome the effect of *KBT*, rather than the precise question of how the offence is conceptualised. For example, the Royal Commission contrasted the Queensland offence with the South Australian offence in force at the time, ‘persistent sexual exploitation of a child’.¹⁰⁷ As described above, this offence had enabled conviction to occur in some cases of persistent CSA that, in the view of the Director of Public Prosecutions, would not have been able to be effectively prosecuted as individual offences. The limitation of the offence was the need for members of the jury to delineate and agree the same two or more acts.¹⁰⁸

The relevance to our analysis is that, while both States now have persistent CSA laws that are effective, the resulting South Australian offence substantially differs in scope and operation from that of Queensland. This provides an opportunity to more closely examine the following critique about the conceptualisation of persistent CSA as an unlawful sexual relationship.

3 *The Terminological Problem: Use of the Concept of a ‘Relationship’*

A third criticism of these offences is the use of the terms ‘relationship’ and ‘sexual relationship’ to delineate the setting in which unlawful sexual acts against children have been perpetrated. Survivors, advocacy groups, and lawyers have argued that this terminology obscures the nature of the crime and causes additional harm to survivors of persistent CSA by mischaracterising the interactions between offenders and victims as mutual or having romantic connotations.¹⁰⁹ Justice Brett of the Supreme Court of Tasmania has described the Tasmanian offence as having a ‘very poor name’, noting the crime ‘has nothing to do with a relationship’.¹¹⁰ Some states,

¹⁰⁴ *Criminal Justice Report: Parts III to VI* (n 17) 66–8.

¹⁰⁵ *Ibid* 42, 44, 46, 49, 50, 51, 53, 54, 56.

¹⁰⁶ *Criminal Justice Report: Parts VII to X and Appendices* (n 75) app H.

¹⁰⁷ *CLCA* (n 1) s 50, as at 23 November 2008.

¹⁰⁸ *Criminal Justice Report: Parts III to VI* (n 17) 68.

¹⁰⁹ Nina Funnell, ‘Nature of Language in Paedophile Charge Adds to Victim Trauma’, *The Mercury* (Hobart, 19 August 2019) 8; Edith Bevin, ‘Overhaul of Sex Abuse Laws Needed to Remedy Community Confusion, Advocates Say’, *ABC News* (online, 15 August 2019) <<https://www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>>; Amber Wilson, ‘Not All for Sex Crime Rename’, *The Mercury* (Hobart, 7 March 2020) 20.

¹¹⁰ Wilson (n 109).

such as Tasmania, Victoria, and Western Australia, have adopted 'persistent sexual abuse' nomenclature in recognition of the inappropriate implications of labelling the offence a 'relationship'.¹¹¹ Many jurisdictions in the United States have also developed persistent CSA offences¹¹² using terminology such as 'continuous sexual abuse of a child'¹¹³ or 'engaging in repeated acts of sexual assault of the same child'.¹¹⁴

The use of 'relationship' terminology does not reflect an accurate understanding of the nature of child sexual abuse. Child sexual abuse occurs when any adult or child in a position of power over the victim inflicts contact or non-contact sexual acts, to seek or obtain physical or mental sexual gratification for themselves or another person and whether immediate or deferred in time and space, when the child either does not have capacity to provide consent, or has capacity but does not provide consent.¹¹⁵ A 'sexual relationship', as a normative concept, involves consensual sexual activity, which by its nature must be premised on full, free, and voluntary consent to the acts.¹¹⁶ On this basis, it is clearly inappropriate to conceive of non-consensual sexual acts inflicted on a child as involving a 'sexual relationship'. This definitive conclusion has clear implications for law reform, to which we return below.

Despite this criticism, the framing of the offence as an 'unlawful sexual relationship', and in particular the Queensland form of the offence, has been preferred as an effective approach to drafting a provision that does not rely on specific acts to form the actus reus of the offence. The Royal Commission explained that '[t]he language of "relationship" does not sit easily with the exploitation involved in child sexual

¹¹¹ *Criminal Code Act 1924* (Tas) s 125A, as amended by *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5; *Crimes Act 1958* (Vic) s 47A, as amended by *Crimes (Sexual Offences) Act (No 2) 2006* (Vic) s 11; *Criminal Code Act Compilation Act 1913* (WA) s 321A, as amended by *Criminal Law and Evidence Amendment Act (No 2) 2008* (WA) s 10. See also Tasmania, *Parliamentary Debates*, House of Assembly, 18 March 2020, 38 (Elise Archer, Minister for Justice); Victoria, *Parliamentary Debates*, House of Assembly, 16 November 2005, 2185 (Rob Hulls, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 June 2006, 4212 (JA McGinty, Attorney General).

¹¹² Woiwod and Connolly (n 22) 211.

¹¹³ See, eg, Cal Penal Code § 288.5 (Deering 2016).

¹¹⁴ Wis Stat § 948.025 (2019–20).

¹¹⁵ Mathews and Collin-Vézina (n 19).

¹¹⁶ Although terms such as 'sex' and 'a sexual relationship' may be qualified as 'non-consensual' or 'unlawful' to refer to sexual assault, the inherent normative assumptions of mutuality and voluntary participation in those terms has been identified by literature on the use of romantic and erotic language in sexual assault trials, and underscored by the misuse of such concepts by offenders to justify their sexual offending against children: see, eg, Janet Bavelas and Linda Coates, 'Is It Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments' (2001) 10(1) *Journal of Social Distress and the Homeless* 29, 31–2; Shruti Navathe, Tony Ward and Theresa Gannon, 'Cognitive Distortions in Child Sex Offenders: An Overview of Theory, Research & Practice' (2008) 4(3) *Journal of Forensic Nursing* 111.

abuse offending’,¹¹⁷ but nevertheless adopted this language in their model provisions on the view that it permitted ‘the most effective form of offence’.¹¹⁸ Accordingly, their model provisions are headed ‘Persistent Sexual Abuse of Children Model Provisions’, while the words within the provision refer to ‘maintaining an unlawful sexual relationship with a child’.¹¹⁹

The recent emergence of an alternative approach in South Australia, occurring after the conclusion of the Royal Commission, provides a new perspective on the operation of the Queensland offence and an opportunity to re-evaluate persistent CSA laws in the light of the comparative observations and critiques above. As will be shown below, concepts of both a ‘relationship’ and a ‘sexual relationship’ have presented challenges for judicial interpretation, which have shaped the operation of the provisions in both Queensland and South Australia. While Queensland pioneered the persistent CSA offence in Australia, and has continued to implement reforms that improve the operation of the law, we argue that judicial interpretation of the provision has drawn on the concepts of a ‘relationship’ and a ‘sexual relationship’ in ways that are legally and factually inappropriate in the context of persistent CSA. A review of the historical and doctrinal development of these offences in Queensland and South Australia, including judicial consideration of the current provisions, will demonstrate the attempt to navigate this tension, and will inform the final analysis.

IV QUEENSLAND: MAINTAINING AN UNLAWFUL SEXUAL RELATIONSHIP

Since 1989, Queensland courts have developed a corpus of case law regarding the interpretation of s 229B, and in particular whether the accused has maintained an unlawful sexual relationship. Despite the reformulation of the offence in 2003, including the partial definition of an ‘unlawful sexual relationship’, the courts’ interpretation of what constitutes the maintenance of an unlawful sexual relationship has remained consistent.¹²⁰ Namely, maintaining an unlawful sexual relationship with a child requires evidence of a *sexual relationship*, which is maintained through sexual contact that occurs with *continuity* and *habituality*.¹²¹ In taking this approach, the offence as it operates in Queensland has been complicated by judicial references to the existence of ‘a sexual relationship’, and to questionable interpretations of the application of the concepts of continuity and habituality, with the result that some situations of repeated acts appear to have been excluded from the operation of the provision.

¹¹⁷ *Criminal Justice Report: Parts III to IV* (n 17) 71.

¹¹⁸ *Ibid.*

¹¹⁹ *Criminal Justice Report: Parts VII to X and Appendices* (n 103) 550–3, especially cl 3 of the Model Provisions.

¹²⁰ *CAZ* (n 2) 457 [46] (Fraser JA).

¹²¹ See, eg, *R v Kemp [No 2]* [1998] 2 Qd R 510, 511–2 (Macrossan CJ), 518 (Mackenzie J) (*Kemp [No 2]*); *R v S* [1999] 2 Qd R 89; *R v A* [2002] QCA 536; *R v DAT* [2009] QCA 181 (*DAT*); *CAZ* (n 2); *R v SCE* [2014] QCA 48, [5] (McMurdo P) (*SCE*).

A *A 'Relationship of a Sexual Nature'*

As first expressed in *R v Kemp [No 2]* (*'Kemp [No 2]'*) in 1998,¹²² and affirmed 20 years later in *R v PBA* (*'PBA'*),¹²³ proving an offence under s 229B requires proof of 'an ongoing relationship of a sexual nature'.¹²⁴ In *Kemp [No 2]*, the Court was looking for evidence of a 'sexual relationship' *between both parties*, drawing on characteristics of an 'ordinary' sexual relationship:

Use of the term 'relationship' implies *a continuity of contact in which both parties are involved; the sexual element will be the particular character of the relationship which will appear*. Evidence of conduct occurring between the two parties, if it pointed to the existence of *a sexual character in their relationship* during the specified period, would be direct evidence of an aspect of this offence.¹²⁵

Where what has to be proved is not just a single incident, or three incidents, but a s. 229B relationship — a situation subsisting over a period of time — acts of the accused tending to show a 'guilty passion' at relevant times are directly relevant; *in court as in ordinary life, one deduces that two people have a sexual relationship with one another, wholly or in part from evidence that they engage in acts characteristic of such a relationship*.¹²⁶

In referring to the ways in which a sexual relationship may be deduced in 'ordinary life', the Court was presumably drawing on the characteristics of a sexual relationship between consenting adults. This approach could be seen as taking up the invitation offered by the Queensland Parliament, since the provision was said to 'use ... ordinary everyday language which is able to be understood by ordinary people'.¹²⁷ However, framing child sexual abuse in terms of mutual involvement in sexual activity is clearly inappropriate and without factual basis. The adoption of prevailing myths and misrepresentations of child sexual abuse can be seen in the following passage in *Kemp [No 2]*, contrasting a s 229B relationship with a scenario where an adult and child meet unexpectedly on multiple occasions and 'decide' to have sexual intercourse:

[I]f an adult and a child were proved by clear evidence to have arranged to meet for the purpose of having sexual intercourse on each occasion when she was allowed out on leave from boarding school, but their arrangement and evidence of their intention to continue with it was discovered after only three such occasions,

¹²² *Kemp [No 2]* (n 121).

¹²³ [2018] QCA 213 (*'PBA'*).

¹²⁴ *Ibid* [7] (Fraser JA). See also *Kemp [No 2]* (n 121) 522 (Mackenzie J): 'Section 229B is an unusual offence in that it requires proof of at least an habitual course of conduct of a sexual nature in respect of a person under 16'.

¹²⁵ *Kemp [No 2]* (n 121) 511 (Macrossan CJ) (emphasis added).

¹²⁶ *Ibid* 512 (Pincus JA) (emphasis added).

¹²⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (BD Austin).

such evidence may be sufficient to satisfy a jury beyond reasonable doubt that the adult was maintaining a sexual relationship with the child. On the other hand there is no reason to think that the section was intended to apply if what is proved are three random or opportunistic incidents such as a case where, over a period of time, an adult and a child meet unexpectedly and without arrangement at a place of entertainment and on each occasion decide to have sexual intercourse during the course of the evening.¹²⁸

Although more recent judgments rarely describe complainants as active participants in a sexual relationship, the requirement that the relationship be of a sexual nature has persisted, even though the provision now provides that '[a]n unlawful sexual relationship is a *relationship* that involves more than 1 unlawful sexual act over any period'.¹²⁹ This is because it has been held that continuity or habituality of sexual contact is necessary to prove the relationship has been *maintained*. In *CAZ*, Fraser JA explained that, before 2003, the offence had required proof of 'sufficient continuity or habituality to justify the inference that the defendant maintained a sexual relationship with the child', and that there was 'no indication in the explanatory notes or in the text of the current section that this requirement has been discarded'.¹³⁰ In particular, s 229B(3), which requires that 'all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed', appeared to Fraser JA as consistent only with the view that there must be an 'ongoing relationship of a sexual nature' with 'continuity or habituality of sexual conduct'.¹³¹ In *PBA*, the Queensland Court of Appeal affirmed that the issue of whether an unlawful sexual relationship *existed* required proof of 'a relationship that involved more than one unlawful sexual act during the charged period'.¹³² This is in line with the partial definition provided in s 229B(2) after 2003. However, the existence of a relationship was distinguished from the issue of whether the accused had *maintained* the relationship, which 'required proof that there was an ongoing relationship of a sexual nature between the appellant and the complainant, and that required some continuity or habituality of sexual conduct rather than merely proof of isolated or unconnected incidents'.¹³³

B *The Concepts and Measurement of Continuity and Habituality*

While all formulations of s 229B have required evidence of a minimum number of unlawful sexual acts within an alleged relationship, Queensland case law shows that they may not be sufficient to demonstrate the maintenance of an unlawful sexual

¹²⁸ *Kemp [No 2]* (n 121) 518 (Mackenzie J).

¹²⁹ *Criminal Code Act 1899* (Qld) s 229B(2) as at 1 May 2003 (emphasis added).

¹³⁰ *CAZ* (n 2) 457–8 [46] (Fraser JA).

¹³¹ *Ibid.*

¹³² *PBA* (n 123) [7] (Fraser JA).

¹³³ *Ibid.*

relationship.¹³⁴ Therefore, even in cases where it is accepted that the accused has done multiple unlawful sexual acts towards a child, this may fall short of the requirement to prove that an unlawful sexual relationship has been maintained through continuity or habituality of sexual conduct. For example, in the Queensland Court of Appeal decision *R v DAT* ('*DAT*'), the complainant provided evidence of approximately seven incidents of 'touching' by her father over five years in the context of weekly access visits.¹³⁵ The relationship was alleged to have occurred between June 1996 and June 2001, and therefore the pre-2003 formulation of s 229B applied. The appellant had pleaded guilty to four counts of indecent treatment of a child under 16, being the complainant, and was also convicted of maintaining a sexual relationship with a child. On appeal, Holmes JA accepted as reasonable the appellant's submission that 'the indicia of maintaining a relationship include the duration of the alleged relationship, the number of acts and the nature of the acts engaged in'.¹³⁶ Her Honour compared the number of acts, approximately seven, to the number of opportunities for sexual contact, represented by approximately 250 access visits, concluding that this number tended to disprove regularity or habituality of conduct by the accused.¹³⁷ Moreover, the decision afforded legal significance to the specific nature of the acts done, based on whether penetration occurred: acts of touching were contrasted with acts of penile penetration, which 'would indicate a more deliberate and significant course of conduct'.¹³⁸ The Queensland Court of Appeal concluded that the incidents of touching were too fleeting to constitute a relationship, amounting instead to 'random spontaneous events':¹³⁹

Given the nature of the touching described, the limited number of events, the fact that they were spread over such a long period of time, and the absence of any evidence that there was any limitation of opportunity, I do not think it was open to his Honour to be satisfied that these were more than random spontaneous events. The evidence was not sufficient to prove beyond reasonable doubt that the appellant had maintained an unlawful relationship with his daughter.¹⁴⁰

The reasoning in *DAT* was endorsed by the Queensland Court of Appeal in *R v SCE* ('*SCE*'), which also applied the pre-2003 version of the offence.¹⁴¹ President McMurdo noted that the unlawful sexual acts on which the jury had agreed (touching the complainant's breasts, simulating sexual intercourse, and sexual intercourse) were 'much more serious and invasive than the acts in *R v DAT* which this Court

¹³⁴ *DAT* (n 121) [12] (Holmes JA).

¹³⁵ *Ibid* [14]–[15].

¹³⁶ *Ibid* [13].

¹³⁷ *Ibid* [15]–[16].

¹³⁸ *Ibid* [13].

¹³⁹ *Ibid* [17] (Holmes JA, Muir JA agreeing at [20]), [24] (McMurdo J).

¹⁴⁰ *Ibid* [17] (Holmes JA).

¹⁴¹ *SCE* (n 121).

found did not establish habituality'.¹⁴² Further, the order in which these acts occurred provided evidence of 'the continuing escalation of the relationship'.¹⁴³ In sum, evidence of 'three discrete acts over less than 18 months' was found by the majority to have 'demonstrated sufficient continuity to allow the drawing of an inference of a developing and continuous relationship' by the jury.¹⁴⁴ The difference between this case and *DAT* appears to be that the acts were more 'serious and invasive' than those in *DAT*, and could be characterised as an 'escalation of the relationship'.¹⁴⁵

There are several difficulties with this approach. It creates a possibility that instances of repeated sexual offending against children will be excluded from the operation of the provision based on an unjustifiably restricted interpretation of what must exist to satisfy the condition of 'a relationship'. This interpretation is premised on the 'fleetingness' of the acts, or their 'isolated' or perceived 'random spontaneous' nature. In this sense, the approach to the concept of 'a relationship' is more reflective of the nature of a sexual relationship between adults, and directly contradicts the purpose of the provision. It also, without any justification in policy or legislation, downgrades the significance of unlawful non-penetrative sexual acts, which by their nature remain illegal and therefore within the ambit of the provision, and which may be just as harmful as penetrative acts.¹⁴⁶ Emphasis on fleeting or spontaneous events of sexual offending against children ignores the very nature of child sexual abuse. This often involves multiple acts over a period of time, and is by its nature often not continuous or habitual in contrast to a more regular pattern reflective of consensual relationships. Child sexual abuse is inherently dependent on spontaneity given the fact that offenders require the opportunity to inflict the acts in secret, and such circumstances are not always present or under their control.¹⁴⁷

¹⁴² Ibid [10] (McMurdo P). For the purposes of clarity, please note the judgment quoted here is that of President Margaret McMurdo, whereas the judgment quoted above in *DAT* is that of Justice Philip McMurdo.

¹⁴³ Ibid [11] (McMurdo P).

¹⁴⁴ Ibid [11] (McMurdo P, Morrison JA agreeing at [78]). Justice of Appeal Gotterson did not consider it necessary to make a determination on that question: at [34].

¹⁴⁵ Ibid [10].

¹⁴⁶ See generally David M Fergusson, Geraldine FH McLeod and L John Horwood, 'Childhood Sexual Abuse and Adult Developmental Outcomes: Findings from a 30-Year Longitudinal Study in New Zealand' (2013) 37(9) *Child Abuse and Neglect* 664; Elizabeth Oddone Paolucci, Mark L Genuis and Claudio Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135(1) *Journal of Psychology: Interdisciplinary and Applied* 17; Penelope K Trickett, Jennie G Noll and Frank W Putnam, 'The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study' (2011) 23(2) *Development and Psychopathology* 453.

¹⁴⁷ Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, 'Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)' (2019) 20(2) *Trauma, Violence and Abuse* 260; Stephen W Smallbone and Richard K Wortley, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi' (Trends and Issues in Crime and Criminal Justice No 193, Australian Institute of Criminology, February 2001).

C Developing an Interpretation More Consistent with Law and Social Science

In some more recent cases, the Queensland Court of Appeal has continued to develop the concepts of continuity and habituality in ways that are more consistent with law and social science evidence on the nature of child sexual offending, without specifically overruling *DAT*. In *R v FAL* ('*FAL*'), the Court stated that continuity or habituality *does not* require physical contact of a minimum level of intimacy, duration, or invasiveness.¹⁴⁸ The Justices of Appeal rejected the argument, based on the *Macquarie Dictionary* definition of 'relationship', that an unlawful sexual relationship must entail intimacy and duration of contact sufficient to show the accused adult and the child having a 'connection'.¹⁴⁹ Similarly to *DAT*, the relevant unlawful sexual acts involved touching the complainant, on or about her genital area on the outside of her clothing, and on her breast or breasts inside her shirt.¹⁵⁰ The appellant argued that such 'fleeting low level contact' was insufficient, but the Court disagreed, concluding that it was for the jury to decide whether such contact amounted to sexual contact of sufficient continuity or habituality to amount to the maintenance of an unlawful sexual relationship.¹⁵¹ In *R v Watson*,¹⁵² the Court agreed with the conclusion in *FAL*, stating that even 'momentary' or 'marginal' touching on the outside of clothing, when of a sexual nature sufficient to constitute indecent dealing, was sufficient to establish the existence of an unlawful sexual relationship.¹⁵³ In both of these cases, there was no requirement that the contact be of a particular level of invasiveness or frequency, nor that it progress in a manner consistent with the development of a sexual relationship. These more recent cases display an approach that is more consistent both with the range of sexual offences against children encompassed by s 229B and social science evidence about the nature of sexual offending against children.

Nevertheless, the interpretation of s 229B by the Queensland courts means that it remains necessary to prove that a relationship of a sexual nature existed, which has been maintained by the accused through the habituality and continuity of sexual contact. The application of the concepts of habituality and continuity arise from the courts' reasoning about the qualities that identify a 'relationship', and in particular a 'sexual relationship', rather than the characteristics of persistent CSA. This restricts the application of the provision despite the purpose of the provision being to accommodate the evidentiary characteristics of persistent CSA. Although more recent decisions are less insistent about the nature and frequency of sexual contact, perhaps reflecting an increased societal and juridical understanding of the nature of child sexual abuse, the Queensland approach leaves open the possibility that the application of the provision is unjustifiably limited.

¹⁴⁸ [2017] QCA 22, [32] ('*FAL*').

¹⁴⁹ *Ibid* [28]–[32].

¹⁵⁰ *Ibid* [5].

¹⁵¹ *Ibid* [21]–[33].

¹⁵² [2017] QCA 82.

¹⁵³ *Ibid* [36]–[38] (Sofronoff P, Fraser JA and Applegarth J).

V SOUTH AUSTRALIA: PERSISTENT SEXUAL ABUSE OF A CHILD

Due to the recency of these reforms, South Australia has a relatively short history of judicial consideration of persistent CSA offences focused on a relationship. The first cases decided in the South Australian District Court under the reformed 2017 law adopted the Queensland approach.¹⁵⁴ For example, in the reasons provided by Judge Muscat in the District Court in the 2019 case of *R v F, KV*, the elements of the offence were enumerated and included both that the defendant had engaged in an unlawful sexual relationship with the complainant, namely ‘a relationship in which an adult engages in two or more sexual acts with or towards a child’, and that the unlawful sexual relationship had been *maintained*, which meant ‘some continuity of sexual conduct and not merely isolated sexual acts’.¹⁵⁵ His Honour cited with approval the comments of McMurdo J in *DAT* regarding the necessity to prove continuity or habituality of the sexual contact to establish that a relevant relationship had been maintained.¹⁵⁶ Thus, initially at least, the South Australian provision was taken to require evidence of a sexual relationship.

A *A Different Approach to the Concept of ‘a Relationship’*

However, in May 2019, the South Australian Court of Criminal Appeal delivered its decision in *M, DV*.¹⁵⁷ Each of the three judgments dealt extensively with the appropriate construction of the term ‘unlawful sexual relationship’ and the concept of ‘a relationship’, based on three alternative constructions which Blue J identified:

- 1 The relationship is constituted by the multiple unlawful sexual acts themselves.
- 2 There must be a relationship (not necessarily a sexual relationship) between the defendant and complainant and this is an element of the offence in addition to multiple unlawful sexual acts.
- 3 There must be a sexual relationship between the defendant and complainant and this is an element of the offence in addition to multiple unlawful sexual acts.¹⁵⁸

Notably, all three judges rejected the third construction, which would require evidence of a *sexual* relationship, and is the construction most closely resembling the Queensland judicial interpretation of s 229B. Chief Justice Kourakis rejected this construction as inconsistent with the statutory definition of an unlawful sexual

¹⁵⁴ See, eg, *R v Hamra* [2018] SADC 33, [4] (Judge Barrett); *R v Keyte* [2018] SADC 22, [10] (Judge Davison).

¹⁵⁵ [2019] SADC 53, [78].

¹⁵⁶ *Ibid*, citing *R v DAT* [2009] QCA 181, [22].

¹⁵⁷ *M, DV* (n 81).

¹⁵⁸ *Ibid* 484–5 [48].

relationship: if evidence of two or more acts is sufficient, to 'require more frequent and persistent acts would be inconsistent'.¹⁵⁹ Similarly, Blue J found no basis in the wording of the provision to support the contention that the relationship must be a sexual one:

The word 'unlawful' in the definition is given meaning by the reference to *unlawful* sexual acts and the word 'sexual' in the definition is given meaning by the reference to unlawful *sexual* acts in the definition.¹⁶⁰

Further, Blue J viewed it as improbable that the legislature intended to create an offence involving such 'complexity and uncertainty' as the concept of a 'sexual relationship'.¹⁶¹

The majority, Kourakis CJ and Lovell J, preferred the second construction.¹⁶² The Chief Justice held that the phrase 'in which' contained in section 50(2) served to 'differentiate the relationship from the unlawful sexual acts', meaning that a relationship must be proved.¹⁶³ His Honour also acknowledged the Parliament's clear intention to adopt the recommendations of the Royal Commission, including that reforms should be made so that 'the actus reus is the maintaining of an unlawful sexual relationship'.¹⁶⁴ In agreement, Lovell J noted that while either the first or second interpretations were possible readings of the text of the provisions, the second interpretation was preferable since it 'accommodates the purpose of the section and the mischief it was designed to overcome'.¹⁶⁵

In contrast, Blue J concluded that the first construction was the proper one, when the text, context, and purpose of the provision were taken into account.¹⁶⁶ In his Honour's view, the text of s 50(2) ('an unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period') could be read consistently with either the first or the second construction.¹⁶⁷ For Kourakis CJ, this wording clearly differentiated the relationship from the unlawful sexual acts.¹⁶⁸ Therefore, Kourakis CJ rejected the first construction on the basis that having no requirement to prove a 'relationship' would remove the element on which the jury could unanimously or by majority agree beyond reasonable doubt.¹⁶⁹ In Blue J's view, the words 'in which' could equally be read as meaning the

¹⁵⁹ Ibid 478 [22].

¹⁶⁰ Ibid 485 [49] (emphasis in original).

¹⁶¹ Ibid 485 [50].

¹⁶² Ibid 474 [9]–[10] (Kourakis CJ), 514 [174] (Lovell J).

¹⁶³ Ibid 474 [10].

¹⁶⁴ Ibid 478 [20], quoting *Criminal Justice Report: Parts III to VI* (n 17) 74.

¹⁶⁵ Ibid 515–16 [178]–[183].

¹⁶⁶ Ibid 488 [64].

¹⁶⁷ Ibid 486 [52].

¹⁶⁸ Ibid 474 [10].

¹⁶⁹ Ibid 475–6 [14].

relationship was constituted by the acts.¹⁷⁰ Justice Blue drew further support for this construction from the context provided by s 50(4)(c), which provides that members of the jury need not agree on ‘which unlawful sexual acts *constitute* the unlawful sexual relationship’.¹⁷¹ Also, Blue J saw the first construction as most consistent with the purpose and rationale of the provision: to enable conviction where a jury agrees that an adult has committed multiple sexual offences against a child but is unable to identify or agree with certainty on particular acts: ‘[i]t should be sufficient ... that the trier of fact is satisfied that multiple sexual offences have been committed’.¹⁷² Finally, his Honour was unpersuaded that a ‘relationship’ element was required for the purposes of jury unanimity, given the deliberate legislative choice to depart from common law principles of unanimity, the availability of other elements (for example the complainant’s age) on which unanimity could occur, and the rarity of cases where the existence of a ‘relationship’ within the South Australian interpretation would be in issue.¹⁷³ We return to these reasons below in Part VI(B).

The effect of *M, DV* and its requirement that there be a relationship, but not necessarily a sexual one, between the complainant and the accused can be seen in subsequent District Court decisions. A range of relationships have been accepted as satisfying this element. In *R v H, A*, Judge Tracey found that there was a relationship between each of the two complainants and the accused, since one was a cousin of the accused and the other was a family friend.¹⁷⁴ In *R v B, LM*, Judge Slattery acknowledged that the parties had ‘a father and daughter relationship’.¹⁷⁵ Going considerably further, in *R v Korth*, Judge Davison held the requisite relationship was established by the fact the complainant was cared for by the accused’s wife in a family day care setting.¹⁷⁶

In *R v Mann* (*‘Mann’*), the Court of Criminal Appeal expanded on the proper approach to the interpretation of the term ‘relationship’ in the context of s 50.¹⁷⁷ *Mann* originated in a South Australian District Court trial that resulted in an acquittal in part because it was found the necessary relationship had not been proven.¹⁷⁸ In that trial, Judge Chapman held that for a relationship to exist, the accused must have

knowingly maintained a relationship with the complainant. There are three parts to this element. First, there was a relationship between the accused and the complainant. That is separate from/outside of the alleged unlawful sexual

¹⁷⁰ Ibid 486 [52].

¹⁷¹ Ibid 486 [53], 488 [61] (emphasis added).

¹⁷² Ibid 486 [54].

¹⁷³ Ibid 488 [62].

¹⁷⁴ [2019] SADC 169, [17].

¹⁷⁵ [2020] SADC 42, [12].

¹⁷⁶ [2019] SADC 133, [16].

¹⁷⁷ (2020) 135 SASR 457 (*‘Mann’*).

¹⁷⁸ *R v Mann* [2020] SADC 47, [91] (Judge Chapman).

acts. Second, the accused maintained that relationship. Third, the accused did so knowingly.¹⁷⁹

Applying this to the facts of the case at trial, Judge Chapman regarded the previous de facto stepfather/stepdaughter relationship, predating the period of the alleged relationship, as relevant but not sufficient to prove beyond reasonable doubt that a relationship existed during the period of the alleged unlawful sexual relationship. During the period of the alleged relationship, contact between the complainant and the accused occurred between four and seven times during random and brief visits by the accused to the house the complainant lived in with her mother.¹⁸⁰ The contact consisted almost solely of the alleged unlawful sexual acts themselves, and Judge Chapman found there was not sufficient evidence of interaction outside the alleged unlawful sexual acts to prove the existence of a relevant relationship.¹⁸¹ Even if a relevant relationship existed, Judge Chapman was not satisfied that the accused had maintained the relationship, since he had gone to the house on only a small number of occasions, arriving late at night, and there was no evidence of interaction other than the acts of abuse.¹⁸² Although the complainant gave evidence that she had provided the accused with breakfast on three of those occasions, that was action taken by the complainant, and Judge Chapman did not view the complainant's 'action in remaining at the house in the morning long enough to have breakfast in bed [as] conduct sufficient to amount to "maintaining" a relationship'.¹⁸³

This interpretation of the offence is difficult to reconcile with the majority's position in *M, DV*, that it was necessary to prove that a relationship existed but without the imposition of additional requirements about the character of that relationship. In this instance, Judge Chapman's interpretation resembled the Queensland approach, where requirements of proof attach to the character of the relationship, and whether that relationship has been maintained by the accused through consistent conduct, such that some instances of repeated sexual offending against a child may fall outside the scope of the offence.

Following the acquittal, Judge Chapman referred a series of questions regarding the interpretation of the offence to the Court of Criminal Appeal,¹⁸⁴ to which Kourakis CJ, with whom Kelly and Peek JJ agreed, responded, expanding on the Court's position in *M, DV*. First, Kourakis CJ disagreed with Judge Chapman's interpretation that a relationship separate from the unlawful sexual acts had to be proved. While it was clear from *M, DV* that a relationship must be proved as a separate element to the occurrence of two or more unlawful sexual acts, evidence of the unlawful sexual acts

¹⁷⁹ Ibid [41].

¹⁸⁰ Ibid [82].

¹⁸¹ Ibid [89].

¹⁸² Ibid [90].

¹⁸³ Ibid.

¹⁸⁴ *Mann* (n 177).

may also be evidence of the existence of a relationship.¹⁸⁵ The jury must unanimously (or by majority) agree on the existence of the unlawful sexual relationship, but may differ on which evidence they rely on to reach that conclusion. Excluding evidence of the accused's repeated sexual conduct from the jury's consideration on whether a relationship has been proved would undermine the purpose of the provision, which is to provide a relaxed requirement for particularisation.¹⁸⁶ Second, Kourakis CJ agreed with the trial judge that the relationship must be maintained, but whereas Judge Chapman expressed this as 'knowingly maintained', the Chief Justice explained that the state of mind required for this element was knowledge of the sexual acts and the surrounding circumstances that constituted the maintenance of a relationship.¹⁸⁷ It was not necessary that the accused saw themselves as being in a particular type of relationship with the complainant.¹⁸⁸

In *M, DV*, the majority of the Court held that it was an element of the offence that a relationship existed, and that it need not be a sexual relationship. In *Mann*, Kourakis CJ expanded further on the correct interpretation of the term 'relationship' for the purposes of s 50:

The category of relationships falling within s 50 of the *CLCA* can never be closed because relationships vary widely and the very concept evolves over time with societal changes. The wide range of social and interpersonal relationships falling within the term include:

- familial, legal and de-facto, relationships;
- residential relationships;
- working relationships;
- sporting and recreational relationships; and
- professional relationships.¹⁸⁹

Additionally, Kourakis CJ referred to the range of persons within the definition of persons in a position of authority in s 50(13) as 'an indication of the breadth of the concept of relationship for the purposes of s 50'.¹⁹⁰ The range of roles enumerated in s 50(13) includes: teachers in relation to all pupils at the school where the teacher works; parents and others in parental roles and any of their de facto or domestic partners; providers of religious, sporting, musical, or other instruction to a child;

¹⁸⁵ Ibid 464 [15].

¹⁸⁶ Ibid 464 [15]–[16].

¹⁸⁷ Ibid 464–5 [20].

¹⁸⁸ Ibid.

¹⁸⁹ Ibid 465 [26].

¹⁹⁰ Ibid 466–7 [32].

religious and spiritual leaders in a group attended by a child; health professionals or social workers providing personal services to a child; and employers and others with a similar authority over a child's employment. In Kourakis CJ's view, sexual acts by adults in a position of authority in relation to a child take place in the context of the 'social, hierarchical and legal relationships' created by that position of authority.¹⁹¹ This reflects a conceptualisation of persistent CSA as a crime where sexual offences are perpetrated within a relationship that might otherwise be benign or ordinary, which is substantially different to the Queensland approach where a relevant 'relationship' must be maintained quite differently through continuous or habitual sexual contact.

Therefore, Kourakis CJ concluded that, in this case, there was strong evidence of a relationship: even though the prior, 'quasi-parental' relationship, had undergone change, it provided 'patterns of behaviour and attitudes towards each other,' some of which the complainant resumed during the period of the alleged unlawful sexual relationship.¹⁹² The prior relationship provided the accused with access to the complainant's home, and authority, acceptance, and a power imbalance which provided context for the complainant's response.¹⁹³ Finally, Kourakis CJ made it clear that the existence of a relationship was a factual question for determination by the jury, and that '[n]o judicial gloss should be put on the statutory language'.¹⁹⁴ This is a substantial departure from the Queensland position, where the statutory language has been subject to extensive interpretation.

The result of these recent South Australian Court of Criminal Appeal cases is that the provision in South Australia requires evidence of a relationship between the complainant and the accused, but an emphatic rejection of the notion that this must be a *sexual* relationship, or that *maintaining* such a relationship requires evidence of continuity or habituality of sexual contact. Evidence of a relationship may be drawn not only from the existence of a recognised social or interpersonal relationship or a position of authority, but from the full context of the interactions between the complainant and accused. Maintenance requires only a mental state of knowledge of the alleged acts and the surrounding circumstances.

VI CRITICAL ANALYSIS OF DIFFERENCES IN THE QUEENSLAND AND SOUTH AUSTRALIAN PROVISIONS AND THEIR JUDICIAL INTERPRETATION

This comparison of the law in Queensland and South Australia demonstrates that the South Australian approach is more consistent with the nature and purpose of the provisions. As it currently operates, the Queensland offence captures repeated unlawful sexual acts committed against a child only in the presence of a relationship that has the characteristics of a 'sexual relationship', which stands in contrast to the

¹⁹¹ Ibid.

¹⁹² Ibid 466 [30].

¹⁹³ Ibid.

¹⁹⁴ Ibid 465 [21].

stated rationale for the provision, which is to enable prosecution of sexual offences against children where the complainant is unable to identify an act with sufficient precision to link it to a single particularised charge. Recent South Australian decisions have dispensed with the need to prove the qualities of habituality and continuity that, in Queensland, serve to limit the circumstances in which the offence can be proved, and have given rise to successful appeals even when there is evidence or an admission of repeated unlawful sexual acts against a child.

The South Australian approach is also more consistent with a proper understanding of the nature of consent, relationships, and child sexual abuse. The South Australian judicial interpretation frames an unlawful sexual relationship with a child as involving an ordinary relationship between an adult and a child, in the context of which the adult sexually offends against the child: 'a relationship which whilst it subsisted was corrupted, and constituted an unlawful sexual relationship, by the defendant engaging in two or more unlawful sexual acts'.¹⁹⁵ This may be contrasted with the approach in Queensland, where an unlawful sexual relationship is inappropriately framed as a relationship of a sexual nature between an adult and a child, drawing on the indicia of sexual relationships between adults. By not requiring that the 'relationship' be a sexual one, the South Australian position more accurately reflects social science knowledge about the dynamics of child sexual offending.¹⁹⁶ As Kourakis CJ observes in *Mann*, 'sexual offending against children is generally committed by taking opportunistic advantage of a relationship with them'.¹⁹⁷ Although more recent Queensland decisions are arguably more consistent with the findings of social science about persistent CSA,¹⁹⁸ the requirement that there be evidence the relationship has been maintained through continuous and habitual sexual contact remains.

¹⁹⁵ *M, DV* (n 81) 476 [16] (Kourakis CJ).

¹⁹⁶ This is due to the fact that offenders are frequently family members or known acquaintances who have a different type of relationship with the child: David Finkelhor et al, 'Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors' (1990) 14(1) *Child Abuse and Neglect* 19, 22; David Finkelhor et al, 'The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence' (2014) 55(3) *Journal of Adolescent Health* 329, 331. Familial relationships can include grandparent, stepparent, and uncle/aunt; non-familial known acquaintances can include schoolteacher, parish priest, and sports coach. In addition, evidence indicates that intrafamilial child sexual offending often involves the opportunistic commission of sexual acts, rather than a planned or purposive pattern of offending: Benoit Leclerc and Jean Proulx, 'An Opportunity View of Child Sexual Offending: Investigating Nonpersuasion and Circumstances of Offending through Criminological Lens' (2018) 30(7) *Sexual Abuse* 869, 877–8.

¹⁹⁷ *Mann* (n 177) 466 [31].

¹⁹⁸ See above Part IV(A).

A *Continuing Problems in Judicial Interpretation of an
'Unlawful Sexual Relationship'*

Although the South Australian construction more effectively responds to the legislative and public policy imperative, and is more consistent with conceptual models of child sexual abuse, there remains more to be said in favour of the construction preferred by Blue J in *M, DV*: that '[t]he relationship is constituted by the multiple unlawful sexual acts themselves.'¹⁹⁹ As an exercise in statutory interpretation, the South Australian construction arguably strains the bounds of the concept in the offence provision of maintaining 'an unlawful sexual relationship', even taking into account the proper contemporary approach to statutory interpretation.²⁰⁰ This points to intractable problems in the continuing use of terminology of 'maintaining an unlawful sexual relationship'. These include the interpretation of the verb 'maintains', the interpretation of the term 'relationship', and the need to elide its adjectival qualifier of 'sexual'. Read together, the s 50(1) definition of an 'unlawful sexual relationship' and the s 50(2) offence provision of 'maintaining an unlawful sexual relationship' effectively state that '[a]n adult who maintains a relationship in which the adult engages in 2 or more unlawful sexual acts with or towards a child over any period is guilty of an offence'.²⁰¹ Demonstrating this ongoing textual ambiguity, in *M, DV*, both Lovell and Blue JJ considered it open on the text of the provision to read this either as requiring a relationship as an element of the offence in addition to unlawful sexual acts, or as *equating* the relationship with those acts.²⁰²

Yet, what is important is the persistence of the acts over time; the 'maintenance of a relationship' becomes redundant. While the 'relationship' may have provided the context within which the offender had access to the child, and could create the conditions which were conducive to offending, it is not the 'relationship' itself that is significant either jurisprudentially or contextually. In large part, this is because the offender in most cases will not have done anything to create or 'maintain' a 'relationship' when viewed in this way. An aunt or uncle neither creates nor maintains a relationship with their niece or nephew, nor does a grandparent with their grandchild, nor does a teacher with their student. These 'relationships' are created through other

¹⁹⁹ *M, DV* (n 81) 484–5 [48].

²⁰⁰ See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ):

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

²⁰¹ *M, DV* (n 81) 484 [47] (Blue J).

²⁰² *Ibid* 486 [52] (Blue J), 515 [178]–[180] (Lovell J).

agencies or mere chance, and are ‘maintained’ of their own status without an active effort by the adult. They can be contrasted with ‘sexual relationships’, which are created by parties of substantively equal standing, capacity and agency, and actively maintained by a range of interactions including genuinely consensual sexual behaviour. This reasoning is similar to that set out by Blue J in *M, DV*: in cases where an adult has been charged with an offence against the South Australian provision, it is not the *existence* of such a relationship that is likely to be in issue, nor is it the relevant conduct giving rise to the charge; those factors do not make the maintenance of a relationship a suitable element on which jury unanimity should rest.²⁰³

B *Two Conclusions and Recommendations for Legislative Reform*

The analysis above informs two conclusions and recommendations for reform. The first is that the construction of the term ‘relationship’ in South Australia is clearly preferable to that in Queensland, both from the perspective of the proper application of orthodox principles of statutory interpretation, and from the perspective of the need to ensure the provision is not unduly restricted in its practical operation.

Second, to overcome the normative objection to the use of the term ‘relationship’ in both these legislative provisions, the legislation — including in South Australia — should be amended to remove the use of the term so that the conceptual, legal and factual focus is on the experience of unlawful sexual acts at multiple points in time. The choice of terminology is significant beyond the implications for survivors, since the concepts of ‘persistent sexual abuse’ and ‘continuous sexual abuse’ more accurately describe in factual terms persistent CSA offending. The concept of a ‘relationship’ has been justifiably denounced as an inappropriate concept in this context, and we would assert this argument applies with even greater force to the use of the concept of a ‘sexual relationship’. An interpretation of this terminological question must be informed by a proper understanding of a robust conceptual model of the nature of child sexual abuse, together with an understanding of the concepts of consent and sexual relationships.

The provisions in both Queensland and South Australia are effective in large part because they establish an actus reus separate from individual unlawful sexual acts, providing an element on which a jury may unanimously agree without the need to particularise or delineate any unlawful sexual acts. Despite the operational effect of South Australia’s construction of the term ‘relationship’ being more appropriate, the continued use of this terminology is problematic. It is the pattern of repeated or persistent behaviour that is jurisprudentially and contextually meaningful, and the existence of this pattern of repeated or persistent behaviour does not require employment of the term ‘relationship’. This, together with the unsatisfactory discrepancy between the existing legal terminology’s reliance on the concepts of ‘relationship’ and ‘sexual relationship’, and the need for the law to reflect a proper understanding of the conceptual nature of child sexual abuse, leads to the conclusion

²⁰³ Ibid 488 [62].

that it is no longer either necessary or appropriate to use either of these relational concepts in this context.

Any proposed reform should address the normative critiques of persistent CSA offences, including that these offences compromise the rights of the accused to a fair trial. The modification of particularisation and removal of extended jury unanimity regarding individual acts are justified by a robust policy rationale, to enable the imposition of criminal sanctions for sexual offending against children, and recognition that the requirement to particularise individual acts may create exceptional difficulties especially in cases where sexual offending is repeated over a prolonged period. This criticism has less force given that the modification applies only to the unlawful sexual acts, and it remains necessary to provide particulars, and for the jury to unanimously agree on, the relationship element of the offence. Additionally, the courts have noted that these provisions do not interfere with the ordinary powers and obligations of a trial judge to ensure a fair trial.²⁰⁴ Nevertheless, this criticism demonstrates that the identification of an *actus reus* separate from individual acts is necessary not only to give effect to the policy objective of the provisions but also to ensure fairness.

Reform that is both conceptually appropriate and operationally practicable can be achieved by referring in the substantive provisions to the concept of 'persistent sexual abuse', rather than 'maintaining a sexual relationship'. This would form the *actus reus* of the offence, and the element on which the jury must unanimously agree, avoiding the need to agree on the occurrence of specific acts. The core substantive provision could be expressed as: 'An adult who engages in persistent sexual abuse of a child is guilty of an offence.' The definitional provision could be expressed as: 'An adult engages in persistent sexual abuse of a child where they engage in two or more unlawful sexual acts with or towards a child over any period.' This approach would better reflect much of the substantive recommendation of the Royal Commission,²⁰⁵ and would be preferable because it also overcomes the terminological problem. The relaxed particularisation requirements, and removal of extended jury unanimity, should continue to apply regarding the unlawful sexual acts.

VII CONCLUSION

Persistent CSA laws attempt to address the difficulties of prosecuting these offences against children. The comparative doctrinal analysis provided above shows that, while Queensland and South Australia have each enacted legislation that is broadly similar in drafting and purpose, the different approaches adopted by the courts in each state lead to substantial differences in the scope and operation of the law. The developments of the law in South Australia are relevant to other states with similar

²⁰⁴ *CAZ* (n 2) 458. See also Transcript of Proceedings, *CAZ v The Queen* [2012] HCATrans 244, [321]–[323] (Crennan J), [362]–[369] (French CJ); Transcript of Proceedings, *MAW v The Queen* [2008] HCATrans 335, [96]–[100] (Kirby J).

²⁰⁵ *Criminal Justice Report: Parts III to VI* (n 17) 74.

forms of persistent CSA offences, including Queensland, and other states that seek to implement reform. Future reforms of these laws in all states and territories should take account of the need to provide an effective means of imposing criminal sanctions on persistent CSA offending, and the need to preserve fairness to the accused in the context of the reduced requirements of particularity and extended jury unanimity enacted by persistent CSA provisions, as well as the imperative to construct laws that accurately reflect the nature of the crime and do not cause further distress and harm to victims.

SPEAKING BACK: DOES COUNTERSPEECH PROVIDE ADEQUATE REDRESS FOR RACIAL VILIFICATION?

ABSTRACT

Speaking back is sometimes presented as an appropriate response by the state to hate speech. This article examines two versions of this argument. Although speaking back may be appropriate and useful in certain circumstances, by itself it does not provide adequate redress to targets of vilification. This article contends that pt IIA of the *Racial Discrimination Act 1975* (Cth) provides a form of legal protection and corrective justice that speaking back cannot provide. Unlike speaking back, these provisions operate to protect the dignity and wellbeing of members of groups targeted by racial vilification, and to authoritatively affirm that public acts of racial vilification are not acceptable in Australian society.

I INTRODUCTION

This article examines two different versions of the argument that counterspeech, or speaking back, provides an appropriate response by the state to hate speech, or vilification.¹ Scholars who oppose vilification laws commonly argue that speech is particularly valuable, and that such laws are unduly or illegitimately restrictive. Essentially, counterspeech proponents argue that ‘the remedy to be applied is more speech, not enforced silence’.² This article examines a specific but important part of the larger debate concerning the legitimacy of racial vilification laws in Australia.³

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¹ In this article, the terms ‘vilification’ and ‘hate speech’ are used interchangeably. The former is commonly used in Australia, whereas the latter is commonly used in the United States.

² *Whitney v California*, 274 US 357, 377 (Brandeis and Holmes JJ) (1927).

³ For an analysis of the relationship between free speech arguments and racial vilification laws, see Bill Swannie, ‘Are Racial Vilification Laws Supported by Free Speech Arguments?’ (2018) 44(1) *Monash University Law Review* 71 (‘Free Speech Arguments’).

This article examines counterspeech proposals in the context of Australia's national racial vilification laws, which are contained in pt IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). These provisions establish a civil cause of action enabling members of groups targeted by vilification to seek legal redress for its harms. In their drafting and interpretation, these laws protect the inherent dignity, or the basic public standing, of members of target groups. Substantively and procedurally, these laws are consistent with principles of corrective justice, or the right of a person harmed by wrongful conduct to seek legal redress in respect of that conduct.

This article argues that counterspeech arguments typically misconceive (or even ignore) the significant harms of racial vilification for those targeted by such conduct.⁴ Further, this article argues that, although counterspeech may be useful and appropriate in certain circumstances, civil racial vilification laws such as pt IIA of the *RDA* are also necessary, for two main reasons. First, they enable targets of racial vilification to seek legal redress for such conduct. Second, these laws provide public assurance, by the state, that all members of society are entitled to be treated with dignity in public discourse.

The two versions of speaking back examined in this article are those of United States constitutional scholar Corey Brettschneider and Australian political scientist Katharine Gelber.⁵ Both scholars present detailed arguments as to why speaking back is an appropriate response to vilification.⁶ Brettschneider argues that the state has a duty to condemn hate speech, in order to confirm the equal worth of all members of society. However, he argues that the state cannot restrict or punish hate speech, as this would undermine the autonomy of speakers and the legitimacy of the state.⁷ Although her more recent works accept the importance of racial vilification laws,

⁴ This article distinguishes between the effects of racial vilification on different groups of people. In particular, it distinguishes between people who are 'targeted' by such conduct, and people who merely hear or observe such conduct ('audience members'). 'Target groups' are members of the particular racial group to whom an act of vilification is directed, or whom it concerns. This group is distinct from audience members, or those who see, hear or experience the vilification, but who are not members of the target group. Part IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') focuses on the likely effect of certain conduct on members of the target group, rather than the effect on audience members, or members of the public generally: see below Part II.

⁵ See below Parts III, IV.

⁶ On the other hand, some scholars simply indicate a preference for 'more speech' or 'speaking back', without providing substantive argument or explanation: see, eg, Augusto Zimmermann and Lorraine Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14(1) *Macquarie Law Journal* 185. The authors state that racist ideas should be 'exposed and challenged', rather than 'simply trying to ban them': at 190.

⁷ Although Brettschneider's approach relies partly on United States constitutional doctrine, it relies more fundamentally on broader notions of political legitimacy in a liberal democracy. Therefore, his approach is relevant to liberal democracies such as Australia, even though Australia has no equivalent to the First Amendment and associated jurisprudence.

Gelber's earlier works argue that the importance of speech to human wellbeing imposes a duty on the state to provide resources to enable members of communities targeted by hate speech to respond.⁸ In these earlier works, she regards speaking back as preferable to hate speech laws, as she views the proper role of the state as *promoting* human wellbeing (including the capacity to speak), rather than *restricting* these capacities.

This article accepts that both Brettschneider and Gelber's counterspeech proposals may be appropriate and useful in certain circumstances. As highlighted in Parts III and IV of this article, Gelber and Brettschneider both argue that their version of counterspeech should be an *exclusive* remedy for vilification, rather than operating in conjunction with legal remedies. However, this article contends that pt IIA of the *RDA* provides a form of legal protection and redress that speaking back cannot provide. Part IIA operates to protect the dignity and wellbeing of members of groups targeted by racial vilification, and to affirm authoritatively that public acts of racial vilification are not acceptable in Australian society. Therefore, counterspeech proposals, *of themselves*, cannot be considered adequate, given the purposes of pt IIA.

II THE OPERATION OF PT IIA OF THE *RDA*

A *Introduction*

This Part examines the key features and operation of pt IIA of the *RDA*. It highlights that these laws enable individuals and groups targeted by racial vilification to seek a legal remedy for this wrong. This is consistent with principles of corrective justice, or the right of a victim of a legal wrong to seek redress in respect of that wrong. Scholars such as Jeremy Waldron argue that, in a liberal democracy, laws such as pt IIA operate to protect the human dignity, or the basic public standing, of members of target groups.⁹ Similar to defamation laws, pt IIA seeks to protect members of target groups from public statements that may exclude them from full and equal participation in society.

B *Part IIA Provides Redress for a Legal Wrong*

Part IIA of the *RDA* contains two main provisions. First, s 18C makes it unlawful to 'do an act' that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' if 'the act is done because of the race ... of the other person or ... the people in the group'.¹⁰ Second, s 18D establishes several exemptions from liability under s 18C. These exemptions

⁸ This article focuses on a specific aspect of Gelber's scholarship regarding state responses to hate speech: see below Part IV.

⁹ See generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) ch 5.

¹⁰ The provision applies only to conduct having 'profound and serious effects': *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J) ('*Creek*').

provide a defence for respondents, provided they have acted ‘reasonably and in good faith’ for certain specified purposes.¹¹ In broad terms, pt IIA defines and prohibits racial vilification.¹²

Three features of pt IIA indicate that it seeks to provide redress for legal wrongs. First, pt IIA has a two-part, tort-like, structure, very similar to the cause of action for defamation.¹³ In particular, s 18C prohibits certain types of conduct, defined in broad terms. Section 18C focuses on the likely *effect* of certain conduct on members of the target group,¹⁴ regardless of the form that the conduct takes.¹⁵ Section 18D provides certain exemptions, which operate as defences for respondents, and which seek to protect certain types of speech.¹⁶ These exemptions operate similarly to defences in defamation law, in that they provide legal immunity for respondents, and simultaneously serve a broader public purpose in protecting certain types of speech.¹⁷ The second feature is that only a person ‘aggrieved’ by an alleged breach of pt IIA can seek redress in respect of that conduct.¹⁸ A two-step process applies to resolving alleged breaches. First, a written complaint may be made to the Australian Human Rights Commission, followed usually by attempted resolution by conciliation. Second, proceedings may be commenced in the Federal Court or the Federal Circuit Court, when a complaint has been terminated.¹⁹ The forms of redress that a court may order, if proceedings are successful, include a declaration, an order requiring that the unlawful conduct cease, and an order to pay compensation.²⁰ The forms of redress available to applicants are similar to the types of redress typically provided by courts in civil proceedings.

The third feature of pt IIA indicating that it seeks to provide redress for a legal wrong is s 18E, which imposes liability on an employer for breach of s 18C by an employee, where the conduct is done ‘in connection with his or her duties as an

¹¹ For an examination of the exemptions in s 18D, see Bill Swannie, ‘The Influence of Defamation Law on the Interpretation of Australia’s Racial Vilification Laws’ (2020) 26(1) *Torts Law Journal* 34 (‘Influence of Defamation Law’).

¹² See, eg, *Toben v Jones* (2003) 129 FCR 515, 535 [84]–[87] (Allsop J) (‘*Toben*’).

¹³ In respect of which, see, eg, Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) chs 2–3.

¹⁴ See, eg, *Eatoock v Bolt* (2011) 197 FCR 261, 318 [241]–[242] (Bromberg J) (‘*Eatoock*’).

¹⁵ Part IIA potentially applies to a broad range of public conduct, and has been applied in: *Toben* (n 12) in respect of a public website; *Eatoock* (n 14) in respect of a newspaper article; and *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 in respect of a public sign at a sports stadium.

¹⁶ See, eg, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 108 [5], 122 [62], 128–9 [79]–[83] (French J) (‘*Bropho*’).

¹⁷ See generally Swannie, ‘Influence of Defamation Law’ (n 11).

¹⁸ *Australian Human Rights Commission Act 1986* (Cth) s 46P(2).

¹⁹ *Ibid* s 46PO(1). A complaint may be terminated on various grounds.

²⁰ *Ibid* s 46PO(4).

employee'.²¹ Section 18E(2) provides that an employer is not liable if it took 'all reasonable steps to prevent the employee ... from doing the act'. Imposing vicarious liability on an employer, in addition to the primary wrongdoer, assists an aggrieved person in obtaining an effective remedy.²²

Therefore, pt IIA establishes a legal wrong, and the *Australian Human Rights Commission Act 1986* (Cth) seeks to provide redress for this wrong. Significantly, a breach of pt IIA is not a criminal offence and the state is not involved in prosecuting or enforcing the provisions.²³ When pt IIA was introduced into Parliament, Attorney-General Michael Lavarch noted that it would establish a 'civil regime' by which 'the victim of alleged unlawful behaviour' could initiate a complaint and potentially obtain a remedy in relation to that behaviour.²⁴

Part IIA was enacted following the publication of three significant reports that recommended legislative protection from racially-based harassment and intimidation.²⁵ These reports were referred to when the relevant provisions²⁶ were introduced into Parliament.²⁷ In particular, the Australian Law Reform Commission's Report *Multiculturalism and the Law*,²⁸ which was referred to by the Attorney-General,²⁹ states that protection from racial vilification 'protect[s] the inherent dignity of the human person'.³⁰

²¹ *RDA* (n 4) s 18E(1)(a).

²² See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, in which the High Court held that a bicycle courier service was vicariously liable for an injury caused to a pedestrian by the negligence of its employee courier: at 46 [61] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

²³ Some scholars criticise the lack of state involvement in enforcing pt IIA, arguing that racial vilification is a 'public wrong': see, eg, Katharine Gelber and Luke McNamara, 'Private Litigation to Address a Public Wrong: A Study of Australia's Regulatory Response to "Hate Speech"' (2014) 33(3) *Civil Justice Quarterly* 307 ('Private Litigation') 312–13.

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341 (Michael Lavarch, Attorney-General) ('Second Reading Speech').

²⁵ *Royal Commission into Aboriginal Deaths in Custody* (National Report, 15 April 1991) vol 5, [213] ('*Royal Commission*'); Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 14 April 1992) [7.47] ('*Multiculturalism*'); Human Rights and Equal Opportunity Commission, *Racist Violence* (Report, 27 March 1991) 299–300.

²⁶ Racial Hatred Bill 1994 (Cth) cl 6, inserting *RDA* (n 4) pt IIA.

²⁷ Second Reading Speech (n 24) 3336–7.

²⁸ *Multiculturalism* (n 25).

²⁹ Second Reading Speech (n 24) 3336.

³⁰ *Multiculturalism* (n 25) [7.44]. In *Eatock* (n 14), Bromberg J stated that s 18C protects against 'conduct which invades or harms the dignity of the individual or group': at 325 [267].

Regarding the seriousness of the harms of racial vilification, the Human Rights and Equal Opportunity Commission's ('HREOC') Report *Racist Violence*,³¹ also referred to by the Attorney-General, emphasised that 'racial hostility'³² is not merely 'hurt feelings and injured sensibilities'.³³ Rather, such conduct has 'adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race'.³⁴ The National Report of the *Royal Commission into Aboriginal Deaths in Custody* ('*Royal Commission*') in particular highlighted that Aboriginal Australians are often subject to racial harassment.³⁵

The provisions of pt IIA focus on the effect of particular conduct on members of the target group.³⁶ In *Eatock v Bolt* ('*Eatock*'),³⁷ Bromberg J held that the words 'reasonably likely, in all the circumstances', establish an objective test. Specifically, s 18C establishes a 'reasonable victim' test, requiring courts to determine the response of a reasonable member of the target group.³⁸ However, other Australian vilification legislation focuses on the effect of particular conduct on the relevant audience, rather than on the target. For example, s 20C the *Anti-Discrimination Act 1977* (NSW) ('*ADA* (NSW)') regulates conduct that 'incite[s] hatred towards, serious contempt for, or severe ridicule of' members of a particular racial group. This provision focuses, as do equivalent provisions in other states and territories,³⁹ on the likely response of other people towards members of the target group.⁴⁰ Whereas pt IIA focuses on the effect of particular conduct on members of identifiable groups, provisions such as s 20C of the *ADA* (NSW) focus on more generalised harms to society. Indeed, incitement is a criminal law concept, and it particularly concerns conduct likely to cause public disorder or a breach of the peace.⁴¹

³¹ *Racist Violence* (n 25).

³² *Ibid* 299.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Royal Commission* (n 25) vol 4, [28.3.35].

³⁶ Members of a group can be *targeted* by vilification in two main ways. First, particular words or epithets may be directed at them, in a face-to-face encounter. Alternatively, the vilification may not be so 'direct', but may be about a racial group of which they are a member: see, eg, Richard Delgado and Jean Stefancic, 'Four Observations about Hate Speech' (2009) 44(2) *Wake Forest Law Review* 353, 361 ('Four Observations').

³⁷ *Eatock* (n 14).

³⁸ *Ibid* 318–19 [243]–[244], 320–1 [250]–[251].

³⁹ *Discrimination Act 1991* (ACT) s 67A(1)(e); *Anti-Discrimination Act 1975* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas) s 19(a); *Racial and Religious Tolerance Act 2001* (Vic) s 7.

⁴⁰ *Kazac v John Fairfax Publications Ltd* [2000] NSWADT 77, [18]; *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207, 231–2 [67] (Nettle JA), 251 [141] (Neave JA) ('*Catch the Fire Ministries*').

⁴¹ *Catch the Fire Ministries* (n 40) 211–12 [14] (Nettle JA).

C *Dignitary Harms and the Need for Legal Regulation*

As mentioned above, the provisions of pt IIA seek to protect the human dignity of members of groups targeted by racial vilification. Similarly, Waldron argues that racial vilification laws are justified, and indeed necessary, based on the dignitary interests of targets of such conduct.⁴² Waldron's arguments have particular relevance to the provisions of pt IIA, because these provisions focus on the harms of racial vilification as experienced by members of target groups.

Waldron argues that racial vilification⁴³ gives rise to *constitutive* harms to members of target groups.⁴⁴ That is, these harms are direct and immediate, rather than merely consequential (such as increasing the risk of violence or discrimination, by people who are influenced or incited by the vilification).⁴⁵ Waldron argues that racial vilification undermines the basic public standing of members of target groups. He highlights the similarity between defamation and vilification, in that both involve public disparagement.⁴⁶ Whereas defamation concerns the public standing of a particular *individual*, vilification concerns the standing of members of a particular racial group.⁴⁷

Waldron emphasises the importance of the state respecting every person's equal citizenship in a liberal democracy. In particular, he focuses on the importance of enacting racial vilification laws, to demonstrate that the state requires every member of society to respect the equal standing of members of minority racial groups. In doing so, Waldron emphasises the harm done by the publication of vilifying words and images to the sense of public assurance, or security, experienced by members of racial groups.⁴⁸ He highlights that members of minority racial groups are more likely to be subjected to vilifying conduct, and this conduct may effectively silence and exclude them from participation in education, employment and political activities.⁴⁹ Similarly, the HREOC's *Racist Violence* Report states that racial vilification laws are

⁴² See Waldron (n 9) ch 5.

⁴³ Waldron refers to 'hate speech', which includes racial vilification: *ibid* 27.

⁴⁴ *Ibid* 166–8. See also Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 500, 505 ('Mapping the Gaps').

⁴⁵ Waldron (n 9) 166–8. Gelber and McNamara argue that laws such as the *Anti-Discrimination Act 1977* (NSW) protect against consequential, rather than constitutive, harms: Gelber and McNamara, 'Mapping the Gaps' (n 44) 491, 500, 505.

⁴⁶ Waldron (n 9) ch 3. Section 18C of the *RDA* (n 4) applies only to conduct done 'otherwise than in private'. As emphasised by the Attorney-General when the provisions were introduced to Parliament, pt IIA 'does not prohibit people from expressing ideas or having beliefs, no matter how un-popular the views may be to many other people. The law has no application to private conversations': Second Reading Speech (n 24) 3337.

⁴⁷ Waldron (n 9) 41–2, 44–5.

⁴⁸ *Ibid* 45.

⁴⁹ *Ibid* 7–10, 33, 66–8.

necessary to protect members of vulnerable racial groups from being excluded from full participation in society.⁵⁰

Waldron argues that racial vilification laws are justified and necessary to provide public assurance of each person's human dignity.⁵¹ Like defamation laws, these laws restrict certain conduct that may harm others. However, in a liberal democracy based on equal citizenship, these laws seek to ensure the basic good standing of every member of society.

Although Waldron does not refer explicitly to principles of corrective justice, these principles are consistent with his arguments.⁵² His dignity-based arguments emphasise the interests and rights of members of groups targeted by racial vilification. However, he also emphasises the obligations on members of society to respect the rights of others in their public conduct.⁵³ Further, he highlights the role of the state in enacting laws that protect the dignity of members of target groups. Reciprocal rights and duties, provided by the state and enforced through proceedings commenced by individuals, are the essential aspects of corrective justice.⁵⁴

Waldron's arguments regarding the importance of legal regulation of racial vilification, based on protecting the dignity of members of target groups, provide a powerful explanation and justification for the provisions of pt IIA of the *RDA*. These provisions seek to redress the constitutive harms caused by racial vilification to members of target groups. Like defamation laws, pt IIA seeks to enable those harmed by certain expressive conduct to seek legal redress to restore their dignity, or basic standing in society.⁵⁵

However, Waldron acknowledges that racial vilification laws need to balance the importance of protecting the dignity of members of target groups, on the one hand, with protecting certain types of speech that is considered to be valuable, on the other.⁵⁶ He argues that lawmakers must balance these competing interests. This

⁵⁰ *Racist Violence* (n 25) 299–301.

⁵¹ Waldron (n 9) 82–3.

⁵² Waldron bases his defence of racial vilification laws on John Rawls' conception of a 'well-ordered society': *ibid* 66–9. This is a society in which all members owe certain duties to one another, as opposed to a libertarian society.

⁵³ *Ibid* 93–4.

⁵⁴ See, eg, Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349, 356.

⁵⁵ The similarities and differences between the law of defamation and pt IIA are examined in Swannie, 'Influence of Defamation Law' (n 11). Similarly, Robert C Post argues that defamation law seeks to protect the inherent dignity of all members of the community, amongst other interests: see Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) *California Law Review* 691, 693, 710.

⁵⁶ Waldron (n 9) 171–2.

approach stands in strong contrast to scholars such as C Edwin Baker,⁵⁷ who argue for an absolutist approach to protection of speech, which denies the state any role in regulating speech.⁵⁸

Waldron's balancing approach is consistent with the provisions of pt IIA, which provide exemptions to liability. As mentioned above, there is no liability under pt IIA if the relevant conduct is done for one of the specified purposes, and 'reasonably and in good faith'. Therefore, pt IIA provides legal protection against dignity-harming speech, but it also protects speech (in the sense of making it immune from liability) in certain circumstances.⁵⁹

The next two Parts of this article examine, in turn, Brettschneider's and Gelber's speaking back approaches. As mentioned above, both scholars argue that counter-speech provides an appropriate response by the state to hate speech, rather than enacting racial vilification laws such as those in pt IIA.

III DEMOCRATIC PERSUASION

A Introduction

Brettschneider argues that the state should protect free speech and promote equality.⁶⁰ Specifically, he argues that the state should not regulate hate speech 'coercively', as this would restrict 'public discourse', or political discussion. However, he argues that the state must 'speak back' to hate speech, as such speech can undermine the democratic values on which rights — including free speech — are based.

Brettschneider's approach — which he labels 'democratic persuasion' — is generally consistent with United States constitutional law, including the exceptionally strong protection of speech under the Supreme Court's interpretation of the First Amendment.⁶¹ However, Brettschneider also draws on political philosophy and

⁵⁷ C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70(4) *Southern California Law Review* 979. Absolutist approaches to free speech are more commonly associated with the United States than with Australia.

⁵⁸ *Ibid* 979, 1003–4.

⁵⁹ In *Bropho* (n 16), the Federal Court held that the requirement that the relevant conduct be done 'reasonably and in good faith' entails a degree of proportionality between the purpose of the relevant conduct and the harm it is likely to cause: at 128 [79] (French J), 141–2 [139]–[140] (Lee J). For an examination of this requirement, see Swannie, 'Influence of Defamation Law' (n 11) 61–3.

⁶⁰ Corey Brettschneider, *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012) ('*State Speaks*').

⁶¹ See, eg, Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) 29. Therefore, Brettschneider's work can be considered a defence of current United States doctrine regarding free speech.

particularly on the democratic importance of free speech.⁶² Therefore, his arguments regarding democratic persuasion are relevant to other liberal democracies, such as Australia.

Brettschneider argues that his approach to hate speech avoids two ‘dystopias’ that face liberal democracies. First, he seeks to avoid a ‘hateful society’, in which citizens are formally equal, but in which members of certain groups are subject to systemic exclusion and discrimination.⁶³ He argues that the state must engage in ‘democratic persuasion’ to avoid this outcome. The second dystopia is an ‘invasive state’, in which the private conduct of individuals (including their speech) is regulated by the state in an oppressive way.⁶⁴ As will be explained below, Brettschneider regards hate speech laws as being ‘invasive’ in an undemocratic way.

B *What Is Democratic Persuasion?*

As outlined above, Brettschneider’s approach has both a positive and a negative aspect. He argues that, although the state must not regulate hate speech, it must ‘speak back’ (or respond) to such conduct. The ways in which the state may respond to hate speech will be outlined below. However, it is important first to establish *why* he regards the state as duty-bound to respond to hate speech.⁶⁵

Brettschneider’s arguments have an appealing symmetry, in that the reasons for the state’s negative duties also explain why the state must speak back. His central argument is that, in a liberal democracy, the state must treat all citizens as free and equal.⁶⁶ This conception of a liberal democracy has a particular resonance in the United States, with its history of slavery and segregation, and its constitutional articulation of racial equality.⁶⁷

Brettschneider argues that the principle of free and equal citizenship is so central to liberal democracy that it imposes a positive duty on the state to respond to hate speech.⁶⁸ The state must do this in order to maintain its democratic legitimacy.⁶⁹

⁶² Brettschneider, *State Speaks* (n 60) 72–9.

⁶³ *Ibid* 10.

⁶⁴ *Ibid*.

⁶⁵ As mentioned above, this article focuses primarily on the positive duty of the state to speak back, rather than the negative duty (not to regulate speech). For an examination of the negative duty, see, eg, Swannie, ‘Free Speech Arguments’ (n 3) 75, 79, 106.

⁶⁶ Brettschneider, *State Speaks* (n 60) 81.

⁶⁷ *United States Constitution* amend XIV. Brettschneider’s arguments are based on formal, rather than substantive, conceptions of equality. Treating people as formally equal — regardless of race — may in fact reinforce unequal power structures.

⁶⁸ Brettschneider, *State Speaks* (n 60) 68.

⁶⁹ Corey Brettschneider, ‘Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies’ (2014) 79(3) *Brooklyn Law Review* 1059, 1065–6 (‘Democratic Persuasion’).

By responding, the state demonstrates that it does not condone, and is not complicit (by its silence) in such conduct. Further, by responding to hate speech, the state demonstrates its equal regard for all citizens.

Significantly, Brettschneider argues that the state's duty to respond to hate speech is owed to the *general public*, or society generally.⁷⁰ Unlike the provisions of pt IIA of the *RDA*, the state's duty to respond is not owed to individuals or members of particular racial groups targeted by vilification. It cannot, therefore, be considered a legal right to have the state respond to any particular instance of hate speech. This is because Brettschneider regards the harm of hate speech as a harm to democracy itself, in that it undermines the ideal of free and equal citizenship.⁷¹

Brettschneider's theory of democratic persuasion distinguishes strongly between the *expressive* and *coercive* functions of the state. As outlined above, he argues that the state may (and, indeed, must) use its expressive functions to promote equality.⁷² However, he argues that the state must not use its coercive powers to restrict or punish hate speech. Brettschneider regards speech (including hate speech) as an individual right.⁷³ He argues that coercive restriction of speech interferes with the *autonomy* of individuals to participate in 'public' or 'political' discourse, which undermines the democratic legitimacy of the state.⁷⁴ Although the state must remain neutral in relation to viewpoints in its coercive role, in its expressive role it may (and, indeed, must) promote the values of democracy and, in particular, free and equal citizenship.⁷⁵

Brettschneider argues that the state is able speak back to hate speech in three main ways. The first is through formal education and, in particular, through promoting awareness of the civil rights movement, and its main proponents and achievements.⁷⁶ The second is through funding civil rights groups, and other groups that promote various forms of equality, and by not funding groups that undermine the ideal of free and equal citizenship.⁷⁷ Third, the state may speak back through its officials, publicly

⁷⁰ Brettschneider, *State Speaks* (n 60) 80, 87, 105.

⁷¹ On the other hand, Waldron argues that the harms of vilification are direct and personal. He argues that vilification harms the dignity, or essential worth, of members of groups whom it targets: Waldron (n 9) 5.

⁷² Brettschneider, *State Speaks* (n 60) 85–8.

⁷³ *Ibid* 79.

⁷⁴ *Ibid* 81, 105.

⁷⁵ *Ibid* 87.

⁷⁶ *Ibid* 96–104. Brettschneider emphasises in particular the importance in the United States of the public holiday on Martin Luther King Jr Day, and public monuments commemorating civil rights leaders.

⁷⁷ *Ibid* 110–11. In this aspect, there is some overlap between Brettschneider's argument and Gelber's conception of speaking back — examined in Part IV of this article — which emphasises the role of state-supported community responses to hate speech. It may be argued that decisions by the state to fund, or not to fund, certain groups, may be 'coercive', in that the state may effectively punish groups for expressing certain views by deciding not to fund them. However, this issue is beyond the scope of this article.

condemning acts of hate speech and promoting notions of political equality and free and equal citizenship.⁷⁸

Brettschneider's third form of speaking back is the most significant for the purposes of this article, as it involves the state responding to particular incidents of hate speech. In relation to this aspect, Brettschneider makes three significant points. First, he argues that the state must not only promote equality in general terms, but must promote awareness of the *reason* for rights (that is, the principle of free and equal citizenship).⁷⁹ This is because, as outlined above, he regards promoting the ideal of free and equal citizenship as central to the legitimacy of the liberal democratic state. Promoting the *reasons* for rights also helps to explain to citizens the 'inverted' (or paradoxical) nature of rights such as free speech, which (he argues) can be exercised in a manner that seems contrary to their purpose.⁸⁰

Second, Brettschneider emphasises that democratic persuasion is not directed to hate speakers, but to the general public.⁸¹ The relevant audience is the 'population at large', as the purpose of responding is for the state to demonstrate to the public that it does not condone such conduct, and publicly to affirm the principles of free and equal citizenship.⁸² Third, democratic persuasion does not require the state publicly to condemn *all* incidents of hate speech.⁸³ Rather, the state responds only when the democratic principle of free and equal citizenship is so clearly and seriously undermined that the legitimacy of the state is thereby threatened.⁸⁴ In other words, the state merely has a 'generalized obligation to promote the ideal of free and equal citizenship'.⁸⁵

C *Evaluation of Democratic Persuasion*

Brettschneider's conception of democratic persuasion particularly emphasises the interests and perspective of speakers, listeners, and members of the public.⁸⁶ He argues that both speakers and listeners have an interest in 'free' (or unrestricted) speech.⁸⁷ In addition, as outlined above, the state owes a duty to the general public to demonstrate its respect for every person's free and equal citizenship. Thus, Brettschneider's

⁷⁸ Ibid 94.

⁷⁹ Ibid.

⁸⁰ Ibid 108.

⁸¹ Ibid 87.

⁸² Ibid. Also, pragmatically, Brettschneider acknowledges that hate speakers (such as the Ku Klux Klan) may not be dissuaded from their views by democratic persuasion, or any other type of persuasion.

⁸³ Brettschneider, 'Democratic Persuasion' (n 69) 1077.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Brettschneider, *State Speaks* (n 60) 77–8.

⁸⁷ Ibid. In particular, Brettschneider emphasises the importance of the state respecting the autonomy of both speakers and listeners.

account of free speech, and of the democratic legitimacy of the state, is based on the state respecting individual autonomy and, in particular, the ability of individuals to exercise their capacity to reason with each other.⁸⁸ Democratic legitimacy, he argues, depends on the state respecting the autonomy of speakers and listeners ‘to make any argument and to hear any argument that they wish’.⁸⁹

Notably absent from Brettschneider’s account, however, is any consideration of the perspectives and interests of members of groups targeted by hate speech. This stands in strong contrast to his emphasis on the individual rights and interests of *speakers*, including hate speakers.⁹⁰ According to his conception of democratic persuasion, the autonomy of individual speakers is harmed by legal restrictions on hate speech.⁹¹ However, Brettschneider does not seem to acknowledge that members of target groups may be harmed in similar ways by incidents of racial vilification.

Brettschneider’s conception of democratic persuasion does not sufficiently acknowledge the harms of vilification, nor does it adequately protect the interests of members of groups targeted by such conduct. First, it is unclear when the state’s duty to respond to hate speech applies. The standard set by Brettschneider — a clear threat to the principle of free and equal citizenship — appears extremely vague and very high.⁹² This standard does not appear to take into account the individual and cumulative harms of vilification for members of target groups.

Second, Brettschneider focuses almost exclusively on the relationship between citizens and the state. Therefore, he focuses on the perceived risks of regulation, including the dangers of the ‘invasive’ state. As an American constitutional scholar, it is understandable for Brettschneider to focus on the ‘vertical’ aspect of constitutional rights (being the rights of citizens *against* interference by the state).⁹³ However, he appears to ignore the ‘horizontal’ aspect of rights (rights of citizens as against each other).⁹⁴ Therefore, Brettschneider focuses on the apparent need to limit the ‘coercive’ role of the state, particularly regarding speech, rather than the role of the state in providing appropriate redress for the harms of hate speech.⁹⁵

⁸⁸ Brettschneider, ‘Democratic Persuasion’ (n 69) 1078.

⁸⁹ Brettschneider, *State Speaks* (n 60) 81. See also at 105.

⁹⁰ *Ibid* 79.

⁹¹ *Ibid*.

⁹² See, eg, Frank I Michelman, ‘Legitimacy and Autonomy: Values of the Speaking State’ (2014) 79(3) *Brooklyn Law Review* 985, 993–4.

⁹³ See, eg, Jud Mathews, *Extending Rights’ Reach: Constitutions, Private Law and Judicial Power* (Oxford University Press, 2018).

⁹⁴ *Ibid*. Mathews argues that courts in the United States focus predominantly on the vertical, rather than the horizontal, aspect of constitutional rights: at 9.

⁹⁵ However, Brettschneider acknowledges that ‘citizens in their relationships with each other could threaten values of free and equal citizenship’: Brettschneider, ‘Democratic Persuasion’ (n 69) 1089.

Third, Brettschneider assumes that all hate speech is valuable, because it is part of public discourse.⁹⁶ For example, he argues that hate speech laws prevent ‘citizens ... [from] develop[ing] and affirm[ing] their own political views’.⁹⁷ Further, he argues that such laws undermine the legitimacy of the state, as they prevent citizens from ‘dissent[ing]’,⁹⁸ and they force hate speakers to ‘come to particular conclusions about politics’.⁹⁹ In the free speech literature, discussion and debate on political issues is considered particularly valuable, as it is considered essential for democratic self-government.¹⁰⁰ Therefore, scholars argue that the state cannot legitimately regulate speech on these topics. However, speech that is ‘political’, in terms of its subject matter, occasion or context, may nonetheless be harmful in terms of the public standing of members of the target group.¹⁰¹

Brettschneider argues that it is illegitimate for the state to regulate speech in *any* circumstances. Similar to scholars such as Baker,¹⁰² Brettschneider contends that laws that exclude even one citizen’s voice from debate undermine both that individual’s autonomy and the legitimacy of the state.¹⁰³ However, as Brettschneider argues, the state must show equal respect for *all* citizens in order to be democratically legitimate. Whereas he emphasises the importance of the state respecting the autonomy of speakers and listeners,¹⁰⁴ racial vilification laws protect the autonomy of members of groups targeted by hate speech, which is equally important.

As stated above, Brettschneider opposes hate speech laws, on the grounds that they are ‘coercive’ and ‘punitive’. However, these descriptions seem to have in mind *criminal* laws. These descriptions apply less to civil laws, which seek mainly to provide redress for legal wrongs,¹⁰⁵ and are less coercive than criminal laws.¹⁰⁶

⁹⁶ Ibid 1082.

⁹⁷ Brettschneider, *State Speaks* (n 60) 72.

⁹⁸ Brettschneider, ‘Democratic Persuasion’ (n 69) 1082.

⁹⁹ Brettschneider, *State Speaks* (n 60) 78. He also argues that hate speech laws ‘punish ... [hate speakers] for their views’: at 81.

¹⁰⁰ See, eg, Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) ch 5. See especially Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers, 1st ed, 1948).

¹⁰¹ Robin West, ‘Liberty, Equality, and State Responsibilities: Review of Corey Brettschneider’s *When the State Speaks, What Should it Say?*’ (2014) 79(3) *Brooklyn Law Review* 1031, 1037.

¹⁰² Baker (n 57) 1011–12.

¹⁰³ Brettschneider, ‘Democratic Persuasion’ (n 69) 1065–6.

¹⁰⁴ Brettschneider, *State Speaks* (n 60) 78.

¹⁰⁵ Robin West (n 101) 1043.

¹⁰⁶ A finding of civil liability under pt IIA of the *RDA* (n 4), for example, may involve a certain amount of social stigma and embarrassment. However, this is less than the stigma attaching to a criminal conviction. Criminal offences, and convictions, arguably express the ‘community’s outrage at certain behaviour’: Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, University of Sydney Law School, 2002) 36–9.

Even if civil racial vilification laws are considered ‘coercive’, they may nonetheless be *justified*. This is because such laws operate to protect members of target groups from the harms of hate speech.

Brettschneider’s conception of democratic persuasion offers some form of response by the state to hate speech. However, scholars such as Robin West highlight that this response is directed towards the general public, rather than towards members of target groups.¹⁰⁷ On the one hand, it is appropriate for the state publicly, though merely verbally,¹⁰⁸ to affirm principles of equal citizenship, and to condemn hate speech. However, democratic persuasion does not provide any form of redress for those harmed by such conduct, and members of target groups may therefore legitimately regard this as hypocritical and ineffective. Further, West argues that Brettschneider’s approach merely pays lip service to the concept of free and equal citizenship, and that it effectively legitimates inequality for members of target groups.¹⁰⁹

In summary, Brettschneider’s work is valuable in that it highlights the importance of individual autonomy and democratic legitimacy in the modern state. However, Brettschneider regards the harms of hate speech as being merely a matter of abstract values. He argues that hate speech is ‘an attack on the public, democratic values of freedom and equality’.¹¹⁰ On the other hand, scholars such as Waldron and West argue that civil racial vilification laws operate to provide protection from *harm*. Therefore, in a democratic state that values equal citizenship, civil racial vilification laws play an important role. Specifically, such laws protect the basic public standing of members of target groups, and enable targets to seek redress for such conduct. This flows naturally from Brettschneider’s acknowledgement that ‘citizens in their relationships with each other could threaten values of free and equal citizenship’.¹¹¹ Therefore, Brettschneider’s argument that vilification laws are illegitimate, and that democratic persuasion is preferable to such laws, is unconvincing.¹¹²

The next Part of this article examines a different conception of speaking back, which seeks to promote individual wellbeing, rather than democratic values.

¹⁰⁷ Robin West (n 101) 1036–7.

¹⁰⁸ As outlined above, Brettschneider’s conception of ‘democratic persuasion’ also involves state funding decisions. However, such measures similarly provide no redress for targets of vilification.

¹⁰⁹ Robin West (n 101) 1037–8. Democratic persuasion may therefore be regarded as essentially a defence of current First Amendment doctrine and practice in the United States.

¹¹⁰ Brettschneider, ‘Democratic Persuasion’ (n 69) 1082.

¹¹¹ *Ibid* 1089.

¹¹² Part V of this article applies Brettschneider’s arguments to pt IIA.

IV ENHANCING HUMAN CAPABILITIES

A Introduction

Gelber presents a different articulation of speaking back to that of Brettschneider. Gelber's approach requires the state to assist and support members of target groups to speak back to hate speech. It is based on capabilities theory, a theory of social justice developed by political philosopher Martha Nussbaum from the work of economist Amartya Sen.¹¹³

This article focuses on a specific aspect of Gelber's scholarship regarding state responses to hate speech, which is set out in a monograph,¹¹⁴ and several subsequent articles and book chapters.¹¹⁵ This aspect will be referred to as her 'original' approach. Broadly, this approach argues that the state has a duty to assist members of target groups to respond to incidents of hate speech. Gelber argues that this approach is preferable to hate speech laws, which she opposes on free speech grounds.¹¹⁶ In other words, Gelber's original approach posits speaking back as the only form of redress for targets of hate speech.

In her recent work on hate speech, Gelber appears to accept the legitimacy, and indeed the importance, of legal regulation of hate speech.¹¹⁷ Nonetheless, for a range of

¹¹³ See Part IV(B) of this article.

¹¹⁴ Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (John Benjamins, 2002) ('*Free Speech Versus Hate Speech*').

¹¹⁵ Katharine Gelber, "'Speaking Back": The Likely Fate of Hate Speech Policy in the United States and Australia' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 50 ('The Likely Fate'); Katharine Gelber, 'Reconceptualizing Counterspeech in Hate Speech Policy, with a Focus on Australia' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 198 ('Reconceptualizing Counterspeech'); Katharine Gelber, 'Nussbaum's Capabilities Approach and Freedom of Speech' in Francesca Panzironi and Katharine Gelber (eds), *The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region* (Routledge, 2012) 38 ('Nussbaum's Capabilities Approach').

¹¹⁶ Gelber argues that 'it is appropriate to respond to ... [the harms of hate speech] by providing the educational, material and institutional support which would enable the victims of hate speech to speak back': Gelber, *Free Speech Versus Hate Speech* (n 114) 117. She also juxtaposes 'enhancing participation in speech' (one goal of her approach), with 'punish[ment]' and 'restrict[ion]': at 135–7. She argues that her approach, being based on capabilities theory, is 'support-oriented', rather than punitive or restrictive: at 119. Gelber refers approvingly to the notion that hate speech should be 'answered', rather than 'banned', and emphasises the importance of an 'exchange of ideas': at 10–11.

¹¹⁷ See especially Katharine Gelber, 'Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory' (2010) 9(3) *Contemporary Political Theory* 304 ('Freedom of Speech'). In this work,

reasons, it is valuable to examine her original speaking back approach. First, Gelber is one of Australia's leading scholars on free speech and hate speech laws. Second, she has never explicitly disavowed her original approach. Third, her speaking back approach has not been examined in the mainstream legal academic literature. Finally, her original approach presents a comprehensive alternative to Australia's racial vilification laws. Therefore, although this article does not accept that Gelber's original approach as *preferable* to racial vilification laws, this approach usefully highlights some key features of those laws.

B *Capabilities Theory*

Gelber's original approach — which she labels 'speaking back', or 'counterspeech' — is based on Martha Nussbaum's conception of human capabilities as fundamental entitlements.¹¹⁸ This section briefly outlines the key features of capabilities theory.

Nussbaum argues that all members of society are entitled to be provided by the state with sufficient resources to enable them to function in certain ways.¹¹⁹ Her conception of fundamental entitlements is itself based on the concept of human capabilities as developed by economist Amartya Sen. Sen argues that a society can be regarded as just only if all its members are able to exercise particular substantive freedoms.¹²⁰ He argues that justice depends on a fair distribution of economic and material resources within a given society.¹²¹

Sen regards certain freedoms as being essential to human wellbeing and development.¹²² His conception of capabilities therefore focuses on human wellbeing, rather

Gelber argues that hate speech imperils not merely individual capabilities, but also the process of democratic deliberation and public discourse. On this basis, she argues that regulation of such conduct is justified: at 306, 319–20. It is not intended as a criticism to say that Gelber's views on this topic appear to have changed. Rather, it is merely recognition of her evolving views on complex issues. Also, capabilities theory — on which her original approach is largely based — was developing rapidly at the time.

¹¹⁸ See, eg, Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2–3) *Feminist Economics* 33, 55 ('Fundamental Entitlements'). See also Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 7–8, 12, 202–3 ('*Women and Human Development*').

¹¹⁹ Nussbaum, 'Fundamental Entitlements' (n 118) 55; Nussbaum, *Women and Human Development* (n 118) 66, 98–9.

¹²⁰ Amartya Sen, *Development as Freedom* (Alfred A Knopf, 1999) ('*Development as Freedom*'). See also Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 315, 332, 335–7.

¹²¹ Sen, *Development as Freedom* (n 120) 66.

¹²² *Ibid* 86. Sen draws on liberal theories of justice regarding the importance of individual liberty: at 63–7.

than individual liberties per se.¹²³ For Sen, access to a sufficient level of resources is essential for human wellbeing.¹²⁴ Sen emphasises that members of differently situated groups may require different levels of resources to meet their basic needs. For example, people with a disability may require more, or different, levels of resources, in order to have equal access to all opportunities.¹²⁵ He defines capabilities as a person's 'freedom to achieve actual livings that one can have reason to value'.¹²⁶ Fundamentally, whether a person is free depends on whether the circumstances of the person's life provide 'real opportunities of judging the kind of life they would like to lead'.¹²⁷

Nussbaum develops Sen's economic theory into a theory of social justice involving obligations on the state. She argues that certain human capabilities are 'fundamental' (or 'basic') to human wellbeing, and that the state therefore has a duty to assist every member of society to enable them to exercise these capabilities.¹²⁸ Enabling all members of society to do or to be certain things is required by notions of human dignity.¹²⁹ The state must not merely provide formal legal rights, but must also provide 'affirmative material and institutional support' to enable every person to exercise these fundamental capabilities.¹³⁰

Nussbaum's conception of fundamental entitlements therefore imposes *positive* duties on the state. Specifically, the state must provide appropriate material, educational and institutional support to enable individuals to exercise certain fundamental capabilities.¹³¹ This positive obligation on the state — to promote the welfare of members of society — distinguishes Nussbaum's approach from negative conceptions of liberty, under which the state merely abstains from interfering with certain individual rights and interests.¹³²

¹²³ His conception of 'capabilities' is based on notions of human 'flourishing' that can be traced to Aristotle and John Stuart Mill: John Kleinig and Nicholas G Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32(5) *Law and Philosophy* 539, 540–3.

¹²⁴ Sen, *Development as Freedom* (n 120) 77.

¹²⁵ *Ibid* 67–81.

¹²⁶ *Ibid* 73 (emphasis omitted).

¹²⁷ *Ibid* 63. Sen's conception of capabilities emphasises the importance of reason and being able to make decisions regarding one's life.

¹²⁸ See Nussbaum, 'Fundamental Entitlements' (n 118) 55. See also Nussbaum, *Women and Human Development* (n 118) 202–3.

¹²⁹ Nussbaum, 'Fundamental Entitlements' (n 118) 40.

¹³⁰ *Ibid* 38.

¹³¹ *Ibid* 38, 55.

¹³² Nussbaum's capabilities approach is a theory of *substantive* freedoms, in that members of different social groups may receive different amounts and types of assistance, in order to enable them to fully participate in society.

Nussbaum provides a list of 10 ‘central human capabilities’.¹³³ These are: life; bodily health and integrity; senses, imagination and thought; emotions; practical reason; affiliation with other people and other species; play; and control over one’s political and material environment.¹³⁴ Nussbaum emphasises that each listed capability is underpinned by notions of human dignity.¹³⁵ In other words, these capabilities are what every member of society is entitled to be provided with by the state, as they are essential to ‘a life worthy of human dignity’.¹³⁶

C *Speaking Back*

Gelber’s original speaking back approach explicitly draws on Nussbaum’s work. Specifically, Gelber argues that speech has a ‘prominent and central role’ in Nussbaum’s capabilities approach,¹³⁷ particularly due to its importance in supporting human development.¹³⁸ Gelber emphasises two aspects of Nussbaum’s articulation of human capabilities that highlight how participation in speech can contribute to human development.¹³⁹ First, participation in speech can develop a person’s ability to think and reason, and therefore to exercise choice over their life.¹⁴⁰ In particular, Nussbaum emphasises the importance of being able to exercise ‘practical reason’, in order to make choices regarding one’s life.¹⁴¹ This includes ‘being able to participate effectively in political choices that govern one’s life; having the right of political participation, [and] protections of free speech and association’.¹⁴² Second, Gelber argues that speech facilitates the formation and maintenance of personal relationships.¹⁴³ This picks up on Nussbaum’s emphasis on the importance of *affiliation*, or the ability to form and maintain relationships with other people, as an important part of human wellbeing and development.¹⁴⁴

¹³³ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) (*Frontiers of Justice*). See also Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–2.

¹³⁴ Nussbaum, *Frontiers of Justice* (n 133) 76–8.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* 78. For a critique of Nussbaum’s conception of capabilities, see Susan Moller Okin, ‘Poverty, Well-Being, and Gender: What Counts, Who’s Heard?’ (2003) 31(3) *Philosophy and Public Affairs* 280.

¹³⁷ Gelber, ‘Nussbaum’s Capabilities Approach’ (n 115) 41.

¹³⁸ Gelber, *Free Speech Versus Hate Speech* (n 114) 40–7. See also John Stuart Mill, ‘On Liberty’ in Alan Ryan (ed), *Mill: Texts, Commentaries* (WW Norton, rev ed, 1997) 52. Mill presents an influential account of the importance of speech in human development.

¹³⁹ Gelber, *Free Speech Versus Hate Speech* (n 114) 42. Gelber argues that speech has a ‘constitutive’ role in the formation of individual capabilities: see Gelber, ‘Freedom of Speech’ (n 117) 306, 315.

¹⁴⁰ Gelber, *Free Speech Versus Hate Speech* (n 114) 42.

¹⁴¹ See Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–8.

¹⁴² Nussbaum, *Frontiers of Justice* (n 133) 76–7.

¹⁴³ Gelber, *Free Speech Versus Hate Speech* (n 114) 41.

¹⁴⁴ Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–8.

Gelber's original speaking back approach, like Brettschneider's approach, has both a negative and a positive aspect. Gelber argues that restricting or punishing hate speech is not supported by a capabilities-based approach. This is because the role of the state is to *promote* capabilities, rather than *limit* them.¹⁴⁵ Therefore, the state must support members of target groups to respond to such conduct, as it interferes with their fundamental entitlements by effectively silencing and marginalising them. Gelber argues that hate speech 'imperil[s] the realization of central human functional capabilities by ... disempowering, marginalizing, and silencing'.¹⁴⁶

In practical terms, Gelber's speaking back approach involves two distinct stages. First, following the reporting and verification of an act of vilification by the target group to the state, the state provides appropriate material support to members of the target group, to enable them to respond.¹⁴⁷ Second, members of the target group respond to the hate speech. Gelber argues it is crucial that members of the target group (rather than the state) respond, as the fundamental purpose of speaking back is to *empower* members of the target group, by enabling them to participate in speech.¹⁴⁸ She emphasises the importance of a *community* response, particularly in involving members of the group initially targeted.¹⁴⁹ Therefore, even if the initial vilification was targeted at particular individuals, those individuals need not be involved in speaking back.

Gelber emphasises that speaking back may take many different forms. For example, the state might provide 'assistance [to a vilified community] to draft and publish a reply in the press in response to an earlier article'.¹⁵⁰ Alternatively, the state may provide resources for 'a community awareness campaign to combat racist stereotypes'.¹⁵¹ Other possible types of assistance include the state providing

resources to generate a community awareness campaign or advertisements; the production of newsletters, pamphlets, or posters; the development of anti-racism awareness campaigns in workplaces; subsidizing community art projects; or assistance to create a media item for broadcasting and dissemination within the community where the hate speech occurred.¹⁵²

¹⁴⁵ Gelber, *Free Speech Versus Hate Speech* (n 114) 119. Like Brettschneider, Gelber focuses on the relationship between the state and the individual, rather than focusing on interpersonal rights and duties.

¹⁴⁶ Gelber, 'Reconceptualizing Counterspeech' (n 115) 213.

¹⁴⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 119.

¹⁴⁸ *Ibid.* See also Gelber, 'The Likely Fate' (n 115) 62.

¹⁴⁹ Gelber, 'Reconceptualizing Counterspeech' (n 115) 215.

¹⁵⁰ *Ibid.* 214.

¹⁵¹ Gelber, 'The Likely Fate' (n 115) 53.

¹⁵² Katharine Gelber, 'Speaking Back' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 249, 263 ('Speaking Back').

As these examples suggest, speaking back need not be done immediately, nor in the same circumstances as the initial hate speech.¹⁵³ Rather, the response will usually come later, and will be general in nature. Importantly, however, the response should ‘appeal to the same community to which the hate speakers appealed’.¹⁵⁴ Therefore, the audience should be as similar as possible to that of the initial vilification, as the response seeks to contradict the message in that vilification.¹⁵⁵ Also, the hate speaker need not be — indeed, should not be — identified or responded to specifically.¹⁵⁶ Therefore, Gelber’s speaking back approach focuses on the relevant *audience*, rather than the source of the vilification.

Gelber argues that her speaking back approach effectively counteracts the silencing and disempowering effects of vilification on its targets, by enabling them to contradict the message in the hate speech.¹⁵⁷ By supporting members of the target group to respond publicly to the same audience as that of the hate speech, members of the group are able to correct (in the minds of the audience) the false and harmful claims made in the vilification.¹⁵⁸

D *Evaluation of Gelber’s Speaking Back Approach*

Gelber’s speaking back approach offers the *possibility* of empowering targets of hate speech. Certainly, her approach is more likely to do so than approaches that merely recommend or encourage targets to speak back without any assistance. For example, Baker argued that targets of hate speech have a *choice* as to how they respond to such incidents.¹⁵⁹ Further, he argued that targets may respond ‘as a victim ... [or] as a critic of the speaker’, and that ‘the possibility always exists for a hearer to use the available information in creating or maintaining an affirmative identity’.¹⁶⁰

¹⁵³ Ibid 261.

¹⁵⁴ Gelber, *Free Speech Versus Hate Speech* (n 114) 123.

¹⁵⁵ Ibid 114, 123.

¹⁵⁶ Ibid 89, 123. As outlined above, Gelber argues that a punitive or restrictive approach to vilification is not supported by capabilities theory. Similarly, Brettschneider emphasises that, when the state speaks back to hate speech, it must not insult or demonise hate speakers, as this would be coercive rather than persuasive: Brettschneider, *State Speaks* (n 60) 89.

¹⁵⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 89, 123.

¹⁵⁸ Ibid.

¹⁵⁹ Baker (n 57) 992.

¹⁶⁰ Ibid. Similarly, Wojciech Sadurski states that victims of racial vilification ‘may easily “turn on ... [their] heels and leave the provocation behind”’: Wojciech Sadurski, ‘Offending with Impunity: Racial Vilification and Freedom of Speech’ (1992) 14(2) *Sydney Law Review* 163, 195, quoting Joel Feinberg, *The Moral Limits of Criminal Law* (Oxford University Press, 1988) vol 2, 91.

Similarly, Judith Butler argues that targets can exercise their ‘agency’ by ‘resignifying’ words used against them.¹⁶¹ For example, she contends that targets can appropriate abusive language and terms previously considered racist or derogatory. In particular, Butler argues that members of target groups can use parody and music as powerful tools to neutralise derogatory language and descriptions.¹⁶² Gelber distinguishes her speaking back approach from Butler’s, which does not involve the state providing any material or financial support or assistance to targets of hate speech.¹⁶³ Her approach, Gelber emphasises, *requires* the state to provide such assistance and support.

Gelber therefore seeks to address one of the main obstacles preventing targets from being able to speak back — lack of resources, and the consequent lack of access to a public platform. As Gelber highlights, those who recommend speaking back often assume that all people have access to the resources needed to respond to incidents of hate speech.¹⁶⁴ On the other hand, Gelber’s approach takes this lack of resources into account, and requires the state to provide such resources. Providing these resources enables targets to present an alternative viewpoint, which may ‘counter the message contained in the original speaker’s utterance’.¹⁶⁵

As mentioned above, Gelber’s counterspeech approach seeks to empower members of target groups by providing support and assistance, enabling them to respond to incidents of racial vilification. This approach may empower members of target groups, in certain circumstances, by enabling them to make a public response to racist messages. For example, it may be effective when a particular speaker, who is a member of the target group, already has some standing in the wider community.¹⁶⁶

¹⁶¹ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 15, 41. See also Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press, 2018).

¹⁶² Butler (n 161). Butler particularly emphasises the use of parody and rap music by people of colour in the United States to highlight issues of racial injustice.

¹⁶³ Gelber, *Free Speech Versus Hate Speech* (n 114) 131.

¹⁶⁴ Gelber, ‘Speaking Back’ (n 152) 254, 258. The assumption of a level playing field in terms of people’s capacity publicly to express their views is a central tenet of many conceptions of free speech: see, eg, Barendt (n 100).

¹⁶⁵ Gelber, ‘Speaking Back’ (n 152) 256.

¹⁶⁶ For example, in 1993, Australian Football League player Nicky Winmar famously responded to racial abuse by spectators during a match by lifting his jumper and pointing to his skin, indicating his pride in his Aboriginality: see, eg, Matthew Klugman and Gary Osmond, *Black and Proud: The Story of an Iconic AFL Photo* (NewSouth, 2013). Brettschneider refers repeatedly to the influence on the public of speeches made by prominent figures in the American civil rights movement and, in particular, Dr Martin Luther King Jr: Brettschneider, *State Speaks* (n 60) 95. Maxime Lepoutre emphasises that the effectiveness of counterspeech depends largely on the personal characteristics, reputation and credibility of the particular speaker: see Maxime Lepoutre, ‘Hate Speech in Public Discourse: A Pessimistic Defense of Counterspeech’ (2017) 43(4) *Social Theory and Practice* 851, 862, 864–5.

However, in many circumstances, Gelber's counterspeech approach is unlikely to be appropriate.¹⁶⁷ This includes situations where the vilification is repeated, and where the vilifier is a powerful public figure, such as a media presenter.¹⁶⁸ In these circumstances, speaking back by members of the target community may not change the views of audience members. This is because the initial act of vilification may effectively discredit members of the target groups, meaning that their words and views are not taken seriously by members of the public thereafter.¹⁶⁹

Further, when the vilifier is a repeat offender, it is not appropriate to expect targeted communities to respond repeatedly.¹⁷⁰ The burden on target communities of responding to repeated vilification cannot be considered reasonable. As mentioned above, such communities often also experience other forms of disadvantage, such as economic and political vulnerability. Rather, it is the responsibility of the state to conduct public education programs, and to fund anti-racism campaigns and groups.¹⁷¹

Members of target groups who respond publicly to hate speech may legitimately fear that doing so will expose them to further, more intensified, hate speech, or even violence.¹⁷² This is particularly so when the hate speech involves threats, abuse or racial epithets made directly to a person or to specific members of a particular racial group.¹⁷³ Although Gelber acknowledges such instances of hate speech,¹⁷⁴ her

¹⁶⁷ Questions regarding the *effectiveness* of speaking back (or of racial vilification laws) often blur into questions regarding their *appropriateness*: see, eg, Gelber, 'Speaking Back' (n 152). Effectiveness is ultimately an empirical question, which is beyond the scope of this article. Rather, this article focuses on the issue of *appropriateness* (which includes issues of effectiveness).

¹⁶⁸ Several reported Australian racial vilification decisions involved Aboriginal complainants and newspaper respondents: see, eg, *Eatock* (n 14); *Bropho* (n 16); *Creek* (n 10); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 (Barker J).

¹⁶⁹ Gelber and McNamara, 'Private Litigation' (n 23) 333.

¹⁷⁰ *Ibid.* For example, Gelber and McNamara refer to prominent radio presenter Alan Jones: at 329–33.

¹⁷¹ See, eg, 'Racism. It Stops with Me', *Australian Human Rights Commission* (Web Page, 2020) <<https://itstopswithme.humanrights.gov.au/>>.

¹⁷² See, eg, Caroline West, 'Words That Silence?: Freedom of Expression and Racist Hate Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 222, 234–5. See also Laura Beth Nielsen, 'Power in Public: Reactions, Responses, and Resistance to Offensive Public Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 148, 156–60.

¹⁷³ See, eg, Delgado and Stefancic, 'Four Observations' (n 36) which refers to two main types of vilification — 'direct' (or face-to-face), and 'indirect': at 361.

¹⁷⁴ Gelber, *Free Speech Versus Hate Speech* (n 114) 13.

focus is on less direct forms of hate speech, such as newspaper articles.¹⁷⁵ In any case, Gelber's approach seeks to avoid the issue of physical danger to targets of hate speech in two ways. First, she argues that speaking back 'need not be immediate [or be done] in the same circumstances as the [original] hate speech'.¹⁷⁶ She conceives of speaking back as being temporally and (perhaps) geographically removed from the original incident. However, as mentioned above, speaking back is directed to the same audience as the original hate speech. Second, even if the hate speech is directed at a particular person, that person need not speak back.¹⁷⁷ Rather, with state support, a response from members of the particular racial group targeted by the hate speech is generated.

Although Gelber's approach addresses two obvious concerns regarding targets speaking back, another three concerns remain. First, although Gelber argues that members of target groups are *empowered* by responding to hate speech, members of such groups may in fact regard this as extremely burdensome and unfair.¹⁷⁸ Even though the state provides material resources to members of target groups, responding takes time and energy that they may well prefer to direct to other activities. Such individuals may already experience certain forms of disadvantage, such as low income and low levels of education.¹⁷⁹ Further, members of groups targeted by vilification may legitimately regard such conduct as a moral (if not legal) wrong against them, to which the state (rather than they) should respond.¹⁸⁰

Second, scholars argue that hate speech has the effect of reducing the credibility of members of the target group,¹⁸¹ as is contended by Gelber and Luke McNamara.¹⁸² Racially derogatory words (or images) may cause those who hear them not to believe

¹⁷⁵ Ibid ch 4. Some scholars argue that face-to-face encounters are not the proper subject of legal regulation. See, eg, Waldron (n 9) who argues that hate speech laws should be limited to 'permanent' or 'enduring' instances, rather than isolated forms such as verbal utterances: at 116–18. Brettschneider also brackets direct threats and intimidation in his discussion of hate speech: Brettschneider, *State Speaks* (n 60) 76.

¹⁷⁶ Gelber, 'Speaking Back' (n 152) 261.

¹⁷⁷ Ibid. Individual targets may be too traumatised and fearful to respond, even at a later time. They may also experience shame, embarrassment and humiliation: Nielsen (n 172) 161–2.

¹⁷⁸ Gelber, 'Speaking Back' (n 152) 258. Gelber's work does not address many important practical issues such as who applies for funding or who from the target community organises a response.

¹⁷⁹ On the other hand, speaking back is optional, and any member of the target group may respond. Therefore, the burden of responding may be shared.

¹⁸⁰ See below Part V.

¹⁸¹ See, eg, Caroline West (n 172) 245. See also Catharine A Mackinnon, *Only Words* (Harvard University Press, 1993) 64.

¹⁸² Gelber and McNamara, *Private Litigation* (n 23) 333–4.

members of particular racial groups, or not to take them seriously.¹⁸³ This is part of the ‘silencing’ effect of hate speech.¹⁸⁴ Gelber argues that hate speech renders marginal the voices and views of members of the target groups in public discourse, by treating them as inherently subordinate or inferior.¹⁸⁵

Gelber emphasises the importance of the state providing resources to enable target groups publicly to present an alternative viewpoint. However, the silencing effects of vilification may prevent this message from being taken seriously by audience members. The effectiveness of this approach therefore depends on a range of factors, including the nature of the hate speech, and the relevant audience.¹⁸⁶

Therefore, the mere provision of resources by the state may not, by itself, restore the credibility or authority of members of target groups. This is because of the powerful and enduring effects of hate speech, and the often significant power imbalance between vilifiers and members of target groups. Gelber argues that racial vilification is often used by ‘powerful racially defined groups [to] circumscribe less powerful racially defined groups to limit the way they are able to participate in society’.¹⁸⁷ She emphasises the power disparity between members of particular groups, arguing that racial vilification often involves a ‘systemic power asymmetry between the speaker and the hearer’.¹⁸⁸ For example, scholars note that some popular radio and television presenters have repeatedly vilified Aboriginal Australians and other minority racial groups.¹⁸⁹

Finally, Gelber implicitly frames hate speech as merely a disagreement, or a difference of opinion. For example, she states that the purpose of speaking back is to present an alternative viewpoint. However, hate speech in the form of racial abuse or insults contains no rational argument, and effectively, therefore, no alternative viewpoint can actually be presented.¹⁹⁰ Scholars such as Laura Beth Nielsen argue

¹⁸³ Caroline West (n 170) 239–43. Cartoons that mock or ridicule members of certain racial groups, such as Aboriginal Australians, could readily be pointed to as an example. But see *Bropho* (n 16) in which the Federal Court held that a racially-based cartoon did not to infringe pt IIA of the *RDA* (n 4), as it was done ‘reasonably and in good faith’ under s 18D.

¹⁸⁴ Gelber, ‘Speaking Back’ (n 152) 257.

¹⁸⁵ *Ibid.* Therefore, vilification has *political* implications, as it may prevent members of target groups from participating, or being heard, in public discourse or debate on political topics. Effectively, it may exclude members of target groups from influencing public debate. On this basis, it may be regulated: Gelber, ‘Freedom of Speech’ (n 117) 320.

¹⁸⁶ For example, an audience with entrenched racist views is unlikely to be persuaded by even the most eloquent response to vilification.

¹⁸⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 73.

¹⁸⁸ *Ibid.* 87. Support from the state may go some way to ameliorating this power disparity.

¹⁸⁹ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23) 318–31.

¹⁹⁰ Caroline West (n 172) 235–6.

that there can be no reasoned response to a verbal epithet.¹⁹¹ Similarly, Waldron notes that there is no scientific basis for claims or assertions of racial inferiority, or superiority.¹⁹² Therefore, there is no logical basis for speaking back to such claims, in order to continue a ‘debate’, or to seek to disprove the truth of such claims.¹⁹³ In response, Gelber argues that even threats and insults can be responded to on a general level.¹⁹⁴

Overall, speaking back by members of target groups can present an alternative viewpoint to, or challenge the message in, certain hate speech. However, for several reasons, including the silencing effect of hate speech, responding in this way may not be effective in all circumstances, and therefore may not empower members of such groups. Indeed, as mentioned above, Gelber’s recent work supports the legitimacy of racial vilification laws.¹⁹⁵ In particular, her recent work emphasises that hate speech imperils not merely individual capabilities, but also the process of democratic deliberation and public discourse.¹⁹⁶ Gelber’s recent work highlights the strong connection between the personal impacts of hate speech on members of target groups, and its political impacts (such as that it effectively excludes members of target groups from participating in, and influencing, public debates, including debates concerning their rights and status).¹⁹⁷ Given the seriousness of these harms, Gelber’s recent work regarding Australia’s racial vilification laws does not refer to her original speaking back approach.¹⁹⁸ She therefore appears, implicitly, to accept that such laws are justified and necessary.

The next Part of this article will compare the operation of pt IIA of the *RDA* with the two speaking back approaches examined in this article.

¹⁹¹ Nielsen (n 172) 157 n 9, 164.

¹⁹² Waldron (n 9) 195.

¹⁹³ Swannie, ‘Free Speech Arguments’ (n 3) 107–10. However, speaking back may change public attitudes, at least over time.

¹⁹⁴ For example, Gelber suggests that speaking back could be an appropriate response where an Aboriginal Australian woman is racially vilified by two strangers at a service station: Gelber, *Free Speech Versus Hate Speech* (n 114) 22, 69. Further, in response to a wooden cross being burnt at night in the front yard of a home of people of colour in the United States, she argues that ‘[t]he production and local distribution of a newsletter, or the holding of neighbourhood community meetings to seek to counter the racist content of the attack may have been warranted.’: at 132.

¹⁹⁵ Gelber, ‘Freedom of Speech’ (n 117) 320.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23).

V COUNTERSPEECH ALONE IS NOT SUFFICIENT REDRESS

A Introduction

This article has so far examined Brettschneider's conception of democratic persuasion, which requires the state to respond to hate speech, and Gelber's (original) speaking back approach, which requires the state to support members of target groups to respond to hate speech.¹⁹⁹ This article accepts that these approaches may be appropriate and effective for certain purposes and in certain circumstances. However, this Part argues that neither of these approaches, taken by themselves, provides sufficient redress to targets of racial vilification. Specifically, these approaches do not provide the types of protection and redress provided by pt IIA of the *RDA*.

It is important to note that both Brettschneider's and Gelber's approaches regard counterspeech as an *exclusive* remedy for hate speech. Brettschneider is explicit in this regard, as he considers hate speech laws democratically illegitimate.²⁰⁰ Gelber's opposition to hate speech laws is implicit by comparison, but is nonetheless apparent. For example, her work juxtaposes 'maximising participation in ... speech' (a major goal of her approach), with 'punishment' and 'restriction'.²⁰¹ She argues that her approach, being based on capabilities theory, is 'support-oriented', rather than punitive or restrictive.²⁰² Her work refers approvingly to the notion that hate speech should be 'answered', rather than 'banned', and emphasises the importance of an 'exchange of ideas'.²⁰³

B The Purposes of Racial Vilification Laws

Civil racial vilification laws, such as pt IIA of the *RDA*, serve two broad purposes. First, they provide redress to members of target groups who are harmed by vilification. Second, they set standards of behaviour that all members of society must comply with. This section examines these two purposes in more detail.

As outlined above, pt IIA makes certain conduct unlawful, and a person aggrieved by such conduct may seek redress. In other words, racial vilification is recognised as a legal wrong against members of target groups. Further, targets have a legal right, provided by the state, to protection from vilification. This provides a form of corrective justice to members of target groups.²⁰⁴ This is not to say that current

¹⁹⁹ A third approach, briefly outlined above, is Gelber's current approach, which, although not positing speaking back as an exclusive remedy for hate speech, regards it as operating in conjunction with racial vilification laws.

²⁰⁰ See, eg, Brettschneider, *State Speaks* (n 60) 105–7.

²⁰¹ Gelber, *Free Speech Versus Hate Speech* (n 114) 117, 130–1.

²⁰² *Ibid* 119.

²⁰³ *Ibid* 10–11.

²⁰⁴ See, eg, Weinrib (n 54) for an influential account of corrective justice.

processes for seeking redress for an alleged breach of pt IIA are without flaws, or that members of target groups always receive adequate redress.²⁰⁵

However, even scholars who criticise these laws highlight that they enable members of target groups to seek redress for racial vilification.²⁰⁶ This enables members of such groups to vindicate their public standing and dignity, through a process provided by law. For example, in *Eatoock*, Bromberg J ordered the respondent to publish a correction notice in the newspaper where the offending articles were initially published.²⁰⁷ This ‘expressive’ remedy provided appropriate vindication of the claimant’s rights.²⁰⁸

The second purpose of racial vilification laws is to establish minimum standards of behaviour applying to all members of society. Indeed, the National Report of the *Royal Commission* emphasised that legislation proscribing racial vilification can have a powerful educative role, particularly in relation to changing attitudes and defining socially acceptable behaviour.²⁰⁹

As highlighted above, Brettschneider emphasises the importance of the *expressive* role of the state in responding to racial vilification.²¹⁰ However, he appears to limit this expressive role to the executive and judicial branches of the state.²¹¹ In contrast, critical race scholars such as Richard Delgado and Jean Stefancic argue that the state expresses its values primarily through laws that it enacts, and through court decisions that interpret and apply legislation.²¹² By enacting and enforcing laws, the state defines and reinforces acceptable standards of behaviour. Particularly in relation to addressing public racially-based behaviour, laws play a significant role. For example, laws prohibiting racial discrimination and segregation are regarded as significant advancements towards equal rights, or free and equal citizenship. Therefore, civil racial vilification laws are both expressive and coercive. Further, Brettschneider’s

²⁰⁵ Gelber and McNamara highlight that most racial vilification complaints are resolved privately in conciliation, rather than publicly in court. They regard this as inappropriate, given the ‘public’ nature of the wrong. They also highlight practical difficulties in accessing and succeeding in legal proceedings, and the risk of adverse costs orders if unsuccessful: Gelber and McNamara, ‘Private Litigation’ (n 23) 333–4; Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 495–6, 509–11.

²⁰⁶ See, eg, Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 508.

²⁰⁷ *Eatoock* (n 14) 366 [468]; *Eatoock v Bolt [No 2]* (2011) 284 ALR 114, 117–19 [13]–[23] (Bromberg J).

²⁰⁸ See, eg, Adrienne Stone, ‘The Ironic Aftermath of *Eatoock v Bolt*’ (2015) 38(3) *Melbourne University Law Review* 926, 938–40. The decision in *Eatoock* (n 14) is examined further in the following section.

²⁰⁹ *Royal Commission* (n 25) vol 4, [28.3.1].

²¹⁰ Brettschneider, *State Speaks* (n 60) 95.

²¹¹ *Ibid.*

²¹² See, eg, Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Routledge, 2004). See also Charles R Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’ [1990] (3) *Duke Law Journal* 431.

argument that the state expresses its values primarily through public statements, public education programs, and funding decisions is questionable. Rather, laws such as pt IIA express the standards of conduct required of all members of society. Empirical research by Gelber and McNamara confirms that members of groups subject to public vilification use racial vilification laws to seek public vindication (through a court or tribunal hearing and determination) for the wrong committed against them.²¹³

Brettschneider argues that the state should verbally condemn racial vilification, but should not pass laws to restrict or regulate such conduct. However, Robin West argues convincingly that states that condemn racial vilification, without regulating it, are hypocritical, and complicit in such conduct.²¹⁴ Further, responding in the way advocated by Brettschneider suggests that the state — despite its public statements — does not take the harms of racial vilification seriously.²¹⁵ Enacting civil racial vilification laws enables members of communities targeted by such conduct to seek justice.²¹⁶

C Part IIA Is Proportionate and Justified

As mentioned above, both Gelber and Brettschneider oppose hate speech laws. For different reasons, they favour an absolute prohibition on regulating speech. Part IIA of the *RDA*, on the other hand, seeks to provide protection from the harms of vilification, while also permitting discourse on a range of topics. In other words, pt IIA restricts speech in a proportionate and justified way.

The structure of pt IIA requires courts to consider, first, whether the particular conduct is likely to be harmful, as defined in s 18C, and second, whether it was justified in terms of s 18D. The second issue involves consideration of the subject matter of the relevant conduct, and also whether it was done proportionately, or reasonably. Section 18D exempts certain types of conduct from liability, including statements or publications made ‘in the public interest’.²¹⁷ Such statements are at the core of political arguments for free speech.²¹⁸

The way in which courts balance the competing considerations of protecting targets from harm and allowing discourse on public interest topics is illustrated by the decision

²¹³ Gelber and McNamara, ‘Private Litigation’ (n 23) 333. In *Creek* (n 10), Kiefel J noted the importance of court orders that would vindicate the applicant (an Aboriginal woman) ‘in the eyes of her own community’: at 360 [34].

²¹⁴ Robin West (n 101) 1037–8.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *RDA* (n 4) ss 18D(b)–(c).

²¹⁸ See, eg, *Barendt* (n 100) 160. For example, certain defences to defamation, such as fair comment, depend on the publication being made on a matter of public interest. Broadly, public interest refers to any matter that is or may be of concern to the general public: at 159–60.

in *Eatock*. In this case, the respondents (a prominent media commentator and a widely-circulated newspaper) published statements alleging that certain ‘fair-skinned Aboriginals’ sought and received certain tax-payer funded benefits.²¹⁹ They argued that this was an honest opinion, or a fair report, on the political issue of who should be entitled to government payments and other benefits. Justice Bromberg accepted that the issue of who is entitled to certain taxpayer funded payments was, broadly speaking, one of public interest.²²⁰ However, his Honour held that the exemptions in s 18D did not apply, as the statements were not published ‘reasonably and in good faith’,²²¹ because statements in the publication concerning particular individuals were inaccurate, and sarcastic and inflammatory in their tone and language.²²²

Justice Bromberg held that pt IIA does not prohibit the discussion of a person’s racial identification, or even the genuineness of that identification.²²³ However, the respondent’s conduct could not be justified under the s 18D exemptions in this case due to the lack of care and prudence exercised in publishing the articles.²²⁴ Therefore, the respondents were found liable due to the careless and harmful manner in which the statements were published, rather than due to the particular ideas or viewpoint expressed.

Similarly, defamation law imposes civil liability on individuals for public statements that lower a person’s standing in the community. Even statements involving matters of government or politics may incur liability. When those statements refer to particular individuals, and they are made either maliciously or without reasonable care, they may be subject to civil liability.²²⁵ Wojciech Sadurski argues that racial vilification concerns statements *about groups* (as distinct from statements about individuals) and that such statements are by definition ‘speech on public matters’.²²⁶ Further, and by reference to the case of *Beauharnais v Illinois*,²²⁷ he contends that racial vilification is a ‘contribution to public debate about racial relations’.²²⁸ However, as the *Eatock* case illustrates, pt IIA applies to statements about individuals, as well as groups.

Significantly, pt IIA does not ban or prohibit the expression of certain political views. Rather, s 18D requires courts to consider the subject matter of the publication (and particularly whether it is ‘of public interest’),²²⁹ and also the nature and

²¹⁹ *Eatock* (n 14) 270 [3], 276 [32], 280 [49] (Bromberg J).

²²⁰ *Ibid* 344 [361], 359 [431].

²²¹ *Ibid* 358 [425], 362 [447].

²²² *Ibid* 358 [425].

²²³ *Ibid* 364–5 [461].

²²⁴ *Ibid* 358 [425], 362 [447]–[449].

²²⁵ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 576 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²⁶ Sadurski (n 160) 179.

²²⁷ 343 US 250 (1952).

²²⁸ Sadurski (n 160) 191.

²²⁹ *RDA* (n 4) s 18D(c)(i).

circumstances of the publication. Whether the publication concerned a matter of public interest is an important consideration. This is appropriate, however, as public discussion of issues concerning race are an important part of public discourse or political discussion and debate in a modern multicultural democracy.²³⁰

Part IIA does not prevent discussion of issues concerning race, such as ‘the attributes of [people of] different races, immigration and asylum policy, or the desirability of integrated or segregated employment and housing policies’.²³¹ However, pt IIA specifically seeks to protect members of particular racial groups from the dignitary harms of racial vilification. Courts take into account the particular circumstances of the vilification, such as the type and extent of the likely harm, and the degree of care taken by the respondent to minimise this harm.²³²

Deterrence of certain conduct is primarily the role of the criminal law.²³³ However, civil laws may also influence public behaviour, by establishing norms of behaviour.²³⁴ Although pt IIA of the *RDA* primarily seeks to vindicate the public standing of members of groups targeted by racial vilification, it may also operate to *deter* such conduct.

Scholars such as Gelber and McNamara highlight the seriousness of the harms of racial vilification.²³⁵ They argue that these harms are primarily *constitutive* in nature, including the impairment a person’s sense of security, and their ability to participate fully in society.²³⁶ Similarly, Waldron argues that racial vilification seriously undermines the dignity of members of target groups,²³⁷ and Gelber describes hate speech as a ‘discursive act of discrimination’.²³⁸ Therefore, given the seriousness of these harms, *deterrence* of such conduct is an important goal, rather than merely responding after the event.

²³⁰ Jürgen Habermas argues that public discourse, or discussion leading to the formation of public opinion, should be unrestricted in democratic societies. Like Brettschneider, Habermas argues that this is essential for the democratic legitimacy of the state: see generally Jürgen Habermas, *Theory of Communicative Action*, tr Thomas McCarthy (Beacon Press, 1984) vol 1.

²³¹ Barendt (n 100) 172.

²³² In *Bropho* (n 16) the Court held that the requirement in s 18D that the relevant conduct be done ‘reasonably and in good faith’ involves consideration of proportionality, or whether the relevant conduct was done with reasonable care, having regard to its purpose and its likely harm: at 128 [79] (French J), 141–2 [139]–[140] (Lee J). See also Swannie, ‘Influence of Defamation Law’ (n 11) 61–3.

²³³ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23) 312–13, 316.

²³⁴ Cane (n 13) 38.

²³⁵ Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 500–7.

²³⁶ *Ibid* 505–7.

²³⁷ See above Part II(C).

²³⁸ Gelber, *Free Speech Versus Hate Speech* (n 114) 9.

Breach of pt IIA operates to impose civil liability on respondents, which (we may infer) deters people from engaging in hate speech. On the other hand, counterspeech by the state involves no real consequences for vilifiers,²³⁹ and therefore is unlikely to deter racial vilification. Speaking back therefore fails members of groups targeted by racial vilification in two ways. First, it fails to confer rights on members of target groups to seek redress in respect of particular incidents of vilification. Second, it fails to prevent or deter such conduct in the future. Racial vilification laws such as pt IIA confer rights and impose duties. Like defamation laws, pt IIA deters harmful conduct by attaching civil liability to it. The provisions impose certain duties on all members of society in respect of their public conduct. Specifically, pt IIA prohibits offensive racially-based behaviour that damages the basic public standing, or dignity, of members of the target group.

Political philosopher Maxime Lepoutre favours counterspeech on the grounds that hate speech laws are likely to have two unintended consequences. First, they may fail to capture subtle or sophisticated hate speech, and therefore they permit speech that is harmful but lawful.²⁴⁰ Second, such laws may be used to silence members of minority groups.²⁴¹ Lepoutre argues that state counterspeech is ‘flexible’, and therefore it avoids the first concern,²⁴² and is less restrictive, so it avoids the second concern.²⁴³

These concerns have no real application to pt IIA of the *RDA*. As mentioned above, the operation of pt IIA depends on the *effect* of certain conduct on members of the target group. The relevant conduct must be ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’²⁴⁴ a reasonable member of target group.²⁴⁵ Part IIA therefore is capable of applying to subtle or sophisticated racial vilification. This is illustrated in *Eatoock*, where the impugned newspaper articles were found to infringe pt IIA partly on the basis that they invoked harmful racial stereotypes regarding Aboriginal Australians.²⁴⁶

There is no evidence, either, that pt IIA has been used to silence members of minority groups. This may be due to pt IIA being a civil provision, rather than involving

²³⁹ Brettschneider argues that the state should avoid ‘demonizing’ individuals, when it publicly condemns hate speech. For this reason, he argues that the state should focus on the ideas or message presented, rather than the vilifier: Brettschneider, *State Speaks* (n 60) 89. See also Lepoutre (n 166), who argues that vilifiers may be ‘disaffected citizens’, who are merely expressing that disaffection: at 860–1.

²⁴⁰ Lepoutre (n 166) 870–1.

²⁴¹ *Ibid* 875.

²⁴² *Ibid* 870–1.

²⁴³ *Ibid* 877.

²⁴⁴ *RDA* (n 4) s 18C(1)(a).

²⁴⁵ *Eatoock* (n 14) 318–19 [243]–[244], 320–1 [250]–[251].

²⁴⁶ *Ibid* 330 [294], [297]–[298]. Justice Bromberg also relied on other reasons, such as the factual inaccuracies in the articles, and the sarcastic tone: see above Part V(C).

criminal sanctions. Also, courts must consider ‘all the circumstances’ when applying the provisions.²⁴⁷ Therefore, it is unlikely that a claim brought by a member of a majority racial group against a member of minority group would meet this threshold. Finally, claims that do not involve ‘profound and serious effects, not to be likened to mere slights’ will not infringe pt IIA.²⁴⁸ This threshold is more likely to be met by conduct which targets members of a disadvantaged or minority racial group.

In summary, the provisions of pt IIA enable members of groups targeted by racial vilification to seek legal redress in respect of that wrong. These laws also establish a standard of conduct, applying to all members of society, regarding racial abuse. Therefore, these laws offer forms of protection and redress not provided by counterspeech proposals. Finally, they are unlikely to have the unintended consequences presented by scholars such as Lepoutre.

VI CONCLUSION

This article has examined Brettschneider and Gelber’s different speaking back approaches to racial vilification. Both scholars argue that racial vilification laws are objectionable on free speech grounds, and that speaking back is a preferable response. Gelber’s account involves the state supporting members of target groups to speak back to vilification. She argues that this empowers such communities, and that it publicly challenges racist ideas. Brettschneider, on the other hand, argues that the state itself should publicly respond to racial vilification in certain circumstances. He argues that this promotes the ideal of free and equal citizenship, on which the political legitimacy of the state ultimately rests.

Both approaches have serious limitations. Gelber’s approach places considerable burdens on members of target groups, in terms of responding to incidents of racial vilification. It also fails to acknowledge that vilification may effectively discredit members of target groups in the eyes of the general public. Therefore, Brettschneider’s conception of democratic persuasion by the state may hold more promise. Unlike members of target groups, the state has authority to speak on behalf of all members of society.

This article examined these arguments in the context of the provisions of pt IIA of the RDA, which are civil laws enabling individuals and members of groups targeted by racial vilification to seek legal redress for this wrong. These laws recognise the serious harms of racial vilification, particularly regarding its impacts on the public standing, or dignity, of members of target groups. In terms of procedure and substance, they provide a form of corrective justice to such groups, by recognising racial vilification as a legal wrong, and enabling targets to seek redress from a particular wrongdoer. In their drafting and interpretation, these laws emphasise the

²⁴⁷ *RDA* (n 4) s 18C(1)(a).

²⁴⁸ *Eatock* (n 14) 325 [268], quoting *Creek* (n 10) 356 [16] (Kiefel J).

importance of redressing the harms experienced by individuals and groups targeted by acts of racial vilification.

In light of the provisions of pt IIA, counterspeech proposals do not provide adequate redress to targets of racial vilification. Clearly, the state has a role in speaking back (or responding) to incidents of racial vilification, apart from enacting racial vilification laws. The state does this, for example, through education programs, and by funding anti-racism campaigns and groups. However, these initiatives, although important, do not provide legal redress for members of target groups, as pt IIA does. Laws such as those in pt IIA — which *prohibit* racial vilification, thereby vindicating the public standing of members of target groups, as well as deterring such conduct in the future — are necessary to protect the dignity of individuals and groups targeted by racial vilification, and to enforce standards of acceptable behaviour for all members of society.

*Ying Khai Liew**

THE 'JOINT ENDEAVOUR CONSTRUCTIVE TRUST' DOCTRINE IN AUSTRALIA: DECONSTRUCTING UNCONSCIONABILITY

ABSTRACT

The 'joint endeavour constructive trust' doctrine, propounded for the first time by the High Court in *Muschinski v Dodds*, is firmly part of modern Australian law. Yet, its precise requirements and remedial approach are poorly understood and inconsistently applied. The primary contributing factor is the prevailing understanding that unconscionability must be established for the doctrine to apply, and that the remedial approach aims to avoid unconscionability. But unconscionability has not been precisely explained, which has led to the erroneous view that the joint endeavour constructive trust doctrine is discretion-based instead of rule-based. This article argues, first, that unconscionability, either per se or as implying the need for wrongdoing, is not a prerequisite for the application of the doctrine, and that the doctrine is triggered by ascertainable and predetermined real world events. Second, this article argues that the remedial aim of avoiding unconscionability finds expression in a structured remedial approach: courts do not exercise open-ended remedial discretion. This deconstruction allows us to appreciate that the rationale of the doctrine lies in its autonomy-enhancing function, and also allows us to resolve prevailing uncertainties concerning the interplay between the joint endeavour constructive trust doctrine and the common intention constructive trust doctrine.

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I INTRODUCTION

It is well known that a novel constructive trust doctrine was enunciated for first time in *Muschinski v Dodds* (*‘Muschinski’*).¹ The following comments of Deane J (*‘Key Statement’*) formed the basis of this doctrine:²

[T]he principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party [C] on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party [D] in circumstances in which it was not specifically intended or specially provided that that other party [D] should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.³

Barely two years later, this doctrine was approved and applied by the High Court in *Baumgartner v Baumgartner* (*‘Baumgartner’*),⁴ cementing its place in Australian law.

The doctrine expounded by Deane J — which may be termed the ‘joint endeavour constructive trust’ (*‘JECT’*) doctrine — has now been in existence for more than three and a half decades. Yet, its precise requirements and remedial approach are poorly understood and inconsistently applied. The primary factor contributing to this state of affairs is the prevailing understanding of the doctrine in terms of ‘unconscionability’. Unconscionability is a protean word, which does not yield a universally accepted core meaning.⁵ To date, no satisfactory attempt has been made to explain what, precisely, unconscionability entails in the context of the JECT doctrine. Instead, there seems to be a general assumption that unconscionability simply indicates that the doctrine is wholly or primarily discretion-based instead of rule-based,⁶ and that,

¹ (1985) 160 CLR 583 (*‘Muschinski’*). ‘History has shown that the most significant judgment in *Muschinski v Dodds* is that given by Deane J’: *Spink v Flourentzou* [2019] NSWSC 256, [235] (Robb J) (*‘Spink’*).

² For the purposes of the ensuing discussion of the doctrine, the two parties his Honour referred to are designated herein as ‘C’ and ‘D’.

³ *Muschinski* (n 1) 620 (citations omitted).

⁴ (1987) 164 CLR 137, 148 (Mason CJ, Wilson and Deane JJ, Toohey J agreeing at 151–2, Gaudron J agreeing at 155) (*‘Baumgartner’*).

⁵ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392 (Lord Nicholls) (*‘Tan’*).

⁶ See, eg, GE Dal Pont, ‘The High Court’s Constructive Trust Tricentenary: Its Legacy from 1985–2015’ (2015) 36(2) *Adelaide Law Review* 459, 467–8; Barbara McDonald, ‘Constructive Trusts’ in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 721, 790 [2146]; Lisa Sarmas, ‘Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns’ (2012) 36(1) *Melbourne University Law Review* 216, 219–20; *Carson v Wood* (1994) 34 NSWLR 9, 17–18 (Clarke JA, Kirby P agreeing at 10) (*‘Carson’*), discussed in Pamela O’Connor,

therefore, it is a ‘remedial constructive trust’, a concept which is not recognised in England.⁷

It may be that this uncertainty has not received close examination due to the common perception that, today, the doctrine is of diminished relevance. After all, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) now allows courts to exercise remedial discretion to adjust property rights at the dissolution of de facto relationships. But a cursory survey of reported cases reveals that the JECT doctrine was pleaded in at least 26 cases in 2019 alone.⁸ It is amply clear that the doctrine continues to be practically relevant in modern judicial practice, for example where disputes arise in the context of bankruptcy, or between parties who are not in a marital or de facto relationship. Therefore, the need for a proper understanding of the topic cannot be overstated.

The main aim of this article is to deconstruct the notion of unconscionability in the context of the JECT doctrine. Part II of this article critiques the idea that unconscionability is necessary for the doctrine to apply. The point is made that the operation of the doctrine is triggered by ascertainable and predetermined real world events and not by any vaguely defined standards. Part III explains that the JECT aims to prevent unconscionability. It suggests that the law achieves this through a structured remedial approach, as opposed to the exercise of open-ended remedial discretion. Part IV reflects on the implications of this analysis on the rationale of the JECT doctrine and on the relationship between the JECT doctrine and the common intention constructive trust (‘CICT’) doctrine.⁹

‘Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust’ (1996) 20(3) *Melbourne University Law Review* 735, 744; John Mee, ‘Trusts of the Family Home: Social Change, Judicial Innovation and Legislative Reform’ (2016) 56 *Irish Jurist* 161, 176–7.

⁷ See especially Ying Khai Liew, ‘Reanalysing Institutional and Remedial Constructive Trusts’ (2016) 75(3) *Cambridge Law Journal* 528, 540, 544, 546, 548.

⁸ *Massalski v Riley* [2019] FamCA 1013; *Zorostar Pty Ltd v Arian Investments Pty Ltd* [2019] WASC 415; *Clementi v Rossi* [2019] VSC 725 (‘*Clementi*’); *Shepard v Behman* [2019] FCA 1801; *Weatherley v Weatherley* [2019] VCAT 1393 (‘*Weatherley*’); *Wu v Yu* [2019] QCA 175; *Lamers v Lamers [No 4]* [2019] VSC 510; *Hughes v Sangster* [2019] ACTSC 178 (‘*Hughes*’); *Combis v Brent* (2019) 17 ABC(NS) 53; *Nguyen v Minister for Home Affairs* [2019] FCA 1095; *Staatz v Berry [No 3]* (2019) 138 ACSR 231 (‘*Staatz [No 3]*’); *Nguyen v Corbett [No 4]* [2019] NSWSC 712 (‘*Corbett [No 4]*’); *DKL v LYK* [2019] SASC 100 (‘*DKL*’); *Lu v Wong* [2019] WASC 169; *Diransson Pty Ltd v El Dirani* [2019] NSWSC 617; *Burton v Prior* [2019] NSWSC 518 (‘*Burton*’); *E Co v Q [No 4]* [2019] NSWSC 429; *Grech v Richardson* [2019] VCAT 363; *Spink* (n 1); *Nguyen v Nguyen* [2019] NSWSC 131; *Stewart v Owen* [2019] VCAT 140; *Karan v Nicholas* [2019] VSC 35; *Ingles v Ingles* [2019] FamCA 33; *Currie v Currie [No 2]* [2019] WASCA 2; *Maisano v Maisano* [2019] VCC 787; *Yotchev v Georgievski* [2019] SADC 61.

⁹ A constructive trust arises when the precise requirements of the doctrine are fulfilled, namely, that there was an express or inferred common intention between the parties concerning their respective beneficial interests in the property, and reliance on that intention by C to their detriment: see *Allen v Snyder* [1977] 2 NSWLR 685, 690 (Glass JA, Samuels JA agreeing at 697) (‘*Allen*’); see below Part IV(B).

II REQUIREMENTS

There are two ways in which the requirements of the JECT doctrine have been understood. The first is that unconscionability is the ultimate overarching requirement. On this understanding, the situations in which the JECT doctrine typically arises are specific manifestations of the wider, more flexible notion of unconscionability. The second understanding is that the doctrine is engaged by a closed list of real world events, the occurrence of which is necessary and sufficient to trigger the application of the doctrine. These competing views are addressed in turn.

A Unconscionability as the Overarching Requirement?

The thinking underlying the approach that unconscionability acts as the overarching requirement can be traced back to *Muschinski*. In a passage addressing the fundamental nature of constructive trusts, Deane J said that they are based on ‘the traditional equitable notion of unconscionable conduct’.¹⁰ Later, his Honour drew on rules concerning the dissolution of partnerships, the collapse of joint ventures and the common law action for money had and received,¹¹ observing that there exists a general principle whereby a person is prevented ‘from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct’.¹² It was in the course of further refining that principle that the Key Statement was made, which included the remark that ‘[t]he content of the [JECT] principle is that ... equity will not permit ... [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do’.¹³

Given that the JECT doctrine was the specific product of Deane J’s analytical progression from a more general notion of unconscionability, there is a strong temptation to focus on the latter at the expense of the former. A significant early example is found in *Bryson v Bryant*,¹⁴ where, without close examination of any specific requirements, Kirby P applied ‘the “new” principle of constructive trusts stated by the High Court of Australia in *Muschinski* and *Baumgartner*’¹⁵ by assessing in an instinctive way whether it was ‘unconscionable’ for D to disregard C’s wishes.¹⁶ A more recent example is *Lloyd v Tedesco*,¹⁷ in which Murray J cited the cases of *Muschinski* and *Baumgartner* as representing examples of remedial constructive trusts which ‘may be imposed ... in any case where circumstances and the conduct of the parties are

¹⁰ *Muschinski* (n 1) 616.

¹¹ *Ibid* 619.

¹² *Ibid* 620.

¹³ *Ibid*.

¹⁴ (1992) 29 NSWLR 188 (‘*Bryson*’).

¹⁵ *Ibid* 200.

¹⁶ *Ibid* 204–5.

¹⁷ (2002) 25 WAR 360 (‘*Lloyd*’).

such as to make it unconscionable not to impose the trust'.¹⁸ His Honour explained away Deane J's Key Statement as simply a 'statement ... made having regard to the particular circumstances of the case'.¹⁹

Examples can also be found in the literature. For instance, David Hayton has written that *Baumgartner* shows that 'there is a general doctrine of remedying unconscionable conduct that justifies the imposition of a constructive trust'.²⁰ Paul Finn has also cited *Baumgartner* as an example where 'direct legal effect [was given] to a finding that a person has acted unconscionably', and that, 'of itself, unconscionable conduct can found a cause of action'.²¹ These examples take unconscionability to be the ultimate criterion, and imply that there are no more concrete requirements, the circumstances in which the JECT doctrine typically arises merely being specific examples of the wider notion of unconscionability in action.

It is clear that this understanding does not reflect the current state of the law. As will be discussed below, the majority of cases operate on the basis that the applicability of the JECT doctrine turns precisely on whether certain specific requirements have been fulfilled. As Kunc J observed in *Burton v Prior*,²² '[a]n affirmative conclusion' that the requirements of the JECT doctrine have been fulfilled itself 'establishes the unconscionability which attracts the intervention of equity by the imposition of a constructive trust'.²³ Thus, the doctrine is 'delimited by an abstraction of the material facts in [*Muschinski* and *Baumgartner*]',²⁴ and the relevant cases do not 'allow interference in property rights in too uncertain terms' because 'the factors activating liability are relatively narrow and are specifically stated [by the High Court] in these cases'.²⁵

Normatively, the inherent uncertainty affecting the notion of unconscionability also suggests that it ought not to be taken to be the ultimate criterion. This point can be made from two perspectives. First, when applied 'in its own uncompromising terms',²⁶ unconscionability is incapable of providing a reason for equity's

¹⁸ Ibid 363 [6] (Murray J, Hasluck J agreeing at 372 [47]).

¹⁹ Ibid 363 [8]. See also *Stewart v Owen* (2020) 60 VR 341, 358 [63] (Forbes J) ('*Stewart*').

²⁰ David Hayton, 'Remedial Constructive Trusts of Homes: An Overseas View' [1988] (July–August) *Conveyancer and Property Lawyer* 259, 259.

²¹ Paul Finn, 'Unconscionable Conduct' (1994) 8(1) *Journal of Contract Law* 37, 39.

²² *Burton* (n 8).

²³ Ibid [268].

²⁴ O'Connor (n 6) 745.

²⁵ Joachim Dietrich, 'Giving Content to General Concepts' (2005) 29(1) *Melbourne University Law Review* 218, 226.

²⁶ Michael Bryan, 'Constructive Trusts and Unconscionability in Australia: On the Endless Road to Unattainable Perfection' (1994) 8(3) *Trust Law International* 74, 74 ('Unconscionability in Australia').

intervention: it is too imprecise to serve as a touchstone of liability.²⁷ This point is further developed below.²⁸

The second perspective is that directly applying unconscionability unjustifiably collapses distinct doctrines into one another. Take for example the English doctrine exemplified in *Rochefoucauld v Boustead* (*‘Rochefoucauld’*)²⁹ and *Bannister v Bannister*,³⁰ which provides that, if C transfers land to D in reliance on D’s informal promise to hold the land on trust for C, a constructive trust arises from the moment D acquires the land in C’s favour.³¹ At an uncomfortably high level of generality, it might be possible, as the Full Court of the Family Court in *Duarte v Morse*³² did, to group this doctrine together with the JECT doctrine under the umbrella principle that ‘[c]onstructive trusts are imposed when it would be unconscionable to allow the legal owner to enjoy the corresponding beneficial ownership of the property’.³³ But such a view distorts a proper analysis by overlooking crucial and fundamental distinctions. To cite but one, the *Rochefoucauld* doctrine arises in response to an informal agreement,³⁴ whereas the JECT doctrine arises ‘regardless of actual or presumed agreement or intention’.³⁵

Conflating the two doctrines is liable to mislead. Consider the case of *Carson v Wood*,³⁶ where the plaintiff parties (‘C’) and the defendant parties (‘D’) were equal shareholders of a company, X Co. As part of a business reorganisation, the parties entered into a written agreement whereby C would transfer their shares in X Co to D, while D would transfer trademarks held by X Co to a new company (‘Y Co’), and the parties would own Y Co equally. C carried out their part of the agreement but D reneged. The New South Wales Court of Appeal declared that X Co held its shares on constructive trust in equal shares for the parties. According to the majority, the reason was that it was ‘inequitable and unconscionable’ for X Co to assert ‘that ... [D] was the sole beneficial owner of the trade marks and that ... [C] had no interest

²⁷ See above n 5 and accompanying text. See also Charles Rickett, ‘Unconscionability and Commercial Law’ (2005) 24(1) *University of Queensland Law Journal* 73.

²⁸ See below Part II(B)(4).

²⁹ [1897] 1 Ch 196 (*‘Rochefoucauld’*).

³⁰ [1948] 2 All ER 133 (*‘Bannister’*).

³¹ The doctrine is well recognised in Australia: see, eg, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 656 (Brennan J); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 53 ATR 527, 602 [329] (Barrett J); *Ciaglia v Ciaglia* (2010) 269 ALR 175.

³² (2019) 59 Fam LR 323.

³³ Ibid 404 [536] (Strickland, Aldridge and Austin JJ). A similar analysis of *Rochefoucauld* (n 29) and *Bannister* (n 30) is found in McDonald (n 6): at 778 [2139].

³⁴ This is why the content of the constructive trust tracks the content of D’s promise: see Ying Khai Liew, *Rationalising Constructive Trusts* (Hart, 2017) 48.

³⁵ *Baumgartner* (n 4) 148 (Mason CJ, Wilson and Deane JJ).

³⁶ *Carson* (n 6).

in them'.³⁷ This reasoning is suspect. X Co — the legal entity (as opposed to D as a shareholder) — was not party to the agreement between C and D, and it was surely within its right to take the shareholders as it found them: it had no obligation to act otherwise. How, then, had it acted unconscionably? The root of the problem is a lack of recognition that the doctrine in *Rochefoucauld*, as distinct from the JECT doctrine, provides the proper analysis: C transferred their shares in X Co to D in reliance on D's promise to share the interests in the trademarks with C (via equal shareholding in Y Co); therefore, upon acquisition of C's shares in X Co, and pending transfer of the trademarks to Y Co, D held those transferred shares on constructive trust for C according to D's promise.

B *Real World Events*

Most modern cases take the applicability of the JECT doctrine to depend on the fulfilment of certain real world events. In general terms, it is accepted that those events are that: (1) the parties have contributed towards, or have pooled resources for the purposes of, a joint endeavour; (2) the joint endeavour has failed or terminated; and (3) this has occurred without any attributable blame.³⁸ On this understanding, it is these precise events which lead to the *conclusion* that it is unconscionable for D to retain the benefit of C's contribution; unconscionability is not itself a requirement for the doctrine to apply. But there is also an outstanding question as to whether a fourth ingredient, (4) wrongdoing in the form of an 'unconscionable retention' of the property, is also necessary.

Each of these elements requires close examination, in order to ascertain what precisely it is that attracts equity's intervention.

1 *Joint Endeavour*

First, what amounts to a joint endeavour? In *Muschinski*, Deane J spoke of a joint endeavour in coterminous terms as a 'joint relationship',³⁹ while contrasting it with a 'true partnership or contractual joint venture between the parties'.⁴⁰ The contrast with partnerships and joint ventures is easily understandable, as the JECT doctrine does not require the relevant parties to be in any association with a view to making a profit.⁴¹

³⁷ Ibid 17 (Clarke JA).

³⁸ *Muschinski* (n 1) 620.

³⁹ Ibid.

⁴⁰ Ibid 618.

⁴¹ See, eg, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 15 (Dawson J). Cf the statement in *Lloyd* (n 18) that a 'commercial venture' is necessary for the JECT doctrine to apply: at 379 [86] (Pullin J).

But courts have refused to apply the JECT doctrine simply on the basis that the parties were in a close personal relationship involving cohabitation,⁴² and instead C is required to go further ‘to identify with some precision, the nature, purpose and scope of ... [C’s] alleged joint endeavour with [D]’.⁴³ This might appear surprising if the expressions ‘joint endeavour’ and ‘joint relationship’ are given their ordinary meaning, since cohabitants — particularly those in a longstanding relationship — might be thought obviously to fall within its scope. Moreover, such an approach causes uncertainty, as it does not state what precisely it is that C must establish; the subject matter remains ambivalent.

It is submitted that ‘joint endeavour’ has a technical legal meaning, one which has little to do with a close relationship per se. A joint endeavour, in the relevant sense, exists where both parties have made contributions which are linked directly or indirectly to the acquisition, maintenance, or improvement of the property the subject of the dispute; and the parties intend for the benefit of the contributions to be for their mutual enjoyment.⁴⁴ Those contributions must not have been simply put towards maintaining the parties’ personal relationship,⁴⁵ such as the provision of ‘love, care and support’.⁴⁶

When determining whether there is a joint endeavour, it has occasionally been suggested that courts look to the parties’ bilateral intentions. In particular, some cases insist that a ‘common intention to pool’ assets or resources is necessary.⁴⁷ The genesis of the phrase ‘pooling’ is undoubtedly *Baumgartner*, in which the term was

⁴² *Willis v Western Australia [No 3]* (2010) 4 ASTLR 359, 376 [72] (Buss JA, McClure P agreeing at 362 [1], Owen JA agreeing at 362 [3]) (*Willis [No 3]*), cited in *Trajkoski v Western Australia* [2017] WASC 273, [30] (Le Miere J) (*Trajkoski*); *DKL* (n 8) [279] (Doyle J).

⁴³ *Willis [No 3]* (n 42) 376 [72] (Buss JA).

⁴⁴ See, eg, *Miller v Sutherland* (1990) 14 Fam LR 416, 424 (Cohen J) (*Miller*); *Bryson* (n 14) 231 (Samuels AJA); *Lloyd* (n 18) 365 [16] (Murray J); *Willis [No 3]* (n 42) 376 [72] (Buss JA); *DKL* (n 8) [279]–[280] (Doyle J); *Leane v Dalbon* [2020] VSC 461, [79] (Derham AsJ) (*Leane*). Some cases seem to set the bar higher, requiring, for example, a direct financial contribution or evidence of a gift: see, eg, *Balnaves v Balnaves* (1988) 12 Fam LR 488, 495 (Nicholson CJ, Fogarty and McCall JJ). Others require a contribution which increases the value of the property in question: see, eg, *Hill v Hill* [2005] NSWSC 863, [41] (Campbell J) (*Hill*). These statements, it is suggested, are inaccurate outliers.

⁴⁵ See, eg, *Cressy v Johnson [No 3]* [2009] VSC 52, [195] (Kaye J); *Hill v Love* (2018) 53 VR 459, 482 [127] (Sifris J); *DKL* (n 8) [279] (Doyle J); *Weatherley* (n 8) [72] (Member Marks).

⁴⁶ *Lloyd* (n 18) 368 [30] (Murray J).

⁴⁷ *Fathers v Cook* [2006] WASC 129, [117], [158] (Simmonds J). See *Lloyd* (n 18) 379 [86] (Pullin J). See also at 368 [27] (Murray J), quoted in *Lamers v Western Australia* (2009) 192 A Crim R 471, 476 [33] (Templeman J). This requirement has been discussed in the literature: Mark Pawlowski and Nicola Grout, ‘Common Intention and Unconscionability: A Comparative Study of English and Australian Constructive Trusts’ (2012) 2(3) *Family Law Review* 164, 176.

employed as a description of the facts of the case.⁴⁸ However, one would be mistaken to think that such an intention is a prerequisite: as other cases have explicitly held, ‘it is not necessary that there should be a physical pooling’,⁴⁹ and it is not the case that ‘a “pooling of earnings” is indispensable to relief’.⁵⁰ Moreover, the JECT doctrine has been applied in cases where no common intention was found, for example, where D told C that C would have no interest in the property,⁵¹ or where C was found to have understood that they would not obtain an interest in the property.⁵² This is consistent with the fact, as discussed above, that the JECT doctrine does not respond to any agreement between the parties. Instead, courts look to the *unilateral* intention of the contributor, and ask whether their contribution was intended to ‘enhance the material wellbeing of both parties, or to provide the contributing party with an interest in specific property, or ... [whether] it is made upon the basis that that party would have an interest in such property’.⁵³ A pooling of resources is good evidence in favour of inferring an intention to contribute to the joint endeavour, but ‘[i]t is not ... the only circumstance from which such an intention may be inferred’.⁵⁴

2 Termination

According to the Key Statement, it is necessary for the substratum of the joint endeavour to have been removed: a termination of the joint endeavour must have occurred.

What counts as a termination in the relevant sense? In a long line of cases,⁵⁵ the JECT doctrine was held to be applicable where the termination was due to the bankruptcy of one of the parties. The cases are less clear as to whether the death of one party suffices.⁵⁶

⁴⁸ *Baumgartner* (n 4) 148–50 (Mason CJ, Wilson and Deane JJ).

⁴⁹ *Hibberson v George* (1989) 12 Fam LR 725, 742 (McHugh JA, Hope JA agreeing at 726) (*Hibberson*).

⁵⁰ *Turner v Dunne* [1996] QCA 272, 18 (McPherson JA) (*Turner*).

⁵¹ See *Hibberson* (n 49).

⁵² *Lipman v Lipman* (1989) 13 Fam LR 1, 20 (Powell J). Cf Simon Gardner, ‘Rethinking Family Property’ (1993) 109 (April) *Law Quarterly Review* 263, 277: ‘[T]he doctrine requires ... that ... [the contribution] was seen by the parties as a contribution to a joint venture involving the acquisition of the property’.

⁵³ *Lloyd* (n 18) 365 [16] (Murray J). See also *Hibberson* (n 49) 742 (McHugh JA); *Turner* (n 50) 18 (McPherson JA).

⁵⁴ *Noordennen v Rofe* [2006] VSCA 253, [32] (Buchanan JA, Callaway JA agreeing at [1], Ashley JA agreeing at [39]) (*Noordennen*).

⁵⁵ See, eg, *Re Sabri* (1996) 137 FLR 165 (*Sabri*); *Miller* (n 44); *Lo Pilato v Stankovic* [2012] FMCA 736 (*Lo Pilato*); *Trustees of the Property of Batavia (Bankrupt) v Batavia* [2018] FamCA 860 (*Batavia*); *Clout v Markwell* (2001) 1 ABC(NS) 177 (*Clout*); *Parianos v Melluish* (2003) 1 ABC(NS) 333 (*Parianos*).

⁵⁶ The result in *Bryson* (n 14) suggests not. Justice Nettle in *Read v Nicholls* [2004] VSC 66, in which one party had died, appeared to suggest that that was sufficient to engage the JECT doctrine. See at [44]: ‘[T]his case falls to be decided in accordance with the general equitable principles of unconscionable conduct essayed in *Muschinski* ... and *Baumgartner*’.

It is submitted that a termination requires a change of circumstances which prevents the mutual enjoyment of the property — one which is substantial enough that it can be concluded that those circumstances were not foreseeable by C when they made their relevant contribution. This analysis is consistent with what the cases say: there needs to be ‘a *premature* termination’;⁵⁷ the new circumstances must ‘not [have been] contemplated by the parties’;⁵⁸ and those circumstances must be ‘outside the contemplation or intentions of the parties at the time of entry into the joint endeavour’.⁵⁹ Thus, there is no closed list of circumstances which constitute a termination in the relevant sense: this is a question of fact. For example, D’s bankruptcy may not be regarded as a relevant termination if, when C makes the relevant contribution, C foresees that D, who is in severe financial difficulty, may soon become bankrupt. Conversely, where D dies of a sudden and unexpected cause, it is likely that a termination will have occurred.⁶⁰

3 *No Attributable Blame*

According to the Key Statement, the joint endeavour must have terminated ‘without attributable blame’. Justice Bryson in *Bennett v Horgan*⁶¹ gave the classic exposition of this requirement:

[I]t does not call for a judgment attributing blame among members of a family for the continuing relationship becoming intolerable, unless perhaps in particularly gross cases. ... Leaving gross cases involving criminality or similarly reprehensible behaviour on one side, it should usually be understood ... that where personal relationships deteriorate and the sharing of a dwelling becomes intolerable to some or all of those concerned, there is, within the meaning of Deane J’s expressions, no attributable blame and the case is one for an equitable adjustment.⁶²

Although the point is well taken that judges should not apportion blameworthiness in familial relationships, the suggestion that criminal or similar behaviour would itself bar relief is apt to cause uncertainty. In the first place, it is surely not the case that the blameworthy conduct of *any* party will count: the rule is better understood as preventing *the party claiming an interest* — C — from doing so where C’s blameworthy conduct secured the termination of the joint endeavour. Moreover, the

⁵⁷ *West v Mead* (2003) 13 BPR 24,431, 24,445 [64] (Campbell J) (emphasis in original) (*‘West’*).

⁵⁸ *Henderson v Miles [No 2]* (2005) 12 BPR 23,579, 23,581 [23] (Young CJ in Eq) (*‘Henderson [No 2]’*).

⁵⁹ *Cetojevic v Cetojevic* [2007] NSWCA 33, [34] (Hodgson JA, Tobias JA agreeing at [58], McColl JA agreeing at [65]) (*‘Cetojevic’*).

⁶⁰ See generally *Cetojevic* (n 59), although the Court also looked at other relevant circumstances in that case.

⁶¹ (Supreme Court of New South Wales, Bryson J, 3 June 1994).

⁶² *Ibid* 11, quoted in *Kriezis v Kriezis* [2004] NSWSC 167, [23] (Burchett AJ); *Hill* (n 44) [35]; *McKay v McKay* [2008] NSWSC 177, [16] (Brereton J) (*‘McKay’*); *Nowland v Nowland* [2020] QSC 151, [194] (Ryan J).

requirement of criminality fails to make a relevant distinction between securing the termination of *the joint endeavour* — that is, acting in such a way that the parties can no longer mutually enjoy the property — and securing the termination of *the personal relationship* between the parties (no matter how reprehensible or criminal that may be).

It is submitted that the better test is that C will be disqualified from obtaining relief if they intentionally hijack the joint endeavour *with the intention of profiting from it*. This test ensures that, consistent with certain other constructive trust doctrines,⁶³ people may not profit from their wrongdoing, regardless of whether the wrongful conduct may be inherently criminal. After all, it is not the inherent nature of the conduct, but the context in which it arises, with which the JECT doctrine ought to be concerned.

4 *Unconscionability as Wrongdoing?*

Is it a requirement for D to have acted unconscionably, in the sense of having acted wrongfully in *asserting* or *retaining* their interest in the property to the exclusion of C?

According to the Key Statement, the JECT doctrine *prevents* D from ‘assert[ing] or retain[ing] the benefit of the relevant property to the extent that it would be unconscionable for him so to do’.⁶⁴ This understanding does not require D to have committed wrongdoing: it implies that D does not — and is unable to — commit a wrong as a result of equity’s intervention. After all, that which a legal rule precludes cannot logically be a precondition, or a reason, for the legal rule to apply. A number of cases reflect this understanding. In particular, in *Clout v Markwell*⁶⁵ and *Jeffrey-Potts v Garel*,⁶⁶ the court rejected counsel’s argument that the JECT doctrine ought not to apply because D was not shown to have engaged in any wrongful conduct, holding that it is sufficient to show that D’s actions ‘*would be unconscionable*’.⁶⁷

However, in *Muschinski*, Deane J also went on to say the following about the defendant in that case: ‘It is the assertion by Mr Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterization of his conduct as unconscionable.’⁶⁸

⁶³ For example, those imposed over property obtained by unlawful killing: see Harold Ford et al, Thomson Reuters, *Ford and Lee: The Law of Trusts* (online at 17 June 2021) [22A.620]. Another doctrine is that in respect of those constructive trusts imposed over bribes and secret commissions obtained by errant fiduciaries: see, eg, *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 360 [256] (Finn, Stone and Perram JJ).

⁶⁴ *Muschinski* (n 1) 620.

⁶⁵ *Clout* (n 55).

⁶⁶ [2012] VSC 237 (*‘Jeffrey-Potts’*).

⁶⁷ *Ibid* [290] (J Forrest J) (emphasis added). See also *Clout* (n 55) 184 [20] (Atkinson J).

⁶⁸ *Muschinski* (n 1) 622.

This line of thinking was seized upon by the High Court in *Baumgartner*,⁶⁹ and by Sir Anthony Mason extra-curially,⁷⁰ as authority for the proposition that it is D’s wrongful assertion or retention of a full interest which attracts equity’s intervention. This thinking has also been adopted in many later cases, which say, for example, that: ‘proof of unconscionable conduct’⁷¹ is required; D must have ‘refused recognition of ... [C’s] interest’;⁷² or ‘[i]t is the *assertion* of legal right to the exclusion of or at the expense of the other’s interest that calls for protection’.⁷³ In the context of limitation periods, it has also been suggested that a JECT action ‘cannot accrue before ... the retention of the contributions of ... [C] by ... [D] in circumstances where it would be unconscionable for ... [D] to do so’.⁷⁴

It is undoubtedly true that, in many of the cases, D acts in a manner which can be described as ‘wrongful’ or ‘unconscionable’, and in such cases it is unsurprising that judges seize the occasion to denounce those acts.⁷⁵ But the essential question is whether such wrongful conduct is a prerequisite to a JECT claim. As James Edelman has written, ‘the key to identifying a given cause of action as a wrong is proof that remedial consequences flow from its characterisation as a breach of duty’.⁷⁶ Thus, the litmus test is to ask whether a successful plaintiff [C]’s action is capable of arising prior to any wrongful conduct by D. On the basis of this test, it seems beyond doubt that D’s wrongful conduct is not a prerequisite. As discussed below,⁷⁷ there is a consistent line of cases holding that, where the joint endeavour terminates due to D’s bankruptcy, the constructive trust arising under the doctrine prevails over D’s trustee in bankruptcy. The only way in which that outcome can be explained is that the constructive trust arose, at the latest, when D was declared bankrupt. By that stage, it cannot possibly be said that D (or the trustee in bankruptcy) had acted wrongfully by asserting or retaining C’s interest in the property; that is, the ‘constructive trust ... arises upon the failure of a joint endeavour’,⁷⁸ and not merely when D commits a wrongful act.

⁶⁹ *Baumgartner* (n 4) 149 (Mason CJ, Wilson and Deane JJ), 152 (Toohey J).

⁷⁰ Sir Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 (April) *Law Quarterly Review* 238, 251.

⁷¹ *Scanlon v McLeay* [2018] QDC 17, [35] (Rosengren DCJ) (emphasis added).

⁷² *Re Osborn* (1989) 25 FCR 547, 554 (Pincus J) (‘*Osborn*’).

⁷³ *Stewart* (n 19) 357 [59] (Forbes J) (emphasis added).

⁷⁴ *Payne v Rowe* (2012) 16 BPR 30,869, 30,895 [99] (Ball J) (‘*Payne*’), cited in *Williams v Congdon* [2018] WASC 289, [24] (Master Sanderson).

⁷⁵ See, eg, *Muschinski* (n 1) 624 (Deane J).

⁷⁶ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 25.

⁷⁷ See below n 100 and accompanying text.

⁷⁸ *Statz [No 3]* (n 8) 279 [178] (Derrington J).

III REMEDY

According to the Key Statement, the appropriate remedy in JECT cases is that which prevents D from retaining the benefit of the property ‘to the extent that it would be unconscionable for him so to do’.⁷⁹ It seems clear that Deane J did not mean for the remedy to be guided by the notion of unconscionability in its unrefined form, since that would conflict with another well-accepted portion of his Honour’s judgment in *Muschinski* which cautions against constructive trusts being used as ‘a medium for the indulgence of idiosyncratic notions of fairness and justice’.⁸⁰ It is surprising, however, that no serious attempt has been made, either in the cases or in the literature, to refine or explain what unconscionability means in this context. This is unfortunate, in light of two major sources of lingering uncertainty.

The first source of uncertainty is a body of High Court case law spanning the past two decades,⁸¹ which suggests that, whenever an award of constructive trust is proposed to be made, courts must exercise remedial discretion to ensure innocent third parties are not prejudiced. The High Court has also stressed the need to join third parties to such proceedings: ‘where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined’.⁸² Both of these points are, however, framed in general terms; the Court does not say whether (and if so, to what extent) they concretely affect the JECT doctrine.

The second, narrower source of uncertainty is found in the JECT cases, in which there is a lack of consistency in the remedial approach taken. Such uncertainty can be detected from the very inception of the doctrine, in that *Muschinski* and *Baumgartner* approached the matter differently, as Parker J in *Nguyen v Corbett*⁸³ pointed out:

In *Muschinski*, the order ultimately made ... provided for the property to be sold, with the proceeds to be applied first towards repayment of contributions made by the parties and the balance then to be divided equally. ...

⁷⁹ *Muschinski* (n 1) 620.

⁸⁰ *Ibid* 615.

⁸¹ See, eg, *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Giumelli v Giumelli* (1999) 196 CLR 101, 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45-6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) (*John Alexander’s Clubs*). See generally Ying Khai Liew, ‘Constructive Trusts in Australia: Taking Stock’ (2021) 44(3) *Melbourne University Law Review* (forthcoming).

⁸² *John Alexander’s Clubs* (n 81) 46 [131] (French CJ, Gummow, Hayne, Heydon and Kiefel).

⁸³ *Corbett [No 4]* (n 8).

The orders made in *Baumgartner* reflect a slightly different approach. ... The High Court ordered that upon sale of the property and discharge of the mortgage, there should be deducted a separate contribution made by the appellant to the purchase price from the sale of his own unit, and also expenditure by the appellant after the relationship had come to an end. Subject to those deductions, the proceeds were to be shared in the ratio 55:45 [the ratio the parties agreed represented their respective contributions to the pooled fund].⁸⁴

Lower courts, as well as tribunals, have likewise approached the remedial point in an inconsistent manner. Since *Baumgartner*, there have been at least 40 cases in the courts and tribunals where a remedy has been awarded to the plaintiff in a successful JECT claim.⁸⁵ In a significant majority — 29 cases — a constructive trust was awarded. In 21 of those 29 cases, C was awarded a share in the property which reflected the proportion of their contributions to the property;⁸⁶ in seven others, C was awarded a share reflecting an agreement or positive intention between the parties as to how the interest in the property would be split.⁸⁷ In *Re Sabri*,⁸⁸ the precise beneficial split was left to the parties to resolve, failing which the Court determined that it would hear further submissions.⁸⁹

In the remaining 11 cases, a remedy was awarded with the aim simply of returning to C their contributions. However, in none of these 11 cases was a constructive trust awarded. Instead, in three cases, C was awarded compensation to the value of their

⁸⁴ Ibid 23–4 [106]–[107] (citations omitted).

⁸⁵ Only an estimation is given as, for many of the cases, a judgment call is required as to whether or not the JECT doctrine, in its true form (as opposed to a more generalised or confused notion of ‘constructive trust’), was applied leading to the remedy being awarded. This survey is not intended to be exhaustive: it is simply intended to be indicative of the trend in the lower courts.

⁸⁶ *Hibberson* (n 49); *Turner* (n 50); *Brown v Manuel* [1996] QCA 65; *Parij v Parij* (1997) 72 SASR 153; *Justesen v Denham* [1999] WASC 181; *West* (n 57); *Deves v Porter* [2003] NSWSC 625; *Anson v Anson* (2004) 12 BPR 22,303 (‘Anson’); *Swettenham v Wild* [2005] QCA 264 (‘Swettenham’) (in which C only sought repayment of their original contributions plus interest, but the Court said that a constructive trust reflecting the proportion of their contribution would have been appropriate had C asked for it); *Pain v Pain* [2006] QSC 335 (‘Pain’) (in which the property had been sold, so equitable compensation was awarded instead); *Noordennen* (n 54); *Cetojevic* (n 59) (although the basis for the award in that case is admittedly not clear-cut); *McKay* (n 62); *Djmal v Cemal* [2015] NSWSC 1125; *Nolan v Nolan* [2015] QCA 199; *Stavrianakos v Western Australia* [2016] WASC 64 (‘Stavrianakos’); *Yeo v Arifovic* [2017] FCCA 604; *Batavia* (n 55); *Staatz [No 3]* (n 8); *Hughes* (n 8); *Clementi* (n 8).

⁸⁷ *Nichols v Nichols* (1986) 4 BPR 9240; *Woodward v Johnston* [1992] 2 Qd R 214; *Huen v Official Receiver* (2008) 248 ALR 1 (‘Huen’); *Lo Pilato* (n 55); *Jeffrey-Potts* (n 66); *Payne* (n 74); *Ngatoko v Giannopoulos* [2017] VCAT 360.

⁸⁸ *Sabri* (n 55).

⁸⁹ Ibid 189 (Chisholm J).

contribution secured by a charge on the property;⁹⁰ in five cases, a similar award was made without mention of a charge;⁹¹ and in the final three cases, the award was a money payment of the *value* of the increase in the land which was ascribable to C's contributions, secured by a charge on the property.⁹²

A *An Analytical Framework*

In order to facilitate an analytically robust discussion, it is necessary first to set out a framework for a precise understanding of the relationship between private law remedies and discretion. A comprehensive discussion of this topic has been undertaken elsewhere,⁹³ for present purposes an outline will suffice.

Remedies can be categorised according to how they relate to the parties' pre-trial, substantive (primary or secondary) rights. Three distinct types of remedies can be detected. The first can be labelled 'replicative' remedies, which give effect to primary rights. Primary rights are those which exist 'in and per se'.⁹⁴ C has a primary right against D if that right arises from events other than a wrong; its existence does not depend on D committing any breach of a duty. A replicative remedy simply restates — indeed, replicates — the content of C's primary right. Discretion as to the goal or content of the remedy is not exercised: the fact that the law deems C's primary right worthy of being enforced per se negates the need for courts to exercise discretion as to the goal of the awarded remedy. The content of the remedy is determined by direct reference to the parties' rights and duties which comprise their legal relationship. For example, an order that a trustee restore to the trust fund trust property of which the trustee has taken possession is replicative in nature: the court order simply restates and enforces the beneficiary's primary right to the property as revealed in the trust instrument.

The second category of remedies can be labelled 'reflective' remedies, which give effect to — indeed, reflect — secondary rights. Secondary rights 'arise out of violations of primary rights':⁹⁵ when D breaches a primary duty, C obtains a

⁹⁰ *Kavurma v Karakurt* (Supreme Court of New South Wales, Santow J, 7 November 1994) ('*Kavurma*'); *Kais v Turvey* (1994) 11 WAR 357; *Spink* (n 1).

⁹¹ *Taylor v Ismailjee* [2001] WASC 36 ('*Taylor*'); *Anderson v Jordan* [2001] WASC 98 ('*Anderson*') (although in this case C only claimed compensation); *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150 ('*John Nelson Developments*'); *Krajovska v Krajovska* [2011] NSWSC 903 (in which C claimed compensation secured by way of a charge, while the Court awarded compensation but refused to secure payment by way of charge); *Austin v Hornby* (2011) 16 BPR 30,623.

⁹² *Henderson [No 2]* (n 58); *Tasevska v Tasevski* [2011] NSWSC 174 ('*Tasevska*'); *Byrnes v Byrnes* [2012] NSWSC 1600 ('*Byrnes*').

⁹³ See, eg, Liew, *Rationalising Constructive Trusts* (n 34) chs 2, 7, which builds on Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005).

⁹⁴ John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, Robert Campbell (ed) (John Murray, 5th ed, 1885) vol 2, 762.

⁹⁵ *Ibid.*

secondary right against D for the correction of the consequences of D’s breach. The court is empowered to exercise discretion as to the type, content and extent of a reflective remedy. That discretion is not at large, because it is exercised with a firm view to reflect C’s secondary rights. Thus, the discretion is exercised by reference to a remedial goal determined by ‘the reasons for the primary obligation that was not performed when its performance was due’.⁹⁶ For example, pursuant to a compensatory goal, equitable compensation may be awarded where a trustee’s negligent investment of trust property causes loss to the trust fund, and the court has discretion to determine the content (ie, quantum) of the award. Because, in the private law context, those primary rights and duties are owed *by the parties* to one another and to no other, any exercise of discretion to determine the content of the remedy will take into account only considerations which affect justice *inter partes*.

The third category can be labelled ‘transformative’ remedies. These remedies create ‘a legal relation that significantly differs from any legal relation that existed before the court order was made’.⁹⁷ A transformative remedy, therefore, has little correlation to C’s pre-trial rights, and its award substantially transforms those rights. These remedies provide for the widest remedial potential, allowing for discretion to be exercised both as to the goal and content of the awarded remedy. While providing the greatest degree of flexibility, it is often difficult to predict in advance whether a transformative remedy will be awarded in a particular case, and — if one is awarded — what its content will be. An example can be found in s 183(6) of the *Bankruptcy Act 1966* (Cth), which provides that, where a trustee in bankruptcy has died, their administrator may apply to the court for the release of the trustee’s estate from any claims arising out of the trustee’s administration of the bankrupt’s estate, and ‘the Court may make such order as it thinks proper in the circumstances’. The administrator does not have a ‘right’ to any particular remedy here; instead, the court’s remedial discretion plays a central role in determining the type and extent of the remedy, taking into account the circumstances of the case. The discretion which is exercised in the award of transformative remedies can be — and often is — exercised with an eye on how the remedy may affect parties extraneous to those immediately before the court. Thus, third party considerations are often relevant in the award of these remedies.

B *Not Transformative Remedies*

The first point to be made is that the remedies awarded under this doctrine are clearly not transformative remedies. They could be classified as transformative remedies if the High Court’s general statements, described above, were taken to be relevant to the JECT doctrine, leading judges to award or deny⁹⁸ a constructive trust in view of third party considerations. But this is far from the case.

⁹⁶ John Gardner, ‘What Is Tort Law for? Part 1: The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1, 33.

⁹⁷ Zakrzewski (n 93) 203.

⁹⁸ Or, indeed, to have the constructive trust take effect only from the date of judgment, as in *Muschinski* (n 1). There is hardly a JECT case where such a constructive trust has been awarded.

Take those cases where a joint endeavour was terminated by reason of D's bankruptcy. Apart from an old outlier decision in which Pincus J refused to impose a constructive trust in order to protect the interests of D's innocent creditors,⁹⁹ courts have consistently awarded a constructive trust to C which takes priority over D's creditors.¹⁰⁰ If third party considerations were truly relevant, C would clearly have been denied a constructive trust on the basis of 'prejudice' to D's innocent creditors. But, in reality, courts rarely give such consideration to D's creditors in making the award.¹⁰¹ Even more strikingly, where courts *have* considered the interests of D's creditors, they have come down firmly against them. For example, in *Trustees of the Property of Batavia (Bankrupt) v Batavia*,¹⁰² Cronin J tersely dismissed their interests by holding that 'the Trustees [in bankruptcy] stand in the shoes of the Bankrupt',¹⁰³ and in *Clout v Markwell*,¹⁰⁴ Atkinson J held that,

[a]lthough this may be inconvenient for the administration of bankrupt estates ...
[c]reditors should be expected in these times to be aware of the possibility of constructive trusts or of equitable interests which may arise when the debtor is married or in a de facto relationship.¹⁰⁵

Even outside the bankruptcy context, there is hardly any case in which a constructive trust award was denied on the basis of third party considerations. Any remedial discretion has been exercised having regard exclusively to considerations affecting C and D inter se, for example, that: C 'owned the relevant property all along';¹⁰⁶ D's improvements to the property were not shown to have increased its value;¹⁰⁷ the parties were not in 'a very substantial and long-standing relationship';¹⁰⁸ and there was a need for a clean break between C and D.¹⁰⁹

It is also telling that, in a number of non-bankruptcy cases in which the timing of the remedy was a crucial factor, courts have consistently held that C's right under the

⁹⁹ *Osborn* (n 72) 554.

¹⁰⁰ See, eg, *Sabri* (n 55); *Clout* (n 55); *Parianos* (n 55); *Huen* (n 87); *Tamer v Official Trustee in Bankruptcy* [2016] NSWSC 680 ('*Tamer*'); *Saba v Plumb* [2017] NSWSC 622 ('*Saba*'); *Batavia* (n 55); *Staatz [No 3]* (n 8); *Miller* (n 44); *Lo Pilato* (n 55).

¹⁰¹ See, eg, *Tamer* (n 100); *Parianos* (n 55); *Staatz [No 3]* (n 8); *Miller* (n 44).

¹⁰² *Batavia* (n 55).

¹⁰³ *Ibid* [51].

¹⁰⁴ *Clout* (n 55).

¹⁰⁵ *Ibid* 185 [21].

¹⁰⁶ *Hill* (n 44) [38] (Campbell J).

¹⁰⁷ *Ibid* [41].

¹⁰⁸ *Kavurma* (n 90) 19 (Santow J). In that case, 'while ... a significant relationship existed between [C and D]', it was that 'between a married man and mistress': at 3, 19. Therefore, it was not 'in the same category as those which led the court in those other cases to ... [impose] a constructive trust': at 19.

¹⁰⁹ *Stoklasa v Stoklasa* [2004] NSWSC 518, [42] (Gzell J).

constructive trust arises at a point in time prior to the orders being made.¹¹⁰ If third party considerations were a factor in determining the appropriate remedy, it would not be possible to know whether any such parties would be prejudiced until the court so determined.

Neither have the courts been hesitant to impose constructive trusts for want of joinder of third parties. This is wholly consistent with the analysis of Sifris J in *Chickabo Pty Ltd v Zphere Pty Ltd [No 2]*,¹¹¹ that third parties who are ‘directly affected’ are those who have pre-existing interests in the property, and not those who would be affected should a constructive trust remedy be awarded.¹¹² In any event, the joinder principle is a principle of general application pertaining to legal procedure, and not one specifically affecting the law of constructive trusts.¹¹³

In the light of the case law, therefore, it can be said that the JECT doctrine does not involve the award of transformative remedies. Contrary to a common assumption, it is amply clear that the doctrine does not provide for ‘a wide-ranging judicial discretion to adjust property entitlements on the termination of an intimate cohabitation’.¹¹⁴ Nor is there a ‘dissociation of liability and remedy’,¹¹⁵ that is, once C succeeds in establishing their JECT case, remedial discretion is exercised without the need to consider any rationale underlying the case established.

C *Not Reflective Remedies*

Only in a small number of cases in which remedial discretion was exercised to deny a constructive trust have the courts provided reasons for so doing. In substance, they boil down to one reason: proportionality. For example, in *Taylor v Ismailjee*,¹¹⁶ Murray J refused to award a constructive trust due to the fact that there was ‘an extreme imbalance’ in the parties’ respective contributions.¹¹⁷ Further, in *Henderson*

¹¹⁰ See, eg, *Re Jonton Pty Ltd* [1992] 2 Qd R 105, 107–8 (Mackenzie J), quoting *Muschinski* (n 1) 613–14 (Deane J). See also *Parianos* (n 55); *Saba* (n 100); *Stavri-anakos* (n 86); *Huen* (n 87).

¹¹¹ [2019] VSC 580.

¹¹² *Ibid* [100]–[120].

¹¹³ See Ford et al (n 63) [22.580].

¹¹⁴ Mee (n 6) 176. See also Malcolm Cope, ‘A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust’ (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 118, 135–7; Dal Pont (n 6) 474.

¹¹⁵ O’Connor (n 6) 751. See also, David Wright, ‘Third Parties and the Australian Remedial Constructive Trust’ (2014) 37(2) *University of Western Australia Law Review* 31.

¹¹⁶ *Taylor* (n 91).

¹¹⁷ *Ibid* [49].

v Miles [No 2] (*'Henderson [No 2]'*),¹¹⁸ *Tasevska v Tasevski*,¹¹⁹ and *Byrnes v Byrnes*,¹²⁰ the court approached the matter on the basis that it was its task to award only the minimum relief necessary to do justice. In these cases, the remedy was, in essence, conceptualised as a reflective remedy, particularly in that the discretion was exercised taking into account considerations affecting justice inter partes and not matters extraneous to the parties. That is, the discretion was exercised to determine the content of the remedy in order to achieve a particular goal — ostensibly that of proportionality.

There are, however, three reasons why it is mistaken to understand the JECT doctrine as leading to the award of reflective remedies.

First, the ability to award reflective remedies is predicated on there being some breach or wrongdoing. This is because reflective remedies give effect to secondary rights, and secondary rights arise only where there is a breach of a primary right. As Peter Birks explains,

a practical question of great importance turns on the distinction between, on the one hand, primary obligations ... and, on the other, secondary obligations arising from wrongs. Wrongs have a wide-open remedial potential. ... A victim of a wrong can be given such remedial rights as the system thinks good. ... The system has a choice.¹²¹

As discussed earlier, wrongdoing is not a prerequisite for the engagement of the JECT doctrine; therefore, the reflective remedies analysis does not work. That is, because the doctrine does not require wrongdoing, it therefore does not have as its aim the correction of the consequences of wrongdoing. Hence, there is no logical room for discretion to be exercised to determine the appropriate content of the remedy.

Secondly, even if wrongdoing were a prerequisite, no satisfactory goal of the remedy can be found. Proportionality is incapable of providing the goal of the exercise of discretion, because it always begs the question — proportionate to what? Proportionality therefore requires a more concrete aim or a target by which its appropriateness can be measured.

To put this in another way, a court cannot impose a remedy *simply* as the 'minimum equity to do justice',¹²² since without refining what the aim or target of 'justice' is, the court will simply be indulging in 'idiosyncratic notions of fairness and

¹¹⁸ *Henderson [No 2]* (n 58). See at 23,585 [62] (Young CJ in Eq).

¹¹⁹ *Tasevska* (n 92). See at [82] (Einstein J).

¹²⁰ *Byrnes* (n 92). See at [124] (Lindsay J).

¹²¹ Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 12.

¹²² *Henderson [No 2]* (n 58) 23,585 [62].

justice’.¹²³ But no concrete aim of the exercise of discretion is evident in the cases. A close contender is Brereton J’s suggestion that ‘equity can decree something less ... [where a return of contributions] would be disproportionate to the requirements of conscionable behaviour’.¹²⁴ However, this is question-begging, since the notion of ‘conscionable behaviour’, left undefined, itself approximates ‘idiosyncratic notions of fairness and justice’. Another contender may be ‘detriment’, drawing on the doctrine of proprietary estoppel, under which reflective remedies are awarded with the aim of preventing the plaintiff from suffering detriment.¹²⁵ But that aim cannot easily explain the JECT doctrine. It has been held that detriment ‘is that which would flow from the change of position if the assumption were deserted that led to it’.¹²⁶ Given that a breach or wrongdoing is not a prerequisite to the application of the JECT doctrine, there is no detriment for the awarded remedy to avoid.

One might riposte, according to what was stated by Young CJ in Eq in *Henderson [No 2]*, that, under the JECT doctrine,

one looks not to the detriment that might be suffered because the arrangement did not continue, but merely to the detriment of losing a fund to the other party to the arrangement through unexpected circumstances, where such loss would result in the other having an unconscionable gain.¹²⁷

This leads to the third and final reason why the JECT doctrine does not entail reflective remedies: the exercise of discretion to achieve proportionality is never necessary. Certainly, the Key Statement says that ‘equity will not permit ... [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do’. But it is difficult to see when it would ever be proportionate, and therefore conscionable, for D to assert their interest to the exclusion of C, regardless of how little C had contributed (so long as C’s contribution is linked to the property in the relevant way and is not *de minimis*). An analogy with resulting trusts is apposite: if A contributes 1% and B contributes 99% to purchase a property in B’s name, B holds the property on a resulting trust for A and B in proportion to their contributions: no question of proportionality arises even though A’s contribution is minimal. Moreover, given that, under the JECT doctrine, C must have contributed to the acquisition, maintenance, or improvement of the property, the exercise of remedial discretion is likely to lead to an award which *disproportionately* allows D to retain the benefit of C’s contribution.

¹²³ *Muschinski* (n 1) 615 (Deane J).

¹²⁴ *McKay* (n 63) [33].

¹²⁵ See, eg, *Statz [No 3]* (n 8) 276 [166] (Derrington J). On proprietary estoppel, see Ying Khai Liew, ‘Proprietary Estoppel in Australia: Two Options for Exercising Remedial Discretion’ (2020) 43(1) *University of New South Wales Law Journal* 281.

¹²⁶ *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J), quoted in *Sidhu v Van Dyke* (2014) 251 CLR 505, 528 [80] (French CJ, Kiefel, Bell and Keane JJ).

¹²⁷ *Henderson [No 2]* (n 58) 23,589 [95].

D *Replicative Remedies: A Structured Remedial Framework*

On a proper understanding, the JECT doctrine entails the award of a replicative remedy in line with a structured remedial framework. It is at once admitted that judges and commentators have not conceptualised JECT remedies in these terms, as the unrefined notion of unconscionability strongly permeates and clouds the present understanding. However, analytical coherence requires us to take the replicative nature of the remedy seriously. Indeed, such an analysis is capable of providing a coherent *explanation* of what courts mean by ‘preventing’ unconscionability.

To explain the structured remedial framework, it is necessary first to reject two types of analyses found in the cases. Most obviously, those cases in which the courts have exercised remedial discretion on the basis of proportionality must be taken to be wrongly decided for the reasons given above. Also to be rejected are those cases where the remedy precisely mirrors the content of the parties’ agreement as to how the interest in the property would be split. The reason for this is not that those cases purport to exercise any remedial discretion at all, but rather that an intention- or agreement-based remedy is inconsistent with the very nature of the JECT doctrine: as discussed earlier, this doctrine arises regardless of intention. On a proper analysis, those cases are better understood as applications of other constructive trust doctrines, such as the doctrine in *Rochefoucauld*, discussed above,¹²⁸ or the CICT doctrine, discussed below.¹²⁹

Once we put to one side those cases, a structured remedial framework emerges. This framework contains two limbs, each giving rise to a different type of remedy. The question of which applies is determined by the effect C’s contribution has on the value of the property at the time of the failure of the joint endeavour. First, where C’s contribution has increased the value of D’s interest in the property, then D holds the proportional increase in value on constructive trust for C. Secondly, where C’s contribution does not increase the value of D’s interest in the property, but without which the value of D’s interest in the property could not have been maintained, C obtains the right to equitable compensation from D for the value of C’s contribution, secured by an equitable charge over D’s interest in the property.

It appears that the first limb reflects the remedy ultimately awarded in *Baumgartner*. It also explains remedies awarded in the majority of lower court decisions; a probable reason for this is that C is more likely to pursue a claim against D where C’s contribution increases the value of the interest D has in the property.

The second limb is reflected in *Muschinski*. In that case, C and D had purchased a property as tenants in common in equal shares, with C having contributed substantially more than D when their joint endeavour came to an end. The High Court imposed a constructive trust to the effect that the parties held ‘their respective legal interests as tenants in common upon trust ... to repay to each [party] her or his

¹²⁸ See above nn 29–35 and accompanying text.

¹²⁹ See below Part IV(B).

respective contribution and as to the residue for them both in equal shares’.¹³⁰ Taken literally, a constructive trust to repay each other their respective contributions is meaningless. A trust provides its beneficiary with a *beneficial interest* in the trust property; it is not a remedy suited to compel repayment of a sum of money.

Perhaps the Court imposed a ‘constructive trust’ because that was in substance C’s claim, C having ‘asserted merely a proprietary right’.¹³¹ Moreover, the Court may have considered that that remedy was convenient because the parties had already been holding the property on trust as tenants in common from the outset. But to illustrate the oddity of that remedial outcome, suppose the property was held in D’s sole name: it is hardly sensible for any court that wishes to compel D simply to repay to C the value of C’s contribution to award a *constructive trust* to achieve that end. A more fitting remedy, surely, would be equitable compensation secured by a charge. Thus, in *Muschinski*, the outcome would have better been achieved by way of an award of equitable compensation to each party against the other for a half-share of the value of their contribution, secured by an equitable charge on the other’s interest in the property. The explanation for why this was (in effect) the award in *Muschinski* is that neither party’s contribution was shown to have *increased* the value of the other’s share in the property. At best, each party’s contribution enabled the other only to obtain their initial half-share interest in the property. Hence, a constructive trust reflecting an increase in value was not an appropriate remedy.

A number of crucial points about the structured remedial framework require noting. First, both limbs are consistent with — and indeed, give substance to — the part of the Key Statement which provides that the JECT doctrine prevents D from unconscionably retaining the benefit of the relevant property. In relation to the first limb, it is necessary to allocate to C the real value of their contribution because D ought never to have taken the benefit of the increase in value that was ascribable to C’s contribution. In relation to the second limb, D cannot be left to take their interest in the property to C’s exclusion without accounting to C for the value of C’s contribution which has maintained the value of D’s interest in the property.

Secondly, C’s right to the (replicative) remedy arises from the moment the joint endeavour is prematurely terminated.¹³² As a result, the exercise of remedial discretion does not come into the picture.

However, and thirdly, this is not to say that the courts are invariably bound by the structured framework in the sense that they *must* make the ultimate award it dictates. Rather, as *Baumgartner* indicates, adjustments may be necessary in order to ensure that the ultimate remedy awarded does not do more than necessary to allocate or return to C that which is due to them. Further, if C is entitled to a constructive trust under the structured framework, but the property has already been sold by D, then

¹³⁰ *Muschinski* (n 1) 624 (Deane J, Gibbs CJ agreeing at 598, Mason J agreeing at 599).

¹³¹ *Ibid* 607 (Brennan J).

¹³² *Anson* (n 86) 22,309 [36] (Campbell J).

that cannot be done; rather, as *Pain v Pain*¹³³ indicates, equitable compensation will be the next best remedy. In addition, the remedy awarded will not exceed that which is actually sought by C, so that, if C claims a remedy less than what they would otherwise be entitled — for example, equitable compensation where a constructive trust would have been an appropriate award — then that is the maximum remedy which the court will award to C.¹³⁴

Finally, the lack of discretion to determine the nature of the remedy is not inconsistent with the view expressed in *Baumgartner* that

[t]he court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest.¹³⁵

This statement simply provides two crucial reminders. On the one hand, C cannot expect to obtain a remedy simply on the basis of contributions *to the parties' joint relationship*: as discussed earlier, such contributions must be linked to the property in the relevant sense. On the other hand, the burden upon C to demonstrate that their contribution either increased or maintained the value of D's interest in the property is by no means a trivial one.

IV IMPLICATIONS

The discussion above has attempted to deconstruct the role of unconscionability in the JECT doctrine, first, by refuting the idea that unconscionability — either per se or as implying wrongdoing — is a prerequisite to the application of the doctrine, and secondly, by explaining that the remedial aim of 'avoiding unconscionability' is best understood by way of a structured framework. Under this framework, a replicative remedy is awarded, the nature of which depends on the effect of C's contribution to the value of D's interest in the property at the time of the termination of the parties' joint endeavour.

This Part considers how the foregoing analysis impacts on the conceptualisation of the rationale of the JECT doctrine, and on how we ought to understand the interplay between the JECT doctrine and the CICT doctrine.

A *Rationale*

To date, there has not been any attempt to explain the precise rationale of — or *reason for* — the JECT doctrine. This might appear to be a surprising claim in the light of Deane J's words in *Muschinski* that the 'rationale and operation' of the

¹³³ *Pain* (n 86).

¹³⁴ See, eg, *Swettenham* (n 86); *Anderson* (n 91).

¹³⁵ *Baumgartner* (n 4) 150 (Mason CJ, Wilson and Deane JJ).

doctrine is ‘to prevent wrongful and undue advantage being taken by one party of a benefit derived at the expense of the other party in the special circumstances of the unforeseen and premature collapse of a joint relationship or endeavour’.¹³⁶ However, the point has been made earlier in this article that that which is prevented by equity’s intervention does not provide a positive *reason* for that intervention. To put this in a different way, Deane J’s judgment does not explain precisely *why* it is wrongful or undue for D to retain the benefit of C’s contribution in the relevant circumstances. It is insufficient to rely on an unrefined notion of (preventing) unconscionability.

Might it be said that equity intervenes because D is enriched unjustly at C’s expense? There are insurmountable difficulties with this understanding. First, in *Muschinski* itself, Deane J rejected counsel’s submission that there exists a general principle of unjust enrichment in Australia which provides ‘a basis of decision as distinct from an informative generic label for purposes of classification’.¹³⁷ Insofar as Australian law is concerned, unjust enrichment is too imprecise to provide a reason for equity’s intervention. Secondly, even if we accept that unjust enrichment is capable of playing a more active role in modern legal reasoning,¹³⁸ it is clear that Australian law does not adopt an ‘absence of basis’ understanding of unjust enrichment, whereby liability arises simply because there lacks a legal explanation for the transfer from C to D:¹³⁹ the principle can apply only if an unjust factor can positively be identified. The closest unjust factor potentially of relevance in the present context is a failure of basis.¹⁴⁰ However, a *total* failure is required,¹⁴¹ a requirement which is not fulfilled in the context of the JECT doctrine because there is no failure from the time the contribution is made to the time the joint endeavour terminates. Thirdly, even if one takes the view that a ‘total’ failure is not actually required, but rather that the requirement is that the failure be not ‘insubstantial’,¹⁴² it remains that the requirement will not be met in many JECT cases. This is particularly so in those cases in which C’s contribution was made long before the termination of the parties’ joint endeavour. Fourthly, even if an unjust factor could be identified in JECT cases, an unjust enrichment logic does not sit easily with the remedial approach of the JECT doctrine: it is by no means clear that unjust enrichment leads (or ought to lead) to the award of a proprietary remedy.¹⁴³

¹³⁶ *Muschinski* (n 1) 621.

¹³⁷ *Ibid* 617.

¹³⁸ See Kit Barker, ‘Unjust Enrichment in Australia: What Is(n’t) It? Implications for Legal Reasoning and Practice’ (2020) 43(3) *Melbourne University Law Review* 903.

¹³⁹ Michael Bryan, ‘Peter Birks and Unjust Enrichment in Australia’ (2004) 28(3) *Melbourne University Law Review* 724, 728.

¹⁴⁰ See generally Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) ch 12.

¹⁴¹ See, eg, *Whincup v Hughes* (1871) LR 6 CP 78, 85 (Montague Smith J).

¹⁴² See, eg, Frederick Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72(2) *Cambridge Law Journal* 414.

¹⁴³ See generally Mitchell, Mitchell and Watterson (n 140) Ch 37.

It is submitted that the rationale for the doctrine can be found in the Key Statement, but only if we shift our attention away from the notion of unconscionability therein. Justice Deane described the doctrine as being engaged where C's contribution is made 'in circumstances in which it was not specifically intended or specially provided that ... [D] should so enjoy it'.¹⁴⁴ While it is true that the JECT doctrine arises 'independently of the actual intention of the parties',¹⁴⁵ its rationale has much to do with C's unilateral intention. Specifically, it is C's *negative intention* which provides the rationale for the doctrine: equity intervenes *because* C's intention in making the contribution was that it would not be for D's sole benefit, but rather for the parties' joint benefit pursuant to the joint endeavour. This is the reason why, when the joint endeavour prematurely terminates, equity ensures that D does not retain any unintended benefits of C's contribution, by applying the structured remedial framework discussed earlier. More broadly, this rationale is based on a general concern to protect and enhance C's personal autonomy, guarding against circumstances where individuals are coerced into relinquishing the benefits of their contributions where they have not decisively chosen to do so.¹⁴⁶ In so doing, the law maximises their ability to determine for themselves the purposes and goals towards which they make their contributions. In other words, the JECT doctrine is autonomy-enhancing.

B *Relationship with the CICT Doctrine*

Another implication of the analysis in this article is that the JECT doctrine is a property law doctrine: it provides a structured solution for the division of beneficial interests in property, rather than an open-ended discretion to (re)allocate property rights. Thus, it is neither here nor there to criticise the doctrine for failing to take into account 'role-divisions assumed within a domestic relationship',¹⁴⁷ or for inadequately recognising non-financial contributions.¹⁴⁸ Nor is it surprising to find that the JECT doctrine has not been applied exclusively in the domestic context.¹⁴⁹

But it is undeniable that the JECT doctrine most commonly arises in the context of the termination of domestic relationships, and in that context an important question arises as to its precise relationship with the CICT doctrine. As Michael Bryan has observed, the High Court, in developing the JECT doctrine, 'failed to clarify whether the new model superseded the old "common intention" constructive trust or

¹⁴⁴ *Muschinski* (n 1) 620.

¹⁴⁵ *Ibid* 617.

¹⁴⁶ See Ying Khai Liew, 'Justifying Anglo-American Trusts Law' (2021) 12(3) *William and Mary Business Law Review* 685.

¹⁴⁷ Rebecca Bailey-Harris, 'Equity Still Childbearing in Australia?' (1997) 113 (April) *Law Quarterly Review* 227, 228.

¹⁴⁸ *Ibid* 229.

¹⁴⁹ See, eg, *Statz [No 3]* (n 8); *Carson* (n 6); *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 97,590; *John Nelson Developments* (n 91).

whether it operated alongside it’.¹⁵⁰ That uncertainty has been perpetuated by lower court decisions post-*Baumgartner*. While many cases treat the JECT and CICT as separate and distinct doctrines,¹⁵¹ this is not invariably the case: a not insignificant number of cases have cited *Muschinski* and/or *Baumgartner* as authorities for the CICT doctrine.¹⁵² As this article has sought to demonstrate, it is a mistake simply to accept that the constructive trusts arising by way of both doctrines are based on ‘the equitable jurisdiction to prevent unconscionable conduct of the person having legal ownership’.¹⁵³ A more precise analysis is required.

When the authorities are closely examined, it can be seen that the CICT doctrine is concerned with replicative remedies.¹⁵⁴ A constructive trust arises when the precise requirements of the doctrine are fulfilled, namely, that there was an express or inferred common intention between the parties concerning their respective beneficial interests in the property, and reliance on that intention by C to their detriment.¹⁵⁵ Those precise requirements are distinct from those required to invoke the JECT doctrine; that is, each doctrine is triggered by different events. Most obviously, the CICT doctrine gives effect to the positive actual intentions of the parties, while the JECT doctrine does not;¹⁵⁶ additionally, the CICT doctrine responds to bilateral intention while the JECT doctrine responds to C’s unilateral intention.

¹⁵⁰ Bryan, ‘Unconscionability in Australia’ (n 26) 74.

¹⁵¹ See, eg, *Green v Green* (1989) 17 NSWLR 343; *Miller* (n 44); *Sivritas v Sivritas* [2008] VSC 374; *Trajkoski* (n 42); *E Co v Q [No 3]* [2018] NSWSC 442; *Staatz [No 3]* (n 8); *Zekry v Zekry* [2020] VSC 221; *Buchan v Young* [2020] QDC 216, [52] (Long DCJ); *Leane* (n 44); *McMillan v Coolah Home Base* [2020] NSWSC 935, [108] (Ward CJ in Eq).

¹⁵² See, eg, *McDonald v Dunscombe* [2018] VSC 283, [181] (McMillan J); *Elzamtar v Bangladesh Islamic Centre of NSW Inc* [2020] NSWSC 1161, [137]–[138] (Parker J); *Lu v Yu* [2019] VSC 499, [8] (Derham AsJ); *Dencio v Dencio* [2020] ACTSC 250, [85]–[87], [96] (Burns J); *Moustapha v Nelson [No 3]* [2020] NSWSC 1263, [21] (Parker J); *Wallis v Rudek* [2020] NSWCA 207, [78] (Emmett AJA, White JA agreeing at [1], Simpson AJA agreeing at [119]); *Maher v Maher* [2020] NSWSC 844, [10] (Parker J); *Santos v Stephenson* [2020] NSWSC 90, [62] (Parker J).

¹⁵³ Ashley Black, ‘*Baumgartner v Baumgartner*, the Constructive Trust and the Expanding Scope of Unconscionability’ (1988) 11(1) *University New South Wales Law Journal* 117, 119.

¹⁵⁴ *Parsons v McBain* (2001) 109 FCR 120, 125–6 [13] (Black CJ, Kiefel and Finkelstein JJ); *Clout* (n 55) 184–5 [20] (Atkinson J). Cf *Tamer* (n 100) [179] (Sackar J).

¹⁵⁵ See *Allen* (n 9) 690 (Glass JA, Samuels JA agreeing at 697); *Austin v Keele* (1987) 10 NSWLR 283, 290–1 (Lord Oliver for the Court) (Privy Council). For a discussion of the CICT doctrine, see Ying Khai Liew, ‘The Secondary-Rights Approach to the “Common Intention Constructive Trust”’ [2015] (3) *Conveyancer and Property Lawyer* 210.

¹⁵⁶ Thus, it has been repeatedly stressed by judges that the JECT doctrine arises regardless of the intention of the parties: see above n 35 and accompanying text. See also *Trajkoski* (n 42) [30] (Le Miere J); *Willis [No 3]* (n 42) 374 [64] (Buss JA); *Tracy v Bifield* (1998) 23 Fam LR 260, 263 (Templeman J) (*‘Tracy’*).

It remains to be asked, however, how the two doctrines interrelate: can and ought the JECT doctrine apply if the parties are found to have had a common intention concerning their respective beneficial interests in the property? In *Koh v Chan*,¹⁵⁷ Murray J would have answered this question in the affirmative, because

the remedial declaration of such a trust is for the purpose of precluding the retention or assertion of the beneficial ownership of property where that would be contrary to equitable principle because in the circumstances it would be unconscionable to permit ... [D] to exercise full legal and beneficial rights to the property.¹⁵⁸

Conversely, in *Tracy v Bifield*,¹⁵⁹ Templeman J held that it was ‘inappropriate to impose a constructive trust where the relationship between the parties is governed by an implied ... trust based on their actual ... intention’, because ‘[c]onstructive trusts are tailored so as to prevent unjust or unconscionable results irrespective of intention. They therefore involve a degree of judicial discretion.’¹⁶⁰ The fact that polar opposite conclusions were reached on the basis of the notion of unconscionability serves only to reinforce the point that that notion, left unrefined, prevents a proper analysis of the law.

It is submitted that everything turns on the content of the parties’ common intention. Sometimes the parties’ common intention may extend to, or specifically provide for, the termination of their joint endeavour. Often, however, it is simply the case that they would not have contemplated the consequences of an *unforeseen*, premature termination of their joint endeavour. Only in the latter case can the JECT doctrine apply. This is consistent with Deane J’s observation in *Muschinski* that

[w]here there are express or implied contractual provisions specially dealing with the consequences of failure of the joint relationship or endeavour, they will ordinarily apply in law and equity to regulate the rights and duties of the parties between themselves and the prima facie legal position will accordingly prevail. Where, however, there are no applicable contractual provisions or the only applicable provisions were not framed to meet the contingency of premature failure of the enterprise or relationship, other rules or principles will commonly be called into play.¹⁶¹

¹⁵⁷ (1997) 139 FLR 410.

¹⁵⁸ *Ibid* 421. See also *Tamer* (n 100) [31] (Sackar J).

¹⁵⁹ *Tracy* (n 156).

¹⁶⁰ *Ibid* 263.

¹⁶¹ *Muschinski* (n 1) 618. See also *West* (n 57) 24,444–5 [63] (Campbell J); *Trajkoski* (n 42) [30] (Le Miere J).

V CONCLUSION

In *Royal Brunei Airlines Sdn Bhd v Tan*,¹⁶² Lord Nicholls observed that

[u]nconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience.¹⁶³

Modern Australian law is worlds apart from the law of Middle Ages England, and yet the appeal of the notion of unconscionability to Australian lawyers seems almost irresistible. Giving in to that temptation sacrifices analytical vigour. Indeed, this article has demonstrated that, on a proper analysis, unconscionability — either per se or as implying the need for wrongdoing — is not a prerequisite to the application of the JECT doctrine. The oft-stated aim of the doctrine of avoiding unconscionability in fact reflects a structured remedial framework, whereby plaintiffs obtain either a constructive trust or equitable compensation secured by a charge, depending on the effect of their contributions to the value of the defendant’s interest in the relevant property. On the basis of this analysis, we are able to appreciate that the JECT doctrine is autonomy-enhancing; we are also able to resolve the uncertainties concerning the interplay between the JECT doctrine and the CICT doctrine.

¹⁶² *Tan* (n 5).

¹⁶³ *Ibid* 392.

KEEPING THE PEACE OF THE iREALM

‘As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoined upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.’¹

‘[I]t turns out that one can penetrate a state’s information networks in the simplest way through Internet channels in addition to the traditional channels of radio, television and the mass media.’²

ABSTRACT

Digital connections and the ubiquity of cyberspace have undermined Australia’s historic defence system: our distance from other nations. Increasingly, this new vulnerability is being covertly exploited by foreign actors. Accordingly, the Commonwealth government has determined that the Australian Defence Force (‘ADF’) is to prepare to counter these new threats in the grey zone. Yet, little has been written on the legal authorities for, and constraints on, the utilisation of the ADF in this context. This article explores one microcosm example of the multitude of threats

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¹ Plutarch, *The Lives of Noble Grecians and Romans*, tr John Dryden (Encyclopaedia Britannica, 1952) 98.

² Keir Giles, NATO Defence College, *Handbook of Russian Information Warfare* (Fellowship Monograph No 9, November 2016) 34.

that Australia might face in the coming century — foreign interference operations targeting domestic voting infrastructure and the information environment.

This article will canvass the viability of the internal security prerogative, the so-called sister prerogative to the war prerogative, to authorise the use of the ADF in counter-interference operations. This is an important area to explore, noting that interference operations will often fall within the ‘domestic violence’ threshold for the ADF to be permitted to be called out under pt IIIAAA of the *Defence Act 1903* (Cth). This article first looks at the nature of the internal security prerogative of ‘keeping the peace of the realm’, and how it is constrained by federalism in the Australian context. This requires a historical exploration of both Anglo-Saxon and Australian domestic military deployments. This article then explores the principle of desuetude as a rule of extinguishment, and whether it is applicable to this little-used prerogative power. It then concludes by arguing for a re-interpretation of the legal foundations for earlier ADF operations — such as the Bowral call-out in 1978 and the 2002 Commonwealth Heads of Government Meeting (‘CHOGM’) deployment — in accordance with the prerogative, rather than under an implied nationhood power.

I INTRODUCTION

Foreign state and non-state actors conducting interference operations³ is not a new phenomenon; nor, too, is the use of information in warfare, as a resource, environment and weapon.⁴ However, historically, there have been some buffer zones. Themistocles, in bringing war along the Ionian coast and attempting to foster insurgencies amongst the Hellenes living under Persian control, understood the demoralising effect his writings on stones would have upon his enemies. Yet he was restricted to choosing locations which he knew to be popular, to prevail upon populations in general, sweeping terms, presumably limited to one language, and to hoping that the target population could read his writings.

This has all changed. Now, rather than simply writing a message on stones at popular watering holes, foreign interference operations can leverage the ubiquity of the internet in order to deliver personally tailored, micro-targeted messages to individuals in their homes. This is the real threat that the digital age has brought: not the death

³ Interference operations can be defined as ‘covert, deceptive and coercive activities’. This is to be distinguished from influence operations, which are transparent. See Attorney-General’s Department (Cth), *What Is the Difference between ‘Foreign Influence’ and ‘Foreign Interference’?* (Foreign Interference Transparency Scheme Factsheet No 2, February 2019) <<https://www.ag.gov.au/integrity/publications/factsheet-2-influence-vs-interference>>.

⁴ See, eg, John Keegan, *Intelligence in War: Knowledge of the Enemy from Napoleon to Al-Qaeda* (Hutchinson Press, 2003).

and disruption that for nearly 25 years been hypothesised,⁵ but the ability to connect to individuals, insidiously, at any time of the day.⁶ This was best recognised by Chief of the Russian General Staff, Valery Gerasimov, who opined as early as 2013 that

[t]he very ‘rules of war’ have changed. The role of nonmilitary means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness.

...[T]echnologies [may be used] for influencing state structures and the population with the help of information networks.⁷

But how do interference operations actually work? One method is cyber-enabled interference operations targeting voting infrastructure, being high value, low-cost operations. Interference in voting infrastructure can occur in multiple ways: by direct tampering with the process by which the votes are tallied; by directly changing the election results (such as changing a vote from party A to party B); or through remotely altering the final votes (not changing the number of votes physically, but, for example, simply the announcement of the end result). It can also aim to crash electoral servers at critical moments through distrusted denial of service attacks, in order to spread doubt as to the legitimacy of the result. Elections and referendums are often targeted, as ‘they are opportunities when significant political and policy change occurs and they are also the means through which elected governments derive their

⁵ See generally Alvin Toffler, *The Third Wave* (William Morrow, 1980); Edward Waltz, *Information Warfare: Principles and Operations* (Artech House, 1st ed, 1998). There are only two known instances of physical destruction from a cyber attack — the destruction caused by Stuxnet, and apparent damage caused to a German blast furnace: see Kim Zetter, ‘An Unprecedented Look at Stuxnet, the World’s First Digital Weapon’, *Wired* (online, 11 March 2014) <<https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet/>>; ‘Hack Attack Causes “Massive Damage” at Steel Works’, *BBC News* (online, 22 December 2014) <<https://www.bbc.com/news/technology-30575104>>. Several major cyber attacks, most notably at Saudi Aramco (with the virus Shamoon) and Sony (with the virus WannaCry) have rendered computers inoperable, but that was as a result of changes in software that were difficult to reverse, rather than damaged hardware: see Marwa Rashad, ‘Saudi Aramco Sees Increase in Attempted Cyber Attacks’, *Reuters* (Web Page, 7 February 2020) <<https://www.reuters.com/article/saudi-aramco-security-idUSL8N2A6703>>; Brian Barrett, ‘DoJ Charges North Korean hacker for Sony, WannaCry, and More’, *Wired* (online, 9 June 2018) <<https://www.wired.com/story/doj-north-korea-hacker-sony-wannacry-complaint/>>.

⁶ The use of information as a resource, environment and weapon in the 21st century is an emergent capability ‘still seeking both language and concepts to become normative for discussions of warfare’: Edward Morgan and Marcus Thompson, Center for Strategic and International Studies, *Building Allied Interoperability in the Indo-Pacific Region: Information Warfare* (Discussion Paper No 3, October 2018) 6.

⁷ Valery Gerasimov, ‘The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations’ (2016) 96(1) *Military Review* 23, 24, 27.

legitimacy'.⁸ The low cost of such interference operations is compounded by the fact that, sometimes, it is simply the *act* of interfering in elections that results in a strategic effect being achieved: long-term erosion in confidence in a targeted government,⁹ leading to destabilisation; or creating a permissive environment.¹⁰

Another method of interference involves cyber-enabled operations corrupting the information environment. Under this method, interference operations aim to target the information environment around government decisions: proceedings in political bodies (such as the House of Representatives or the Senate); and those behind closed doors of registered political parties. Such operations can also interfere with individual representatives or even potential representatives.¹¹ Traditional 'hierarchical models of information distribution (from government, from national broadcasters, from mainstream media) are replaced by a proliferation' and spectrum of social media forums.¹² This makes infiltrating, and interfering with, the information environment even easier.

This is not a theoretical risk. In 2017, the former Commonwealth Director-General of Security, Duncan Lewis stated that '[f]oreign powers are clandestinely seeking to shape the opinions of members of the Australian public, of our media organisations and our government officials in order to advance their country's own political objectives',¹³ on a scale and intensity that 'exceeds any similar operations launched against the country during the Cold War, or in any other period'.¹⁴ From this, and other concerns on foreign interference, a trifecta of legislation was introduced with sweeping amendments, and proscriptions of new offences: the *Foreign Influence Transparency Scheme Act 2018* (Cth); the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth); and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth). But this

⁸ Sarah O'Connor et al, Australian Strategic Policy Institute, *Cyber-Enabled Foreign Interference in Elections and Referendums* (Report No 41/2020, October 2020) 5.

⁹ See Fergus Hanson et al, Australian Strategic Policy Institute, *Hacking Democracies: Cataloguing Cyber-Enabled Attacks on Elections* (Report No 16/2019, May 2019), which builds on the framework in Zoe Hawkins, Australian Strategic Policy Institute, *Securing Democracy in the Digital Age* (Report, 29 May 2017).

¹⁰ The notion of a permissive environment is a Russian strategic concept, which correlates to forcing a target to be unable to respond in a manner that they wish, either through controlling their access to information (and thus their understanding of the situation) or through undermining their capacity to respond: see Giles (n 2) 22–3.

¹¹ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'). See at div 92.

¹² Jake Wallis and Thomas Uren, Submission No 2 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, (13 March 2020) 3.

¹³ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 October 2017, 129 (Duncan Lewis, Director-General of Security).

¹⁴ Duncan Lewis, 'Address to the Lowy Institute' (Speech, Lowy Institute, 4 September 2019).

legislation has failed to deter those seeking to conduct interference operations. Two years later, in late 2019, Lewis declared that foreign interference poses an ‘existential threat to Australia’ and is ‘by far the most serious issue going forward’ for Australian security.¹⁵

So what is Australia to do? In responding to situations generally, there are four levers of national power available to the Commonwealth government, namely, ‘diplomatic, informational, military and economic’.¹⁶ This article approaches the issue through the military lever. Conduct that amounts to cyber-enabled interference operations entails only razor-thin differences between valid online activism, illegal criminal conduct, and the modern hybrid warfare that Gerasimov prophesised. Questions about the appropriateness of a military response to what might simply be viewed as criminal activity are bound to arise. However, there is significant risk associated with regarding interference operations as merely criminal acts, for ‘[h]aving accepted continued harassment as the new normal puts the onus on the defender to risk escalation to end harassment; it has to shift from deterrence to the much harder act of compulsion’.¹⁷

Luckily, the decision has been made already by the Commonwealth government. Noting the changing security landscape in the *2020 Defence Strategic Update* to the *2016 Defence White Paper*,¹⁸ the ADF has been tasked with preparing to counter ‘non-geographic threats in cyberspace’,¹⁹ and with expanding its capabilities by ‘working closely with other arms of Government’.²⁰ This, in turn, requires the ADF to acquire capabilities able to ‘deliver deterrent effects against a broad range of threats, including preventing coercive or grey-zone activities from escalating to conventional conflict’.²¹ Accordingly, in January 2020, the Australian Army established the position of ‘cyber specialist’, allowing the Army to develop highly technical capabilities to meet modern operational requirements, including counter-interference operations. This initiative would appear only to be growing.²²

¹⁵ Ibid.

¹⁶ Joint Chiefs of Staff (US), *Strategy* (Joint Doctrine Note No 1-18, 25 April 2018) vii.

¹⁷ Martin C Libicki, ‘The Convergence of Information Warfare’ in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 21, 21.

¹⁸ Department of Defence, *2020 Defence Strategic Update* (Report, 2020) (‘*2020 Defence Strategic Update*’).

¹⁹ Department of Defence, *2016 Defence White Paper* (Report, 2016) 34 [1.19] (‘*2016 White Paper*’).

²⁰ *2020 Defence Strategic Update* (n 18) 25 [2.13].

²¹ Ibid 27–9 [2.24]. See also at 33–4 [3.3].

²² See, eg, Kate Banville, ‘ADF Bolsters Cyber Defences with New Specialist Role’, *Townsville Bulletin* (online, 18 October 2020) <<https://www.townsvillebulletin.com.au/news/adf-bolsters-cyber-defences-with-new-specialist-role/news-story/6d57523163458cf6641b1c743d0bffbfbf>>.

Yet, little has been written on the legal authorities and constraints on the utilisation of the ADF in countering interference operations.²³ Noting that the voting infrastructure and information environment is inherently domestic, this article will focus upon domestic law to the exclusion of international legal remedies and authorities that might empower Australia to respond to interference operations. In any event, the view has emerged that international law is neither useful nor productive in this context.²⁴ Therefore, this article will focus upon the executive power of the Commonwealth, and the internal security prerogative found in s 61 of the *Constitution*. The focus upon this specific prerogative, which may operate outside of instances of emergency — in which the common law doctrine of necessity would suffice as legal authority for action²⁵ — is important. Whilst the prerogative has been accepted in the United Kingdom, no Australian court has yet mirrored that acceptance. In the absence of clear legal authorities, what remains is effectively a ‘secret prerogative [which] is an anomaly — perhaps the greatest of anomalies’.²⁶ This article seeks to rectify this anomaly.

In order to demonstrate that such a power exists, this article will canvass the leading case on the internal security prerogative, and address its critiques and criticisms, arguing that many academics oppose an internal security prerogative on the basis of policy, rather than law. This article addresses one of the key critiques of the internal security prerogative — that it has been created, rather than discovered. In doing so, it canvasses the history of the use of organs of the state to Keep the Peace of the Realm. It then addresses both how and when a prerogative may evolve, and whether the internal security prerogative has fallen into desuetude. Finally, this article will address how federalism affects the operationalisation of the ADF domestically. Although the implied freedom of political communication is discussed, it is not the focus of the article or argument.²⁷ Further, the article will not discuss in detail any constitutional limitations upon executive power such as the principle of

²³ The closest would appear to be Hywel Evans and Andrew Williams, ‘ADF Offensive Cyberspace Operations and Australian Domestic Law: Proprietary and Constitutional Implications’ (2019) 47(4) *Federal Law Review* 606.

²⁴ Except, perhaps, through actions against foreign measures that amount to retorsion or counter-measures: see generally Dale Stephens, ‘Influence Operations and International Law’ (2020) 19(4) *Journal of Information Warfare* 1; Duncan Hollis, ‘The Influence of War: The War for Influence’ (2018) 32(1) *Temple International and Comparative Law Journal* 31; Michael Schmitt, ‘Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law’ in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186.

²⁵ See generally Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 187–8 (‘*Crown and Sword*’).

²⁶ Walter Bagehot, *The English Constitution*, ed Paul Smith (Cambridge University Press, 2001) 49.

²⁷ See *Chief of Defence Force v Gaynor* (2017) 246 FCR 298, 314–315 [68]–[72] (Perram, Mortimer and Gleeson JJ). See also Gerard Carney, ‘A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power’ (2018) 43(2) *University of Western Australia Law Review* 255, 266.

legality,²⁸ nor the question whether the prerogative has been abrogated by statute.²⁹ Although important, they are outside the scope of this article. Neither will this article deal with checks and balances on exercises of prerogative power — the ‘ancient and coarse’, or the ‘modern and delicate’ — that have historically accompanied discussions of the use of the military against its own people.³⁰ Finally, this article will not canvass the capabilities, tactics, techniques, and procedures that the ADF may employ in counter-interference operations, as it is concerned with legal possibilities rather than technical plausibility. At any rate, these capabilities are classified and fall outside the remit of any public works.

II LEGAL AND POLICY FRAMEWORK

There are three overlapping constitutional provisions relevant to the ADF conducting counter-information operations. They are ss 51(vi) (the defence power), 61 (from which the executive power of the Commonwealth emanates), and 119 (that the Commonwealth shall protect the states against invasion and domestic violence). This article will focus solely upon available prerogative powers under s 61, for two key reasons.

The first is that the executive power of the Commonwealth is the primary source of power for ADF operations and the most relied upon in combat operations.³¹ Accordingly, it deserves the most attention. The second key reason is that, as recent operations have demonstrated, there will always be situations where statutory powers for ADF operations (as may be legislated under s 51(vi)) may not be appropriately drafted for the issue at hand, and executive power will, inevitably, be viewed as an alternate legal authority.³² In the absence of legislative authority, the High Court has indicated that the Commonwealth Executive only has power to interfere with the

²⁸ See generally Chief Justice Robert French, ‘The Courts and the Parliament’ (Speech, Queensland Supreme Court Seminar, 4 August 2012), which raises the interesting issue of whether the principle of legality would be wide enough to encompass international obligations.

²⁹ The importance of this topic is increasingly being acknowledged: see Peta Stephenson, ‘The Relationship between the Royal Prerogative and Statute in Australia’ (2021) 44(3) *Melbourne University Law Review* (forthcoming); Anthony Gray, ‘The Australian Government’s Use of the Military in an Emergency and the *Constitution*’ (2021) 44(1) *University of New South Wales Law Journal* 357, 385.

³⁰ Bagehot (n 26) 210. Bagehot identifies the ancient and coarse model as charging a responsible minister with treason and executing them, or the modern and delicate method of simply dismissing the minister: at 210–11.

³¹ See Cameron Moore, ‘Military Law and Executive Power’ in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 98.

³² See, eg, the incredibly prescriptive provisions of the *Biosecurity Act 2015* (Cth) and the suggestion of reliance upon Commonwealth executive power in Shreeya Smith, ‘The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions’, *AUSPUBLAW* (Blog Post, 13 May 2020) <<https://auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19/>>.

legal rights of persons if it is exercising its *prerogative* powers. As Gageler J stated in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*³³ (*‘Plaintiff M68/2015’*),

[a]n act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. ... Subject to statute, and to the limited extent to which the operation of the common law accommodates to the continued existence of ‘those rights and capacities which the King enjoys alone’ and which are therefore properly to be categorised as prerogative, the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.³⁴

Leslie Zines has similarly commented that the Commonwealth’s prerogative powers ‘such as the declaration of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders and various Crown immunities and privileges, are capable of interfering with ... legal rights and duties of others’.³⁵

Having canvassed the importance of executive power, it is necessary to discuss its nature and scope. For some, executive power is elusive, for it is ‘described but not defined in sec[tion] 61’³⁶ of the *Constitution*, which reads as follows:

61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.³⁷

The executive power of the Commonwealth can be divided into three categories: statutory, non-statutory (the prerogative), and a power that is neither statutory nor a prerogative (the nationhood power). Recent case law, however, may have implications for the nomenclature of non-statutory executive power. In *Attorney-General (Cth) v Ogawa*,³⁸ the Full Court of the Federal Court held that prerogative powers

³³ (2016) 257 CLR 42 (*‘Plaintiff M68/2015’*).

³⁴ *Ibid* 98 [135] (citations omitted).

³⁵ James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) 374–5.

³⁶ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 440 (Isaacs J) (*‘Wooltops Case’*). See also *Davis v Commonwealth* (1988) 166 CLR 79, 92–3 (Mason CJ, Deane and Gaudron JJ) (*‘Davis’*); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ) (*‘Tampa Case’*); George Winterton, ‘The Limits and Use of Executive Power by the Government’ (2003) 31(3) *Federal Law Review* 421, 423–4.

³⁷ *Constitution* s 61.

³⁸ (2020) 384 ALR 474 (Allsop CJ, Flick and Griffiths JJ) (*‘Ogawa’*).

are ‘preferably described as the exercise of the Commonwealth executive power’.³⁹ Such a holistic approach to the executive power of the Commonwealth is useful from a practitioner’s perspective — it matters not which sub-branch of executive power is relied upon; one may simply designate it as the executive power of the Commonwealth. But from an academic perspective, there is merit in retaining a tripartite definition, so as to help delineate between a power that is prerogative and a power arising from nationhood.

When analysing the executive power conferred by s 61, it has become common practice to adopt the distinction drawn by George Winterton, between the ‘breadth’ and ‘depth’ of that power.⁴⁰ This practice was adopted by Gageler J in *Plaintiff M68/2015*, who explained ‘breadth’ to relate to ‘the subject matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system’,⁴¹ whilst depth denotes ‘the precise actions which the Executive Government is empowered to undertake in relation to those subject matters’.⁴² It can moreover be understood to limit the Executive’s ability to undertake coercive activities. The reference to ‘coercive activities’ in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional authorities such as: the *Magna Carta 1215*; the *Petition of Right 1628*; the *Habeas Corpus Act 1640*, 16 Car 1, c 10; the *Bill of Rights 1689*, 1 Wm & M sess 2, c 2; and the *Habeas Corpus Act 1816*, 56 Geo 3, c 100. As Brennan J observed in *Re Bolton; Ex parte Beane*,⁴³

[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.⁴⁴

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament in England, which resulted in the Parliament establishing limits on the executive’s non-statutory power. Critically, these limitations are most restrictive when it comes to the ‘internal’, rather than ‘external’, aspects of society.

So what depth, then, is there for the ADF to undertake counter-interference operations? Answering this requires ascertaining whether counter-interference operations would amount to force. Force, as a concept, is rather hard to define in

³⁹ Ibid 487 [64].

⁴⁰ George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 21.

⁴¹ *Plaintiff M68/2015* (n 33) 96 [130].

⁴² Ibid.

⁴³ (1987) 162 CLR 514.

⁴⁴ Ibid 520–1.

a military context — does the mere presence of ADF members constitute force? It seems prudent to go to publicly available ADF policy addressing the issue at first instance.

Generally speaking, as a matter of Defence policy, the use of the military within Australia falls into two broad categories: Defence Assistance to the Civil Community ('DACC') and Defence Force Aid to the Civil Authority ('DFACA'). DACC relates to 'where there is no likelihood that Defence personnel will be required to use force, or potential use, of force (including intrusive or coercive acts)'.⁴⁵ Force, in turn, is defined within the *Defence Assistance to Civil Community Manual* to include 'the restriction of freedom of movement of the civil community whether there is physical contact or not'.⁴⁶ But this is merely a policy statement, and would appear contextual on ADF members being in a public space (as opposed to restricting civilians entering Defence premises). It is implicit in the pattern of public DACC activities that the mere presence of ADF members, unarmed, would not be thought to constitute force, and would seem to occur under the prerogative relating to the command, control and disposition of the ADF found within s 68 of the *Constitution*.⁴⁷ This is a live issue, and discussed in more depth below with respect to Operation COVID-19 Assist.

In order to counter interference operations, it may be necessary for ADF members, by the direction of the government, to undertake coercive and intrusive measures in the virtual and physical realm. This would constitute more than a simple presence and accordingly falls under DFACA. Table 1 provides some examples of unclassified cyber operations that could be undertaken to counter interference operations.

⁴⁵ Department of Defence, *Defence Assistance to Civil Community Manual*, 17 August 2020, [6.1] ('*DACC Manual*'). For discussion on the concept see Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8/1997–98, Department of the Parliamentary Library, 2012) 63. Sir Victor Windeyer questioned whether such a threshold should be the determinant of the need for and the lawfulness of an order by the Governor-General: Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called out to Aid the Civil Power' in Bruce DeBelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (Federation Press, 2019) 211, 211–16. I have addressed this question elsewhere: see Samuel White, 'Military Intervention in Australian Industrial Action' (2020) 31(4) *Public Law Review* 423.

⁴⁶ *DACC Manual* (n 45) ch 6 [6.13(a)].

⁴⁷ Examples of DACC, historically, include military aid in bushfires, floods and storms or the use of specialist military personnel and equipment for explosive ordnance disposal. It has also included helicopters or fighter jets appearing at motorsport events, helicopters or skydivers appearing at football matches, or bands appearing at ceremonial functions. See *DACC Manual* (n 45) chs 3, 4. There are grey zones, however, such as what has happened at least on one occasion when the ADF assisted Victoria Police in breaching motorcycle gang safe houses: see 'Army, Police Raid Melbourne Property in Ongoing Operation Targeting Outlaw Motorcycle Gangs', *ABC News* (online, 12 October 2013) <<https://www.abc.net.au/news/2013-10-12/police-and-adf-raid-bikie-property-in-melbourne/5018414>>.

Table 1: Cyber Self-Help Courses of Action⁴⁸

Cyber Self-Help	Non-Cyber Equivalent
Tracer routes/Tracebacks	Public surveillance/security cameras
Responding to hostile IP addresses with logic bombs	Dangerous perimeters/electric fence
Automatic response to cyber probes/honeypots/tarbits	Booby traps
Reasonable damage to hacker hardware	Proactive destruction of a dangerous item
Tracking and collecting stolen data	Theft of property — chasing a criminal into a private third party house
Installing/embedding malware or virus to be remote activated if stolen	Interference with private property
Kill switches ⁴⁹	Denial of the right to communicate or move

These operations, if conducted in a non-cyber environment, could violate common law rights to protection from negligence and trespass to the person,⁵⁰ the common law right to liberty from false imprisonment and the writ of habeas corpus,⁵¹ and common law rights in relation to private property protected by the tort of trespass and other torts.⁵²

The only relevant statutory provisions that may provide legal authority for the ADF to conduct these operations are found within pt IIIAAA of the *Defence Act 1903* (Cth) (*‘Defence Act’*). Part IIIAAA supplies ‘the mechanics for the deployment of the ADF in aid of the civil authorities’.⁵³ There is a clear issue, however, with relying upon pt IIIAAA to authorise ADF action for counter-interference operations. In order to conduct a ‘call out’ of the ADF under this statutory regime, there must be a threat of ‘domestic violence’.⁵⁴ The term has no clear definition in the *Defence Act* or the *Constitution*, nor has it received any Australian jurisprudential commentary. At its best, the Addendum to the relevant Explanatory Memorandum notes that domestic violence

⁴⁸ The table is a collation of information and terms found within Wyatt Hoffman and Steven Nyikos, ‘Governing Private Sector Self-Help in Cyberspace: Analogies from the Physical World’ (Paper, Carnegie Endowment for International Peace, December 2018) 9–24.

⁴⁹ William D Toronto, ‘Fake News and Kill-Switches: The US Government’s Fight to Respond to and Prevent Fake News’ (2018) 79(1) *Air Force Law Review* 167, 177.

⁵⁰ See, eg, *Binsaris v Northern Territory* (2020) 380 ALR 1, 6–7 [25] (Gageler J).

⁵¹ *Plaintiff M68/2015* (n 33) 104–5 [159]–[162] (Gageler J).

⁵² See, eg, *Coco v The Queen* (1994) 179 CLR 427, 435–6 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁵³ HP Lee, ‘Military Aid to the Civil Power’ in HP Lee et al (eds), *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 218, 226.

⁵⁴ Samuel C Duckett White and Andrew Butler, ‘Reviewing a Decision to Call out the Troops’ (2020) 99(1) *AIAL Forum* 58.

refers to *conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term ‘domestic violence’ as this is the term used in section 119 of the *Constitution* ...⁵⁵

Yet, the same Addendum further notes that ‘[p]eaceful protests, industrial action or civil disobedience would not fall within the definition of “domestic violence”’.⁵⁶

Recently, Anthony Gray has attempted to advocate for ‘narrow’ and ‘broad’ interpretations of the constitutional term.⁵⁷ Gray, in a somewhat disconnected manner, appears to try link jurisprudential developments in the concept of ‘domestic violence’ between individuals in relationships to the constitutional concept of ‘domestic violence’.⁵⁸ Gray then posits that a ‘liberal’, and ‘non-literal’ interpretation of domestic violence should be applied,⁵⁹ which recognises that the meaning of words in the *Constitution* can change over time.⁶⁰ There is some benefit to this, despite an erroneous link between the alternate meanings of domestic violence and the incorrect and dangerous conclusions drawn from them with respect to the use of the military in Operation COVID-19 Assist.⁶¹

In making this assessment of whether and how the interpretation of constitutional terms should change, it is useful to utilise what Professor Jonathan Crowe has termed a ‘counterfactual’ analysis tool.⁶² The first step is to assess the lexical meaning of the term, at the time of enactment. The term comes from the *United States Constitution* art IV § 4, where the provision is read to include instances of ‘local uprisings, insurrections or internal unrest ... which may also threaten the existence or institutions of the states’.⁶³

⁵⁵ Addendum to Explanatory Memorandum, Defence Amendment (Call out of the Australian Defence Force) Bill 2018 (Cth) 2 [165A] (emphasis added) (‘Addendum to Explanatory Memorandum’).

⁵⁶ Ibid.

⁵⁷ Gray (n 29) 362–4.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495 [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁶¹ See Gray (n 29) 373 where Gray concludes that the nature and scale of the global health emergency in Operation COVID-19 Assist, and the bushfires of Operation Bushfire Assist 2019 2020, would meet the threshold of domestic violence.

⁶² Jonathan Crowe and Peta Stephenson, ‘An Express Constitutional Right to Vote? The Case for Reviving Section 41’ (2014) 36(2) *Sydney Law Review* 205, 229. For a detailed argument in support of this approach see Jonathan Crowe, ‘The Role of Contextual Meaning in Judicial Interpretation’ (2013) 41(3) *Federal Law Review* 417.

⁶³ Peta Stephenson, ‘Fertile Ground for Federalism: Internal Security, the States and Section 119 of the *Constitution*’ (2015) 43(2) *Federal Law Review* 289, 298 (‘Fertile Ground for Federalism?’). For further guidance on the meaning of ‘domestic violence’ see Michael Head, *Calling out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 16–18 (‘*Calling out the Troops*’).

The next step, according to Crowe and Stephenson, is ‘to identify the broader contextual factors that underpin those meanings’.⁶⁴ It is clear from the constitutional drafting and debates, history of statutory operationalisation of the section, Parliament’s intent in the Explanatory Memorandums, and American jurisprudence that domestic violence is concerned with conduct which would rupture the social fabric.⁶⁵ A counterfactual question can then be posed: would the Framers have intended for domestic violence to cover attempts to actively target voting infrastructure? Perhaps. Would the Framers have intended for domestic violence to cover attempts to corrupt the information environment? Most likely not. What, then, for operations that fall below this threshold?

It is clear that Parliament presumes that there exists an executive power outside of the statutory regime that may allow for DFACA operations domestically.⁶⁶ Part IIIAAA is subject to an express limitation that it ‘does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded’.⁶⁷ This is further mirrored in the *Defence Regulation 2016* (Cth) (*‘Defence Regulation’*) which applies to situations where the ADF is called out ‘other than [those] under Part IIIAAA of the [*Defence Act*]’.⁶⁸ Meanwhile, reference to an internal security prerogative was found historically within the oath taken upon enlistment in the ADF, which, until 1964, included promising to ‘cause Her Majesty’s peace to be kept and maintained’.⁶⁹

But these statutory provisions merely presume such a power; they do not create it. A search must be undertaken to assess the nature and ambit of any such manifestation of the executive power of the Commonwealth.

III AN INTERNAL SECURITY PREROGATIVE

What this article is concerned with is the depth of action that any internal security prerogative might provide. It deliberately does not look to address the applicability of the war prerogative, which, like any prerogative, can evolve, and is at its core concerned

⁶⁴ Crowe and Stephenson (n 62) 229.

⁶⁵ Windeyer (n 45) 284 [17].

⁶⁶ The extent to which this is applicable, however, is questionable. A similar provision within the *Maritime Powers Act 2013* (Cth) was dismissed as a tool of statutory interpretation of Parliamentary intent in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514: at 538 [41] (French CJ), 564–5 [141] (Hayne and Bell JJ), 601–2 [283] (Kiefel J).

⁶⁷ *Defence Act 1903* (Cth) s 51ZD (*‘Defence Act’*).

⁶⁸ *Defence Regulation 2016* (Cth) reg 69(1)(a) (*‘Defence Regulation’*).

⁶⁹ Windeyer (n 45) 278. Upon enlistment, ADF members take an oath or affirmation to serve Her Majesty the Queen, swearing that ‘I will resist Her enemies and faithfully discharge my duty according to law’: *ibid* sch 1 cl 1.

with the application of lethal force against declared enemies extra-territorially.⁷⁰ Its applicability is limited. Nor too, does this article look at the prerogative of command and control of the armed forces, recognised by the House of Lords in *China Navigation Co Ltd v Attorney-General*.⁷¹ There, the House of Lords found that linked to the war prerogative was a prerogative that provided for the management of war, even if war was not occurring. In argument, counsel for the respondent referred to a passage from Joseph Chitty's *Prerogatives of the Crown*,⁷² that

the King is at the head of his army and navy, is alone entitled to order their movements, to regulate their internal arrangements, and to diminish, or, during war, increase their numbers, as may seem to His Majesty most consistent with political propriety.⁷³

Thirty years later, the House of Lords in *Chandler v Director of Public Prosecutions*⁷⁴ reaffirmed the position, considering the issue of protestors entering a military base and preventing the movement of troops. Lord Devlin stated:

So long as the Crown maintains armed forces for the defence of the realm, it cannot be in its interest that any part of them should be immobilised. ...

It is by virtue of the Prerogative that the Crown is the head of the armed forces and responsible for their operation.⁷⁵

This position has also been upheld in New Zealand,⁷⁶ and there seems no reason to suggest that it would not be the case in Australia, as a general rule.⁷⁷ The prerogative of command, however, does not find its constitutional home in s 61, but rather in s 68. There are some important, and significant, consequences of this. Section 68 of the *Constitution* reads: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.' Unaltered since federation, the words seem clear and unambiguous enough.

⁷⁰ See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 115 (Viscount Radcliffe) ('*Burmah*') where it was noted that the prerogative is enlivened when there is an 'outbreak or imminence of war, provided that it carried with it the threat of imminent invasion or attack'.

⁷¹ [1932] 2 KB 197 ('*China Navigation Co*').

⁷² See Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) ('*Prerogatives of the Crown*').

⁷³ *China Navigation Co* (n 71) 207. Chitty (n 72) was subsequently referred to with approval: *China Navigation Co* (n 70) 242, 246 (Slesser LJ).

⁷⁴ [1964] AC 763.

⁷⁵ *Ibid* 807.

⁷⁶ See *Curtis v Minister of Defence* [2002] 2 NZLR 744, 752 [24]–[26] (Tipping J for the Court).

⁷⁷ Such a position is advocated in Moore, *Crown and Sword* (n 25) 90–1.

Yet, there is much to be read both in, and between, the lines. As distinct from many other provisions that refer to the Governor-General in Council, s 68 does not require such decisions to be made by an Order-in-Council.⁷⁸ As such, Sir Victor Windeyer opined:

It follows that orders by the Governor-General to the Defence Force, including calling it out, are given by virtue of the authority of command in chief. That does not mean that His Excellency may act without ministerial advice. He must act on the advice of a responsible minister ...⁷⁹

The reference to calling out should be read as reference to the highest level of *domestic* military operations — the calling out of the Defence Force to aid the civilian authority.⁸⁰ But it is unclear whether the prerogative power with respect to the control and disposition of the forces is itself a source of authority to engage in coercive actions directed at persons outside the armed forces. Sir Victor wrote in an era before any judicial findings had been made in the United Kingdom upon the existence of an internal security prerogative, as discussed in more depth below. His statement, then, was in accordance with contemporary legal thinking, but is now outdated. If *Attorney-General v Nissan*⁸¹ is to be followed, the prerogative of command under s 68 is reserved for administration, not warfighting. It is preferable, then, to focus upon a prerogative that is solely concerned with the use of force domestically, in keeping the peace of the realm, namely, the internal security prerogative.

But prior to discussing any possible depth of action the internal security prerogative may provide, the near-ritualistic discussion of the meaning and nature of the term ‘prerogative’ must be engaged in. This ritual is performed increasingly ‘self-consciously and semi-ironically’.⁸² In this article, the term ‘prerogative’ is used in a strict, Blackstonian sense, in terms of ‘those rights and capacities which the king enjoys alone, in contradistinction to others, and not those which he enjoys in common with any of his subjects’.⁸³

⁷⁸ As required under s 63 of the *Constitution*.

⁷⁹ Windeyer (n 45) 215. See also Sir Ninian Stephen, ‘The Governor-General as Commander-in-Chief’ (1984) 14(4) *Melbourne University Law Review* 563, 571, quoted in *Millar v Bornholt* (2009) 177 FCR 67, 77 [27] (Logan J).

⁸⁰ See Samuel White, ‘Military Intervention in Australian Industrial Action’ (n 45).

⁸¹ [1970] AC 179. See at 213 (Lord Reid). His Lordship preferred not to reach a view on whether this prerogative power provided lawful authority for British officers to acquire a hotel in Cyprus as part of a peacekeeping operation.

⁸² Thomas Poole, ‘The Strange Death of Prerogative in England’ (2018) 43(2) *University of Western Australia Law Review* 42, 45.

⁸³ William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid R Prest et al (Oxford University Press, 2016) bk 1, 155.

There two interpretations are by no means the only interpretation.⁸⁴ Dicey's interpretation is popular in the UK,⁸⁵ but as Munro has noted, it is a rather careless articulation which has proven unfortunately resilient⁸⁶ which fails to acknowledge the concept of the duality of the Crown. Blackstone's writing, in contradistinction, is popular in Australia and has been accepted by members of the High Court on several occasions.⁸⁷ It is important, however, to note that the prerogative does not just encompass coercive powers, 'but also a series of capacities and attributes, with widely differing subject matter'.⁸⁸ It is thus an umbrella term, varying from the power to grant honours and awards,⁸⁹ and mercy,⁹⁰ to declaring and conducting war.⁹¹

Notwithstanding this, the question remains of the extent to which a prerogative could be relied upon for utilising the ADF in countering interference operations in the grey zone. It is important to note that the existence of prerogative powers in emergencies short of war has not been authoritatively established.⁹² Such powers have been described as 'remarkably abstruse'.⁹³ There is no definitive list of prerogatives, despite attempts to produce one.⁹⁴ Accordingly, whilst the High Court has emphasised that 'the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the

⁸⁴ Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge, 2020) 47–8 ('*The Royal Prerogative and Constitutional Law*').

⁸⁵ *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin) ('*De Keyser*'); *Burmah* (n 70) 99 (Lord Reid); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser) ('*GCHQ*'); *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 139–40 [47]–[48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

⁸⁶ Colin R Munro, *Studies in Constitutional Law* (Butterworths, 1987) 160.

⁸⁷ *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320 (Evatt J); *Davis* (n 36) 108 (Brennan J); *Plaintiff M68/2015* (n 33) 97 [133] (Gageler J).

⁸⁸ Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41(2) *Federal Law Review* 363, 367.

⁸⁹ See Noel Cox, 'The Royal Prerogative in the Realms' (2007) 33(4) *Commonwealth Law Bulletin* 611.

⁹⁰ See *Ogawa* (n 38).

⁹¹ See *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.

⁹² Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279, 287; Carney (n 27) 266.

⁹³ Stanley A De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 566 n 13.

⁹⁴ See generally Chitty (n 72). The closest that can be found is Ministry of Justice (UK), *Review of the Executive Royal Prerogative Powers* (Final Report, 2009) 26–7, which recognises a prerogative of internal security.

ambit of British executive power’,⁹⁵ it remains that ‘[c]onsideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history’.⁹⁶ This is a clear endorsement of the view that, when addressing the extent of the executive power of the Commonwealth, an autochthonous interpretation is to be taken over a historical one.⁹⁷ Thus, although modern case law can be helpful in understanding the relevance of the respective prerogative power, any search for a prerogative must take us back to an era prior to the Glorious Revolution of 1688; for, whilst it can adapt to new circumstances, ‘it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative’.⁹⁸

Luckily, this search has already been undertaken both by academics writing in the 17th and 18th centuries, and more recently by the English courts. Chitty said that the King ‘may do various acts growing out of sudden emergencies’,⁹⁹ which appears relevant to internal security as well. The emphasis on, and acceptance of, a state of emergency was critical for scholars such as John Allen in his *Rise and Growth of the Royal Prerogative in England*,¹⁰⁰ and Arthur Berriedale Keith in his *The King and the Imperial Crown*.¹⁰¹ Allen went so far as to remark that emergencies could include abuse of monarchical power, relief from which included restoring peace to the realm by overthrowing the monarch.¹⁰² Reflecting on their line of academic thinking, modern scholar Peter Rowe sees that the use of military force domestically can be justified on the basis of a prerogative power emerging from the common law doctrine of necessity.¹⁰³

⁹⁵ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 469 [81] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁶ *Ibid.*

⁹⁷ See generally Peter Gerangelos, ‘Section 61 of the *Commonwealth Constitution* and an “Historical Constitutional Approach”: An Excursus on Justice Gageler’s Reasoning in the *M68 Case*’ (2018) 43(2) *University of Western Australia Law Review* 103. This approach is supported in Catherine Dale Greentree, ‘The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative’ (2020) 43(3) *University of New South Wales Law Journal* 893.

⁹⁸ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ) (‘*Johns*’), quoted in *Tampa Case* (n 36) 501 [30] (Black CJ). This position is a little misleading in that it suggests the Glorious Revolution froze prerogative powers when, in fact, in the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 it had already been held that the powers could not expand.

⁹⁹ Chitty (n 72) 50.

¹⁰⁰ John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (Longman, Brown, Green, and Longmans, 1849) (‘*Rise and Growth of the Royal Prerogative in England*’).

¹⁰¹ A Berriedale Keith, *The King and the Imperial Crown: The Powers and Duties of His Majesty* (Longmans, Green, 1936) (‘*The King and the Imperial Crown*’).

¹⁰² Allen (n 100) 87.

¹⁰³ Peter J Rowe, *Defence: The Legal Implications* (Brassey’s, 1987) 44–7.

This requirement of a state of emergency, however, was overturned by developments in the common law in the late 20th century. One consequence of the inner-city riots of the early 1980s in the United Kingdom was the establishment, by the Home Office, of a central store of plastic batons and tear gas rounds, to be made available to chief officers of police in situations of serious public disorder.¹⁰⁴ In Home Officer Circular 40/1986, the Home Secretary announced that the store may be made available to those in need without the approval of the local police authority.¹⁰⁵ This announcement displeased a local police authority, which applied for a declaration to the effect that, to that extent, the circular was ultra vires.¹⁰⁶ This application was refused by the Divisional Court, and an appeal dismissed by the Court of Appeal, in *Northumbria Police Authority*, it being held, inter alia, that the circular could be justified under the Royal prerogative.

Relevantly, the Court of Appeal in *Northumbria Police Authority* affirmed that the Crown has a prerogative power to do what is necessary to keep the peace of the realm, against both actual and threatened disturbances.¹⁰⁷ This arose from a finding that the Crown owes a prerogative duty to keep those under its allegiance safe from physical attack within its dominions.¹⁰⁸ This duty, importantly, was applicable at all times and not only in times of emergency. In dispensing with evidence to the contrary, Nourse LJ held that ‘a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest [of William I]’,¹⁰⁹ and that ‘[t]here is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm’.¹¹⁰ This would imply that the depth of action authorised by the prerogative is identical to that under the war prerogative, which, in the Australian context, would empower members of the ADF to apply lethal force and destroy property in the conduct of war-like operations. Indeed, Nourse LJ explicitly noted that the armed forces could exercise the internal security prerogative.¹¹¹ His Lordship continued that, with the exception of statutory abridgement, the internal security prerogative ‘has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces’.¹¹² Although there is no approval of this case so far in Australia, such a position would seem to be supported by other authorities.¹¹³

¹⁰⁴ *R v Home Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] 1 QB 26, 26–8 (*Northumbria Police Authority*).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 33.

¹⁰⁷ *Ibid* 44 (Croom-Johnson LJ).

¹⁰⁸ *Ibid* 46.

¹⁰⁹ *Ibid* 59.

¹¹⁰ *Ibid* 58.

¹¹¹ *Ibid* 51.

¹¹² *Ibid* 58–9.

¹¹³ Viscount Radcliffe in *Burmah* (n 70) said that the prerogative of protecting public safety was not necessarily confined to the imminence or outbreak of war: at 114–15, quoted in *Northumbria Police Authority* (n 104) 55 (Purchas LJ). See also *Qarase*

It remains the accepted and oft-used power for DFACA operations within the United Kingdom by military forces.¹¹⁴

Many civil libertarians have taken issue with the decision in *Northumbria Police Authority*. One issue is the lack of historical justification for the finding that the prerogative exists; Robert Ward argued that the Court of Appeal deserved '[f]ull marks ... for creative thinking', and that the result was erroneous.¹¹⁵ But simply because a court has not been asked to make a determination on the existence of a prerogative does not mean that the prerogative power does not exist. Historically, courts were reluctant to review exercises of the Crown's prerogative power on the basis of justiciability, with decisions relating to the 'defence of the country' and 'national security' generally treated as non-justiciable.¹¹⁶ James I summarised the position well when His Royal Highness suggested that the 'Prerogative of the Crown ... is no subject for the tongue of a Lawyer'.¹¹⁷

The English courts' willingness to review exercises of prerogative powers shifted in 1985, as a result of the decision in *GCHQ*.¹¹⁸ The House of Lords concluded that the question whether a particular exercise of prerogative power is justiciable would depend on the nature and subject matter of the particular prerogative power being exercised.¹¹⁹ English courts have subsequently emphasised that caution must be taken when relying on cases concerning the Crown's prerogative powers which were determined prior to the *GCHQ* decision.¹²⁰ Relevantly, *Northumbria Police Authority* was determined in 1989. There seems no reason to find fault in their Lordships' legal reasoning on this basis, although it is expanded upon with concurrence below.

v Bainimarama [2009] FJCA 9, in which the Court of Appeal of Fiji overturned a decision that a *coup d'état* was brought about by a valid exercise of the reserve powers of the President, on the basis that the *Constitution of the Republic of Fiji* deals expressly with reserve powers, and had thus displaced any relevant prerogative: at [93]–[94] (Powell, Lloyd and Douglas JJA). The *Australian Constitution* does not contain equivalent provisions, and would appear not to have displaced the prerogative on that basis.

¹¹⁴ Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Report, October 2009) 26 [102].

¹¹⁵ Robert Ward, 'Baton Rounds and Circulars' (1988) 47(2) *Cambridge Law Journal* 155, 156.

¹¹⁶ See *Minister of Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277 (Bowen CJ, Sheppard J agreeing at 280).

¹¹⁷ See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 379–80, quoting Johann P Sommerville (ed), *King James VI and I: Political Writings* (Cambridge University Press, 1994) 212–14.

¹¹⁸ *GCHQ* (n 85).

¹¹⁹ *Ibid* 399–400 (Lord Fraser, Lord Brightman agreeing at 424), 407 (Lord Scarman), 410–11 (Lord Diplock), 417–19 (Lord Roskill).

¹²⁰ See, eg, *Belhaj v Straw* [2017] AC 964, 1102 [95] (Lord Mance JSC); *Al-Jedda v Secretary of State for Defence* [2011] QB 773, 822–3 [206]–[208] (Elias LJ).

British academics have criticised the decision in *Northumbria Police Authority* as being ‘more policy than principle’.¹²¹ Further still, it has been argued that the decision failed to mark the limits of the internal security prerogative, and that it is thus normatively undesirable.¹²² Yet, for the most part, these criticisms are *lex ferenda*, rather than *lex lata*. It is clear that both the Divisional Court and Court of Appeal considered that the Crown held a prerogative power to keep the peace of the realm, importantly, *where no emergency exists*.

If a prerogative is established, courts must take notice of it.¹²³ Logically, considering that s 61 of the *Constitution* is informed by the British common law,¹²⁴ it would appear common sense that, an internal security prerogative having been affirmatively upheld within the United Kingdom (thereby being found to have existed in 1688), it concomitantly exists within Australia, regardless of the absence of any case law. This being so, it is not for academics to argue that such a prerogative does not exist, but for Parliament either to displace it through legislation, or to allow it to exist unregulated.¹²⁵ Yet, it would appear that, despite what would seem to be a rather clear-cut prerogative, there are Australian academics who consider its existence doubtful.¹²⁶

Thus, this article will aim, axiomatically, to justify the existence of the internal security prerogative within Australia, despite the clear case law and history that confirms its existence in the United Kingdom. In doing so, it will use the opportunity to outline the depth of action that this prerogative may provide legal authority for, with specific reference to counter-interference operations.

¹²¹ Conor Gearty, ‘The Courts and Recent Exercises of the Prerogative’ (1987) 46(3) *Cambridge Law Journal* 372, 374. See also Christopher Vicenzi, *Crown Powers, Subjects and Citizens* (Bloomsbury, 1998).

¹²² Ward (n 115) 156. See also Sebastian Payne, ‘The Royal Prerogative’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77.

¹²³ Noel Cox, *The Royal Prerogative and Constitutional Law* (n 84) 15 n 80.

¹²⁴ See *Plaintiff M68/2015* (n 33) 96–100 [129]–[142] (Gageler J). See also *Davis* (n 36) 92 (Mason CJ, Deane and Gaudron JJ) quoted in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 62 [131] (French CJ) (‘Pape’); *Williams v Commonwealth* (2012) 248 CLR 156, 372 [588] (Kiefel J) (‘Williams’).

¹²⁵ The latter option being apparently taken by the British government: see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2019] UKIPTrib IPT 17 186 CH.

¹²⁶ See, eg, Anne Twomey, ‘Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers’ (2010) 34(1) *Melbourne University Law Review* 313, 319–20; Rob McLaughlin, ‘The Use of Lethal Force by Military Forces on Law Enforcement Operations: Is There a “Lawful Authority”?’ (2009) 37(3) *Federal Law Review* 441, 444–5 n 12. There are, however, some who do support the proposition. See generally Moore, *Crown and Sword* (n 25) ch 4. See also HE Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 466–7. Finally, see Stephenson, ‘The Relationship between the Royal Prerogative and Statute in Australia’ (n 29).

A *The History of Keeping the Peace of the Realm*

As a historical entity, ‘the prerogative can only fully be understood in its more recent manifestations through taking a long-term perspective’.¹²⁷ It is arguable that, so long as the polis as a concept has existed, there has also existed a prerogative right to utilise the military, internally, for the good of the people.¹²⁸ This power necessarily has ranged from tasks where no force was used (such as the construction of aqueducts and roads), to the use of force to maintain the peace (such as enforcing quarantines and destroying property in order to stop the spread of a fire),¹²⁹ to the use of lethal force to suppress riots and insurrections.

1 *Prior to Conquest*

It is fitting, then, noting the etymological origins of the term prerogative that a discussion of the internal security prerogative begins with Rome.¹³⁰ Within the era of the Roman Republic, any military operation was required to be conducted against a legally defined enemy — *justus hostis* — who enjoyed rights within warfare. These rights, however, were not extended to bandits, pirates, rebels and slaves who undermined internal peace and security.¹³¹

In contradistinction, the Anglo-Saxon or Germanic tradition held that rather than swearing a universal oath, ‘[e]very member of a German state [was] bound by duty, as well as by regard to self-preservation, to defend the community to which he belonged; and if he betrayed or deserted its interests, he was punished with death’.¹³² Every German chief was voluntarily surrounded by a hand of followers and companions — a *comitatus*, or warband.¹³³ A King had a reciprocal ‘right to

¹²⁷ Andrew Blick, ‘Emergency Powers and the Withering of the Royal Prerogative’ (2014) 18(2) *International Journal of Human Rights* 195, 195.

¹²⁸ This aligns with the maxim *salus populi suprema lex* advocated in 1905 by the then Attorney-General, Robert Garran, in respect of the Commonwealth’s power to control submarine cables and private telegraph lines: RR Garran, ‘Opinion No 217’ in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, with Opinions of Solicitors-General and the Attorney-General’s Department* (Australian Government Publishing Service, 1981) vol 1, 259–60.

¹²⁹ See *Burmah* (n 70).

¹³⁰ See Blackstone (n 83) bk 1, 214.

¹³¹ See, eg, Wouter G Werner, ‘From Justus Hostis to Rogue State: The Concept of the Enemy in International Legal Thinking’ (2004) 17(2) *International Journal for the Semiotics of Law* 155, 158, 167.

¹³² Allen (n 100) 57.

¹³³ Cornelius Tacitus, *The Complete Works of Tacitus: The Annals, the History, the Life of Cnaeus Julius Agricola, Germany and its Tribes, a Dialogue on Oratory*, ed Moses Hadas, tr Alfred John Church and William Jackson Brodribb (Modern Library, 1942) 715–16.

the service of any of his subjects in any station or capacity he cho[se]'.¹³⁴ This was operationalised through the *fyrð*, in which men were obliged to aid the suppression of riots and civil disturbances in accordance with the principle that 'each civic grouping should be responsible for the maintenance of order within its own area'.¹³⁵ Those in the *fyrð*, necessarily, could use force up to and including lethal force, lawfully.

2 After the Conquest

The two different concepts of internal security — Roman and Germanic — were merged after the Norman Conquest of England, under William the Bastard who firmly established feudal law — a combination of Christian, Roman and Germanic law.¹³⁶

The Anglo-Saxon traditions of keeping the peace of the realm through the *fyrð* continued unchanged after the Conquest,¹³⁷ but was subsumed by the positions of Justice of the Peace, and Lord Lieutenant.¹³⁸ They could utilise the *posse comitatus* to ensure the orders of Henry I, son of William the Conqueror, were obeyed. Henry, under authority of his absolute Royal prerogative, decreed: 'I establish my firm peace throughout the whole kingdom and command that it henceforth be maintained.'¹³⁹ The importance of the control and security of land, as a prerogative of a ruler, gathered support during the Middle Ages, when, in periods of revolt, a feudal lord could declare war in order to retain order — similar to the Roman tradition.¹⁴⁰

The use of localised governance continued unchanged until the civil administration of Britain under the Lord Protector, Oliver Cromwell. Under the Lord Protector, the eponymously named 'London Scheme' was introduced, establishing a military commission in London with authority to raise troops for the suppression of 'rebellions, insurrections, tumults and unlawful assemblies' through the potentially lethal use of force.¹⁴¹ This scheme was quickly adopted in major population centres.¹⁴²

¹³⁴ *Marks v Commonwealth* (1964) 111 CLR 549, 573 (Windeyer J) ('Marks'), citing *R v Larwood* (1694) 1 Ld Raym 29; 91 ER 916; *Duke of Queensberry's Case* (1719) 1 P Wms 582; 24 ER 527.

¹³⁵ Anthony Babington, *Military Intervention in Britain: From the Gordon Riots to the Gibraltar Incident* (Routledge, 1990) ix.

¹³⁶ MH Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1st ed, 1965) 72.

¹³⁷ Babington (n 135).

¹³⁸ *Ibid.*

¹³⁹ Henry I, 'Henry I: Coronation Charter (1100)' in Carl Stephenson and Frederick George Marcham (eds), *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (Harper & Row, 1937) vol 1, 46, 48.

¹⁴⁰ See Keen (n 136) 48; Allen (n 100) 85–6, 111, 121.

¹⁴¹ Babington (n 135) 3.

¹⁴² Over the course of its history, the etymology of the phrase 'call out' has developed: see generally Windeyer (n 45). In the United States, the phrase remains 'calling forth': see *United States Constitution* art I § 8 cl 15. See also *Martin v Mott*, 25 US (12 Wheat) 19 (1827).

In 1688, the ‘Glorious Revolution’ resulted in William of Orange being placed on the English throne.¹⁴³ The new regent, retitled William III, utilised the troops stationed in London in an attempt to disband highwaymen who plagued the countryside,¹⁴⁴ reflecting that the use and direction of soldiers and sailors remained at the Crown’s discretion.¹⁴⁵ These members of the armed forces were required to use force in order to disband the internal security threat. Neither the military nor the navy fell under civilian jurisdiction at this time; rather, they were directly answerable to the Crown, and their use domestically was a simple extension of the Crown’s prerogative power.¹⁴⁶

As the conditions of the 18th century fuelled mass protests, the now British military were increasingly used as riot controllers.¹⁴⁷ Rarely of national or political character, these civil disturbances were often in protest of a local grievance or food shortage. Military intervention, sometimes including the use of lethal force, was justified on the basis of the Royal prerogative of keeping the peace of the realm.¹⁴⁸

The death of Queen Anne in 1714 led to government apprehension of riots over the accession of George I. Accordingly, a statute was introduced which imposed a duty upon public officer holders (such as magistrates, sheriffs or mayors), whenever 12 or more individuals were gathered, to read the following proclamation:

Our sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.¹⁴⁹

The *Riot Act 1714*, 1 Geo 1 sess 2, c 5 (*‘Riot Act’*) — as the statute was — also imposed a duty on any of the King’s subjects of age and ability to seize individuals who remained for more than an hour after the proclamation was read.¹⁵⁰ In 1781, the Chief Magistrate of London was charged with a criminal breach of duty in failing to

¹⁴³ *Bill of Rights 1688*, 1 Wm & M sess 2, c 2 art 7: ‘That the raising or keeping [of] a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law’.

¹⁴⁴ Babington (n 135) 4.

¹⁴⁵ Ibid 5.

¹⁴⁶ Ibid 4.

¹⁴⁷ Ibid 3.

¹⁴⁸ Ibid.

¹⁴⁹ *Riot Act 1714*, 1 Geo 1 sess 2, c 5. One charge read in 1830 apparently failed ‘because the magistrate who read ... [it] omitted the words “God save the King”’: Commissioners on Criminal Law, *Fifth Report* (Report, 1840) 100.

¹⁵⁰ A historical search has suggested that the first instance of the proclamation being read was in Southern Ireland in 1717: see Babington (n 135) 5.

order a military intervention with respect to the Gordon Riots.¹⁵¹ In *R v Pinney*,¹⁵² the difficulty of the position was expounded by Littledale J:

Now a person, whether a magistrate, or peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty: ... that, difficult as it may be, he is bound to do.¹⁵³

Once again, the *Riot Act* simply placed a positive duty upon servants of the Crown to keep the peace of the realm, by imbuing them with an iota of executive power. Accordingly, there is strong evidence to suggest that, both prior to and after the Norman conquest of England, there was a prerogative right to use force, including lethal force, domestically, to keep the peace of the realm.¹⁵⁴

3 *Australia*

The effect of this historical and legislative evolution in England was brought to the British colony of New South Wales after colonisation in Sydney.¹⁵⁵ During the first 100 years after colonisation, troops aided the civil power in a variety of ways, but primarily through conducting killings of Aboriginal Australians, under the legal premise of keeping the peace of the realm.¹⁵⁶ As Australia was settled under the premise of terra nullius, the British government refused to accept that any frontier conflict was ‘war’, for to do so would effectively recognise the sovereignty of Aboriginal Australians.¹⁵⁷ As the legal reasoning at the time went, Aboriginal Australians had become British subjects, and thus any armed attacks were *criminal* acts of misbehaving British subjects.¹⁵⁸ The only basis for the colonial armed forces

¹⁵¹ See *R v Pinney* (1832) 5 Car & P 254; 172 ER 962.

¹⁵² *Ibid.*

¹⁵³ *Ibid* 270. Lieutenant-Colonel Thomas Brereton was court martialled, having failed to charge the mob in the Bristol Riots under which the mayor, Charles Pinney, was also charged. Lieutenant-Colonel Brereton committed suicide before the conclusion of the court martial.

¹⁵⁴ See, eg, Twomey (n 136) 325–6.

¹⁵⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 34–5 (Brennan J) (*‘Mabo [No 2]’*).

¹⁵⁶ See Timothy Bottoms, *Conspiracy of Silence: Queensland’s Frontier Killing-Times* (Allen & Unwin, 2013) 32–5; Richard G Fox and Jodie E Lydeker, ‘The Militarisation of Australia’s Federal Criminal Justice System’ (2008) 32(5) *Criminal Law Journal* 287, 290–1; David Mackay, ‘Far-Flung Empire: A Neglected Imperial Outpost at Botany Bay 1788–1801’ (1981) 9(2) *Journal of Imperial and Commonwealth History* 125, 132–3.

¹⁵⁷ John Connor, ‘The Frontier War that Never Was’ in Craig Stockings (ed), *Zombie Myths of Australian Military History* (2010) 10, 11. See also *Mabo [No 2]* (n 155) 141, 144 (Dawson J).

¹⁵⁸ *Ibid.*

to conduct domestic operations would appear to be found in the internal security prerogative.¹⁵⁹

The role of the British Army personnel posted to the colony remained relatively constant, until after the establishment of police forces in the 19th century,¹⁶⁰ at which time it shifted to acting in ‘aid to the civil power’, rather than being the only effective instrument of that power.¹⁶¹

The most notable uses of colonial armed forces were in industrial strikes.¹⁶² Although not as infamous as the Eureka Stockade, the Queensland Shearers’ Strike of 1891 had important constitutional consequences. ‘The Shearers’ Strike arose in response to the “Pastoralists Agreement”, which, among other things, eroded the wages and working conditions of shearers, which the unions had ... been striving hard to improve.’¹⁶³ The unionised shearers refused to sign the Agreement and in 1891 they withheld their labour from the pastoralists. In response to the Shearers’ Strike, the pastoralists imported non-unionised labour from other colonies, and a conflict subsequently ensued between the unionised and non-unionised shearers.¹⁶⁴ Off the back of reports which suggested that the conflict could escalate, the Premier of Queensland, Sir Samuel Griffith, deployed troops from the Queensland Defence Force for ‘special service’ in aid of the civil power. From 20 February 1891 to 30 April 1891, a total of 1,442 troops were called out to areas where the unionists were concentrated.¹⁶⁵ A historical search reveals that s 119 of the Australian *Constitution* was originally introduced by Sir Samuel, on or around March 1891 in light of this experience.¹⁶⁶

Accordingly, it is clear that there existed a prerogative power to keep the peace of the realm, outside of emergencies, from pre-Norman England through to the federation of Australia. The prerogative power would appear to have provided lawful authority for the use of force, including lethal force, for both civilians and members of the armed forces. This reflects the fact that the Crown ‘has an interest in all ... [its] subjects; and is so far entitled to their services that in case of sudden invasion or formidable insurrection ... [it] may legally demand and enforce their personal

¹⁵⁹ See ‘Proclamation: By His Excellency Sir Thomas Brisbane’, *Sydney Gazette and New South Wales Advertiser* (Sydney, 19 August 1824) 1: made on 14 August 1824 in response to the Wiradjuri Resistance.

¹⁶⁰ See Gary Mason, *The Official History of The Metropolitan Police: 175 Years of Policing London* (Carlton Press, 2004).

¹⁶¹ Hugh Smith, ‘The Use of Armed Forces in Law Enforcement: Legal, Constitutional and Political Issues in Australia’ (1998) 33(2) *Australian Journal of Political Science* 219, 219, 231.

¹⁶² White, ‘Military Intervention in Australian Industrial Action’ (n 45).

¹⁶³ Stephenson, ‘Fertile Ground for Federalism?’ (n 63) 294.

¹⁶⁴ Stuart Swensen, *The Shearers’ War: The Story of the 1891 Shearers’ Strike* (University of Queensland Press, 1989) 5.

¹⁶⁵ *Ibid.*

¹⁶⁶ John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 62.

assistance'.¹⁶⁷ This entitlement, relevantly, does not extend to compelling subjects to go overseas for warlike purposes.

4 *Evolution?*

The Royal prerogative is a flexible power that evolves to meet new circumstances, providing flexibility in situations that may require it.¹⁶⁸ But how far can it evolve, and what is the test (if any) to ascertain whether any such evolution has occurred?

Although the prerogative, being part of the common law, necessarily holds the ability to evolve to novel situations, the line between evolution and creation may be a fine one. Equally unclear is the test to apply to determine when a prerogative has evolved. One test to apply is to look at whether the *expectation* of the citizens has changed. Winterton's example for this test is the questionable prerogative power of the Crown to open and read postal articles, and its potential evolution as a lawful authority to intercept telephone calls. The objectives of both intercepting letters and intercepting phone calls are the same 'protecting state security and preventing and detecting crime'¹⁶⁹ yet Winterton opined at the time that the sender's expectations are different. A letter sent can always be intercepted; a phone call is expected to be private.¹⁷⁰ This example, arguably, is one that is no longer relevant with the clear social expectation that data will be collected and mined from online interactions — hence the popularity of encrypted telecommunication applications. But the test is a useful one to apply.

So, can the internal security prerogative evolve to the digital domain? Within Australia, the use of the ADF in domestic security operations has been characterised by 'deeply held, even if imperfectly understood, reservations'.¹⁷¹ This perhaps reflects the isolated nature of the ADF from civilian society, or historical aversion that Anglo-Saxon culture has held towards the military, which — prior to the creation of a standing army — primarily comprised '[t]he dregs of society ... the rogues and vagabonds, the destitute, the condemned felons, and the prisoners from the gaols'.¹⁷² It perhaps also reflects the tension in colonial Australia, between the free colonisers supported by the colonial government and the military, and the convicts.¹⁷³ Yet there also remains an expectation that the use of military force can, and will, be applied in

¹⁶⁷ *Marks* (n 134) 573–4 (Windeyer J), quoting Chitty (n 72) 18. Justice Windeyer believed that the principle was no longer applicable; however, in the same decision, Kitto J (with whom Taylor J agreed) was of the opinion that it was: *Marks* (n 135) 557 (Kitto J, Taylor J agreeing at 558).

¹⁶⁸ See *Northumbria Police Authority* (n 104) 44 (Croom-Johnson LJ), 55 (Purchas LJ), 56, 58–9 (Nourse LJ); George Winterton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 408.

¹⁶⁹ Winterton (n 168) 408–9

¹⁷⁰ *Ibid.*

¹⁷¹ Margaret White, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 438.

¹⁷² Babington (n 135) 2.

¹⁷³ Robert Hughes, *The Fatal Shore* (Vintage Books, 1st ed, 2003) 301.

situations that demand it. Accordingly, and applying Winterton's test (noting that it has not been accepted by any court and indeed is a rather high threshold) it is logical to find that the internal security prerogative can and should be considered to have evolved into keeping the peace of the 'iRealm'. Citizens expect that their government is able to take action to counter and neutralise a threat, thereby keeping the peace of the realm. The history outlined above demonstrates that there is an expectation that military force can and will be applied, domestically, outside situations of riot and insurrection. Indeed, if British courts have accepted that the war prerogative can evolve to encompass new technology and new methods of warfare,¹⁷⁴ then there seems no reason to deny that evolution to its 'sister prerogative', the internal security prerogative.¹⁷⁵

But the history of the internal security prerogative so far has developed only against a backdrop of a unitary system;¹⁷⁶ it has not addressed the effects of federalism. Indeed, as 'developments that will occur in Britain are developments that will be informed and moulded by a radically different constitutional setting'¹⁷⁷ it is necessary to shift attention to the concept of a federal realm. This is a question that has rarely been grappled with.¹⁷⁸

IV A FEDERAL REALM

Federalism can be constructed across two axes — a design axis (dualist or integrated), and a constitutional axis (separation of powers).¹⁷⁹ Australia, relevantly, is a dualist federation, dividing spheres of responsibility between state and federal governments along thematic lines. For the most part, thematic divisions increase clarity of roles and responsibilities. However, with respect to interference operations, the theme can become rather blurred.

As Anne Twomey notes, '[f]ederation did not transform Australia into an independent sovereign nation. It merely consolidated six colonies into one federated larger colony.'¹⁸⁰ The status of these colonies can be viewed in contra-distinction to its

¹⁷⁴ *De Keyser* (n 85) 565 (Lord Sumner); *Re a Petition of Right* [1915] 3 KB 649, 666 (Warrington LJ).

¹⁷⁵ *Northumbria Police Authority* (n 104) 58 (Nourse LJ).

¹⁷⁶ Cheryl Saunders, 'Executive Power in Federations' in Amnon Lev (ed), *The Federal Idea: Public Law between Governance and Political Life* (Hart, 2017) 145–64. See also Cox, *The Royal Prerogative and Constitutional Law* (n 84).

¹⁷⁷ KM Hayne, 'Non-Statutory Executive Power' (2017) 28(4) *Public Law Review* 333, 337.

¹⁷⁸ Zines merely notes that any such delineation would be difficult, but also that he hopes that, as a matter of civil libertarianism, the decision in *Northumbria Police Authority* (n 104) is not followed: Zines (n 92) 287.

¹⁷⁹ Cheryl Saunders, 'Executive Power in Federations' (n 176) 156–7.

¹⁸⁰ Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 18 ('*The Chameleon Crown*').

Empire sister on the other side of the Pacific — Canada. In Canada, the separate colonies had sunk to the position of provinces, subordinated to the Canadian Federal Government. These provinces represented the Queen through Lieutenant-Governors, individuals appointed by the Governor-General. The *Australian Constitution*, however, deliberately rejected the subordination of the colonies and the states therefore retained their ability to appoint Governors. This difference was, and is, rather significant. One indicator at the time of Empire of the status of colonies was whether or not the administrators were ‘sterling’ or ‘currency’ — British born, or colony born.¹⁸¹ State Governors, coming from ‘the lesser nobility’ and historically liaising directly with the Colonial Office were *prima facie* more sovereign rather than ‘the Lieutenant-Governors of the Canadian Provinces [who] were of local origins and had no direct relations with the United Kingdom’.¹⁸²

Communication rights came to the fore particularly with federation approaching, through the delineation of what fell within a state’s interest, and what fell within the Commonwealth’s interest. In November 1900, the British Secretary of State for the Colonies wrote to the individual Australian colonial Governors, informing them that any correspondence back to the Colonial Office on matters that were a Commonwealth interest would be required to include the Commonwealth as a recipient, for awareness.¹⁸³

The first test of this divide — state or Commonwealth interest — came in 1902 when the Dutch Government sought action from the British Government for lack of action taken by South Australia to arrest the crew of a Dutch ship, in breach of treaty obligations with respect to deserters.¹⁸⁴ The British Government directly communicated with the Commonwealth Government for a situation report, noting that internal security and public order fell within the remit of the State. The Secretary of State for the Colonies, having taken submissions on the matter, concluded that as the matter fell within external affairs and treaties, it was a Commonwealth matter.¹⁸⁵

This tension of external affairs and defence (clearly Commonwealth interests) and the maintenance of civil order (a state affair) would routinely emerge in the appropriate recipients for communiqués on issues such as permission of foreign warships to land in State ports, or riots.¹⁸⁶ It is a tension that still remains.

A *Whose Peace?*

After federation, s 119 of the *Constitution* had important consequences for the scope of the role of the armed forces, and of the Commonwealth generally, in exercising

¹⁸¹ Hughes (n 173) 88.

¹⁸² Twomey, *The Chameleon Crown* (n 180) 21.

¹⁸³ *Ibid* 20.

¹⁸⁴ *Ibid* 21.

¹⁸⁵ *Ibid* 22.

¹⁸⁶ *Ibid*.

a right to keep the peace of the realm. Section 119 reads: ‘The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.’¹⁸⁷ The provision must be read in conjunction with part of its sister provision, s 114: ‘A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force.’

Although described as the ‘wallflower of the *Constitution*’,¹⁸⁸ s 119 (combined with s 114) is anything but. It has the effect of confirming the right of the states and territories to regulate matters of their own general public order, which has been recognised by the High Court.¹⁸⁹ Yet s 119 also states that domestic violence is a matter that can flow into the Commonwealth’s area of responsibility on the application of a state. Accordingly, when discussing any internal security prerogative, it is necessary to distinguish between peace as concerns the Commonwealth, and peace as concerns the states. John Quick and Robert Garran discuss this tension in *The Annotated Constitution of the Australian Commonwealth*:

The Federal Authority is not required or empowered to interfere to protect a State against domestic violence, except on the application of the Executive Government of the State. ... If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. *Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections*, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.¹⁹⁰

The above passage, outlining so-called ‘Commonwealth interests’, was quoted with approval by Dixon J in *R v Sharkey*¹⁹¹ (‘*Sharkey*’).

¹⁸⁷ *Constitution* s 119.

¹⁸⁸ Stephenson, ‘Fertile Ground for Federalism?’ (n 63) 290.

¹⁸⁹ See *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 653–4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 964; Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987) 226–38; Zines (n 92) 287; (2005) 16(4) *Public Law Review* 279, 287 (‘*The Inherent Executive Power of the Commonwealth*’); Cheryl Saunders, ‘The Australian Federation: A Story of Centralization of Power’ in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 87.

¹⁹⁰ Quick and Garran (n 189) 964 (emphasis added).

¹⁹¹ (1949) 79 CLR 121, 151.

However, it is argued by some that the executive cannot do that which could not be legislated for.¹⁹² Given this,¹⁹³ it is well to note that the concept of ‘Commonwealth interests’ may already be found in legislation. Part IIIAAA of the *Defence Act* is one example. Part IIIAAA does not, however, define the term ‘Commonwealth interests’. Some interpretive help on this nebulous concept may be found in the Addendum to the Explanatory Memorandum, referred to above. There, it is suggested that the term is to be read as including ‘the protection of Commonwealth property or facilities . . . , the protection of Commonwealth public officials as well as visiting foreign dignitaries or heads of State and, major events, like the Commonwealth Games or G20’.¹⁹⁴

A broader definition can be found in a separate statute — specifically, s 100.4 of the *Criminal Code* (Cth),¹⁹⁵ which provides much more detail as to what an ‘interest of the Commonwealth’ constitutes. This provision was introduced after the referral from the states to the Commonwealth of powers for the purposes of counter-terrorism.¹⁹⁶ Section 100.4(5), in turn, attempts to codify non-exhaustively what the Commonwealth views as its interest when there is no consent from a state or territory. It reads:

- (5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if:
 - (a) the action affects, or if carried out would affect, the interests of:
 - (i) the Commonwealth; or
 - (ii) an authority of the Commonwealth; or
 - (iii) a constitutional corporation; or
 - (b) the threat is made to:
 - (i) the Commonwealth; or
 - (ii) an authority of the Commonwealth; or
 - (iii) a constitutional corporation; or

¹⁹² See, eg, *Plaintiff M68/2015* (n 33) 42; *Moore* (n 31) 98; *Winterton* (n 40) 29–30.

¹⁹³ The Commonwealth could, perhaps, pass legislation that consents to the conferral, by a state or territory in a demonstration of co-operative federalism, of coercive powers which the Commonwealth itself could not have legislated for: see, eg, *R v Hughes* (2000) 202 CLR 535, 554–5 [38]–[39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁹⁴ Addendum to Explanatory Memorandum (n 55) 2 [163A], 3 [189A]. This is mirrored in the Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 15 [38].

¹⁹⁵ *Criminal Code* (n 11).

¹⁹⁶ In accordance with the referral power under s 51 (xxxvii) of the *Constitution*.

- (c) the action is carried out by, or the threat is made by, a constitutional corporation; or
- (d) the action takes place, or if carried out would take place, in a Commonwealth place; or
- (e) the threat is made in a Commonwealth place; or
- (f) the action involves, or if carried out would involve, the use of a postal service or other like service; or
- (g) the threat is made using a postal or other like service; or
- (h) the action involves, or if carried out would involve, the use of an electronic communication; or
- (i) the threat is made using an electronic communication; or
- (j) the action disrupts, or if carried out would disrupt, trade or commerce:
 - (i) between Australia and places outside Australia; or
 - (ii) among the States; or
 - (iii) within a Territory, between a State and a Territory or between 2 Territories; or
- (k) the action disrupts, or if carried out would disrupt:
 - (i) banking (other than State banking not extending beyond the limits of the State concerned); or
 - (ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or
- (l) the action is, or if carried out would be, an action in relation to which the Commonwealth is obliged to create an offence under international law; or
- (m) the threat is one in relation to which the Commonwealth is obliged to create an offence under international law.

The above provisions attempt to capture all relevant provisions of the *Constitution* and the enumerated heads of power under s 51, and the existence of Commonwealth executive power in these areas is straightforward enough. Indeed, in these instances, questions about federalistic spheres of influence are automatically resolved.¹⁹⁷ To this, one could add Quick and Garran's riots and federal mail, 'the protection of trading and financial corporations, banks and insurance companies as well as the

¹⁹⁷ Windeyer (n 45).

protection of federal legislative, executive, judicial, administrative and military institutions, public authorities and statutory bodies'.¹⁹⁸

B *Can the Commonwealth 'Protect Itself' against Interference Operations?*

Of more pressing concern are instances that are not automatically resolved, such as ADF operations to counter interference operations. Are such operations more analogous to ordinary policing functions within a state? Or are they more similar to military operations and internal security? The closer they are to the former, the more likely the High Court is to find that this is a matter within the ordinary competence of the states, and therefore not within the sphere of responsibility of the Commonwealth. The difference between interference operations as a crime (a public order issue, for the states) or as a defence issue (a form of war and within the remit of the Commonwealth) is eerily similar to the tensions felt with Dutch deserters in 1902.

This paper argues that interference operations are a defence issue, rather than a simple public order issue, although the difference is razor thin. Indeed, from the perspective of a cyber warrior, the method may amount to a crime on a technical basis (software tools and logistic support) similar to terrorism. *Thomas v Mowbray* would support the proposition that it can remain a Commonwealth issue, despite being a prima facie public order issue.¹⁹⁹ If particular notice is given to military strategists and leading commentators on war studies, the potential for interference operations to supersede traditional kinetic warfare can be clearly seen. As Gerasimov noted above, and both the respective Australian and British Chiefs of Defence Forces have recently accepted, warfare is changing.²⁰⁰ Interference operations are most likely best categorized as a form of warfare, and thus within the remit of Commonwealth responsibility as enumerated under the Constitution, rather than a simple law and order concern.²⁰¹ Such a discussion however is political and without a clear position from the High Court, simply conjecture.

Another school of constitutional thinking is that there is inherent power within the Commonwealth to protect itself. As I have covered elsewhere, it is not necessary that a Commonwealth interest requires a statute.²⁰² It is logical that there are some non-statutory interests of the Commonwealth, such as its continued existence (reflecting that a constitution should not be a suicide pact). This aligns with the common law maxim *salus populi suprema lex* — the welfare of the people is the paramount law.²⁰³

¹⁹⁸ Zines (n 92) 289.

¹⁹⁹ (2007) 233 CLR 307, 308.

²⁰⁰ See generally Alvin Toffler, *The Third Wave* (William Morrow, 1980).

²⁰¹ For Australia, see General Angus Campbell, 'War in 2025' (Speech, ASPI Canberra, 13 June 2019). For the British perspective, see General Nick Carter, 'Launch of the Integrated Operating Concept' (Policy Exchange, 30 September 2020) <<https://www.gov.uk/government/speeches/chief-of-the-defence-staff-general-sir-nick-carter-launches-the-integrated-operating-concept>>.

²⁰² Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210, 213–14.

²⁰³ Garran (n 128) 259–60.

How far can this concept go? It is difficult to envisage a situation of civil order in the modern, globally connected world where some aspect of a Commonwealth interest would not be threatened or endangered.²⁰⁴ Clearly, the threat posed by foreign interference operations is one that would ostensibly touch upon a Commonwealth interest, be it constitutional provisions,²⁰⁵ a method of delivery that touches upon Commonwealth legislation,²⁰⁶ or, accepting this article's earlier proposition, the good of the people. Using the example of interference operations targeting voting infrastructure, any operation that touched on federal elections would necessarily fall within the ambit of Commonwealth interests. It is arguable that, on this broad approach, these interests extend to foreign interference operations that affect *state* voting infrastructure. This is because the *Constitution* requires, as does federalism as a concept, stable states and territories with elected representatives. Any interference with these elections could thus be said to affect the Commonwealth, as discussed by Quick and Garran. On this broad approach, AV Dicey's concept that '[f]ederal government means weak government' perhaps might not be correct anymore.²⁰⁷

Could this also extend to protecting the information environment? Whilst 'it is conventional wisdom that the *Australian Constitution* does not expressly guarantee a right to vote',²⁰⁸ the reasoning underpinning the implied freedom of political communication would appear to suggest a non-statutory Commonwealth interest in ensuring the 'marketplace of ideas' remains uncorrupted by foreign influence.²⁰⁹

²⁰⁴ See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338, 412–13 (Jacobs J) ('*AAP Case*'). His Honour stated that:

The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexing and reflecting those values.

²⁰⁵ Which gives Parliament the power 'to make laws for the peace, order, and good government of the Commonwealth with respect to: postal, telegraphic, telephonic, and other like services': *Constitution* s 51(v).

²⁰⁶ See *Radiocommunications Act 1992* (Cth); *Telecommunications Act 1997* (Cth).

²⁰⁷ See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 167. See also Cheryl Saunders, 'Executive Power in Federations' (n 176) 145.

²⁰⁸ Crowe and Stephenson (n 62). This article is particularly useful in discussing the nuanced decisions around s 41 of the *Constitution*, and the resisted implication of a *right to vote*. See also *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

²⁰⁹ These concepts denote the philosophical rationale for freedom of expression, using the analogy of the economic concept of a free market, where ideas can be traded and accepted. It presumes that individuals will, if exposed to information, seek out and value 'truth' over falsehoods. John Milton, in arguing against British censorship laws some years earlier said 'though all the winds of doctrine are let loose to play upon the earth ... whoever knew truth put to the worse in a free and open encounter? ... [T]ruth must always prevail in a fair fight with falsehood?': Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in John Gray and GW Smith (eds), *JS Mill On Liberty: In Focus* (Routledge, 1991) 131, 144.

The High Court has stated that the implied freedom of political communication exists to enable ‘the people to exercise a free and informed choice as electors’,²¹⁰ and revolves around the principles of representative democracy, as implied within ss 7, 24, 64 and 128 of the *Constitution*. However, the implied freedom has not invalidated legislation seeking to enhance the electoral process by ‘ensuring that one voice does not drown out others’ in political discourse.²¹¹

The desire to protect the information environment, specifically with respect to elections, was addressed by the High Court in *Smith v Oldham* (‘*Smith*’).²¹² Subsequent to federation, electoral legislation was introduced,²¹³ prohibiting newspapers and other publishers from publishing anonymously written articles on matters of the election. In an eerily accurate statement over a century ago, Isaacs J scathingly remarked:

The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.

... For an opinion into which a man has been tricked or misled, even innocently, is a double wrong. It means not merely a loss to the side on which he would otherwise have cast the vote, but it also strengthens their opponents.²¹⁴

His Honour then continued, ‘the public injury, so far as political results are concerned, *is as great when the opinion of the electorate is warped by reckless, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified*’.²¹⁵

It thus seems that the High Court’s interpretation of the *Constitution* supports the proposition that the Commonwealth is empowered, through legislation, to protect the intangible information environment. The very recent High Court case

²¹⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ) (‘*McCloy*’).

²¹¹ *McCloy* (n 210) 206 [43] (French CJ, Kiefel, Bell and Keane JJ), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144–5, 159, 175, 188–91, 239.

²¹² (1912) 15 CLR 355 (‘*Smith*’).

²¹³ *Commonwealth Electoral Act 1902* (Cth), later amended by *Commonwealth Electoral Act 1911* (Cth).

²¹⁴ *Smith* (n 212) 362.

²¹⁵ *Ibid* 362–3 (emphasis added).

of *LibertyWorks Inc v Commonwealth* confirms this against the modern threat of interference operations.²¹⁶ In *LibertyWorks*, the compulsive provisions within the new *Foreign Influence Transparency Scheme Act 2018* (Cth) (*'FITS Act'*) as a precondition to engaging in political communication with the public, or a section of the public²¹⁷ was challenged as unduly restricting the implied freedom of political communication. This legislation was part of the trifecta of Acts passed, noted at the outset of this paper, that sought to address the threat of foreign interference. Noting the Australian government's intent that the legislation empowered the 'sunlight' of activities²¹⁸ to act as a disinfectant to disinformation²¹⁹ a majority of the Court found in favour of the provisions and their constitutionality.²²⁰ Importantly, the majority expressly affirmed and cited the above observations in *Smith*.²²¹

Whilst the underlying premise of the Australian government's response to foreign interference may be questioned (that individuals will rationally seek and prefer true and correct information),²²² it is important that the High Court has consistently affirmed that the information environment is a key underpinning concept of the *Constitution*.²²³ Obviously, the cases are concerned with restrictions on legislation, rather than as an authority for executive action. The legislation being of a Commonwealth nature, it follows from the above discussion that there is a prima facie Commonwealth interest. But it is axiomatic that there need be legislation for such an integral part of the *Constitution*, and representative democracy. This position necessarily must be qualified by a clear statement that there has been little judicial approval of any power of the Commonwealth to protect its interests.²²⁴

²¹⁶ [2021] HCA 18 (*'LibertyWorks'*).

²¹⁷ *Ibid* [92] (Gageler J).

²¹⁸ *Ibid* [57] (Kiefel CJ, Keane and Gleeson JJ); [104] (Gageler J); [122] (Gordon J); [206] (Edelman J).

²¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13147 (Malcolm Turnbull, Prime Minister).

²²⁰ *LibertyWorks* (n 216).

²²¹ *Ibid* 20 [59] (Kiefel CJ, Keane and Gleeson JJ).

²²² See Philip M Napoli, 'What If More Speech Is No Longer the Solution?' (2017) 70(1) *Federal Communications Law Journal* 55. See also Trevor Thrall and Andrew Armstrong, 'Bear Market? Grizzly Steppe and the American Marketplace of Ideas' in Christopher Whyte, Trevor Thrall and Andrew Armstrong (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 73, 78: '[t]he marketplace of ideas model is undeniably elegant and compelling, an Enlightenment-era cocktail of Bayesian opinion formation, free speech, and capitalism. Unfortunately, its most foundational premise is false'.

²²³ See *LibertyWorks* (n 216) [249] (Steward J). Interestingly, the newly appointed Steward J made comments in obiter that his Honour's belief in the implied freedom was arguable.

²²⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (*'Communist Party Case'*); *AAP Case* (n 204); *Davis* (n 36); *Tampa Case* (n 36).

An alternate test as to when it is appropriate for the Commonwealth to intervene to protect its interests, specifically with the military, has appeared within academic thinking. The position is best advocated by Peter Johnston:

An alternative approach in determining when resort to the [Australian] Defence Force is constitutionally justifiable [to operate domestically] is to focus on the *gravity of the risk* and the *nature of the persons* engaged in breaking a Commonwealth law, instead of the *kind* of Commonwealth interest entailed. No one would quibble about calling in specialist military units to counter terrorist assaults, for example ...²²⁵

Johnston's test, in other language, can be summarised as a *nature and scale* test, and would appear to be supported by the High Court's decision in *Pape v Federal Commissioner of Taxation*²²⁶ ('*Pape*'), in which the majority relevantly approved comments in *Davis v Commonwealth*.²²⁷ Their Honours held that the existence of Commonwealth executive power is clearest where there is no competition with the states in respect of the matter the subject of the purported power. Where there is a contest, consideration is given to the comparative capacity of the states and the Commonwealth to engage in the activity in question.²²⁸

Continuing to use the example of Commonwealth and state elections, it is clear that the use of the ADF to protect a federal election does not involve competition with the states, in the sense discussed above. Yet, it is arguable that Commonwealth intervention may be justified in response to threats of a certain *nature* and of a sufficient *scale*. Arguably, in case of threats to voting infrastructure from digital interference operations (such as distributed denial of service attacks, or manipulation of voting data), the Commonwealth may intervene. This intervention would be on the basis that only the Commonwealth may have the capabilities to respond to interference operations through the use of specialised organs such as the ADF and the Australian Signals Directorate. This logic further applies to the information environment, although it is necessary to make this assessment on a case-by-case basis.²²⁹ Such a position is reflected within the relevant statutory considerations for calling out the ADF domestically, namely, that the authorising Ministers must take into account the

²²⁵ Peter W Johnston, 'Re Tracey: Some Implications for the Military-Civil Authority Relationship' (1990) 20(1) *University of Western Australia Law Review* 73, 79 (emphasis in original).

²²⁶ *Pape* (n 124).

²²⁷ *Pape* (n 124) 62 [131] (French CJ), quoting *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J). See also *Pape* (n 124) 90 [239] (Gummow, Crennan and Bell JJ), quoting *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ).

²²⁸ *Ibid* 60–2 [127]–[131] (French CJ), 90 [239] (Gummow, Crennan and Bell JJ).

²²⁹ See *Davis* (n 36) 111 (Brennan J): '[t]he variety of [Commonwealth] enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria'.

nature of the domestic violence threat and the capabilities of the ADF before the authorising Ministers may be satisfied that the ADF should be called out.²³⁰

IV SURVIVAL OF THE PREROGATIVE

Having canvassed and addressed the existence, limits and federal operationalisation of a Commonwealth internal security prerogative, it remains to be seen whether the final hurdle can be surmounted — whether the prerogative power has fallen foul of the principle of desuetude. As the prerogative is founded on usage, it is a contradiction of terms to have a power that has fallen into disuse.²³¹

A The Principle of Desuetude

Walter Bagehot, in *The English Constitution*, noted that, on its face, any review of prerogative powers would conclude that the Crown holds many plenary powers which ‘waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if ... [the Crown] tried to exercise them’.²³² Having argued that the internal security prerogative exists, and has been not been displaced by the *Defence Regulation*, the final issue for this article to address is whether the principle of desuetude applies — that principle is that long disuse effectively extinguishes a prerogative.²³³

This is not an accepted doctrine — it has been held that disused prerogatives are lost,²³⁴ though it is also said that they are not lost by disuse.²³⁵ A middle ground would appear to be the reasons of Lord Simon in *McKendrick v Sinclair*,²³⁶ in discussing whether, by reason of disuse, the action of assythment in Scottish law had been extinguished. His Lordship observed:

²³⁰ See *Defence Act* (n 67) ss 33–6. For an analysis of this decision-making process: see White and Butler (n 54). Realistically speaking, however, this is a political decision, and whether the nature and scale of any foreign interference operation is deemed to warrant Commonwealth intervention would depend on the political environment of the day. Officially, there have been six requests for ADF assistance under pt IIIAAA of the *Defence Act* (n 67), with all six denied on the basis that the authorising Ministers did not reach the requisite state of mind under ss 33–6: see Stephenson, ‘Fertile Ground for Federalism?’ (n 163) 290–1, citing HP Lee, *Emergency Powers* (Law Book, 1984) 202.

²³¹ Allen (n 100) 158.

²³² Bagehot (n 26) 49.

²³³ See especially *South Australia v Victoria* (1911) 12 CLR 667, 703 (Griffith CJ, Barton J agreeing at 706) (*‘Boundaries Case’*): ‘[t]he Prerogative may ... be regarded as having ... fallen into abeyance’.

²³⁴ *Ibid.*

²³⁵ *Burmah* (n 70) 101 (Lord Reid).

²³⁶ (1972) SC (HL) 25.

The true doctrine ... is that a rule of the English common law, once clearly established, does not become extinct merely by disuse, and remains capable of recrudescence in *propitious* circumstances, *but not when it would be grossly anomalous and anachronistic* ... But the maxim *cessante ratione cessat ipsa lex* is also part of English law. If a rule of English common law cannot become as dead as the dodo, it can at least go into a cataleptic trance like Brünnhilde or Rip van Winkle or the Sleeping Beauty. In such a state the rule in question cannot ... be revived at the mere call of any passing litigant, but only if its appropriate moment has come again to operate *usefully and without gross anomaly*.²³⁷

Given the paucity of military intervention in Australia, one might think that the ‘revival’ of an internal security prerogative would need to pass under the principle of desuetude. However, as expanded upon below, there have been clear historical uses of Australian military forces under this prerogative, albeit without the clear designation of its nomenclature. It is problematic, however, to rely upon past practice as *indicia* of legality. As Heydon J in *Pape* stated decisively:

Executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional. Practice must conform with the *Constitution*, not the *Constitution* with practice. The fact that the executive and legislative practices may have generated benefits does not establish that they are constitutional.²³⁸

In the absence of any specific authority, practice may provide a guide as to what is accepted as lawful. There is merit, therefore, in areas of legal ambiguity, to look at past practice to see whether or not there was legal controversy or subsequent specific statutory regulation in response. Indeed, it is not just academia that utilises past practice as a litmus test — the High Court considered practice as a guide in *Pape*²³⁹ and *Williams*.²⁴⁰ There is implicit support therefore for looking at past practice. To that end, this article considers: the 1949 Coalminers’ Strike; the 1969 secessionist agitation in Papua New Guinea; the 1978 Bowral call-out; and the 2002 CHOGM and 2003 visit of the President of the United States. It is noted that at least some of these events have been considered by legal scholars before, though it is emphasised that that has not been done in respect of the question whether the internal security prerogative has fallen into desuetude.

1 *The 1949 Coalminers’ Strike*

In April 1949, Australian troops were used in unloading coal from an Indian ship which had been blacklisted by the communist controlled Miners’ Federation in New South Wales and Victoria.²⁴¹ The *National Emergency (Coal Strike) Act 1949* (Cth) was assented to on 29 June 1949 to prevent the funding of the strike. Whilst

²³⁷ Ibid 60–1 (emphasis added) (citations omitted).

²³⁸ *Pape* (n 124) 209 [598].

²³⁹ Ibid 24–5 (French J), 74 (Gummow, Crennan and Bell), 122 (Hayne and Kiefel JJ).

²⁴⁰ *Williams* (n 124) 340 (Crennan J), 369 (Kiefel J).

²⁴¹ Margaret White (n 171) 448.

not requested by New South Wales, the low level of coal reserves, and the potentially communist-inspired nature of the strike, would appear to have given rise to a Commonwealth interest in the sense described above. Interstate trade was no doubt affected, since

more than 500,000 wage and salary earners in the several States were progressively thrown out of work. Reserves of coal had been practically nil, and of alternative fuels scanty. Much of heavy industry ground to a standstill. Electricity was sharply rationed in at least three States. Domestic gas was rationed to an hour a day in Melbourne and Sydney. Electric train and tram services ran at skeleton strength.²⁴²

Subsequently, troops were sent by the Commonwealth to work in the mines in a strike substitution capacity. Such a deployment is on its face a *de facto* DACC tasking. In positioning the troops, it was agreed that the maintenance of law and order, and *ipso facto* the use of force, would remain the responsibility of the New South Wales constabulary forces. There was, however, a *furor* raised by the Australian military personnel on being deprived of their arms. Accordingly, it was agreed that the troops could carry their weapon systems in the rail and road movements and could guard their own camps, but would remain unarmed whilst working.²⁴³ The fact that they were armed effectively made the deployment a *de jure* DFACA deployment.

The deployment of troops in this instance proceeded on the premise of ensuring the supply of coal, rather than of preserving law and order in the area.²⁴⁴ This control of the coal supply, however, was viewed as a necessary precaution in order to prevent a breakdown of the peace (of the realm, it may be said) that might occur if industry ground to a halt. Subsequent academic commentary has suggested the use of the military in this situation would be authorised by Commonwealth executive power;²⁴⁵ and Dr Evatt, the Attorney-General during the strikes, later commended the ‘strong executive action to defend the people against specific disruptive activities’²⁴⁶ which is simply another method of stating *salus populi suprema lex*.

2 *The 1970 Suppression of the Secessionist Movements in the Territory of Papua New Guinea*

A second instance of the internal security prerogative arguably authorising the use of force for domestic operations, although not much discussed in Australian history, occurred in 1970.

²⁴² LF Crisp, *Ben Chifley: A Biography* (Longmans, 1961) 362.

²⁴³ Margaret White (n 171) 448.

²⁴⁴ Windeyer (n 45) 232.

²⁴⁵ Ward (n 45).

²⁴⁶ HV Evatt, ‘Danger to All Citizens’, *The Herald* (Melbourne, 6 May 1950).

The then-Administrator of New Guinea sought military assistance from the Commonwealth in response to secessionist agitation in Rabaul.²⁴⁷ At the time of the civil unrest, Papua New Guinea was a territory of the Commonwealth of Australia. In July 1970, the Governor-General of Australia, Sir Paul Hasluck, signed an Order-in-Council calling out the members of the Australian Army's Pacific Island Regiment 'to render aid to the civil power'.²⁴⁸

The order empowered the Administrator of the Territory, in the event that police lost or feared losing control of law and order, to permit the Regiment to use lethal force. Orders-in-Council are a legal instrument issued under prerogative power, and reflects that the legal basis for the call out was a perceived prerogative power of internal security.

3 *The 1978 Bowral Call-Out*

The third, more widely known, instance of the ADF aiding the civil authority concerned the bomb explosion outside the Hilton Hotel in Sydney, on 13 February 1978; three men were killed with a further nine injured.²⁴⁹ The blast occurred before the opening of the Commonwealth Heads of Government Regional Meeting ('CHOGRM'). Subsequently, the Governor-General, by Order-in-Council, called out the ADF on the advice of the Executive Council.²⁵⁰ 1900 troops were called out in a security force role, occupying the town of Bowral, New South Wales, during a visit by CHOGRM.²⁵¹ The call-out may well have been justified under what Dixon J in *Sharkey* coined the duty and power of the Commonwealth 'not to protect the State, but to protect itself'.²⁵²

The Hilton bombing and subsequent Bowral call-out remains '[t]he only major mobilisation of troops in an urban setting in Australia's history'.²⁵³ Indeed, '[o]ne local newspaper said the "virtual siege conditions" were reminiscent of "Franco's Spain"'.²⁵⁴ Anthony Blackshield summarised the position as follows:

In terms of our popular social traditions, the idea is very firmly entrenched that the use of armed force within the realm in peacetime is 'not cricket'. It is this longstanding social tradition that really underlies the disquiet surrounding the

²⁴⁷ RJ May, *The Changing Role of the Military in Papua New Guinea* (Australian National University, 1993) 39.

²⁴⁸ Robert J O'Neill, *The Army in Papua-New Guinea: Current Role and Implications for Independence* (Australian National University Press, 1971) 1–2, 4.

²⁴⁹ Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) 1, 258.

²⁵⁰ Commonwealth, *Gazette: Special*, No S 30, 14 February 1978.

²⁵¹ See Hope (n 249) 1 [1.2]; Head, *Calling out the Troops* (n 63) 44.

²⁵² *Sharkey* (n 191) 151 (Dixon J).

²⁵³ Head, *Calling out the Troops* (n 63) 49.

²⁵⁴ *Ibid* 11, quoting *Southern Highland News* (Bowral, 15 February 1978) 1.

events at Bowral. But as soon as one asks whether this social tradition is reflected in any legal tradition that might be invoked as a constitutional restraint on the use of armed forces, one is plunged into an esoteric maze of uncertainties.²⁵⁵

This ‘maze’ was navigated by Sir Victor Windeyer’s Opinion, annexed to Justice Robert Hope in his *Protective Security Review* (*‘Hope Review’*) which, inter alia, found the use of the ADF to have been valid on the basis of the inherent power of the Commonwealth to protect its interests.²⁵⁶ Windeyer stated that the Commonwealth had the inherent power to ‘employ members of its Defence Force “for the protection of its servants or property or the safeguarding of its interests”’.²⁵⁷ This was because, prima facie, such power was an incident of nationhood:

The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the *Constitution* created a sovereign body politic with the attributes that are inherit in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.²⁵⁸

Specifically to s 61, Windeyer continued:

The ultimate constitutional authority for the calling out of the Defence Force in ... [Bowral] was thus the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth. Being by order of The Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity.²⁵⁹

It should be recollected that the *Northumbria Police Authority* case at this point had not been decided (and thus an internal security prerogative had not been identified nor accepted by the House of Lords, nor by legal historians). Windeyer’s opinion was thus in keeping with the legal theory at the time. His discussion of the implied nationhood power as the legal authority can and should be built upon by a discussion of an internal security prerogative. This would help navigate the legal tension in identifying what depth of action the implied nationhood power can provide, in accordance with Winterton’s test.

4 2002 CHOGM and 2003 POTUS Visit

Operation Guardian II — the operation with respect to the 2002 CHOGM at Coolom — established the framework for the use of force by the Royal Australian Air Force and authorised the shooting down of civilian aircraft by fighter jets in order

²⁵⁵ Anthony Roland Blackshield, ‘The Siege of Bowral: The Legal Issues’ (1978) 4(9) *Pacific Defence Reporter* 6.

²⁵⁶ Windeyer (n 45).

²⁵⁷ *Ibid*, 279, quoting *Australian Military Regulations 1927* (Cth) reg 415.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid* 280.

to prevent a suicidal crash, in the wake of the September 11 attacks in the United States. These security provisions were mirrored when the President of the United States visited Australia in 2003.²⁶⁰ Although a contingent call-out was authorised and enacted under pt IIIAAA of the *Defence Act*, the statutory provisions at the time did not include any ability to authorise lethal force in air operations. No clear legal basis was provided for the operations.²⁶¹

Unlike the 1978 Bowral call-out, which occurred ad hoc, these two air operations ‘were planned well in advance for a foreseeable threat’.²⁶² Although the prerogative as to the disposition and arming of the forces would have authorised the take-off of the flights, and while self-defence could authorise the destruction of the aircraft in response to an actual attack, these air operations arguably went beyond the scope of these sources of power. It is difficult to see what legal authority, outside of an internal security prerogative, could have authorised such action. This view would appear to be shared by other academics.²⁶³

5 *Operation COVID-19 Assist*

In combating the most destructive public health emergency in living memory (COVID-19), Prime Minister Morrison utilised the ADF as part of Australia’s response to a domestic crisis.²⁶⁴ As the pandemic continued to unfold, reliance upon military personnel increased significantly and Operation COVID-19 Assist was announced on 1 April 2020.²⁶⁵ The operation constituted the largest deployment of ADF since the Second World War and comprised of seven state and territory based task groups.

At its peak, several thousand ADF personnel were deployed in support of Operation COVID-19 Assist.²⁶⁶ The role of each task group varied depending upon each jurisdictional need but included assistance to health workers in contact tracing,

²⁶⁰ See, eg, ‘RAAF Poised to Shoot down Stray Aircraft’, *The Sydney Morning Herald* (online, 28 August 2003) <<https://www.smh.com.au/national/raaf-poised-to-shoot-down-stray-aircraft-20030828-gdharj.html>>.

²⁶¹ See Department of Defence, Submission No 6 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (6 February 2006) 3.

²⁶² Moore, *Crown and Sword* (n 25) 199.

²⁶³ Ibid 199–200. Cf Simon Bronitt and Dale Stephens, “‘Flying under the Radar’: The Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments’ (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 265, 267–9.

²⁶⁴ Prime Minister Morrison stated that ‘we are in a war against this virus and all Australians are enlisted to do the right thing’: Interview with Prime Minister of Australia The Honourable Scott Morrison MP (Tara Brown, 60 Minutes, 22 March 2020).

²⁶⁵ Linda Reynolds, ‘Expansion of ADF Support to COVID-19 Assist’ (Media Release, Department of Defence, 1 April 2020).

²⁶⁶ Department of Defence, ‘Defence Response to COVID-19’, *Defence News* (online, 12 October 2020) <<https://news.defence.gov.au/national/daily-update-defence-response-covid-19>>.

the provision of assistance to law enforcement agencies as part of quarantine and isolation compliance in areas of international arrivals and border control.²⁶⁷ It was stressed by the Minister of Defence that all stages of the operation were DACC policy (thus not permitting the ADF members to use coercive powers at any time).²⁶⁸

As aforementioned, DACC policy clearly defines force as including ‘the restriction of freedom of movement of the civil community whether there is physical contact or not’.²⁶⁹ This is what support to law enforcement to ensure quarantine and isolation compliance is. The use of the ADF in quarantine and isolation compliance, outside of the *Biosecurity Act 2015* (Cth), logically falls within a DFACA setting by Defence’s own policy construct. This is not to say that the operation is illegal; this paper has demonstrated that there is a clear non-statutory lawful authority for the conduct of these operations. But it is demonstrative that, regardless of recent arbitrary and paradoxical policy guidelines, the internal security prerogative has not fallen into disuse. To the contrary, it would appear to have been a basis, if not the only plausible basis, for several historical and recent uses of the ADF. It is suggested, therefore, that the prerogative exists, and continues to exist, and may be used by the Commonwealth to protect the peace of the iRealm.

V CONCLUSION

This article has highlighted and justified that there exists a clear non-statutory executive power of the Commonwealth to utilise the ADF in order to keep the peace of the realm, extending to authorising the use of force. This power is necessarily distinct from maintaining public order — which falls clearly within state responsibility — but is one concerned with public *security* — which falls less clearly within the Commonwealth’s. It did so by tracing the history of this prerogative, from its English beginnings to more recent incidents in Australia. It was argued that, in the Australian federal context, the prerogative extends to counter-interference operations by the Commonwealth. Finally, it was contended that the prerogative has not been abrogated by statute, nor has it fallen into desuetude.

Reliance upon non-statutory executive power to maintain security is not a popular option. Robert French has said that executive power is both nurtured and bound in anxiety — ‘anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive approaches to its content’.²⁷⁰ This anxiety is even more pronounced when

²⁶⁷ Linda Reynolds, ‘Defence Provides Additional Assistance in Response to COVID-19’ (Media Release, Department of Defence, 23 March 2020).

²⁶⁸ Linda Reynolds, ‘Defence Support to Mandatory Quarantine Measures Commences’ (Media Release, Department of Defence, 29 March 2020); Department of Defence, ‘A Message from Lieutenant General Frewen’ *Defence News* (online, 31 April 2020) <<https://news.defence.gov.au/national/message-lieutenant-general-john-frewen>>.

²⁶⁹ *DACC Manual* (n 45) [6.13(a)].

²⁷⁰ Robert French, ‘Executive Power in Australia: Nurtured and Bound in Anxiety’ (2018) 43(2) *University of Western Australia Law Review* 16, 16.

it comes to non-statutory executive power — some consider the prerogative power ‘to be an obscure relic of an undemocratic past, and a potential threat to civil liberties’.²⁷¹ Arguments are raised that the prerogative should be abrogated, and placed on a statutory footing. Yet, it should not be dismissed. It is a flexible power that may evolve to meet new circumstances, providing flexibility in situations that may require it. The importance of flexibility is not to be understated. In an era of hyper legislation and limited ‘legislative mission command’²⁷² unintended consequences can include the displacement of executive power. The internal security prerogative would not appear to be one such victim, for now.

Accepting that an internal security prerogative exists in Australia (as it does in the United Kingdom), albeit necessarily influenced by the Australian federal context, is not only consistent with the original concept of executive power when the *Constitution* was drafted, but helps to navigate the tension that has arisen as to the nature and scope of the implied nationhood power. One view is that the nationhood power is an inherent, separate part of the executive power flowing from s 61 of the *Constitution*.²⁷³ Another is that it is simply an erroneous interpretation of the Royal prerogative.²⁷⁴ Those in the latter camp focus upon the Convention Debates, and that s 61 was drafted on the assumption that the prerogative formed the essence of the non-statutory executive power.²⁷⁵ At the 1897 Australasian Federal Convention in Adelaide, Sir Edmund Barton characterised the executive power as ‘primarily divided into two classes: those exercised by the prerogative ... and those which are ordinary Executive Acts’.²⁷⁶ The argument thus goes that to rely upon an implied nationhood power to provide any depth is legally erroneous, and is contrary to the accepted proposition that the Crown’s prerogatives cannot expand.²⁷⁷ As such, it is

²⁷¹ Benjamin B Saunders (n 88) 363. See also Keith Syrett, ‘Prerogative Powers: New Labour’s Forgotten Constitutional Reform?’ (1998) 13(1) *Denning Law Journal* 111; Thomas Poole, ‘United Kingdom: The Royal Prerogative’ (2010) 8(1) *International Journal of Constitutional Law* 146, 147.

²⁷² Mission command is a military doctrinal concept that aims to place trust within junior officers and non-commissioned officers to respond to their superior officer’s orders. It allows junior members with the choice of *means* to reach a specified *end*. On the concept of legislative mission command see Justice John Logan, ‘Mission Command: Some Additional Thoughts on its Relevance to Policing and the Rule of Law’ (Address, Queensland Police Headquarters, 15 February 2018) 2–3.

²⁷³ See, eg, *Pape* (n 124) 83 [215] (Gummow, Crennan and Bell JJ).

²⁷⁴ See Gerangelos (n 97) 107–9, 140. One of the better summaries of this school of thought.

²⁷⁵ See Michael Crommelin, ‘The Executive’ in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) bk 6, 127, 131–2.

²⁷⁶ *Official Report of the Australasian Federal Convention Debates*, Adelaide, 19 April 1897, 910 (Edmund Barton).

²⁷⁷ *Johns* (n 98) 79 (Diplock LJ).

argued that the implied nationhood power should and can only be interpreted as simply expanding the breadth, ‘in a federal sense’, of executive power.²⁷⁸

Yet the High Court has also accepted that a power exists that gives ‘capacity to engage in *enterprises and activities* peculiarly adapted to the government of a nation’.²⁷⁹ It would appear, then, to be a power to act, rather than to make laws, and is ‘akin to the capacities of the Commonwealth as a person’.²⁸⁰ Due to its inherent nature, the nationhood power can only be invoked in a manner consistent with Australia’s federal structure, as canvassed above; namely, ‘the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive ... action involves no real competition with State executive ... competence’.²⁸¹ This would appear identical to an internal security prerogative, and in situations that require force to be used, it may be more appropriate for academics to argue for reliance upon an internal security prerogative, with historic checks and balances, rather than the nebulous concept of an implied nationhood power. At any rate, for the practitioner, it suffices to say that the executive power of the Commonwealth arguably extends to keeping the peace of the iRealm.

²⁷⁸ See Gerangelos (n 97) 108–9.

²⁷⁹ *AAP Case* (n 204) 397 (Mason J) (emphasis added).

²⁸⁰ Twomey (n 126) 338.

²⁸¹ *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ).

*John Waugh**

CONTROVERSY AND RENOWN: COLEMAN PHILLIPSON AT THE ADELAIDE LAW SCHOOL

ABSTRACT

Coleman Phillipson, international lawyer and Professor of Law at the University of Adelaide from 1920 to 1925, became the first Australian professor of law to be forced to resign, when a controversy over private coaching of students ended his academic career. He was the first Australian professor of law of Jewish heritage, his family having settled in northern England after leaving Russian Poland as anti-Semitism flared there in the early 1880s. Before it appointed Phillipson, the University received private warnings that he was Jewish. While he conceded the truth of the key allegations that led to his resignation, he believed that he was unfairly treated. The details of the controversy, recorded in archival sources, allow it to be seen in the context of Phillipson's life and the University's history.

I INTRODUCTION

Coleman Phillipson, Professor of Law at the University of Adelaide from 1920 to 1925, has an ambiguous place in the University's history. He was 'a renowned international lawyer',¹ in the words of an eminent successor in the field, Ivan Shearer, who described Phillipson's work on international law in ancient Greece and Rome as 'magisterial'.² Yet Phillipson departed the Adelaide Law School amid controversy, following a complaint that he had offered expensive private coaching to one of his students. Feelings ran high. Before he left, an anonymous note was pinned to his office door: 'Coleman Phillipson, Blackmailer[.] Get out you dirty swine.'³

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¹ Ivan A Shearer, 'The Teaching of International Law in Australian Law Schools' (1983) 9(1) *Adelaide Law Review* 61, 69.

² Ivan Shearer, 'James Crawford: The Early Years' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, 2015) xiii, xv.

³ Letter from Coleman Phillipson to Justice Poole, 18 April 1925 (University of Adelaide Archives, series 280, item 369).

He became the first Australian professor of law to have his appointment effectively terminated.⁴

The most detailed, albeit brief, study of Phillipson's time in Australia was written by Victor Edgeloe, the former Registrar of the University. In retirement, as the University's Registrar Emeritus, Edgeloe wrote a history of the Law School as part of a series of papers on the University's history.⁵ Edgeloe described his work as 'an administrator's history' that summarised university records and newspaper comment.⁶ He drew no conclusions about Phillipson but commented that he was 'deeply interested in money'.⁷ The comment is contentious: a contemporary of Phillipson formed the opposite impression, as we will see. Edgeloe had an administrator's reticence about potentially embarrassing details. He chose not to publish the names of the parents who reported Phillipson to the University's Vice-Chancellor and did not mention the note pinned to Phillipson's door, although both featured in contemporaneous newspaper reports.

Silence about the names of the complainants was perhaps tactful. Their son, the student whose poor academic record gave rise to the discussion of coaching, had gone on to a notable career as a lawyer, company director, Member of Parliament and Lord Mayor of Adelaide, becoming Sir Arthur Rymill. He was still alive when Edgeloe wrote. This reticence continued a pattern of silence concerning the details of the case that was established by the University Council in 1925. Edgeloe's focus was institutional rather than biographical, and he did not explore Phillipson's scholarship or his life and career before and after Adelaide. Other brief mentions of the controversy appear elsewhere.⁸

Archival records now provide insights into Phillipson's early life and the controversy that ended his career. Shearer noted that 'a great deal of mystery' surrounded Phillipson; information about his career before and after his time in South Australia

⁴ For earlier resignations, see: VA Edgeloe, 'The Adelaide Law School 1883–1983' (1983) 9(1) *Adelaide Law Review* 1, 11, 13, 24–5; JM Bennett, 'Out of Nothing: Professor Pitt Cobbett 1890–1909' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 48; Michael Roe, *Nine Australian Progressives: Vitalism in Bourgeois Social Thought, 1890–1960* (University of Queensland Press, 1984) 29; John Waugh, *First Principles: The Melbourne Law School, 1857–2007* (Miegunyah Press, 2007) 56.

⁵ Edgeloe, 'The Adelaide Law School 1883–1983' (n 4) 25–7; VA Edgeloe, *Annals of the University of Adelaide* (Barr Smith Press, 2003) 105–6, 134–5.

⁶ Edgeloe, *Annals of the University of Adelaide* (n 5) 71.

⁷ Edgeloe, 'The Adelaide Law School 1883–1983' (n 4) 26.

⁸ Alex Castles, Andrew Ligertwood and Peter Kelly, *Law on North Terrace, 1883–1983* (Faculty of Law, University of Adelaide, 1983) 26–7; Rosemary De Meyrick, *Rymill: His Life and Times* (Aldgate Publishers, 2003) 42–3; WGK Duncan and Roger Ashley Leonard, *The University of Adelaide, 1874–1974* (Rigby, 1973) 32–3.

was thin.⁹ *The British Year Book of International Law* has described him as ‘sadly neglected’.¹⁰ More light can now be thrown on his origins and on his later life. Archival records also document, in detail, the inquiry that led to his resignation. Phillipson contended, and continued to believe, that the University had acted unfairly. His reasons, and those of the University, can now be understood more fully.

II PHILLIPSON’S BACKGROUND

Phillipson was the first Australian professor of law of Jewish heritage.¹¹ He was ‘a co-religionist’, according to *The Hebrew Standard of Australasia*,¹² and was listed in the press among leading Jewish jurists.¹³ While these descriptions by others are supported by Phillipson’s family background, the extent to which he saw himself as Jewish is unclear. Most sources state that he was born in Leeds, Yorkshire, where he grew up, but it was more likely that, as English census records indicate, he was born in Poland and came to England with his parents as a child.¹⁴ Census records for his family give his birthplace as Poland or Germany; the occupation of much of Poland by Austria, Germany and Russia in the 19th century complicates the identification of countries of birth. His year of birth varies in published sources, but the census entries suggest that he was born around 1875. Jewish emigration from Russian-controlled areas of Poland surged in 1881, in response to persecution after the assassination of Tsar Alexander II, and the migrant Jewish population of Leeds began to grow rapidly.¹⁵

⁹ Shearer, ‘The Teaching of International Law in Australian Law Schools’ (n 1) 72.

¹⁰ ‘Alberico Gentili (1552–1608)’ (2008) 79(1) *British Year Book of International Law* 1, 1 n 3.

¹¹ Earlier professors of law were: Frederick Pennefather, John Salmond and William Jethro Brown (Adelaide); Edward Jenks and William Harrison Moore (Melbourne); William Pitt Cobbett and John Peden (Sydney); William Jethro Brown and Dugald McDougall (Tasmania). All except Pennefather are the subjects of entries in the *Australian Dictionary of Biography* (online at 10 April 2021). Pennefather was Anglican: see ‘Church of England Synod’, *The South Australian Advertiser* (Adelaide, 2 May 1888) 5.

¹² ‘News and Views’, *The Hebrew Standard of Australasia* (Sydney, 11 August 1911) 10.

¹³ W Summerfield, ‘Anglo-Jewry and the Law: The Legal Profession’, *The Reform Advocate* (Chicago, 10 June 1922) 475, 477.

¹⁴ Victoria University of Manchester, *Register of Graduates Up to July 1st, 1908* (Victoria University of Manchester, 1908) 277; *Who’s Who in Adelaide, South Australia, 1921–22* (Associated Publishing Service, 1923) 120; General Register Office: 1891 Census Returns (The National Archives of the UK, RG 12/3688) 111; General Register Office: 1901 Census Returns (The National Archives of the UK, RG 13/4229) 89.

¹⁵ Nigel Grizzard, ‘Demographic: The Jewish Population of Leeds’ in Derek Fraser (ed), *Leeds and Its Jewish Community: A History* (Manchester University Press, 2019) 35, 36–7.

Phillipson's father, Solomon, was a teacher of Hebrew, and in 1891 the family lived in the Leylands, home of most of the recent Jewish immigrants in Leeds and a district marked by poverty.¹⁶ Coleman was educated in Leeds at the Central High School and at Yorkshire College, an affiliate of Victoria University (later the University of Manchester).¹⁷ He supported himself by teaching. He is listed as a teacher in the 1891 census (aged 16) and was still working as a teacher, in Lincoln, in 1903–05.¹⁸ In common with most English lawyers of the period, he had no undergraduate degree in law. At Yorkshire College, he studied arts, winning prizes in English, French and education and graduating with Victoria University degrees (BA, 1901; MA, 1905).¹⁹

The years that followed were ones of striking productivity and achievement. Phillipson worked at University College London, as a research student in 1907–10.²⁰ He did not take a London degree, but submitted his research for two Manchester doctorates in quick succession, in law (1908) and in letters (1910). As an author, he spanned international law, classics and history. His first books comprised his three successive winning entries, in 1906–08, for the essay prize offered by Sir John Macdonell, the Quain Professor of Comparative Law at University College, London.²¹ The set topics included the effects of war on telecommunications and business operations. A series of biographical articles on early international lawyers that Phillipson wrote around this time were republished, together with chapters by other authors, in *Great Jurists of the World* (1913), under Macdonell's editorship.²² In 1911, Phillipson's major work appeared, a pioneering two-volume study of international law in ancient Greece and Rome (the 'magisterial work' praised by Ivan Shearer).²³ His theme was that elements of international law, comparable to modern systems, could be identified in ancient history. He supported this thesis with a survey of ancient practice and

¹⁶ General Register Office: 1891 Census Returns (n 14); Laura Vaughan and Alan Penn, 'Jewish Immigrant Settlement Patterns in Manchester and Leeds 1881' (2006) 43(3) *Urban Studies* 653, 657, 659–60.

¹⁷ *Who's Who in Adelaide, South Australia, 1921–22* (n 14) 120.

¹⁸ General Register Office: 1891 Census Returns (n 14); Victoria University of Manchester (n 14) 277.

¹⁹ Victoria University, *The Yorkshire College, Leeds: Twenty-Seventh Annual Report, 1900–01* (Yorkshire College, 1901) 19, 57; Victoria University of Manchester (n 14) 277.

²⁰ University of London, *The Calendar for the Year 1910–1911* (University of London, 1910) 520.

²¹ Coleman Phillipson, *Two Studies in International Law* (Stevens & Haynes, 1908); Coleman Phillipson, *The Effect of War on Contracts and on Trading Associations in Territories of Belligerents* (Stevens and Haynes, 1909) ('*The Effect of War on Contracts*').

²² Sir John Macdonell and Edward Manson (eds), *Great Jurists of the World* (John Murray, 1913).

²³ Shearer, 'James Crawford: The Early Years' (n 2) xv; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (Macmillan, 1911).

opinion that drew on his knowledge of ancient and modern languages. Contemporaries noted the severity of his judgements on earlier writers.²⁴

The timely topic of international law in wartime provided Phillipson with material for no fewer than four books published in 1915–18. *International Law and the Great War* examined the commencement and conduct of the War.²⁵ It was followed by a study of peace treaties and the termination of war, with an appendix of treaty documents collated by his wife.²⁶ He co-authored a book on the international law applicable to the Bosphorus and Dardanelles (1917), and, in the fourth of his wartime books, he advocated self-determination for the contested territory of Alsace-Lorraine.²⁷ His method was, to adapt his own phrase, historical, analytical and comparative, founded on the compilation of sources from which he quoted freely.²⁸ He argued for stronger international institutions to avert future conflicts and, as was perhaps expected in wartime publications, criticised Britain's enemies, above all Germany for its breaches of the laws of war, which he catalogued in *International Law and the Great War*. He also edited numerous established texts, producing new editions of John Foote's treatise on private international law (1914), textbooks of international law by Henry Wheaton and Frederick Smith (1916, 1918), Thomas Taswell-Langmead's standard text on English constitutional history (1919) and John Mayne's treatise on damages (1920).²⁹ He was versatile, always readable, extraordinarily prolific, and experienced in both authorship and editing.

In addition to writing, Phillipson practised as a barrister. In Phillipson's time, Leeds law firms excluded Jewish people from employment or articles of clerkship.³⁰ In any

²⁴ Amos S Hershey, 'The International Law and Custom of Ancient Greece and Rome' (1912) 6(2) *American Journal of International Law* 565, 565; Robert Warden Lee, 'The International Law of the Ancients', *The Times Literary Supplement* (London, 2 November 1911) 424, 424.

²⁵ Coleman Phillipson, *International Law and the Great War* (Unwin, 1915).

²⁶ Coleman Phillipson, *Termination of War and Treaties of Peace* (Sweet & Maxwell, 1916) vi.

²⁷ Coleman Phillipson and Noel Buxton, *The Question of the Bosphorus and Dardanelles* (Stevens & Haynes, 1917); Coleman Phillipson, *Alsace-Lorraine: Past, Present, and Future* (TF Unwin, 1918).

²⁸ Phillipson, *The Effect of War on Contracts* (n 21) 3.

²⁹ John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence*, ed Coleman Phillipson (Stevens and Haynes, 4th ed, 1914); Henry Wheaton, *Elements of International Law*, ed Coleman Phillipson (Stevens, 5th ed, 1916); Sir Frederick Smith, *International Law*, ed Coleman Phillipson (JM Dent, 5th ed, 1918); Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time*, ed Coleman Phillipson (Sweet & Maxwell, 8th ed, 1919); John D Mayne, *Mayne's Treatise on Damages*, ed Coleman Phillipson (Sweet & Maxwell, 9th ed, 1920).

³⁰ Amanda Bergen, 'The Unwalled Ghetto: Mobility and Anti-Semitism in the Interwar Period' in Derek Fraser (ed), *Leeds and Its Jewish Community: A History* (Manchester University Press, 2019) 125, 131–2.

event, his talents for research and public speaking were better suited to advocacy and the writing of opinions than to work as a solicitor. He qualified for legal practice in London, where he was called to the Bar in 1907.³¹ His court appearances left occasional traces in the newspapers (but not, it seems, in the law reports). In 1918, he appeared in two cases challenging the conscription into the British army of Russian emigrants living in Britain, in the aftermath of the Bolshevik Revolution and Soviet Russia's peace treaty with Germany. In one of these, he appeared with the Attorney-General and the Solicitor-General.³² The other was a test case in Phillipson's home town, Leeds, involving more than a hundred Jewish people from Russia who had migrated to England and been conscripted into the British army without becoming British subjects. As junior counsel for the Russian defendants, Phillipson argued that they were not Russian subjects, since Jewish people lacked citizenship rights there, and were not subject to conscription under arrangements made in 1917 between the British and provisional Russian governments for military service.³³ His personal connection (he was most likely describing his own citizenship) went unremarked.

Expertise on questions of wartime international law made Phillipson useful in other ways. *Who's Who* recorded that he 'did confidential work' for government departments during the War and wrote one of the many handbooks prepared by the Foreign Office to provide background information ahead of the Paris Peace Conference.³⁴ Phillipson attended the Conference and later recounted assisting the Conference's Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.³⁵ *Who's Who* described Phillipson as legal secretary to the law officers of the Crown at the Peace Conference (the law officers were the British representatives on the Commission). His introduction to this work most likely came through Macdonell, who from 1918 chaired a committee of experts advising the British government on German breaches of international law.³⁶ In Adelaide, Phillipson was an outspoken defender of the provisions of the *Treaty of Versailles*³⁷ concerning payment by Germany of post-war reparations. He wrote: 'The hard terms imposed conform to the demands of universally established international justice.'³⁸

³¹ 'Coleman Phillipson', *The Inner Temple Admissions Database* (Web Page) <<http://www.innertemplearchives.org.uk/detail.asp?id=21952>>.

³² 'Law Report, March 22', *The Times* (London, 23 March 1918) 4.

³³ 'Russian Jews and Army Service', *The Leeds Mercury* (Leeds, 29 January 1918).

³⁴ *Who Was Who 1951–1960* (Adam and Charles Black, 1961) 872.

³⁵ 'World Rebuilders', *The Chronicle* (Adelaide, 21 May 1921) 36.

³⁶ *Oxford Dictionary of National Biography* (online at 10 April 2021) 'Macdonell, Sir John (1845–1921), Jurist'.

³⁷ *Treaty of Peace with Germany (Treaty of Versailles)*, signed 28 June 1919, 2 UTS 43 (entered into force 10 January 1920).

³⁸ Coleman Phillipson, 'The Peace Treaty', *The Advertiser* (Adelaide, 6 August 1921) 15.

A To Australia

In 1919, Phillipson seemed to be on track for high-status roles in Britain, perhaps at the Bar, perhaps in government or academia. He had an impressive record as an author on international law, and, as his referees for the Adelaide Chair would show, he received praise from the peak of the English legal establishment. Moving to Australia marked a major change of direction, one that at best postponed further advancement in England and more likely jeopardised it. In Australia, he would have little contact with the practice and development of international law.

His nemesis in Adelaide, AG Rymill, claimed to have asked Phillipson: '[W]hy did you come out to a place like this when you had London at your feet?'³⁹ Phillipson's answer, according to Rymill, was that he was war-weary. His war had certainly been a busy one, albeit not in military service, but his response was partly a deflection of the question. He had sought an overseas academic post before the War, applying in 1913 for a chair of jurisprudence and Roman law at the Khedivial School of Law in Cairo.⁴⁰ Under the British hegemony in Egypt, the School was increasingly staffed by lawyers from the United Kingdom.⁴¹ In his Adelaide application, as if aware of a need to account for his interest in such a distant place, he mentioned that he had four siblings in Melbourne and that his wife had Australian relatives.⁴²

Discrimination against Jewish people in academia was another possible reason for seeking positions overseas. The *Universities Tests Act 1871*, 34 & 35 Vict, c 26, s 3, abolished the last of the religious tests that had previously excluded adherents to Judaism from Oxford and Cambridge, but anti-Semitism still sometimes led to the rejection of Jewish candidates for appointments at the ancient universities and elsewhere. Such attitudes were not uniform, and they fluctuated over time. The first person elected to an Oxford or Cambridge fellowship who professed adherence to Judaism is said to have been Samuel Alexander, an Australian who became a fellow of Lincoln College, Oxford, in 1882 and later became Professor of Philosophy at the University of Manchester.⁴³ Other Jewish people were appointed to a professorship and a university readership at Oxford in the 1880s.⁴⁴ In Phillipson's chosen field,

³⁹ 'Notes Dictated by AG Rymill to His Son' (University of Adelaide Archives, series 280, item 369) 2.

⁴⁰ See Reference from Sir John Macdonell, 19 March 1913 (University of Adelaide Archives, series 280, item 39).

⁴¹ Leonard Wood, *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875–1952* (Oxford University Press, 2016) 30, 168–9.

⁴² See Coleman Phillipson: Additional Information (University of Adelaide Archives, series 280, item 39).

⁴³ David M Lewis, *The Jews of Oxford* (Oxford Jewish Congregation, 1992) 23.

⁴⁴ *Ibid* 23–4.

Hersch Lauterpacht, who was, like him, the son of a Polish Jewish family, became Whewell Professor of International Law at Cambridge in 1938.⁴⁵

In other cases, anti-Semitism appeared explicitly in the historical record. The careers of two younger Jewish scholars can be compared with Phillipson's experience. The first, the historian Lewis Namier (1888–1960), was born in Russian Poland. He later described himself as 'a Russian subject by birth, naturalised British, a Jew by race'.⁴⁶ An Oxford graduate, he was rejected for a fellowship at All Souls College in 1911. Namier himself did not believe that he failed because he was Jewish, but two fellows of the College present at the election said that this was the reason. Namier's biographer, David Hayton, who assembled this evidence, commented: 'The fact that All Souls did not knowingly elect a Jew as a fellow until Isaiah Berlin in 1931 speaks volumes.'⁴⁷ Namier eventually became Professor of History at the University of Manchester, in 1930. The second scholar was Julius Stone (1907–85). He came, like Phillipson, from the Leylands area of Leeds, but Stone had an even more impressive record in legal scholarship. He was rejected for a series of university posts in England and in 1939 accepted a chair in distant New Zealand, at the Auckland Law School. He used Auckland as a springboard to a chair at the University of Sydney, where anti-Semitism was among the motivations for a prolonged but ultimately unsuccessful campaign against his appointment in 1941.⁴⁸

Even when a Jewish candidate was successful, referees and others consulted about an application sometimes noted the applicant's Jewish heritage or supposed appearance as a relevant and potentially disqualifying factor. When Namier applied for the Manchester Chair, the university consulted the historian Albert Pollard, who replied: 'Namier is a brazen pot, a Jew of the Jews, and the worst bore I know'.⁴⁹ On the other hand, Pollard added that Namier was 'extraordinarily able, hard-working, vigorous and original'.⁵⁰ Some of Stone's referees, too, informed the institutions to which he applied that he was Jewish.⁵¹

The University of Adelaide had rejected a strongly recommended Jewish applicant for the Chair of Modern History in 1900,⁵² and when Phillipson applied for the

⁴⁵ Sir Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (Cambridge University Press, 2010) 9, 82.

⁴⁶ DW Hayton, *Conservative Revolutionary: The Lives of Lewis Namier* (Manchester University Press, 2019) 189.

⁴⁷ *Ibid* 41.

⁴⁸ Leonie Star, *Julius Stone: An Intellectual Life* (Sydney University Press, 1992) 42–3, 50–1, 59–64.

⁴⁹ Hayton (n 46) 199.

⁵⁰ *Ibid*.

⁵¹ Star (n 48) 43, 50.

⁵² Wilfrid Prest, 'How We Got Here from There: History in a "Scottish University"' in Wilfrid Prest (ed), *Pasts Present: History at Australia's Third University* (Wakefield Press, 2014) 6, 7, 9–10.

professorship, the Dean of Law, William Isbister, received two similar warnings. One came from company director James Frederick (Fred) Downer, a member of the London selection board for the Chair, who informed Isbister: 'Dr Phillipson's appearance suggests Jewish ancestry[;] with this possible qualification his claims seem to us to be undoubted'.⁵³ The other came from John Latham, the future Chief Justice of the High Court of Australia, who met Phillipson at the Paris Peace Conference and wrote at Isbister's request with his impressions:

I believe — as was generally understood in Paris — that Dr Phillipson is of Jewish race. I do not like to appear to pay attention to race prejudice, but I know that many persons would regard this aspect of the matter as highly relevant, & I therefore mention it to you. Personally, I got on well with him & found him a decidedly interesting man.⁵⁴

Jewish ancestry marked Phillipson as something of an outsider for these men, but Latham found him well qualified for the appointment, 'a highly competent lawyer', 'well fitted ... for academic work', 'active minded' and 'a legal author of some distinction'.⁵⁵ His English referees could hardly have been more eminent. The Lord Chancellor, Lord Birkenhead (Frederick Smith), whose textbook on international law had been edited by Phillipson, endorsed him as 'a very learned lawyer' who had done 'valuable work for the British Government' and was 'an author of much distinction'.⁵⁶ In his preface to Phillipson's edition of his textbook, Birkenhead went even further, boosting Phillipson, and indirectly the book, by saying he was 'generally recognised as one of the greatest living authorities upon the subject of International Law'.⁵⁷ The Lord Chief Justice, Lord Reading, said Phillipson was 'eminently suited for the position' and 'certain to give every satisfaction'.⁵⁸ The praise of these patrons was impressive, but it does not seem to have helped Phillipson find employment closer to home.

The doctorates, the prizes and Phillipson's work at the English Bar more than compensated for his lack of a first degree in law, but the London committee still hesitated before recommending him. Phillipson had held no university teaching positions, although he was highly praised for his part-time lecturing at a commercial education

⁵³ Letter from JF Downer to Registrar, 26 September 1919 (University of Adelaide Archives, series 280, item 39).

⁵⁴ Letter from JG Latham to WJ Isbister, 17 November 1919 (University of Adelaide Archives, series 280, item 39).

⁵⁵ *Ibid.*

⁵⁶ Telegram from Lord Birkenhead to Agent-General, 26 September 1919 (University of Adelaide Archives, series 280, item 39).

⁵⁷ Smith (n 29) 7.

⁵⁸ Letter from Lord Reading to Edward Lucas, 30 September 1919 (University of Adelaide Archives, series 280, item 39).

centre, or evening institute, operated by the London County Council, in 1909–14.⁵⁹ Getting a first academic appointment as a professor remained possible long after Phillipson's time (Richard Blackburn's appointment to the Adelaide Chair of Law in 1950 is an example).⁶⁰ In the choice of law teachers, general legal ability counted at least as much as teaching experience.

More significantly, the committee was unsure about Phillipson's personality. William Mitchell, Adelaide's Vice-Chancellor and Professor of Philosophy, joined the London selection committee while on a visit to Britain. He found Phillipson somewhat odd: '[H]e ultimately said that his one recreation is conversation! But, he added, in literature and philosophy.'⁶¹ Mitchell continued:

If I hadn't known that he was in Paris for four months in connexion with international questions I should have put him down for a learned book-worm such as you see at the British Museum ... He said that he had collected a vast amount of material for a book on Elizabethan literary criticism!⁶²

Mitchell wanted to 'get better at his character'.⁶³ The London committee provisionally recommended Phillipson, while seeking more information from people who knew him.⁶⁴ They evidently heard nothing against him, and their recommendation stood.

A local candidate, William Jethro Brown, was a strong rival to Phillipson, but his candidature was unusual. Brown, the former holder of the Chair of Law, had moved from the University to the bench, becoming President of the Industrial Court of South Australia in 1916. The transition was difficult. Brown faced complaints about delays in the work of the Court, and he submitted, but then withdrew, his resignation as President in the course of a disagreement over the terms of his appointment.⁶⁵ In 1918, he applied for reinstatement to the Chair of Law, which had been left vacant

⁵⁹ Letter from Coleman Phillipson to Registrar, 8 September 1919 (University of Adelaide Archives, series 280, item 39); Reference from FB Hart, 20 March 1913 (University of Adelaide Archives, series 280, item 39).

⁶⁰ See *Australian Dictionary of Biography* (online at 10 April 2021) 'Blackburn, Sir Richard Arthur (Dick) (1918–1987)'.

⁶¹ Letter from William Mitchell to Sir George Murray, 25 September 1919 (University of Adelaide Archives, series 200, item 564/1919) 2–3.

⁶² *Ibid.* 3.

⁶³ *Ibid.*

⁶⁴ Letter from Sir Frederick Young and JF Downer to WJ Isbister, 26 September 1919 (University of Adelaide Archives, series 280, item 39); Letter from JF Downer to WJ Isbister, 25 September 1919 (University of Adelaide Archives, series 280, item 39).

⁶⁵ 'Mr President Brown: Criticism in Parliament', *The Advertiser* (Adelaide, 22 September 1916) 10; 'Mr Jethro Brown's Resignation', *The Advertiser* (Adelaide, 11 October 1916) 6; 'Arbitration Judge's Salary', *The Register* (Adelaide, 11 November 1916) 11; 'Industrial Court President', *The Register* (Adelaide, 30 November 1916) 4.

for the duration of World War I, but the University chose to wait and advertise the vacancy the following year. When Brown was asked if he wanted his application to stand, his response was ambivalent, and the Council offered the Chair to Phillipson.⁶⁶

B *Phillipson in Adelaide*

The Jewish population of Adelaide was small and declining in the 1920s, and it sometimes lacked a rabbi.⁶⁷ Phillipson does not feature in available records of the community, and it is unclear whether he was religiously observant. (His wedding, in 1903, was a civil ceremony.)⁶⁸ In the words of Rodney Gouttman, the community ‘was dominantly Anglo-Jewish in composition, strongly Anglophile, and culturally well assimilated’.⁶⁹ One such family was that of Jonas Moses Phillipson (unrelated to Coleman), an early colonist in South Australia who prospered in the pastoral industry and received a significant mark of elite acceptance, membership of the Adelaide Club.⁷⁰ The Club was later reputed to exclude Jewish people, although that claim has been disputed.⁷¹ A prominent Jewish Adelaidean in Coleman Phillipson’s time was the English-born businessman Lewis Cohen, Lord Mayor in 1921–23.⁷²

Phillipson fitted this milieu well, although (unlike Brown and Arthur Campbell, Phillipson’s successor as Professor of Law) he was not a member of the Adelaide Club.⁷³ He, his wife Evelyn (known as Eva) and daughter Margaret, their only child, were active in the cultural and social life of Adelaide’s business, professional and university circles, as contemporary newspapers record. Eva was interested in French culture and the performing arts. She sang at the *Alliance Française* and joined the

⁶⁶ Letter from W Jethro Brown to Chancellor, 7 October 1918 (University of Adelaide Archives, series 200, item 456/1918); Letter from Registrar to W Jethro Brown, 16 December 1918 (University of Adelaide Archives, series 200, item 456/1918); Letter from W Jethro Brown to Registrar, 26 November 1919 (University of Adelaide Archives, series 200, item 456/1918); Minute of Council, 28 November 1919 (University of Adelaide Archives, series 200, item 71/1920).

⁶⁷ Hilary L Rubinstein, *The Jews in Australia: A Thematic History* (William Heinemann, 1991) vol 1, 94; Wilfrid Prest, Kerrie Round and Carol Fort (eds), *The Wakefield Companion to South Australian History* (Wakefield Press, 2001) 287.

⁶⁸ ‘Yorkshire Marriage Indexes for the Years: 1903’, *Yorkshire BMD* (Web Page) <<http://www.yorkshirebmd.org.uk/marriagesearch.php>>.

⁶⁹ Rodney Gouttman, ‘Brothers and Sisters? The Response of Adelaide Jewry to Anti-Jewish Atrocities in the First Half of the 20th Century’ (1994) 12(2) *Australian Jewish Historical Society Journal* 359, 361.

⁷⁰ EJR Morgan, *The Adelaide Club, 1863–1963* (Adelaide Club, 1963) 106.

⁷¹ Rubinstein (n 67) 426; PA Howell, ‘Rob Linn, *The Adelaide Club 1863–2013*’ (2013) 41 *Journal of the Historical Society of South Australia* 115, 117.

⁷² *Australian Dictionary of Biography* (online at 11 April 2021) ‘Cohen, Sir Lewis (1849–1933)’.

⁷³ Morgan (n 70) 117, 126.

board of management of the Adelaide Repertory Theatre.⁷⁴ Her membership of the organising committee for the Artists' Ball, a charity event held under the patronage of the State Governor, led indirectly to the conversations that ended her husband's Australian career.

Like the professors at Australia's three other law schools, at the universities of Melbourne, Sydney and Tasmania, Phillipson was the sole full-time member of the law teaching staff.⁷⁵ (Sydney appointed a second professor of law in 1921.) During most of his tenure, Phillipson taught four law subjects, the remainder being taught by part-time lecturers appointed from the profession.⁷⁶ They shared the initiative in the main academic development of his tenure, a new requirement for students to pass the first year of the law course before commencing articles of clerkship. The change was introduced in collaboration with the Law Society of South Australia, which represented the State's practitioners.⁷⁷

During term, the University's internal statutes required professors to make the whole of their time available to the University, for six days a week, but the Council could grant exemptions.⁷⁸ Phillipson taught Italian at the Elder Conservatorium of Music in the evenings, with the Council's approval, but it rejected his request in 1923 for permission to enter legal practice in Adelaide.⁷⁹ While Professor of Law at the University of Tasmania, Jethro Brown had been permitted to practise law, after an initial prohibition, but he did not pursue the opportunity.⁸⁰ In Adelaide, Brown was admitted as a practitioner but did not practise.⁸¹ Phillipson's successor in the Adelaide Chair, Arthur Campbell, was another barrister who wanted to be able to continue practising. Unlike Phillipson, Campbell made a right of limited practice a

⁷⁴ 'L'Alliance Francaise', *The Mail* (Adelaide, 7 May 1921) 13; 'Adelaide Repertory Theatre', *The Critic* (Adelaide, 3 May 1922) 19.

⁷⁵ *Australian Dictionary of Biography* (online at 15 April 2021) 'McDougall, Dugald Gordon (1867–1944)'; Judy Mackinolty, 'Learned Practitioners: Professor John Peden 1910–1941' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 57, 58; Waugh (n 4) 107–8.

⁷⁶ Faculty of Law Minutes, 21 September 1920 (University of Adelaide Archives, series 131, item 5) 63; Faculty of Law Minutes, 15 November 1920 (University of Adelaide Archives, series 131, item 5) 70.

⁷⁷ Faculty of Law Minutes, 20 March 1922 (University of Adelaide Archives, series 131, item 5) 88; 'South Australia: Supreme Court Rules, 1925', *South Australian Government Gazette*, No 47, 19 November 1925, 1359, 1359.

⁷⁸ *Calendar of the University of Adelaide for the Year 1925* (University of Adelaide, 1925) 97.

⁷⁹ Edgeloe, 'The Adelaide Law School 1883–1983' (n 4) 26; Letter from Registrar to Coleman Phillipson, 2 July 1923 (University of Adelaide Archives, series 200, item 325/23).

⁸⁰ Roe (n 4) 24.

⁸¹ 'The Industrial Court: Resignation of Dr Brown', *The Advertiser* (Adelaide, 27 July 1927) 9.

condition of his acceptance of the Chair, and in the face of this insistence the Council gave permission, so long as any court appearances were approved in advance.⁸²

Phillipson wrote feature articles for the newspapers and was a frequent, and popular, public lecturer. His subjects ranged far beyond international law to include penology, art, literature, music and other topics of general interest. ‘He is by way of being a universal genius’, one critic commented.⁸³ Phillipson was an empire loyalist, an advocate of reformatory prisons and the abolition of capital punishment, and a supporter of the League of Nations.⁸⁴ He defended his opinions in pugnacious exchanges with his critics, notably in a protracted debate in which he defended the *Treaty of Versailles*.⁸⁵ Fluent, engaging and prickly, he was slow to let a matter drop. On the other hand, the stream of scholarly publications that poured from his pen dwindled after he moved to Adelaide. While he was at the Law School, his only publication was *Three Criminal Law Reformers*, an appreciation of the work of Cesare Beccaria, Jeremy Bentham and Samuel Romilly. The manuscript had been completed before he came to Australia.⁸⁶

Victor Edgeloe guessed, plausibly, that Phillipson was paid for his contributions to the newspapers, but his comment about Phillipson’s deep interest in money is more controversial.⁸⁷ Fred Downer had the opposite impression:

One first is inclined to wonder how it is that a man with such attainments should be prepared to accept a salary such as that offered by the Adelaide University, but he looks upon the Chair of Laws as an occupation which would not debar him from literary work, and, like so many scholars, he has little regard for financial considerations.⁸⁸

⁸² Letter from AL Campbell to Mr Justice Parsons, 11 August 1925 (University of Adelaide Archives, series 200, item 70/1925); Letter from Registrar to AL Campbell, 15 September 1925 (University of Adelaide Archives, series 200, item 70/1925).

⁸³ ‘Metropolitan Memoranda’, *The Mount Barker Courier and Onkaparinga and Gumeracha Advertiser* (Mount Barker, 18 May 1923) 3.

⁸⁴ ‘English Characteristics: Future of the British Commonwealth’, *The Register* (Adelaide, 25 April 1921) 7; ‘Discriminating Imprisonment: Professor Phillipson’s Views’, *The Register* (Adelaide, 19 September 1923) 10; Coleman Phillipson, ‘The Death Penalty’, *The News* (Adelaide, 12 July 1924) 4; Coleman Phillipson, ‘Faith in the League’, *The News* (Adelaide, 5 January 1924) 4.

⁸⁵ Malcolm Saunders, ‘Harry Taylor, the *Murray Pioneer*, and the Issue of German War Guilt 1905–26’ (1998) 26(1) *Journal of the Historical Society of South Australia* 112, 130.

⁸⁶ Coleman Phillipson, *Three Criminal Law Reformers: Beccaria, Bentham, Romilly* (JM Dent, 1923) viii (‘*Three Criminal Law Reformers*’).

⁸⁷ Edgeloe, ‘The Adelaide Law School 1883–1983’ (n 4) 26.

⁸⁸ Letter from JF Downer to WJ Isbister, 23 September 1919 (University of Adelaide Archives, series 280, item 39).

Mitchell remarked on the smallness of Phillipson's London house, 'packed among others' at Putney.⁸⁹

III THE CONTROVERSY

The trouble that engulfed Phillipson centred on the coaching of law students. Coaching of university students was not unusual. Frederick d'Arenberg, the Law School's long-serving lecturer in Evidence and Procedure, got the Faculty's permission to coach law students in 1898.⁹⁰ Professional coach George Newman prepared students for the LLB Latin exams in the 1920s, and, after Phillipson's time, graduates William Anstey Wynes and David Hogarth both coached law students.⁹¹ None of them, however, offered paid coaching in subjects in which they lectured at the University (d'Arenberg's permission from the Faculty was explicitly limited in this way). Private coaching by professors was not covered as clearly as it could have been by the University's statutes. They stated that no professor could 'give private instruction or deliver lectures to persons not being students of the University' without Council approval.⁹² The ban on private tuition of students from outside the University was clear, but the clause's bearing on private tuition of the University's own students was uncertain.

It had once been common for students' fees to supplement professors' salaries. The University of Adelaide's early professors received their students' term fees, as did their counterparts at the University of Sydney.⁹³ Joshua Ives, Adelaide's Professor of Music, received up to £250 a year from the fees of his students, and Phillipson himself received the bulk of the fees paid by his students at the Elder Conservatorium.⁹⁴ In all of these cases, however, professors received the fees through the respective University, not directly from students.

⁸⁹ Letter from William Mitchell to Sir George Murray (n 61).

⁹⁰ Faculty of Law Minutes, 21 February 1898 (University of Adelaide Archives, series 131, item 3) 63–4.

⁹¹ 'Value of Special Coaching: Adelaide Professional Coach Speaks', *The News* (Adelaide, 11 April 1925) 5; 'The Lure of the Open: Quiet Surroundings Conducive to Concentration', *The News* (Adelaide, 11 July 1925) 5; Faculty of Law Minutes, 12 February 1937 (University of Adelaide Archives, series 131, item 6) 6; Letter from David Hogarth to Acting Registrar, 23 September 1949 (University of Adelaide Archives, series 280, item 421).

⁹² *Calendar of the University of Adelaide for the Year 1925* (n 78) 97.

⁹³ 'Distribution of Fees, 1876' (University of Adelaide Archives, series 169, item 59); *The Sydney University Calendar 1852–53* (Joseph Cook, 1853) 68.

⁹⁴ *Australian Dictionary of Biography* (online at 11 April 2021) 'Ives, Joshua (1854–1931)'; Edgeloe, 'The Adelaide Law School 1883–1983' (n 4) 26.

In December 1923, John McLeay approached Phillipson and offered him £250 to provide private tuition for his son, law student Marshall McLeay.⁹⁵ Phillipson turned down the offer, but in June 1924 he approached dentist John T Hardy and offered to coach his son, law student John Scott Hardy, for a substantial sum, £90 or more.⁹⁶ Neither proposal progressed any further. In March 1925, Agnes Rymill and her husband, Arthur Graham Rymill, wrote to the Vice-Chancellor stating that Phillipson had told them, in separate meetings, that he was willing to coach their son Arthur (known as ‘Lum’) in Contracts, for a fee of 200 guineas.⁹⁷ Phillipson himself was the lecturer in this subject.

The Rymill family was wealthy and well-known. AG Rymill was a pastoralist, land agent and director of various companies, including the Bank of Adelaide.⁹⁸ His father, too, had been a director of the Bank. Agnes Rymill was a friend of Eva Phillipson, at least until their conflicting recollections put them on opposing sides in the University inquiry that led to Phillipson’s resignation.⁹⁹

The Council established a subcommittee to investigate. The high calibre of its members showed how seriously the Council viewed the matter. The subcommittee comprised two Supreme Court Justices (Thomas Slaney Poole, who was Acting Chief Justice and Warden of the University Senate, and Herbert Angas Parsons), together with William Isbister, the former Dean. The subcommittee met in Justice Poole’s chambers at the Supreme Court. It took statements from Coleman and Eva Phillipson, AG and Agnes Rymill, John McLeay and JT Hardy on three days in March and May 1925, extending its hearings so that Agnes Rymill, who was overseas in March, could attend. AG Rymill sent an emissary, the lawyer Richard Bennett, to Hardy, to encourage him to tell the University what he knew.¹⁰⁰ This is probably the source of later statements that Hardy had consulted his lawyer about Phillipson’s offer.

According to the Phillipsons, Agnes Rymill asked Coleman, during a social visit to the Phillipsons’ house in August or September 1924, whether he would coach

⁹⁵ Transcript of Subcommittee Hearings (University of Adelaide Archives, series 280, item 369) 10–11, 39. On Marshall McLeay, see *Calendar of the University of Adelaide for the Year 1928* (University of Adelaide, 1928) 98; ‘Admitted to Bar: New Legal Practitioners’, *The Register* (Adelaide, 25 April 1927) 10.

⁹⁶ Transcript of Subcommittee Hearings (n 95) 26–8. On John Scott Hardy, see ‘Law Graduates’, *The News* (Adelaide, 24 April 1926) 1.

⁹⁷ Letter from Agnes Rymill to Vice-Chancellor, 3 March 1925 (University of Adelaide Archives, series 200, item 61/25); Letter from AG Rymill to Vice-Chancellor, 4 March 1925 (University of Adelaide Archives, series 200, item 61/25).

⁹⁸ HJ Gibbney and Ann G Smith (eds), *A Biographical Register 1788–1939: Notes from the Name Index of the Australian Dictionary of Biography* (Australian Dictionary of Biography, 1987) vol 2, 236; ‘Business Leader and Pastoralist’, *The Advertiser* (Adelaide, 11 September 1934) 15.

⁹⁹ Transcript of Subcommittee Hearings (n 95) 41.

¹⁰⁰ *Ibid* 14, 33–4.

her son.¹⁰¹ Agnes Rymill raised the subject again, Eva Phillipson said, in January 1925.¹⁰² In February, Agnes Rymill met Coleman Phillipson, at his suggestion, and he told her he was willing to coach her son for a fee of 200 guineas.¹⁰³ Phillipson later said, and Agnes Rymill denied, that he said he would first need to consult the Faculty of Law or the Council.¹⁰⁴ According to Agnes Rymill, it was Phillipson who first mentioned the coaching, and he did not do so until his meeting with her in February.¹⁰⁵ Following this meeting, AG Rymill met Phillipson with the admitted purpose of setting a trap, to get him to confirm his conversation with Agnes.¹⁰⁶ Phillipson initially confirmed his willingness to coach Lum Rymill but changed his mind when AG Rymill said he would consult the Chancellor.¹⁰⁷ Phillipson asked both AG Rymill and Hardy to keep their meetings with him confidential.¹⁰⁸

The Phillipsons and the Rymills disagreed emphatically on many points, notably over who initiated the coaching proposal and whether Phillipson said he would need to consult the University before proceeding. The question of who initiated the proposal was a sensitive one. If Phillipson was the first to suggest coaching for a fee, he might seem to have demanded money to let the student pass the subject, as AG Rymill implied when he told his wife that Phillipson's offer was 'like a case of refined blackmail'.¹⁰⁹ On the other hand, if the idea came from the Rymills, they might appear to have sought preferential treatment for their son.

Although Phillipson attacked the reliability of the Rymills, he conceded the most important points: he had named a fee of 200 guineas for coaching Lum Rymill and such coaching was undesirable.¹¹⁰ Some of his comments to the subcommittee were inflammatory. Concerning AG Rymill's reference to blackmail, Phillipson

¹⁰¹ Ibid 16; Letter from Eva Phillipson to Justice Poole, 22 March 1925 (University of Adelaide Archives, series 280, item 369) 1; 'Comments on Two Letters Addressed to the Vice-Chancellor' (University of Adelaide Archives, series 280, item 369).

¹⁰² Transcript of Subcommittee Hearings (n 95) 17–18; Letter from Eva Phillipson to Justice Poole, 22 March 1925 (n 101).

¹⁰³ Transcript of Subcommittee Hearings (n 95) 55; 'Comments on Two Letters Addressed to the Vice-Chancellor' (n 101) 3; Letter from Agnes Rymill to Vice-Chancellor, 3 March 1925 (n 97).

¹⁰⁴ 'Comments on Two Letters Addressed to the Vice-Chancellor' (n 101) 2; Transcript of Subcommittee Hearings (n 95) 8–9, 43.

¹⁰⁵ Transcript of Subcommittee Hearings (n 95) 41–2, 51–2.

¹⁰⁶ Ibid 54.

¹⁰⁷ 'Comments on Two Letters Addressed to the Vice-Chancellor' (n 101) 4; Letter from AG Rymill to Vice-Chancellor, 4 March 1925 (n 97).

¹⁰⁸ Letter from AG Rymill to Vice-Chancellor, 4 March 1925 (n 97); Transcript of Subcommittee Hearings (n 95) 24, 28, 35.

¹⁰⁹ Transcript of Subcommittee Hearings (n 95) 53.

¹¹⁰ 'Comments on Two Letters Addressed to the Vice-Chancellor' (n 101) 2–3; Report to the Council of the University of Adelaide of Subcommittee Re Professor Phillipson (University of Adelaide Archives, series 200, item 61/1925) 8 ('Report to the Council').

wrote: '[T]his is the construction of one who is possessed either of the mentality of an imbecile or the malicious spirit of a hooligan'.¹¹¹ AG Rymill had 'not the least element of a gentleman', he said.¹¹² When the anonymous note appeared on his door, Phillipson took its reference to blackmail as an indication that AG Rymill had something to do with the incident, an implication rejected by Rymill and by Justice Poole, who called the posting of the note 'a dastardly thing'.¹¹³ The culprit was never identified. Phillipson also claimed that Agnes Rymill 'said the Rymill family had always had more money than brains'. She denied the claim.¹¹⁴

The subcommittee sifted the testimony with judicial care. It concluded that Phillipson had offered to coach Hardy and Rymill, and that he had not made his offers conditional on approval from the University.¹¹⁵ However, it also found that Phillipson had 'never agreed to coach any student', meaning, it seems, that he had not agreed that the coaching would go ahead.¹¹⁶ The Rymills' statements, the subcommittee commented, 'lose weight from their obvious indignation and animus', and in court proceedings AG Rymill's evidence 'would be open to strong comment as being the evidence of a "trap" witness'.¹¹⁷ The subcommittee received several documents from Phillipson, but his scattergun arguments, made in writing and in person, did him little good. The subcommittee's report quoted at length a written statement from Phillipson on the propriety of coaching but dismissed it, saying that commenting on the statement was beyond the scope of the inquiry.¹¹⁸

In the absence of an explicit prohibition in the University's statutes, the report identified the essential problem: if he coached one of his students, Phillipson would face a conflict between his duty to the University to maintain its academic standards and his interest as a coach in making sure the student passed. The report commented:

It was his duty as a Professor examining to see that none passed unless they reached the proper standard. As a paid coach his business of coaching would be injured if the student he coached did not pass, and his interest *qua* coach would be in conflict with his duty as an examiner.¹¹⁹

¹¹¹ Comments Received 6th May with Letter to Mr Justice Poole (University of Adelaide Archives, series 280, item 369).

¹¹² Transcript of Subcommittee Hearings (n 95) 56.

¹¹³ *Ibid.*

¹¹⁴ 'Comments on Two Letters Addressed to the Vice-Chancellor' (n 101) 2; Transcript of Subcommittee Hearings (n 95) 45.

¹¹⁵ Report to the Council (n 110) 2–3.

¹¹⁶ *Ibid* 3.

¹¹⁷ *Ibid* 4.

¹¹⁸ *Ibid* 4–9.

¹¹⁹ *Ibid* 9.

On the other hand, the report rejected the characterisation of Phillipson's actions as blackmail.¹²⁰

The subcommittee concluded that coaching would be an improper use of Phillipson's position, regardless of whether it breached the University's statutes and regulations. It did not recommend what action the University should take, although an unsigned note, probably originating from the subcommittee, suggested tentatively that offering to 'enter into transactions' that created a conflict between duty to the University and personal interest justified a professor's summary dismissal.¹²¹ Under the University's statutes, the Council could dismiss a professor whose continuance in office or performance of duties would 'in the opinion of the Council be injurious to the progress of the students or to the interests of the University'.¹²² Dismissal was subject to ratification by the State Governor. The terms of appointment to the Chair of Law also allowed termination by either side on six months' notice after an initial five-year term, which would expire at the end of 1925.¹²³

An incident that occurred during the inquiry proved particularly damaging to Phillipson. On 16 March 1925, after the appointment of the subcommittee, Phillipson met again with JT Hardy. They discussed Hardy's son, although there was little clarity in their later statements about what was said.¹²⁴ Five days later, speaking to the inquiry, Phillipson had difficulty remembering his discussions with Hardy and said, in answer to a direct question, that he had had only one meeting with him.¹²⁵ The subcommittee concluded that Phillipson

has not, it appears to us, been at all times candid. He affected to recollect with difficulty whether there had been any offer to coach the student Hardy, although within a few days of our meeting he had been to Mr Hardy with reference to the very matter.¹²⁶

Codes of professional conduct made a finding of dishonesty on the part of the Professor of Law all the more serious. Justice Poole told newly admitted practitioners in April, while the inquiry was proceeding, that their profession demanded 'honorable conduct and unremitting care'.¹²⁷

¹²⁰ Ibid.

¹²¹ Note Concerning Dismissal of a Professor (University of Adelaide Archives, series 280, item 369).

¹²² *Calendar of the University of Adelaide for the Year 1925* (n 78) 97.

¹²³ 'University of Adelaide: Professor of Law' (University of Adelaide Archives, series 200, item 633/1919).

¹²⁴ Transcript of Subcommittee Hearings (n 95) 29–32; 'Remarks on Mr Hardy's Statement' (University of Adelaide Archives, series 280, item 369).

¹²⁵ Transcript of Subcommittee Hearings (n 95) 11–13.

¹²⁶ Report to the Council (n 110) 4.

¹²⁷ 'Admissions to the Bar: Privileges and Responsibilities', *The Advertiser* (Adelaide, 28 April 1925) 14.

On 11 May 1925, the Council considered the subcommittee's report. The findings were evidently too damaging for it merely to warn Phillipson that he should not undertake private coaching. Instead, it began moves to dismiss him, through notice of a motion to give him immediate leave and terminate his appointment at the end of the year. In the meantime, the Council gave Phillipson the chance to resign.¹²⁸ Two days later, he did so. His letter of resignation portrayed him as the wronged party. He resigned, he said, because of 'an attack recently made on me, which I consider unjustifiable, and the unpleasantness thereby caused'.¹²⁹ He wanted to return to research and to the legal practice that the Council had denied him in Adelaide.

These parting shots stung the Council into rejecting the terms of his letter, but it authorised Vice-Chancellor Mitchell to accept his resignation, if he found the terms acceptable.¹³⁰ No amended letter of resignation appears in the records, and Mitchell seems to have decided to overlook Phillipson's choice of words. He wrote immediately to Phillipson, saying that his resignation was accepted and that he could have leave until the end of the year. His tone was conciliatory: 'This will leave you free to resume the valuable work which you gave up to come to Adelaide.'¹³¹ The Council decided not to release the report of the inquiry. Even Phillipson and AG Rymill were not to receive copies, since disclosure to them would constitute publication (that is, it would meet the legal definition of publication for the purposes of defamation).¹³² The subcommittee had heard that Phillipson was willing to sue for libel.¹³³ Non-disclosure would also remove the report from public debate or challenge.

IV REACTIONS

The case produced a burst of publicity in the newspapers, but it was short-lived, quickly starved of new material by the University's silence and the lack of any prospect of the outcome being overturned. Rumours about Phillipson had begun to circulate in March or earlier.¹³⁴ In April 1925, before the subcommittee completed its inquiry, Phillipson found the anonymous note pinned to his office door: 'Coleman Phillipson, Blackmailer[.] Get out you dirty swine.' He wrote to Justice Poole to inform him, adding:

¹²⁸ University Council Minutes, 11 May 1925 (University of Adelaide Archives, series 18, item 13) 53.

¹²⁹ Letter from Coleman Phillipson to Vice-Chancellor, 13 May 1925 (University of Adelaide Archives, series 200, item 106/1925).

¹³⁰ University Council Minutes, 15 May 1925 (University of Adelaide Archives, series 18, item 13) 54.

¹³¹ Letter from Vice-Chancellor to Coleman Phillipson, 15 May 1925 (University of Adelaide Archives, series 200, item 106/1925).

¹³² University Council Minutes, 11 May 1925 (n 128) 53.

¹³³ Transcript of Subcommittee Hearings (n 95) 3, 29–30.

¹³⁴ *Ibid* 29, 32, 37.

I beg you to bring the enquiry to a speedy conclusion. My health is suffering through the protracted enquiry, through gross misrepresentations and distorted accounts scattered about the town, and through such an attack as the present one, which is probably a result of these misrepresentations and distortions and which will, no doubt, be followed by similar attacks in the dark.¹³⁵

The Register reported on 7 April that a committee of the Council was investigating the propriety of coaching by an unnamed professor.¹³⁶ A month later, the newspaper reported that the committee had finished investigating and would report to the Council in a few days. This story included the new detail that the coaching was of a law student.¹³⁷

When the full story broke in mid-May, the University was officially silent, aside from announcing Phillipson's resignation. However, *The Register* was well informed, aware that Phillipson and the Rymills disagreed over who initiated the coaching proposal and whether it was conditional on the University's approval. It also said explicitly, unlike other newspapers, that Phillipson was asked to resign. The fact that the Council had begun moves to dismiss him went unreported. *The Register* called on the University to release the report of the inquiry, as did AG Rymill.¹³⁸ But the only result was a further refusal by the Vice-Chancellor to comment, other than by saying that the report dealt 'only with the facts of the case, and the decision of the council was unanimous'.¹³⁹

This information vacuum was filled by Phillipson, who told his side of the story to the newspapers. He also gave them his letter of resignation and the University's reply. 'The crux of the whole matter', he told reporters, 'was my willingness to give private tuition to one or two backward students. The council objected to my doing so. There is nothing dishonourable or wrongful in it'.¹⁴⁰ He told journalists about the note that had been pinned to his door and added that he had wanted to return to England for the last two years, but had stayed because his wife loved the climate. (The Phillipsons had bought a house in Adelaide the previous year.)¹⁴¹ He quoted compliments he had received from Lords Birkenhead and Reading, along with other flattering comments. Soon he gave journalists more information, naming the Rymills and the fee he asked for coaching their son, while saying that he made his offer conditional on the approval of the Faculty or the Council. The University had overreacted: '[T]he initial suggestion I made may, perhaps, have been inexpedient or an indiscretion, if

¹³⁵ Letter from Coleman Phillipson to Justice Poole, 18 April 1925 (n 3).

¹³⁶ 'University Studies', *The Register* (Adelaide, 7 April 1925) 8.

¹³⁷ 'University Studies', *The Register* (Adelaide, 7 May 1925) 8.

¹³⁸ 'The Resignation of Professor Phillipson', *The Register* (Adelaide, 20 May 1925) 8.

¹³⁹ 'Professor Phillipson's Resignation: "Council's Decision Unanimous"', *The Register* (Adelaide, 20 May 1925) 9.

¹⁴⁰ 'Professor Phillipson's Resignation: "Glad to Return Home"', *The Register* (Adelaide, 18 May 1925) 7.

¹⁴¹ 'The Social Round', *The Register* (Adelaide, 13 November 1924) 7.

you like, but surely it did not merit the application of a sledge hammer wielded in the dark.’¹⁴²

Writers to the newspapers took sides. One correspondent regretted the loss to Adelaide of ‘an intellectual leader of the first order’ and condemned anonymous attacks on him, while saying little or nothing about the coaching question.¹⁴³ ‘An onlooker’, writing to *The Register*, was unimpressed by Phillipson’s repeated references to his testimonials and achievements:

I hope the public are admiring the way Professor Coleman Phillipson is ‘dragging a herring across the track.’ The question is not what he has done or what he can do in legal work, what books he has written, or what he may write; but whether a University professor has any right to coach students for a financial consideration. The suggestion of 200 guineas makes one consider. He must have a colossal idea of his own ability to ask such a fee.¹⁴⁴

‘Lex’ (‘Law’), another writer to *The Register*, overheard passengers on a tram saying that Phillipson had been ‘persecuted and “hounded out”’.¹⁴⁵ ‘Lex’ retorted that the case ‘strikes at the very root of the University’, but sought ‘to impress on the University the absolute necessity for raising the veil of secrecy’.¹⁴⁶ *Truth*, under a characteristic headline (‘Adelaide’s University Scandal Searns a Shining Citizen: Was Professor Pushed Out?’), blamed the affair on the hostility of practitioners who feared competition from Phillipson and the jealousy of students who were not offered coaching.¹⁴⁷ The fear of competition was far-fetched (Phillipson was unable to practise in South Australia), but the hostility of practitioners was more plausible. In evidence to the Royal Commission on Law Reform in 1923, Phillipson freely criticised the conduct of South Australian advocates.¹⁴⁸ When publicly rebuked by Thomas O’Halloran, Vice-President of the Law Society, he returned fire vigorously in *The Advertiser*.¹⁴⁹

¹⁴² ‘Professor Phillipson: A Personal Explanation’, *The Advertiser* (Adelaide, 19 May 1925) 13.

¹⁴³ Llewellyn Lewis, ‘Professor Phillipson’s Resignation: To the Editor’, *The Register* (Adelaide, 19 May 1925) 9.

¹⁴⁴ ‘Correspondence: To the Editor’, *The Register* (Adelaide, 20 May 1925) 9.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ ‘Adelaide’s University Scandal Searns a Shining Citizen’, *Truth* (Adelaide, 23 May 1925) 1.

¹⁴⁸ ‘Law Reform: Jury System Defended’, *The Register* (Adelaide, 7 March 1923) 9.

¹⁴⁹ ‘More Judges Advocated: With High Salaries’, *The Journal* (Adelaide, 10 April 1923) 1; ‘Law Reform: Mr TS O’Halloran’s Evidence’, *The Express* (Adelaide, 7 May 1923) 4; Coleman Phillipson, ‘Professor Phillipson and Mr O’Halloran: To the Editor’, *The Advertiser* (Adelaide, 9 May 1923) 10.

On his departure from Adelaide, Phillipson thanked his supporters and the groups of law students who had visited him.¹⁵⁰ He gave the subcommittee a copy of one letter of support that he received while the inquiry was under way. It came from one of the few women in his classes, Eleanor Wemyss. She wrote:

May I be permitted to express the feelings which are shared by every right-minded student, of the strongest sympathy with you, and of intense indignation at the base and cowardly attack made upon you by some unknown person, (who, we may hope, will soon be discovered and dealt with as he deserves.)¹⁵¹

Others viewed him harshly. John Ewens, who enrolled at the Law School the year after Phillipson left, had a low opinion of him: ‘He had little or no interest in the students, and so far as teaching students at the university was concerned, he was a dead loss.’¹⁵² Jethro Brown remained a member of the Faculty of Law after his resignation from the Chair, and he and his family became friendly with the Phillipsons. Brown’s son Cyril recalled Phillipson as ‘a man almost completely lacking in tact, good form or sense of humour’.¹⁵³

Phillipson’s daughter Margaret and his wife Eva stayed on in Adelaide for a few months after he left in August 1925. On their way to England, they visited Phillipson’s brother Brian, a member of the Indian Civil Service, in Assam. There, Margaret caught enteric fever and died, aged 18.¹⁵⁴ Phillipson remembered her in the preface to his next book: ‘I may perhaps be permitted to add that this work was written just after I lost one in whom my hopes had been centred, and who, notwithstanding her youth, often manifested a great interest in my dry writings.’¹⁵⁵

V CONCLUSION

Between its foundation in 1874 and Phillipson’s arrival in 1920, the University of Adelaide terminated the appointments of three professors against their wishes. Henry Read, inaugural Hughes Professor of Classics and Philology, was forced to resign in 1878 after he was alleged to have taken young women to a hotel for

¹⁵⁰ Coleman Phillipson, ‘Professor Phillipson’s Departure’, *The Register* (Adelaide, 6 August 1925) 15.

¹⁵¹ Letter from Eleanor Wemyss to Coleman Phillipson, 22 April 1925 (University of Adelaide Archives, series 280, item 369).

¹⁵² Interview with John Qualtrough Ewens (Barr Smith Library, University of Adelaide, 8 March 1982) University of Adelaide Law School Oral History Archives.

¹⁵³ Cyril MA Brown, *William Jethro Brown: A Personal Biography and a Bibliography* (CMA Brown, 1983) 50.

¹⁵⁴ ‘Obituary’, *The Register* (Adelaide, 23 March 1926) 9.

¹⁵⁵ Coleman Phillipson, *The Trial of Socrates: With Chapters on His Life, Teaching, and Personality* (Stevens & Sons, 1928) v–vi (‘*The Trial of Socrates*’).

immoral purposes.¹⁵⁶ The appointment of Joshua Ives as Professor of Music was not renewed in 1901 following numerous complaints about Ives himself and about the Elder Conservatorium.¹⁵⁷ Robert Langton Douglas, Professor of Modern History and English Language and Literature, was forced to resign in 1902 after his wife divorced him on the grounds of desertion and adultery.¹⁵⁸ Read and Douglas were both Anglican priests and may have been held to higher standards as a consequence; Read's troubles began with a complaint to the church.¹⁵⁹ Questions of personal morality dominated Australia's longest and most acrimonious nineteenth-century debate over the removal of a professor, that concerning George Marshall-Hall, Professor of Music at the University of Melbourne from 1891 to 1900.¹⁶⁰

The size of the fees Phillipson was willing to accept probably intensified reactions inside and outside the University. The amount offered to him by John McLeay, £250, was a substantial, even startling, amount of money, as much as many people earned in a year. It was far more than the total fees a student paid for the LLB course (about £66) but comparable to the premiums paid to obtain articles of clerkship.¹⁶¹ In 1931, Dorothy Somerville estimated the premium payable for articles at about 200 guineas, or £210.¹⁶² McLeay was not questioned about his motives for offering such a large sum, and they remain obscure. If his offer of £250 inspired Phillipson to ask for large fees from Hardy and the Rymills, its magnitude added to the surprise, and probably the suspicion, with which his actions were viewed. Phillipson himself gave no indication that he saw these large sums as anything other than an appropriate recognition of his expertise and the value of his time. The habits of insecure employment may have stayed with him. Before his Adelaide appointment, Phillipson was essentially a freelancer, picking up work as a barrister, author and editor where he could. Opportunities to supplement his income became his downfall.

Nothing indicated that Phillipson had gone ahead with any private coaching or received any money from parents. His offence was his willingness to do so, coupled with what the subcommittee saw as a lack of candour. His voluble response to the allegations against him, found in his testimony to the subcommittee and the lengthy documents he sent to its Chair, veered between denials, attacks on other witnesses, and fatal concessions of key points. If his second visit to Hardy was an attempt to

¹⁵⁶ *Australian Dictionary of Biography* (online at 15 April 2021) 'Read, Henry (1831–1888)'; Letter from A Russell to W Barlow, 5 June 1878 (University of Adelaide Archives, series 169, item 91).

¹⁵⁷ 'Ives, Joshua (1854–1931)' (n 94).

¹⁵⁸ Prest (n 52) 8; 'General Cable News', *The Register* (Adelaide, 29 March 1902) 5.

¹⁵⁹ *Crockford's Clerical Directory for 1898* (Horace Cox, 1898) 385; Letter from A Russell to W Barlow, 5 June 1878 (n 156).

¹⁶⁰ RJW Selleck, *The Shop: The University of Melbourne 1850–1939* (Melbourne University Press, 2003) 404–28.

¹⁶¹ *Calendar of the University of Adelaide for the Year 1925* (n 78) 149, 174.

¹⁶² Dorothy Somerville, 'Vocations for Girls: Law', *The Advertiser* (Adelaide, 8 December 1931) 14.

influence his recollections of their earlier discussion, it was a failure, and his efforts to conceal his conversations with Hardy and AG Rymill hint at guilty knowledge.

The controversy ended quickly. Once he had resigned, Phillipson could do little more than protest to the newspapers that the University had acted unfairly and that it had lost an eminent member of staff. Without access to the subcommittee's report, he could not challenge its findings, and the Council presented a very small target. Strictly speaking, all it had done was to receive the subcommittee's report and record a notice of motion for his dismissal. Phillipson had sympathisers, but there was no campaign on his behalf, and he was without defenders in positions of influence when he needed them. Crucially, he had no supporters in the Council. Its minutes record no dissent from its actions on his case, and there is no reason to doubt the Vice-Chancellor's statement that the members were unanimous. Perhaps, too, Phillipson's status as a newcomer and an outsider left him more vulnerable, despite the friendships his family had formed. His repeated citing of the compliments of famous men suggested insecurity as well as vanity.

After leaving Adelaide, Phillipson published two works: in 1928, a reverential study of the trial of Socrates, and, in 1933, a substantial introduction to a translation of Gentili's *De Jure Belli Libri Tres* (*Three Books on the Law of War*), commissioned 11 years earlier.¹⁶³ They were noteworthy books, but the contrast with Phillipson's earlier productivity is puzzling. A remark he had made about Cesare Beccaria became true of Phillipson's own career:

The later portion of his life did not correspond to his earlier promise, which was so strikingly shown in his literary achievement. Whether he was satisfied to rest on his laurels, or had come to the end of his capabilities and talent, or had reached the conclusion that all is vanity and that a 'dolce far niente' is best, it is difficult to say.¹⁶⁴

Phillipson continued to be listed as a London barrister.¹⁶⁵ His sense that he had been treated unjustly was still evident in a chance encounter in Italy with the South Australian artist, Arthur d'Auvergne Boxall, in 1930. A report of Boxall's meeting appeared in the press:

He approached a man he thought to be a rather voluble Italian, who spoke English well, and discovered after a few minutes' conversation that it was Professor Coleman Phillipson, formerly of the Adelaide University. His wife was wintering in the Riviera, he explained. He was engaged in writing a series of trials to show the difference between Roman, mediaeval, and Rabbinical law. The three trials were those of Jesus Christ, Julius Caesar, and Joan of Arc. 'Perhaps,' he added,

¹⁶³ Phillipson, *The Trial of Socrates* (n 155); Alberico Gentili, *Three Books on the Law of War*, tr John C Rolfe (Clarendon Press, 1933) vol 2, 9a; 'Personal News', *The Express and Telegraph* (Adelaide, 29 March 1922) 1.

¹⁶⁴ Phillipson, *Three Criminal Law Reformers* (n 86) 20–1.

¹⁶⁵ *The Law List 1930* (Stevens and Sons, 1930) 233.

with a sardonic smile, 'I may be permitted to write my own some day and show the ideals of modern justice.'

He evidently felt that an injustice had been done him in Adelaide, and he pointed out that he had thought private work was a natural corollary of his acceptance of the post of Law Professor at the University here.¹⁶⁶

When he died in 1958, on England's south coast, Phillipson was given the most prominent of *The Times's* daily obituaries, thanks to his writings on international law, but the newspaper said nothing about his life after 1920.¹⁶⁷ Some of his earlier renown, or his talent for publicity, remained. The year before his death, Phillipson's local newspaper reported on the 'leading international jurist' living, unrecognised by his neighbours, in Torquay, and said that his work was now to be extracted for study by the armed forces of the United States.¹⁶⁸ The report harked back to Phillipson's glory days, when he served the government during World War I and mixed with the famous at the Paris Peace Conference.

¹⁶⁶ 'Outstanding Women: Studied Grace of Queen Mary', *The Advertiser* (Adelaide, 27 May 1930) 14.

¹⁶⁷ 'Obituary: Dr Coleman Phillipson', *The Times* (London, 18 December 1958) 12. See also 'World Law Expert Dies at Torquay', *Herald Express* (Torquay, 16 December 1958) 7.

¹⁶⁸ 'Torquay Writer Quoted in the US', *Herald Express* (Torquay, 4 April 1957) 3.

HIGHER EDUCATION PROVIDERS' LIABILITY TO STUDENTS FOR FAILING ADEQUATELY TO EMBED LEARNING OUTCOMES IN THE EDUCATIONAL EXPERIENCE

ABSTRACT

Australian higher education providers are required by Standard 1.4 of the *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) to ensure that learning outcomes are adequately embedded in the educational experience. However, the question arises as to what extent, if at all, a student can initiate legal action to hold the higher education provider liable in the event of a failure to comply with stand 1.4. This article approaches that question from three avenues: the *Australian Consumer Law*, educational negligence, and breach of contract. The likelihood of an aggrieved student successfully suing their higher education provider under each avenue is explored, and common themes and challenges are highlighted. Ultimately, the analysis shows that none of the three avenues are likely to provide a reliable or cost-effective mechanism for aggrieved students.

I INTRODUCTION

The last two decades have seen the higher education sector globally place significant focus on the 'graduate skills agenda'¹ to address the recognised 'skills gap' within the sector.² The shift towards learning outcomes-based curriculum

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¹ Wendy Green, Sarah Hammer and Cassandra Star, 'Facing Up to the Challenge: Why Is It So Hard to Develop Graduate Attributes?' (2009) 28(1) *Higher Education Research and Development* 17, 18. The terms 'learning outcomes' and 'graduate attributes' are often used interchangeably within the higher education sector and academic literature. For a comprehensive explanation of the interchange of these two terms: see generally Christina Do and Leigh Smith, 'The Integration of Learning Outcomes and Graduate Attributes in the Australian Higher Education Sector. Part I: Integration, Evidence and Legal Consequences' (2021) 47(1) *Monash University Law Review* (forthcoming).

² Lorraine Anderson, 'The Learning Graduate' in Carey Normand and Lorraine Anderson (eds), *Graduate Attributes in Higher Education: Attitudes on Attributes from Across the Disciplines* (Taylor & Francis, 2017) 4, 7.

was aimed at addressing quality assurance concerns around whether university graduates were acquiring the necessary skills for the purpose of employment.³ The *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*')⁴ require higher education providers to specify the learning outcomes for each course of study offered by the institution and to assess students' achievement and attainment of the set learning outcomes.⁵ Failing to do so can result in an institution being investigated by the Tertiary Education Quality and Standards Agency ('TEQSA'), the regulator for the Australian higher education sector, and facing an array of sanctions and penalties if it is ultimately found that the institution failed to adequately implement and assess its promoted learning outcomes.⁶

Despite this movement within the sector and the legal requirement for Australian higher education providers to ensure the implementation and assessment of learning outcomes, research investigating learning outcomes reveals that the implementation, assessment and measurement of learning outcomes within the sector can be problematic.⁷ Students are likely to be the most adversely affected by a higher education provider's failure adequately to implement and assess learning outcomes, particularly since learning outcomes are often framed with the purpose of optimising graduate employability.⁸ Despite Australian university students generally paying between \$20,000 and \$45,000 for an undergraduate bachelor degree,⁹ there appear to be limited avenues for aggrieved students to seek redress in circumstances where their university has failed adequately to implement and assess the learning outcomes that the institution advertises.

³ Ibid 5.

⁴ *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*'), as enacted by *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 58(1) ('*TEQSA Act*').

⁵ *Threshold Standards* (n 4) stands 1.4.1–1.4.4.

⁶ Such as administrative sanction, civil penalties, removal of accreditation and withdrawal of registration: see *TEQSA Act* (n 4) pt 3 div 6, s 54, pt 7 divs 1–2.

⁷ See, eg, Simon Barrie, Clair Hughes and Calvin Smith, *The National Graduate Attributes Project: Integration and Assessment of Graduate Attributes in Curriculum* (Final Report, 2009) 20, 41; David Spencer, Matthew Riddle and Bernadette Knewstubb, 'Curriculum Mapping to Embed Graduate Capabilities' (2012) 31(2) *Higher Education Research and Development* 217, 218; Simon C Barrie, 'Understanding What We Mean by the Generic Attributes of Graduates' (2006) 51(2) *Higher Education* 215, 218; Beverley Oliver, *Assuring Graduate Outcomes* (Good Practice Report, 2011) 3; Green, Hammer and Star (n 1) 18.

⁸ See generally Duncan Bentley and Joan Squelch, *Internationalising the Australian Law Curriculum for Enhanced Global Legal Practice* (Final Report, 2012); Duncan Bentley and Joan Squelch, 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context' (2014) 24(1) *Legal Education Review* 95; Leigh Smith and Christina Do, 'Law Students' Awareness of University Graduate Attributes' (2018) 11(1) *Journal of the Australasian Law Teachers Association* 68, 68.

⁹ 'Education and Living Costs in Australia', *Study Australia* (Web Page) <<https://www.studyinaustralia.gov.au/English/Live-in-Australia/living-costs>>.

Although the *Threshold Standards* require that higher education providers have internal and external complaint management systems in place to investigate and address concerns raised by aggrieved students,¹⁰ if the aggrieved student is dissatisfied with the outcome of their hearing there are very few viable options available for the student to enforce their legal rights. While the aggrieved student could lodge a complaint with the Australian Competition and Consumer Commission ('ACCC') or TEQSA,¹¹ whether these regulatory bodies will pursue the complaint will largely depend on the regulatory bodies' priorities and the nature of the grievance.¹² The final option for an aggrieved student is to commence private legal action against their higher education provider.

This article highlights the legal difficulties associated with a student bringing such an action for a provider's failure adequately to embed learning outcomes in the educational experience. It begins by outlining the legislative framework that requires higher education providers to specify, implement and assess learning outcomes. The paper then explores the potential private legal action an aggrieved student could bring against their higher education provider in circumstances where it has failed adequately to implement and assess the learning outcomes that the institution advertises. Three potential causes of action are explored in this article: contravention of the *Australian Consumer Law* ('ACL'), contained within sch 2 of the *Competition and Consumer Act 2010* (Cth);¹³ educational negligence; and breach of contract. Analysis of these three causes of action highlights two significant legal hurdles that a student plaintiff would need to overcome in order to succeed: the low likelihood of judicial intervention, and the need to demonstrate loss or damage.¹⁴ Both barriers would be very difficult to overcome and, as a result, the likelihood of an aggrieved student succeeding in a private legal action against their university is presently very low.

The authors contend that there are limited causes of action available to students to enforce their legal rights in circumstances where they believe their higher education provider has failed adequately to implement and assess its promoted learning outcomes. This is especially so in light of the numerous government-funded projects

¹⁰ *Threshold Standards* (n 4) stands 2.4.1–2.4.5.

¹¹ 'Higher Education Student Complaints', *Study Assist* (Web Page) <<https://www.studyassist.gov.au/support-while-you-study/higher-education-student-complaints>>. The ACCC will only investigate complaints alleging contraventions of the *Competition and Consumer Act 2010* (Cth) ('*Competition and Consumer Act*') and TEQSA will only investigate complaints alleging contraventions of the *Threshold Standards* (n 4).

¹² See generally 'Compliance & Enforcement Policy & Priorities', *Australian Competition and Consumer Commission* (Web Page, 2021) <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>>; 'Higher Education Student Complaints' (n 11); Do and Smith (n 1) pt III.

¹³ *Competition and Consumer Act* (n 11) sch 2 ('ACL').

¹⁴ Do and Smith (n 1) pt III.

which have indicated that the implementation and assessment of learning outcomes within the higher education sector require significant improvement.¹⁵ Higher education providers need to prioritise the comprehensive coverage of the learning outcomes they promote, while external regulation from TEQSA must ensure that educational services provided reflect what providers advertise in respect of those services.

II LEARNING OUTCOMES

Higher education in Australia is heavily regulated, with the *Threshold Standards*, created pursuant to s 58(1) of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth), an important source of regulation. The *Threshold Standards* are categorised into seven 'Domains',¹⁶ the first of which is 'Student Participation and Attainment'.¹⁷ Central to the present article is stand 1.4, which is about the acquisition of learning outcomes.¹⁸ Standards 1.4.1–1.4.4 provide:

1. The expected learning outcomes for each course of study are specified, consistent with the level and field of education of the qualification awarded, and informed by national and international comparators.
2. The specified learning outcomes for each course of study encompass discipline-related and generic outcomes, including:
 - a. specific knowledge and skills and their application that characterise the field(s) of education or disciplines involved
 - b. generic skills and their application in the context of the field(s) of education or disciplines involved
 - c. knowledge and skills required for employment and further study related to the course of study, including those required to be eligible to seek registration to practise where applicable, and
 - d. skills in independent and critical thinking suitable for life-long learning.

¹⁵ See, eg, Oliver, *Assuring Graduate Outcomes* (n 7) 3; Beverley Oliver, *Assuring Graduate Capabilities: Evidencing Levels of Achievement for Graduate Employability* (Final Report, 2015) 10–11.

¹⁶ 'Contextual Overview of the HES Framework 2015', *Tertiary Education Quality and Standards Agency* (Web Page) <<https://www.teqsa.gov.au/contextual-overview-hes-framework-2015>>.

¹⁷ *Threshold Standards* (n 4) stand 1.

¹⁸ *Ibid* stand 1.4.

3. Methods of assessment are consistent with the learning outcomes being assessed, are capable of confirming that all specified learning outcomes are achieved and that grades awarded reflect the level of student attainment.
4. On completion of a course of study, students have demonstrated the learning outcomes specified for the course of study, whether assessed at unit level, course level, or in combination.¹⁹

As can be seen from the above extract, stand 1.4 is centred on the concept of a learning outcome. Within the literature on learning and teaching in higher education, there is considerable discussion of learning outcomes and their operation.²⁰ One notable example is the work of John Biggs and Catherine Tang, who identify three levels of learning outcomes, namely (1) institutional, (2) program, and (3) course levels.²¹ In the Australian context, these are better expressed as (1) institutional, (2) course, and (3) unit levels.²² Adjusting for the Australian terminology, learning outcomes at these levels can be defined thus:

- the *institutional* level, as a statement of what the graduates of the university are supposed to be able to do;
- the ... [*course*] level, as a statement of what graduates from particular degree ... [*courses*] should be able to do;
- the ... [*unit*] level, as a statement of what students should be able to do at the completion of a given ... [*unit*].²³

¹⁹ Ibid stands 1.4.1–1.4.4. See also stands 1.4.5–1.4.7 which relate to research training.

²⁰ See, eg, Joakim Caspersen, Nicoline Frølich and Johan Muller, 'Higher Education Learning Outcomes: Ambiguity and Change in Higher Education' (2017) 52(1) *European Journal of Education* 8, 10–11; Hamish Coates, 'Research and Governance Architectures to Develop the Field of Learning Outcomes Assessment' in Olga Zlatkin-Troitschanskaia et al (eds), *Assessment of Learning Outcomes in Higher Education: Cross-National Comparisons and Perspectives* (Springer International Publishing, 2018) 3, 4–5.

²¹ John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 4th ed, 2011) 113.

²² Pursuant to the *Higher Education Support Act 2003* (Cth) ('*Higher Education Support Act*'), a 'unit of study' is defined as '(a) a subject or unit that a person may undertake with a higher education provider as part of a course of study ...', while a 'course of study' is defined as '(a) an enabling course; or (b) a single course leading to a higher education award; or (c) a course recognised by the higher education provider at which the course is undertaken as a combined or double course leading to 1 or more higher education awards': at sch 1 cl 1. See also the definitions of 'course of study' and 'unit of study' pursuant to the *TEQSA Act* (n 4) s 5.

²³ Biggs and Tang (n 21) 113.

The language of stand 1.4 suggests that it is focused on the middle level of learning outcomes, namely, course learning outcomes,²⁴ being those learning outcomes associated with each course of study, such as the Bachelor of Arts or Bachelor of Commerce. For the purposes of this article, when reference is made to learning outcomes in the context of stand 1.4, it is a reference to course learning outcomes.

Standards 1.4.1–1.4.4 show that the *Threshold Standards* contemplate far more than a higher education provider paying cursory attention to learning outcomes; rather, as noted in stand 1.4.4, students must have ‘demonstrated’ their acquisition of the learning outcomes.²⁵ But what if the standard is not met, that is, what if a student has not acquired the requisite learning outcomes? In such a case the student may seek to lodge a complaint with their higher education provider.²⁶ Likewise, there may be an opportunity for the sector’s regulator, TEQSA, to take action.²⁷ However, what if the student wishes to pursue a private legal action against their higher education provider? What avenues are available to the student? Analysing these two questions is the focus of Part III of this article.

III PRIVATE LEGAL ACTION

For a student aggrieved by an alleged failure of their university adequately to cover the relevant learning outcomes, it is likely that an internal complaint would be the first step to seek redress. However, if this avenue fails, the student may be left with no choice but to litigate or walk away. This Part explores the potential for a student to litigate against their university for: contravention of the *ACL*; educational negligence; and breach of contract. Each cause of action will be discussed in turn. First, however, it is important to comment briefly on the justiciability of such claims.

A Justiciability

In the context of a dispute between a student and their university, justiciability could be a key issue and a significant challenge for the student plaintiff.²⁸ Put simply,

²⁴ This is evident from the use of the phrase ‘course of study’ in the standard itself: *Threshold Standards* (n 4) stand 1.4.

²⁵ *Ibid* stand 1.4.4.

²⁶ For example, the authors’ institution, Curtin University, has a Teaching category for complaints, which includes ‘[q]uality of teaching/support/guidance/feedback’: Integrity and Standards Unit, ‘Complaint Categories’, *Curtin University* (Web Page, 27 July 2020) <https://complaints.curtin.edu.au/management/complaint_categories.cfm>.

²⁷ *TEQSA Act* (n 4) s 134(1)(c).

²⁸ See, eg, Patty Kamvounias and Sally Varnham, ‘Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals’ (2010) 34(1) *Melbourne University Law Review* 140, 159–65.

justiciability refers to the '[s]uitability of a matter for adjudication by a court'.²⁹ Essentially, a student plaintiff would need to show that the alleged failure of a university adequately to embed learning outcomes in the educational experience is a matter that the courts can and should intervene in. The authorities establish, however, that matters of academic judgment are non-justiciable, that is, not appropriate for court intervention.³⁰ To succeed, a student plaintiff would first need to convince a court that the matter in question is justiciable; if they could not do so, the claim would fail. Keeping this in mind, the discussion now turns to the specific causes of action presently under consideration.

B *Contravention of the ACL*

In Australia, it is generally accepted that students are consumers of educational services offered by universities.³¹ As consumers, university students are entitled to a

²⁹ *Encyclopaedic Australian Legal Dictionary* (online at 25 November 2020), 'justiciability'. See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 126–7 [3.70]. Later in their text, Aronson, Groves, and Weeks describe 'non-justiciability' as follows:

Concepts of non-justiciability vary between countries, and even within the same country, different meanings will be used for different contexts ... 'Non-justiciability' might signify the court's unwillingness to entertain disputes that are best left to the political process, or disputes which cannot be framed in legal terms or be resolved by the application of manageable legal criteria. It might signify the inability of our adversarial or judicial processes to handle large-scale fractal inquiries or a judicial sense of prudent self-restraint in second-guessing essentially political, religious, economic, or other non-legal debates.

At 1115 [19.250].

³⁰ See, eg, *Griffith University v Tang* (2005) 221 CLR 99, 121 [58] (Gummow, Callinan and Heydon JJ), 156–7 [165] (Kirby J); *Hanna v University of New England* [2006] NSWSC 122, [66] (Malpass AsJ), citing *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988; *Walsh v University of Technology, Sydney* [2007] FCA 880, [86] (Buchanan J); Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2nd ed, 2012) 333; J Joy Cumming 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 97, 99–100; Lisa Goldacre, 'The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers' (2013) 37(1) *University of Western Australia Law Review* 176, 180.

³¹ See, eg, Goldacre (n 30) 176. Although there is general support for the proposition that the *ACL* applies to the provision of educational services, there has been debate as to whether the activities and conduct of higher education providers with respect to students who utilise the Higher Education Contributions Schemes ('HECS') occur in 'trade or commerce'. However, Stephen Corones contends that, since the *Higher Education Support Act* (n 22) amendments, higher education providers' conduct in relation to HECS students occurs in 'trade or commerce': Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1, 6.

number of legal rights arising from the *ACL*. An aggrieved student has two potential *ACL* causes of action available to them, namely

1. that the university has engaged in misleading or deceptive conduct, contrary to s 18(1) of the *ACL*, by promoting acquisition of specified learning outcomes and/or graduate attributes in their handbooks, but nonetheless being unable to provide convincing evidence that the learning outcomes have been comprehensively and systemically acquired by their students; and
2. that the university has not satisfied the consumer guarantee relating to the supply of services, pursuant to s 60, ensuring that academic staff have exercised due care and skill in teaching and assessing the institution's specified learning outcomes.

These causes of action are discussed in turn.

1 *Misleading or Deceptive Conduct*

Section 18(1) of the *ACL* stipulates: 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'³² An aggrieved student who is able to establish a claim under s 18(1) would be able to seek damages pursuant to s 236 of the *ACL*.³³

The first hurdle for students pursuing a claim against their higher education provider for alleged misleading or deceptive conduct under the *ACL* is to establish that the conduct in question occurred in 'trade or commerce'. To determine whether the educational service or conduct occurred in 'trade or commerce', the courts will apply the test developed by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* ('*Concrete Constructions*').³⁴ There, a majority of Mason CJ, Deane, Dawson and Gaudron JJ emphasised that the conduct in question must have occurred "'in" trade or commerce' and not merely 'with respect to ... [t]rade and commerce'.³⁵ Their Honours stated:

[T]he words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.³⁶

Hence, the conduct in question must bear a trading or commercial character.

³² *ACL* (n 13) s 18(1).

³³ *Ibid* s 236.

³⁴ (1990) 169 CLR 594 ('*Concrete Constructions*').

³⁵ *Ibid* 602 (emphasis in original).

³⁶ *Ibid* 603.

Whilst it has historically been questionable whether a non-private university's educational services and conduct were of a trading or commercial nature, since the introduction of the *ACL* the definition of 'trade or commerce' has been extended to include 'any business or professional activity (whether or not carried on for profit)'.³⁷ It is contended, as it is by Lisa Goldacre, that the inclusion of the phrase 'professional activity' extends the application of the *ACL* to include providers of educational services, such as higher education providers.³⁸

Drawing on the decision in *Concrete Constructions*, Jessup J of the Federal Court in *Shahid v Australasian College of Dermatologists*³⁹ (with whom Branson and Stone JJ agreed) held that, in order to satisfy the phrase 'any professional activity', 'the activity in question [must] be unequivocally and distinctly characteristic of the carrying on of a profession, giving to the latter concept a connotation which is not limited to engagement in professional practice'.⁴⁰ Applying this reasoning, Jessup J held that representations made by the Australian College of Dermatologists in published handbooks relating to record-keeping and the availability of a meaningful appeal process were 'unequivocally and distinctly characteristic of the carrying on of the profession of dermatologists'.⁴¹ Although the matter concerned the activities of a professional association, the Full Court of the Federal Court's reasoning can be extrapolated to universities more generally. Although there is no direct Australian authority on the matter, Goldacre provides a useful analysis of how the Full Court's reasoning in *Shahid* can be broadly applied to higher education providers.⁴² Drawing parallels from the five key reasons for which the Full Court found that the Australian College of Dermatologists' actions constituted 'the carrying on of a profession', Goldacre argues:

First, academics and their institutions are likely to regard themselves as a profession, or a collection of professionals. Second, HEIs [higher education institutions] are institutions whose main concern is to advance knowledge and to maintain standards of learning for many disciplines and often in accordance with accrediting bodies' approval. Third, the establishment of standards of learning and the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental. Fourth, transactions with students in relation to the delivery of educational services occur as an instrumental act of the HEI. ... Fifth, the entrance into and the provision of education services are tightly organised, systematic and ongoing activities of a HEI. Many academic activities that make up the supply of educational services will thus be unequivocally and

³⁷ *ACL* (n 13) s 2(1).

³⁸ Goldacre (n 30) 185.

³⁹ (2008) 168 FCR 46 ('*Shahid*').

⁴⁰ *Ibid* 103 [194] (Jessup J, Branson and Stone JJ agreeing at 48–9 [1]).

⁴¹ *Ibid* 104 [197]. It was ultimately held that, 'in making the record-keeping representation ... the College engaged in misleading conduct': at 104–5 [198].

⁴² Goldacre (n 30) 186.

distinctly characteristic of the carrying on of the profession and therefore come within the extended meaning of 'trade or commerce' under the *ACL*.⁴³

Where a university publishes its learning outcomes and graduate attributes is a factor that can influence whether the conduct occurs in 'trade or commerce'. If the learning outcomes and graduate attributes are published in an institution's 'promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers',⁴⁴ then such actions fall within the scope of the expression 'in trade or commerce'.⁴⁵ In the context of higher education, the publication of materials and activities which promote courses — such as prospectuses, advertisements and handbooks — is likely to be characterised as conduct occurring 'in trade or commerce' as the conduct is likely to have been carried out 'in the central conception' of the provider's commercial activities.⁴⁶ Similarly, where institutions publish their learning outcomes and graduate attributes in their handbooks, ie, publications that outline information regarding the courses that are offered by the institution, such representations will also be considered to have been made 'in trade or commerce'.⁴⁷ If the learning outcomes and graduate attributes are published in the institution's policies and procedures, such representations will likely be considered to be actions that are 'characteristic of the carrying on of the profession', and thereby to have been made 'in trade or commerce'.⁴⁸ A university's policies and procedures represent the institution's standards with respect to teaching, learning and research, and 'the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental'.⁴⁹

An aggrieved student must also demonstrate that the conduct in question was 'misleading or deceptive or is likely to mislead or deceive'.⁵⁰ Conduct is misleading or deceptive when it 'lead[s] into error'.⁵¹ In determining whether the conduct in question was misleading or deceptive, the courts will take into consideration the class of consumers that the alleged conduct was directed at, and whether an ordinary and reasonable person from that class would likely be misled or deceived.⁵²

⁴³ Ibid (citations omitted).

⁴⁴ *Concrete Constructions* (n 34) 604.

⁴⁵ Ibid.

⁴⁶ See, eg, *Shahid* (n 40) 54 [28] (Branson and Stone JJ).

⁴⁷ Ibid 53–4 [28].

⁴⁸ Ibid 104 [197].

⁴⁹ *Goldacre* (n 30) 186.

⁵⁰ *ACL* (n 13) s 18(1).

⁵¹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ). See also *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651–2 [39] (French CJ, Crennan, Bell and Keane JJ).

⁵² *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202–3 (Deane and Fitzgerald JJ).

Learning outcomes and graduate attributes are often found in university promotional materials and handbooks. Arguably the class of consumers that read these materials is the public at large, especially given that universities attract interest from a cross-section of society. Furthermore, the representations made in these sources contain general information about the facilities and courses offered at the institution to entice enrolment. In contrast, the relevant section of the public that the university's specific policies and procedures are likely to be directed at are students enrolled at the institution, who may have a stronger understanding of the higher education sector than members of the general public. Furthermore, the information contained in the institution's policies and procedures is specific to the processes that the institution is required to follow in the course of its dealings with its various stakeholders.

Whether an ordinary and reasonable member of the class of consumers that university promotional materials and handbooks are directed towards would be led into error as a result of the representations is a question for the court to determine — this test is an objective one.⁵³ The fact of persons having actually been misled is not essential, although such evidence may be adduced.⁵⁴ Jim Jackson contends that because of the 'trust given to universities as knowledge discovers [sic] and disseminators one can expect little sympathy from courts for any level of sharp practice in course promotion',⁵⁵ especially since a significant portion of universities' targeted audience is made up of teenagers (some of whom are under 18) and young adults.⁵⁶

Prudent universities may incorporate a disclaimer in their marketing materials and handbooks negating any liability for any loss or damage incurred from the use of the materials. The presence of such disclaimers does not necessarily alleviate an institution from liability in relation to an allegation of misleading or deceptive conduct. In general, courts tend to interpret disclaimers with respect to misleading or deceptive conduct very critically as such clauses may be contrary to the public policy underpinning the *ACL*.⁵⁷ Justice Wilcox of the Federal Court in *Hutchence v South Seas Bubble Co Pty Ltd*⁵⁸ acknowledged that:

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Jim Jackson, 'The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974 (Cth)*' (2002) 6(1) *Southern Cross University Law Review* 106, 118 (citations omitted).

⁵⁶ Ibid.

⁵⁷ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561 (Lockhart J, Burchett J agreeing at 568, Foster J agreeing at 568). Justice Lockhart explained the Court's objections with respect to the effect of disclaimers to exclude liability against claims made under the predecessor legislation to the *ACL*:

Parliament passed the Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act.

At 561.

⁵⁸ (1986) 64 ALR 330.

There are occasions upon which the effect of otherwise misleading or deceptive conduct may be neutralized by an appropriate disclaimer. But such cases are likely to be comparatively rare and to be confined to situations in which the court is able to reach satisfaction — the onus resting on the party relying upon the disclaimer — that the disclaimer is likely to be seen and understood by all those — leaving aside isolated exceptions — who would otherwise be misled before they act in relation to the relevant transaction.⁵⁹

Most importantly, in order for an aggrieved student to succeed in an action for damages, the student must demonstrate that they relied and acted on the alleged misleading or deceptive conduct and, as a result, suffered loss or damage.⁶⁰ An action for damages will be unsuccessful if the applicant cannot demonstrate that they acted on the conduct in question, regardless of whether the conduct was misleading or deceptive. Therefore, a student claiming that they suffered damage as a result of their university's misleading or deceptive representations regarding its teaching and assessment of learning outcomes and graduate attributes must demonstrate that they relied and acted on these representations. A possible argument would be that the university's course learning outcomes or graduate attributes enticed the student to enrol at the institution. A key aspect of establishing this causative link is first demonstrating that the student was aware of the learning outcomes or graduate attributes. This may prove to be difficult, as a research project conducted in 2018 indicated a lack of general awareness and understanding by students of their institution's graduate attributes.⁶¹ Further, the student must demonstrate that reliance on the promoted learning outcomes and graduate attributes by their university caused them to suffer loss or damage.⁶²

2 *Consumer Guarantee Relating to the Supply of Service: Due Care and Skill*

Section 60 of the *ACL* stipulates: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.'⁶³ This is one of three consumer guarantees that are legally imposed on suppliers of services acting in trade or commerce under the *ACL*.⁶⁴ These consumer guarantees cannot be excluded, restricted or modified.⁶⁵ An aggrieved student who is able to establish a claim under s 60 against their higher education provider is able to seek damages pursuant to s 267(1) of the *ACL*.

⁵⁹ Ibid 338 (citations omitted).

⁶⁰ See, eg, *Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522, 538 [116] (Lander J, Hill and Jacobson JJ agreeing at 524 [1]) ('*Ford Motor*').

⁶¹ Smith and Do (n 8) 80.

⁶² *Ford Motor* (n 60).

⁶³ *ACL* (n 13) s 60.

⁶⁴ See *ibid* ss 60–2.

⁶⁵ *Ibid* s 64(1).

As previously discussed, many of the activities carried out by higher education institutions in the course of providing education services are likely to be characterised as ‘the carrying on of a profession’.⁶⁶ Therefore, it is probable that education services, such as curriculum design and delivery, would be categorised as being carried out ‘in trade or commerce’ within the *ACL*.

Higher education students must also satisfy the definition of ‘consumer’ under the *ACL*. Section 3(3) of the *ACL* states:

- (3) A person is taken to have acquired particular services as a consumer if, and only if:
 - (a) the amount paid or payable for the services ... did not exceed:
 - (i) \$100,000; or
 - (ii) if a greater amount is prescribed for the purposes of subsection (1)(a) — that greater amount; or
 - (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.⁶⁷

In circumstances where a student acquires education services to the amount of \$100,000 or less, the student is automatically classified as a ‘consumer’. However, if the educational services exceed \$100,000, the nature of the service acquired must be examined. The courts will consider whether the essential character of the service acquired is “‘commonly” or “regularly”” acquired for personal use or consumption.⁶⁸ This is not a contentious issue, as it is generally accepted that students are consumers of higher education in accordance with the definition of ‘consumer’ under s 3 of the *ACL* and the equivalent provision of its predecessor.⁶⁹

⁶⁶ *Shahid* (n 40) 103 [192] (Jessup J).

⁶⁷ *Treasury Laws Amendment (Acquisition as Consumer: Financial Thresholds) Regulations 2020* (Cth) sch 1 item 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 77A.

⁶⁸ *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479, 496 [81] (Young J).

⁶⁹ See generally Francine Rochford, ‘The Relationship between the Student and the University’ (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 28, 36; Bruce Lindsay, ‘Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions’ (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 11; Goldacre (n 30) 176; Patty Kamvounias and Sally Varnham, ‘Getting What They Paid for: Consumer Rights of Students in Higher Education’ (2006) 15(2) *Griffith Law Review* 306, 322–4; Corones (n 31) 5; Jackson, ‘The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)’ (n 55) 106.

Under the *ACL*, the term 'service' includes

- (a) any rights ... benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce ...
- (b) ... under:
 - (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods ...⁷⁰

It is likely that the educational services provided by universities would constitute 'services'.⁷¹ Therefore, the consumer guarantees that the *ACL* provides would apply to universities and their students.

The question whether a university or an academic employed by the institution has 'rendered with due care and skill' the coverage and assessment of the institution's learning outcomes and graduate attributes is legally complex. This is largely attributed to the fact that there is no definition of 'due care and skill' in the *ACL*. Further, there is limited explanation as to the requisite standard that is required to be met in order to discharge this guarantee under the *ACL*. The Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) explains:

This guarantee requires that the provider of services must have an acceptable level of skill in the particular area of activity involved in the supply of services. The provider must also exercise due care in providing the services. These requirements ensure that services are provided in accordance with the specifications agreed ...⁷²

The first limb of the guarantee specifies that the provider of the service possesses an 'acceptable level of skill'.⁷³ With respect to the provision of educational services, this requires that universities ensure that academic staff have the necessary academic and professional qualifications to undertake and discharge their duties.⁷⁴ Failing this,

⁷⁰ *ACL* (n 13) s 2.

⁷¹ Patty Kamvounias, 'Students and the Australian Consumer Law' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 96–7.

⁷² Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 192 [7.59] ('Explanatory Memorandum').

⁷³ *Ibid.*

⁷⁴ See *Threshold Standards* (n 4) stand 3.2.3, which provides that, in addition to relevant discipline knowledge and skills, academic staff must have at least one qualification level higher than the course of study which they have academic oversight (except academic staff with a doctoral or equivalent research experience supervising doctoral degrees).

the institution will not have discharged the consumer guarantee of due care and skill in the provision of the educational services.

The second limb requires that the provider of service ‘exercise due care in providing the services’.⁷⁵ Stephen Corones, in his article on the consumer guarantees that apply to the provision of education services by universities, offers a detailed analysis of the guarantee of due care and skill with respect to curriculum design and delivery.⁷⁶ Relying on the decision in *Read v Nerey Nominees Pty Ltd*,⁷⁷ Corones contends that this guarantee requires that the service provider carry out the service in a ‘careful, skilful and workmanlike’ manner,⁷⁸ which is an objective test. Drawing on s 28 of the *Consumer Guarantees Act 1993* (NZ), Corones suggests that the courts are likely to assess the duty against the ‘standard appropriate to the profession’.⁷⁹ Given that the *Threshold Standards* ‘set the requirements a higher education provider must meet — and continue to meet — in order to be registered by ... [TEQSA] to operate in Australia’,⁸⁰ and that the Australian Qualifications Framework (‘AQF’) is the national policy regulating education and training qualifications in Australia,⁸¹ these instruments represent the minimum standard expected of universities in providing educational services.

Whilst the AQF learning outcomes and the Learning Teaching Academics Standards Threshold Learning Outcomes (‘TLO’) are different from the learning outcomes referred to in the *Threshold Standards*, it appears that some universities have used the AQF learning outcomes and the TLOs to frame their institutions’ learning outcomes and graduate attributes.⁸² Therefore, provided a dissatisfied student can produce convincing evidence that demonstrates their institution has not adequately achieved the *Threshold Standards* and AQF learning outcomes associated with their course qualification, they may be able to contend that their institution failed to satisfy the guarantee of providing the educational service with due care and diligence.⁸³

⁷⁵ Explanatory Memorandum (n 72) 192 [7.59].

⁷⁶ Corones (n 31).

⁷⁷ [1979] VR 47 (‘*Read*’).

⁷⁸ Corones (n 31) 11, citing *Read* (n 77) 48 (Marks J).

⁷⁹ Corones (n 31) 11. This position has been supported by other Australian legal commentators: see, eg, Kamvounias (n 71) 96, 97.

⁸⁰ Explanatory Statement, Higher Education Standards Framework (Threshold Standards) 2015 (Cth) 2.

⁸¹ See *Australian Qualifications Framework* (National Policy No 2, January 2013) 9 <<https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf>>.

⁸² For example, the Curtin Law School’s Bachelor of Laws course has nine Course Learning Outcomes, which appear to have largely incorporated the six TLOs for the Bachelor of Laws: ‘Courses Handbook 2021: B-LAWS v1 Bachelor of Laws’, *Curtin University* (Web Page, 2021) <<http://handbook.curtin.edu.au/courses/31/319279.html>>; Australian Learning and Teaching Council, *Bachelor of Laws* (Learning and Teaching Academic Standards Statement, December 2010) 10 <<https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>>.

⁸³ Corones (n 31) 12; Kamvounias (n 71) 97.

Similar to a student raising a claim for misleading or deceptive conduct, a student claiming that their university failed to act with due care and skill must demonstrate that they suffered damage as a result of the failure. If a university is found to have not met its obligation to ensure that its educational services are rendered with due care and skill, it may be found responsible for the losses and damages that flow from the breach.

The remedies available for a breach of a consumer guarantee depend on the extent of the provider's failure to comply with the guarantee.⁸⁴ If the failure can be remedied and does not constitute a 'major failure',⁸⁵ the consumer can require the supplier to remedy the failure within a reasonable time.⁸⁶ If the supplier refuses or is unable to do so, or the failure cannot be remedied, the consumer may commence an action against the supplier for all reasonable costs incurred in remedying the failure or, alternatively, terminate the contract.⁸⁷ Furthermore, where there has been a failure to comply with a consumer guarantee, a consumer may seek to recover damages for any reasonably foreseeable loss or damage incurred.⁸⁸

If a university is found not to have exercised due care and skill in its provision of education services with respect to curriculum design and delivery of promoted learning outcomes and/or graduate attributes, it is unlikely that the university will be able to remedy the failure within a reasonable time. Students are only likely to become aware of the university's failure adequately to cover the learning outcomes once the course has commenced or nearer to its completion. As such, it is difficult to envisage a situation in which a university would be able to remedy a failure to comply with the guarantee within a reasonable time. If classified as a 'minor breach', students would need to re-enrol in units which did not adequately cover the learning outcomes in question again — such a process could take multiple study periods. Therefore, the most likely remedy available to an aggrieved student would be compensation for the reduction in value of the services rendered or compensation for the money they paid. Furthermore, if a student were able to demonstrate that it was reasonably foreseeable that a provider's failure adequately to teach and assess its promoted learning outcomes would significantly reduce their prospects of obtaining employment, the student might have a claim for this consequential loss.

The *ACL* lists a number of circumstances which constitute a 'major failure'.⁸⁹ An aggrieved student could contend that the educational services provided 'would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure',⁹⁰ that is, they would not have enrolled in the relevant course

⁸⁴ *ACL* (n 13) ss 267(2), 268.

⁸⁵ *Ibid* s 268, which outlines the circumstances where a breach of a consumer guarantee constitutes a 'major failure'.

⁸⁶ *Ibid* s 267(2)(a).

⁸⁷ *Ibid* s 267(2)(b).

⁸⁸ *Ibid* s 267(4).

⁸⁹ *Ibid* s 268.

⁹⁰ *Ibid* s 268(1)(a).

of study had they been aware that the university would not comprehensively cover its promoted learning outcomes and/or graduate attributes. In order to make good this argument, the student would need to demonstrate that the university's learning outcomes and/or graduate attributes are influential factors in a prospective student's decision to enrol at the institution. On that basis, knowledge that they may not adequately be covered could be said to be influential in deciding not to enrol. Given that research has indicated that there is a lack of general awareness and understanding by students of their institution's graduate attributes,⁹¹ however, it is unlikely that an institution's promoted learning outcomes and/or graduate attributes are a factor that influences prospective students' decision-making in this way.

The foregoing discussion demonstrates that student plaintiffs would likely face significant hurdles in seeking to establish a claim against their university under the *ACL*. The next possible cause of action considered by this article is educational negligence.

C Educational Negligence

The question whether an aggrieved student could establish an action in negligence against a provider of education is not new. Delivering a speech in March 1982, then Chairman of the Australian Law Reform Commission Michael Kirby stated:

I do think it likely that increasing community concern about educational standards will evidence itself one day in an endeavour to test the legal duty of teachers to give education of a suggested standard to pupils in their care. ... If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents.⁹²

While this speech concerned schoolteachers, these comments can be readily extrapolated to those who teach in the Australian higher education sector. Despite the passage of time, however, educational negligence in Australia is still under-developed. 'Educational negligence occurs when a student suffers harm as the result of incompetent or negligent teaching.'⁹³ It has been the subject of some commentary in Australia.⁹⁴ However, the legal position is still unclear. Consider, for example,

⁹¹ See, eg, Smith and Do (n 8) 80.

⁹² MD Kirby, 'Legal and Social Responsibilities of Teachers' (Speech, Education Centre for Whyalla and Region Annual Dinner, 22 March 1982) 14–15.

⁹³ Ian M Ramsey, 'Educational Negligence and the Legalisation of Education' (1988) 11(2) *University of New South Wales Law Journal* 184, 184.

⁹⁴ See, eg, Rosemary Antonia Dalby, 'A Human Rights Analysis of a Claim for Educational Negligence in Australian Schools' (SJD Thesis, Queensland University of Technology, July 2013); Caroline Cohen, 'Australian Universities' Potential Liability for Courses That Fail to Deliver', *Colin, Biggers & Paisley Lawyers* (Web Page, 15 December 2016) <<https://www.cbp.com.au/insights/insights/2016/december/australian-universities-potential-liability-for-c>>; Ramsey (n 93).

a school authority, which will owe a duty of care to a student.⁹⁵ The scope of that duty is primarily focused on physical injury; according to Amanda Stickley, whether or not 'a duty is owed for failing to provide a child with an appropriate standard of education ... has not yet been directly addressed in Australia'.⁹⁶ With respect to the higher education sector, Robert Horton, Kerry Smith and Abigail Tisbury comment that there 'is little specific Australian authority on the nature of a university's duty of care to its students, who are members of their universities'.⁹⁷ Consequently, the question whether a university owes a duty of care to their students is arguably even more complicated.

The approach generally taken by commentators on whether an educational negligence claim has the potential to succeed is to consider the elements of negligence.⁹⁸ That is the approach adopted below. Where relevant, reference is made to the *Civil Liability Act 1936* (SA) ('CLA') by way of illustration.⁹⁹ There is similar legislation in other Australian jurisdictions.¹⁰⁰

The first element of a negligence claim is duty of care.¹⁰¹ A duty can be of an established category, such as that of employer and employee,¹⁰² or novel.¹⁰³ A duty of care also has a defined scope, as outlined by Gummow J in *Roads and Traffic Authority (NSW) v Dederer*¹⁰⁴ (with whom Callinan J and Heydon J agreed):

[D]uties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. ...

... [A] duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and

⁹⁵ See, eg, Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 4th ed, 2016) 173–4 [9.69]–[9.76]; Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 8th ed, 2017) 964–6 [17.6.9]–[17.6.11].

⁹⁶ Stickley (n 95) 174 [9.74].

⁹⁷ Robert Horton, Kerry Smith and Abigail Tisbury, 'The Tort of Negligence and Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 179.

⁹⁸ See, eg, Ramsey (n 93) 198–207; Cohen (n 94); Dalby (n 94) ch 6.

⁹⁹ *Civil Liability Act 1936* (SA) ('CLA').

¹⁰⁰ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

¹⁰¹ Stickley (n 95) 143 [8.4].

¹⁰² See generally *ibid* ch 9.

¹⁰³ See generally *ibid* ch 10.

¹⁰⁴ (2007) 234 CLR 330 ('*Dederer*').

an ascertained plaintiff (or class of plaintiffs). Sometimes, the determination of that legal obligation is ... complicated ...¹⁰⁵

Pure economic loss, that is, economic loss not consequent upon physical injury or property damage, is one such complicating factor.¹⁰⁶ It is recognised in educational negligence commentary that the most appropriate characterisation of the loss suffered in such a context is purely economic.¹⁰⁷ In her discussion of duty of care, Rosemary Dalby compares educational negligence with other types of negligence involving pure economic loss, including professional negligence and negligent misstatement,¹⁰⁸ before considering the concept of foreseeability and the salient features of the school authority–student relationship that govern the existence and scope of any duty.¹⁰⁹ Caroline Cohen draws attention to the vulnerability of the plaintiff, the indeterminacy of liability, and the defendant’s knowledge of any risk of harm as being the ‘key issues’.¹¹⁰ A student plaintiff’s first hurdle would be to demonstrate that they were owed a duty of care, having regard to not only reasonable foreseeability but also these salient features.

Assuming a duty could be established, the student would then need to show that the university fell below the requisite standard of care¹¹¹ by failing adequately to cover the institution’s promoted learning outcomes and graduate attributes. Absent a non-delegable duty (which Horton, Smith, and Tisbury argue would be unlikely to arise in the higher education context),¹¹² ‘the exercise of reasonable care is always sufficient to exculpate a defendant in an action in negligence’.¹¹³ The challenge in the educational negligence context is to identify what is reasonable. This is particularly difficult given the extensive range of subject material taught by universities (usually well beyond what is taught in a school context). Establishing a breach of duty, however, is not necessarily insurmountable for a student plaintiff. As noted by Ian Ramsey,

[p]rofessional negligence cases frequently involve difficult issues associated with determining an appropriate standard of care. Teaching is not the only profession where there exists a vigorous debate concerning the very nature of the professional process and the role of the professional in that process. ... Moreover, it is a fundamental part of being a professional that complex matters requiring the exercise of skill and judgment and are common place and therefore, professionals

¹⁰⁵ Ibid 345 [43]–[44] (Gummow J, Callinan J agreeing at 405–6 [270], 408 [282], Heydon J agreeing at 408 [283]).

¹⁰⁶ Stickley (n 95) 219 [10.77].

¹⁰⁷ Cohen (n 94).

¹⁰⁸ Dalby (n 94) 190–3.

¹⁰⁹ Ibid 195–9. See also Ramsey (n 93) 196–201, 204; Cohen (n 94).

¹¹⁰ Cohen (n 94).

¹¹¹ See generally Stickley (n 95) ch 11. See also, *CLA* (n 99) ss 31–2.

¹¹² Horton, Smith and Tisbury (n 97) 180.

¹¹³ *Dederer* (n 104) 348 [50] (Gummow J).

should not be liable for mere errors of judgment. Courts usually give wide latitude to the exercise of judgment by professionals in the course of their duties.¹¹⁴

The above extract is particularly relevant here. On one hand, a negligence claim will not necessarily fail simply because it may be difficult to determine the standard of care. (Such complexity is also discussed by Cohen and Dalby.)¹¹⁵ However, on the other hand, establishing a breach where there are a range of potentially acceptable teaching methods and practices could be difficult.¹¹⁶

The establishment of factual causation is also complex in the context of educational negligence. Factual causation in South Australia is generally governed by s 34(1)(a) of the *CLA*.¹¹⁷ Closely linked to factual causation is the concept of the scope of liability,¹¹⁸ which is a more policy-focused inquiry.¹¹⁹ Pursuant to s 34(1)(a), to establish factual causation, it must be shown that the negligence was a 'necessary condition of the occurrence of the harm' suffered.¹²⁰ Put another way, and in the educational context, it must be shown that, 'but for' the negligence,¹²¹ the harm suffered by the student would not have occurred. Consider, for example, an allegation that, due to educational negligence, a student received a poor grade and therefore missed out on a valuable job opportunity. There are potentially a wide range of factors (both student- and recruitment/selection-related) that could lead to such an outcome.¹²² Being able to establish that the alleged educational negligence was a necessary condition of that outcome would be difficult, especially in the context of the coverage of learning outcomes and graduate attributes. Despite the above discussion, however, it is possible that, in time, factual causation could be more viable to establish. Dalby proposes that 'the ideal case would be if there were empirically verified, universally applicable principles of teaching that could be used to rule out all likely causative factors other than teacher or school error'.¹²³ While this is unlikely to happen in the near future, it is not necessarily impossible that such a development might occur.¹²⁴

Finally, it is important to consider the potential for a university to raise a defence to a claim of educational negligence. Here, the focus will be on the defence of contributory negligence, which may be easier to establish than other defences such

¹¹⁴ Ramsey (n 93) 203 (citations omitted).

¹¹⁵ Cohen (n 94); Dalby (n 94) 202.

¹¹⁶ Ramsey (n 93) 203.

¹¹⁷ *CLA* (n 99) s 34(1)(a).

¹¹⁸ *Ibid* s 34(1)(b).

¹¹⁹ See generally Stickley (n 95) 311–23 [12.56–12.89].

¹²⁰ *CLA* (n 99) s 34(1)(a). Note also s 34(2).

¹²¹ See, eg, *Wallace v Kam* (2013) 250 CLR 375, 383 [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

¹²² Cohen (n 94).

¹²³ Dalby (n 94) 229.

¹²⁴ *Ibid* 229–30.

as voluntary assumption of risk.¹²⁵ In South Australia, contributory negligence is a partial defence.¹²⁶ Pursuant to the *CLA*, contributory negligence uses a similar approach to breach of duty, but applied to the plaintiff.¹²⁷ Dalby engages in a detailed discussion of contributory negligence in the educational negligence context.¹²⁸ An important point of differentiation between Dalby's analysis and this article, however, is that students in the higher education sector are generally aged 18 or above. In the educational negligence context, a university alleging that a student was contributorily negligent would, in essence, be arguing that the student failed to take reasonable care with respect to their own education. Any non-attendance of (or lack of engagement with) lectures, tutorials and other classes, non-completion of assigned readings, lack of effort in assessments, late submissions, etc, by the student could all potentially be facts relevant to the question of contributory negligence.

Overall, therefore, while educational negligence may be a possibility for a student dissatisfied with their learning experience from an Australian university, such a claim is likely to be difficult, costly,¹²⁹ and with limited guarantee of success, at least at present. This article now turns to consider breach of contract as a possible cause of action in this setting.

D *Breach of Contract*

Despite the limited Australian judicial authority exploring the potential contractual relationship between students and universities,¹³⁰ there appears to be a general consensus amongst Australian legal commentators that contracts between universities and students do exist.¹³¹ However, due to the legislative instruments and university by-laws that regulate the relationship, it is unlikely that the entirety of the relationship is purely contractual.¹³² The scarcity of legal authority exploring the student–university contractual relationship is largely attributable to the fact that most claims brought before the courts have been predominately brought under legislation

¹²⁵ See generally Stickley (n 95) ch 13.

¹²⁶ *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7.

¹²⁷ *CLA* (n 99) s 44(1).

¹²⁸ Dalby (n 94) 231–3.

¹²⁹ See, eg, Pamela Stewart and Anita Stuhmcke, 'Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond' (2014) 38(1) *Melbourne University Law Review* 151, 167–7.

¹³⁰ But see *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424, 428, 435–6 (Allen J).

¹³¹ See, eg, Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005–06) 10(2)–11(1) *Australia and New Zealand Journal of Law and Education* 67, 74–5; Goldacre (n 30) 188; Lindsay (n 69) 7; Rochford (n 69) 28–9.

¹³² See, eg, Francine Rochford, 'The Contract between the University and the Student' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 84–8; Goldacre (n 30) 188; Lindsay (n 69) 7.

concerning consumer protection, discrimination and freedom of information, or on application for administrative remedies.¹³³

Although there is support for the position that a contract exists between students and universities, given the lack of judicial authority, the express and implied terms of any such agreements are uncertain.¹³⁴ However, there appears to be support for the proposition that the contract for the supply of educational services consists of two contracts: 'a "contract to enrol"' and 'a "contract to educate"'.¹³⁵ The contract to enrol is entered first, at the time a student enrolls at the institution, and is followed by a broader contract to educate.

Although a contract to enrol will often make reference to the university's statutes, rules and by-laws, it is contentious as to whether these non-contractual authorities are legally binding.¹³⁶ Justice Jagot in *Soliman v University of Technology, Sydney* ('*Soliman*'),¹³⁷ in determining the terms of a university employment contract, held that these authorities could form part of the contract 'if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement'.¹³⁸ Francine Rochford suggests that it is likely that this legal reasoning will be extended to a student's contract to enrol with their university.¹³⁹ In *Soliman*, however, Jagot J held that merely stating that the contract was 'subject to and governed by' the institution's constitutive statute and by-laws 'could not reasonably have been intended to represent obligations that were contractually binding'.¹⁴⁰

An aggrieved student contending that their university has not adequately covered its promoted learning outcomes and/or graduate attributes will not likely succeed in a claim for breach of contract bringing into issue the contract to enrol. The case law suggests that references to learning outcomes and graduate attributes in the institution's statutes and by-laws are unlikely to be incorporated into the contract to enrol.¹⁴¹ Therefore, a claim that the higher education provider breached a term of the contract by failing adequately to cover the learning outcomes and/or graduate attributes will be unlikely to succeed.

¹³³ Rochford, 'The Contract between the University and the Student' (n 132) 85.

¹³⁴ Lindsay (n 69) 10–11.

¹³⁵ Goldacre (n 30) 189. See also Rochford, 'The Contract between the University and the Student' (n 132) 86.

¹³⁶ Goldacre (n 30) 191; Rochford, 'The Contract between the University and the Student' (n 132) 86–8.

¹³⁷ (2008) 176 IR 183 ('*Soliman*').

¹³⁸ Ibid 198 [65], quoting *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [23] (Black CJ).

¹³⁹ Rochford, 'The Contract between the University and the Student' (n 132) 86–8.

¹⁴⁰ *Soliman* (n 138) 199 [67].

¹⁴¹ Ibid.

Commentators have indicated that the contract to educate relates to the provision of teaching and learning facilities, but does not necessarily stipulate the standard and quality expected of the educational service provided.¹⁴² Given the general reluctance of courts to interfere with matters concerning academic judgment, it is unlikely that courts will consider claims for breach of contract by students bringing into issue the standard and quality of the educational services rendered by universities. The court will likely perceive the regulator, TEQSA, as being a more appropriate decision-maker.¹⁴³ Therefore, an aggrieved student claiming that the university has breached the terms of the contract to educate by failing to ensure adequate coverage of the learning outcomes and/or graduate attributes will be unlikely to succeed. In such circumstances, the university would have likely delivered the units specified in the course study plan, but the coverage of the learning outcomes or graduate attributes may have not been to the standard and quality the student had expected. Commenting on the quality of educational services, Neville FM in *Yee v Hort (ANU College)*,¹⁴⁴ in obiter, said:

[I]t is not uncommon that courses in educational institutions ... are not delivered to the absolute, highest quality. Such is the reality of most human endeavour. However, it is one thing for educational courses, to be, among other things, of varying quality; it is quite another for the delivery of a course (or courses) to provide a base, in law, for a dissatisfied student to claim ... relief ...¹⁴⁵

Based on the above discussion, it is apparent that the *ACL*, educational negligence and breach of contract are not suitable options for students seeking a remedy against their higher education provider for a failure adequately to embed learning outcomes in the educational experience.

IV CONCLUSION

Theoretically, there are several options available to a student who contends that their higher education provider has not adequately taken measures to ensure that 'all specified learning outcomes are achieved [by students] and that grades awarded reflect the level of student attainment'.¹⁴⁶ The aggrieved could seek redress through the higher education provider's internal complaint management system, by lodging a complaint with the relevant regulatory body, and/or, ultimately, by pursuing a private legal action. Although students theoretically have these options available to them, if a student is dissatisfied with the decision reached from the internal complaint management system, there is no real viable option for the student to seek redress

¹⁴² See, eg, Rochford, 'The Contract between the University and the Student' (n 132) 88–9.

¹⁴³ See, eg, *Kweifio-Okai v Australian College of Natural Medicine [No 2]* [2014] FCA 1124, [37] (Tracey J).

¹⁴⁴ [2012] FMCA 391.

¹⁴⁵ *Ibid* [21].

¹⁴⁶ *Threshold Standards* (n 4) stand 1.4.3.

beyond this point. Lodging a complaint to either ACCC or TEQSA does not necessarily equate to legal action with a tangible remedy for the student.

Likewise, as shown in Part III of this article, private legal action is unlikely to result in success for the student. Arguably, the greatest challenge highlighted by the discussion is the causation element, that is, the requirement to establish a causal relationship between the conduct of the university (here, the failure to embed learning outcomes in the educational experience) and the effect on the student (for example, a missed job opportunity). While this element can take multiple forms, and use different terminology (for example, reliance in the *ACL* context versus factual causation in the negligence context), it is apparent that this will amount to a significant burden on any student seeking to bring a private legal action against their university.

Given that students have limited viable options for enforcing their rights with respect to the coverage of learning outcomes within their higher education experience, and the 'trust given to universities as knowledge discovers [sic] and disseminators',¹⁴⁷ Australian universities need to do more to address this recognised shortcoming within the sector. While it is widely acknowledged that learning outcomes within the higher education sector are generally vague, of 'patchy' implementation and often treated as a compliance-based exercise,¹⁴⁸ Australian universities must not be complacent with respect to learning outcomes, especially given the acknowledgement that 'graduate attributes are now recognised globally as a critical outcome of modern university education'¹⁴⁹ and are legally mandated.¹⁵⁰ In the event that Australian universities do not develop measures of assuring attainment of learning outcomes for graduates, then it will be left largely for the regulator, TEQSA, to step in and hold universities accountable, given that, for students, enforcement through private legal action is likely to be time-consuming, expensive,¹⁵¹ and unsuccessful.

¹⁴⁷ Jackson, 'The Marketing of University Courses' (n 55) 118.

¹⁴⁸ See, eg, Simon Barrie, 'Rethinking Generic Graduate Attributes' (2005) 27(1) *Higher Education Research and Development Society of Australasia News* 1, 3; Green, Hammer and Star (n 1) 18; Do and Smith (n 1); Barrie (n 7) 218; Barrie, Hughes and Smith (n 7) 6, 20; Spencer, Riddle and Knewstubb (n 7) 218.

¹⁴⁹ Alex Radloff et al, *The B Factor Project: Understanding Academic Staff Beliefs about Graduate Attributes* (Final Report, 2009) 1.

¹⁵⁰ *Threshold Standards* (n 4) stands 1.4.1–1.4.4.

¹⁵¹ See, eg, Stewart and Stuhmcke (n 129) 166–7.

*Jeremy J Kingsley**

DRAFTING INTER-ASIAN LEGALITIES: JAKARTA'S TRANSNATIONAL CORPORATE LAWYERS

ABSTRACT

Asia's legal architecture is in a state of transformation, with commerce and information flowing easily across borders. These socio-political changes are a challenge to traditional notions of jurisdiction and applicable substantive law. I argue that a new body of law is developing — akin to a law of merchants or *lex mercatoria* — to facilitate these complex commercial relationships. I demonstrate how the map of inter-Asian legalities — the connective tissue within and between Asian legal systems — is being redrawn, blending non-state local rules, domestic state laws, international law, and privatised transnational law. These legal regimes are often applied in plural legal environments that are facilitated and administered by legal intermediaries. I argue that in recent decades, a new breed of legal intermediary has emerged in the form of transnational corporate lawyers and the global law firms for which they work. This article will focus on the transnational corporate lawyers of Jakarta, Indonesia, who implement new modes of documenting and disputing commercial relationships.

I PREAMBLE

At the time of writing, international borders are closed, people are working from home, airlines across the globe are halting services, and corporations are going into liquidation. In this context, it seems an odd time to write about transnational corporate lawyers and legal interconnections across Asia. However, commercial and trade activities have remained active through technologies such as cloud systems and video conferencing.¹ These technologies have allowed arbitral forums to continue hearing matters (even if suboptimally) and contracts to be drafted by lawyers operating from their homes.

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¹ Emily Bary, 'Zoom, Microsoft Teams Usage Are Rocketing during Coronavirus Pandemic, New Data Show', *Market Watch* (online, 1 April 2020) <<https://www.marketwatch.com/story/zoom-microsoft-cloud-usage-are-rocketing-during-coronavirus-pandemic-new-data-show-2020-03-30>>; Brendan Ittelson, 'A Story of Agility and Innovation: Findings from the Impact of Video Communications during COVID-19 Report', (online, 25 March 2021) <<https://blog.zoom.us/findings-from-the-impact-of-video-communications-during-covid-19-report/>>.

With this all said, just as the COVID-19² pandemic will become a matter of historical record, trade and legal interconnections will continue as they have for hundreds of years. Consequently, this article remains relevant to our contemporary situation and future legal environments. Our entangled legal realities are, therefore, worth remembering as an essential element of legal practice, research, and education.

II INTRODUCTION

Over the past few decades, Asia has undergone major changes to its legal architecture, and with these changes, new actors and institutions have developed. The new modes and agents of legal change are captured in the interaction between state and non-state laws, actors and institutions. They combine to facilitate transnational commercial and political relationships across the region and beyond.³ Transnational corporate lawyers, acting as legal intermediaries navigating Asia's new legal architecture, are an important element of inter-Asian legalities. Transnational corporate lawyers navigate the amalgam of local legal practices, domestic laws, international treaties, and private transnational contractual arrangements underpinning an intricate fabric of transnational governance.⁴ These lawyers operate across the sea lanes of Asia from Hong Kong to Dubai and span the newly re-emerging inland 'silk road' from China to Europe.⁵ Important to these transnational private arrangements are contract-based commercial relationships and privatised dispute resolution processes.⁶ In this legal domain, where globalisation creates new forms of commercial interaction, the

² COVID-19 is also referred to as SARS-CoV-2, coronavirus, or novel coronavirus.

³ The study of connections across the Asian region — broadly defined — has been brought back into scholarly attention by Prasenjit Duara. See generally Prasenjit Duara, 'Asia Redux: Conceptualizing a Region for Our Times' (2010) 69(4) *Journal of Asian Studies* 963.

⁴ Legal and anthropological examinations of the ideas of plural legal arrangements that exist within and flow across borders are provided by Franz von Benda-Beckmann and Keebet von Benda-Beckmann. See Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 38(53–4) *Journal of Legal Pluralism and Unofficial Law* 1. See also H Patrick Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50(4) *McGill Law Review* 863; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012).

⁵ These connections have existed for hundreds of years: Engseng Ho, *The Graves of Tarim: Genealogy and Mobility across the Indian Ocean* (University of California Press, 2006); John N Miksic, *Singapore and the Silk Road of the Sea 1300–1800* (National University of Singapore Press, 2013); Abdul Sheriff and Engseng Ho (eds), *The Indian Ocean: Oceanic Connections and the Creation of New Societies* (Hurst & Company, 2014).

⁶ Philip Caryl Jessup, *Transnational Law* (Yale University Press, 1956); Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2012), 206–8; Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (Cambridge University Press, 2015) 22–5.

transnational corporate lawyers are based in service centres (or professional ‘garrison towns’) such as Dubai, Jakarta, and Singapore.⁷

For the purposes of this article, transnational corporate lawyers are considered to be both transactional lawyers and dispute resolution lawyers primarily involved with International Commercial Arbitration.⁸ As these lawyers operate on commercial arrangements that cross multiple jurisdictions, they do not simply apply one statute, treaty arrangement or an identifiable series of cases. Rather, a combination of state and non-state legal instruments and rules are applied based upon the business arrangements, parties involved, local sociopolitical requirements and jurisdictions being traversed.⁹

I argue that this complex legal reality that transnational corporate lawyers traverse can be viewed as a re-imagined *lex mercatoria*, or a law of merchants.¹⁰ *Lex mercatoria*, as a legal concept, emerged from the customary trade practices of merchants in the medieval period around Mediterranean seaports and inland trade centres.¹¹ *Lex mercatoria* created an informal legal regime regulating the relationship between merchants.¹² This body of law, whether in its historical form or its current iteration, allows for complex cross-border transactions and the resolution of disputes arising from them.¹³

⁷ Jeremy J Kingsley and Melinda Heap, ‘Dubai: Creating a Global Legal Platform?’ (2019) 20(1) *Melbourne Journal of International Law* 277, 281–5.

⁸ The notion of transnational corporate lawyers has been studied over the past two decades. See, eg, John Flood, ‘Transnational Lawyering: Clients, Ethics and Regulation’ in Lynn Mather and Leslie Levin (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012) 176 (‘Transnational Lawyering’). The complex regulatory environment and challenges thrown up by transnational lawyers are discussed in Donald H Rivkin, ‘Transnational Legal Practice’ (1998) 32(2) *International Lawyer* 413, 423–6.

⁹ Much of the discussion of transnational law in this article focuses on private contractual relationships, however, the role of the nation-state should not be underestimated in this new legal architecture. See Paolo Contini, ‘International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1959) 8(3) *American Journal of Comparative Law* 283.

¹⁰ A new vision of *lex mercatoria* has been simmering in legal debates for the last few decades: Harold J Berman and Colin Kaufman, ‘The Law of International Commercial Transactions (Lex Mercatoria)’ (1978) 19(1) *Harvard International Law Journal* 221; Nikitas Hatzimihail, ‘The Many Lives — and Faces — of Lex Mercatoria: History as Genealogy in International Business Law’ (2008) 71(3) *Law and Contemporary Problems* 169.

¹¹ Hatzimihail (n 10) 172–4.

¹² See Jeremy J Kingsley, ‘Introduction: Reimagining Lex Mercatoria’ (2020) 40(2) *Comparative Studies of South Asia, Africa and the Middle East* 257.

¹³ See Neilesh Bose and Victor V Ramraj, ‘Lex Mercatoria, Legal Pluralism, and the Modern State through the Lens of the East India Company, 1600–1757’ (2020) 40(2) *Comparative Studies of South Asia, Africa and the Middle East* 277. This article examines colonial notions and applications of *lex mercatoria* that occurred across south Asia.

I contend that the reconstitution of this medieval legal notion underpins a web of mercantile relationships across Asia.¹⁴ The fabric that weaves these relationships together requires facilitators, ie legal intermediaries, who can guide their clients across boundaries and points of regulatory friction to secure these transactions. They are the administrators of globalisation and document Asia's legal architecture ('inter-Asian legalities').

In order to identify these legal connections across Asia and examine the substantive law developing from these mercantile interactions, this article focuses on the capital city of one of Asia's largest States and an emerging global city, Jakarta. It is from this commercial centre that I will examine how transnational corporate lawyers have become key actors within this new Asian legal architecture.

Legal intermediaries are people, and increasingly technological systems, that facilitate and provide the documentation, rules, and mediate (or decide) the outcome of commercial, social, and political relationships and disputes.¹⁵ In this context, the concept of 'figures of prowess'¹⁶ is a useful framework to use in relation to legal intermediaries as these actors can assist in defining the way that larger transnational legal interactions operate. By examining these figures of prowess — these lawyers — we are able to interrogate the way that commercial and political relationships develop and are structured within and across borders. Legal intermediaries have become a useful focus of analysis, as their role deepens our understanding of the networks that link the smallest villages in eastern Indonesia to the metropolis of Jakarta and then onward to Singapore and further afield.¹⁷ In complex legal environments, transnational corporate lawyers and the firms they work for are important as

¹⁴ See, eg, Robert Hillman, 'Cross-Border Investment, Conflict of Laws and the Privatization of Securities Law' (1992) 55(4) *Law and Contemporary Problems* 331, 331–5; A Claire Cutler, 'The Privatization of Global Governance and the Modern Law Merchant' in Adrienne Windoff-Héritier (ed), *Common Goods: Reinventing European and International Governance* (Rowan & Littlefield, 2002) 127.

¹⁵ In the digital age, the complexity of who should be classified as legal intermediary, what the parameters of their functions are and the role of technology in the facilitation of legal services needs to be considered as a thick series of interactions. Technologies can augment the facilitation of legal services, such as online precedent systems and legal databases, while other technology bypass human interaction, such as automated service agreements and online compliance systems (like the infamous Commonwealth 'robodebt' program). For further discussion on legal automation and intermediaries: see Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2010) 99–145; Harry Surden, 'Machine Learning and Law' (2014) 89(1) *Washington Law Review* 87.

¹⁶ Joshua Barker et al, 'Figures of Indonesian Modernity' (2009) 87(1) *Indonesia* 35, 35.

¹⁷ For a discussion of the need for the incorporation of a broader social science, particularly anthropology, into the study of law, see, Jeremy J Kingsley and Kari Telle, 'Does Anthropology Matter to Law?' (2018) 2(2) *Journal of Legal Anthropology* 61, 61–2; Lawrence Rosen, 'Reconciling Anthropology and Law' (2018) 2(2) *Journal of Legal Anthropology* 105, 105–8.

they are perceived by many commercial and political actors to provide legitimacy and authority to cross-border legal relationships.¹⁸

Part III outlines the background and parameters of transnational corporate lawyers operating in Jakarta. This article will then seek to provide historical context to the role and function of legal intermediaries within the mercantile life of the Indonesian archipelago and its connection to other parts of Asia and beyond. Then finally, to consider the complex role of lawyers within transnational legal transactions and disputes, the article unpicks a succinct, but practical, case study. Through focusing on Asia, this article allows us to understand global commercial and legal infrastructure and consequently consider a re-emerging body of law in *lex mercatoria*.

III SITUATING JAKARTA'S TRANSNATIONAL CORPORATE LAWYERS

It has long been recognised that what is 'global' essentially always becomes 'territorialised'. The legal concepts examined in this article became more grounded through working with Jakarta lawyers, which allowed me to illuminate and make sense of their understandings of their own practice.¹⁹ In order to explore transnational law and its actors, this article undertakes a finely-grained account of the activities of Jakarta's transnational corporate lawyers and the law firms for which they work, gathered over five years of field work.²⁰ I use Jakarta as a hub for legal infrastructure in the world's fourth most populous country, Indonesia.²¹ Given Indonesia's economic size and strategic location in the region dominating the maritime trade routes across Asia,²² Jakarta provides a reference point for us to consider inter-Asian legalities and the new law of merchants.

¹⁸ John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14(1) *Indiana Journal of Global Legal Studies* 35.

¹⁹ Arjun Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' (1990) 7(2-3) *Theory, Culture and Society* 295.

²⁰ Focusing on lawyers and their practice to refine our understanding of law has been undertaken in Michael J Kelly, *Lives of Lawyers Revisited: Transformation and Resilience in the Organisation of Legal Practice* (University of Michigan Press, 2007) 7. The importance of carefully reviewing the way legal practice gives meaning to our understanding of law is also examined in Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985). While in the field of transnational legal practice one cannot avoid Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of Transnational Legal Order* (University of Chicago Press, 1996) ('*Dealing in Virtue*').

²¹ 'Indonesia Overview', *World Bank* (Web Page, 6 April 2021) <<https://www.worldbank.org/en/country/indonesia/overview#:~:text=Today%2C%20Indonesia%20is%20the%20world's,%2C%20to%209.78%25%20in%202020>>.

²² Political and business elites in Indonesia have been attempting to leverage their strategic geography, and the control of many of the globe's major sea lanes. See Chaminda Abeyesinghe and Hashan Wijesinghe, 'Geo-Economics of the Global Maritime Fulcrum (GMF) Vision of Indonesia' (2021) 16(1) *Technium Social Sciences Journal* 561.

The globalisation of legal services has challenged the nature and identity of Indonesian law firms. Over the past 20 years, Indonesian corporate law firms have started to gain pre-eminence as players within the Indonesian legal services sector, with the number and size of these firms growing dramatically.²³ Scholars have divided Indonesian lawyers and their law firms into ‘white hat’ and ‘black hat’ categories.²⁴ ‘White hat’ lawyers are those who seek to assist clients to comply with Indonesian law and actively attempt to remain immune to corrupt practices, while ‘black hat’ lawyers are those who are actively involved in longstanding practices in Indonesia connected to judicial corruption and bureaucratic manipulation.²⁵ This article deals with the Indonesian corporate law firms that are considered ‘white hat’ in that they aim to offer foreign and local businesses the tools to comply with Indonesian and foreign regulatory requirements.²⁶

The internationalisation of legal practice has had an uneven impact on Indonesia. What has occurred in the legal services sector is better described as nationalised globalisation that protects the local actors and law firms. This is exhibited by the regulations guiding the admission to practice and the provision of legal services in Indonesia. To be a lawyer, one must be an Indonesian citizen and resident.²⁷ While foreign lawyers are allowed to practise in Indonesia, they can only provide limited consulting services and must hold a work permit in order to undertake this limited role.²⁸ On 14 November 2017, the Indonesian Ministry of Law and Human Rights (*Kementrian Hukum dan Hak Asasi*) issued a decree concerning the role and employment of foreign lawyers.²⁹ The decision allows foreign lawyers to practise in Indonesian firms at a ratio of 4:1, with a maximum of five foreign lawyers per firm.

²³ Ahmad Fikri Assegaf, ‘Besar Itu Perlu: Perkembangan Kantor Advokat Di Indonesia dan Tantangannya’ [Big Need: Development of Advocate Offices in Indonesia and the Challenges] (2015) 10(1) *Jurnal Hukum & Pasar Modal* [Journal of Law & Capital Markets] 5. This article promotes the importance of expanding the size of Indonesian law firms and the depth of services that they can provide, indicating the approach that the author has to legal practice as the founding partner of Indonesia’s largest full-service law firm, Assegaf Hamzah & Partners.

²⁴ Santy Kouwagam and Adriaan Bedner, ‘Indonesia: Professionals, Brokers and Fixers’ in Richard Abel et al (eds), *Lawyers in 21st Century Societies* (Hart, 2020) 735.

²⁵ Tim Lindsey, ‘The Criminal State: *Premanisme* and the New Indonesia’ in Grayson J Lloyd and Shannon L Smith (eds), *Indonesia Today: Challenges of History* (Institute of Southeast Asian Studies, 2001) 283.

²⁶ The extraterritorial application of anti-corruption measures can be seen in the *Criminal Code Act 1995* (Cth) div 70; *Foreign Corrupt Practices Act of 1977*, 15 USC § 78dd–1; *Bribery Act 2010* (UK) s 6.

²⁷ Undang-Undang Republik Indonesia Nomor 18 Tahun 2003 Tentang Advokat [Law No 18 of 2003 on Advocates] (Indonesia) art 23(2). The permission process and requirements for documentation to become a foreign legal consultant are dealt with in art 3(2) of this legislation.

²⁸ *Ibid* art 23(4).

²⁹ Ministry of Law and Human Rights Decision No. 26 of 2017 art 3.

Indonesian firms with only three Indonesian lawyers are also permitted to hire one foreign lawyer.

This means that as of 24 February 2020, before the COVID-19 pandemic's full effects were felt, there were only 40 foreign lawyers practising in Jakarta³⁰ among Indonesia's top 30 commercial law firms.³¹ In the top 20 firms, there are, on average, two to four foreign counsel, while in the next 10 largest firms, there are maximally two foreign counsel.³² This number of foreign legal practitioners is small compared to the over 1,200 foreign lawyers working in Singapore.³³ Consequently, Jakarta is a global legal centre dominated by Indonesian nationals and local law firms.³⁴ Although, many Indonesian firms have now formed alliances with global law firms.³⁵

Jakarta creates the legal, administrative, and political hub for the archipelagic nation of Indonesia which consists of over 17,000 islands. The city provides a centralised node for Indonesian business, politics, and legal networks, which then connect into

³⁰ Foreign counsel in Jakarta are coming from the following countries: Japan: six; Singapore: two; Malaysia: four; Korea: one; Philippines: two; China: one; Netherlands: four; United Kingdom: five; United States: eight; Australia: six; New Zealand: one.

³¹ The top 30 law firms in Indonesia were identified through a ranking list developed by leading Indonesian legal website, Hukumonline: 'Ini Dia Daftar Corporate Law Firm Terbesar dan Menengah Indonesia 2019' [List of Indonesia's Largest and Middle-Sized Corporate Law Firms 2019], Hukum Online [Law Online] (Blog Post, 29 March 2019) <<https://www.hukumonline.com/berita/baca/lt5c9dcb196e932/>>.

³² These figures were gathered through assessing these law firms' webpages.

³³ Gabriel The, 'How Many Lawyers Are There in Singapore?', *Asia Law Network* (Web Page, 30 August 2017) <<https://learn.asialawnetwork.com/2017/08/30/how-many-lawyers-singapore-infographic/>>.

³⁴ These alliances include large Indonesian firms such as Hadiputranto Hadinoto & Partners (representing global law firm, Baker McKenzie), Hiswara Bunjamin & Tandjung (representing global firm, Herbert Smith Freehills), Hanafiah Ponggawa & Partners (representing global firm, Dentons) and premium boutique law firm Yang & Co (representing American law firm, Schnader). See 'Indonesia', *Baker McKenzie* (Web Page) <<https://www.bakermckenzie.com/en/locations/asia-pacific/indonesia>>; 'Jakarta', *Herbert Smith Freehills* (Web Page) <<https://www.herbertsmithfreehills.com/where-we-work/jakarta>>; 'Jakarta', *Dentons* (Web Page) <<https://www.dentons.com/en/global-presence/asean/indonesia/jakarta>>; 'Jakarta', *Schnader* (Web Page) <<https://www.schnader.com/locations/jakarta/>>.

³⁵ The impetus to form alliances with global law firms to meet international expectations has been discussed in Linda Widyati and Dede Fikry, 'Pola Interaksi Advokat Indonesia dan Advokat Asing Dalam Menjawab Tantangan Dinamika Dunia Business di Indonesia' [Pattern of Interaction between Indonesian Advocates and Foreign Advocates in Answering the Challenge of the Dynamic Business World in Indonesia] (2015) 10(1) *Jurnal Hukum & Pasar Modal* [Journal of Law & Capital Markets] 34. The authors are two lawyers who were the driving force behind Clifford Chance's Indonesia affiliation that closed in 2017 after just a few years of operation.

global business and political networks.³⁶ The Jakarta-centric nature of Indonesian business and political affairs is evident in the fact that the nation's entire suite of large and medium-sized corporate law firms is based solely in the capital. The only exception to this is Indonesia's largest law firm, Assegaf Hamzah & Partners, which has a satellite Surabaya office (Indonesia's second largest business city).³⁷ This contrasts with comparable corporate law firms in Australia, which have two to six domestic offices in numerous cities.³⁸

The field research undertaken, which underpins this article, involved spending six months working within one boutique corporate law firm and two larger full service corporate law firms in Jakarta.³⁹ The case study in this article is based on observations of lawyers' activities, sociopolitical role, and intellectual influences illuminating the fabric of transnational governance across Asia through careful consideration of the networks that these transnational corporate lawyers create.⁴⁰ An example of the potency of everyday legalities, and the utility of investigations that provide detailed descriptions and analysis of the activities of lawyers, known as ethnographic accounts, is Didier Fassin's work on Parisian policing.⁴¹ Accompanying police officers on patrol, operating in the outer suburbs of the French capital for 16 months, Fassin observed their daily activities, practices and modes of behaviour. As a result, he identified the enforcement of French criminal law not as a hypothetical

³⁶ William H Leggett, *The Flexible Imagination: At Work in the Transnational Corporate Offices of Jakarta, Indonesia* (Lexington Books, 2013) 17.

³⁷ See 'Contact Us', *Assegaf Hamzah & Partners* (Web Page) <<https://www.ahp.id/contact-us>>.

³⁸ For example, Corrs Chambers Westgarth has four domestic offices and Clayton Utz has six domestic offices. See 'Contact Us', *Corrs Chambers Westgarth* (Web Page) <<https://corrs.com.au/contact-us>>; 'Our Offices', *Clayton Utz* (Web Page) <<https://www.claytonutz.com/about/offices>>.

³⁹ Ethics approvals were received for this research. In accordance with these approvals, the law firms and lawyers who participated in this research have been de-identified.

⁴⁰ The complex functioning of workplaces and the findings they provide has enabled incredible insight when attempting to understand how sociopolitical realities emerge. Anthropologist and social theorist Bruno Latour was one of the leading scholars studying these intricate workplace arrangements. He focused primarily upon laboratories but has also undertaken an analysis of legal functioning in practice: Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'etat* (Polity Press, 2010). The theoretical framework that he deployed was the concept known as actor-network theory, which looked at the way that different players within a process interacted with one another. This theoretical approach was also considered by legal anthropologist Annalise Riles when studying Japanese market regulators and their application of regulatory controls upon the market: Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011). Legal practice and the importance of placing the practice of their activities into context has been examined in John Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (1991) 25(1) *Law & Society Review* 419.

⁴¹ Didier Fassin, *Enforcing Order: An Ethnography of Urban Policing* (Polity Press, 2013).

exercise but as a lived activity. Working in the office of major commercial law firms and sitting alongside these lawyers has allowed me to understand the pressures that these practitioners face, observe their modes of behaviour, and reflect upon the documents they draft.⁴²

This research expands upon academic work over the past two decades on transnational corporate lawyers and the firms in which they work.⁴³ This article also relies on the scholarly investigations into other forms of legal intermediaries: human rights lawyers,⁴⁴ and Japanese financial service regulators.⁴⁵ Finally, this research builds on anthropological scholarship about lawyers practising in the courtroom.⁴⁶ However, in this article I seek to ground these discussions not in the spectacle of the courtroom, but in the everyday experiences of lawyers in their offices drafting, strategising, and negotiating. My research looks behind the curtain and into the relatively mundane operations of a law office in Jakarta. In so doing, I have developed an ethnography of legal practice that speaks to the larger legal, social and political issues, exposing inter-Asian legalities and the creation of a substantive body of law, a reimagined *lex mercatoria*.⁴⁷

IV CONTINUITY OF CONNECTIONS

In the contemporary environment, transnational corporate lawyers facilitate and give meaning to a web of state and non-state legal instruments and infrastructures that enable sociopolitical and commercial interactions across Asia and beyond. When studying these Jakarta lawyers, it is necessary to bear in mind that law evolves within a historical continuum. The common law, for instance, is based on accumulating legal doctrines over time.⁴⁸ This is no different among South-East Asia's legal systems. Jakarta's transnational lawyers operate within a contemporary legal environment

⁴² Both Latour and Fassin highlight the operation and human processes of law as an activity benefitting from being studied in intricate detail: Latour (n 40); *ibid*.

⁴³ See, eg, Dezalay and Garth, *Dealing in Virtue* (n 20); James Faulconbridge et al, 'Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work' (2008) 28(3) *Northwestern Journal of International Law and Business* 455; Flood, 'Transnational Lawyering' (n 8).

⁴⁴ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

⁴⁵ Annelise Riles, 'Market Collaboration: Finance, Culture and Ethnography after Neo-Liberalism' (2013) 115(4) *American Anthropologist* 555.

⁴⁶ See, eg, Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford University Press, 2000); Michael G Peletz, 'A Tale of Two Courts: Judicial Transformation and the Rise of a Corporate Islamic Governmentality in Malaysia' (2015) 42(1) *American Ethnologist* 144.

⁴⁷ Kingsley, 'Introduction: Reimagining Lex Mercatoria' (n 12).

⁴⁸ See Theodore F T Plunkett, *A Concise History of the Common Law* (Little, Brown & Company, 5th ed, 1956).

that has its foundation in pre-existing notions of governance and law.⁴⁹ The idea of law, its transmission and documentation, has been an important element used for interpreting inter-Asian connections for centuries.⁵⁰ Significant research has been undertaken to discover the trade routes, and therefore commercial connections, and the modes of authoritative legal intermediary, which have for millennia moved across Asia along the interior from Persia to China and across the Indian Ocean.⁵¹

To facilitate these commercial connections across the maritime Indian Ocean, traders needed their relationships to be documented and protected by facilitators who were deemed legitimate. For several hundred years preceding the mid 20th century, these facilitators were Muslim religious leaders, *ulama*, who acted pursuant to legal principles defined by Sharia (Islamic law), which received wide purchase among Muslims and non-Muslim traders.⁵² These legal interconnections subsequently shaped the historical trajectories of Asia and the Middle East. According to historian Fahad Bishara, the Indian Ocean world has been moulded by law, which ‘furnished the institutions and instruments necessary to organize commerce and settlement[s]’.⁵³ Another historian, Michael Laffan, identified how commerce and legal arrangements moved across the Indian Ocean and brought social change along with it in the form of Islam to the Malay-Indonesian world.⁵⁴

Law needs an authoritative language and Islam, in those historical circumstances, often provided the legitimacy to support mercantile interactions by providing figures of prowess, religious scholars, and legal frameworks that provided the documentation ascribing these commercial relationships.⁵⁵ Therefore, Muslim religious scholars who documented the legal interactions between traders in South-East Asia were activating a context appropriate mode of a law of traders (*lex mercatoria*).⁵⁶ They were acting as legal intermediaries for a privatised law of traders that was authoritative and legitimate for its time and place. Traders felt that these authority figures, and the documents they drafted, secured their commercial relationships and provided a

⁴⁹ One of the leading texts that looks at governance structures in South-East Asia before and into the colonial period is written by Tony Day: Tony Day, *Fluid Iron: State Formation in Southeast Asia* (University of Hawai'i Press, 2002).

⁵⁰ See Michael Laffan, *The Making of Indonesian Islam: Orientalism and the Narration of a Sufi Past* (Princeton University Press, 2011); Fahad Ahmad Bishara, *Law and Economic Life in the Western Indian Ocean, 1780–1950: A Sea of Debt* (Cambridge University Press, 2014).

⁵¹ See Miksic (n 5); Sheriff and Ho (n 5); Susan Whitfield, *Life along the Silk Road* (University of California Press, 2015).

⁵² M B Hooker, ‘Southeast Asian Shari’ahs’ (2013) 20(2) *Studia Islamika* 183.

⁵³ Bishara (n 50) 9.

⁵⁴ Laffan (n 50).

⁵⁵ Hatzimihail (n 10) 172–4.

⁵⁶ Kingsley, ‘Introduction: Reimagining Lex Mercatoria’ (n 12); Nurfadzilah Yahaya, *Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia* (Cornell University Press, 2020).

reliable forum for resolving problems flowing from these activities.⁵⁷ In contemporary circumstances, the nature of the substantive law used to connect business and politics across Asia and the legal intermediaries used to apply it has changed.

It is important to recognise that the reimagined *lex mercatoria*, as noted, is also built upon a pre-colonial and colonial legal archaeology. To contextualise Jakarta's legal profession, it is necessary to understand the legal context in the archipelago. There is a large body of literature about South-East Asian governance and legal history in the period before European colonisation.⁵⁸ During this pre-colonial period and the early colonial period in Indonesia, these forms of governance were the sultanates and their royal courts, who dominated these arrangements in the Malay-Indonesian world.⁵⁹ They were focused on performing statecraft and on the symbolism of their authority rather than pragmatic function.⁶⁰ This approach to statecraft is significantly different to those that emerged from Europe. As anthropologist Partha Chatterjee has noted, this divergence should not be marked as positive or negative but a reality of cleavages amongst governance structures and approaches to political life.⁶¹ These longstanding modes of governance should be borne in mind when seeking to understand the actions of contemporary legal intermediaries.

Preceding Indonesian independence there was a period of over 300 years of Dutch colonial rule over the Indonesian archipelago.⁶² It was a heavily extractive form of colonialism, and authorities were focused on regulating trade without a deep desire to regulate Indonesian society. Essentially, 'there was very little investment by the Dutch in law in Indonesia'.⁶³ Through relationships with ruling sultanates and their subjects, the Dutch sought to have commercial control without needing to exert too much legal or political energy. Even in the late phases of the Dutch colonial period, 'legal training among local elites was therefore late and small scale. The private profession remained small with very few local lawyers'.⁶⁴ When Dutch reformers sought to bring changes to the colonial court system in the 19th century, the changes were driven by the colonial authorities using Dutch civil servants rather than

⁵⁷ Bishara (n 50) 9–14.

⁵⁸ Day (n 49).

⁵⁹ Ibid.

⁶⁰ John Pemberton, *On the Subject of 'Java'* (Cornell University Press, 1994); Jeremy Kingsley and Kari Telle, 'Introduction: Performing the State' (2016) 172(2–3) *Bijdragen tot de taal-, land- en volkenkunde* [Journal of the Humanities and Social Sciences of Southeast Asia] 171.

⁶¹ Partha Chatterjee, *Lineage of Political Society: Studies in Postcolonial Democracy* (Columbia University Press, 2011).

⁶² M C Ricklefs, *A History of Modern Indonesia since c 1300* (Macmillan, 1994) 61–236.

⁶³ Yves Dezalay and Bryant G Garth, *Asian Revivals: Lawyers in the Shadow of Empire* (University of Chicago Press, 2010) 41 ('*Lawyers in the Shadow of Empire*').

⁶⁴ Ibid 43.

indigenous actors.⁶⁵ Therefore, like many postcolonial States, Indonesia struggled to create the human capital necessary to develop a functional national legal system.⁶⁶

Over the last 50 years, significant legal, political, and economic change has altered the nature and modes of governance and legal interactions across Asia. This new legal architecture emerged in the wake of the Second World War and the Cold War that followed it. It was a moment of significance with formerly colonised parts of the world gaining their independence. Essentially, new actors, polities, and mercantile interests emerged.⁶⁷ The recent genealogy of geopolitical affairs explains why corporate lawyers have become intermediaries within this new transnational fabric of governance. The end of colonialism came with the conclusion of the Second World War. This led to the emergence of new nation-states. Therefore, the post-colonial political reconfiguration saw the development of locally constituted legal systems independent from, yet heavily influenced by, their colonial legal legacies.⁶⁸ With the postcolonial period came a 'localisation' of legal practice and standards, as noted in the last section. These political changes have meant the development of local legal professions and associations, including the proliferation of Bar associations alongside the emergence of these newly independent Asian States (these may have existed beforehand, but they became more important after independence).⁶⁹

The transforming political environment also saw borders emerge where they had previously not existed, yet business relationships still flowed between these sovereign States. As these lines of demarcation emerged, lawyers saw an opportunity to create mechanisms for cross-border commercial interactions. A new breed of corporate lawyers, operating within regional law firms like Rajah & Tann, founded in 1976 in Singapore,⁷⁰ developed the skills to deal within this new regulatory environment where commercial transactions often flowed across multiple jurisdictions and business and government actors needed to use intermediaries to navigate these legal

⁶⁵ Sanne Ravensbergen, 'Rule of Lawyers: Liberalism and Colonial Judges in Nineteenth-Century Java' in René Koekkoek, Anne-Isabelle Richard and Arthur Weststeijn (eds), *The Dutch Empire between Ideas and Practice* (Palgrave Macmillan, 2019) 159.

⁶⁶ Daniel S Lev, 'Judicial Unification in Post-Colonial Indonesia' (1973) 16 *Indonesia* 1.

⁶⁷ Dezalay and Garth, *Lawyers in the Shadow of Empire* (n 63).

⁶⁸ Daniel Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40 *Indonesia* 57; Tim Lindsey and Mas Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia' in Tim Lindsey (ed), *Indonesia Law and Society* (Federation Press, 2008) 2.

⁶⁹ Daniel S Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer International, 2000). This is a seminal text that reflects Indonesia's legal evolution in the postcolonial period. Similar transformations occurred elsewhere in Asia during this period.

⁷⁰ This is one of Singapore's leading corporate law firms and they have created alliances with influential law firms across Asia. See 'Home', *Rajah & Tann Asia* (Web Page) <<https://www.rajahtannasia.com>>.

demarcations.⁷¹ The case study later in this article looks at how legal intermediaries have been managing these reconfigured boundaries and the diverse responses of business communities to cross-border commercial relationships.

Over the past decades with the rise of globalisation and an increase in transnational commerce, there has been the emergence of new practice areas in New York and London, which have diffused globally.⁷² Many of these new areas of practice were specifically devised to overcome or avoid territorial borders. One of the most important of these new practice areas was international commercial arbitration. This privatised dispute resolution mechanism came to the fore in the early 1980s with the United States government seeking compensation from Iran on behalf of the former's companies, whose assets were appropriated after the 1979 Iranian Revolution. This situation was a legal grey zone as these two States, the United States and Iran, had severed diplomatic relations.⁷³ In order to overcome this political dilemma, lawyers constructed a private arbitration body, the Iran–United States Claims Tribunal ('Claims Tribunal'), to facilitate compensation for the nationalisation of investments by United States businesses in Iran.⁷⁴

This privatised process developed to resolve a series of disputes between businesses/investors and the Iranian State created a wave of arbitral proceedings during which almost all top tier law firms in London and New York formed dedicated arbitration teams.⁷⁵ As the Claims Tribunal slowed down following years of proceedings, this group of now experienced lawyers sought to apply their newly acquired talents towards resolving large-scale infrastructure and cross-border commercial disputes outside of domestic courts. They offered their skills to Asian clients from regional

⁷¹ It is only in the last three decades that reforms have opened up the legal services market in Singapore, however, the local firms still remain significant to the practice of law in this pivotal South-East Asian city-state: Yasmin Lambert, 'Early Reforms Recast Singapore as a Hub of Legal Services', *Financial Times* (online, 27 June 2019) <<https://www.ft.com/content/3d9129f0-8e93-11e9-a1c1-51bf8f989972>>.

⁷² Jonathan V Beaverstock, Peter J Taylor and Richard G Smith, 'The Long Arm of the Law: London's Law Firms in a Globalising World Economy' (1999) 31(10) *Environment and Planning A: Economy and Space* 1857.

⁷³ Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) 15.

⁷⁴ *Ibid.*

⁷⁵ During this period, there was also significant legal infrastructure developed to facilitate international commercial dispute resolution such as the *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 61/33, UN Doc A/40/17 (7 July 2006) annex I ('*UNCITRAL Model Law*'). The *UNCITRAL Model Law* was designed to more efficiently manage transnational privatised dispute resolution: Luke Nottage, 'A Weather Map for International Arbitration: Mainly Sunny, Some Clouds, Possible Thunderstorms' (2015) 26(4) *American Review of International Arbitration* 495.

offices, such as Singapore, Hong Kong and Jakarta.⁷⁶ Another important element of inter-Asian legalities is the nature of the clients of law firms across Asia. Newly empowered local business elites have become more cosmopolitan in orientation over the last few decades, alongside changing political circumstances, although this is often influenced by local realities and longstanding business practices, discussed in the case study.⁷⁷ This cosmopolitanism became clear when talking privately with one of Indonesia's most important banking and finance lawyers, who noted that many of Indonesia's new generation of business elite wanted to develop their businesses across borders and enter into joint ventures with foreign business partners. In making these sorts of commercial arrangements, many entrepreneurs and executives have seen the benefit of, or need for, sophisticated legal representation. With this said, the transition to more sophisticated legal services, using transnational corporate lawyers, is not universally accepted. And where their services are used, these intermediaries' recommendations are not necessarily adopted, such as will be seen in the case study.

In recent years, another rationale behind the use of more sophisticated legal services emerges from the concerns of politicians and businesspeople over higher levels of probity and accountability. In short, transnational corporate lawyers and law firms lend an air of credibility, compliance, and good governance to business and political activities. For instance, Indonesian anti-corruption regulators have become significantly more aggressive, such that business leaders can no longer fearlessly 'grease the wheels' of enterprise with corrupt business practices.⁷⁸ Lawyers are consequently becoming important in avoiding (or minimising) these kinds of risks.⁷⁹ In 2017, the Chief Executive Officer of Garuda was placed under investigation for allegedly receiving bribes from Rolls-Royce, and was subsequently found guilty of corruption.⁸⁰ Similar high profile corruption investigations can be seen elsewhere in Asia,

⁷⁶ International arbitration teams have emerged in the last decade across the Indo-Pacific region as part of this transformation. For instance, global law firm White & Case brought arbitration partner Matthew Secomb from their Paris office to run their team in Singapore.

⁷⁷ William Case, 'Interlocking Elites in Southeast Asia' (2003) 2(1) *Comparative Sociology* 249, 252.

⁷⁸ The increased anti-corruption measures in Indonesia are described by Simon Butt. See Simon Butt, *Corruption and Law in Indonesia* (Routledge, 2012). These anti-corruption measures have lately been placed under pressure: see Michael Buehler, 'Indonesia Takes a Wrong Turn in Crusade against Corruption', *Financial Times* (online, 10 March 2019) <<https://www.ft.com/content/048ecc9c-7819-3553-9ec7-546dd19f09ae>>; Jefferson Ng, *Jokowi after the First Term: Indonesia's KPK: Clipping Its Anti-Corruption Wings?* (RSIS Commentary No 187, 25 September 2019).

⁷⁹ Leading Indonesian corporate law firms, such as Assegaf Hamzah & Partners, have marketed their services to potential clients as a mechanism for avoiding, or minimising, entanglement with corrupt business practices. See, eg, 'A New Standard to Convict Defendants in Corruption Cases', *Assegaf Hamzah & Partners Client Update* (Web Page, 6 August 2020) <<https://www.ahp.id/client-update-6-August-2020>>.

⁸⁰ Cici Marlina Rahayu, 'Skandal Korupsi Rolls-Royce, KPK: Ini Perkara Lintas', *Detik News* (online, 19 January 2017) <<https://news.detik.com/berita/d-3400462/skandal-korupsi-rolls-royce-kpk-ini-perkara-lintas-negara>>. In mid 2020, the cases that

for example, in Hong Kong.⁸¹ Providing guidance to foreign and domestic clients about avoiding corruption or other inappropriate practices is no insignificant task for lawyers operating in administratively and politically opaque environments. Legal advice to avoid these pitfalls emerges at many stages of business negotiations and transactions.

In the case study discussed in the next section, I outline how the in-house counsel team were concerned with improving regulatory compliance and record keeping procedures to document the history of commercial relationships. However, these concerns about a changing political and legal environment were not necessarily shared by the senior management of their business. Importantly, the case study examines the complex array of laws and legal regimes with which transnational corporate lawyers interact on a daily basis, as they create a new legal architecture across Asia: the *lex mercatoria* which lies at the heart of this article. It identifies how human interactions guide the decision-making processes of businesspeople and the way these are reflected in the new law of traders.

V CASE STUDY: LAWYERS NEGOTIATING BETWEEN BUSINESS CULTURES

We live in a complex, interconnected world. This case study is based in a ‘frustrating struggle for coherence and meaning’ in the “flexible” world of global capitalism’.⁸² It is useful to offer an example of the most mundane of legal practice situations in order to understand the challenges of managing complex inter-cultural business environments.⁸³ The following provides an example of the manner in which transnational corporate lawyers advise their clients.⁸⁴ It is an illustration of contractual analysis and the accompanying consultation with an Indonesian client from a mid-sized tourism business. These experiences emerged during my placement at a boutique law firm in Jakarta during early 2018.

commenced were concluded with the Indonesian Anti-Corruption Commission successfully prosecuting the two Garuda executives. They were both given sentences of over six years imprisonment and fined in excess of AUD 100 thousand each. See Corruption Eradication Commission (RI), ‘International Cooperation in the Investigation of the Garuda Case’ (Press Release, 11 May 2020) <<https://www.kpk.go.id/en/news/press-releases/1687-international-cooperation-in-the-investigation-of-garuda-case>>.

⁸¹ Cal Wong, ‘Former Hong Kong Chief Executive Sentenced to Jail’, *The Diplomat* (online, 28 February 2017) <<http://thediplomat.com/2017/02/former-hong-kong-chief-executive-sentenced-to-jail/>>.

⁸² Leggett (n 36) 1.

⁸³ Lawyers craft a sociopolitical role that is complex, powerful and sometimes even nefarious: George Melloan, ‘Rule of Law or Rule by Lawyers?’, *Wall Street Journal* (New York City, 21 November 2000) 27.

⁸⁴ This case study emerges from the author’s field notes dated 16, 18 and 20 January 2018, Swinburne University Human Research Ethics Committee approval 2017/352.

The case study allows me to apply a ‘thick description’⁸⁵ to my analysis of the activities and nature of contemporary lawyering. By immersing oneself in a law firm, and engaging in ethnography, my assumptions were tested, and in this instance, proven wrong.⁸⁶ An ethnographic lens provides this article with a unique framework to consider what it means to be a contemporary lawyer.⁸⁷ The case study highlights the application of *lex mercatoria* and gives meaning to inter-Asian legalities through the mundane act of analysing a contract. Focusing on the roles of lawyers, and their professional activities, should be a significant form of legal analysis.⁸⁸ Lawyers are figures of prowess who through their actions make tangible legal ideas and practicalities.⁸⁹

The case study starts just after returning from lunch, when I was asked along with another associate, Dina, to meet with one of the partners. The partner, Lia, handed us two contracts.⁹⁰ One was a contract that our client, a local tourism services provider, was currently using to gain exclusive access to an online hotel and airfare database/purchasing system. The second document was the proposed new contract, which was intended to be a continuation of this relationship. It had been given to our clients by their European partner who provided the online services. The instructions from our client had been to compare the two contracts and advise them on whether to proceed with the new arrangement. Additionally, they wanted us to identify any possible amendments to the new agreement. These were relatively simple instructions. Dina and I were told to prepare a comparison document reviewing the two agreements and then provide a series of potential amendments to be put forward to the client.

Watching these lawyers prepare their advice and then present their findings to their clients allowed me to understand the process of how and why law is practiced in diverse ways across different legal and business cultures. Legal scholar Marc Galanter highlighted the importance of focusing upon the ‘culture of law practice’ and the nature and impact of their backgrounds and pressures upon lawyers and their clients

⁸⁵ Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973) ch 1.

⁸⁶ For an explanation of the importance of legal scholars immersing themselves in legal cultures and systems other than their own (or learning through immersion more generally), see Vivian Grosswald Curran, ‘Cultural Immersion, Difference and Categories in US Comparative Law’ (1998) 46(1) *American Journal of Comparative Law* 43.

⁸⁷ Danilyn Rutherford, ‘Kinky Empiricism’ (2012) 27(3) *Cultural Anthropology* 465.

⁸⁸ Kingsley and Telle, ‘Does Anthropology Matter to Law?’ (n 17).

⁸⁹ Barker et al (n 16).

⁹⁰ Watching Lia and Dina during this meeting was a visual reminder of the significant leadership role that female lawyers played in all three Jakarta law firms that I had worked at. Lia was in fact the founding partner of the boutique law firm where I worked and had been pivotal in leading the firm’s expansion, which had been exponential — over 30% annual growth over the preceding five years (both in revenue and personnel).

in their application of the law.⁹¹ The everyday activity for commercial lawyers of preparing a legal advice provided a reality check for me as to our client's commercial priorities and orientations. When attempting to understand *lex mercatoria*, local context becomes vital to understanding the nuances within larger regional and global networks.⁹²

After the initial meeting with Lia, Dina and I went away and reviewed both contracts. After about three hours, I emailed Dina with my initial feedback on the documents. She then proceeded to review the agreements overnight and the next morning we sat down to discuss our initial assessments. On the face of the new contract, our client was significantly disadvantaged in several obvious ways. There were provisions that allowed for the contracts to be amended unilaterally by the European service provider and importantly the new arrangements lacked exclusivity in the Indonesian market for the online service (potentially allowing our client's rivals to use the service). Finally, the contract gave the European party the ability to intervene in our client's internal business operations in a manner that would be appropriate for a joint venture arrangement but not under a software licence. Both of us felt that these issues would concern our client.

I also identified some additional problems, particularly the use in the proposed contract of a dispute resolution clause that provided for institutional arbitration at the International Chamber of Commerce ('ICC') in Paris. The initial contract had no similar provision. I did not doubt the validity of using ICC processes or its status as a leading arbitral centre.⁹³ Rather, my concern was that it was an inappropriate forum for resolving disputes arising out of this contract, given the location of our client in Indonesia and the relatively small amount of money involved. The total contract value was USD 25 million with the licence fee per annum being USD 5 million and the contract length five years. My suggestion was that this clause should be amended to use a more appropriate forum for dispute resolution. For instance, a local court such as the District Court for Central Jakarta (*Pengadilan Negeri Jakarta Pusat*). If arbitration was preferred, there were more geographically appropriate arbitral forums, and therefore reasonably priced options, such as the Singapore International Arbitration Centre.

⁹¹ Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34(2) *Journal of Legal Education* 268, 270.

⁹² Through participating in the initial analysis of our client's proposed contract and then proceeding to our client's offices to meet them, I was able to observe the tensions existing within the local business culture and the manner in which these were documented: Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (n 40). Putting a lawyer into their context helps us to understand law and its application.

⁹³ It is sensible for foreign business entities investing in Indonesia to have arbitration clauses in their contracts, due to the perceived risks involved with participation in the Indonesian court system. With this said, enforcing a foreign arbitral decision is unlikely to be successful in an Indonesian court: Fifi Junita, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5(1) *Macquarie Journal of Business Law* 369.

Dina noted that her major concern with the contract was that it was drafted only in English. In recent years, best practice at Indonesian corporate law firms has involved drafting contracts bilingually. It was standard practice to draft contracts with versions in English and Indonesian to avoid Indonesian domestic courts voiding the contract.⁹⁴ This drafting practice had arisen due to several court decisions and relatively unclear statutory provisions concerning whether Indonesian language versions of contracts are required. Dina's position relied on the ambiguous requirements of an Indonesian statute on the use of the Indonesian language.⁹⁵ The importance of having Indonesian language versions of contracts, alongside English, for example, was confirmed in the 2015 Indonesian Supreme Court Case of *PT Bangun Karya Pratama Lestari v Nine AM Ltd.*⁹⁶ This is not a definitive position, but due to the lack of clarity, the common practice among Indonesia's corporate lawyers is to advise clients on the importance of bilingual contract drafting to evade the voiding of a contract based on the language used. The importance of Indonesian language in the drafting of contracts reflects the nationalised globalisation discussed earlier where an Indonesian assertion of sovereignty interacts with global commercial connections.

We then prepared a draft letter of advice on the most important issues that we felt required the client's attention. Lia carefully reviewed this advice, then Dina and I incorporated her feedback into the letter. Once this was all completed, Lia signed the letter of advice, as required by the firm's oversight processes, and we then sent it to our client within 24 hours of receiving our instructions from Lia. So far, all was progressing as I would have anticipated: our law firm had received instructions and documentation from a client, which we had reviewed, thoroughly developing a letter of advice based on law, and with an eye to protecting our client's commercial interests.

Two days later, Dina, Lia and I drove to our client's offices. It was in this meeting that things started to veer from the direction I had expected. We were visiting the client to explain our legal advice and see if they wanted us to assist with their forthcoming negotiations. Our meeting was scheduled for 10am and the meeting was a short five kilometre drive from our office. Despite the notorious Jakarta traffic congestion

⁹⁴ Since the time of undertaking fieldwork, the voidability of contracts for non-use of the Indonesian language has been removed: Peraturan Presiden No 63 Tahun 2019 Tentang Penggunaan Bahasa Indonesia [Presidential Regulation No 63 of 2019 on the Use of Indonesian Language] (Indonesia), 30 September 2019. There is still ambiguity, particularly around whether Indonesian parties can use English as a choice of governing language. Nevertheless, the problem of immediate voidability no longer exists. Despite these reforms, Indonesian lawyers still actively advise bilingual drafting as it remains a prudent practice.

⁹⁵ Undang-Undang Republik Indonesia Nomor 24 Tahun 2009 Tentang Bendera, Bahasa, dan Lambang Negara, serta Lagu Kebangsaan [Law No 24 of 2009 on National Flag, Language, Symbols and Anthem] (Indonesia) art 31(1). See also Undang-Undang Republik Indonesia Nomor 30 Tahun 2004 Tentang Jabatan Notaris [Law No 30 of 2004 on Notaries] (Indonesia) art 43(1).

⁹⁶ Indonesian Supreme Court Decision, No 601 K/Pdt/2015, 31 August 2015.

(*macet*) we made quick time across town and arrived just before our designated appointment time.

The three of us were then ushered up two flights of stairs and invited into a boardroom. It was a pleasant but basic room dominated by a large table that could seat approximately 20 people. At one end of the room was a projector and screen, while at the other end of the room was a large cabinet covering the full wall. On the shelves was a treasure trove of travel awards, trophies, and industry recognition plaques. This display cabinet was more than an ornamental representation of the business' success. It also represented the centrality of ritual, and its importance within business cultures and governance, within Javanese, and Indonesian, society.⁹⁷

As we sat down, we were offered refreshments by an immaculately uniformed administrative assistant. While such an offering is not uncommon in other global business environments, the role of food and drink and its consumption between business associates has a particularly important role in Jakarta. It is part of the relational dynamics that drive Indonesian business rather than a courtesy or formality — essentially, it is pivotal to the social infrastructure of business.⁹⁸ These are seen in Indonesia through an array of social activities, such as the Islamic concept of maintaining good relations with your neighbours and colleagues (*silaturahmi*) or the idea that the community, and groups of friends, should collect and share money together to facilitate business and social life (*arisan*). These social activities provide a backbone to commercial, political and community life across the archipelago.⁹⁹ Similar relationships are seen elsewhere in Asia, such as China with its notion of *guan xi* (personalised social networks of power) which highlights the importance of the highly acculturated local legal and business cultures.

We waited for a few minutes before the general manager and a member of the in-house legal team arrived. We then sat and talked over coffee for a few minutes as introductions were given and small talk made. The general manager was dressed simply, yet sophisticated, in Western business attire but without tie or jacket, while the female member of their legal team was conservatively dressed, in a red *kebaya* (a traditional blouse worn in Indonesia), and she held herself with a reserved demeanour. Throughout the meeting she was silent, other than at the very start, as she was putting

⁹⁷ Pemberton (n 60).

⁹⁸ Sociality, or human interactions, are essential for the creation of social connections and networks in Indonesian business circles. One's relationships secure connections and access to business. Sociality as a concept is discussed in Nicholas J Long and Henrietta L Moore, 'Sociality Revisited: Setting a New Agenda' (2012) 30(1) *Cambridge Journal of Anthropology* 40.

⁹⁹ See Zamakhsyari Dhofier, 'The Pesantren Tradition: A Study of the Role of the Kyai in the Maintenance of the Traditional Ideology of Islam in Java' (PhD Thesis, The Australian National University, 1980); Virginie Vial, 'Micro-Entrepreneurship in a Hostile Environment: Evidence from Indonesia' (2011) 47(2) *Bulletin of Indonesian Economic Studies* 233; Sujoko Efferin and Monika S Hartono, 'Management Control and Leadership Styles in Family Business: An Indonesian Case Study' (2015) 11(1) *Journal of Accounting & Organizational Change* 130.

the draft letter of advice onto the projector. She studiously deferred to the authority of the general manager.

During the meeting, Dina was given the role of leading the discussion. Lia would clarify any arguments or points of law as necessary. She made additional comments to mesh the legal advice with business prerogatives or commercial realities. My role was not to speak unless it related to international or foreign law — so, for instance, the arbitration and choice of law clauses were left for me to explain.

Dina started by highlighting our first major concern in relation to the obligations under the proposed contract. The general obligations seemed to bind our client strictly but provided non-exclusive licence rights to the online product in the Indonesian market. Connected to this general concern was the presence of clauses imposing obligations upon our client that extended beyond the life of the business agreement. On the surface of things, there seemed to be no particular reason for our client to accept these clauses. Such a combined position of disadvantage would have seemed to be an obvious point of concern. However, it was at this juncture that the atmosphere in the room changed surprisingly. The general manager stopped Dina midway through her explanation, saying that he understood our point, however, this was an ‘incredibly important business relationship’ and technical (legal) matters should not impede these working arrangements. From this point onwards, the general manager made the same point repeatedly after every clause of concern was raised and its potential implications identified.

Frustration grew with Dina becoming bewildered with the client’s seemingly illogical approach. Running through my mind was a simple question: why retain a law firm with high charge out rates to review a contract when you had no intention of negotiating any clauses or rejecting the contract either in part or whole? It seemed an expensive exercise without any underlying strategy. As this question swirled through my mind, Lia tried to diffuse the situation by saying, ‘we will tell you where you stand legally but the commercial decisions are obviously yours’. It was a wise statement, which was aimed at reassuring our client and reminding Dina (and me) that our client would use our legal advice in whatever way they felt appropriate.¹⁰⁰ Lia recognised, like the earlier Muslim religious leaders of South-East Asia, that their authority and legitimacy as legal intermediaries depended upon the parties to a transaction or dispute accepting their sociopolitical standing.¹⁰¹

¹⁰⁰ Relationships are at the heart of social and business structures in Indonesia — see for example discussion of *silaturahmi* and communal meals in this part of the article. Lia understood that whatever form of legal relationships a business would use, as their lawyer, there was an overriding imperative to maintain, and where possible deepen, their relationship with their client. By identifying legal problems and not pushing back against the general manager, Lia showed her firm’s proficiency and professionalism, alongside due deference to his prerogative to act on the advice in the manner he thought fit.

¹⁰¹ See Jeremy J Kingsley, *Religious Authority and Local Governance in Eastern Indonesia* (Melbourne University Press, 2018).

This situation highlighted a tension, which we were unaware of before the meeting, within the company itself. The legal counsel who had invited us had not received the full support of the general manager for taking a more formally documented and legalistic approach to transnational business partnerships. The General Manager's approach in contrast is best described as relational contracting.¹⁰² The divergence of the client's interests from my perceptions and their approach to contract law had a rational basis. The efficacy of contract law and its enforcement is relatively weak in Indonesia.¹⁰³ As a result, a business culture has developed that emphasises relationships and business networks over formal legal instruments and processes. This reticence is accepted in many quarters of Indonesian business.¹⁰⁴ With this said, these commercial arrangements are never fully written into formal contracts, nor based solely on relational contracting.¹⁰⁵ These arrangements are usually a combination of written documentation and business relationships. This case study is an example of this combination of modes of commercial arrangement.

Despite there being many drafting issues, our client remained unconcerned. The general manager recognised our frustration, and as the meeting was about to end, said that he wanted to explain his business philosophy. His approach was that 'in business all that counts are developing and maintaining quality relationships'. To him everything else, including legal issues, were of secondary concern. He trusted relationships and mutual interest above all else.¹⁰⁶

To explain this philosophy, he told us about the time he met a Japanese businessman who was interested in exploring an opportunity to develop a three-star hotel in Jakarta. On the surface, the businessman looked the part. He was well-dressed and appeared to be an experienced business operator. Additionally, all his correspondence and legal documentation appeared to be legitimate. In order to progress this

¹⁰² For a thorough investigation of relational contracting, see Quan H Nguyen, 'The Norms and Incentive Structures of Relational Contracting in Vietnam: Two Surveys' (2007) 9(1) *Australian Journal of Asian Law* 44.

¹⁰³ Ross H McLeod, 'Doing Business in Indonesia: Legal and Bureaucratic Constraints' (Working Paper, Research School of Pacific and Asian Studies, Australian National University, October 2006) <<https://devpolicy.crawford.anu.edu.au/acde/publications/publish/papers/wp2006/wp-econ-2006-12.pdf>>; Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 312.

¹⁰⁴ Cristiana Victoria Marta Davidescu, 'Culture and Ethics in Indonesian Business' (Conference Paper, International Conference on Business, Entrepreneurship and Management, Universitas Widyatama, January 2012) 199 <<https://repository.widyatama.ac.id/xmlui/bitstream/handle/123456789/3375/CONTENTS%20CHRISTIANA.pdf?sequence=6>>.

¹⁰⁵ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

¹⁰⁶ The role of social infrastructure and relationships to facilitate business is not unique to Jakarta and can be seen elsewhere. For example, Julia Elyachar described the importance of business relationships and social practices in Cairo. See Julia Elyachar, 'Phatic Labor, Infrastructure, and the Question of Empowerment in Cairo' (2010) 37(3) *American Ethnologist* 452.

opportunity, the general manager spent a week in Jakarta working with his Japanese colleague on the project, introducing him to builders and architects, while scouting appropriate sites for their enterprise. The only thing that had seemed a little outside of the usual was the small size of the rooms desired.

It was only when they went for dinner at the end of the week, in one of Jakarta's fanciest restaurants, when the real business strategy emerged. As they settled into a private dining room, their Japanese business partner brought 'his people' into the private dining room. Far from being the business executives anticipated, several scantily dressed women entered the function room. Within minutes, the relationship had collapsed as the Japanese associate made clear this hotel was essentially a front for a brothel. The general manager then noted that no contract can protect someone from devious businesspeople, or at least, that this was his belief.

The client's business model considered longterm working relationships to be the best form of business security.¹⁰⁷ From this perspective, the bottom line focused on relational contracts rather than formal agreements. Our client understood the risks that were present in the new contract provided, and yet was willing to accept all the clauses as specified. What emerged afterwards was that the legal team had been seeking to change the corporate culture of our client. The in-house legal team wanted to utilise a more sophisticated approach to the application of legal advice in business processes, however, the general manager obviously was not interested in this kind of orientation.

In conclusion, legal prudence would have been to seek amendments to the proposed agreement, and work on the relationship simultaneously. However, the business culture of the senior management in this medium-sized Indonesian business was oriented differently. This case study exemplifies the complex interplay between legal and business cultures and the fact that transnational law is not necessarily a hegemonic or unidirectional force. Legal intermediaries need to navigate situations where multiple legal and social orders exist, and weigh these up against the application of more formal legal instruments. The situation illuminates how complex local environments are navigated by an array of actors who create the contours of transnational legal practice.

While this is a case study of a simple contract negotiation, it shows how the development of a letter of advice is an acculturated process. Global mercantile networks need places to situate their activities in order to undertake their business operations and secure their capital.¹⁰⁸ Consequently, this case study demonstrates that networks are created between Asian legal systems and global actors that cannot be papered

¹⁰⁷ For a discussion of the manner in which relational connections drive Asian business and localised approaches to contracting, see Gary G Hamilton (ed), *Asian Business Networks* (De Gruyter Studies in Organization, 1996); Ludwig Bstielier and Martin Hemmert, 'The Effectiveness of Relational and Contractual Governance in New Product Development Collaborations: Evidence from Korea' (2015) 45–6(1) *Technovation* 29.

¹⁰⁸ Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press, 2001).

over but are highly localised and operate within deeply contextualised environments. If we examine this simple act of contract negotiation as evidence of a new *lex mercatoria*, it is necessary to recognise that it does not exist in a political or social vacuum, and legal intermediaries navigate an array of interests, objectives and modes of creating business relationships.¹⁰⁹ Legal intermediaries thus become the bridge between business cultures and facilitate commerce among individuals and groups that operate in diverse social, political and economic environments. While trying to understand inter-Asian legalities, and more generally global connections, we therefore need to ground — make local — our legal analysis.¹¹⁰

VI CONCLUSION

This article has considered the manner in which Asia is developing a new legal architecture. It seeks to place transnational corporate lawyers in the architecture as legal intermediaries who facilitate cross-border legal connections through negotiations, documentation, compliance management and dispute resolution. This concept of inter-Asian legality has been examined by considering the manner in which legal practice takes place, and the way in which a new substantive body of law is developing from interconnected mercantile relationships.

Inter-Asian legalities navigate the emergence of postcolonial boundaries and the impact of globalisation. As the case study identifies, contemporary legal interactions are not straightforward. The case study aims to make tangible the complexity of local business cultures navigated by transnational corporate lawyers. The web of commercial relationships creates a legal architecture — a fabric of transnational governance — which is underpinned through an emerging body of substantive law, in *lex mercatoria*. This body of law incorporates an amalgam of informal networks, customary local practices/rules, privatised legal relationships written into contracts, domestic law and international treaties.

These business relationships are facilitated through formal and informal legal mechanisms, which have been created to enable transnational business activities. *Lex mercatoria* is consequently a flexible set of legal instruments, rules, and social relationships, enabled by transnational corporate lawyers who negotiate, document and sanctify cross-border transactions and dispute resolution. This article orients its vision from Jakarta outwards to show how legal networks originate and are connected into larger webs of mercantile association. This finely-grained approach to Asia's interconnected legalities incorporates diverse legal environments where multiple regulatory actors and institutions operate in parallel. In this legal landscape, problems and opportunities do not stop at borders.

¹⁰⁹ These plural legal, political and commercial environments create complex environments, resulting in 'hybrid jurisdictions': Rivke Jaffe, 'The Hybrid State: Crime and Citizenship in Urban Jamaica' (2013) 40(4) *American Ethnologist* 734.

¹¹⁰ George E Marcus, 'Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography' (1995) 24(1) *Annual Review of Anthropology* 95.

ENSURING IMPACTFUL PERFORMANCE IN GREEN BONDS AND SUSTAINABILITY-LINKED LOANS

ABSTRACT

This article examines the revolution of socially responsible approaches to financing in the sustainable debt market, primarily in green bonds and sustainability-linked loans. Specifically, this article considers the risk of greenwashing, and the regulatory governance and contractual mechanisms in place that attempt to ameliorate this risk. The concept of ‘impact’ is also examined to demonstrate the difficulty market participants face in measuring and managing outcomes. To ensure systemic legitimacy and thereby sustained growth in sustainable debt financing, it is contended that contracting parties to these debt instruments need to incorporate performance-based provisions within the relevant legal documentation to better ensure that positive social and environmental externalities are achieved from their investments. Relatedly, market participants must continually strive to develop a comprehensive, tailored understanding of how ‘impact’ is most relevantly measured. A better understanding of ‘impact’ will then inform the contractual targets to be set, as well as provide standardisation for future sustainable investments.

I INTRODUCTION

The spectre of climate change poses some of the most significant and disruptive challenges for our generation. Its impact is to be felt on a global scale and will be disproportionately borne by the poorest and most marginalised communities.¹ While the dual adoption of the *Paris Agreement* and the United Nations’ Sustainable Development Goals (‘SDGs’) signalled that countries, both large

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¹ Jerry Melillo, Terese Richmond and Gary Yohe, *Climate Change Impacts in the United States: The Third National Climate Assessment* (Report, 2014) 7–13 <<https://www.nrc.gov/docs/ML1412/ML14129A233.pdf>>; William Nordhaus, *The Climate Casino: Risk, Uncertainty, and Economics for a Warming World* (Yale University Press, 2013) 3–4.

and small, are committed to taking measures in halting climate change,² the road thereafter has not been without difficulties. For example, the decision by the United States of America to withdraw from the *Paris Agreement* in 2017 highlights that international, voluntary regimes can often clash with political will, competing policy priorities, and tight budgets.³ Indeed, several multilateral development banks, including the World Bank Group, have recognised that the implementation of climate mitigation strategies cannot be solely left to governments.⁴ Trillions of dollars will need to be invested into green technologies and infrastructure to realise our carbon emission goals, and the private sector must involve itself in bridging this enormous financial gap.⁵

At the forefront of this siren call is the sustainable debt market, which in 2019 reached a market size record of USD465 billion, up 78% from the previous year. The two most issued debt instruments are currently sustainability-linked loans ('SLLs')

² *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) ('*Paris Agreement*'); *Sustainable Development Goals*, UN Doc A/RES/70/1 (25 September 2015). Article 2 of the *Paris Agreement* expressly commits to:

- a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
- b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
- c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

³ 'Lean, not Green: America's Proposed Budget Cuts Will Be Bad for the Environment', *The Economist* (online, 23 May 2017) <<https://www.economist.com/international/2017/03/23/americas-proposed-budget-cuts-will-be-bad-for-the-environment>>; Georgia Levenson Keohane and Saadia Madsbjerg, 'The Innovative Finance Revolution: Private Capital for the Public Good', *Foreign Affairs* (Web Page, July–August 2016) <<https://www.foreignaffairs.com/articles/2016-06-05/innovative-finance-revolution>>.

⁴ Multilateral Development Banks, *Joint Report on Climate Finance* (Report, 2019) <<http://www.ebrd.com/2019-joint-report-on-mdbs-climate-finance>>; OECD, *Supporting the Implementation of the Paris Outcome* (Report, May 2016) <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/epoc\(2016\)8/rev1&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/epoc(2016)8/rev1&doclanguage=en)>; OECD, *Green Bonds: Mobilising the Debt Capital Markets for a Low-Carbon Transition* (Report, December 2015) <<https://www.oecd.org/environment/cc/Green%20bonds%20PP%20%5Bf3%5D%20%5Blr%5D.pdf>>; Daniel Puig et al, *The Adaptation Finance Gap Report* (Report, UNEP, 2016) <https://backend.orbit.dtu.dk/ws/files/198610751/Adaptation_Finance_Gap_Report_2016.pdf>.

⁵ OECD, *Green Bonds: Mobilising the Debt Capital Markets for a Low-Carbon Transition* (n 4) 2.

and green bonds.⁶ SLLs, which are loans linked to the borrower's performance on defined environmental, social or governance ('ESG') criteria, are in their infancy compared to green bonds. Yet despite their first issuance in 2017, SLLs have quickly become the second most popular thematic debt type in the sustainable debt market,⁷ growing 168% to USD122 billion in issuances in 2019.⁸ On the other hand, the green bond, also known as a climate bond or climate awareness bond, was established more than a decade ago in 2007 by the European Investment Bank as an innovative way to fund renewable energy projects. Since then, the green bond market has accelerated to become the most issued sustainable debt instrument amongst investors, constituting more than half of the entire sustainable debt market in 2019, with USD271 billion issued.⁹ While governments and developmental banks were the pioneers in issuing these types of bonds, they have become increasingly prevalent amongst private corporations.¹⁰ Although the sustainable debt market is still dwarfed by the USD100 trillion global debt market, the level of growth of these debt instruments signifies an incipient revolution in socially responsible approaches to financing, otherwise known as sustainable financing.¹¹

Sustainability has a broad definition, encompassing all types of social welfare.¹² Sustainable finance is the manifestation of mobilised financial capital in a manner where economic growth, environmental protection and social justice are promoted,

⁶ Veronika Henze, 'Sustainable Debt Sees Record Issuance at \$465Bn in 2019, Up 78% from 2018', *Bloomberg NEF* (Web Page, 8 January 2020) <<https://about.bnef.com/blog/sustainable-debt-sees-record-issuance-at-465bn-in-2019-up-78-from-2018/>>. Sustainable finance can also be observed in private equity and public equity, which is becoming a popular avenue for impact investors: Rachel Bass et al, *The State of Impact Measurement and Management Practice* (Report, Global Impact Investing Network, 21 January 2020) 18 <<https://thegiin.org/research/publication/imm-survey-second-edition>>.

⁷ Henze (n 6). See also Nathaniel Bullard, 'The Sustainable Debt Market Is All Grown Up', *Bloomberg Green* (Web Page, 14 January 2021) <<https://www.bloomberg.com/news/articles/2021-01-14/the-sustainable-debt-market-is-all-grown-up>>. Other debt instruments within the sustainable debt market include sustainability-linked bonds, green loans, and sustainability bonds.

⁸ Henze (n 6).

⁹ Ibid.

¹⁰ Stephen Kim Park, 'Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution' (2018) 54(1) *Stanford Journal of International Law* 1, 4; Michael Doran and James Tanner, *Green Bonds: An Overview* (Presentation, Baker McKenzie, May 2019) 4; Justin Pugsley, 'Regulators Starting to Catch Up with Green Bond Boom', *Global Risk Regulator* (Web Page, 13 September 2016) <<https://www.globalriskregulator.com/Subjects/Capital/Regulators-starting-to-catch-up-with-green-bond-boom>>.

¹¹ Park (n 10) 4. See also Gerald F Davis and Suntae Kim, 'Financialization of the Economy' (2015) 41(1) *Annual Review of Sociology* 203, 213–14, stating that financial markets have enabled social activism.

¹² Park (n 10) 5.

or at the very least, not harmed.¹³ These concepts are often found within a corporation's corporate social responsibility ('CSR') policy, which is in turn governed by quasi-regulatory tools in the form of voluntary principles, reporting, certification, and process standards.¹⁴ These standards are complemented by a broader range of actors such as third-party experts and reviewers, consulting organisations, and ratings and ranking schemes.¹⁵ Regulation of the green bond and SLL market can be characterised as decentralised and heavily influenced by market participants that trade or assess these instruments.¹⁶ Fundamental concerns that such regulation seeks to address are the slippery definition of 'green', and whether the proceeds raised from the debt instrument are resulting in positive environmental or social impacts.

These conceptual concerns highlight the risk of greenwashing, a major vulnerability and threat to the future of the sustainable finance market. In the context of sustainable finance, greenwashing is where firms engage in environmental rhetoric to gain reputational leverage with investors without the borrowed funds achieving some level of positive, sustainable impact.¹⁷ For the market to survive, systemic legitimacy of the instrument's purpose is paramount. Issuers and borrowers alike need to be able to sell more green bonds or acquire loan funding, and investors and lenders of these instruments require confidence in their economic value and desired impact.¹⁸ Without systemic legitimacy, the success of the sustainable finance revolution will stall. After an overview of the sustainable debt market in Part II, Part III will address the heart of these legitimacy concerns, examining the main private mandates that govern green bonds and SLLs, as well as the use of, or lack of, performance-based provisions or impact provisions in SLL and green bond documentation.

¹³ Catherine Gwin and Mai Le Libman, *Banking on Sustainability: Financing Environmental and Social Opportunities in Emerging Markets* (Report, International Financial Corporation, 2007) 7 <<https://documents1.worldbank.org/curated/en/434571468339551160/pdf/392230IFC1BankItainability01PUBLIC1.pdf>>.

¹⁴ Amiram Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26(1) *Berkeley Journal of International Law* 452, 464–5; Dirk Ulrich Gilbert, Andreas Rasche and Sandra Waddock, 'Accountability in the Global Economy: The Emergence of International Accountability Standards' (2011) 21(1) *Business Ethics Quarterly* 23, 25–30.

¹⁵ Sandra Waddock, 'Building a New Institutional Infrastructure for Corporate Responsibility' (2008) 22(3) *Academy of Management Perspectives* 87, 93–103; Cherie Metcalf, 'Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information' (2010) 28(1) *Pace Environmental Law Review* 145.

¹⁶ Park (n 10) 6; Benjamin J Richardson, 'Keeping Ethical Investments Ethical: Regulatory Issues for Sustainability' (2009) 87(4) *Journal of Business Ethics* 555, 559.

¹⁷ Miriam A Cherry and Judd F Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster' (2011) 85(4) *Tulane Law Review* 983, 985.

¹⁸ Climate Bonds Initiative, *Green Bond Pricing in the Primary Market: Q4 2016 Snapshot* (Report, 2017) 1.

However, for these innovative contractual provisions to have substance, what must follow is a comprehensive discussion of what exactly the concept of ‘impact’ means in the sustainable finance sphere. As the marketplace for sustainable debt instruments continues to grow, so too does the expectation from investors that their funds are leading to measurable environmental or social impact. However, the concept of impact, much like the meaning of ‘green’, is continually evolving. Part IV will demonstrate that tracking and evaluating investments in terms of their non-financial performance or social returns is complicated by many factors, such as disagreements over the metrics used to measure impact and who should be involved in formulating impact measurement methodology. Looking towards the future, Part V proposes a range of short- and long-term considerations that are necessary for the enduring success of the sustainable debt market.

II EMERGENCE OF SUSTAINABLE PRIVATE DEBT PRODUCTS

Sustainable finance involves both a range of financial products as well as investments in green technologies and projects.¹⁹ Sustainable finance, however, is not inherently altruistic. Institutional and individual investors, as well as the firms whose operations they finance, view sustainability as a means of self-preservation, acknowledging that the risks posed by climate change will have pervasive effects on all levels of the global economy.²⁰ This notion that investors seek to minimise their exposure to environmental costs is reflected by the growth of signatories to the Principles for Responsible Investment (‘PRI’), a commitment drafted by a United Nations-supported network that advances environmental, social, and governance (‘ESG’) issues in investment decision-making: the PRI went from 20 signatories in 2006 to over 3,100 signatories now.²¹

Green bonds can be broadly defined as a debt security issued by a government entity, multilateral institution, or corporation in order to raise capital from investors for the

¹⁹ George Inderst, Christopher Kaminker and Fiona Stewart, *Defining and Measuring Green Investments: Implications for Institutional Investors Asset Allocations* (Working Paper No 24, OECD, 2012) 9. ‘Financial products’ can be understood as the issuing, trading, and holding of equity securities and debt securities.

²⁰ Gregory Unruh et al, *Investing for a Sustainable Future* (Report, MITSloan Management Review, 11 May 2016). See also Park (n 10) 8: ‘Over seventy percent of mainstream institutional investors consider sustainability as central to their investment decisions’.

²¹ Principles for Responsible Investment, ‘About the PRI’ (Web Page, 2020) <<https://www.unpri.org/pri/about-the-pri>>; Christa Clapp et al, *Green Bonds and Environmental Integrity: Insights from CICERO Second Opinions* (Report, CICERO Centre for International Climate and Environmental Research Oslo, 2016) 4. This approach may be in alignment with the ‘universal owner’ theory, in that highly diversified, long term portfolios represent a slice of the global capital market, making their investment returns dependent upon the continuing good health of the economy. As such, it is in their interest to promote sustainable finance: See PRI: Principles for Responsible Investment, *The SDG Investment Case* (Report, 2017) 7.

financing of green projects, assets, or business activities.²² An essential component of the green bond is the practice of earmarking funds, in which the issuer, during the solicitation of finance and sale of the debt instrument, allocates funds raised to a specific earmarked project.²³ In addition to financing new projects, green bonds can also be used to refinance existing debt, which may bring about benefits in reducing costs of capital or attracting additional financing.²⁴

The green bond marketplace is maturing. As noted above, the very first green bond was issued in 2007 by the European Investment Bank, and for a period of time, such instruments were only issued by multilateral development banks and other public development agencies.²⁵ However, green bonds have since attracted public and private issuers of all sizes.²⁶ Australia has been a major participant in the green bond market, issuing approximately AUD15.6 billion in 2019, ranking 10th globally and third in Asia.²⁷ The types of issuers have also been diverse. For example, the state treasury corporations for Queensland, New South Wales, and Victoria have issued totals of AUD2.48 billion, AUD1.8 billion, and AUD300 million in green bonds, respectively.²⁸ In recent years, Australian banks such as National Australia Bank have issued over

²² Inderst, Kaminker and Stewart (n 19) 28.

²³ World Bank, *Green Bond Process Implementation Guidelines* (Report, 2017) 2.

²⁴ Park (n 10) 12.

²⁵ Clapp et al (n 21) 5; Altaf Nanji, Matthew Kolodzie and Andrew Calder, *Green Bonds: Fifty Shades of Green* (Report, RBC Capital Markets, 26 March 2016) 6.

²⁶ A publicised example of corporate involvement is the issuances of green bonds from Apple, amounting to over USD4.7 billion. The proceeds will be used to lower carbon emissions across their supply chain as well as support energy efficient projects: Sustainalytics, *Second Party Opinion: Apple Green Bond Framework* (Evaluation, 6 November 2019). Starbucks Corporation recently issued a USD1 billion green bond to finance the purchase and development of sustainable coffee: Sustainalytics, *Second Party Opinion: Starbucks Sustainability Bond* (Evaluation, May 2019). The governments of Poland and France have also issued sovereign green bonds in recent years: Helene Durand, 'Poland Puts Stakes in the Ground for First Sovereign Green Bond', *Reuters* (Web Page, 6 December 2016) <<https://www.reuters.com/article/bonds-markets/update-1-poland-puts-stake-in-the-ground-for-first-sovereign-green-bond-idUSL5N1E04UD>>; Anna Hirtenstein, 'Green Bond Giant Awakened by Countries Spending to Save Climate', *Bloomberg* (online, 20 January 2017) <<https://www.bloomberg.com/news/articles/2017-01-20/green-bond-giant-awakened-by-countries-spending-to-save-climate>>.

²⁷ Climate Bonds Initiative, *Australia: Green Finance State of the Market 2019* (Report, 2019).

²⁸ Queensland Treasury Corporation, *Green Bond Annual Report: Supporting Queensland's Transition to a Low-Carbon, Climate Resilient and Environmentally Sustainable Economy* (Annual Report, 2020) 3; New South Wales Treasury Corporation and NSW Sustainability Bond Programme, *Creating a Sustainable Future* (Annual Report, 2019) 1; Treasury Corporation of Victoria, *TCV Annual Green Bond Report* (Report, December 2020) 3–4.

AUD2 billion in domestic and offshore green bonds.²⁹ Similarly, Macquarie Group issued an offshore green bond valued at AUD883 million.³⁰ Recent green bond issuances from corporations include Brookfield Australia, AUD880 million, and Woolworths Group, AUD400 million.³¹ The Queensland Investment Corporation Shopping Centre Fund issued a AUD300 million green bond in 2019 — the first to be issued by a retail property landlord.³² Monash University issued a green bond in 2016, raising over AUD218 million, making it the first university in the world to raise funds by issuing a climate bond.³³ It has since issued an additional two green bonds with a cumulative value of AUD172 million.³⁴

The allure of green bonds can be attributed to a variety of reasons. Green bonds serve as a convenient avenue for governments and private issuers to appeal to a new group of socially conscious investors, and demonstrate to the wider public that issuers are incorporating climate change related risks in their long term financial strategies.³⁵ Indeed, it has been shown that firms integrating environmental and social concerns as part of their corporate strategy tend to outperform those that do not.³⁶ On the demand side of the market, green bonds have been characteristically known by their over-subscription, resulting in a premium for green bonds in which holders of these debt instruments are able to sell them at higher prices compared to conventional bonds.³⁷

²⁹ National Australia Bank, *NAB Annual Green Bond Report* (Annual Report, September 2018) 3 <<https://capital.nab.com.au/docs/2018-NAB-Green-Bond-Report.pdf>>.

³⁰ Rachel Alembakis, 'Australia's Green Bond Issuance Tops \$15 Billion', *Pro Bono Australia* (Web Page, 3 September 2019) <<https://probonoaustralia.com.au/news/2019/09/australias-green-bond-issuance-tops-15-billion/>>.

³¹ *Ibid.*

³² 'QIC GRE Delivers World First Green Bond for the Retail Property Sector', *Queensland Investment Corporation* (Web Page, 2019) <<https://www.qic.com.au/knowledge-centre/qscf-green-bonds-20190807>>.

³³ 'Monash University Raises over \$200 Million in US Market to Tackle Climate Change', *Monash University* (Web Page, 8 December 2016) <[https://www.monash.edu/news/articles/monash-university-raises-over-\\$200-million-in-us-market-to-tackle-climate-change](https://www.monash.edu/news/articles/monash-university-raises-over-$200-million-in-us-market-to-tackle-climate-change)>.

³⁴ 'Monash University', *Climate Bonds Initiative* (Web Page, 2021) <<https://www.climatebonds.net/certification/monash-university>>.

³⁵ See, eg, Chris Flood, 'Green Bonds Need Global Standards', *Financial Times* (online, 8 May 2017) <<https://www.ft.com/content/ef9a02d6-28fe-11e7-bc4b-5528796fe35c>>; Echo Kaixi Wang, 'Financing Green: Reforming Green Bond Regulation in the United States' (2018) 12(2) *Brooklyn Journal of Corporate, Financial and Commercial Law* 467, 472.

³⁶ It has been reported that well-governed firms are more likely to be socially responsible, and that they outperform traditional firms in the long term: Allen Ferrell, Hao Liang and Luc Renneboog, 'Socially Responsible Firms' (2016) 122(3) *Journal of Financial Economics* 585; Robert Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60(11) *Management Science* 2835.

³⁷ Climate Bonds Initiative (n 18).

Green bonds also serve as an ideal diversification investment. Not only do they provide investors a stable hedge against climate risk, but due to the bonds' typically high investment grade, they serve as a substitute to conventional bonds that may comprise part of an investor's core bond portfolio.³⁸ Multilateral development banks, such as the World Bank, have been able to leverage their AAA credit ratings to attract swathes of investors.³⁹ Even with the entrance of new corporate and municipal issuers, no green bond has been issued a rating lower than BBB.⁴⁰ Finally, risk exposure in green bonds is low. These instruments, similar to conventional bonds, rank *pari passu*, meaning that investors will have recourse to issuers in the event that the issuer fails to make interest payments or pay principal on the bond.⁴¹

While the green bond market has grown significantly, there has been a noticeable lagging of corporate issuances of green bonds. This may be primarily attributed to the high barriers to entry required in satisfying the 'green' label of these bonds. Moreover, there exist rising expectations and requirements in meeting the acceptable 'green' definition.⁴² The Centre for International Climate and Environmental Research Oslo's ('CICERO') 'shades of green' methodology demonstrates a green spectrum, where less environmentally conscious bonds are lighter green and more environmentally conscious bonds are darker green. Under this methodology, investors are beginning to expect earmarked projects to be of a darker green character, such as long-term, environmentally sustainable infrastructure.⁴³ SLLs have been a powerful instrument in bridging this gap in the green marketplace. For borrowers who operate in industries that are not within close commercial proximity to green projects or expenditures, or those that have limited assets or expenditures

³⁸ Wang (n 35). See also VanEck, 'The Investment Case for Green Bonds', *Seeking Alpha* (Web Page, 27 March 2017) <<https://seekingalpha.com/article/4058210-investment-case-for-green-bonds>>; Rochelle J March, 'Six Benefits to Companies That Issue Green Bonds', *GreenBiz* (Web Page, 5 May 2017) <<https://www.greenbiz.com/article/6-benefits-companies-issue-green-bonds>>.

³⁹ Luke Trompeter, 'Green Is Good: How Green Bonds Cultivated into Wall Street's Environmental Paradox' (2017) 17(2) *Sustainable Development Law and Policy Brief* 4, 5; Bridget Boule, 'The Dawn of an Age of Green Bonds?', *Green Economy Coalition* (Web Page, 11 March 2014) <<https://www.greeneconomycoalition.org/news-and-resources/dawn-age-green-bonds>>.

⁴⁰ Trompeter (n 39) 5.

⁴¹ George G Triantis and Ronald J Daniels, 'The Role of Debt in Interactive Corporate Governance' (1995) 83(4) *California Law Review* 1073, 1104–5; 'Explaining Green Bonds', *Climate Bonds Initiative* (Web Page, 2021) <<https://www.climatebonds.net/market/explaining-green-bonds>>; Park (n 10) 14.

⁴² Catherine Snowdon, 'Green Bonds Survey: What Investors Want', *Euromoney* (Web Page, 25 April 2015) <<https://www.euromoney.com/article/b12knjfmnwsctf/green-bonds-survey-what-investors-want>>.

⁴³ CICERO, *Shades of Green* (Fact Sheet, 2015) 1 <https://static1.squarespace.com/static/5bc5b31a7788975c96763ea7/t/5bffc53370a6addcd6cd9541/1543488824244/Shades+of+green+factsheet_2018.pdf>. An example of a dark green project, as provided by CICERO, is wind energy projects.

capable of being thematically classified as ‘green’, the SLLs enable corporations of this nature to access the sustainable finance market. Broadly speaking, SLLs are a debt financial instrument that provide borrowers with capital for the use of proceeds of *general* corporate purposes, with financial incentives (such as margin rates) that are tied to the borrower’s sustainability performance throughout the life of the loan.⁴⁴ The sustainability performance, which can be either environmental, social, or both, allows for an unprecedented level of flexibility in how the proceeds of the loan are used.

A critical distinction to note is that SLLs do not require an earmarking of funds for eligible, thematic projects. The first SLL was completed in 2017 by Royal Philips, a health technology company.⁴⁵ Despite its first issuance only three years ago, the SLL has seen spectacular growth, and is now the second most popular thematic debt type in the debt market.⁴⁶ In Australia, notable SLLs have been in the airport sector, with Adelaide Airport signing Australia’s first SLL in late 2018, an AUD50 million lending facility from ANZ Banking Group.⁴⁷ Sydney Airport closely followed in much larger fashion, agreeing to an AUD1.4 billion SLL with ANZ Banking Group and BNP Paribas.⁴⁸ Shortly after, Queensland Airports Limited secured an AUD100 million SLL from Westpac for its Gold Coast Airport redevelopment.⁴⁹ Outside of the airport industry, prominent SLLs in recent years include Wesfarmer’s conversion from an existing debt facility into an AUD400 million SLL with Commonwealth Bank,⁵⁰

⁴⁴ Loan Market Association, Loan Syndication and Trading Association and Asia Pacific Loan Market Association, *Sustainability Linked Loan Principles* (Report, May 2020) 1 <<https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/#>> (‘LMA, LSTA, APLMA’).

⁴⁵ ING, ‘ING and Philips Collaborate on Sustainable Loan’ (Web Page, 19 April 2017) <<https://www.ing.com/Newsroom/News/ING-and-Philips-collaborate-on-sustainable-loan.htm>>; KangaNews, ‘The SLL Door Opens in Australia’ (Web Page, 2019) <<https://www.kanganews.com/news/10561-the-sll-door-opens-in-australia>>.

⁴⁶ Henze (n 6).

⁴⁷ Adelaide Airport, ‘Adelaide Airport Secures Australia’s First Sustainability Loan with ANZ’ (Media Release, 20 December 2018) <<https://www.adelaideairport.com.au/corporate/wp-content/uploads/2018/12/SU-MISC-ESG-Loan-Media-Release-2018-web.pdf>>.

⁴⁸ Sydney Airport, ‘Sydney Airport Successfully Delivers Innovative Sustainability Linked Loan’ (Media Release, 23 May 2019) <<https://www.asx.com.au/asxpdf/20190523/pdf/4459h8vb22w48z.pdf>>; ANZ Bank, ‘Apac’s Biggest Sustainable Loan Takes Flight’ (Media Release, May 2019) <<https://institutional.anz.com/insight-and-research/apacs-biggest-sustainable-loan-takes-flight>>.

⁴⁹ Westpac, ‘Westpac Supports Sustainability-Linked Loan: First of Kind for Australian Airport’ (Media Release, 17 July 2019) <<https://www.westpac.com.au/about-westpac/media/media-releases/2019/17-july/>>.

⁵⁰ Commonwealth Bank, ‘Rewarding Businesses for Doing the Right Thing’ (Media Release, 13 March 2020) <<https://www.commbank.com.au/guidance/newsroom/cba-wesfarmers-sustainability-loan-202003.html>>.

and AGL Energy's AUD600 million syndicated SLL with ANZ Banking Group and BNP Paribas.⁵¹

The SLLs are fertile ground for innovative financing mechanisms and have 'whetted the appetites' of a wide variety of borrowers seeking to be a part of the emerging revolution of social responsibly approaches to financing.⁵²

III GOVERNANCE FOR GREEN BONDS AND SUSTAINABILITY-LINKED LOANS

The significant interest in sustainable finance, both for its financial and reputational benefits, has demonstrated that environmental or social-centric debt instruments are likely to become a mainstream form of investing in the future. To ensure this social revolution continues, the risk of greenwashing needs to be dealt with appropriately by governance and contractual mechanisms.

Governments typically struggle to regulate cross-jurisdictional transactions conducted by multinational corporations. As noted by Stephen Park:

Government regulators struggle to address the wide range of environmental and social impacts attributable to global commercial activity. Further, governments are limited in their ability to implement tax and social welfare policies due to the ability of multinational corporations to shift capital to other jurisdictions through offshoring, re-incorporation, or other means.⁵³

As a result, private governance and self-regulation have become cornerstones in regulating international business⁵⁴ driven by 'governance clubs' of firms that are normally industry specific.⁵⁵ Membership of these private governance regimes is

⁵¹ Herbert Smith Freehills, 'Herbert Smith Freehills Advises AGL Energy Limited on Its Innovative A\$600 Million Sustainability-Linked Loan' (Web Page, 11 December 2019) <<https://www.herbertsmithfreehills.com/news/herbert-smith-freehills-advises-agl-energy-limited-on-its-innovative-a600-million>>.

⁵² Ibid.

⁵³ Park (n 10) 17–18. See also Cynthia A Williams, 'Corporate Social Responsibility in an Era of Economic Globalization' (2002) 35(3) *UC Davis Law Review* 705, 724–5, 746–50; Stephen Kim Park, 'Bridging the Global Governance Gap: Reforming the Law of Trade Adjustments' (2012) 43(3) *Georgetown Journal of International Law* 797, 829–30.

⁵⁴ Cynthia A Williams, 'A Tale of Two Trajectories' (2006) 75(3) *Fordham Law Review* 1629, 1639–41; Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy' (2011) 48(4) *Journal of Management Studies* 899, 909.

⁵⁵ Park (n 10) 18.

voluntary, but requires compliance with their policies.⁵⁶ Their objective, most relevantly here, is to produce positive social and environmental returns from investments.⁵⁷

These regimes will vary in their degree of inclusiveness of stakeholders and their level of enforcement. Private governance regimes are normally exclusively created by the market participants, such as issuers, investors, ratings agencies, and various financial intermediaries. Other regimes, however, may include a wider spectrum of stakeholders such as government agencies, advocacy groups, and local communities.⁵⁸ Private governance regimes often do not possess the same level of enforcement as public regimes due to the absence of government coercion.⁵⁹ Rather, they rely on market-signalling mechanisms such as peer pressure and reputational leverage, and emphasise transparency and accountability by way of review and reporting mechanisms.⁶⁰ The level of prescriptiveness will depend on the specific private governance regime. For regulatory frameworks that are more permissive in nature, such as those with flexible, broadly defined principles, a contravention of such will simply be left to the market in how it should respond.⁶¹ On the other end of the spectrum, in regimes with prescriptive rules and strictly defined benchmarks for corporate behaviour, a violation would result in exclusion from membership or certification benefits.⁶²

The primary private governance regimes that have domain over the green bond market and SLL market will now be analysed. These are the Green Bond Principles,⁶³ the Climate Bonds Standards,⁶⁴ and the Sustainability Linked Loan Principles.⁶⁵

A *Green Bond Principles*

The Green Bond Principles ('GB Principles') can be classified as a 'process standard', meaning that they provide a process that public and private entities can use to develop

⁵⁶ Ibid. See also Matthew Potoski and Aseem Prakash, *Voluntary Programs: A Club Perspective* (MIT Press, 2009) 1–2.

⁵⁷ Park (n 10) 18.

⁵⁸ Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36(3) *Michigan Journal of International Law* 425, 438; Oren Perez, 'The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes' (2016) 17(1) *Minnesota Journal of Law, Science and Technology* 153, 216–17.

⁵⁹ Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' (2000) 52(3) *Administrative Law Review* 813, 824–5.

⁶⁰ Park (n 10) 20.

⁶¹ Ibid 21.

⁶² Lesley K McAllister, 'Harnessing Private Regulation' (2014) 3(2) *Michigan Journal of Environment and Administrative Law* 291, 313–16.

⁶³ International Capital Market Association, *Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds* (Report, June 2018) ('ICMA').

⁶⁴ Climate Bonds Initiative, *Climate Bond Standards Version 3.0* (Report, 2019).

⁶⁵ LMA, LSTA, APLMA (n 44).

their own operational frameworks.⁶⁶ More relevantly, they assist issuers in launching a credible green bond and informing what their obligations are towards investors and underwriters.⁶⁷ Voluntary disclosure and transparency serve as the primary means of promoting the integrity of the green bond market.⁶⁸

The GB Principles comprise four core components. First, the utilisation of the bond's proceeds should be towards green projects to give peace of mind to investors that their funds will be used for the purpose as promised by the issuer, and not according to the whims of corporate management.⁶⁹ While the GB Principles make clear that they do not attempt to strictly define appropriate green projects, they provide a list of non-exhaustive green project categories eligible for selection.⁷⁰ Second, issuers should clearly communicate to investors the environmental sustainability objectives of the green project, and the process of how that project was evaluated and selected, including any exclusion criteria used. Third, issuers should manage and track the green bond proceeds by appropriately separating them from proceeds of any other bonds issued. This may be done by crediting these funds into a separate sub-account. Finally, the issuers are to provide up-to-date, publicly available reports, and information on the use of green bond proceeds, the earmarked project, and expected environmental and social impacts effectuated by the investment. Such reports are to be released annually and for any significant developments. Comprehensive qualitative and quantitative indicators of performance and impact of the green projects should be public, although this may be tempered by confidentiality agreements and market competition considerations.

The GB Principles recommend that issuers organise an external review to confirm that the bond framework is aligned with these four components. Such a review can be undertaken in the form of second party opinions, green bond scoring/rating, verification or third-party assurance, and certification. Second-party opinions are generally taken pre-issuance of the bond and will assess how aligned the issuer's green bond framework is with the GB Principles.⁷¹ Providers of second-party opinions may also give a rating of the 'shade of green' (light, medium, dark

⁶⁶ Gilbert, Rasche and Waddock (n 14) 29.

⁶⁷ ICMA (n 63) 3.

⁶⁸ Ibid: 'The GB Principles emphasise the required transparency, accuracy and integrity of information that will be disclosed and reported by issuers to stakeholders'.

⁶⁹ Gilbert and Tobin, 'Green Bond Market in Australian and Overseas', *Gilbert and Tobin* (Web Page, 20 February 2019) <<https://www.gtlaw.com.au/insights/green-bond-market-australia-overseas>> ('Green Bond Market').

⁷⁰ International Capital Market Association (n 63). Eligible green project categories may be: renewable energy including production, transmission and products; energy efficiency and energy storage in new and refurbished buildings and smart grids; pollution prevention greenhouse gas control and soil remediation; sustainable management of living natural resources; terrestrial biodiversity conservation; clean transportation; sustainable water management; climate change adaptation; and eco-efficient processes.

⁷¹ Gilbert and Tobin (n 69).

green bonds).⁷² Green bond ratings are typically provided pre-issuance.⁷³ Credit rating agencies such as Moody's released a framework for green bond assessments in 2016, assessing the 'relative likelihood that bond proceeds will be invested to support environmentally friendly projects'.⁷⁴ Standard and Poor's have similarly published a green evaluations framework that assesses the expected lifetime environmental impact of a bond, along with other factors such as reporting mechanisms and compliance with environmental regulations.⁷⁵ Independent verifications are taken pre-issuance or post-issuance, where the bond's alignment is tested against a designated set of internally- or externally-set criteria. Independent verifications are less onerous than second-party opinions, in that verifications serve as a rubber stamp of approval of compliance, rather than an entire review process.⁷⁶ Finally, certification is taken post-issuance, and allows for an issuer to have their green bond certified against a recognised, external, and GB Principles-aligned standard. Certification is determined by an accredited third party, and perhaps the most widely accepted in the industry is the Climate Bond Standards (addressed in more detail below).

The implementation of the GB Principles is led by an Executive Committee that holds wide-reaching authority over the content of these principles.⁷⁷ The Executive Committee consists solely of investors, issuers, and underwriters.⁷⁸ While other stakeholders, such as consultants, auditors, and academics may participate in relevant discussions to the formulation of GB Principles, they are limited in their capacity as non-voting observers.⁷⁹ The International Capital Market Association ('ICMA') serves as the GB Principles' secretariat.⁸⁰ It is clear that the GB Principles subscribe to a market-participant led governance structure, meaning it may be difficult for stakeholders outside of the Executive Committee to participate in the formulation and implementation of the GB Principles.⁸¹ The absence of mandatory language in

⁷² Ibid.

⁷³ Ibid.

⁷⁴ See Moody's, *Green Bond Assessment Methodology* (Report, 30 March 2016) <https://www.moody.com/research/Moodys-publishes-methodology-on-Green-Bonds-Assessment--PR_346585>.

⁷⁵ See Standard and Poors, *Green Evaluations* (Report, 2017).

⁷⁶ Gilbert and Tobin (n 69).

⁷⁷ International Capital Market Association, *The Governance Framework of the Principles* (Report, 5 May 2020) 3 <<https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/GBP-SBP-GovernanceFinal5-May-2020-110520.pdf>>. The Executive Committee: appoints and oversees the Secretariat; approves formal GB Principles communications; votes on amendments to the GB Principles; and can propose and validate issue-specific working groups including Members and Observers.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Park (n 10) 24.

⁸¹ Ibid. Market-led regimes typically lack deliberation across a broad scope of parties: Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42(2) *Vanderbilt Journal of Transnational Law* 501, 556–7.

the GB Principles is indicative of their permissive nature.⁸² Without strict guidelines as to what is ‘green’ or what is ‘impact’, there is concern that the GB Principles do not significantly ameliorate the risk of greenwashing, and allow issuers easy access to reputational benefits of participating in the green bond market.⁸³ While these claims are valid, it must also be remembered that burdensome regulatory costs are capable of drying up the green bond market, as many of the suggested mechanisms are not only expensive but are not required in conventional bond instruments.⁸⁴ The GB Principles are intended for broad use of the market, expressly stating that their overarching mission for market participants is to expand the green bond market through private standards.⁸⁵ This is reflected by ICMA’s Resource Centre, which serves as a repository for disclosure templates and standard templates that have been used by past issuers and external reviewers.⁸⁶ The Resource Centre also provides a plethora of impact reporting guidance documents, such as suggested reporting metrics and reporting templates for projects.

B *Climate Bond Standards*

The Climate Bond Initiative (‘CBI’), an international, investor-focused not-for-profit organisation, produced the Climate Bonds Standards and Certification Scheme (‘CBS’). The standards are much stricter than the GB Principles, in that their purpose is to develop industry-agreed and scientifically-driven definitions and standards for climate integrity, management of proceeds, and transparency. The CBS requirements are founded upon the long-term target of net zero emissions by 2050 as provided by the *Paris Agreement*. From the issuer’s perspective, the CBS aims to ensure that the internal processes, controls, reporting processes, and any other relevant criteria in the issuance and maintenance of the green bond are appropriately established. Issuers who attain this certification demonstrate that their bond meets science-based standards for climate integrity, and best practice standards for management of proceeds and transparency.⁸⁷ From the investor’s perspective, the CBS hopes to provide investors the ability to identify and prioritise low-carbon and climate-resilient investments with a high level of confidence.⁸⁸ The certification lowers the transaction

⁸² Park (n 10) 23–4. See also ICMA (n 63) 7, where the disclaimer states: ‘The Green Bond Principles are voluntary process guidelines that neither constitute an offer to purchase or sell securities nor constitute specific advice of whatever form (tax, legal, environmental, accounting or regulatory) in respect of Green Bonds or any other securities’.

⁸³ Trompeter (n 39) 6.

⁸⁴ Ibid.

⁸⁵ ICMA (n 63) 3.

⁸⁶ ICMA, ‘Resource Centre’ (Web Page, 2021) <<https://www.icmagroup.org/sustainable-finance/resource-centre/>>; ICMA, *Launch of Green Bond Principles Resource Centre FAQs* (Media Release, 12 August 2016) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Resource-Centre/GBP-RC_FAQ_08_2016%20150816.pdf>.

⁸⁷ Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 4.

⁸⁸ Ibid.

costs and uncertainty of subjective judgements during an investor's due diligence on the 'green-ness' of the proposed investment. In short, issuers who achieve the CBS certification signal to potential investors that their funds will be, to a greater extent when compared to the GB Principles, used to achieve positive environmental or sustainable externalities.

The CBS comprises the Climate Bonds Standard, market-wide Climate Bonds Taxonomy ('Taxonomy') and Sector Eligibility Criteria.⁸⁹ The Taxonomy identifies the assets and projects needed to deliver a low-carbon economy and gives greenhouse gas emissions screening criteria consistent with the 2°C degree global warming target set by the *Paris Agreement*.⁹⁰ To date, projects and assets that are available for CBS certification fall under the categories of: renewable and alternative energy; energy efficiency; low-carbon transport; sustainable waste; waste; recycling and pollution; sustainable agriculture and forestry; and climate-resilient infrastructure and climate adaptation. In addition, the Taxonomy sets out certain projects and assets that are ineligible for certification as they are not in line with achieving the *Paris Agreement*.⁹¹ The Sector Eligibility Criteria, which are developed by CBI's Technical Working Groups ('TWGs'), which are comprised of scientists, engineers, and technical experts, have developed to date 10 specific sector criteria available for certification.⁹² In tandem with the Taxonomy, these Sector Eligibility Criteria provide a further layer of detailed definitions of 'green-ness' specific to assets and projects in each respective sector.

The certification process for issuers consists of the following steps.⁹³ First, the issuer must prepare the bond, creating a green bond framework setting out the use of proceeds for the bonds, and also identify assets that meet the relevant sector criteria. Second, it must engage an approved verifier for pre- and post-issuance certification and provide them with the relevant information. The verifier will then provide a verifier's report giving assurance that the CBS requirements are met. Third, the verifier's report is then submitted to the CBI, upon which the bond will receive a pre-issuance certification. Fourth, within 12 months of issuance, the verifier will

⁸⁹ Ibid 5.

⁹⁰ Climate Bonds Initiative, *Climate Bonds Taxonomy* (Report, January 2021) <https://www.climatebonds.net/files/files/CBI_Taxonomy_Jan2021.pdf>.

⁹¹ There is a disconnect between Western countries and for example, China's standards of what is considered 'green'. For example, in 2015, China formed its own green bond standard which permits the use of green bonds to fund clean coal projects. However, coal projects are wholly rejected from being 'green' under the Climate Bonds Standards. See Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 5–6; Wang (n 35) 483.

⁹² Climate Bonds Initiative, *Climate Bonds Taxonomy* (n 90). See also 'Sector Criteria', *Climate Bonds Initiative* (Web Page, 2020) <<https://www.climatebonds.net/standard/sector-criteria>>. The specific selection criteria are: solar; wind; marine; geothermal; bioenergy; forestry; buildings; water; waste; and transport. Sector criteria currently being developed are hydropower, water transport, and agriculture.

⁹³ Climate Bonds Initiative, *Climate Bonds Taxonomy* (n 90).

provide a post-issuance verifier's report, which will then be submitted to the CBI for approval in order for the issuer to obtain post-issuance certification. Finally, the issuer must prepare a report each year for the term of the bond and provide this to bondholders and the CBI. This final reporting step is mandatory for the certification of the bond, and the issuer needs to provide two types of reporting: allocation reporting⁹⁴ and eligibility reporting.⁹⁵ Impact reporting is also recommended but is not mandatory.⁹⁶

In comparison to the GBP, the CBS is a more prescriptive yet inclusive, investor-oriented governance scheme,⁹⁷ involving a much broader range of stakeholder groups.⁹⁸ Its prescriptiveness is due to its distinguishing certification character, which involves the 'establishment of standards, assessment for compliance with standards, accreditation of the certifier, and continual compliance monitoring by a certified third party'.⁹⁹ The CBS provides a useful remedy for the issues stemming from the vagueness of the GB Principles. However, it must be remembered that the CBS remains a voluntary standard and involves another layer of burdensome costs upon the issuer. Indeed, it is not uncommon for issuers to simply avoid the CBS regime altogether.¹⁰⁰ Moreover, to add further complexity to the governance of the green bond market, issuers like the World Bank, Fannie Mae, and Berlin Hyp have developed their own criteria for green bond eligibility in lieu of certification under the CBS.¹⁰¹

C Sustainability Linked Loan Principles

A sustainability linked loan ('SLL') allows the borrower to use the proceeds for general corporate purposes, but with incentives to improve their sustainability performance

⁹⁴ Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 5. Allocation reporting is confirming the allocation of bond proceeds to eligible projects and assets, and is mandatory for all certified debt instruments.

⁹⁵ Ibid. Eligibility reporting is confirming the characteristics or performance of projects and assets to demonstrate their eligibility under the Taxonomy and relevant Sector Eligibility Criteria. It is mandatory for all certified debt instruments.

⁹⁶ Ibid. Impact reporting is disclosure of metrics or indicators that reflect the expected or actual impact of eligible projects and assets, and is encouraged for all certified debt instruments, but is not mandatory.

⁹⁷ Park (n 10) 25.

⁹⁸ Members of the board and advisory panel include socially responsible investors, academics, and NGOs. For a comprehensive list, see 'Climate Bonds Standard Board', *Climate Bonds Initiative* (Web Page, 2021) <<https://www.climatebonds.net/standard/governance/board>>; 'Advisory Panel', *Climate Bonds Initiative* (Web Page, 2020) <<https://www.climatebonds.net/about/advisory-panel>>.

⁹⁹ Park (n 10) 25; Martijn W Scheltema, 'Assessing Effectiveness of International Private Regulation in the CSR Arena' (2014) 13(2) *Richmond Journal of Global Law and Business* 263, 323.

¹⁰⁰ Trompeter (n 39) 7.

¹⁰¹ Gilbert and Tobin (n 69).

over time. This sustainability performance is measured using sustainability performance targets ('SPTs'), which may include key performance indicators, external ratings, and various metrics that measure the borrower's sustainability profile. As a result, a typically distinguishing feature of an SLL is that the margin of the loan will change depending upon the borrower's sustainability performance. In comparison to the green bond, there is no need for borrowers of an SLL to earmark funds for eligible green projects or demonstrate sustainable expenditure.

The governing regime lies in the Sustainability Linked Loans Principles ('SLL Principles'). Similar to the GB Principles, they are market derived voluntary guidelines with the purpose of providing a level of identifiability, consistency, and transparency for SLLs. The SLL Principles comprise four main components. First, there must be a relationship between the funds lent and the borrower's overall corporate social responsibility ('CSR') strategy. Second, target setting in the form of SPTs should be created in order to measure the sustainability profile of the borrower. Third, borrowers are recommended to publish information relevant to their SPTs. Finally, there should exist either an external or internal review of the borrower's performance against the SPTs.

The first two components, which are unique compared to the GB Principles, require that the borrower demonstrates to its lenders what its sustainability objectives are as stipulated in their CSR strategy, and how these objectives translate into reaching their SPTs.¹⁰² Borrowers should be comprehensive in the disclosure of any objectives, strategies, policies, and processes relating to sustainability. To that end, they should also disclose any sustainability standards or certifications to which they are seeking to conform.¹⁰³ These SPTs should be 'ambitious and meaningful' to the borrower's general business operations, relevant throughout the life of the loan, and be measured against either internal or external benchmarks.¹⁰⁴ It is vital that SPTs negotiated between the contracting parties are well formulated as they normally serve as the reference point for the margin of the facility.¹⁰⁵ Indeed, the SLL Principles encourage borrowers to seek independent review in determining the appropriateness of the SPTs. In applying SLL Principles practically, borrowers and lenders alike need to analyse the robustness of the CSR strategy in place and the borrower's prioritisation of sustainability practice in their core business operations. The SLL Principles provide an example list of SPTs falling under primarily environmental sustainability categories. However, innovative measures may include those that consider social outcomes such as employee diversity or lower crime rates.

The SLL Principles recommend reporting — on an annual basis — all information relating to their SPTs, such as the borrower's performance and the methodology

¹⁰² LMA, LSTA, APLMA (n 44).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* External benchmarks could include an ESG rating based upon recent performance and assessed against an external third-party rating criterion.

¹⁰⁵ *Ibid.*

used in assessing such performance.¹⁰⁶ However, the SLL Principles note that certain companies such as sub-investment grade borrowers do not need to publicly disclose this information, and only need to share it with their relevant lenders. This exception exists to lower reporting costs and thereby remove a barrier to entry for certain companies, typically unlisted mid-market corporations, who want to participate in sustainable activities but do not have large number of assets or projects dedicated towards thematically green investments. A notable difference is that the SLL Principles remain silent on impact reporting, whereas the GB Principles provide substantial detail on this in the form of impact reporting frameworks.¹⁰⁷ It has been suggested that the reason for this is that it is much harder to identify social and environmental impact in relation to the borrower's sustainability performance compared to funds directed at a specific green project.¹⁰⁸

The independent review component of the SLL Principles recommends for this to be a negotiation point between borrowers and lenders. However, in some circumstances they permit internal reviews — a noticeably less exacting requirement compared to the GB Principles — which provide substantial detail on pre-issuance and post-issuance review processes, such as second-party opinions, verification, certification, and green bond ratings. As a final step, the SLL Principles recommend that the lenders themselves conduct an evaluation of the borrower's compliance against the SPTs based on the reported information.¹⁰⁹

The relaxed standards of reporting and reviewing in the SLL Principles compared with GB Principles bring to the forefront concerns over harmonisation and product integrity, especially given that the SLL market attracts borrowers from wide-ranging industries, locations, scales, and financial and sustainability profiles. As such, it is suggested that the SLL Principles establish an online repository similar to ICMA's Resource Centre. This repository could contain reporting templates, along with other relevant documents such as SPT formulation and assessment methodologies, and suitable impact reporting metrics, in order to facilitate standardisation and information sharing across the marketplace.¹¹⁰

¹⁰⁶ LMA, LSTA, APLMA (n 44) 3.

¹⁰⁷ See ICMA, 'Resource Centre' (n 86).

¹⁰⁸ Tallat Hussain and Jeffrey Rubinoff, 'Sustainability Linked Loan Principles Extend Green Finance', *White and Case* (Web Page, 21 March 2019) <<https://www.whitecase.com/publications/alert/sustainability-linked-loan-principles-extend-green-finance>>.

¹⁰⁹ This seems to mirror current lending practices in risk management, where the lender reviews its borrowers using audited documents and reports received from the borrower, for the purpose of affirming their risk profile: Australian Prudential Regulation Authority, *Prudential Standard CPS 220: Risk Management* (Prudential Standard, 2019) 11.

¹¹⁰ Similar 'knowledge hubs' have been created by the Task Force on Climate Related Financial Disclosures ('TCFD') and Altioem, providing resources for those involved in sustainable investing. See 'TCFD Knowledge Hub', *TCFD* (Web Page, 2020) <<https://www.tcfdhub.org/>>; 'Library', *Altioem* (Web Page, 2021) <<https://altioem.org/library/case/>>.

The SLL Principles were created by the Loan Market Association, the Loan Syndicate and Trading Association, and the Asia Pacific Loan Market Association, all of whom were advised by lenders and borrowers of financial institutions, as well as the ICMA in relation to their work with the GB Principles.¹¹¹ As expected, the governance structure is identical to the GB Principles, in that it is a market-participant, permissive-rules based framework and shares the strengths and limitations of the GB Principles as discussed above. The SLL Principles are even less demanding than the GB Principles, given the notable absence of suggested pre-issuance and post-issuance review processes. The SLL market is still in its infancy. As the marketplace expands overtime, it should require greater levels of reporting and review processes to ensure the instruments are achieving their intended environmental and social impacts.

D *Australian Securities and Investments Commission's Regulatory Guidance 228*

In 2015, the Group of 20 ('G20') Finance Ministers requested that the Financial Stability Board ('FSB') 'convene public- and private-sector participants to review how the financial sector can take account of climate-related issues'.¹¹² The FSB, which includes representatives from Australia's Reserve Bank and Treasury, quickly established the Task Force on Climate-Related Financial Disclosures ('TCFD') to develop recommendations for voluntary climate-related financial disclosures for use by corporations to support investors, lenders, and insurance underwriters in understanding material climate risks.¹¹³ The TCFD released its final report in June 2017, and in it addressed four core elements of climate-related financial disclosures:

1. Governance — Disclos[ing] the organization's governance around climate-related risks and opportunities.
2. Strategy — Disclos[ing] the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning where such information is available.
3. Risk Management — Disclos[ing] how the organization identifies, assesses, and manages climate-related risks.
4. Metrics and Targets — Disclos[ing] the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.¹¹⁴

¹¹¹ Loan Syndications and Trading Association, 'The LMA, LSTA and the APLMA Launch the Sustainability Linked Loan Principles' (Media Release, 19 March 2019) <<https://www.lsta.org/news-resources/the-lma-lsta-and-the-aplma-launched-the-sustainability-linked-loan-principles-sllp/>>.

¹¹² Colin Myers, 'Financing Our Future's Health: Why the United States Must Establish Mandatory Climate-Related Financial Disclosure Requirements Aligned with the TCFD Recommendations' (2020) 37(2) *Pace Environmental Law Review* 415, 433.

¹¹³ Task Force on Climate-Related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (Report, June 2017) ('TCFD'); Australian Sustainable Finance Initiative, *Developing an Australian Sustainable Finance Roadmap: Progress Report* (Report, December 2019) 14.

¹¹⁴ TCFD (n 113) 14.

Climate-related risk is delineated into transition risks, such as risks tied to changes in law, technology, and market forces; and physical risks, such as risks directly stemming from rising temperatures, sea levels, and extreme weather events.¹¹⁵ Finally, the disclosure of climate-related risks in financial filings should be underpinned by six principles, in which disclosures should be: representative of relevant information; specific and complete; clear, balanced, and understandable; consistent over time; comparable among companies within a sector industry or portfolio; reliable, verifiable, and objective; and provided on a timely basis.¹¹⁶

The TCFD report was greatly influential in Australia, with many regulators and governing bodies signalling their commitment towards monitoring entities' management of climate change risk, and also endorsing the report's recommendations as a preferred disclosure framework.¹¹⁷ Most relevant for bond issuers and investors was the Australian Securities and Investments Commission's ('ASIC') update to *Regulatory Guide 228 Prospectuses: Effective Disclosure for Retail Investors* ('RG228').¹¹⁸ The update incorporated the types of climate change risks as identified by the TCFD Report into the list of examples of common risks that may need to be disclosed in a prospectus.¹¹⁹ As such, bond issuers will likely need to provide disclosures in their prospectuses about impacts of climate change on the issuer's business model, and also transition and physical climate risks associated with the security

¹¹⁵ Ibid 27.

¹¹⁶ Ibid 18.

¹¹⁷ Governance Institute of Australia, *Climate Change Risk Disclosure: A Practical Guide to Reporting against ASX Corporate Governance Council's Corporate Governance Principles and Recommendations* (Report, February 2020) 5. Recommendation 7.4 of the ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Report, February 2019) provides that a listed entity should disclose whether it has any material exposure to environmental or social risks, and if it does, how it intends to manage it: at 27. This applies to annual reports for the first full financial year after 1 January 2020. See Australian Accounting Standards Board and Auditing and Assurance Standards Board, *Climate-Related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/IASB Practice Statement 2* (Report, April 2019). This joint guidance paper reinforces that report preparers, assurers, and auditors should take into consideration climate-related issues in financial statement accounting. See also Australian Prudential Regulation Authority, *Climate Change: Awareness to Action* (Information Paper, 20 March 2019) 25.

¹¹⁸ ASIC, *19-208MR ASIC Updates Guidance on Climate Change Related Disclosure* (Regulatory Guide Update, August 2019) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-208mr-asic-updates-guidance-on-climate-change-related-disclosure/>>; ASIC, *Regulatory Guide 228 Prospectuses: Effective Disclosure for Retail Investors* (Regulatory Guide, 12 August 2019) ('RG228'). See also ASIC, *Regulatory Guide 247 Effective Disclosure in an Operating and Financial Review* (Regulatory Guide, 12 August 2019); ASIC, *REP 593 Climate Risk Disclosure by Australia's Listed Companies* (Report, 20 September 2018).

¹¹⁹ See Table 7 of ASIC, 'RG228' (n 118).

and the offer.¹²⁰ While the RG228 only applies to offers to retail investors, issuers should not rely on the purported sophistication of wholesale investors as justification for failures in considering and disclosing relevant climate-related risks in offering documents.¹²¹

Very recently, the duty to disclose climate-related risks in bond offering documents has been cast into the limelight by the Federal Court claim, *O'Donnell v Commonwealth* ('*O'Donnell*').¹²² Kathleen O'Donnell, representing herself, retail investors and holders of Australian Government Bonds ('AGBs'), alleges that physical and transitional climate-related risks capable of influencing an investor's investment decision should have been disclosed in the bonds' term sheets and information memoranda issued by the government. In failing to disclose these risks, it is alleged that the Commonwealth, as promoter of the information statements, engaged in misleading or deceptive conduct and breached its duty of utmost candour and honesty to investors.¹²³ The claim further alleges that the officials of the Commonwealth, specifically the Secretary to the Department of Treasury and the Chief Executive Officer of the Australian Office of Financial Management, failed to discharge their statutory obligation to exercise due care and diligence in approving the release of these documents to the public.¹²⁴ The applicant does not seek damages, but rather a declaration of breaches and an injunction preventing the Commonwealth from promoting exchange traded government bonds that do not disclose climate-related financial risks.

There exist some challenges to this claim. For example, the applicant will need to establish a reasonable expectation in all circumstances that climate-related risks would have been disclosed to potential investors in AGBs.¹²⁵ Moreover, the applicant will need to articulate what information ought to have been disclosed. Given the complexity of climate-related risks, it will be difficult to navigate 'which facts are material enough to warrant disclosure, and to what extent future possibilities are sufficiently certain to warrant disclosure'.¹²⁶ It is important to distinguish that *O'Donnell* and the RG228 do not concern greenwashing per se (unlike the governance regimes above), but rather the broader notion that climate change will cause material, financial risks, and must be considered and disclosed to the same

¹²⁰ Ibid 31.

¹²¹ Sarah Barker, 'Misleading Climate-Related Disclosure: Are Your Verification and Disclosure Processes Defensible?', *MinterEllison* (Web Page, 23 July 2020) <<https://www.minterellison.com/articles/misleading-climate-related-disclosure>>.

¹²² Federal Court, VID482/2020, commenced 22 July 2020 ('*O'Donnell*').

¹²³ *Australian Investments and Securities Commission Act 2001* (Cth) s 12DA(1).

¹²⁴ *Public Governance, Performance and Accountability Act 2013* (Cth) s 25(1).

¹²⁵ Kim Reid et al, 'A Growing Tide? Climate Change Class Action Proceedings Issued against the Federal Treasury', *Allens Linklaters* (Web Page, 12 August 2020) <<https://www.allens.com.au/insights-news/insights/2020/08/a-growing-tide-climate-change-proceedings-against-federal-treasury/>>.

¹²⁶ Ibid.

extent as conventional financial risks relevant to a financial product issuance.¹²⁷ Nonetheless, the implications of this claim will be of importance to sovereign and corporate issuers of green debt instruments and their advisors. Several issues to consider include:

1. Fundraising structure — do we (and our key advisors) understand the range of climate-related financial risks that may be material to the issue, its size and structure, intended use of proceeds, credit rating, issue timing, covenants, pricing and subscription demand? What are the risk metrics and variables that will need to be considered?
2. Information gathering and verification — how do we, and our advisors, remain across dynamic climate-related financial risk issues, regulatory expectations and investor preferences, and integrate appropriate due diligence procedures into our information gathering and verification frameworks?
3. Disclosure documents — what disclosures should be made in our disclosure documents — both narrative and quantitative? What is the materiality threshold we should apply? What disclosure of forward-looking stress-testing and scenario analysis against the plausible range of climate futures should be included?
4. Roadshows, investor presentations and market questions — what are the key climate change-related questions that we may expect from potential subscribers?¹²⁸

IV CONTRACTS AND IMPACTS

The governance regimes of green bonds and SLLs provide investors with an increased level of confidence that the funds raised will be used towards environmental or social causes. But as the sustainable finance market matures, investors expect more than a perceived integration of socially responsible approaches to financing. Rather, they are beginning to demand measurable insight into impact performance by way of performance-based mechanisms contracted into the debt instrument's legal documentation.¹²⁹

A Provisions in SLLs

In understanding and developing appropriate performance-based contractual provisions for SLLs, it may be useful to first highlight the historical developments of loan agreements in microfinance impact investments. In contrast with traditional

¹²⁷ Barker (n 121).

¹²⁸ *Ibid.*

¹²⁹ Bass et al (n 6) 13–14.

loan agreements where lenders are focused on protecting expected financial returns and institutional reputation, impact lenders are additionally wary of protecting, and even enhancing expected impact returns. Indeed, it has been commented that reputational stakes are higher for impact investors due to the ever-present risk of greenwashing.¹³⁰ In the past, impact provisions in loan agreements, if addressed at all, stipulated the impact intentions of the contracting parties and the causes to which the loan's proceeds could be put.¹³¹ However, over time, impact investors have become more concerned with the manifestation of those intentions, resulting in the broadening of impact provisions to include covenants related to meaningful impact reporting.¹³² More experimental impact lenders have gone further by incorporating key performance requirements or targets to be reached by borrowers. Such clauses are often connected to financial events, thereby rewarding or sanctioning borrowers according to their performance in reaching specified impact goals.¹³³ This carrot-and-stick mechanism is to some extent already mirrored by SLLs as seen through the requirement of SPTs. However, a current criticism is that SPTs are often drafted in general and vague terms, making it difficult to specifically measure and understand what the borrower intends to accomplish. As such, it is contended that SPTs as well as other impact provisions in SLLs should be tailored to the contracting parties and drafted in very specific language in order to provide greater assurance to lenders that positive social and environmental externalities will be achieved.

1 *Common Contractual Provisions*

Traditional commercial loan agreements contain many provisions that require little modification to accommodate for impact investments.¹³⁴ This should serve as a starting point for those seeking to create an SLL facility, or incorporating an SLL into an existing facility agreement.¹³⁵

Introductory provisions, such as 'definitions' and 'recitals', will need to be adapted to address the impact goals of the loan. These may include additional definitions directed towards SPTs, the external reporting requirements, assessment methodologies, and the purpose of the loan itself. Financial terms of the loan, such as conditions precedent, lending disbursements, and repayment structures, may be revised so that they are contingent upon an impact related event, for example reaching an impact milestone or achieving a certain level of quality and frequency of impact

¹³⁰ Deborah Burand, 'Contracting for Impact: Embedding Social and Environmental Impact Goals into Loan Agreements' (2017) 13(3) *New York University Journal of Law and Business* 775, 784.

¹³¹ *Ibid* 783.

¹³² Keith Allman and Ximena Escobar de Nogales, *A Practical Guide to Investment Process and Social Impact Analysis* (Wiley Finance, 2015) 163.

¹³³ Burand (n 130) 785.

¹³⁴ *Ibid*.

¹³⁵ Allman and Escobar de Nogales (n 132) 163.

reporting.¹³⁶ Similarly, performance commitment provisions, such as representations and warranties, may be altered so that any misrepresentations in an impact report may result in an event of default.

In the typical fashion of SLLs, the margin clause would also be modified in order to connect the borrower's sustainability performance with the margin of the loan facility.¹³⁷ It is contended that contracting parties should strive towards specified SPTs outlining precise milestones to be achieved within certain time periods. How stringently these SPTs are to be measured, and how significant the financial incentives or sanctions are in relation to the borrower's performance, will need to be determined on a case-by-case basis, especially given the varying industries, geographic regions, and financial capabilities of participants in the SLL market. The current market practice is that SLLs will exhibit a one-way pricing structure, meaning that if the borrower satisfies its sustainability criteria, the margin on the loan will be reduced; but, if the borrower fails to meet its targets, there will be no resulting margin penalty.¹³⁸ The size of the reduction varies depending on the loan and the market, but typically within the range of 0.02% to 0.04% on general corporate financing.¹³⁹ More recently, two-way pricing has been introduced to better incentivise performance, meaning that pricing increases are applied if the borrower's performance declines.¹⁴⁰

Covenants that protect the lender's financial standing and returns, such as by regulating the borrower's handling of funds and business operations, may be similarly adjusted to protect the lender's impact returns.¹⁴¹ For instance, a covenant which limits a borrower's discretion in making substantial changes in its business may be utilised by impact lenders for the purpose of preventing the borrower from deviating from its stated sustainable mission.¹⁴² These may specifically include mitigating

¹³⁶ An example of a term sheet provision combining impact reporting with financial reporting requirements:

The [borrower] company will deliver to the [lender]: quarterly (within [number] days), and annual (within [number] days) financial statements; and (ii) quarterly reports summarising the status and results, pursuant to the agreed upon metrics, of the implementations of the [X] project (including, without limitation, a report detailing the number of [X] contracts sold and details of its sale, the number of [X] clients enrolled in the [X] program and the outcomes for all such clients).

¹³⁷ 'Cleaning Up: How Green Loans Are Evolving', *Ashurst* (Web Page, 16 July 2018) <<https://www.ashurst.com/en/news-and-insights/legal-updates/cleaning-up-how-green-loans-are-evolving/>>.

¹³⁸ Linklaters, *Sustainable Finance: The Rise of Green Loans and Sustainability Linked Lending* (Report, 2019) 15 <<https://www.linklaters.com/en/insights/thought-leadership/sustainable-finance/the-rise-of-green-loans-and-sustainability-linked-lending-where-are-we-now>>.

¹³⁹ *Ibid.* However, in some markets, discounts might be higher — as much as 0.1% to 0.2%.

¹⁴⁰ *Ibid.*

¹⁴¹ Burand (n 130) 786.

¹⁴² Allman and Escobar de Nogales (n 132) 167.

departure risks of key individuals in the borrower's central management team,¹⁴³ requiring the borrower to retain and protect intellectual property that is essential to the borrower's environmental or social mission,¹⁴⁴ or even limiting certain expenditures by borrowers that may be deemed inconsistent with the impacts being sought.¹⁴⁵ In protecting from reputational risks, 'do no harm' covenants may also be present, discouraging borrowers from behaviour that may result in harmful impacts. Such covenants will be especially important when impact investment projects involve disadvantaged people.¹⁴⁶ A more general example of this is the International Finance Corporation's 'exclusion list', which prohibits direct or indirect financing to certain organisations that have previously engaged in socially or environmentally harmful corporate behaviour.¹⁴⁷

2 *Impact Performance Provisions*

Impact performance provisions in loan agreements have existed for many years within the microfinance sector, and their experience provides useful guidance on how the SLL's SPTs may be formulated and implemented.¹⁴⁸ According to microfinance

¹⁴³ Ibid 183.

¹⁴⁴ Ibid 176.

¹⁴⁵ An example of a term sheet provision used by an impact investor in limiting significant remuneration package increases to the borrower's senior management team:

The borrower shall not (without the prior written consent of the lender) make any material amendments to senior management remuneration packages, including but not limited to, increases in total compensation of greater than [x] %.

¹⁴⁶ Consultative Group to Assist the Poor ('CGAP'), *Implementing the Client Protection Principles: A Technical Guide for Investors* (World Bank Publications, 2010) 16 <<https://openknowledge.worldbank.org/bitstream/handle/10986/21977/Implementing0t00guide0for0investors.pdf?sequence=1&isAllowed=y>>. In the microfinance sector, investors have implemented provisions that ameliorate the risk of microfinance institutions engaging in predatory behaviour when offering micro-credit products. For example, KfW, the German government's development bank implemented the following provision:

The borrower shall in particular provide its customers with clear and comprehensive information on the main characteristics of the financial services the customers seek. The borrower shall, for example, have thoroughly informed its customers in good time before the signing of a loan agreement on the terms and conditions of the loan in a way easily understandable for the customer. These loan agreements shall further contain such information and shall be drafted in a manner the customers are able to understand. Furthermore, the borrower shall critically review the customer's repayment capacities before signing a loan agreement and shall refrain from any form of unfair or even harmful debt collection practices.

¹⁴⁷ See, eg, 'IFC Exclusion List', *International Finance Corporation* (Web Page, 2007) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/ifcexclusionlist#2007>.

¹⁴⁸ See, eg, CGAP, *Microfinance Poverty Assessment Tool* (World Bank Publications, September 2003) 1 <<https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Microfinance-Poverty-Assessment-Tool-Sep-2003.pdf>>.

commentators, performance-based provisions are marked by two attributes: first, they are ‘as clear and specific as possible about the expected results and how they will be measured’.¹⁴⁹ Second, they incentivise ‘good performance [by borrowers] by defining sanctions or benefits that are tied to the achievement of the expected results’.¹⁵⁰ As a starting point, the following basic three-step approach¹⁵¹ may be taken for contracting parties in SLLs: identification of appropriate SPTs; establishing performance level expectations for these SPTs; and aligning incentives by creating compliance rewards and noncompliance sanctions that are linked to SPTs.

In negotiating these steps, lenders and borrowers should remember that the agreement will only be as effective as the measurement and monitoring mechanisms of the borrower’s performance that are in place. In the likely event that the borrower bears the cost in impact measuring and reporting, contracting parties should be cognisant of how exacting and onerous these terms may be when negotiating them.¹⁵²

Moreover, selecting or designing appropriate SPTs will require a tailored mindset. Borrowers such as start-ups, who have fewer resources and limited capacity to acquire the data necessary to measure their performance, would not be held to the same standard as a mature, larger corporation with well-established reporting systems. Similarly, loans or loan facilities of a shorter duration will boast different SPTs to those that are used in longer term financing.¹⁵³ The context of the project is also a critical consideration as different sectors will require different measurements, particularly in the case of large corporations, which are engaged in various

¹⁴⁹ CGAP, *Performance-Based Agreements: Incorporating Performance-Based Elements into Standard Loan and Grant Agreements* (World Bank Publications, May 2010) 1 <<https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Performance-Based-Agreements-Incorporating-Performance-Based-Elements-into-Standard-Loan-and-Grant-Agreements-May-2010.pdf>>.

¹⁵⁰ *Ibid.*

¹⁵¹ Burand (n 132) 791.

¹⁵² See, eg, Linklaters (n 138) 16. An example of a term sheet provision for reporting on impact goals for self-reporting by the borrower can be found at Impact Terms, ‘Measuring Impact’ (Web Page, 2016) <<https://www.impactterms.org/measuring-impact/>>:

The Company and the Investors have defined a set of metrics to assess the Company’s performance in [describe impact goals], which metrics are described in [Exhibit X]. [During the term of the Loan], the Company shall deliver to the Investors, within X days following the end of each [reporting period], a report setting forth [the metrics] OR [the Company’s progress toward each impact milestone] described in Exhibit X (‘Impact Report’). [During the term of the Loan], each Impact Report described in the preceding paragraph shall be audited by a third-party organization with relevant expertise, [selected by the Investors and reasonably acceptable to the Company] OR [agreed upon by the Investors and the Company]. Costs of the audit shall be borne by the Company. If mutually agreed, the findings of the audit may be publicized by the Investors and the Company.

¹⁵³ Burand (n 130) 791.

industries.¹⁵⁴ The spectrum of available SPTs is vast and contracting parties will need to consider using standardised or customised metrics,¹⁵⁵ and whether the SPTs are to focus on impact outputs or impact outcomes.¹⁵⁶

In establishing performance level expectations, contracting parties should not be overzealous, as undue pressure on a borrower may lead to a deterioration in impact results.¹⁵⁷ Borrowers should avoid agreeing to performance hurdles that easily trigger events of default or mandatory prepayment requirements as poor financial viability of the borrower can result in enduring reputational damage.¹⁵⁸ Similarly, lenders will want to avoid a reputation of enforcing drastic consequences over impact targets as this may damage their relations with borrowers, prospective borrowers, and potential co-lenders.¹⁵⁹ To balance these interests, lenders should set achievable targets so that only events of serious underperformance by borrowers would trigger penalties or zero financial benefits. Impact performance provisions can also be utilised throughout the life of the loan agreement, from ‘cradle to grave’.¹⁶⁰ Indeed, it has been reported that investors commonly use impact data in their pre-screening or due diligence stage, as well as in their decision to exit investments.¹⁶¹

Financial incentives or sanctions could be connected to the timing and amount of loan disbursements to the borrower,¹⁶² the interest rate applied to disbursed

¹⁵⁴ Allman and Escobar de Nogales (n 132) 208: ‘One company’s social mission, even in the same industry, might justify different metrics than another’.

¹⁵⁵ It has been reported that most impact investors use a standard impact measurement system, with IRIS+ being the most popular: Dean Hand et al, *2020 Annual Impact Investor Survey* (Report, Global Impact Investing Network, 2020) 48.

¹⁵⁶ A greater discussion on impact outputs, impact outcomes, and the impact value chain can be found in Part V of this article. It has been reported by impact investors that current impact measuring systems are still insufficient in measuring outcomes: Hand et al (n 155) 8.

¹⁵⁷ Mayada El-Zoghbi, Jasmina Glisovic-Mezieres and Alexia Latortue, *Performance-Based Agreements: Incorporating Performance-Based Elements into Standard Loan and Grant Agreements: A Technical Guide* (Technical Guide, 2010) 5–6.

¹⁵⁸ Burand (n 130) 802.

¹⁵⁹ Ibid. Many lenders post-Global Financial Crisis in 2008 refrained from accelerating loan payments against their borrowers, instead focusing on the frequency of financial reporting and other actions that enhanced informational flows: International Association of Microfinance Investors, *Charting the Course: Best Practices and Tools for Voluntary Debt Restructurings in Microfinance* (Report, 2011) 6.

¹⁶⁰ Burand (n 130) 813.

¹⁶¹ Bass et al (n 6) 13–14: In a survey of numerous impact investors, it was found that 77% and 88% of respondents used impact investment data in the due diligence and investment screening stage of the investment respectively, and 36% and 21% in the exit and post-exit stage of the investment respectively.

¹⁶² A term sheet’s ‘use of proceeds’ provision is capable of reflecting the impact goals of the transaction. Moreover, an event of default may be triggered by social performance failures by the borrower.

amounts,¹⁶³ variable repayment schedules of disbursed amounts, and mandatory prepayment requirements.¹⁶⁴ To date, the market practice for SLLs is that the pricing is set by reference to the borrower's overall Environmental, Social, and Governance ('ESG') rating. The rating is usually expressed by a numerical range, such as zero to 100, and measures a variety of factors, depending on the rating agency.¹⁶⁵ If a transaction uses specific ESG criteria rather than an overall rating, different discounts may be applied for each specific target that is met. Alternatively, contracting parties may agree to an all or nothing approach where all targets must be met to trigger pricing changes.¹⁶⁶

There are two competing challenges with the proposition of protecting impact returns. On one hand, financial success may be inseparable from impact success and there should not be a strict delineation of financial returns versus social and environmental returns.¹⁶⁷ Conversely, lenders and investors alike are wary of the greenwashing risk and do not want to rely solely on superficial integrations of sustainable impact goals in business models.¹⁶⁸ Rather, they want to see actual results which may be achieved through performance-based impact provisions. Contracting parties must balance these two concerns based on the circumstances before them. Performance-based impact provisions should not be unduly onerous on the borrower's investment capacity, but they must also provide lenders with an acceptable level of certainty that the raised funds are resulting in positive social or environmental impacts. The mere presence of these provisions also performs a valuable screening function, in that borrowers and lenders can quickly identify those parties that are not sufficiently mission-aligned and thereby inappropriate for sustainable financing.¹⁶⁹

¹⁶³ An example provision connecting increased interest rate to poor social performance can be found at Impact Terms, 'Impact Terms Guide' (Web Page, 2021) <https://www.impactterms.org/impact-terms-guide/#iii_Interest_Rate_Decrease_for_Debt_Transactions>:

If during the term of the Loan the Company fails to cure the violation of [specify penalty trigger] within X days, the interest rate shall be increased by [x] percent, provided that the interest rate shall not be increased above the Initial Rate plus [x] percent. Impact Terms.

¹⁶⁴ *Ibid.* An example of a term sheet's provision of a mandatory prepayment requirement that is connected to the borrower's failure in achieving its impact objectives:

In the event that as of [date], the borrower does not have a minimum of AUD[x] of the loan invested to support the [project], at the option of the lender, exercised in its sole discretion, the difference between the loan outstanding and the amount of the loan invested to support the [project], shall be due and payable as a mandatory prepayment on the loan.

¹⁶⁵ Linklaters (n 138) 17. See, eg, Sustainalytics, *The ESG Risk Ratings Methodology* (Report, 2021) 4 <https://connect.sustainalytics.com/hubfs/INV/Methodology/Sustainalytics_ESG%20Ratings_Methodology%20Abstract.pdf>, which measures the magnitude of a company's unmanaged ESG risks.

¹⁶⁶ Linklaters (n 138) 17.

¹⁶⁷ Burand (n 130) 794.

¹⁶⁸ *Ibid* 795.

¹⁶⁹ *Ibid* 803.

B Provisions in Green Bonds

A characteristic feature of the modern debt market is the differing standards of documentary protections between loans and bonds, despite the fact that they serve more or less the same purpose — the investor or lender provides funds, and the borrower or issuer pays them back with interest.¹⁷⁰ With loans, there is generally one main document — the loan agreement, which outlines the entire transaction and the protections and expectations for both the borrower and the lender. However, bonds are fractured into several documents: the subscription agreement; the bond term sheet which sets out financial terms, covenants, and events of default; a paying agency agreement; a trust deed; and a bond indenture sheet. Despite the additional documents in bonds, bond lenders are afforded, or perhaps require, fewer protections than bank lenders do.¹⁷¹

In the context of impact investing, this difference in protections is an important distinction to make, given that investors, regardless of the debt instrument they pursue, are conscious of the actual environmental or social change that their funds are creating. As demonstrated above, there are many types of performance-based provisions that can be implemented into an SLL agreement. However, such specificity or direction is hardly found in the GB Principles. Furthermore, from analysing various green bond frameworks, prospectuses, and terms and conditions issued,¹⁷² the issuance of green bonds has been observed to mostly mirror conventional bonds in the sense that there are no or very few modified provisions to accommodate the fact that they are thematically green. After stipulating that the funds are to be invested into a specified green project, the green thematic stops there. The price and interest rates of the bond tranches, and the instalments of this interest to be paid are not connected to the issuer's sustainable impact performance. The events of default clauses and covenant clauses are typically confined to details of payment performance and are silent on the issuer's obligations of reporting and external review requirements or achieving impact targets. Indeed, a major legal challenge facing green bonds today is that they rarely trigger an event of default if the use of proceeds is not complied with.¹⁷³ As long as the interest and principal are paid, the bondholder often has no recourse.

Bond issuers can very easily advertise to the public and external verifiers that the instrument complies with the four components of the GB Principles, but the generality

¹⁷⁰ Philip R Wood, 'Bondholders and Banks: Why the Difference in Protections' (2011) 6(2) *Capital Markets Law Journal* 188, 189.

¹⁷¹ *Ibid.*

¹⁷² See, eg, Apple, *Green Bond Prospectus* (2019); Acorn Holdings Limited, *Green Bond Framework* (2019); Green Storm, *Securitised Green Bond Prospectus* (2019). See also 'Labelled Green Bonds Data: Latest 3 Months', *Climate Bonds Initiative* (Web Page, 2021) <<https://www.climatebonds.net/cbi/pub/data/bonds>>; 'Green, Social and Sustainability Bonds Database', *International Capital Market Association* (Web Page, 2021) <<https://www.icmagroup.org/green-social-and-sustainability-bonds/green-social-and-sustainability-bonds-database>>.

¹⁷³ Doran and Tanner (n 10) 23.

of the bond's actual terms and conditions of issuance may reveal a completely different picture. For example, in 2015 the East Bay Municipal Utility District issued USD74 million tranches labelled as green bonds.¹⁷⁴ The official statements provided very clear descriptions of the criteria used in order to ensure that the proposed green projects complied with the GB Principles. However, a further document went on to say:

The terms 'Green Bonds' and 'green project' are *neither defined in nor related to provisions* in the Indenture. The use of such terms herein is for identification purposes only and is not intended to provide or imply that an owner of the Series 2015B Bonds is entitled to any additional security other than as provided in the Indenture. The purpose of labeling the Series [2015B] Bonds as 'Green Bonds' is, as noted, to allow owners of the Series 2015B Bonds to invest directly in bonds that will finance environmentally beneficial projects. *The District assumes no obligation to ensure that these projects comply with the principles of green projects as such principles may hereafter evolve.*¹⁷⁵

Although the bond was advertised as compliant within a major regulatory framework, the issuer's ability to carve out any reference to it in the bond's term sheet is a concern for environmental non-performance.¹⁷⁶ There is generally little recourse to this.¹⁷⁷ Disgruntled investors will usually act with their feet, selling their investment in the bond on the secondary market. Alternatively, they may group together to negotiate with the issuer to provide greater reporting on impact performance, although this is rare due to practical difficulties.¹⁷⁸ While such actions may be effective in causing reputational damage to the issuer, they are not particularly helpful in aligning financial

¹⁷⁴ Phillip Ludvigsen, 'Advanced Topics in Green Bonds: Risks', *Environmental Finance* (Web Page, 24 November 2015) <<https://www.environmental-finance.com/content/analysis/advanced-topics-in-green-bonds-risks.html>>.

¹⁷⁵ East Bay Municipal Utility District, *Water System Revenue Bonds, Series 2015B Green Bonds and Series 2015C* (Report, 2015) 7 (emphasis added).

¹⁷⁶ Wang (n 35) 485. See also Antonio Vives, 'What's the True Impact of Green Bonds?', *GreenBiz* (Web Page, 11 May 2018) <<https://www.greenbiz.com/article/whats-true-impact-green-bonds>>: Gaps in the bond framework or prospectus greatly inhibit the bond's ability to be green.

These documents state how the [bond] issue intends to comply with the GBP, but the vast majority include generalities, the minimum necessary to comply. The priority seems to be to maintain operational flexibility, to avoid having to disclose more information than necessary, to avoid potential reputational and, especially, to avoid legal risks. Many just state the general types of projects or activities to be undertaken without specifying details. With very few exceptions, they do not state how the projects or activities will contribute to the greening of the environment and society.

¹⁷⁷ *Ibid*; Doran and Tanner (n 10) 23.

¹⁷⁸ 'It is usually impossible to have informal discussions with a multitude of anonymous bondholders. If changes are required, then bondholder meetings have to be called and usually something must be offered to the bondholders as a sweetener to persuade them to vote, even if there are voting clauses in the bonds or by statute': Wood (n 170) 194.

and social interests of the transaction *ex ante*.¹⁷⁹ Impact investors should not be left to rely solely on a perceived integration of impact goals into the business model, but rather on performance-based provisions stipulated within the bond documents.

There exist several possible explanations as to why we see such a stark difference in bond provisions compared with loan provisions, despite the similarity in their function. One reason may be due to the stubbornness and indelibility of market practice.¹⁸⁰ Dating back to the late 1960s when the ‘eurobond’ market was still in its infancy, most issuers were blue-chip creditors who, as investors, were not willing to purchase bonds of weaker issuers. These issuers were able to resist over-exacting covenants and events of default, which hence informed the market norm.¹⁸¹ Another explanation is that bond negotiation is not as tailored or personal compared to a loan instrument. The ‘real’ lender, being the investors in the bond, are not at the negotiating table when the terms of the bond are negotiated. Rather, the terms of the documents are being negotiated by the bank, who do not intend on holding the bonds but rather selling them on to investors on issue. Following this vein, the bank’s primary interest is working towards minimum protections necessary to sell the bond. There is no reason for them to go further by, for example, arranging impact performance-based provisions as such a process can be temporally and financially burdensome. Perhaps the most cynical view of all is that investors simply do not have the time or resources to critically analyse the detailed terms of each bond, and therefore, do not care. Bondholders do not have the resources to initiate and process a bond restructuring by way of a bondholder meeting and would rather exit by a sale of the bonds. Given the oversubscription of green bonds in the market, it is very easy for investors to ‘vote with their feet’.

It is likely there is a level of truth to all these reasons provided. That being said, it is difficult to argue that bond market stubbornness alone explains the prevailing conservative practices. Indeed, we have seen substantial changes in the bond market by way of securitisation bonds, derivatives, and various thematic bonds.¹⁸² Moreover, although investors in green bonds are not seated at the negotiation table, it would be dismissive to believe that the arranging banks do not have a significant interest in the investors that they are selling to. Certain bond investors *do* have an interest in the environmental or social performance of their funds being used, despite the fact that they may not be willing to porously scrutinise various bond term sheets. So, while investors qua lenders may be either satisfied or forced to accept the earmarking process of green bonds as the primary means of corporate monitoring, this practice only serves to be detrimental to the legitimacy of the green bond market. It is necessary that both the banks representing prospective investors, as well as the investors themselves, negotiate for performance-based impact provisions in bond documentation to ensure stronger accountability of issuing entities in achieving positive environmental and social returns.

¹⁷⁹ Burand (n 130) 795.

¹⁸⁰ Wood (n 170) 192–3.

¹⁸¹ *Ibid.*

¹⁸² *Ibid* 193.

V THE CONCEPT OF ‘IMPACT’

As the sustainable finance market grows, so too does the demand for insight into impact performance.¹⁸³ Impact investors and borrowers alike have recognised that while there exist costs with impact measurement and management, the data collected is capable of generating business value and financial benefits.¹⁸⁴ Greater understanding in efficient uses of proceeds, assessing risk factors, revising impact goals, and refining business strategy are all reported benefits stemming from increased impact measurement and management.¹⁸⁵ However, simply repeating the mantra of measuring impact is not at all meaningful. If we are to contend that impact provisions should have a place in SLLs and green bonds, then it is important to dissect the concept of ‘impact’ and the measurement of social and environmental performance. Investors have cited a lack of transparency on impact performance, inability to compare impact results with market performance, difficulty in collecting quality data, and aggregating, analysing or interpreting data, as key challenges in measuring meaningful impact data.¹⁸⁶

The ‘impact value chain’ has been acknowledged as a starting conceptual framework in analysing social and environmental impact.¹⁸⁷ It provides that the ‘outputs’ resulting from impact investing activities achieve certain ‘outcomes’ that then enable the assessment of ‘impact’ as the ‘net effect or change in outcomes attributable to activities funded by an investment among individuals, communities, or in a defined geographical area’.¹⁸⁸ Some may believe that measuring these immediate outputs is sufficient, whereas others believe measuring outcomes is more rigorous. By way of example, a venture philanthropy fund, Acumen Fund, invested in companies for the purpose of improving the health and environment of target areas. If one of these companies manufactured anti-malaria bed nets, Acumen would count the number of these nets manufactured and distributed. Similarly, for an enterprise that built toilets and shower facilities in lower socio-economic districts, Acumen would track the number of times these facilities were used.¹⁸⁹ Through consultation with experts

¹⁸³ Bass et al (n 6) 14.

¹⁸⁴ Ibid; Laura Budzyna et al, *Measuring Social Impact in Microfinance: New Insights from Client Monitoring Databases* (Report, EA Consultants and Triple Jump, 12 March 2014).

¹⁸⁵ Bass et al (n 6) 14.

¹⁸⁶ Ibid.

¹⁸⁷ Lisa Hehenberger, Anna-Marie Harling and Peter Scholten, *A Practical Guide to Measuring and Managing Impact* (Report, European Venture Philanthropy Association, April 2013).

¹⁸⁸ Neil Reeder et al, ‘Measuring Impact in Impact Investing: An Analysis of the Predominant Strength That Is also Its Greatest Weakness’ (2015) 5(3) *Journal of Sustainable Finance and Investment* 136, 139.

¹⁸⁹ Alnoor Ebrahim, ‘Let’s Be Realistic about Measuring Impact’, *Harvard Business Review* (Web Page, 2013) <<https://hbr.org/2013/03/lets-be-realistic-about-measur.html?>>. This is also in alignment with the ‘theory of change’, which is a popular methodology used by impact investors. This theory can be defined as identifying and

and literature review, Acumen believes that there is a sufficient link between a specific output and desired outcome. In this instance, they believe that the number of anti-malaria bed nets distributed will lead to a reduction in malaria. This can be distinguished from measuring actual short or long term ‘outcomes’, such as the rate of malaria contraction, in which the process of acquiring such data can be complicated, expensive, and impractical for new enterprises.¹⁹⁰

This is not to say outcome measures do not have a key role in assessing impact. However, progress on readily accepted, standardised outcome measures is often sector-specific. For example, the Investor Group on Climate Change’s work in examining greenhouse gas emissions has been made possible through strong government and commercial resources.¹⁹¹ For more nascent sectors, however, there remain issues with the lack of consensus on performance criteria, resulting in a chorus of commentators positing for a slow and careful approach, along with public policy action, before standardised outcome measures can be adopted.¹⁹² One of the most difficult tasks in accurately and rigorously measuring outcomes is understanding what factors are responsible for these outcomes taking place. Common obstacles in attribution include multiple causes of effects, lack of longitudinal studies, changing efficacy over time, and possibilities of displacement in which benefits to the target group are offset by losses to others.¹⁹³ For instance, an impact investor who provided funding to farmers in Kenya to purchase dairy cattle sought to measure the impact it would have on their livelihood. While in the short-term farmers had access to capital to finance their business immediately, whether these farmers would ultimately thrive later on

achieving linkages or ‘missing middles’ between what a program does and how it leads to desired outcomes: Edward T Jackson, ‘Interrogating the Theory of Change: Evaluating Impact Investing Where It Matters Most’ (2013) 3(2) *Journal of Sustainable Finance and Investment* 95, 100.

¹⁹⁰ Ebrahim (n 189). See also Reeder (n 188) 142–3. ‘Available resources can be tight’, meaning rigorous measurement is not always possible: John Gargani, ‘Three Market Forces That Drive the Quality of Impact Measurement’, *Social Value International* (Web Page, 2015) <<https://socialvalueint.org/three-market-forces-that-drive-the-quality-of-impact-measurement/>>.

¹⁹¹ Reeder et al (n 188) 139; Investor Group on Climate Change, *Transparency in Transition: A Guide to Investor Disclosure on Climate Change* (Report, April 2017) 34.

¹⁹² Lack of consensus on performance criteria has been reported as a major challenge to assessing impact, and that a slower and more careful approach is necessary to permit the necessary knowledge mobilisation: Alex Nicholls and Cathy Pharoah, *The Landscape of Social Investment: A Holistic Topology of Opportunities and Challenges* (Report, March 2008); Marguerite Mendell and Erica Barbosa, ‘Impact Investing: A Preliminary Analysis of Emergent Primary and Secondary Exchange Platforms’ (2013) 3(2) *Journal of Sustainable Finance and Investment* 111; David Wood, Ben Thornley and Katie Grace, ‘Institutional Impact Investing: Practice and Policy’ (2013) 3(2) *Journal of Sustainable Finance and Investment* 75.

¹⁹³ Budzyna et al (n 184); Hehenberger, Harling and Scholten (n 187); Frank Vanclay, ‘International Principles of Social Impact Assessment’ (2003) 21(1) *Impact Assessment and Project Appraisal* 5, 7.

depended on volatile and uncontrollable variables such as weather conditions, crime rates, and the level of government corruption in their area.¹⁹⁴

Another important hurdle is the nature of the outcomes the impact investor should be concerned with. While these outcomes will generally be connected to the objectives of the impact investor, as well as the relevant outputs, there is debate over whether short-term, long-term, individual-centric or society-based outcomes are the most appropriate.¹⁹⁵ Root Capital's investment in the agricultural sector in developing countries assessed the number of producers reached, their revenue, and the number of sustainable hectares under management.¹⁹⁶ In comparison, common metrics in the Canadian impact investor sphere of sustainable agriculture include the volume of organic produce; area of land farmed sustainably; reductions in the use of fertiliser; and availability of farmer's markets.¹⁹⁷ General market practice has demonstrated that the easiest outcomes to measure are the most preferable: 'where outcome metrics are resource-intensive or not essential to a venture's success, investors expressed a preference to work with output data that is easier to obtain'.¹⁹⁸ Market practice has also demonstrated that standardised impact frameworks or systems, normally more than one, are used in impact management and measurement by investors. The most commonly used impact frameworks are the SDG and Impact Reporting and Investment Standards ('IRIS') metrics.¹⁹⁹

The difficulty in deciding which metrics to measure is in part due to the varying opinions of relevant stakeholders. There are many parties that may have influence over this decision, including the impact investors themselves, the beneficiaries, the parties supplying the funds, and third-party technical experts.²⁰⁰ The impact investor and technical experts typically play fundamental roles in formulating impact measurement strategies due to their expertise in which metric is best aligned to the impact investor's goals and can be readily tracked.²⁰¹ Investing firms should ensure that there is close collaboration with the professionals dedicated to measuring impact due to raised concerns of stark knowledge disconnects between

¹⁹⁴ Reeder et al (n 188) 147–8.

¹⁹⁵ Ibid 141–2; Ebrahim (n 189).

¹⁹⁶ Reeder et al (n 188) 141–2.

¹⁹⁷ Hilary Best and Karim Harji, *Social Impact Measurement Use among Canadian Impact Investors* (Report, February 2013) 5.

¹⁹⁸ Ibid 9.

¹⁹⁹ Bass et al (n 6) 37; Natasha Watts and Ivan R Scales, 'Social Impact Investing, Agriculture, and the Financialisation of Development: Insights from Sub-Saharan Africa' (2020) 130(1) *World Development* 1, 6.

²⁰⁰ Reeder et al (n 188) 142–3.

²⁰¹ Emma Disley et al, *Lessons Learned from the Planning and Early Implementation of the Social Impact Bond at HMP Peterborough* (Report, 2011); Peter Shergold, Cheryl Kernot and Les Hems, *Report on the New South Wales Social Impact Bond Pilot* (Report, Centre for Social Impact, February 2011).

the two sectors in market practice.²⁰² However, this collaborative approach has been criticised as being overly confined, resulting in poorly informed impact measuring methodologies, and consequently a bias towards those metrics most convenient to the impact investor.²⁰³ In response, consultations with wider stakeholders such as the ultimate beneficiaries of impact investments may be a helpful redress in this imbalance of assessment.²⁰⁴

These experiences demonstrate that impact measurement is still a nascent domain, and formulation of appropriate assessment methodology is a far from straightforward process. In the long term, frontline organisations and contracting parties will need to research and collaborate on their practices amongst the whole impact investing marketplace. The Global Impact Investment Network ('GIIN') recently released IRIS+, a system that provides users with comparable impact data contributed from hundreds of impact investors in various industries.²⁰⁵ Key features of IRIS+ include core metrics sets backed by evidence and best practices across the industry, thematic taxonomies, and interoperability with third party data platforms that use IRIS metrics. While this is a significant step in impact measurement, IRIS+ was launched only in 2019, and will require continued contribution before rigorous market practices are realised. In the interim, investors and borrowers will need to identify when it is best to measure outputs as opposed to outcomes, especially when causality remains poorly understood, and engage in robust collaboration between impact beneficiaries, investment managers and technical experts dedicated to the assessment of impact.²⁰⁶

VI CONCLUSION

The continued growth of the sustainable debt market relies heavily on the regulatory and contractual measures available in combatting the risk of greenwashing and providing systemic legitimacy in green and social investments. Borrowers and issuers require sustained market demand for their green bonds and SLLs, while investors and lenders expect not only financial returns, but also measurable, positive social and environmental returns. To date, the governance structures in place, such as the GB Principles, CBS, and SLL Principles, have provided the much needed regulation to these markets by implementing a level of transparency and standardisation that has not been so burdensome as to inhibit its growth. However, almost in lockstep,

²⁰² Budzyna et al (n 184) 8.

²⁰³ Melinda T Tuan, *Measuring and/or Estimating Social Value Creation: Insights into Eight Integrated Cost Approaches* (Report, Bill and Melinda Gates Foundation: Impact Planning and Improvement, 15 December 2008); Jim Clifford, Kate Markey and Natasha Maplani, *Measuring Social Impact in Social Enterprise: The State of Thought and Practice in the UK* (Report, 27 February 2013); Reeder et al (n 188) 148.

²⁰⁴ Reeder et al (n 188) 151.

²⁰⁵ 'IRIS+ System: About', *Global Impact Investment Network* (Web Page, 2021) <<https://iris.thegiin.org/about/>>.

²⁰⁶ Ebrahim (n 189).

as the market continues to develop, so too does the expectation that the raised funds are resulting in measurable impacts. While regulation will be continually tweaked and modified to reflect this sentiment, contracting parties also have a role to play in their negotiations over performance-based clauses. By extension, a robust and rigorous understanding in measuring ‘impact’ is required if these clauses are to have their intended effect.

Given the infancy of the SLL market, it is important to allow the market to grow by avoiding onerous and expensive regulatory requirements. However, future iterations of the SLL Principles could include more comprehensive detail around SPTs and reporting. Compared to the GB Principles, there is considerable information on what may be eligible green projects for green bond issuance. In a similar manner, the SLL Principles could provide further guidance on what are appropriate SPTs, fostering a more informed understanding of how an SLL borrower could improve their sustainability profile. Relatedly, the recommendation of reporting information relevant to SPTs, such as assessment methodologies and impact reporting, could be implemented effectively through a resource centre akin to the one provided in the GB Principles. Templates demonstrating to market-participants how to structure SPTs, measure compliance against SPTs, and the content involved in reporting for both internal and external reviews would promote consistency amongst the breadth of borrowers hailing from various industries and geographies and of different financial sizes.

An innovative proposition for green bonds would be to incorporate performance-based provisions into green bond documentation, similar to specified SPTs in their SLL counterparts. While there are notable differences in required documentation and market norms between these two debt instruments, there is no reason why green bondholders should not be afforded a greater level of certainty in the advertised impact of their investments. The onus lies on the underwriters as well as the investors they represent to negotiate for terms in the bond agreement that stipulate specific environmental and social targets, along with more stringent impact reporting requirements. These could be tied to financial incentives of a similar nature to SLLs by rewarding issuers with lower interest rates paid out to bondholders. ICMA’s Resource Centre already provides a wealth of information regarding suitable impact measuring metrics and impact reporting frameworks that would serve as, at the very least, a baseline for such negotiations.

While such contractual provisions would be one way of ameliorating the risk of greenwashing, the stubbornness of the green bond market may require another avenue in the form of increased regulation. The difficulty with the current regulatory regimes as discussed above is that they are voluntary and do not provide an official definition of what is ‘green’. A conclusive definition by a federal regulator, such as ASIC would be helpful *ex ante* in reassuring investors that issuers are committed to a credible, green investment, and that the funds raised will be used appropriately. ASIC, the Reserve Bank of Australia, and the recently created Australian Sustainable Finance Initiative, which comprises of leaders from Australian and international financial institutions, regulators, think tanks, and regulators, should collaborate to create a pioneering official definition of green bonds that is clear and reasonable to comply

with.²⁰⁷ A mandatory verification and certification step by either the government or a government-endorsed third party would also vest greater legitimacy in the invested green bond. In a similar vein, it would also be beneficial for Australian regulators to stipulate due diligence and reporting standards for impact reporting and financial reporting. These stipulated reports would discuss the allocation and progress of funds being used, and the outcomes and performance of invested environmental and social projects. Such frequent and comprehensive reporting would not only achieve greater transparency of the green bond proceeds, but also provide investors with sufficient information to raise complaints against the issuing corporation to a federal regulator, such as ASIC, in instances of suspected greenwashing.

Governmental involvement has already been seen in China and India, which have been identified as very active participants in the green bond market. Between 2015–17, several Chinese government institutions produced green bond issuance guidelines and opinions, advocating for quarterly financial and impact reporting, as well as external review.²⁰⁸ At around the same time, the Securities and Exchange Board of India ('SEBI') released their official green bond requirements, providing a categorical list of eligible green bond project types, as well as discretion by the SEBI to approve other categories on a case-by-case basis. Disclosure requirements were also a critical component, with issuers needing to provide regular statements and reports on the environmental objectives of the green bond project, tracking of raised funds, and qualitative and quantitative performance measures on its achieved social and environmental impact.²⁰⁹ As such, it is contended that Australian regulators should take a more proactive approach in regulating the green bond market by providing

²⁰⁷ See 'Australian Sustainable Finance Roadmap', *Australian Sustainable Finance Initiative* (Web Page, 2020) <<https://www.sustainablefinance.org.au/>>; James Fernyhough, 'Big Four Banks Form Climate Investment Initiative', *Australian Financial Review* (online, 27 May 2019) <<https://www.afr.com/companies/financial-services/big-four-banks-form-climate-investment-initiative-20190324-p5172j>>. An interesting analogy can be seen with the United States Food and Drug Administration ('FDA') deciding upon a definition for 'organic' food labelling. Here, the FDA worked in conjunction with the Department of Agriculture ('USDA') in conducting studies and requesting comments from industry participants. This was done to create a criterion for a suitable 'organic' definition that was well informed and cost effective. To be considered 'organic', the food must meet several requirements in its production, as well as mandatory certification by the USDA National Organic Program. It is illegal to label products as organic with the USDA organic seal without certification: Trompeter (n 39) 7.

²⁰⁸ See Weihui Dai, Sean Kidney and Beate Sonerud, *Roadmap for China: Green Bond Guidelines for the Next Stage of Market Growth* (Report, Climate Bonds Initiative, 2016); Hao Zhang, *Regulating Green Bonds in the People's Republic of China: Definitional Divergence and Implications for Policy Making* (Working Paper No 1072, Asian Development Bank Institute, January 2020).

²⁰⁹ Securities and Exchange Board of India, *Disclosure Requirements for Issuance and Listing Green Bonds* (Memorandum, 2015) 7 <https://www.sebi.gov.in/sebi_data/meetingfiles/1453349548574-a.pdf>.

official definitions of what should be considered green, and requiring certification accreditation and more frequent financial and impact reporting.

The understanding of ‘impact’ and the corresponding requirements for measuring and reporting impact is an area that will require many years of refinement and collaboration. Methodologies, templates, and general practices will need to be provided by impact investors from all types of industries, geographies, and financial sizes. The creation of IRIS+, along with other knowledge banks and resource centres, will hopefully facilitate these developments over the long term. However, for now, there are several matters that participants in SLLs and green bonds should consider that may aid in the formulation of rigorous and appropriate impact assessment. Depending on the impact investor’s industry and financial capabilities, measuring ‘outputs’ instead of ‘outcomes’ may be more appropriate. Indeed, outcomes have been identified as difficult to accurately and rigorously measure as they may not only require monitoring over many years, but can be affected by variables out of control by the investor. However, outcomes do provide meaningful data, and are perhaps the best indication of whether the end goal of the investment has been realised. It is also critical that there is strong coordination between those responsible for formulating the impact assessment methodology. Not only will this require a decision on who should be involved to begin with, but also precision about how those that are involved are working together throughout the entirety of the investment. Indeed, a reported issue in the industry is a knowledge disconnect between investment managers and professionals dedicated to the assessment of impact, resulting in the two sides often working separately in their day-to-day operations.

This article has identified some of the difficulties in ensuring measurable impact within the sustainable debt market, specifically in relation to SLLs and green bonds. Moreover, it has analysed the primary regulatory regimes governing these two debt instruments as well as emerging contractual mechanisms in the impact investing domain, both of which attempt to ameliorate the risk of greenwashing and provide a level of systemic legitimacy across the market. Contracting parties need to place greater emphasis upon the inclusion of impact provisions into the documentation of debt agreements, in conjunction with a rigorous and collaborative consideration of what ‘impact’ they are attempting to measure and achieve. It is conceded that this refined regulation will likely discourage certain market participants of sustainable finance from issuing bonds in the short term due to the additional costs incurred. However, it is a necessary step in tempering and restraining corporations from misleading the public and investors by taking advantage of their intentions to achieve positive social and environmental returns. By promoting the goals of transparency and legal accountability, market participants can trust in the legitimacy of the sustainable debt instruments, and more importantly, ensure the survival of the sustainable finance revolution.

ABANDONING THE *QUISTCLOSE* TRUST IN INSOLVENCY

ABSTRACT

The majority of academic commentary on the *Quistclose* trust has focused on its juridical nature in an attempt to understand it through orthodox trust principles. This article focuses instead on the less discussed normative and practical aspects of the *Quistclose* trust. Through a consideration of the leading cases giving rise to *Quistclose* relief, it is shown that the trust cannot be justified as a device to give effect to party intention. Instead, in light of commercial realities, it is better understood as a proprietary remedy for lenders. Since the effect of *Quistclose* relief is to allow the lender to bypass *pari passu* distribution in insolvency, there must be some normative justification for granting proprietary relief to lenders in these scenarios rather than restricting them to their remedy in debt. This article argues that there is none, and the result of maintaining the *Quistclose* trust is to unjustly distinguish between equally deserving creditors of the insolvent company.

I INTRODUCTION

Since the House of Lords' decision in *Barclays Bank Ltd v Quistclose Investments Ltd* ('*Quistclose Investments*'),¹ courts have held that when A advances money, on loan or otherwise, to B for a specific purpose, and that purpose fails, the money is held on trust by B for A.² The decision has generated significant debate,

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¹ [1970] AC 567 ('*Quistclose Investments*').

² *Quistclose Investments* (n 1) was not the first case to grant this result: see, eg, *Toovey v Milne* (1819) 2 B & Ald 683; 106 ER 514; *Edwards v Glyn* (1859) 2 El & El 29; 121 ER 12; *Gilbert v Gonard* (1885) 54 LJ Ch 439; *Re Rogers* (1891) 8 Morr 243; *Re Drucker* [1920] 2 KB 237; *Re Watson*; *Ex parte Schipper* (1912) 107 LT 783; *Re Hooley* [1915] 84 LJ KB 181; *Re Nanwa Gold Mines Ltd* [1955] 1 WLR 1080 ('*Re Nanwa*'). *Quistclose Investments* (n 1) was, however, the first instance of the House of Lords' approval of these principles and has been described as the most authoritative: see Justice LJ Priestley, 'The Romalpa Clause and the Quistclose Trust' in PD Finn (ed), *Equity and Commercial Relationships* (LawBook, 1987) 217, 230.

not least due to the consequences of granting this form of proprietary relief to A in the case of B's insolvency.³ This declaration allows A to step out of B's insolvency and thus gain effective priority⁴ over B's unsecured creditors.⁵ Although strictly speaking, a court's declaration of the existence of a proprietary interest does not impact the priority of claimants under any statutory scheme, it removes these assets from the pool of assets available for distribution to unsecured creditors under the relevant legislation. As a matter of practice, the impact on all parties is the same. In light of these significant consequences, this article focuses on the typical *Quistclose Investments* scenario where money is advanced on loan and the failure of purpose is due to the borrower's insolvency.

In his seminal article on the *Quistclose* trust, CEF Rickett suggested two competing philosophies underlying the trust, deemed the 'pure trusts law philosophy' and the 'remedial trusts law philosophy', noting that 'the future development and use of the *Quistclose* analysis will be determined by whichever philosophy gains the ascendancy'.⁶ Since its publication in 1991, the preferred view in most jurisdictions has been the 'pure trusts law philosophy',⁷ whereby the *Quistclose* trust is treated as institutional and compatible with orthodox trust principles. Throughout this article, the term 'institutional' is used to refer to trusts arising independently of any equitable remedial discretion exercised by the court. An 'institutional' trust, as the term is used here, therefore refers to express and resulting trusts which arise due to a party's intention to create a trust or lack of intention to pass beneficial title respectively. It would also encompass some *sui generis* trusts which are declared by the court without the exercise of any remedial discretion. This is in contrast to 'remedial' trusts

³ Throughout this article, corporate insolvency language is used for ease of expression. However, the material impact of a court's declaration of a *Quistclose* trust is the same in circumstances of both corporate insolvency and personal bankruptcy. The money advanced does not form part of the assets available for distribution in insolvency and the lender is granted a proprietary interest in the form of a trust over the money lent, which is not yet used for the purpose specified: *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (*Twinsectra*). Whilst there are some differences between the treatment of *Quistclose* trusts in personal bankruptcy and corporate insolvency — for example, as they relate to unlawful preferences — these are irrelevant for the purposes of this article.

⁴ For the purposes of this article, the term 'priority' is used in its practical sense when discussing the order of payments of creditors, regardless of whether their priority in distribution is a function of statute, a security interest, or grant of proprietary relief. This is in contrast to William Swadling's argument that the term 'priority' should be limited to discussion of creditors' claims under the relevant statutory insolvency scheme: William Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28(4) *Legal Studies* 506, 523–5.

⁵ The term 'unsecured creditors' is used throughout this article to include both voluntary creditors such as traditional lenders, and involuntary creditors such as tort claimants.

⁶ CEF Rickett, 'Different Views on the Scope of the *Quistclose* Analysis: English and Antipodean Insights' (1991) 107 (October) *Law Quarterly Review* 608, 608.

⁷ Emily Hudson, 'A Normative Approach to the *Quistclose* Trust' (2017) 80(5) *Modern Law Review* 775, 778–83.

including the remedial constructive trust, which involve an exercise of discretion in equity's remedial jurisdiction and are typically operative from the date of judgment rather than the happening of some event.⁸ The argument advanced in Part III and IV of this article is that in cases involving insolvency, the declaration of a *Quistclose* trust has not reflected orthodox trust principles, and it is incorrect to view the *Quistclose* trust as a proprietary interest giving effect to the intention of the settlor. Instead, modern commercial realities and the practical application of the trust prove that the trust is better understood as remedial in nature.

In light of this finding, another potentially more difficult problem arises. Contemporary private law scholarship has attempted to develop a principled, normative basis for the award of proprietary remedies.⁹ Thus, if *Quistclose* trusts are indeed proprietary remedies, conferring effective priority over the borrower's unsecured creditors, there must be some justification for granting this form of proprietary relief to lenders rather than restricting them to their contractual remedy in debt. Part V of this article suggests that there is none; the benefits achieved by maintaining the remedy fail to justify the prejudice caused to the borrower's other unsecured creditors. As such, the only suitable solution to maintain principle in the law of remedies is to abandon the *Quistclose* trust as a form of proprietary relief in insolvency.

II *QUISTCLOSE* TRUSTS: GENERAL PRINCIPLES AND REGULATION

The *Quistclose* trust arises in specific circumstances. When A advances money,¹⁰ on loan or otherwise,¹¹ to B for a specific, identified purpose and B is unable to, or fails

⁸ See also Simon Evans, 'Defending Discretionary Remedialism' (2001) 23(4) *Sydney Law Review* 463; Michael Bryan, 'Constructive Trusts: Understanding Remedialism' in Jamie Glistler and Pauline Ridge (eds), *Fault Lines in Equity* (Hart, 2012) 215.

⁹ Elise Bant, 'Trusts, Powers and Liens: An Exercise in Ground-Clearing' (2009) 3(3) *Journal of Equity* 286, 286–9; Elise Bant and Michael Bryan, 'A Model of Proprietary Remedies' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 211, 214–17.

¹⁰ Courts have historically limited *Quistclose* analysis to money advances: see *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1994] 2 Lloyd's Rep 152 (Saville LJ). See also Robert Chambers, 'Restrictions on the Use of Money' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 77, 77. Cf Sarah Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996). Worthington argues that any property transfer could be understood as giving rise to a *Quistclose* trust if other conditions are met: at 64.

¹¹ This includes for pre-payment of goods and services: see, eg, *Re Kayford Ltd (in liq)* [1975] 1 All ER 604 ('*Kayford*'); *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (in liq)* [1985] Ch D 207, 222 (Gibson J). There is some argument that *Kayford* and cases in its line of authority should not strictly be seen as *Quistclose* cases and instead should be explained in a separate analysis: see Rickett (n 6) 609; Gerard McCormack, 'Conditional Payments and Insolvency: The Quistclose Trust' (1994) 9(1) *Denning Law Journal* 93, 93 n 2.

to, perform that purpose, courts have held that the money advanced is held on trust by B for A. A court's declaration of the existence of a *Quistclose* trust thus confers on A a proprietary interest in the money instead of leaving them to their purely personal remedy in debt.

To better understand the nature of the *Quistclose* trust, it is important to appreciate the specific facts that formed the background of the House of Lords' decision. Briefly, Rolls Razor Ltd, at the time experiencing financial difficulties, declared a dividend in favour of its shareholders on 2 July 1964, with payment anticipated to occur on 24 July. To meet this newly created debt, Rolls Razor entered into an agreement to borrow money from Quistclose Investments on the condition that the money was to be used exclusively for payment of the dividend. The money was borrowed by Rolls Razor and deposited at Barclays Bank in a separate account, with notice given to Barclays Bank of the agreement with Quistclose Investments. On 17 July 1964, the directors of Rolls Razor resolved to put Rolls Razor into voluntary liquidation. The result of liquidation was an inability to pay the dividend until all other debts were paid since the shareholders were postponed to the unsecured creditors. Barclays Bank then sought to use the money in the separate dividend account to set-off pre-existing debts it was owed by Rolls Razor. Quistclose Investments brought an action against Barclays Bank, claiming that the money advanced was held on trust by Rolls Razor.¹²

At first instance, Plowman J limited the relationship between Quistclose Investments and Rolls Razor to a contractual debtor-creditor relationship without any further equitable obligations.¹³ The Court of Appeal overturned Plowman J's decision, declaring that the money was held on trust and therefore separate from the general assets of Rolls Razor.¹⁴ Since Barclays Bank was aware of their agreement, they were prevented from raising the bona fide purchase defence and thus could not effect a valid set-off of Rolls Razor's debts.¹⁵ The Court of Appeal's decision was affirmed by the House of Lords.

¹² *Quistclose Investments* (n 1) 567–70 (Lord Wilberforce).

¹³ *Barclays Bank Ltd v Quistclose Investments Ltd* [1967] Ch 910, 929–31 (Plowman J).

¹⁴ *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] 1 Ch 540.

¹⁵ Michael Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 327, 332–3. Cf *Thomson v Clydesdale Bank Ltd* [1893] AC 282. Glistler argues that in situations involving insolvency set-off such as *Quistclose*, the good faith purchaser defence has no role to play. Instead, the statutory rules should prevail. Glistler, however, acknowledges the House of Lords' acceptance of the applicability of the defence in *Quistclose Investments* (n 1): Jamie Glistler, 'Trust Money and the Combination of Bank Accounts' (2018) 134 (July) *Law Quarterly Review* 478, 497.

The classification of the *Quistclose* trust as either express, resulting, constructive, or sui generis¹⁶ has consumed most academic and judicial debate since the initial decision recognising its existence.¹⁷ The preferred view in Australia seems to be that the *Quistclose* trust can be explained on express trust principles.¹⁸ Importantly, however, this is not unanimous, and in the absence of a decision of the High Court of Australia providing clarification,¹⁹ some superior courts still prefer a resulting trust analysis in line with Lord Millett's decision in *Twinsectra Ltd v Yardley* ('*Twinsectra*').²⁰

The circumstances in *Quistclose Investments*, whereby a lender advances money for use in paying other creditors, provides the most common fact scenario which has given rise to a *Quistclose* trust.²¹ However, courts have also found the existence of *Quistclose* trusts where money is advanced for other purposes, including to purchase equipment,²² subscribe for shares,²³ pre-purchase goods,²⁴ and upon failure of a

¹⁶ The position that the *Quistclose* trust is a sui generis trust is the least common of these views: see, eg, Jennifer Payne, 'Quistclose and Resulting Trusts' in Peter Birks and Francis Rose (eds), *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (Routledge, 2000) 77.

¹⁷ Hudson (n 7) 775. Glistler argues that there is no single 'correct answer' to this question and the classification of the trust is dependent on the circumstances: JA Glistler, 'The Nature of *Quistclose* Trusts: Classification and Reconciliation' (2004) 63(3) *Cambridge Law Journal* 632, 633 ('Nature of *Quistclose* Trusts').

¹⁸ See, eg, *Salvo v New Tel Limited* [2005] NSWCA 281, [32]–[53] (Spigelman CJ) ('*Salvo*'); *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 523–7 [112]–[127] (Bell, Gageler and Keane JJ) ('*Legal Services Board*'); *Raulfs v Fishy Bite* [2012] NSWCA 135, [44]–[55] (Campbell JA) ('*Fishy Bite*'); Michael Bryan et al, *A Sourcebook on Equity & Trusts in Australia* (Cambridge University Press, 2016) 505.

¹⁹ The nature of the *Quistclose* trust was discussed by the High Court of Australia in *Legal Services Board* (n 18). However, the discussion of the classification was made in obiter, and as Elise Bant suggests, the nomenclature of *Quistclose Investments* (n 1) added nothing of value to the Court's analysis; the circumstances clearly gave rise to an express trust. It still remains unclear how the High Court will apply *Quistclose Investments* (n 1) where the circumstances are not so amenable to straight-forward express trust analysis: Elise Bant, 'Thieving Lawyers: Trust and Fidelity in the High Court: *Legal Services Board v Gillespie-Jones*', *Opinions on High* (Blog Post, 16 August 2013) <<https://blogs.unimelb.edu.au/opinionsonhigh/2013/08/16/bant-gillespie-jones/>>.

²⁰ *Twinsectra* (n 3). See, eg, *Salvo* (n 18) [76]–[78] (Handley JA); *McManus RE Pty Ltd v Ward* (2009) 74 NSWLR 662, 667 [25] (Palmer J); *Adam v Hasabo* [2019] NSWSC 1167, [252] (Robb J).

²¹ Richard Hedlund and Amber Lavinia Rhodes, 'Loan or Commercial Trust? The Continuing Mischief of the Quistclose Trust' (2017) 4(1) *Conveyancer and Property Lawyer* 254, 260–2.

²² *Re EVTR Ltd* (1987) 3 BCC 389 ('*Re EVTR*').

²³ *Re Associated Securities Ltd* [1981] 1 NSWLR 742.

²⁴ *Kayford* (n 11).

managed investment scheme.²⁵ The unifying feature of all these circumstances is a finding that the money, once advanced, was ‘earmarked’ for some specific purpose.²⁶ Whilst the law has tended to treat all circumstances giving rise to the trust similarly, as Richard Hedlund and Amber Rhodes note, there is no clear justification for this uniform approach.²⁷

A court’s declaration of a *Quistclose* trust, transforming a loan arrangement into a trust relationship, has been described by Lord Millett as the ‘single most important application of equitable principles in commercial life’.²⁸ This is no more evident than in situations where the failure of purpose is a result of insolvency. By ‘ring-fencing’ the money advanced,²⁹ it is said that the lender does not take the risk of the borrower’s insolvency, and is thus entitled to proprietary restitution of the money advanced upon a failure of purpose.³⁰ The *Quistclose* trust thus confers effective priority to the lender over the borrower’s unsecured creditors by removing the money from the pool of assets available to the liquidator,³¹ and as a matter of practice, allows the lender to

²⁵ *Bellis v Challinor* [2015] EWCA Civ 59.

²⁶ Hedlund and Rhodes (n 21) 254. Some commentators have argued that there is no reason in principle to limit the purposes for which *Quistclose* trusts will arise: see, eg, JD Heydon, MJ Leeming and SK Jacobs, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 15 [2]–[16]; Robert Chambers, ‘Conditional Gifts’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (Taylor & Francis Ltd, 1st ed, 1993) 429, 445; James Alexander Glistler, ‘Quistclose Trusts: Theory and Context’ (MJur Thesis, Durham University, 2003) 10–11 (‘Quistclose Trusts’). Cf *Re Associated Securities Ltd and the Companies Act* [1981] 1 NSWLR 742, 749–50 (Needham J); *Re Miles* (1988) 20 FCR 194, 199 (Pincus J) (‘*Re Miles*’); William Swadling, ‘A New Role for Resulting Trusts?’ (1996) 16(1) *Legal Studies* 110, 122. Whilst there has been significant discussion on the types of purposes giving rise to *Quistclose* trusts, the required degree of specificity or clarity of the purpose is still unclear: see Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997) 86; *Twinsectra* (n 3) 192 [99] (Lord Millett).

²⁷ Hedlund and Rhodes (n 21) 254.

²⁸ Lord Millett, ‘Foreword’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) vii, vii.

²⁹ The term ‘ring-fencing’ refers to the separation of some of a company’s financial assets from the rest, typically in order to ensure they are not available for distribution in the case of the company’s insolvency.

³⁰ *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1074 (Lord Templeman). This is not to say that the *Quistclose* trust is currently understood as a proprietary response to unjust enrichment due to a failure of consideration. Such a classification of the *Quistclose* trust has been rejected in Zhuang WenXiong, ‘The (*Quistclose*) Resulting Trust as a Proprietary Response to Unjust Enrichment: A Bridge Too Far?’ (2014) 26(2) *Singapore Academy of Law Journal* 649, 675–81.

³¹ As is true for all equitable proprietary interests: see Ben McFarlane and Robert Stevens, ‘The Nature of Equitable Property’ (2010) 4(1) *Journal of Equity* 1, 1; *Bankruptcy Act 1966* (Cth) s 116(2)(a) (‘*Bankruptcy Act*’); *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17; Peter Watts, ‘Constructive Trusts and Insolvency’ (2009) 3(3) *Journal of Equity* 250, 252–4.

receive the entirety of their money advanced less any recovery costs.³² The lender is transformed from an unsecured creditor participating in *pari passu* distribution from the pool of assets not subject to security interests, to a beneficiary under a trust.³³ Lord Millett described this result as ‘the whole purpose of [*Quistclose*] arrangements ... to prevent the money from passing to the borrower’s [liquidator] in the event of his insolvency’.³⁴ This classification also provides lenders with the ability to make *Barnes v Addy*-type claims in particular circumstances involving third party liability for breach of trust.³⁵

The regulation of *Quistclose* trusts in Australia remains potentially problematic. *Quistclose* trusts are explicitly excluded from registration under the *Personal Property Securities Act 2009* (Cth) (*PPSA*).³⁶ Section 8(1)(h) states that the *PPSA* does not apply to

a trust over some or all of an amount provided by way of financial accommodation, if the person to whom the financial accommodation is provided is required to use the amount in accordance with a condition under which the financial accommodation is provided.³⁷

Prioritising certainty by subjecting *Quistclose* trusts to an express exclusion from the *PPSA* remains problematic for two reasons. First, the factual scenarios giving rise to their existence are still evolving and whether money can be said to be held on *Quistclose* trust often requires judicial determination.³⁸ Second, the lack of registration requirements has the potential to result in situations of ‘ostensible ownership’, whereby the true equitable ownership of the money advanced is unknown to

³² If some money advanced has been correctly applied, this is not recoverable; only the portion which is yet to be applied prior to the failure of purpose is recoverable: see *Re EVTR* (n 22).

³³ Malcolm Cope, *Proprietary Claims and Remedies* (Federation Press, 1997) 2–6. The impact on recovery is tremendous; in the context of personal bankruptcies in Australia, in 2018–19, unsecured creditors received an average of 1.84 cents per dollar owed: see ‘Rate of Return’, *Australian Financial Security Authority* (Web Page) <<https://www.afsa.gov.au/about-us/statistics/rate-return>>.

³⁴ *Twinsectra* (n 3) 187–8 [82] (Lord Millett).

³⁵ *Barnes v Addy* (1874) LR 9 Ch App 244. See also Heydon, Leeming and Jacobs (n 26) 12 [2]–[14]. Briefly, *Barnes v Addy* held that third parties could be held liable for breach of trust in two circumstances, either where they knowingly received trust property in breach of trust conditions or knowingly assisted in the breach of trust.

³⁶ Glister provides an overview of the regulation of trusts under the *PPSA*: Jamie Glister, ‘The Role of Trusts in the *PPSA*’ (2011) 34(2) *University of New South Wales Law Journal* 628.

³⁷ *Personal Property Securities Act 2009* (Cth) s 8(1)(h) (*PPSA*).

³⁸ Ying Khai Liew, ‘The Wider Ambit of the *Quistclose* Doctrine’ (2015) 9(1) *Journal of Equity* 66, 72–3.

third parties.³⁹ Together, the impact of these two problems may leave creditors unaware of the existence of a *Quistclose* lender's equitable interest either when they are lending or once they are participating in distribution during insolvency proceedings. This 'ostensible ownership' issue for trusts is generally understood as problematic,⁴⁰ and in light of the express exclusion in s 8(1)(h) of the *PPSA*, these concerns are exacerbated in the specific circumstances giving rise to *Quistclose* trusts.

III INTENTION: THE CLASSICAL JUSTIFICATION

Since the decision in *Quistclose Investments*, there remains some debate concerning whether *Quistclose* arrangements are better explained under a pure trusts law philosophy or remedial trusts law philosophy.⁴¹ The prevailing view, held by both courts and academic lawyers, is one that prefers pure trusts law philosophy, characterising *Quistclose* trusts as facilitative devices which give effect to the lender's intention.⁴² If this view is correct, Jamie Glistler suggests that '[a]s long as the necessary intention to create a trust can be inferred from the parties' agreement, there is no reason to deny them the relationship that they objectively intended'.⁴³ However, since declaring the existence of a *Quistclose* trust in commercial settings requires a departure from the curial reticence against imposing trustee obligations on a party to a commercial contract,⁴⁴ the requisite intention must be clearly ascertainable. Whilst Australian courts have reflected this position by expressing concerns about adopting a liberal approach to finding intention,⁴⁵ the absence of significant Australian case law applying *Quistclose Investments* leaves the position unclear.

The problems with understanding the degree and nature of intention required to justify a *Quistclose* trust are many, not least due to disagreement between academics and inconsistent application by courts. Courts in their application of

³⁹ Jeffrey Helman, 'Ostensible Ownership and the Uniform Commercial Code' (1978) 83(1) *Commercial Law Journal* 25, 25.

⁴⁰ See Michael JR Crawford, 'The Case against the Equitable Lien' (2019) 42(3) *Melbourne University Law Review* 813, 823–4; Arthur Chan, 'The Tree That Was Not Meant to Be: The Quistclose Trust Moving On from the Twinsectra Model and Why It May Never Be an Established Transactional Arrangement' (2015) 9(1) *Hong Kong Journal of Legal Studies* 1, 23–4 ('The Tree That Was Not Meant to Be'); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 704–5 (Lord Browne-Wilkinson) ('*Westdeutsche Landesbank Girozentrale*').

⁴¹ Rickett (n 6) 608.

⁴² Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Bloomsbury, 2002) 160–1; Liew (n 38) 81; *Salvo* (n 18) [32]–[53] (Spigelman CJ); *Legal Services Board* (n 18) 523–7 [112]–[127] (Bell, Gageler and Keane JJ); *Fishy Bite* (n 18).

⁴³ Glistler, 'Nature of *Quistclose* Trusts' (n 17) 645.

⁴⁴ *Polly Peck International plc v Nadir [No 2]* [1992] All ER 769, 782 (Scott LJ).

⁴⁵ See, eg, *Re Miles* (n 26) 198–9 (Pincus J).

Quistclose Investments have considered the intention of the lender alone,⁴⁶ the borrower alone,⁴⁷ and mutual intention.⁴⁸ Whilst Lord Wilberforce understood the circumstances in *Quistclose Investments* as evincing a mutual intention to create a trust, Fiona Burns notes that the concept of mutual intention is not necessarily applicable in every case invoking *Quistclose Investments*.⁴⁹ In any case, it remains unclear why the intention of the borrower is relevant in any express or resulting trust analyses.⁵⁰ Whilst in most commercial lending situations, a written contract will stipulate the nature of money advanced, including the relationship between the debtor and creditor, and therefore there will be some mutual intention evinced in the contract, it is only the settlor's intention which is relevant to the creation of a trust over their rights.⁵¹ Therefore, the role of mutual intention remains unclear. Glister has argued directly against the existence of a mutual intention requirement and instead suggested that the intention of the transferor and recipient should be considered separately.⁵² Further, whilst intention plays different roles in express and resulting trust analyses of *Quistclose Investments*, the differences are immaterial in the context of commercial loan cases; Glister suggests that an investigation of party intention under either an express or resulting trust model will lead to the same result.⁵³ In light of this confusion, if intention is used to justify a proprietary claim for the return of money, the nature of the intention required to be shown must warrant this result. Whilst courts have tended to place significant weight on the segregation of funds to draw inferences of intention,⁵⁴ this requirement is not

⁴⁶ See, eg, *George v Webb* [2011] NSWSC 1608, [210] (Ward J).

⁴⁷ See, eg, *Kayford* (n 11) 607 (Megarry J). Relying on the intention of the borrower seems to lead to absurd results; the customers in *Kayford* (n 11) did not transfer the money with the intention or knowledge it would be held on trust, but it was nonetheless done so due to the actions of the supplier, arguably in an unlawful preference: at 607. See also William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43(5) *Modern Law Review* 489, 496–7.

⁴⁸ *Quistclose Investments* (n 1) 580 (Lord Wilberforce).

⁴⁹ Fiona R Burns, 'The Quistclose Trust: Intention and the Express Private Trust' (1992) 18(2) *Monash University Law Review* 147, 161.

⁵⁰ McCormack attempts to reconcile this with the perspective that considers the intention of the settlor. He argues that since intention is considered objectively, what the lender intended must have been accepted by the borrower when entering into the loan agreement: see McCormack (n 11) 112. See also Rickett (n 6) 618.

⁵¹ Heydon, Leeming and Jacobs (n 26) 50 [502].

⁵² Jamie Glister, 'Mutual Intention and *Quistclose* Trusts' (2012) 6(3) *Journal of Equity* 221.

⁵³ *Ibid* 236.

⁵⁴ See, eg, *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, 100 (Lord Mustill); *Re Nanwa* (n 2) 1084 (Harman J). Interestingly, the House of Lords did not place *significant* weight on the fact that the loan was paid into a separate bank account: *Quistclose Investments* (n 1) 571 (Lord Wilberforce); Michael Bryan and M P Ellinghaus, 'Fault Lines in the Law of Obligations: *Roxborough v Rothmans of Pall Mall Australia Ltd*' (2000) 22(4) *Sydney Law Review* 636, 664.

necessarily determinative,⁵⁵ and is better viewed as informing performance rather than creation of the trust.⁵⁶ Similarly, as Sue Tappenden emphasises, a stipulation on the use of funds provides no insight into the intention of the lender,⁵⁷ and many cases have involved a money transfer subject to a condition that was not held to create a trust.⁵⁸ Robert Chambers argues that the intention required to be proven to justify imposing a *Quistclose* trust is not a positive intention to retain the beneficial title, but rather the absence of the lender's intention to benefit the borrower by keeping the beneficial ownership of the money for any purpose other than the one specified.⁵⁹ In the two-party scenarios that dominate *Quistclose* cases, James Penner describes the distinction articulated by Chambers as 'almost scholastic in its unreality'.⁶⁰ He notes:

What, in a two party case where *A* transfers property to *B*, genuinely distinguishes *A*'s intention that he retain the beneficial interest from *A*'s intention only that *B* should not have it? ... [I]t seems clear that the exclusion of an interest for one party necessarily dictates that it rests with the other.⁶¹

Sarah Worthington argues instead that there must be a positive intention to create a trust but recognises that it is typically inferred by courts.⁶² The difference between the two perspectives is immaterial as it applies to the scenarios concerned in this article for two reasons. First, most scenarios that satisfy one requirement will also satisfy the other. Second, and more importantly, neither of these requirements are clearly available on the facts of the leading *Quistclose* trust cases.

⁵⁵ Glister argues that placing undue weight on the segregation of funds conflates the intention to segregate and the fact of segregation when inferring intention to create a trust, which is assessed prospectively at the time of the advance: see Jamie Glister, 'Twinsectra v Yardley: Trusts, Powers and Contractual Obligations' (2002) 16(4) *Trust Law International* 223, 230; Glister, 'Quistclose Trusts' (n 26) 5. See also Kayford (n 11) 607 (Megarry J).

⁵⁶ *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 605–6 [34]–[35] (Gaudron, McHugh, Gummow and Hayne JJ); Glister, 'The Role of Trusts in the PPSA' (n 36) 641.

⁵⁷ Sue Tappenden, 'Commercial Equity: The *Quistclose* Trust and Asset Recovery' (2009) 2(3) *Journal of Politics and Law* 11, 13.

⁵⁸ See, eg, *Re Osoba* [1979] 1 WLR 247.

⁵⁹ Chambers, *Resulting Trusts* (n 26) 84–5. There is some argument that technically there cannot be a transfer of legal title whilst retaining beneficial title, since, at the time of transfer, there is no separate beneficial ownership. Prior to the transfer, the lender does not hold separate legal and beneficial title but rather has full ownership. The separation occurs upon a transfer of complete title and an instant transfer-back of beneficial title: see *Re Bond Worth Ltd* [1980] Ch 228, 244–7 (Slade J).

⁶⁰ James Penner, 'Lord Millett's Analysis' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 41, 53 n 37.

⁶¹ *Ibid* (emphasis in original).

⁶² Worthington (n 10) 51–2.

1 *Quistclose Investments*

Consider the case of *Quistclose Investments* itself. Quistclose Investments was not an independent entity. Instead, its shares were owned by John Bloom, who remained chairman of Rolls Razor.⁶³ Prior to the advance from Quistclose Investments, attempting to avoid the need to invest his own funds, Bloom had been in negotiations with Sir Isaac Wolfson to gain financing for Rolls Razor. However, as a pre-condition of Wolfson's financing, Rolls Razor was required to pay all pre-declared dividends.⁶⁴ These facts, Emily Hudson argues, are more indicative of an intention for Bloom to hastily enter into loan contracts in order to keep the potential for Wolfson's financing on foot rather than form any trust relationship.⁶⁵ Further, to find a mutual intention, the Court also looked to the documentation exchanged between the three parties, Quistclose Investments, Rolls Razor, and Barclays Bank. These documents provided instructions, including the purpose of the loan and the requirement to separate funds into a newly opened account.⁶⁶ However, as Hudson notes, this documentation was simply sighted by Quistclose Investments; the documentation was made to record communications between Rolls Razor and Barclays Bank.⁶⁷ The Court, however, failed to consider the significance of this difference, and instead imputed mutual intention as if the documentation was indicative of Quistclose Investment's intention.⁶⁸ It remains unclear how, on these facts alone, there was sufficient evidence to show that Quistclose Investments did not intend to transfer the beneficial title to money to Rolls Razor in *all* situations *except* when it was used for the payment of the declared dividend. As Michael Smolyansky argues, there is a degree of artificiality in finding that the complex, two-pronged trust arrangement found by Lord Wilberforce is simply inferred from the mutual intention of the parties on these facts.⁶⁹ It remains unlikely that an intention to create a trust or retain beneficial title can be inferred without relying on assumptions about the behaviour of rational, independent corporate entities, which is not descriptive of the parties involved in *Quistclose Investments*.⁷⁰

2 *Twinsectra*

Twinsectra provides an even clearer example of the failure of the lender to demonstrate an intention not to part with the beneficial title or create a trust over the money

⁶³ Robert Stevens, 'Rolls Razor Ltd' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 1, 5.

⁶⁴ *Ibid*; *Quistclose Investments* (n 1) 568 (Lord Wilberforce).

⁶⁵ Hudson (n 7) 784.

⁶⁶ *Quistclose Investments* (n 1) 580 (Lord Wilberforce).

⁶⁷ Hudson (n 7) 784–5.

⁶⁸ *Ibid* 785.

⁶⁹ Michael Smolyansky, 'Reining in the *Quistclose* Trust: A Response to *Twinsectra v Yardley*' (2010) 16(7) *Trusts & Trustees* 558, 559.

⁷⁰ Hudson (n 7) 785.

advanced.⁷¹ There, Yardley sought bridging finance of £1 million from a bank for the purchase of land. Concerned by delays, Yardley sought alternate financing from Twinsectra, who provided the loan, requiring only a solicitor's personal undertaking to repay the loan.⁷² Unable to obtain this undertaking from his usual lawyer, Yardley approached another solicitor, Sims, who willingly agreed to the personal undertaking. Sims provided a written agreement to retain the money until it was applied for the purchase of property by Yardley, noting 'the loan monies will be utilised for the acquisition of property on behalf of our client [Yardley] and for no other purposes'.⁷³ The money was then transferred by Sims to Yardley and used by Yardley for various purposes outside the agreement, including to pay pre-existing creditors. Soon after this misuse of money, Sims went bankrupt, and Twinsectra was never repaid their loan.⁷⁴ Twinsectra brought proceedings claiming the money advanced was held on *Quistclose* trust.

Detailed consideration of these facts points against any intention to form a trust or retain beneficial title. First, there was no requirement to segregate the money advanced like in *Quistclose Investments*, nor any use of the language of trusts. Whilst neither of these are required, they suggest a failure on the part of Twinsectra to take steps to create a trust over the money advanced.⁷⁵ As Smolyansky suggests, if a trust was truly intended, it is inconceivable that a commercial lending entity such as Twinsectra simply omitted any mention of a retention of title limitation.⁷⁶ Second, the purpose described in the contract, 'acquisition of property', was vague and failed to identify the specific land discussed in negotiations. This implies no requirement for Twinsectra to constrain the use of funds in any material way and instead suggests that the money was treated as a typical unsecured loan guaranteed by Sims.⁷⁷ This is compounded in light of the high interest rate of 24%, reflecting the riskiness of the loan for Twinsectra. Arguably, if Twinsectra retained beneficial ownership, the loan would be significantly less risky, and a 24% interest rate would not be justified;⁷⁸ Yardley could have sought cheaper financing elsewhere. Lastly, and possibly the clearest indication of a lack of requisite intention, was the trial judge's finding that Twinsectra believed the loan was 'secured' solely by Sims' personal undertaking and not any form of security over property or through a trust.⁷⁹ Given Twinsectra was a commercial lender, it is difficult to argue that it intended to retain beneficial title or create a trust over the money advanced, but failed to make this explicit in the loan agreement. Instead, all indicia point to an unsecured loan protected by a high interest rate and a solicitor's personal undertaking.

⁷¹ Ibid.

⁷² *Twinsectra* (n 3) 168 [9]–[10] (Lord Hoffmann).

⁷³ Ibid 168 [9] (Lord Hoffmann).

⁷⁴ Ibid 168 [10]–[11] (Lord Hoffmann).

⁷⁵ Hudson (n 7) 787.

⁷⁶ Smolyansky (n 69) 561–2.

⁷⁷ Hudson (n 7) 787.

⁷⁸ Smolyansky (n 69) 562.

⁷⁹ *Twinsectra Ltd v Yardley* [2000] Lloyd's Rep PN 239, 255 (Potter LJ).

3 *Re EVTR*

Lastly, consider *Re EVTR Ltd* ('*Re EVTR*').⁸⁰ Mr Barber, a previous employee of EVTR, provided financial assistance to EVTR for the purchase of equipment. EVTR was, at the time, experiencing financial difficulties. Barber paid £60,000 to EVTR's solicitor and provided in writing an instruction that the money should only be released for the 'sole purpose of buying new equipment'.⁸¹ EVTR used Barber's money, alongside other financing, to purchase equipment, but before the transaction was completed, a receiver was appointed.⁸²

In deciding that the money was held on *Quistclose* trust by EVTR for Barber, two different approaches were adopted. Lord Justice Bingham invoked the language of fairness, noting that it would 'strike most people as very hard if Mr Barber were in this situation to be confined to a claim as an unsecured creditor of the company'.⁸³ The judgment avoided many doctrinal concerns about the intention of the parties to the transaction and seems to extend *Quistclose* trust analysis beyond a pure trusts law understanding,⁸⁴ and into the realm of constructive trusts.⁸⁵ Michael Bridge argues that the court's imposition of a *Quistclose* trust in the case was a direct attempt to ensure Barber retained some remedy against EVTR, due to the Court's perceived unfairness of requiring him to join unsecured creditors in distribution.⁸⁶ The more conventional approach of grounding the *Quistclose Investments* declaration in intention was adopted by Dillon LJ.⁸⁷ However, similar to the above analysis of *Twinsectra*, a number of factors point against a finding of intention. First, Barber was advised by accountants and even monitored EVTR through regular board meeting attendance. Initially, the transaction was structured for Barber to purchase the equipment himself and lease it to EVTR, although changes in circumstances necessitated the latter arrangement be adopted.⁸⁸ It would seem odd that in light of this, Barber had an intention to retain beneficial title or create a trust but failed to take active steps to make this explicit.⁸⁹ Second, the trial judge found that it was in Barber's contemplation that upon advancing the money, he would be a 'loan creditor of the company' and that he failed to give any thought to his position if the purpose of

⁸⁰ *Re EVTR* (n 22) 390–2 (Dillon LJ).

⁸¹ *Ibid* 392 (Dillon LJ).

⁸² *Ibid* 391–2 (Dillon LJ).

⁸³ *Ibid* 394 (Bingham LJ).

⁸⁴ Justice Bingham, as he then was, expressed similar observations of the operation of *Quistclose* trust in *Neste Oy v Lloyd's Bank Plc* [1983] 2 Lloyds Rep 658, 665–6 (Bingham J).

⁸⁵ Hudson (n 7) 797–9.

⁸⁶ Michael Bridge, 'The *Quistclose* Trust in a World of Secured Transactions' (1992) 12(3) *Oxford Journal of Legal Studies* 333, 354.

⁸⁷ *Re EVTR* (n 22) 393–4 (Dillon LJ).

⁸⁸ *Ibid* 390 (Dillon LJ).

⁸⁹ Smolyansky (n 69) 561–2.

the loan failed.⁹⁰ This seems to contradict any finding that Barber actually intended to create a trust, particularly when he held a belief that he would be an unsecured creditor and did not take steps to take security or explicitly declare a trust. Lastly, prior to advancing money, Barber also participated in a capital restructure of EVTR, purchasing £40,000 worth of shares in a holding company tasked with taking over EVTR.⁹¹ Thus, given he was willing to take on risk in the company through equity ownership, it can be inferred that he did not actively consider the possibility of a failure of purpose and the need to protect his debt position using a trust.

Thus, it is clear that courts' analyses of *Quistclose* trusts do not reflect orthodox trust law principles. The only way these principles have been maintained is, as Hudson suggests, by hiding a normative judgment that the money advanced should be returned behind a liberal and potentially unprincipled approach to finding intention through an unrealistic interpretation of the facts.⁹² As Elise Bant and Michael Bryan assert, 'if on a proper construction of a loan agreement the parties have allocated the risk of borrower failure, a court has no business imposing on them its own assumptions as to risk-sharing'.⁹³ Perhaps, therefore, the better view is to recognise the explanation of *Quistclose* trusts provided by remedial trusts law philosophy, which would allow courts to be explicit in their normative discussion, rather than apply unprincipled standards to ensure particular fact scenarios fit within orthodox trust principles when they are not suitable.

IV INSTITUTIONAL OR REMEDIAL?

In light of the proven difficulties of finding intention in *Quistclose Investments* scenarios, a significant question arises: are *Quistclose* trusts, as they apply to lenders upon a borrower's insolvency, really institutional, or are they better understood as remedial? The prevailing view, under both the express and resulting trust models, characterises *Quistclose* trusts as institutional.⁹⁴ That is, the trust arises upon the happening of some event,⁹⁵ not at the date of judgment. In this Part, I argue that the institutional approach fails to recognise the practical nature of the *Quistclose* trust, particularly as it is currently invoked by lenders in an attempt to bypass *pari passu* distribution upon the borrower's insolvency. In these circumstances, the *Quistclose*

⁹⁰ *Re EVTR Ltd* (1987) 3 BCC 382, 388 (Michael Wheeler QC).

⁹¹ *Re EVTR* (n 22) 390 (Dillon LJ).

⁹² Hudson (n 7) 783–91.

⁹³ Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5(3) *Journal of Equity* 171, 196 ('Constructive Trusts and Equitable Proprietary Relief').

⁹⁴ Hudson (n 7) 778–83.

⁹⁵ Under Lord Wilberforce's two express trust analysis, the first trust arises when money is advanced and the second arises upon a failure of purpose. Lord Millett's resulting trust analysis suggests the one and only trust arises upon a failure of purpose, and that no trust exists after money has been advanced while the purpose is still capable of being performed: Smolyansky (n 69) 559, 562.

trust has no utility as an institutional trust and is much better understood in substance as remedial. This is not to say that the strict legal characterisation of the trust should be as a remedial constructive trust,⁹⁶ but rather that its practical impact in cases of insolvency should be understood as achieving a similar result. I recognise at the outset, the taxonomical concerns that may arise by drawing parallels between the *Quistclose* trust and a remedial constructive trust *only* in situations of insolvency. However, the purpose of doing so is not to provide any substantive discussion in the well-trodden classification debate,⁹⁷ but rather to recognise that any normative arguments for or against the maintenance of the trust in insolvency should be considered in light of its reality as a grant of proprietary relief.⁹⁸ This is because, as Rhodes emphasises, ‘there is a fundamental difference between rights which are *upheld* on insolvency and rights which are ... *imposed* on a party at a later point in time’.⁹⁹

The prevailing view of *Quistclose* trusts fails to recognise their practical nature. Commercial realities suggest that there is rarely ever an intention to create an express trust in cases where a *Quistclose Investments* analysis is invoked.¹⁰⁰ This is evident in the fact that commercial loan documents in *Quistclose* trust cases rarely, if ever, use the language of trusts.¹⁰¹ Whilst use of the language of trusts is not a prerequisite for the creation of a trust,¹⁰² it is difficult to argue that sophisticated lenders who consider the risks of insolvency in lending practice have overlooked the need to include specific language where a trust is actually intended to be created.¹⁰³

Further, as Ewan McKendrick suggests, lenders are almost always in a better situation if they choose to take traditional forms of security, such as a mortgage or charge, instead of relying on a *Quistclose* trust as a form of quasi-security.¹⁰⁴ Similarly, Doug Fawcett, discussing the application of *Quistclose Investments* in Canadian jurisprudence, suggests that lenders should structure transactions so as to

⁹⁶ The constructive trust approach to classification has received far less attention than the express/resulting debate. However, it has received some acceptance in New Zealand and the United States: see *Dines Construction Ltd v Perry Dines Corp Ltd* (1989) 4 NZCLC 65, 298 (Ellis J); *In re Jones* 50 Bankr 911, 921–3 (Michael A McConnell) (Bankr ND Tex, 1985). There exists only limited discussion of the classification of *Quistclose* as constructive in Australia: see *Smith v Western Australia* [2009] WASC 189, [78] (McKechnie J).

⁹⁷ See generally Glister, ‘Nature of *Quistclose* Trusts’ (n 17).

⁹⁸ See below Part V.

⁹⁹ Amber Lavinia Rhodes, ‘The *Quistclose* Trust’s Detrimental Effect on Commercial Transactions’ (2013) 27(4) *Trust Law International* 179, 181 (emphasis in original).

¹⁰⁰ Ewan McKendrick, ‘Commerce’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 145, 148; Liew (n 38) 69.

¹⁰¹ McKendrick (n 100) 150–1.

¹⁰² *Re Armstrong* [1960] VR 202; *Byrnes v Kendle* (2011) 243 CLR 253, 290 [114]–[115] (Heydon and Crennan JJ) (‘*Byrnes*’).

¹⁰³ Hudson (n 7) 795.

¹⁰⁴ McKendrick (n 100) 148.

avoid over-reliance on *Quistclose*-style quasi-security.¹⁰⁵ As such, the value of the *Quistclose* trust is not as an institutional trust but rather as a proprietary remedy for a lender to gain priority in the case of a borrower's insolvency. Empirical analysis highlights this phenomenon: *Quistclose Investments* is invoked predominantly when a lender attempts to recover money advanced in a priority dispute with an insolvent borrower's unsecured creditors.¹⁰⁶ McKendrick thus describes *Quistclose* trusts in the context of modern commercial practice as 'residual device(s)'.¹⁰⁷ Further, not all failures of purpose provide a reason for lenders to invoke *Quistclose Investments*. Where the failure of purpose is not a function of insolvency and the borrower remains solvent, lenders will be satisfied with a personal remedy for payment of debt.¹⁰⁸ There is no need in these situations to attempt to make the difficult argument of applying *Quistclose Investments* to the specific circumstances.

The confusion relating to the location of the beneficial interest in a *Quistclose Investments* transaction limits the utility of the trust prior to insolvency. Commentators have argued that the beneficial ownership of money advanced in a *Quistclose Investments* transaction remains with the lender,¹⁰⁹ passes to the borrower,¹¹⁰ or extends to the third parties who are identified in the purpose of the transaction.¹¹¹ Even if the better view is that the beneficial ownership remains with the lender, the lender's rights as a beneficiary under the trust are extremely limited. The lender is in no position to require the transfer back of the trust property under *Saunders v Vautier* principles.¹¹² This would clearly be inconsistent with the original loan contract under which money was advanced.¹¹³ Resultantly, the value of a *Quistclose* trust only arises

¹⁰⁵ Doug Fawcett, 'Quistclose Trust: Security (or Additional Security) for a Loan Transaction' (2013) 32(2) *Estates, Trusts & Pensions Journal* 138, 154–5.

¹⁰⁶ McKendrick (n 100) 146. The other key category of cases where *Quistclose Investments* is raised is in taxation and entitlement cases: see, eg, *Morley-Clarke v Jones (Inspector of Taxes)* [1986] Ch 311.

¹⁰⁷ McKendrick (n 100) 152.

¹⁰⁸ RM Goode, 'Is the Law Too Favourable to Secured Creditors?' (1983) 8(1) *Canadian Business Law Journal* 53, 56.

¹⁰⁹ Bridge (n 86) 352.

¹¹⁰ Chambers, *Resulting Trusts* (n 26) 73–8.

¹¹¹ PJ Millett, 'The Quistclose Trust: Who Can Enforce It?' (1985) 101 (April) *Law Quarterly Review* 269, 290.

¹¹² (1841) 4 Beav 115; 49 ER 282. Briefly, the rule in *Saunders v Vautier* notes that beneficiaries may require a trustee to transfer trust property to them at any time and thereby terminate the trustee-beneficiary relationship. For a general discussion on the conflicting perspectives of the applicability of *Saunders v Vautier* powers in *Quistclose* scenarios, see Chan, 'The Tree That Was Not Meant to Be' (n 40) 8–11.

¹¹³ William Swadling, 'Orthodoxy' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 9, 28; Cope (n 33) 47–8. Glistler, however, argues that this analysis fuses contractual and proprietary obligations and that separating these with the caveat that proprietary obligations trump contractual obligations provides a better understanding: Glistler, 'Quistclose Trusts' (n 26) 20–5. Similar arguments are expressed in Janet Ulph, 'Equitable Proprietary Rights in Insolvency: the Ebbing

upon failure of purpose due to insolvency, by allowing lenders to gain priority over unsecured creditors.¹¹⁴ Prior to insolvency, as Donovan Waters notes, the trust is simply ‘a holding device pending the taking effect of the loan or sale’.¹¹⁵ Essentially, the trust has no value until either the loan money is applied successfully, where the trust will fall away, or the loan money is misapplied, where the Court will deem it to be held on trust for the lender.

Rhodes argues that the court’s declaration of the existence of a *Quistclose* trust is only useful insofar as it clarifies to third parties the existence of an equitable proprietary interest over the money from the date of judgment.¹¹⁶ This is particularly so under the *Twinsectra* resulting trust model. A finding of implied intention to justify imposing a resulting trust requires the court to retrospectively define the nature of the loan arrangement well after the money is initially advanced. Whilst Rhodes notes that there is no inherent problem with equity imposing proprietary interests after the original disposition of property,¹¹⁷ *Quistclose* scenarios are uniquely unsuited to this grant since they fail to locate the beneficial interest during the period between money transfer and judicial proceedings. Rhodes’ characterisation would allow parties such as Barclays Bank (in *Quistclose Investments* itself) to set-off against money later declared to be held on *Quistclose* trust, given it would not be characterised as trust property until judicial intervention. Such an understanding would thus be inconsistent with the availability of claims against third parties for breach of *Quistclose* trusts. However, as a matter of form, the practical impact in scenarios involving insolvency is simply that which flows after judgment by preferring the *Quistclose* lender to the borrower’s other unsecured creditors. This conclusion, as to the remedial nature of *Quistclose* trusts highlights its similarities with the remedial constructive trust as understood in modern Australian jurisprudence. Justice Deane in *Muschinski v Dodds* (*‘Muschinski’*), discussing the nature of constructive trusts stated:

[T]he constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.¹¹⁸

Tide?’ [1996] (September) *Journal of Business Law* 482, 494. However, the better view seems to be that whilst the lender is in theory absolutely entitled to require the return of the money, the presence of the borrower’s power to apply the money would trump this *Saunders v Vautier* (n 112) entitlement. The only way to avoid this would be for the lender to reserve an express power to require return of the money advance: see Peter Birks, ‘Retrieving Tied Money’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 121, 126.

¹¹⁴ Glister, ‘Quistclose Trusts’ (n 26) 27.

¹¹⁵ Donovan WM Waters, ‘Trusts in the Setting of Business, Commerce, and Bankruptcy’ (1983) 21(3) *Alberta Law Review* 395, 417.

¹¹⁶ Rhodes (n 99) 183.

¹¹⁷ *Ibid* 184.

¹¹⁸ (1985) 160 CLR 583, 614 (*‘Muschinski’*).

The scope of ‘contrary to equitable principle’ is necessarily broad to grant the court discretion when determining whether particular circumstances justify imposing a constructive trust.¹¹⁹ Justice Deane’s use of the term ‘remedial institution’ is however apt to confuse, particularly in light of the significant debate on constructive trusts using the terms ‘remedial’ and ‘institutional’ as two opposing perspectives.¹²⁰ However, Deane J notes that this dichotomy is misleading, and that the practical impact on parties remains the same.¹²¹ The discretion of a court when imposing a constructive trust essentially means it is always remedial, as its impact on parties to litigation, as well as third parties, is only understood after judicial intervention.¹²² Peter Birks thus describes the court’s order as an exercise of a strong discretion to grant a proprietary right to a party who prior to judgment, did not have one.¹²³

Justice Deane’s comments highlight the similar impact of a court granting relief through both *Quistclose* trusts and remedial constructive trusts. In particular, the distribution of assets in insolvency is directly affected by a court’s declaration of a *Quistclose* trust. The impact on the borrower’s liquidator, the lender, and other third-party creditors results directly after the court’s decision.¹²⁴ Alexandra Whelan thus groups *Quistclose* trusts together with the remedial constructive trust, noting that they both have the effect of granting a proprietary right in the insolvent party’s property after the commencement of the insolvency process where one did not exist before insolvency.¹²⁵ Similar to Rhodes’ argument, such an understanding of *Quistclose* trusts would be inconsistent with principles of third party liability for breach of a *Quistclose* trust occurring before judicial intervention. In that sense, Whelan’s argument is best understood as explaining the practical impact on, as opposed to the strict legal characterisation of, the parties involved in insolvency proceedings insofar as it relates to asset distribution.

Whilst courts currently do not purport to exercise any discretion when granting a *Quistclose* trust as they do for other equitable remedies, Smolyansky suggests that they in fact do exercise discretion but hide this behind the liberal application of tests to determine intention.¹²⁶ He argues that fashioning relief in *Quistclose Investments* scenarios is not an exercise grounded in intention but rather an enforcement of a policy

¹¹⁹ GE Dal Pont, ‘The High Court’s Constructive Trust Tricentenary: Its Legacy from 1985–2015’ (2015) 36(2) *Adelaide Law Review* 459, 466–7.

¹²⁰ *Ibid* 466.

¹²¹ *Muschinski* (n 118) 614.

¹²² *Ibid* 614 (Deane J); *Westdeutsche Landesbank Girozentrale* (n 40) 714–15 (Lord Browne-Wilkinson).

¹²³ Peter Birks, ‘Proprietary Remedies’ in John P Lowry and Loukas A Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, 2006) 185, 185.

¹²⁴ Robert Stevens, ‘Insolvency’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 153, 153–4.

¹²⁵ Alexandra M Whelan, ‘Proprietary Rescission and the Impact of Insolvency’ (2012) 23(1) *Journal of Banking and Finance Law and Practice* 3, 7.

¹²⁶ Smolyansky (n 69) 567. Here, ‘tests to determine intention’ refers to the factors the court considers when determining whether the settlor demonstrated an intention to create an express trust.

which encourages corporate rescue and lending to firms on the brink of insolvency.¹²⁷ Whilst courts do not express this rationale for *Quistclose* trusts, the circumstances which typically give rise to *Quistclose* trust relief align with his suggestion.¹²⁸ Thus, Smolyansky asserts that *Quistclose* trusts operate in accordance with general understandings of unconscionability: a court exercises its discretion and declares a trust since it would be unconscionable for unsecured creditors, who would have benefitted if the firm remained solvent as a result of the *Quistclose* advance,¹²⁹ to assert beneficial title and retain the money in the general pool of assets.¹³⁰ In that sense, the declaration of a *Quistclose* trust is similar to the constructive trust in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*.¹³¹ There, a payment was mistakenly made to an insolvent firm due to a clerical error. The High Court of England and Wales granted proprietary relief in the form of a constructive trust to prevent the unconscionable retention of money by the firm's unsecured creditors.¹³² Smolyansky suggests *Quistclose* trusts operate in a similar manner.¹³³ Whether *Quistclose* trusts can be understood under these principles in Australia is unclear, since Australian courts have tended to avoid imposing constructive trusts in commercial dealings and have expressed the need for a cautious approach to ordering a remedial constructive trust.¹³⁴

¹²⁷ Ibid 566.

¹²⁸ Ibid 566–7.

¹²⁹ They would have benefitted because they would be more likely to receive complete repayment of their debt.

¹³⁰ Smolyansky (n 69) 567.

¹³¹ [1981] Ch 105 ('*Chase Manhattan*').

¹³² Ibid 119–20, 127–8 (Goulding J). Justice Goulding provided little justification for imposing proprietary relief in the circumstances. Some have argued that it is better characterised as a constructive trust as a restitutionary remedy for unjust enrichment, rather than to cure unconscionability: see, eg, Bryan et al, *A Sourcebook on Equity & Trusts in Australia* (n 18) 544–5. In any case, WenXiong has argued against any classification of the *Quistclose* trust as a proprietary response to unjust enrichment due to a failure of consideration: see WenXiong (n 30) 675–81. Therefore, the utility of comparing *Chase Manhattan* (n 131) and *Quistclose Investments* (n 1) comes from treating both as responses to unconscionability: Smolyansky (n 69) 567.

¹³³ Smolyansky (n 69) 567.

¹³⁴ David Wright, 'Third Parties and the Australian Remedial Constructive Trust' (2014) 37(2) *University of Western Australia Law Review* 31, 37–9. Wright identifies the High Court of Australia's hesitation to rely on equitable remedies in commercial settings in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45–6 [129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*John Alexander's Clubs*'). There, the High Court emphasised the need to consider the appropriateness of equitable intervention in scenarios where parties have arrived at a commercial agreement, and also to consider the interests of third parties in such transactions. See also, Nicholas Allton, 'The Boundaries of Proprietary Claims' (1997) 13(1) *Queensland University of Technology Law Journal* 276, 287–8. See generally Justice of Appeal PA Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 84(2) *Australian Law Journal* 92, 111, where Justice of Appeal Keane argued extra-curially against equitable intervention in commercial dealings due to the inconsistent goals of equity and commercial practices.

There may be some argument that unlike remedial constructive trusts, a court's retrospective imposition of a trust in *Quistclose* scenarios impacts parties differently, particularly in a scenario where creditors have lent money between the period of the *Quistclose* advance and the court's remedial grant. However, as a matter of practice, in circumstances where the failure of purpose is a result of a borrower's insolvency, such concerns are unfounded, as they relate to unsecured creditors,¹³⁵ for two reasons. First, money advanced by a lender invoking a *Quistclose* trust is typically for the purpose of corporate rescue.¹³⁶ It is therefore uncommon to encounter a situation where further money is lent by a creditor after a *Quistclose* advance. Second, as long as money is lent prior to trial, *pari passu* distribution creates no prejudice to the new lender. In the absence of any registration requirement for *Quistclose* trusts,¹³⁷ the later lender is in no different position to the unsecured creditors who lent money prior to the *Quistclose* advance.¹³⁸ Whilst this may not be a just result, as a matter of form, there is no reason in law to prefer or differentiate the new lender from pre-existing unsecured creditors. As such, the impact on all parties involved flows directly from judicial declaration of a *Quistclose* trust.

Therefore, in considering any normative justifications for retaining the *Quistclose* trust in private law taxonomy, it must be justified in light of its remedial nature. As Rickett has argued, 'were "the remedial trusts law philosophy" to become dominant ... [we must ask] "why is the remedy to be imposed?"'.¹³⁹

V THE ABSENCE OF A PRINCIPLED BASIS TO MAINTAIN *QUISTCLOSE* TRUSTS

Once accepted, as I have argued in Part IV, that the *Quistclose* trust, at least in situations of insolvency, should be considered remedial rather than institutional, there must be a principled basis for maintaining its existence given that it cannot be justified through intention.¹⁴⁰ The High Court of Australia in *Bathurst City Council*

¹³⁵ The position when considering some secured creditors is more complex, due to the operation of the *PPSA* (n 37) and *Corporations Act 2001* (Cth) ('*Corporations Act*'). Insolvency provisions in the *Corporations Act* may apply to some secured creditors in the same manner as unsecured creditors where the former have failed to comply with the requirements under *PPSA* (n 37) ss 19–21. See also *PPSA* (n 37) s 267 which identifies the point in time when personal property of a debtor vests in an administrator or liquidator and the nature of the property which is subject to these provisions.

¹³⁶ McKendrick (n 100) 148.

¹³⁷ *PPSA* (n 37) s 8(1)(h); Glister, 'The Role of Trusts in the *PPSA*' (n 36) 640–1.

¹³⁸ Excepting the circumstance where further money is advanced under an existing security interest: see *PPSA* (n 37) s 58.

¹³⁹ Rickett (n 6) 617 (emphasis in original).

¹⁴⁰ As Hanoch Dagan suggests, private law should reflect a balance between instrumentalist and autonomist views. Private law rights and remedies must be justified, at least to some extent, on some normative basis: see Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56(3) *American Journal of Comparative Law* 809,

v PWC Properties Pty Ltd ('*Bathurst*') emphasised this requirement, particularly in light of the invasiveness of proprietary relief in insolvency.¹⁴¹ There, the majority emphasised the need to, before granting a remedial trust, consider other efforts to avoid 'a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant'.¹⁴²

This Part considers the grant of proprietary relief in *Quistclose* situations in light of Bant and Bryan's model of proprietary remedies. In particular, I focus on their fourth and fifth propositions concerning discretionary factors that may defeat or qualify proprietary relief, which involves considering policy arguments.¹⁴³ Specifically, I consider efficiency in lending, incentivising corporate rescue, and the coherence of *Quistclose* trusts with the objectives of statutory insolvency schemes as potential normative justifications. Importantly, it is not enough that maintaining the *Quistclose* trust in insolvency achieves one of these justifications, for example by encouraging corporate rescue. Instead, the utility achieved by maintaining *Quistclose* trusts must outweigh the prejudice caused by prioritising the lender over other unsecured creditors to justify removing assets from the pool available for distribution in insolvency.¹⁴⁴ This is because the unsecured creditors are the 'true' defendants in cases arguing priorities in insolvency; they are not typical third parties and the

810–18; François Du Bois, 'Social Purposes, Fundamental Rights and the Judicial Development of Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart, 2012) 89, 98–100.

¹⁴¹ (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bathurst*'). This concern has been raised prior to *Bathurst* including in *Re Osborn; Ex parte Trustee of Property Osborn v Osborn* (1989) 25 FCR 546. The High Court has also considered the prejudicial effect on innocent third parties generally when imposing proprietary relief: see *Giumelli v Giumelli* (1999) 196 CLR 101, 125 [49]–[50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

¹⁴² *Bathurst* (n 141) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ). The High Court made similar comments in the more recent case of *John Alexander's Clubs* (n 134) 45 [128] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). Concerns have also been expressed in the United Kingdom: see, eg, *Borden (UK) Ltd v Scottish Timber Products Ltd* [1979] 3 All ER 961, 973 (Templeman LJ).

¹⁴³ Bant and Bryan, 'A Model of Proprietary Remedies' (n 9) 216–17; Elise Bant and Michael Bryan, 'Defences, Bars and Discretionary Factors' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 185, 200–7. The first three propositions in the model focus predominantly on the nature of property and ensuring any proprietary remedy results in specific restitution of the original asset or substituted assets if relevant, as well as any secondary profits earned by the defendant in use of the assets. These are less relevant given *Quistclose* relief always concerns money transferred, which is either specifically identifiable or substituted in the form of other money. The sixth proposition simply notes that the defendant has an obligation to preserve the plaintiff's asset in the period between becoming aware of the plaintiff's entitlement and final court orders. This is similarly not a concern in *Quistclose* scenarios for the reasons identified in Part IV on the timing of a claim of *Quistclose* relief.

¹⁴⁴ Goode (n 108) 66; Goodhart and Jones (n 47) 494.

insolvent borrower's role is purely procedural.¹⁴⁵ Only if the utility to lenders clearly outweighs the prejudice to unsecured creditors should the *Quistclose* trust remain in the taxonomy of proprietary remedies in insolvency. This is particularly so after the High Court of Australia's separation of right and remedy in *Bathurst*, evincing a greater willingness to consider the impact on all relevant parties of imposing a particular form of proprietary relief.¹⁴⁶

It is important at this stage to clarify why this remains a concern in light of Australian courts' apparent approval of the 'acceptance of risk' theory.¹⁴⁷ The theory justifies granting proprietary relief to a lender on the assumption that other unsecured creditors have accepted the risk that the borrower may grant proprietary interests which could reduce the assets available for distribution in insolvency.¹⁴⁸ However, the theory cannot apply in scenarios giving rise to *Quistclose* relief. First, it does not explain why a *Quistclose* lender should gain priority over involuntary creditors, such as tort claimants, who are unable to bargain for security.¹⁴⁹ Second, the theory assumes that creditors are aware of circumstances in which a claimant will gain priority through proprietary relief.¹⁵⁰ This is evidently not the case in situations of *Quistclose* relief; the application of tests to determine its availability yields inconsistent results.¹⁵¹

There exists very limited jurisprudence which attempts to discern a normative justification for maintaining *Quistclose* trusts. The discussion of the underlying justification for the *Quistclose* trust is limited to concepts of fairness, best expressed by Bingham LJ in *Re EVTR*. There, Bingham LJ justified the imposition of a *Quistclose* trust by relying on the unfairness of forcing the lender in that case to participate in *pari passu* distribution alongside other unsecured creditors. However, this reasoning is 'consequentialist'; it justifies the result by considering the consequences of an award of *Quistclose* relief rather than through a process of deductive reasoning.¹⁵² If, as Lord Millett described in *Twinsectra*, the purpose of the *Quistclose* arrangement is 'to prevent the money from passing to the borrower's [liquidator] in the event

¹⁴⁵ Crawford (n 40) 820.

¹⁴⁶ David Wright, 'Proprietary Remedies and the Role of Insolvency' (2000) 23(2) *University of New South Wales Law Journal* 143, 169.

¹⁴⁷ *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd* (1994) 49 FCR 334, 358–9 (Northrop J). David Stevens argues that a grant of equitable relief reflects a court's judgment on the transactional allocation of risk: David Stevens, 'Restitution, Property and Cause of Action in Unjust Enrichment: Getting By with Fewer Things' (1989) 39(3) *University of Toronto Law Journal* 258, 290–2.

¹⁴⁸ David M Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors' (1989) 68(2) *Canadian Bar Review* 315, 324–5.

¹⁴⁹ Goode (n 108) 57.

¹⁵⁰ *Clout v Markwell* [2001] QSC 91, [21] (Atkinson J); Wright, 'Third Parties and the Australian Remedial Constructive Trust' (n 134) 47.

¹⁵¹ See above Part III.

¹⁵² Bant and Bryan, 'Constructive Trusts and Equitable Proprietary Relief' (n 93) 196; Cope (n 33) 10.

of his insolvency',¹⁵³ it is unsuitable to justify *Quistclose* trusts on fairness grounds to protect the lender in insolvency, particularly given intention requirements are not satisfied.¹⁵⁴ There must be some other normative basis on which to retain *Quistclose* trusts in private law remedial taxonomy.¹⁵⁵ This Part shows there is none.

A *Efficiency*

Some commentators have argued that one fundamental role of *Quistclose* trusts is to provide security or quasi-security for lenders.¹⁵⁶ Thus, the argument would go, if lenders could confidently structure transactions using *Quistclose* trusts as security, they would be more likely to lend.¹⁵⁷ This would lead to increased competition in lending and thus promote more efficient capital markets.¹⁵⁸ At the outset, it is important to qualify this argument. Some scholars have suggested that security does not actually promote efficiency in lending, and that the cost savings accruing to borrowers who grant security must be paid through increased interest rates demanded by unsecured lenders.¹⁵⁹ However, this argument usually relies on the Modigliani-Miller theory¹⁶⁰ of capital structure which operates only in perfect capital markets.¹⁶¹ This theory assumes perfect pricing of credit, but empirical observations highlight the flaws in this assumption typically arising out of differences in risk tolerance for creditors.¹⁶² In contrast, the main proponents of secured lending argue that credit markets are never perfectly informed, and therefore efficiency gains are possible through the use of secured loans for two reasons.¹⁶³ First, security reduces the need to monitor the borrower's behaviour once money is lent; the cost savings accrued by lenders are

¹⁵³ *Twinsectra* (n 3) 187–8 [82] (Lord Millett).

¹⁵⁴ See above Part III.

¹⁵⁵ *Ulph* (n 113) 486; *Dagan* (n 140) 813–18.

¹⁵⁶ See, eg, Brandon Dominic Chan, 'The Enigma of the Quistclose Trust' (2013) 2(1) *University College London Journal of Law and Jurisprudence* 1, 3–7; Paul U Ali, 'Quistclose Trusts in Lending: Trust or Security Interest?' (2005) 23(1) *Company and Securities Law Journal* 325, 326–34. There is some argument that *Quistclose* trusts are not strictly security interests as they secure no independent obligation; the obligation is repayment of the 'security' itself: see Stevens, 'Insolvency' (n 124) 154–5. Lionel Smith argues generally that interests under a trust should not be considered 'security' in the traditional form, but concedes that they often perform the same function: Lionel Smith, 'Security' in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 307, 351 [5.107].

¹⁵⁷ *Goode* (n 108) 56.

¹⁵⁸ Cf *Keane* (n 134) 111.

¹⁵⁹ Alan Schwartz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10(1) *Journal of Legal Studies* 1, 7–9.

¹⁶⁰ See generally Franco Modigliani and Merton H Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' (1958) 48(3) *American Economic Review* 261.

¹⁶¹ *Bridge* (n 86) 337–8.

¹⁶² James J White, 'Efficiency Justifications for Personal Property Security' (1984) 37(3) *Vanderbilt Law Review* 473, 494–502.

¹⁶³ Schwartz (n 159) 9–21.

passed on to borrowers through lower interest rates.¹⁶⁴ Second, the borrower's grant of security signals to the market that the prospects of a company's projects are strong and will produce predictable profits, thus making the borrower willing to grant security over their assets.¹⁶⁵ If indeed these two advantages of secured lending are accepted to increase efficiency in capital markets, it is clear that they do not apply to *Quistclose* trusts as they are currently regulated, as explained below.

Before discussing the ability for the *Quistclose* trust to achieve efficiencies through reduced monitoring costs and a signalling effect, a number of concerns arise due to the timing of a grant of *Quistclose* proprietary relief. Given that *Quistclose* trusts are invoked primarily as a last resort in insolvency proceedings,¹⁶⁶ the time available for the transaction to send any signal to the market is negligible. That is, a court's grant of *Quistclose* relief is preceded by the distribution of assets in insolvency. No further lending takes place and therefore the efficiency gains derived from the signalling effect are negligible. Second, the inconsistent application of the intention tests in *Quistclose* trust cases¹⁶⁷ minimises any certainty for lenders in claiming security. This has the effect of neutralising any efficiency gains until insolvency proceedings, at which point no further lending occurs anyway.

Similar arguments can be levelled against the perceived monitoring cost savings, even if it is assumed that the circumstances which would give rise to *Quistclose* proprietary relief are sufficiently clear and can be acted upon by lenders. This is because the vast majority of lending giving rise to *Quistclose* relief, particularly where the failure of purpose is caused by insolvency, occurs in corporate rescue attempts.¹⁶⁸ As such, the loan is intended to be a form of short-term debt, to allow the borrower to return to normal operations.¹⁶⁹ The short-term nature of this debt means the cost savings gained by not being required to monitor the borrower's activities only accrue over a short time period. In contrast, traditional forms of security are typically used in long-term lending situations, such that the savings accrued over the period of the loan are significant.¹⁷⁰ Thus, it is difficult to argue that the minor monitoring cost

¹⁶⁴ Ibid 9–14; Goode (n 108) 56.

¹⁶⁵ Schwartz (n 159) 14–21. Whilst this remains a common argument, empirical evidence of lending practice shows that theoretically security is more often granted by younger, riskier firms and thus is indicative of a lack of creditworthiness, since lenders are only lending money with extra protections: see Sheng-Syan Chen, Gillian HH Yeo and Kim Wai Ho, 'Further Evidence on the Determinants of Secured Versus Unsecured Loans' (1998) 25(3–4) *Journal of Business Finance & Accounting* 371, 374–7.

¹⁶⁶ McKendrick (n 100) 146.

¹⁶⁷ See above Part III.

¹⁶⁸ McKendrick (n 100) 148.

¹⁶⁹ Bridge (n 86) 348, 361; Deepa Parmar, 'The Uncertainty Surrounding the Quistclose Trust' (Pt 2) (2012) 9(3) *International Corporate Rescue* 202, 206–7.

¹⁷⁰ This is particularly so given the costs incurred by the lender to facilitate the process of encumbering an asset, such as registration under any personal property securities legislation. Cost savings through reduced monitoring must at least cover this cost for the loan to be commercially viable: see Goode (n 108) 60.

savings gained from lending on the assumption of a grant of *Quistclose* proprietary relief are enough to justify removing these assets from the pool available for distribution to unsecured creditors. This is particularly true given the evidence which suggests that lenders do not regard themselves as secured lenders with a *Quistclose* proprietary interest until a court rules in their favour.¹⁷¹

The unique circumstances giving rise to *Quistclose* trusts also minimise any efficiencies from the signalling effect. The signalling effect relies on a message being sent to the market that a company trusts its prospects enough to encumber its revenue generating assets with the risk of security.¹⁷² This is not the same situation as that which results in *Quistclose* relief. Unlike traditional security over pre-existing assets of the borrower, the encumbered asset is the money advance itself.¹⁷³ Any signal sent that the borrower is willing to encumber loan moneys is likely to have a negligible impact on other creditors' perceptions of the company. There is no encumbrance over the assets of the firm as it existed prior to the money advance.

Potentially more concerning however, is the scope for 'ostensible ownership' problems due to the current regulation of *Quistclose* trusts.¹⁷⁴ The signalling effect assumes that the information which is being used to signal a firm's prospects is widely accessible by credit markets. However, this certainly is not the case for *Quistclose* trusts in Australia,¹⁷⁵ and likely not for other jurisdictions either.¹⁷⁶ Without any registration, credit markets are unaware of the characterisation of money as trust assets rather than forming part of the freely available assets of the borrower.¹⁷⁷ This has the potential to create inefficiencies in capital markets as lenders overestimate the creditworthiness of a firm. Whilst in the short-term this will actually drive down interest rates, the long-term impact is significant.¹⁷⁸ As lenders experience insolvency proceedings in which the court declares that some of the money they believed was available for distribution is actually held on *Quistclose* trust, their confidence in their ability to calculate risk will decrease. The obvious long-term result is an over-pricing of credit, as lenders adjust their risk tolerance to reflect a more conservative approach.¹⁷⁹ Thus, the efficiency gains from signalling effects are minimal, or potentially negative, and

¹⁷¹ Fawcett (n 105) 154–6.

¹⁷² Schwartz (n 159) 14–15.

¹⁷³ Stevens, 'Insolvency' (n 124) 154–5; Glister, 'Quistclose Trusts' (n 26) 89–90; Chan, 'The Tree That Was Not Meant to Be' (n 40) 25.

¹⁷⁴ See Helman (n 39).

¹⁷⁵ *PPSA* (n 37) s 8(1)(h).

¹⁷⁶ Glister, 'The Role of Trusts in the *PPSA*' (n 36) 641–3.

¹⁷⁷ Lusina Ho and Phillip Smart, 'Quistclose and Romalpa: Ambivalence and Contradiction' (2009) 39(1) *Hong Kong Law Journal* 37, 49; Chan, 'The Tree That was Not Meant to Be' (n 40) 23–4.

¹⁷⁸ Christopher Viney and Peter Phillips, *Financial Institutions, Instruments and Markets* (McGraw Hill Education, 8th ed, 2015) 460–1.

¹⁷⁹ See generally Zvi Bodie, Alex Kane and Alan J Marcus, *Investments* (McGraw Hill Education, 10th ed, 2014) 349–80.

do not justify the grant of proprietary relief which confers effective priority over the borrower's unsecured creditors.

B *Incentivisation*

The award of *Quistclose* trust relief has been argued by some commentators to reflect an underlying instrumentalist policy of incentivising corporate rescue and protecting parties who lend to companies facing the threat of insolvency.¹⁸⁰ Smolyansky suggests that the ongoing difficulty with understanding *Quistclose* trusts within pure trusts law philosophy results from a failure of judges to articulate this underlying policy goal of granting proprietary relief in the circumstances.¹⁸¹ He suggests that judges have adopted creative and somewhat artificial reasoning to find intention to declare the existence of a *Quistclose* trust. However, this instead reflects their attempts to reach a fair and just outcome by protecting lenders who endeavour to prevent a borrower's insolvency.¹⁸² Similarly, Ulph suggests that the judiciary has facilitated equitable intervention in *Quistclose* scenarios more willingly than other scenarios such as those involving retention of title¹⁸³ due to the benefits of encouraging corporate rescue.¹⁸⁴ Smolyansky argues that the priority granted to the *Quistclose* lender over other unsecured creditors is also warranted due to the nature of the transaction. He suggests that those creditors stand to gain if the *Quistclose* advance prevents a borrower's insolvency, yet they have not provided any consideration. As such, the unsecured creditors are no worse off if the *Quistclose* lender is granted proprietary relief; and in fact, retention by the unsecured creditors of the advance would represent a windfall profit at the expense of the *Quistclose* lender.¹⁸⁵

On its face, incentivising corporate rescue seems to be a sound policy goal on which to ground proprietary relief. The impact of a company's insolvency extends beyond unsecured creditors and impacts employees, customers, suppliers, and others.¹⁸⁶ Thus, attempts by the law to prevent these consequences should be encouraged and lenders should be protected in circumstances where their efforts do not succeed.¹⁸⁷ Corporate rescue at the very least maintains the status quo and avoids lengthy

¹⁸⁰ Smolyansky (n 69) 566–7; Rebecca Clarke, 'The Quistclose Trust: A Welcome Facilitator of Corporate Rescue?' (2017) 26(1) *Nottingham Law Journal* 130, 140–1; Parmar (n 169) 202.

¹⁸¹ Smolyansky (n 69) 566–7.

¹⁸² *Ibid* 567.

¹⁸³ Commonly known as *Romalpa* clauses after the United Kingdom Court of Appeal's decision in *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552.

¹⁸⁴ Ulph (n 113) 495–6.

¹⁸⁵ Smolyansky (n 69) 567.

¹⁸⁶ Elizabeth Warren, 'Bankruptcy Policy' (1987) 54(3) *University of Chicago Law Review* 775, 787–8.

¹⁸⁷ RP Austin, 'Commerce and Equity: Fiduciary Duty and Constructive Trust' (1986) 6(3) *Oxford Journal of Legal Studies* 444, 455; McCormack (n 11) 97–8.

and costly insolvency proceedings.¹⁸⁸ Incentivisation only works if lenders are guaranteed protection over their loans in these circumstances.¹⁸⁹ However, the utility of corporate rescue is not unchallenged. The common objection is one of efficiency, the core of the argument being that the resources from the failing company could be more efficiently deployed in another venture.¹⁹⁰ The other argument hinges on the notion that since third-party stakeholders such as unsecured creditors, employees, and suppliers are expected to bear losses when a firm fails outside of insolvency, it is unclear why they should be protected inside insolvency; rights should be the same both inside and outside of insolvency.¹⁹¹ Thus it is argued that incentivisation of pre-insolvency transactions should not be a goal of the law. In any case, even assuming that incentivising corporate rescue is a worthy objective, this does not provide a sound basis for granting *Quistclose* relief and priority over other unsecured lenders, for the reasons discussed below.

Smolyansky's argument that unsecured creditors are no worse off if *Quistclose* relief is granted relies on the 'swollen assets' thesis of restitution, which attempts to justify the priority of unjust enrichment plaintiffs. The thesis posits that where the plaintiff has not taken on the risks of insolvency and their money advance has enriched the defendant, the lender should be granted priority through proprietary relief.¹⁹² In that sense, the defendant's assets have been 'swollen' by the plaintiff's payment. The first concern with the application of this theory to *Quistclose* scenarios is evident in its

¹⁸⁸ Thomas H Jackson posits that this remains the common view of insolvency policy: Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) 24–7; Warren (n 186) 787–8; Smolyansky (n 69) 567.

¹⁸⁹ Smolyansky (n 69) 566.

¹⁹⁰ Warren (n 186) 800–4.

¹⁹¹ Douglas G Baird, 'Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren' (1987) 54(3) *University of Chicago Law Review* 815, 817; Jackson (n 188) 25–7; Anthony Duggan, 'Constructive Trusts from a Law and Economics Perspective' (2005) 55(2) *University of Toronto Law Journal* 217, 244–5. Whilst this argument was developed in the United States context, which in some cases allows failing firms to choose between federal or state bankruptcy schemes, with some states maintaining a 'first-in-best-dressed' model, its value broadly holds in Australia: Crawford (n 40) 813. The argument essentially maintains that only those property rights respected outside of insolvency should be maintained within insolvency; it is not for courts to *create* property rights inside of insolvency for any reason, including pursuing policy goals; courts should only *uphold* property rights which already existed outside of insolvency.

¹⁹² Rotherham (n 42) 81–2; Cope (n 33) 9–10; John Glover, 'Equity, Restitution and the Proprietary Recovery of Value' (1991) 14(2) *University of New South Wales Law Journal* 247, 276–7. Bant and Bryan also propose a model based on the swollen assets thesis for the award of constructive trusts. They argue that judges need not consider the impact of an award in insolvency, but more specifically the question of whether the lender assumed the risk of the borrower's insolvency: see 'Constructive Trusts and Equitable Proprietary Relief' (n 93) 196–7. Andrew Burrows has criticised this justification of priority: Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd ed, 2002) 69–75.

first condition. It is extremely difficult to argue that lenders, who advance money on loan, often with high interest rates,¹⁹³ did not contemplate the risk of insolvency,¹⁹⁴ particularly when the transaction was itself an attempt at corporate rescue.¹⁹⁵ Further, since upon a correct application of money, the lender would anyway transform into an unsecured creditor,¹⁹⁶ a suggestion that they did not take the risk of insolvency cannot be sustained. Even if there were circumstances that would suggest the lender did not take the risk, this would not distinguish their position from involuntary creditors such as tort claimants.¹⁹⁷ Another concern is Smolyansky's suggestion that the creditors are no worse off if the money is returned to the *Quistclose* lender since the transfer has 'swollen' the assets of the borrower.¹⁹⁸ The problem with this argument, as Michael Crawford notes, is that it is circular.¹⁹⁹ It can only be accepted if we assume what the thesis sets out to prove: that the unsecured creditors have no entitlement to the *Quistclose* payment in the first place.²⁰⁰

A lender's subjective knowledge that they will be protected by *Quistclose* trust relief is necessary if its grant is to be justified as incentivising corporate rescue. However, for at least two reasons, this is not the case. First, Smolyansky suggests that courts' use of intention to justify *Quistclose* trusts has created a situation in which their grant remains inherently uncertain.²⁰¹ As such, it is difficult to suggest that lenders are advancing money in corporate rescue situations on the assumption that they will be protected by courts in the case of the borrower's insolvency. If lenders recognised the availability of protection over assets through a trust, and subjectively wished to structure a transaction to make use of this protection, they would demonstrate a subjective intention to create a trust.²⁰² In such a case, any argument based on *Quistclose Investments* would not be necessary, and instead the transaction would be governed by orthodox express trust principles or a traditional security interest.

¹⁹³ For example, the 24% interest rate on the money advanced in *Twinsectra* (n 3).

¹⁹⁴ See *Paciocco* (n 148) 342–5 which argues that a written contract provides a clear indication of the lender's assumption of risk. This is another basis on which the *Kayford* (n 11) line of cases has been distinguished, given the money advance was provided by customers for pre-purchase of goods, who arguably cannot be said to have taken the risks of the insolvency: see *McCormack* (n 11) 103–4.

¹⁹⁵ See *Quistclose Investments* (n 1).

¹⁹⁶ *Smith* (n 156) 351 [5.108]. In *Quistclose Investments* (n 1), for example, the result would have been one of 'credit substitution': see *McCormack* (n 11) 98.

¹⁹⁷ *Crawford* (n 40) 848–50.

¹⁹⁸ Smolyansky (n 69) 567. Emily L Sherwin makes a similar argument in the context of constructive trusts, that the borrower's other creditors are unjustly enriched by the money advance and proprietary restitution is justified when the plaintiff can point to the specific asset which has enriched the creditors: see Emily L Sherwin, 'Constructive Trusts in Bankruptcy' [1989] (2) *University of Illinois Law Review* 297, 332–6.

¹⁹⁹ *Crawford* (n 40) 849.

²⁰⁰ *Ibid*; *Sherwin* (n 198).

²⁰¹ Smolyansky (n 69) 560–2, 564, 566–7.

²⁰² *Hudson* (n 7) 802.

Second, there is no empirical analysis to suggest that lenders do in fact rely on the protections afforded by *Quistclose* trusts to incentivise corporate rescue.²⁰³ Rather, some leading cases seem to suggest other reasons motivating the transaction. For example, in *Twinsectra* the incentive would likely have been the 24% interest rate rather than any subjective belief of asset protection under a *Quistclose* trust.²⁰⁴

Last, even if the incentivisation of corporate rescue transactions is to be promoted, it seems contrary to the separation of powers to encourage courts to undertake this task. The promotion of policy goals in lending remains within the bounds of the legislature.²⁰⁵ Arguably, it is not for courts to be motivated in the grant of proprietary relief by some overarching policy objective of incentivising beneficial behaviour.²⁰⁶ If incentivising these transactions warrants granting priority over a company's unsecured creditors, this should be determined by Parliament and not courts.²⁰⁷

C Coherence

The High Court of Australia has on a number of occasions, including in consideration of *Quistclose* relief,²⁰⁸ emphasised the need to ensure coherence in the law.²⁰⁹ The concept of coherence as applied in High Court jurisprudence is complex, and has been subject to significant academic debate.²¹⁰ The core of the principle is that a plaintiff should not be granted relief if doing so would undermine or stultify overriding principles or policies of the law.²¹¹ The purpose of blocking relief is to

²⁰³ Ibid 801; Clarke (n 180) 140.

²⁰⁴ Hudson (n 7) 803.

²⁰⁵ Ulph (n 113) 505–6.

²⁰⁶ A number of commentators hold this view. One of the most vocal is former Australian High Court judge, Justice Dyson Heydon: see, eg, Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 504–14; Birks (n 123) 189.

²⁰⁷ Bant and Bryan, 'Constructive Trusts and Equitable Proprietary Relief' (n 93) 196.

²⁰⁸ *Legal Services Board* (n 18) 525–6 [119]–[123] (Bell, Gageler and Keane JJ). This was in the context of the potential for a *Quistclose* trust to create rights and obligations inconsistent with the *Legal Profession Act 2004* (Vic) ss 3.3.2, 3.3.14.

²⁰⁹ See, eg, *Miller v Miller* (2011) 242 CLR 446, 479–82 [93]–[102] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 518 [33]–[34] (French CJ, Crennan and Kiefel JJ).

²¹⁰ See generally Bant, 'Thieving Lawyers: Trust and Fidelity in the High Court: *Legal Services Board v Gillespie-Jones*' (n 19); Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160; Michael Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87(1) *Australian Law Journal* 33; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367.

²¹¹ Since this concept is not the focus of this article, I adopt a broad definition in line with that expressed in Fell (n 210) 1167–79.

ensure the development of the common law, including equitable doctrine, promotes rather than undermines consistency in the law's underlying normative reasons.²¹²

A grant of *Quistclose* relief in situations of a borrower's insolvency provides an interesting problem for the principle of coherence. Since a declaration of a *Quistclose* trust results in effective priority for the lender over other unsecured creditors, it bypasses *pari passu* distribution rules under insolvency statutory schemes.²¹³ Smolyansky argues that the grant of *Quistclose* relief directly conflicts with orthodox insolvency law principles and policy, in particular the purpose of *pari passu* distribution.²¹⁴ He suggests that courts mask this potential conflict with insolvency law by justifying a grant of *Quistclose* relief as an exercise in respecting intention rather than a choice to prefer one creditor over others due to their perceived merits.²¹⁵ In doing so, courts have transplanted principles of equitable relief based on two-party scenarios into insolvency situations concerning multiple stakeholders.²¹⁶ Worthington thus argues:

Equity's rules for determining the rights *as between claimant and defendant* may often legitimately suggest that an identifiable asset or item of wealth should be specifically delivered to the claimant rather than being left in the hands of the defendant. But this analysis cannot tell us — it is not designed to tell us — whether, *as between the creditor and all the debtor's* [unsecured] *creditors*, the creditor should be entitled to the specific asset via a mechanism that ensures insolvency priority and avoids the *pari passu* rule. That assessment has to be made on the basis of other considerations that are specific to the insolvency context.²¹⁷

To assess the validity of Smolyansky's arguments, it is important to understand the rationale behind the current insolvency scheme, and in particular, the choice of *pari passu* distribution as opposed to another method of debt collection. Insolvency law necessarily must balance two competing tensions: the need to respect the merits of creditors whilst minimising the costs associated with debt collection.²¹⁸ In the absence of a system for collective debt enforcement, creditors are left to bring claims

²¹² Ibid 1163–4; Bant, 'Thieving Lawyers: Trust and Fidelity in the High Court: *Legal Services Board v Gillespie-Jones*' (n 19).

²¹³ See *Corporations Act* (n 135) ss 501, 555, 556; *Bankruptcy Act* (n 31) s 108.

²¹⁴ Smolyansky (n 69) 564.

²¹⁵ Ibid 563–4.

²¹⁶ Sarah Worthington, 'Proprietary Remedies and Insolvency Policy: The Need for a New Approach' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, 2006) 191, 191.

²¹⁷ Ibid 203 (emphasis in original). Similar arguments were raised by Lord Browne-Wilkinson concerning 'wholesale importation into commercial law of equitable principles inconsistent with ... the orderly conduct of business affairs': *Westdeutsche Landesbank Girozentrale* (n 40) 704, citing *Barnes v Addy* (n 35) 251, 255 (Lord Selborne LC); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 703–4 (Lord Diplock).

²¹⁸ Jackson (n 188) 9–11.

individually. The result is significant costs for all parties, including the insolvent company, which reduces the funds available for all creditors. A system of individual debt enforcement is plagued by the ‘common pool’ problem and the prisoners dilemma; a ‘first-in-first-served’ system would result in an inefficient and counter-productive distribution of assets.²¹⁹ By requiring groups of creditors to act as a collective unit, rather than as individuals, the group as a whole is in a better position, albeit some individual creditors will be worse off.²²⁰ The necessary consequence however, is a system of rough justice which prefers a straightforward, efficient, and cost-effective distribution of assets at the expense of perfect, individualised justice, in which a creditor’s individual merits are considered.²²¹ The current system adopted in Australia, and many other jurisdictions, is *pari passu* distribution whereby unsecured creditors are entitled to a pro rata share in the assets remaining after all superior claims are satisfied.²²² The question to be asked therefore, is whether equitable intervention through a grant of proprietary relief is justified in *Quistclose* scenarios, in light of its effects of allowing an otherwise unsecured creditor to bypass *pari passu* distribution.²²³ Crawford argues that any award of these types of devices, including *Quistclose* trusts, which grant priority on the basis of an individual creditor’s ‘deserts’ are fundamentally inconsistent with the distributive justice goals of insolvency distribution.²²⁴ *Pari passu* distribution necessarily represents a compromise which would be undermined by individual attempts to claim priority through the *Quistclose* trust.²²⁵ If this system is to be changed to allow individual claims based on ‘desert’ this should be an objective for the legislature, not the judiciary.²²⁶

Clearly, attempts to invoke a *Quistclose* trust to gain priority appear to be inconsistent with the goals of insolvency legislation. They seem to revert to a system of individual debt enforcement and result in a removal of assets available to unsecured creditors. In that sense, they potentially undermine coherence in the law, by encouraging courts to grant remedies which directly contradict the goals of *pari*

²¹⁹ Ibid 10–11.

²²⁰ Ibid 13–16.

²²¹ Richard Calnan, *Proprietary Rights and Insolvency* (Oxford University Press, 2nd ed, 2016) 41 [1.166].

²²² Michael Murray and Jason Harris, *Keay’s Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 9th ed, 2016) 38; Smolyansky (n 69) 564.

²²³ Worthington, ‘Proprietary Remedies and Insolvency Policy: The Need for a New Approach’ (n 216) 194–5.

²²⁴ Crawford (n 40) 850–1.

²²⁵ Ibid 851. Similar concerns have been expressed about equitable proprietary claims broadly: see *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, 43–5 (Templeman LJ).

²²⁶ Hanoch Dagan, ‘Restitution in Bankruptcy: Why All Involuntary Creditors Should Be Preferred’ (2004) 78(3) *American Bankruptcy Law Journal* 247, 275–6; Bant and Bryan, ‘Constructive Trusts and Equitable Proprietary Relief’ (n 93) 196.

passu distribution.²²⁷ However, this would suggest that all trusts, not only those in *Quistclose* scenarios, would come under scrutiny due to their ability to grant the beneficiary effective priority. However, there remains a distinction between circumstances giving rise to *Quistclose* trusts and other types of trusts. First, express trusts are created in situations where clear evidence of intention to create a trust can be ascertained.²²⁸ Second, resulting trusts are imposed by the law where it is clear that the provider of property did not intend to benefit the recipient.²²⁹ Neither of these situations are involved in *Quistclose* trust cases.²³⁰ Express and resulting trusts can thus be justified as institutions to respect party autonomy. Remedial constructive trusts on the other hand, respond to unconscionability. Smolyansky argues that this provides the justification for granting effective priority over unsecured creditors in *Quistclose* trust cases since the money advance swells the assets of the borrower.²³¹ However, as discussed earlier, this argument fails to justify priority over involuntary creditors. In any case, this does not reflect the position of the *Quistclose* trust as it is currently understood by courts. If courts were indeed responding to unconscionable conduct, there would be no benefit in maintaining the *Quistclose* label and attempting to discern the common facts giving rise to proprietary relief analogous to *Quistclose Investments*; the circumstances would simply give rise to a remedial constructive trust. However, this would seem to require a broader approach to unconscionability to be adopted by Australian courts, since remedial constructive trust cases have typically only been granted in domestic settings and not in situations involving commercial parties transacting at arms-length.²³² Therefore, the distinction between circumstances giving rise to *Quistclose* trusts as opposed to other trusts justifies their separate treatment.

In the absence of unconscionability,²³³ a positive intention to create a trust, or a negative intention to pass beneficial title, there must be some reason in the circumstances giving rise to *Quistclose* relief which justifies its grant in conflict with insolvency law policy. However, there is nothing particularly unique about the circumstances of a *Quistclose* advance. In fact, Stevens suggests that some circumstances may actually involve an unlawful preference to the subjects of the loan,

²²⁷ Judicial concern over transactions undermining the goals of insolvency law can be traced to at least 1873: see *Re Jeavons; Ex parte Mackay* (1873) LR 8 Ch App 643, 647 (James LJ).

²²⁸ *Byrnes* (n 102) 290 [114]–[115] (Heydon and Crennan JJ).

²²⁹ *Anderson v McPherson [No 2]* [2012] WASC 19, [103] (Edelman J); Chambers, *Resulting Trusts* (n 26) 1–5.

²³⁰ See above Part III.

²³¹ Smolyansky (n 69) 567.

²³² Allton (n 134) 287–8.

²³³ Crawford has argued that unconscionability, at least that of the borrower, does not provide a sound basis for awarding proprietary relief in what is essentially a dispute between the lender and the borrower's third-party creditors: see Crawford (n 40) 842–3, discussing *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1073–6 (Lord Templeman).

typically creditors or shareholders.²³⁴ As such, it is difficult to find a reason why *Quistclose* lenders should be granted a proprietary remedy in conflict with the system of collective debt enforcement under insolvency law. This is particularly so given all the other potential methods through which the lender could protect their interest, including high interest rates, traditional security over assets, personal guarantees, and others. Some of these methods are already taken advantage of in *Quistclose* trust cases.²³⁵ Thus, maintaining *Quistclose* relief seems to undermine coherence and conflict with the objectives of the statutory insolvency framework.

VI CONCLUSION

This article has attempted to extend the analysis of the *Quistclose* trust beyond its well-considered, yet still contentious, juridical nature. It has focused on asking why we should maintain a grant of proprietary relief in the circumstances which have given rise to *Quistclose* trusts in the first place. This is particularly important given the practical operation of the trust as remedial rather than institutional. The answer provided in this article is that there is no normative justification which warrants a grant of proprietary relief to *Quistclose* lenders, conferring on them effective priority over the borrower's unsecured creditors. The utility achieved in maintaining *Quistclose* trusts does not outweigh the prejudice caused to unsecured creditors by removing assets from the pool available for distribution to them in insolvency.

This article does not suggest an alternative to the *Quistclose* trust precisely for the reason that there is none. The approach to be favoured is one which abandons proprietary relief for lenders in *Quistclose* scenarios and leaves the lender to their personal remedy in debt. The maintenance of *Quistclose* trusts in modern private law remedial taxonomy cannot be justified for any normative reason and can only be preserved under the guise of consistency with precedent. However, as Crawford has asserted, '[i]n the law of remedies, as elsewhere, whilst there is merit in being consistent, there is no merit in being consistently wrong'.²³⁶

²³⁴ Stevens, 'Insolvency' (n 124) 160–2.

²³⁵ For example, the high interest rate and solicitor's undertaking in *Twinsectra* (n 3).

²³⁶ Crawford (n 40) 857.

MAPPING CHANGES IN THE ACCESS TO CIVIL JUSTICE OF AVERAGE AUSTRALIANS: AN ANALYSIS AND EMPIRICAL SURVEY

ABSTRACT

The phrase ‘access to justice’ is growing more common in contemporary debates about the Australian civil justice system. This article examines the concept of access to civil justice, why it is important, and the obstacles to achieving it, before reporting the results of an empirical survey on changes in access to civil justice for average Australians. It reports on significant areas of legal problems, their impact, the most popular legal services sought and perceptions of changes in access. This article includes an analysis of perceptions of changes in access including a discussion of effects of innovations such as no-win-no-charge, class actions and third-party litigation funding. This article also reports findings on the public desire to be informed of legal rights of action, differences in problems in inner-city, suburban and rural settings as well as the production of index numbers for levels of access in particular legal areas.

I INTRODUCTION

In recent years in Australia, discussion and debate in relation to our justice system has frequently made reference to the importance of ‘access to justice’.¹ This is particularly so in civil justice and the recent debate over the merits of class actions

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¹ This extends to judicial references to such access, such as those in recent decisions of the High Court: see *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 647 [82]–[83], 649 [93] (Kiefel CJ, Bell and Keane JJ), 650 [97], 653 [110] (Gageler J), 669 [177], 676 [199], 677 [202], 678 [205] (Edelman J) (*‘Brewster’*); *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 106 [60], 116 [90], 118 [91]

and third-party litigation funding, which have seen no less than two government law reform commission reports and a Parliamentary Joint Committee report in the last three years.² All of these have made extensive reference to the notion of access to justice.

Though the concept of access to justice defies precise definition,³ the relevant debates have generally acknowledged the merits of such a concept.⁴ Yet there is an absence of analysis of where access to civil justice — and in particular the concepts of no-win-no-charge, class actions and litigation funding — is located in the wider concept of access to justice and legal needs, despite there being considerable literature and empirical studies on that broader concept.⁵ There is also somewhat limited Australian empirical analysis of this relationship.⁶

In this article the authors seek to address a number of issues in the context of the contemporary Australian public debate, including by: (1) interrogating the importance of access to civil justice to citizens with legal problems and to society generally; (2) identifying some of the barriers to such access; and (3) reporting findings of our own empirical survey on these questions and on the accessibility of civil justice to average Australians. The latter section will summarise key aspects of our full empirical survey conducted in 2018–19,⁷ which sought to assess whether access to

(Heydon J); *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 336 [10], 336 [12] (Gummow J), 411 [288] (Heydon J); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 425 [65] (Gummow, Hayne and Crennan JJ), 444 [125], 451 [145] (Kirby J), 482–3 [256], 489–90 [271]–[272] (Callinan and Heydon JJ) (*Fostif*); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 424 [297] (Kirby J), 465 [431] (Callinan J).

² Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018); Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, 21 December 2020) 125 [9.124].

³ See, eg, OECD and Open Society Foundations, *Legal Needs Surveys and Access to Justice* (Report, 31 May 2019) 15, 41 n 3.

⁴ Though there is debate on how this is achieved and whether an increase in the amount of litigation necessarily correlates with an increase in access to justice.

⁵ See below Part III(A).

⁶ Though a number of Commonwealth government reports have certainly noted the importance of representative actions (class actions) and litigation funding, and their potential to increase access to justice: see, eg, 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) 114–17; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) 527–52 [7.87]–[7.128].

⁷ Ethics approval was received from the Monash University Human Research Ethics Committee on 25 June 2018.

civil justice of average Australians has reduced, been static or increased over the past two decades. The empirical survey also identified: (a) areas where average Australians have the most legal problems; (b) legal problems with the highest impact on life; (c) services most popularly sought and satisfaction with these and the legal process; (d) citizens' attitude to their potential civil claims; (e) the extent to which different innovations — no-win-no-charge, pro bono, third-party litigation funding, and class actions — have assisted access to civil justice overall and in different areas of the law; and (f) any salient differences in access to justice in inner and outer urban and regional settings. Lastly, the authors produce access to justice index numbers showing access levels from a list of 26 types of legal problems.

II ACCESS TO JUSTICE

A *What Is Access to Civil Justice?*

The expression 'access to justice' is widely used but not so often defined. In some cases, the use of the phrase has focused on the issue of *equality of access* to the legal system and to the courts.⁸ This expression is related to the phrase 'equal justice under law'.⁹ In Australia, access to justice has been noted as referring to:

- the ability of people to access legal representation;
- the adequacy of legal aid;
- the cost of delivering justice;
- measures to reduce the length and complexity of litigation and improve efficiency;
- alternative means of delivering justice;
- the adequacy of funding and resource arrangements for community legal centres; and
- the ability of Indigenous people to access justice.¹⁰

⁸ Access to Justice Advisory Committee, Parliament of Australia, *Access to Justice: An Action Plan* (Report, 1994) xxx.

⁹ As inscribed on the United States Supreme Court building and reflecting the Fourteenth Amendment to the *United States Constitution*, which provides that no state shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws': see at amend XIV. This focus is on equal *protection* of citizens which might imply a focus on equality of application of laws that protect criminal or civil *defendants*. Yet other laws that protect from harm may require enforcement of remedies by those who suffer harm from others whereby citizens may arguably need equal protection as *plaintiffs*: see below Part II(B).

¹⁰ See generally Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (Report, December 2009).

This article focuses on access to *civil* justice, but the civil landscape is itself very broad. While we will focus to a degree on access to the courts and to legal advice through lawyers, access to civil justice clearly also encompasses alternative means of obtaining civil justice. These extend to using dispute resolution bodies (such as the Australian Financial Complaints Authority), administrative remedies through (less formal) tribunals, ombudsmen, assistance from regulators and community legal centres, legal aid, non-government organisations such as the Consumer Action Law Centre and the Arts Law Centre of Australia, advisory services such as the Family Relationship Advice Line, as well as mandatory dispute resolution services offered by the Small Business Commissioner and other bodies.¹¹ Indeed, such a variety of possible avenues makes it important for services to explain and guide legal consumers in the best direction.¹²

In a narrower sense, the access to justice phrase is often used in the area of civil litigation, particularly in recent debates over the merits of class action procedural mechanisms,¹³ and third-party litigation funding.¹⁴ The academic literature has noted that the term has evolved from only access to lawyers and redress through the courts to encompass enhanced public legal information and education, enhanced use of Alternative Dispute Resolution ('ADR'), and public participation in law reform.¹⁵

The definition of access to civil justice that we will use in this article and which was used in the survey is a person's 'ability to obtain a just or fair outcome in an area of civil justice' including their 'ability to use and access the court system and the legal system to obtain a just or fair outcome'. The questions in the survey (which are contained in the Appendix to this article) also focus on access to legal advice and representation as well as to court action, given that the three may interrelate in

¹¹ See generally Access to Justice Taskforce (n 6) 32–5.

¹² Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 155–9.

¹³ See, eg, Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399; Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13.

¹⁴ See, eg, Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Consultation Paper, July 2017). See also US Chamber Institute for Legal Reform, *Third-Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy* (Report, October 2013) 14 <http://instituteforlegalreform.org/uploads/sites/1/TPLF_in_Australia_page_web.pdf>.

¹⁵ Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale, Ambitions' in Julia Bass, WA Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada, 2005) 19, cited in Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Report, March 2006) 201–2 <[http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/\\$file/Justice_Made_to_Measure.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/$file/Justice_Made_to_Measure.pdf)>.

practice (advice and representation often precede litigation, and may raise the possibility or threat of litigation, which will eventuate in some cases).

This article also seeks to reconcile alternative meanings of access to justice, on the one hand as referring to procedural justice, but also in the broader sense to the obtaining of a just result or outcome overall.¹⁶ Our definition also accords closely with the definition given in the Organisation for Economic Co-Operation and Development's ('OECD') Report *Legal Needs Surveys and Access to Justice*.¹⁷ The OECD definition refers to 'the ability of people to obtain just resolution of justiciable problems ... [being] a problem that raises legal issues'.¹⁸ As discussed below, a subjective assessment (by legal consumers) as to whether this has been achieved was favoured in the survey over any attempt to determine this objectively.

The definition of access to justice adopted in this article is also wide enough to encompass defending and prosecuting proceedings.¹⁹ It is also wider than only access to 'suing', and encompasses general access to legal advice about a person's rights or legal position and letters of demand or defence, arbitration and mediation, and drawing of agreements which are often the 'springboard' to preventing a dispute or negotiating an outcome.

B *The Importance of Access to Civil Justice*

1 *The Rule of Law*

A reasonable level of access to the justice system and the courts appears to be concomitant with, or a component of, the rule of law.²⁰ Equality before the law and access to justice are fundamental to the rule of law.²¹ The notion of rule of law

¹⁶ Deborah L Rhode, 'Access to Justice' (2001) 69(5) *Fordham Law Review* 1785, 1786–7.

¹⁷ OECD and Open Society Foundations (n 3).

¹⁸ *Ibid* 11.

¹⁹ While finding that in three quarters of 'serious dispute[s]' members of the public were potential plaintiffs, Hazel Genn's landmark 1999 survey also revealed that, in one quarter of such serious disputes, members of the public were potential defendants: see Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart, 1999) 8.

²⁰ Access to Justice Taskforce (n 6) 1.

²¹ See generally Law Council of Australia, *The Justice Project* (Final Report, August 2018) 2 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>. In a 2007 work, Daniel Zolo theorises a 'conceptual identity' of the rule of law as including: (1) equal membership of the political and legal community; (2) legal equality; (3) certainty of law; (4) constitutional acknowledgment of individual rights; (5) delimitation of the scope of political power and law enforcement; (6) separation of legislative and administrative institutions; (7) primacy of legislative power, the principle of legality and reserve of legislation; (8) obligation of legislative power to

remains potent in the modern world and is often invoked in connection with the modern development of human rights law.²²

2 *The Rule of Law and the Question of Access to Legal Representation in Australia*

A similar normative rationale for access to justice and the rule of law is that deriving from liberal ideas of equal freedom and dignity of individuals.²³ The liberal ideal of individual autonomy is represented in the common law adversarial system which allows each party to represent their own cause and present their case.²⁴

The rule of law was famously described in the United States as ‘government of laws and not of men’.²⁵ This involved courts, vested with judicial power independent of executive and legislative power, playing a crucial role in constraining state power and protecting rights.²⁶ Further, due process and equal protection under the Fourteenth Amendment to the *United States Constitution* have raised questions of equality of legal representation in the enforcement and defence of rights.²⁷

Considering these issues in the Australian context, it must of course be noted that the *Australian Constitution* does not include a Bill of Rights, within which a right to counsel might otherwise be located.²⁸ While the Australian right to ‘due process’ appears to extend to the right to be tried under recognised procedures in common law courts,²⁹ the High Court has noted that it does not extend to the right to be provided with counsel at public expense.³⁰ Yet in that same judgment, *Dietrich v The Queen* (‘*Dietrich*’),³¹ the High Court did note that courts have the power to stay or adjourn

respect individual rights; and (9) independence of the judiciary: see Danilo Zolo, ‘The Rule of Law: A Critical Reappraisal’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 3, 18–29.

²² Zolo (n 21) 4.

²³ Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008) 236.

²⁴ And in doing so a liberal state may also be concerned to ensure that each party has access to roughly equal legal representation: see generally Ronald J Daniels and Michael J Trebilcock, *Rethinking the Welfare State: The Prospects for Government by Voucher* (Routledge, 2005).

²⁵ Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay, 6 March 1775, 314 <<http://www.masshist.org/publications/adams-papers/index.php/view/PJA02d096>>.

²⁶ *Ibid.* See also *Massachusetts Constitution* pt 1 art XXX.

²⁷ See generally *Douglas v California*, 372 US 353 (1963).

²⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J), 342–3, 350 (Dawson J) (‘*Dietrich*’).

²⁹ *Ibid* 307 (Mason CJ and McHugh J), 347 (Dawson J) and 359 (Toohey J).

³⁰ *Ibid* 309–11 (Mason CJ and McHugh J), 317–21 (Brennan J).

³¹ *Dietrich* (n 28).

criminal proceedings that will result in an unfair trial.³² Thus, where a person is charged with a serious criminal offence and through no fault of their own was unable to obtain legal representation, the court, in the absence of exceptional circumstances, should generally adjourn or stay the trial until representation is available.³³

These principles enunciated in *Dietrich* are however generally limited to criminal law, rather than having anything direct to say about fairness and representation in civil matters. While the concept of due process is similarly directed at protection of those subject to criminal proceedings, it is sometimes said to include representation where people face civil loss of property.³⁴ Nevertheless, the discretion to adjourn in civil courts must be exercised reasonably, and while it will likely be reasonable to adjourn to afford a defendant an opportunity to present their defence,³⁵ this will be balanced against the plaintiff's right to proceed.³⁶

In relation to the inverse position in civil courts — lack of legal representation leading to a plaintiff's likely inability to properly *prosecute* a civil claim — the High Court has quite recently touched upon the proper role of the courts in making orders that might facilitate legal representation to prosecute a claim. In *BMW Australia Ltd v Brewster*³⁷ there was a question as to the court's power to make a common fund order authorising deduction of litigation funders' fees from damages of litigants with whom the funders did not have a contract (the recovery of the funders' fees enabling, inter alia, the payment by the funder of the plaintiffs' legal fees). The question was whether such a power existed pursuant to general powers to make orders 'appropriate or necessary to ensure that justice is done in the proceeding'.³⁸ The plurality (Kiefel CJ, Bell and Keane JJ) found that such an order did not assist in determining any issue in dispute and found no intention of the legislature that maintaining litigation was itself doing justice to the parties.³⁹

³² Ibid 298, 315 (Mason CJ and McHugh J), 357 (Toohey J). Further, Deane J and Gaudron J did suggest that a right to representation in some circumstances is founded in ch III of the *Constitution*, which requires that judicial process and fairness be observed: *Dietrich* (n 28) 326 (Deane J), 362–5 (Gaudron J).

³³ As to later applications of *Dietrich* (n 28) including application in (civil) family law cases, see Frances Gibbon, 'A Decade after Dietrich' (2003) 41(4) *NSW Law Society Journal* May 2003, 52.

³⁴ See generally Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411. See also Gibbon (n 33) 54–6.

³⁵ See Deane J's comments in *Sullivan v Department of Transport (Cth)* (1978) 20 ALR 323: at 343. See also Australian Law Reform Commission, *The Unrepresented Party* (Background Paper No 4, December 1996).

³⁶ The High Court has noted that unnecessary delay may itself be a form of unfair prejudice: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 182 [5] (French CJ) ('*Aon Risk*').

³⁷ *Brewster* (n 1).

³⁸ *Federal Court of Australia Act 1976* (Cth) s 33ZF ('*Federal Court of Australia Act*').

³⁹ *Brewster* (n 1) 639–40 [51]–[53]. The plurality were joined by Gordon J and Nettle J in the result. Justice Gageler and Edelman J dissented from this view finding that such a common fund order could be made: at 655–6 [117] (Gageler J), 685 [232] (Edelman J).

3 *Rule of Law and Economic Wellbeing*

There is some evidence of a correlation between the rule of law (partly facilitated by access to justice, as discussed above) and a higher standard of living. The United Nations Development Programme has stated:

There are strong links between establishing democratic governance, reducing poverty and securing access to justice. Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent.⁴⁰

In the economic paradigm, there is evidence of a significant correlation between a country's achievement of rule of law criteria and its economic wealth or GDP. Researchers have identified high correlations between good institutions (encompassing the rule of law), high levels of trade and rapid economic growth over the very long run.⁴¹ It has also been noted that differences in capital accumulation, productivity, and therefore output per worker are partially driven by differences in institutions and government policies, or 'social infrastructure'.⁴² The World Justice Project's Report *Rule of Law Index* came to similar conclusions,⁴³ identifying nine factors of the rule of law of which the seventh was civil justice.⁴⁴ Civil justice was said to encompass the following principles:

- People can access and afford civil justice;
- Civil justice is free of discrimination;
- Civil justice is free of corruption;
- Civil justice is free of improper government influence;
- Civil justice is not subject to unreasonable delay;
- Civil justice is effectively enforced; and
- Alternative dispute resolution mechanisms are accessible and impartial.⁴⁵

⁴⁰ United Nations Development Programme, *Access to Justice: Practice Note* (Report, 3 September 2004) 3 ('*Access to Justice*').

⁴¹ See generally David Dollar and Aart Kraay, 'Institutions, Trade and Growth' (2003) 50(1) *Journal of Monetary Economics* 133.

⁴² Robert E Hall and Charles I Jones, 'Why Do Some Countries Produce So Much More Output Per Worker Than Others?' (1999) 114(1) *Quarterly Journal of Economics* 83.

⁴³ World Justice Project, *Rule of Law Index* (Report, 2020) 9 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>.

⁴⁴ *Ibid* 10. The factors are: (1) Constraints on Government Powers; (2) Absence of Corruption; (3) Open Government; (4) Fundamental Rights; (5) Order & Security; (6) Regulatory Enforcement; (7) Civil Justice; (8) Criminal Justice; and (9) Informal Justice.

⁴⁵ *Ibid* 11.

Variable one — that people can access and afford justice — measured the accessibility and affordability of civil courts, including whether people were aware of available remedies, and could access and afford legal advice and representation and the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers.⁴⁶

David Dyzenhaus argues that a government has an obligation under the rule of law to provide resources so that people can not only know the law but gain access to it.⁴⁷ This might include not only legal aid or public information services but also policy settings that encourage private providers. The latter might include self funding mechanisms for lawyers such as ‘no-win-no-charge’ or other contingent fee arrangements or external third-party litigation funding (for making claims) and insurance (for defending them). These measures, in the Australian context, were considered in the survey, as discussed below.

4 *Economic Effects of Access to Civil Compensatory Remedies*

A significant aspect of the access to justice literature — particularly in Australia — is the importance of access to ‘redress’ or civil remedies, which are often of a compensatory nature.⁴⁸ This section focuses on economic effects or benefits of civil compensatory remedies which are facilitated through better access to justice.

The argument for compensation used in tort law and other areas of civil law derives from the concept of corrective justice whereby damages ‘correct’ the ‘injustice’.⁴⁹ George P Fletcher, writing in 1972, developed this idea to focus on the concept of ‘reciprocity’ as a source of tort law.⁵⁰ Another school of tort philosophy that developed in the 1970s was the analysis of tort and civil remedies in economic terms, associated most notably with Richard Posner. In simple terms, the economic view in a negligence case was that there were three important things to be measured: (a) the magnitude of loss if an accident occurs; (b) the probability of the accident occurring; and (c) the burden of taking precautions that would avert the accident.⁵¹ If the product of (a) and (b) exceeded (c) then the failure to take precautions was said

⁴⁶ Ibid 14.

⁴⁷ David Dyzenhaus, ‘Normative Justifications for the Provision of Legal Aid’ in John D McCamus et al (eds), *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Report, 1997) 477.

⁴⁸ See, eg, Murphy and Cameron (n 13).

⁴⁹ See, eg, Richard A Posner, ‘The Concept of Corrective Justice in Recent Theories of Tort Law’ (1981) 10(1) *Journal of Legal Studies* 187.

⁵⁰ George P Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85(3) *Harvard Law Review* 537, 540–2.

⁵¹ Richard A Posner, ‘A Theory of Negligence’ (1972) 1(1) *Journal of Legal Studies* 29, 32 (‘A Theory of Negligence’).

to be negligent.⁵² Findings of negligence by courts may, therefore, through the effect of deterrence and/or rational risk management, lead actors to take more precautions to avoid accidents and liability. Posner's view was that liability rules seem to have been broadly designed to bring about a low 'efficient' level of accidents and safety, 'an approximation thereto',⁵³ or an 'efficient allocation of resources to safety and care'.⁵⁴

5 Access to Civil Justice Leading to Enforcement of the Law (Including Regulatory Actions)

Greater access to civil justice is also a driver of actions that may have a potential regulatory nature and/or supplement public regulatory enforcement. These might include securities law and investment class actions,⁵⁵ competition law class actions,⁵⁶ and consumer protection, financial services and environmental actions.⁵⁷ Though the philosophy of limiting civil litigation, exemplified by the maxim *interest rei publicae ut sit finis litium* ('it is in the public interest that litigation come to an end'), tends to apply to civil disputes, there is generally less complaint about 'too much' regulatory law enforcement against wrongdoers in the public interest.⁵⁸ (Indeed, there is often complaint that regulators have insufficient resources to bring cases that should be brought.) While private suits tend not to achieve all the objectives of public enforcement, they certainly have an important role.⁵⁹ Access to civil justice, then, might encourage actions that enforce the law and achieve public regulatory goals and deterrence of illegal conduct. Thus, an award of damages that is higher in magnitude than the cost of taking precautions is thought to tend to cause a party to

⁵² Ibid, invoking the famous formulation of the negligence standard set out by Judge Learned Hand in *United States v Carroll Towing Co*, 159 F 2d 169 (2nd Cir, 1947) and *Conway v O'Brien*, 111 F 2d 611 (2nd Cir, 1940).

⁵³ Posner, 'A Theory of Negligence' (n 51) 73.

⁵⁴ William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 8.

⁵⁵ Michael Duffy, 'Australian Private Securities Class Actions and Public Interest: Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162 ('Australian Private Securities Class Actions').

⁵⁶ Murphy and Morabito (n 13) 25.

⁵⁷ Ibid 25–6. As to environmental litigation, see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793.

⁵⁸ For instance, in the Royal Commission into Banking, Superannuation and Financial Services, Commissioner Hayne criticized ASIC as having an alleged starting point of resolving misconduct by agreement and suggested that it should rather ask whether it could make a case of breach and why it would not be in the public interest to bring proceedings to penalise the breach. See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, 277.

⁵⁹ Duffy, 'Australian Private Securities Class Actions' (n 55) 192.

take those precautions to avoid that award of damages.⁶⁰ In this way, deterrence is the mechanism by which *ex post* compensation can lead to *ex ante* prevention.

C *Barriers to Access to Civil Justice*

There are a number of obstacles to achieving access to civil justice in the courts. Though identified as key problems more than 100 years ago, the evils of cost, delay and complexity⁶¹ appear to remain problematic.

1 *Cost*

In contemporary Australia it has been observed that the justice system is most open to the very rich who can afford representation, and the very poor who can access legal aid,⁶² leaving a large group of ‘ordinary Australians’ in the middle without good access.⁶³ The reasons for the high costs of legal services and representation include:

- the labour intensity of legal work,⁶⁴ in that, to advise a client correctly, lawyers need to be across the facts and evidence which can be detailed and often in dispute;
- duplication of work arising from the need for multiple persons (such as barristers, partners and junior solicitors) to be familiar with the same facts and to read the same documents;⁶⁵
- the unpredictability of litigation,⁶⁶ which can arise from the complexity and uncertainty of both facts and law, and leads to the inability to estimate costs accurately in advance;
- time costing which can create an incentive to do more legal work and to involve more legal personnel to generate higher fees;⁶⁷

⁶⁰ Posner, ‘A Theory of Negligence’ (n 51) 73.

⁶¹ See Roscoe Pound, ‘The Causes of Popular Dissatisfaction with the Administration of Justice’ (Speech, Annual Convention of the American Bar Association, 29 August 1906).

⁶² Chief Justice Wayne Martin, ‘Access to Justice’ (2014) 16(1) *University of Notre Dame Australia Law Review* 1, 3. See also Centre for Innovative Justice, RMIT University, *Affordable Justice: A Pragmatic Path to Greater Flexibility and Access in the Private Legal Services Market* (Report, October 2013).

⁶³ Martin (n 62) 3.

⁶⁴ *Ibid* 5.

⁶⁵ *Ibid* 6.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*. See also Michael Duffy, ‘Two’s Company, Three’s a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory’ (2016) 39(1) *University of New South Wales Law Journal* 165 (‘Regulating Third-Party Litigation Funding’).

- high charge out rates⁶⁸ (which may signal higher quality representation but, given asymmetric information and the unique nature of legal work, particularly in litigation, may not always actually do so);⁶⁹
- market regulation⁷⁰ limiting supply of lawyers (though this may also be justified as a means of quality control);
- the asymmetry of information, in that legal consumers lack knowledge and understanding of the nature and quality of the legal services which impedes their ability to negotiate on supply and price;⁷¹ and
- high overheads due to the need for counsel, office space, information technology, support staff and forensic support services.⁷²

Solutions to the problems of expense will not be explored in detail in this article but suggestions in response include no-win-no-charge/conditional fee arrangements (conditional on a successful outcome⁷³), percentage contingency fees, fixed fee arrangements,⁷⁴ and third-party litigation funding.⁷⁵ Other suggestions have included means tested litigation loans from trusts run by professional associations⁷⁶ or government,⁷⁷ and public litigation funding of meritorious public interest litigation.⁷⁸ Pro bono assistance generally, or for discrete tasks, has been encouraged,⁷⁹ as has subsidised pro bono work in commercial law firms or law firms actually owned and run by charities.⁸⁰ Supply-side suggestions to reduce cost include reducing overheads by running legal practices on a leaner basis, sometimes involving an

⁶⁸ Martin (n 62) 8.

⁶⁹ Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 228.

⁷⁰ Martin (n 62) 6.

⁷¹ Martin (n 62) 6–7. See also Waye (n 69) 228.

⁷² Martin (n 62) 7.

⁷³ Centre for Innovative Justice (n 62) 16.

⁷⁴ *Ibid* 17.

⁷⁵ This may not reduce costs but will offer a source of funding of such costs.

⁷⁶ Centre for Innovative Justice (n 62) 24.

⁷⁷ *Ibid* 25.

⁷⁸ See Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 621 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/VLRC/2008/1.html?context=1;query=civil%20justice%20review%20report%202008;mask_path>.

⁷⁹ Centre for Innovative Justice (n 62) 32. See also Martin (n 62) 10.

⁸⁰ Centre for Innovative Justice (n 62) 32. Research by Stephen Daniels and Joanne Martin in the United States suggests that pro bono work is of value to some law firms in (a) providing training opportunities to new and junior staff and (b) marketing the firm, promoting a good image and facilitating client relations. They suggest that these motivations may lead to a situation where the services provided do not always coincide

increased use of technology,⁸¹ and increasing competition in the market. Some have questioned whether legal expenses insurance to protect individuals and families from the consequences of incurring legal expenses needs to be examined,⁸² as well as greater dissemination of information through the internet.⁸³ Others have argued for increased use of ADR such as mediation, as well as greater use of law graduates within practices to provide low fee services.⁸⁴ Allowing tax deductibility of legal fees for individuals' personal legal expenses in the same manner as business' legal expenses has also been suggested.⁸⁵

2 Delay

Delay has long been complained of in the law, with the system in place in the English Court of Chancery in the 19th century even described as one of 'exquisitely contrived chicanery which maximises delay and denial of justice'.⁸⁶

In modern times, proactive judicial case management has done much to mitigate delay. Legislative reforms to civil procedure rules⁸⁷ have also done much to encourage parties to narrow the issues in dispute. There remains, however, the perennial problem of choosing between refusing or curtailing further time for pleading, submission or evidence in the interests of minimising delay, and allowing same in the interests of maximising fairness.⁸⁸ The balance often tends to tip, not surprisingly, to the latter, though the High Court has questioned whether delay is in itself a form of unfairness that cannot always be compensated by costs orders.⁸⁹ ADR is another modern solution that has been encouraged and is now embedded in judicial case management through

with areas of need: see Stephen Daniels and Joanne Martin, 'Legal Services for the Poor: Access, Self-Interest, and Pro-Bono' (2015) 12 *Access to Justice: Sociology of Crime, Law and Deviance* 145.

⁸¹ Centre for Innovative Justice (n 62) 20. See also Martin (n 62) 9.

⁸² Centre for Innovative Justice (n 62) 39. It is said that cover may include both 'before the event' household or motor insurance and 'after the event' insurance sold through solicitors usually taken out in conjunction with no-win-no-charge arrangements and usually involving a large premium.

⁸³ Martin (n 62) 8.

⁸⁴ *Ibid* 10.

⁸⁵ *Ibid* 11.

⁸⁶ Jack IH Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (Sweet & Maxwell, 1982) 207.

⁸⁷ See, eg, *Civil Procedure Act 2005* (NSW) s 56 (3) ('NSW Civil Procedure Act'); *Civil Procedure Act 2010* (Vic) s 23; *Uniform Civil Rules 2020* (SA) r 3.1(1)(g).

⁸⁸ See, eg, Michael Legg, 'Reconciling the Goals of Minimising Cost and Delay with the Principle of a Fair Trial in the Australian Civil Justice System' (2014) 33(2) *Civil Justice Quarterly* 157.

⁸⁹ Thus, the High Court in 2009 came down strongly in favour of a case management approach, which recognises that delay may itself be a form of unfair prejudice: *Aon Risk* (n 36) 182 [5] (French CJ).

the courts' ability to order mediation.⁹⁰ As well as saving time and costs, ADR has the benefit that in some cases it enables creative solutions to disputes (such as renegotiation of commercial relationships) that cannot be provided by courts.

3 *Complexity*

Complexity encompasses complexity of facts, the substantive law and procedure. This is a problem that is generally increasing as society develops, and the volume of law increases and branches endlessly into areas of greater specialisation. Social change leading to growth in both order and disorder also leads to greater complexity of facts and evidence. The lawyer must become familiar with those facts and that evidence to advise the litigant properly and prepare the case. There is also complexity in procedure — for example, commencing proceedings by both motions and writs and the use of different terminology for originating process in different jurisdictions.

In relation to substantive law, it has been suggested that legislation could be simplified to remove complexity and provide general principles rather than attempting to deal with every conceivable contingency.⁹¹ There is also scope for greater use of plain English.⁹² As to procedure, pleadings can sometimes involve semantic and tactical gamesmanship rather than genuine efforts to illuminate the real issues in order to assist the court.⁹³ This can be controlled by judges to a degree, but given that the pleading stage occurs before evidence comes before the court, judges' ability to sift through to the salient facts can sometimes be constrained.⁹⁴

III THE EMPIRICAL STUDY

A *Legal Needs Surveys*

1 *International*

Attempts to measure or assess access to justice inevitably take us into the rich literature of 'legal needs' surveys (though these surveys have at times been distinguished from access to justice assessment surveys).⁹⁵ The OECD has identified 56 such legal needs

⁹⁰ See, eg, *Federal Court Rules 2011* (Cth) rr 28.01–28.02.

⁹¹ Martin (n 62) 12–13.

⁹² *Ibid.*

⁹³ Though the court has an interest in the pleadings, the right to draw pleadings in civil matters moved from the state ('enrolling clerks of courts') to the private legal profession (the bar) as far back as the 13th and 14th centuries: see Theodore Plucknett, *A Concise History of the Common Law* (Butterworth, 4th ed, 1948), 381–5.

⁹⁴ Though again, as noted above, the High Court took a proactive approach to this issue in *Aon Risk* (n 36).

⁹⁵ OECD and Open Society Foundations (n 3) 25. Legal needs surveys are said to identify a range of justiciable problems and focus on responders' experience rather than their perceptions and attitudes.

surveys across 23 countries over the 25 years up to 2017.⁹⁶ These include surveys in the United Kingdom, common law jurisdictions throughout the British Commonwealth, the United States, Japan, Taiwan, Hong Kong, various eastern European countries and former Soviet republics, the Netherlands and some South American and African countries.⁹⁷ Pascoe Pleasence, Nigel Balmer and Rebecca Sandefur trace the origins of these types of reports to Charles Clark and Emma Corstvet's landmark study, in Connecticut during the 1930s, of 'how the needs of the community for legal service were being met'.⁹⁸ In the 1990s there was renewed interest in such studies, including an American Bar Association Study in 1994,⁹⁹ and the landmark study by Hazel Genn in the United Kingdom.¹⁰⁰

2 *Australia*

In Australia, Michael Cass and Ronald Sackville's 1975 survey in *Legal Needs of the Poor* was a pioneering work on access to justice.¹⁰¹ A major survey was also conducted by Christine Coumarelos, Zhigang Wei and Albert Zhou in 2006 for the Law and Justice Foundation of New South Wales.¹⁰² Further surveys at both national¹⁰³ and state¹⁰⁴ levels were conducted in 2012. Those surveys were part of the *Legal Australia-Wide Survey* by Coumarelos et al, which is discussed further below.

3 *The Genn Survey*

Genn's study in England and Wales focused on the behaviour of the public in dealing with 'non-trivial justiciable civil problems and disputes, as potential plaintiffs or potential defendants'.¹⁰⁵ A 'justiciable event' was defined as

⁹⁶ Ibid 26–7.

⁹⁷ Ibid.

⁹⁸ Charles E Clark and Emma Corstvet, 'The Lawyer and the Public: An AALS Survey' (1938) 47(8) *Yale Law Journal* 1272, 1272. See Pascoe Pleasence, Nigel J Balmer and Rebecca L Sandefur, *Paths to Justice: A Past, Present and Future Roadmap* (Report, August 2013) 3.

⁹⁹ Consortium on Legal Services and the Public, American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans* (Report, 1994).

¹⁰⁰ See Genn (n 19).

¹⁰¹ Michael Cass and Ronald Sackville, Commission of Inquiry into Poverty, *Legal Needs of the Poor: Research Report* (Report, 1975).

¹⁰² Coumarelos, Wei and Zhou (n 15).

¹⁰³ See, eg, Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, August 2012) ('*Legal Need in Australia*').

¹⁰⁴ See, eg, Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Victoria* (Report, August 2012) ('*Legal Need in Victoria*').

¹⁰⁵ Genn (n 19) 12.

[a] matter experienced by a respondent [to the survey] which raised legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.¹⁰⁶

Events were regarded as trivial if the respondent had taken no action because they considered the problem unimportant.¹⁰⁷ Further, the survey applied only to private individuals and not businesses.¹⁰⁸

Genn’s objectives included obtaining information on the incidence of justiciable problems, how members of the public responded to them, perceived barriers to accessing justice, motivations for using or not using court processes, outcomes of the different strategies adopted and public experiences and perceptions of the legal process.¹⁰⁹ The survey involved replies of a random sample of 4,125 adults. Genn identified thirteen problem types. For analytical purposes, she later regrouped these into nine problem types,¹¹⁰ being:

- Problems with neighbours;
- Divorce and separation;
- Employment problems;
- Consumer problems;
- Accidental injury and work-related ill health;
- Problems over money;
- Freehold problems;
- Problems with landlords; and
- Tribunal matters.

4 *The 2012 Legal Australia-Wide Survey*

The Law and Justice Foundation of New South Wales began its Access to Justice and Legal Needs (‘A2JLN’) research program in 2002 to examine the ability of disadvantaged people to: (a) ‘obtain legal assistance’; (b) ‘participate effectively in the legal

¹⁰⁶ Ibid.

¹⁰⁷ Though Genn did not apply this exception to divorce or situations where defence or commencement of proceedings were contemplated: *ibid* 13.

¹⁰⁸ *Ibid* 14.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid* 55–6.

system’; (c) ‘obtain assistance from non-legal advocacy and support’; and (d) ‘participate effectively in law reform processes’.¹¹¹ In doing so, the A2JLN sought in its conception of ‘legal need’ and ‘access to justice’ to go somewhat beyond the approach of ‘access to a lawyer’ or ‘access to a lawyer in a court’.¹¹²

As part of the A2JLN, the Legal Australia-Wide Survey (‘LAW Survey’) was a nationwide survey¹¹³ administered between January and November 2008 involving 20,716 randomised telephone interviews nationwide (noted to be the largest sample undertaken anywhere in the world¹¹⁴) with residents aged 15 years or over. Responders were asked about their experience of a total of 129 specific types of ‘legal’ problems, defined as ‘problems that have the potential for legal resolution’.¹¹⁵ These legal problems were categorised into 12 broad problem groups with 27 subgroups.¹¹⁶ The LAW Survey sought to assess the prevalence, nature, finalisation and outcome of legal problems, as well as the strategies used in response to legal problems and the advice received for legal problems.

5 *Our Survey*

The OECD has suggested that access to justice surveys may be distinct from legal needs surveys,¹¹⁷ and our survey focused particularly on the effects of class actions, litigation funding and no-win-no-charge funding. The OECD also suggests that, despite all legal needs surveys being part of the same tradition, their scale, design and methodology can vary significantly.¹¹⁸ Every country and every survey is different such that there can be no ‘one size fits all’ approach. This survey thus had some small but important differences with existing surveys, as discussed below. These differences were intended to provide a further contribution to and/or fill gaps in surveys to date. They are as follows.

First, our survey included two categories which gave specific recognition to the online world as a discrete new area of potential legal problems. Secondly, we did not adopt Genn’s specific exclusion of problems related to work activities of individuals who are in business on their ‘own account’.¹¹⁹ Whilst, as discussed below, our focus was on average Australians rather than large corporations or organisations, we considered that there was nevertheless likely to be overlap between, for example, the legal problems and difficulties of an employee and the legal problems of an

¹¹¹ Coumarelos et al, *Legal Need in Australia* (n 103) iii.

¹¹² Ibid.

¹¹³ Ibid. The LAW Survey led to eight other reports focusing on each state and territory.

¹¹⁴ Ibid 2.

¹¹⁵ Ibid xiii.

¹¹⁶ Ibid 48.

¹¹⁷ OECD and Open Society Foundations (n 3) 25.

¹¹⁸ Ibid 18, 40.

¹¹⁹ Genn (n 19) 14. The LAW Survey’s focus on ‘individuals’ may also arguably exclude small businesses: Coumarelos et al, *Legal Need in Australia* (n 103) 16.

independent contractor who is in business on their own account (including those contracting in the ‘gig’ economy, for instance). The legal problems of small and micro businesspeople are therefore not specifically excluded, though this may be an area ripe for further specific research.¹²⁰ As noted below, the focus on average Australians was established both by generally mainstream legal problem choice and by pitching the survey universally and therefore favouring the problems of the majority rather than any specific grouping.

Thirdly, as an Australian survey, ours had a different context to overseas surveys. Context in that regard includes, for instance, that all working Australians hold compulsory superannuation and are subject to the legal issues and problems of same, and also benefit from workers’ compensation schemes and healthcare, which differentiate some insurance and medical legal problems from, for example, the United States.

Fourthly, our survey dealt with areas in which Australian class action law (there being a lack of such general machinery in the United Kingdom,¹²¹ for instance) has made possible small claims that would not have been pursued in the past, such as retail shareholder nondisclosure claims,¹²² and claims for individual consumer loss from cartel activity.

Finally, our survey also benefitted from the ‘supply side’ perspective or insight of the authors based on their own experience of city, suburban and rural private legal practice, including areas of law that many average private law firms spend considerable time servicing. These include probate and to a lesser degree elder law and guardianship, the effects of personal and corporate insolvency, small-scale defamation and debt recovery (less specifically referred to in some of the other surveys).

B *Legal Problems of Average Australians*

It is necessary to canvass the most common legal problems and needs, as this inquiry informed the scope of our survey.

1 *Common Legal Problems and Needs*

The question of which civil justice legal needs of average citizens are not being adequately addressed is an area of debate. Much of the population states that they have one or more legal problems,¹²³ and the areas of ‘unmet need’ that have been

¹²⁰ The Commonwealth Productivity Commission has noted the relatively few sources of information around the legal needs of such businesses: Productivity Commission (n 12) 93.

¹²¹ Though certain consumer class actions are now available under the *Consumer Rights Act 2015* (UK): at sch 8 pt 1 cl 5.

¹²² See generally Michael J Duffy, ‘Shareholder Representative Proceedings: Remedies for the Mums and Dads’ (2001) 75(5) *Law Institute Journal* 54.

¹²³ Department of Justice and Regulation (Vic), *Access to Justice Review* (Report, August 2016) vol 1, 55, citing Coumarelos et al, *Legal Need in Victoria* (n 104) 57.

identified by expert reports include family law, employment law, migration law, personal injury, consumer rights, welfare law and housing and tenancy law.¹²⁴ Australia's 2012 LAW Survey found that 'consumer, crime, housing and government problem groups' (in that order) were most prevalent.¹²⁵ Another 2012 survey, by the Australia Institute, found that 'being treated unfairly by a business', such as a bank, phone company, tradesperson or retail outlet, was the most common category of legal complaint (12% reporting such a problem).¹²⁶ The next most common was a dispute with a landlord or tenant, real estate agent or neighbour (8% reporting this).¹²⁷

Overseas, Genn's 1999 United Kingdom survey found problems with '[f]aulty goods and services' as the most frequently experienced problem followed by '[m]oney problems', '[o]wning residential property' problems and '[i]njury/work related health problem[s]' (in that order),¹²⁸

In US surveys the area of 'consumer rights' has also been seen as one of the most significant areas, as well as 'personal finances'¹²⁹ and 'problems with creditors'.¹³⁰ Michael Trebilcock and Ronald Daniels also note that, in the US, while access to justice in criminal law, social security law, immigration law and family law are important, there are private disputes between parties in which those with fewer legal resources are often at a great disadvantage. Disputes relating to contract, property, consumer protection or landlord/tenant law may have important repercussions yet, for low income people, be relatively difficult to prosecute or pursue vindication of rights.¹³¹ Indeed, socio-economically disadvantaged groups appear to be particularly vulnerable to legal problems and less able to resolve those problems.¹³² In this sense, a lack of access to opportunities also results in a lack of access to justice.¹³³ Genn found in the UK that low levels of income were similarly associated with a propensity not to seek advice when faced with legal problems.¹³⁴ Yet it can be argued that legal need is not the same as social disadvantage and that, though there is overlap

¹²⁴ Martin (n 62) 4–5.

¹²⁵ Coumarelos et al, *Legal Need in Australia* (n 103) xv.

¹²⁶ Richard Denniss, Josh Fear and Emily Millane, *Justice for All: Giving Australians Greater Access to the Legal System* (Institute Paper No 8, Australia Institute, March 2012) 17. This is reflected in Productivity Commission (n 12): see at 88.

¹²⁷ Denniss, Fear and Millane (n 126) 17.

¹²⁸ Genn (n 19) 23–4.

¹²⁹ Thirty-three percent (33%) of those reporting at least one problem cited this problem type. This involved a survey of over 8,000 responders as to experience with legal issues: Ipsos MORI Social Research Institute, *Online Survey of Individuals' Handling of Legal Issues in England and Wales 2015* (Report, May 2016) 1, 3.

¹³⁰ Consortium on Legal Services and the Public (n 99) app B.

¹³¹ Trebilcock and Daniels (n 23) 239–40.

¹³² Coumarelos et al, *Legal Need in Australia* (n 103) 1.

¹³³ *Ibid.*

¹³⁴ Genn (n 19) 142.

between social disadvantage and lack of access to justice, they are not the same issue and may not always affect the same people.

2 *Average Australians*

Our survey endeavoured to focus on ‘access to civil justice of average Australians’ which is not a precise term. The term ‘average’ has been defined as ‘the arithmetical mean’ or the ‘ordinary, normal or typical’.¹³⁵ This would mean that, in income terms for instance, it seeks to focus on neither the top nor the bottom income levels (so that, unlike some surveys, the focus is not specifically on the disadvantaged). Less intuitively, but following this theme and the demographic data below, ‘average Australians’ may be more likely to come from populous areas and to have middle level education. Whether the survey succeeded in focusing on ‘average or typical’ Australians is partly answered by asking whether the distribution of responders was also ‘typical’ in being broadly comparable with the Australian population in general and on a number of key demographics. That question is investigated below.

The legal problems of average Australians might be expected to include areas that are ubiquitous in city, suburban and rural legal practice, such as deceased estates, personal injury and family law. It does not follow however that legal problems will always include those areas. Some areas of law will be characterised by small numbers of clients (such as high net worth individuals and corporations) paying high fees for large and difficult legal services, as opposed to large client bases paying smaller fees for more common matters. The former areas generally fell outside this survey and might include preparation of prospectuses, corporate mergers, acquisitions and restructures, commercial property development and landlord advice, banking and finance, construction contracts and disputes, liquor licensing, corporate taxation, advising government, franchisor advice, financial services provider advice, intellectual property protection and disputes and so on. Similarly, some areas of public law, such as constitutional law, were not surveyed, due to a lack of direct daily relevance to average Australians.

The survey thus set out some 26 types of civil legal problems likely to be encountered by average Australians. (These are set out in the Appendix at Question 13.) The list drew substantially on various sources as well as the practical experience of two of the authors over a number of years as legal practitioners within private law firms in the city and suburbs and regionally. The authors also drew from their experience in commercial, general and plaintiff-focused practice, as well as government work. The areas of criminal law, immigration law and taxation law were excluded from the survey which we will now discuss briefly.¹³⁶

Criminal law is a discrete and specialised area of the law, involving action by the state against persons for distinct purposes — punishment, rehabilitation, deterrence,

¹³⁵ *Macquarie Dictionary* (online at 5 June 2021) ‘average’ (defs 1, 3).

¹³⁶ Which is consistent with the usual the focus of ‘legal needs’ surveys: OECD and Open Society Foundations (n 3) 25.

denunciation and incapacitation (among others).¹³⁷ By contrast, the civil sphere focuses on compensation to victims and resolving disputes.¹³⁸

It might also be commented that ‘access to justice’ in the criminal sphere revolves heavily around arguments as to appropriate levels of government funded legal aid and, to a lesser extent, pro bono representation. Class actions, litigation funding and no-win-no-charge/contingent fee agreements have little or no role in the criminal jurisdiction.

As well as criminal law, the list also excludes the area of immigration law. The rationale for this exclusion is that the experience of the legal process in this area is somewhat unique; it often involves non-citizens seeking citizenship or an entry visa. Our survey being focused on Australian citizens, it was appropriate to exclude immigration law.

Taxation law was excluded as being a discrete and specialised area. Further, it may be that most average Australians will tend to consult their tax accountant, at least initially, in relation to tax matters rather than a lawyer.¹³⁹ Taxation may thus fit in more with those areas that are important for larger commercial legal practices but which may have less daily domestic relevance to the bulk of average Australians.

The list of legal problems included in the survey was otherwise considered to be fairly comprehensive. Civil justice may of course go beyond pure private law and involve the state in the area of administrative law. Questions about problems in the area of government law — such as planning issues and dealings with state and federal government bodies — were included in the survey as part of access to civil justice and, notwithstanding the exclusion of areas such as constitutional law, imported some aspects of public law into the survey.

¹³⁷ See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (LexisNexis Butterworths, 3rd ed, 2010) 17–33.

¹³⁸ See, eg, Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 7th ed, 2019) 816–19. See also Tania Sourdin, *Alternative Dispute Resolution* (Lawbook, 6th ed, 2020) 5–9. The desirability of reducing dispute and conflict is often not contended for in detail as it seems to be frequently assumed or treated as self-evident.

¹³⁹ According to the Law Society of New South Wales’ National Profile, as at October 2020, there were 83,643 practising solicitors in Australia: Law Society of New South Wales, *2020 National Profile of Solicitors* (Final Report, 1 July 2021) 6 <<https://www.lawsociety.com.au/sites/default/files/2021-07/2020%20National%20Profile%20of%20Solicitors%20-%20Final%20-%201%20July%202021.pdf>>. It is reasonable to assume generally and from anecdotal evidence that only a percentage of these specialised in giving tax advice. On the other hand, it is said that there were in 2019 some 43,000 registered tax agents, 20,000 registered tax financial planners and 15,000 registered Business Activity Statement agents in Australia: Treasury (Cth), ‘Independent Review of the Tax Practitioners Board’ (Final Report, 31 October 2019) 16 [1.1].

C Methodology

1 Justice: Objective and Subjective Evaluations

Whether an outcome is ‘just’ can be evaluated both objectively and subjectively. The former evaluation is more complicated and is likely to require an extensive enquiry into the outcome, process, law and relevant facts. Objective evaluation may then require ‘second guessing’ the processes that led to that outcome which is likely to be fraught with problems, difficulties, biases and flaws. The subjective evaluation is arguably much simpler in that it merely requires an enquiry into the level of satisfaction with the outcome of the complainant or ‘legal consumer’.¹⁴⁰ On this view, a person who subjectively believes they have had access to ‘civil justice’ — for example, they believe that they have achieved an outcome through the legal system that was basically ‘just’ or ‘fair’ — has, by virtue of that belief, clearly had such access to civil ‘justice’, subjectively evaluated. There is much to be said for the subjective conception in civil law and it is partly the philosophical basis for the facilitation and general approval by courts of negotiated settlement of disputes (for example, if the parties are subjectively satisfied, the court need not intervene or upset their bargain¹⁴¹). Thus, our survey adopted the subjective evaluation.

2 Sample Size

There were 575 responders, the target group being Australian adults (18 years or over).¹⁴² Some statistical approaches note that, for populations of 100,000 or more, a sample size of 400 should deliver a confidence level of plus or minus 5%.¹⁴³ It is also said that a sample of 384 is reasonable for populations of a million or more and will deliver a similar confidence level.¹⁴⁴ Another approach to confidence intervals is to apply the following formula:

$$z \times \frac{\sigma}{\sqrt{n}}$$

¹⁴⁰ The term ‘legal consumer’ has some utility, though may also trivialise somewhat the relationship between the individual and the legal system (the economic analysis that reduces the legal system to a production process designed to satisfy legal ‘wants’ is necessarily a simplification of a more complex and subtle process and interrelationship).

¹⁴¹ The requirement of court approval of class action settlements being an exception to this precept.

¹⁴² A group with a population of roughly 20 million individuals. See ‘Australia 2019’, *Population Pyramids of the World from 1950 to 2100* (Web Page, December 2019) <<https://www.populationpyramid.net/australia/2019/>>.

¹⁴³ See, eg, Glenn D Israel, University of Florida Institute of Food and Agricultural Science Cooperative Extension, *Determining Sample Size* (Document No PEOD6, April 2009) 3.

¹⁴⁴ See, eg, Robert V Krejcie and Daryle W Morgan, ‘Determining Sample Size for Research Activities’ (1970) 30(3) *Educational and Psychological Measurement* 607, 607–10.

(where z is the ‘critical value’, σ is the standard deviation from the mean in the population samples and n is the sample size).

At the 95% confidence level, which is often used in statistical studies, the corresponding value of z is 1.96. The survey data showed standard deviations on the Likert questions¹⁴⁵ ranging from 0.7 to 2.6, but most are in the area of about 1.5. Using 1.5 as a typical standard deviation, the confidence interval would be calculated as follows:

$$1.96 \times \frac{1.5}{\sqrt{575}} = 0.12$$

With this information, it can be said that 95% of the time the true statistics among the Australian population will lie within 0.12 of the statistics collected from the survey (ie, a range of 2.88 to 3.12 for a sample mean of 3) thus supporting the reliability of the data. It should be noted however that findings within particular areas of law are based upon smaller sample sizes and are therefore less reliable as are the results noted for particular regions. It must also be noted that confidence levels are affected (reduced) by this being a nonprobability sample.

3 *Online Panel and Methodological Issues (Including Limitations)*

The survey was conducted through the use of online panels. The panels were independently arranged by Qualtrics International Inc (‘Qualtrics’).

An online panel is a form of access panel defined as ‘a sample database of potential responders who declare that they will cooperate for future data collection if selected’.¹⁴⁶ Such panels can include very large numbers of people who are said to be ‘sampled on numerous occasions and asked to complete a questionnaire for a myriad of generally unrelated studies’.¹⁴⁷ In recent years, online panels have become a popular way to collect survey data and have been used in a number of fields including market research, social research, psychological research, electoral studies and medical research.¹⁴⁸ Online panels offer substantial advantages in terms

¹⁴⁵ A Likert scale being (in this case) a five point scale with choices ranging through Strongly Agree, Agree, Neither Agree nor Disagree, Disagree and Strongly Disagree. The idea is to get a holistic view of opinions. See generally Rensis Likert, ‘A Technique for the Measurement of Attitudes’ (1932) 22(140) *Archives of Psychology* 5, 42–3.

¹⁴⁶ International Organization for Standardization, *Market, Opinion and Social Research: Vocabulary and Service Requirements* (Standard No 20252, June 2012) 1, quoted in Mario Callegaro et al, ‘Online Panel Research: History, Concepts, Applications and a Look at The Future’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 1, 2–3.

¹⁴⁷ Callegaro et al (n 146) 3.

¹⁴⁸ *Ibid* 1. The European Society for Opinion and Market Research estimates that global expenditure on online research as a percentage of total expenditure on quantitative and qualitative research was 27% in 2018 (of which 25% was quantitative and 2% qualitative). See European Society for Opinion and Market Research, *Global Market Research 2018: An ESOMAR Industry Report* (Online Report, 2018) 138–9

of reduced costs and time required to conduct research. Panel-based online survey research has grown steadily in the 21st century.¹⁴⁹

Samuel Gosling et al have found that samples gathered using internet methods are at least as diverse as many of the samples already used in psychological research and are not unusually maladjusted.¹⁵⁰ Tangible indication of increased acceptance and reliability of internet surveys is their increasing use and acceptance by court, the forum where probity of evidence is most stringently tested. One example is their use by experts in trademark litigation where they are now said to ‘enjoy cautious acceptance by the courts’.¹⁵¹ The literature suggests that online surveys can ‘readily capture a demographically representative sample by design, obtain better response rates than telephone surveys, and reach across a much broader geography than mall samples’.¹⁵²

Nevertheless, it must be noted that while the online panel process can produce a sample that is comparable to the population on the key demographics that we have discussed, it is partly self-selected so is a ‘nonprobability’ survey. This means that not every individual has a known probability of being selected, being exposed to the invitation and accepting the invitation.¹⁵³ Whilst the last element is true of all surveys (whether randomly selected or not) the first two are not, which limits confidence as to representativeness.

4 *Qualtrics*

The research team engaged Qualtrics to conduct the online survey. Qualtrics applies various techniques to address the above sampling and quality issues, which are described in its Panel Services Information, and in Qualtrics’ Response¹⁵⁴ to the European Society for Opinion and Market Research’s *28 Questions to Help Buyers of*

<<https://www.dx2025.com/wp-content/uploads/2019/11/global-market-research-industry-report-2018-encrypted.pdf>>.

¹⁴⁹ Mario Callegaro et al, ‘A Critical Review of Studies Investigating the Quality of Data Obtained with Online Panels Based on Probability and Nonprobability Samples’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 23, 23–4.

¹⁵⁰ Samuel D Gosling et al, ‘Should We Trust Web-Based Studies? A Comparative Analysis of Six Preconceptions about Internet Questionnaires’ (2004) 59(2) *American Psychologist* 93, 102.

¹⁵¹ Himanshu Mishra and Ruth M Corbin, ‘Internet Surveys in Intellectual Property Litigation: *Doveryai, No Proveryai*’ (2017) 107(5) *Trademark Reporter* 1097, 1121. *Doveryai, No Proveryai* is a Russian proverb that means ‘trust but verify’: at 1097 n 1.

¹⁵² *Ibid* 1121.

¹⁵³ Stephanie Steinmetz et al, ‘Improving Web Survey Quality: Potentials and Constraints of Propensity Score Adjustments’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 273, 274.

¹⁵⁴ Qualtrics, *ESOMAR 28: 28 Questions to Help Buyers of Online Sample* (Online Report, 30 April 2019) <<https://www.iup.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=274179&libID=274203>>.

Online Samples (‘ESOMAR 28’).¹⁵⁵ Qualtrics’ techniques include multiple panels, quality checks to exclude duplication and ensure validity and precautionary steps to make sure the best data is being collected via the panel providers.

D Representativeness of Survey Responders/Interviewees and Effect of Demographic Attributes

A comparison of the demographics of the 575 responders with Australian Bureau of Statistics (‘ABS’) data indicates broad similarity with the Australian population on a number of key demographics.

1 Place of Residency

Figure 1 compares the state or territory of responders with the state or territory of responders to the 2016 Census (‘Census’)¹⁵⁶ compiled by the ABS and suggests that the responders correspond reasonably with the state and territory distribution of the Australian population.

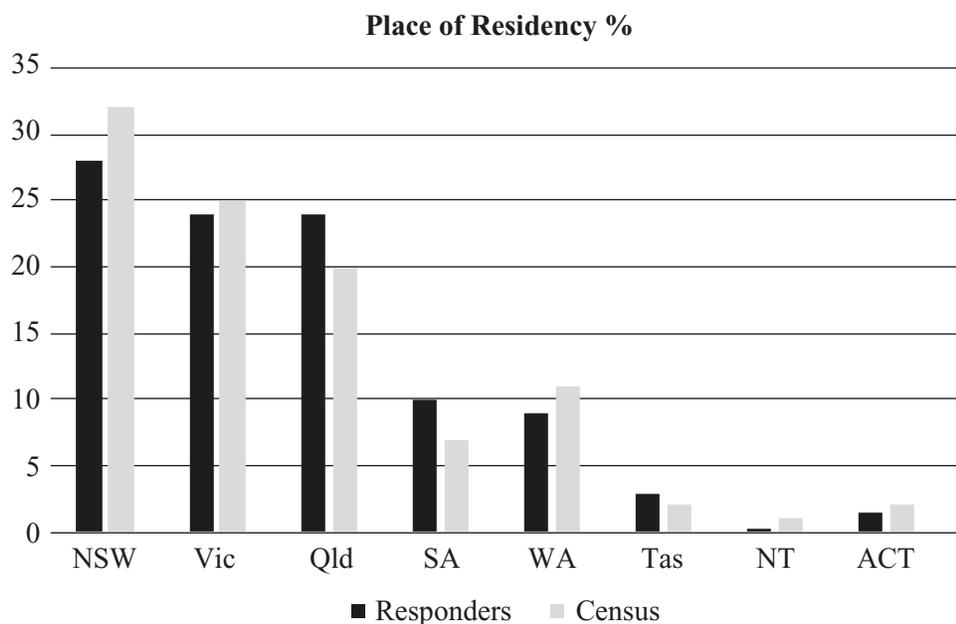


Figure 1: Comparison of responders’ locations with Australian population locations from the 2016 Census (responders n = 574)

¹⁵⁵ European Society for Opinion and Market Research, *28 Questions to Help Buyers of Online Samples* (Guide, 15 June 2012) <<https://www.esomar.org/uploads/public/knowledge-and-standards/documents/ESOMAR-28-Questions-to-Help-Buyers-of-Online-Samples-September-2012.pdf>>.

¹⁵⁶ See generally ‘Census’, *Australian Bureau of Statistics* (Web Page) <<https://www.abs.gov.au/Census>>.

2 Age Distribution

The survey excluded minors due to their lack of legal capacity. Apart from this factor, Figure 2 suggests that the age distribution of responders resembles the national average, save for a slight bias toward the young and away from the old. Insofar as computer literacy and online access might be somewhat related to age, this bias may reflect the fact that this is an online survey.

The bulk of the responders are in the following three age brackets: 25–34 (21%), 35–44 (19%) and 44–55 (17%). This could indicate that these age groups have more legal problems or may be better informed of their legal rights than those aged 18–24 or over 55. As discussed below, findings in relation to changes in access to justice over the previous 20 years should be treated with considerably more caution for those in the 18–24 and 25–34 age groups.

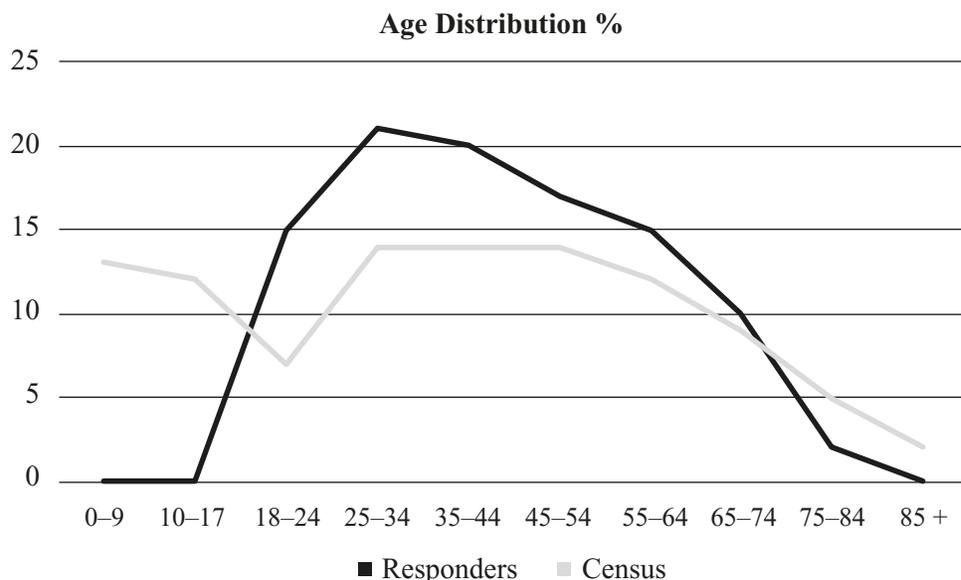


Figure 2: Comparison of responders’ ages with Australian population ages from the 2016 Census (responders n = 574)

3 Education Levels

The survey group appears to have a somewhat higher percentage of those whose highest education level is Year 12 or above (some 62%), compared to the general population where some 42% hold education equivalent to Year 12 or above as their highest level of education.¹⁵⁷ Insofar as computer literacy and online access might be

¹⁵⁷ Australian Bureau of Statistics, *Microdata: Education and Work, Australia* (Catalogue No 6227.0.30.001, 11 November 2020).

argued to be somewhat related to education level, then the slightly higher educational levels of responders may also be a reflection of the online nature of the survey.

The survey group of responders appears to have a somewhat higher percentage of those with a postgraduate or master's degree than the general population (13% compared to approximately 10% respectively),¹⁵⁸ and conversely a somewhat lower percentage of those with a bachelor's degree (25% compared to approximately 32% respectively).¹⁵⁹ The percentage of the survey group with a diploma is 20% compared to approximately 23% in the general population.¹⁶⁰ Despite these limitations, the group appears to be still reasonably representative of the general population in relation to education.

4 *Income Levels*

Income levels of the responders seem to be fairly representative of the Australian population. The largest annual income group of the responders is in the \$20,000–50,000 range at 31%, compared to approximately 24% in the general population.¹⁶¹ The second largest income group is in the \$50,000–80,000 range at 21%, compared to approximately 15% in the general population.¹⁶² With 49% of the population earning less than \$50,000 annually,¹⁶³ income is likely to be an issue in accessing the legal system due to high legal fees. This raises the possible importance of pro bono, no-win-no-charge, third-party litigation funding, legal aid and so on.

E *Access to Justice Index Numbers*

Eighteen of the 50 questions in the survey tested overall access to civil justice. These test any general increase (or reduction) in access to civil justice over the past 20 years. They also tested access to justice for particular types of legal problems. This was a partly 'leximetric' analysis involving comparative quantitative analysis of legal phenomena relating to access to civil justice — in this case, allocating positive values to attributes to seek to measure an overall phenomenon.¹⁶⁴ This form of analysis has been employed in various areas of law.¹⁶⁵

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2015–16* (Catalogue No 6523.0, 13 September 2017).

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Robert Cooter and Thomas Ginsburg, Illinois Law and Economics Working Papers Series, *Leximetrics: Why the Same Laws are Longer in Some Countries than Others* (Working Paper No LE03-012, June 2003) 2.

¹⁶⁵ For example, it has been applied to measure the effectiveness of laws for shareholder protection: see Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1115–17; Priya P Lele and Mathias M Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7(1) *Journal of Corporate Law Studies* 17, 22–30.

The authors selected various criteria in constructing the leximetric index numbers. The implicit contention is that subjective evaluation by responders that their access to various services has increased over the previous 20 years indicates that their access to civil justice has increased over that time (and that disagreement indicates that such access has not increased over that period). The services tested include legal advice/information from government bodies, advice from legal aid and private lawyers, no-win-no-charge arrangements with private lawyers, and class action proceedings.

Surveying these different types of providers and legal services also offers some data on why or how access to civil justice may have improved (if indeed it has). In relation to particular legal problems, the implicit contention is that the responders' subjective evaluations of achievement of the following factors indicate a higher overall level of access to civil justice (and that a negative evaluation indicates a lack of overall access to civil justice). These factors include ability to obtain legal assistance, satisfaction with legal assistance, satisfaction with the litigation process and outcome, awareness of how to become part of any relevant class action proceedings, and availability of third-party litigation funding.

IV SOME OVERALL FINDINGS OF THE EMPIRICAL STUDY

A Most Common Legal Problems

The most frequently cited area of legal problems for average Australians was employment law. The second highest was family law. Of the 575 responders, 181 had had an employment law problem in the last 20 years. In that same period, 114 had a family law problem, 105 a debt problem, 100 a personal injury legal problem, 91 a discrimination problem and 90 a housing or tenancy problem.¹⁶⁶ The raw numbers of responders with particular problems are set out in Table 1 below. Percentage numbers are marked out of total responders (575) and also out of total legal problems reported (1325).

Table 1: Responders' Legal Problems as a Percentage of Problems Reported and Total Responders (responders n = 574)

No.	Legal Problem	% of Responders Reporting	% of Problems Reported
1.	Employment law (181)	31.5%	13.7%
2.	Family law (114)	19.8%	8.6%
3.	Money, debt or insolvency problems (105)	18.3%	7.9%
4.	Personal injury law (100)	17.4%	7.6%
5.	Discrimination law (91)	15.8%	6.9%

¹⁶⁶ Note that responders could nominate more than one legal problem.

No.	Legal Problem	% of Responders Reporting	% of Problems Reported
6.	Housing and tenancy law (90)	15.7%	6.8%
7.	Damage to property (72)	12.5%	5.4%
8.	Consumer rights (62)	10.8%	4.7%
9.	Wills or estates (50)	8.7%	3.8%
10.	Medical negligence (40)	7.0%	3.0%
11.	Insurance (39)	6.8%	2.9%
12.	Online commerce (38)	6.6%	2.9%
13.	Investment including shares (35)	6.1%	2.6%
14.	Other legal problem (33)	5.7%	2.6%
15.	Contracts (32)	5.6%	2.4%
16.	Dealings with government (27)	4.7%	2.0%
17.	Total or permanent disablement (26)	4.5%	2.0%
18.	Disability law (25)	4.4%	1.9%
19.	Other online issues (Social media, etc) (22)	3.8%	1.7%
19.	Trade practices including misleading conduct (22)	3.8%	1.7%
21.	Banking law (21)	3.7%	1.6%
21.	Law relating to the elderly (21)	3.7%	1.6%
21.	Defamation (21)	3.7%	1.6%
24.	Class Actions (20)	3.5%	1.5%
25.	Superannuation (19)	3.3%	1.4%
25.	Competition law (19)	3.3%	1.4%

As can be seen, employment law was easily the most reported legal problem and, together, the first three largely domestic issues of employment, family law and debt affected over 69% of responders.

There was some variation in the most common legal problems between urban and rural settings. Employment law was the most common legal problem in all areas except for the outer suburbs, where they were the second most common, ranking behind personal injury problems. Family law was the second most common in all areas except for the outer suburbs where they were the third most common, ranking behind personal injury and employment law.

Other areas of regional difference included discrimination, which was the second most common problem in farm settings and the third most common problem in inner cities, yet was less of an issue in middle and outer suburban locales where it was only the seventh most common problem. The inverse was the case with personal injury which was the most common legal problem in the outer suburbs, but ranked as only the seventh most common legal problem in inner urban areas. Housing and tenancy were the fifth most common problems for inner and middle urban dwellers

but the sixth most common for regional areas and only tenth most common for farmers.

Table 2: Area of Legal Problem By Region

ALL AREAS	Employment 13.7%	Family 8.6%	Money, Debt or Insolvency 7.9%	Personal injury 7.6%	Discrimination 6.9%
Inner urban	Employment 12.5%	Family 9.0%	Discrimination 7.9%	Money, Debt or Insolvency 7.9%	Housing & Tenancy 7.1%
Middle urban	Employment 16.0%	Family 9.4%	Money, Debt or Insolvency 8.2%	Personal injury 7.2%	Housing & Tenancy 6.9%
Outer urban	Personal injury 11.1%	Employment 10.7%	Family 8.7%	Money, Debt or Insolvency 8.7%	Property Damage 8.3%
Regional	Employment 14.3%	Family 7.9%	Discrimination 7.7%	Money, Debt or Insolvency 7.3%	Personal Injury 7.3%
Farm	Employment 9.8%	Discrimination 8.7%	Money, Debt or Insolvency 8.7%	Family 7.6%	Insurance/ Personal Injury 6.5%

B Highest Impact Problems

The legal problems that had the most impact on a person's life were problems relating to total or permanent disablement (76%). Despite being the most frequent area of legal problems, employment law was only eighth in terms of impact. The areas of highest impact represented by the percentages of responders of that area nominating impact on their life as high were as follows:

**Table 3: Percentage of Responders Reporting High Impact
(responders n = 574)**

No.	Legal Problem	% of Responders Reporting High Impact
1.	Total or permanent disablement	76%
2.	Defamation or slander	66%
3.	Disability	60%
4.	Family law	59%
5.	Medical negligence	57%
6.	Problems with government	53%

No.	Legal Problem	% of Responders Reporting High Impact
6.	Money, debt or insolvency	53%
8.	Employment	51%
9.	Discrimination	50%
10.	Investment including shares	48%
10.	Personal injury	48%
12.	Other legal problems	45%
13.	Laws relating to the elderly	42%
13.	Banking	42%
13.	Wills and estates	42%
16.	Class actions	40%
17.	Housing and tenancy	39%
18.	Property damage	37%
19.	Superannuation	36%
19.	Trade practices	36%
21.	Online issues other online commerce	36%
22.	Consumer rights	30%
23.	Competition law	26%
24.	Insurance	25%
24.	Contracts	25%
26.	Online commerce	15%

C Most Used Legal Service

The legal service sought most by average Australians by a large margin was advice (33%). A limitation on this finding may be that responders gave varying interpretations to the notion of ‘advice’.¹⁶⁷ Nevertheless, this appears to be access to civil justice at its most essential level — knowledge of a person’s legal position and rights and obligations. Thus, knowing what a court may do can often facilitate an early resolution of a dispute. The most used services were:

¹⁶⁷ The LAW Survey spoke of seeking advice from a lawyer as ‘consulting ... [a lawyer] in a professional or formal capacity to try to resolve the problem’. Consulting the lawyer meant that ‘the respondent, or someone on the respondent’s behalf, had spoken or written directly to the ... [lawyer]’: Coumarelos et al, *Legal Need in Australia* (n 103) 92.

Table 4: Most Used Legal Services (responders n = 574)

No.	Legal Service	% Used
1.	Advice	33%
2.	Representation in negotiation	19%
3.	Preparation or drawing of documents	14%
4.	Letter of demand	9%
5.	Commencement of court proceedings	8%
6.	Defence of court proceedings/arbitration	3%

D *Desire to be Informed of Civil Claims*

Most average Australians would like to be informed of their rights to make civil claims. Eighty-seven percent (87%) of responders agreed or strongly agreed that they would wish to be informed of potential civil claims they may have for breaches of law by businesses, companies or government. Nine percent (9%) were undecided about whether they wished to be informed and only 3% did not wish to be informed. The question was posed because, in the debate over third-party litigation funding in particular, an argument is sometimes put that litigation funders and some lawyers ‘stir up’ civil disputes that would not otherwise exist. An example of this view is contained in the minority judgment of Callinan and Heydon JJ in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,¹⁶⁸ where their Honours observed:

The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes ... and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits.¹⁶⁹

The survey thus sought the perception of the users of the legal system as to this view.¹⁷⁰ Perhaps due to responders’ self-interest in imagining themselves having a potential claim, it was considered that a disproportionate number of responders might

¹⁶⁸ *Fostif* (n 1).

¹⁶⁹ *Ibid* 487–8 [266].

¹⁷⁰ The views of potential litigants (legal ‘consumers’) are of course not decisive of this question — wider public policy questions about the function of civil law itself are relevant and there are arguments for and against this; nevertheless, the views of users can also not be entirely ignored.

agree that they should be informed of such claims. As such, ‘control’ questions were added, but these did not change the outcome.¹⁷¹

Whether potential defendants are insured for liability or not does not seem to have been an influential factor. Ninety percent (90%) agreed (62% strongly and 28% somewhat) that the existence or otherwise of insurance to indemnify such claims did not bear on whether claimants should be informed of such claims. These results indicate a strong desire of Australians to be informed if they or others have civil claims. It should be noted that this kind of ‘informing of claims’ is already occurring in various types of law firm marketing and entrepreneurial lawyering and in the process of so called ‘book-building’ (where group members with claims are recruited in a class action).¹⁷²

E *Change in Level of Access to Civil Justice*

A *majority* of Australians believe their access to civil justice has increased over the last 20 years. An important limitation on this result is that exposure to legal problems is likely to begin with (and increase) with adulthood. Some 37% of responders were under the age of 34 years, so that their experience of dealing with legal problems up to 20 years prior is more questionable (any recollections prior to adulthood may be of parents dealing with such problems, for instance). An additional limitation is the concept of access to justice itself. Despite the definition given in the questionnaire preamble, and discussed above, the notion is sufficiently abstract and potentially complex that responders might reasonably be expected to have had different understandings of it. Fifty-nine percent (59%) of responders considered that their overall access to civil justice has increased over the last 20 years. Twenty-seven percent (27%) neither agreed nor disagreed and 12% disagreed (either somewhat or strongly).

Perceptions of whether access to justice has increased over the last 20 years show some variation across the urban/rural divide, with the inner urban group most supportive of the view that access to civil justice has increased in the last 20 years and the outer suburban group least supportive of that view. The mean results (a lower

¹⁷¹ Control questions are questions designed for the responses to be compared to responses to other questions. See, eg, Christopher J Patrick and William G Iacono, ‘Validity of the Control Question Polygraph Test: The Problem of Sampling Bias’ (1991) 76(2) *Journal of Applied Psychology* 229, 229. The first control question asked whether others should be informed of potential claims against a company in which the responder held shares. This question sought to remove or minimise such self-interest or at least offset it by raising the counter prospect of potential detriment to responders. A further control question asked about claims by others (not including the responder) against federal or state governments. This assumed that interviewees perceive that civil actions against government may lead ultimately to higher taxes. It is of course possible that not all interviewees perceived this connection.

¹⁷² See, eg, *Brewster* (n 1) 649 [91] (Kiefel CJ, Bell and Keane JJ); *Wigmans v AMP Ltd* [2019] NSWSC 603.

figure on the scale 1 to 5 indicating greater approval with the proposition that access to justice has increased) are as follows:¹⁷³

**Table 5: Mean Agreement with Proposition By Region
(responders n = 574)**

Location	Mean
Inner urban	1.14
Middle urban	2.26
Outer urban	2.51
Regional	2.41
Farm	2.24

F *Effect of No-Win-No-Charge*

The largest of the surveyed factors contributing to the perceived increase in access to civil justice was the introduction of ‘no-win-no-charge’¹⁷⁴ agreements. A significant proportion — 59% of responders — agreed that the introduction of such agreements has increased their access to civil justice. Twenty-seven percent (27%) were undecided about this and only 13% disagreed.

No-win-no-charge agreements first appeared formally in Victoria in July 1994.¹⁷⁵ This concept was explained in the survey instructions as meaning ‘a fee arrangement with a private lawyer where the lawyer charges a fee from the client only if the outcome of the case is successful for the client in recovering money or property (but not if it is unsuccessful)’. No-win-no-charge appears to be popular in personal injury and certain other claims. However, it is unlikely to be an effective billing method for a client who is defending a claim. Though there is the possibility of an award of party/party costs on a successful defence this may not be sufficient to cover the (higher) solicitor/client costs that may be charged. The authors are not aware of firms generally offering no-win-no-charge for defence of claims.

¹⁷³ Note that the overall numbers of responders from a farm or regional setting (other than regional towns or cities) were 33 in total which is not a large sample.

¹⁷⁴ Which were also known variously as ‘no-win-no-fee’, ‘no-win-no-pay’, ‘no-win-no-cost’ and so on by various different providers.

¹⁷⁵ Irene Lawson, “No Win: No Fee”: The Management of Medical Negligence Litigation on a Conditional Fee Basis’ (1998) 23(6) *Alternative Law Journal* 280, 280. See also ‘No Win No Fee Lawyers’, *Slater and Gordon Lawyers* (Web Page) <<https://www.slatergordon.com.au/the-firm/legal-costs/no-win-no-fee>>.

No-win-no-charge was found to be most common in personal injury law (46%) and superannuation (41%), and least common in wills¹⁷⁶ (1%) and contracts (0%).

G *Other Effects on Access*

Other important reasons for the perceived increase in access to civil justice were found to be: (1) the introduction of class action proceedings; and (2) better legal advice or information from government bodies.

Fifty-six percent (56%) of responders believed that the introduction of class action proceedings has increased their access to civil justice. Twenty-nine percent (29%) were undecided on this point while 13% disagreed. ‘Class actions’ is also included as a category of legal problem itself, which 20 responders had experienced.¹⁷⁷ Of these 20 responders, 45% strongly agreed, while 25% agreed, that they were able to obtain legal assistance. Forty percent (40%) strongly agreed, while 20% agreed, that they were satisfied with the legal assistance they received. Some lack of actual experience of class actions is obviously an important caveat on the significance of answers about their effect on access to justice. Likewise, the online survey results are limited as to provision of raw qualitative data on responders’ specific experiences of the phenomena of litigation funding, class actions, government information, pro bono and no-win-no-charge. Responders were not asked specifically to rank these phenomena. Fifty-six percent (56%) considered that their access to legal advice or information from government bodies had increased over the last 20 years. Twenty-eight percent (28%) were undecided whether this was so while 14% disagreed.

1 *Class Actions*

The procedural machinery for class actions was first generally introduced in Australia by amendments to the *Federal Court of Australia Act 1976* (Cth) allowing for a claim on behalf of seven or more persons.¹⁷⁸ The amendments were intended to ‘enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources’.¹⁷⁹ Similar procedural rules for class actions have since been enacted or promulgated in most states.¹⁸⁰

¹⁷⁶ Costs in will disputes are often ordered to be paid out of the estate. This is not technically no-win-no-charge as an unsuccessful claimant might still have their costs paid if the action was reasonable. Nevertheless, it might appear similar to no-win-no-charge to the lay person, making this low result somewhat puzzling.

¹⁷⁷ This category obviously overlaps with other categories. ‘Class actions’ (category 25) have been common for shareholders, resulting in potential overlap with category 5, ‘investment including shares’.

¹⁷⁸ *Federal Court of Australia Act* (n 38) s 33C.

¹⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

¹⁸⁰ See, eg, *NSW Civil Procedure Act* (n 87) pt 10; *Uniform Civil Rules 2020* (SA) ch 3 pt 4; *Supreme Court Act 1986* (Vic) pt 4A.

Class actions are of course a procedural mechanism rather than either a substantive area of the law or a specific means of funding proceedings (they are often funded as no-win-no-charge or through a litigation funder). Nevertheless, they have become an area of legal specialisation and so were included in the survey as an area of law in their own right. They also spread funding costs and were generally included as a form of funding assistance/access. Significant numbers of class actions have been brought in the areas of securities and investment, product liability, employment, mass tort, consumer protection and immigration.¹⁸¹ Class actions appear to have been most available in competition law (2.11 mean) and share investment (2.31 mean).

2 *Information from Government*

The survey did not interrogate responders further on the question of how information from government has improved; however, given the vast amount of information nowadays made available by government bodies online, it is clear that the internet has been a key factor in significantly enhancing access to legal advice or information from government bodies. Prior to the advent of the internet, such advice could only be provided in printed form, as well as verbally.¹⁸²

Increasing resources for assistance from government may have influenced these figures. An example in the area that the survey identified as most significant to average Australians — employment law — is the creation of the Fair Work Ombudsman which can provide free advice in certain circumstances. It publicises the results of major investigations and uses media to make the public aware of issues in employment law such as underpayment of wages.¹⁸³

H *Lesser Influences*

Other lesser factors in the increase in access to civil justice over the last 20 years are increased access to advice from private lawyers, availability of legal aid, third-party litigation funding and lawyers acting on a pro bono basis.

Fifty-one percent (51%) of responders believed they had experienced better access to private lawyers generally over the 20-year period with only 18% disagreeing. Thirty

¹⁸¹ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report, July 2017) 27 <http://global.classactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf>.

¹⁸² Though, conversely, the complete migration of information sources to the internet may be detrimental to those who do not have internet access or have low online skills: see, eg, Catrina Denvir, University College London Centre for Access to Justice, *Assisted Digital Support for Civil Justice System Users: Demand, Design, & Implementation* (Final Research Report, April 2019) <https://researchmgt.monash.edu/ws/portalfiles/portal/257143565/257090538_oa.pdf>.

¹⁸³ See, eg, 'Revealed: How 7-Eleven Is Ripping off Its Workers', *The Sydney Morning Herald* (Web Page, 2015) <<https://www.smh.com.au/interactive/2015/7-eleven-revealed/>>; 'Slaving Away', *Four Corners* (Australian Broadcasting Corporation, 2017) <<https://www.abc.net.au/4corners/slaving-away-promo/6437876>>.

percent (30%) neither agreed nor disagreed with this suggestion. Legal aid, third-party litigation funding and lawyers acting pro bono have all assisted in increasing access to civil justice somewhat, with agreement to this suggestion significantly outweighing disagreement, though falling short of majority agreement, and the balance being undecided. Forty-seven percent (47%) of responders agreed that access to legal aid lawyers has increased over the last 20 years. Thirty two percent (32%) were undecided and 19.87% disagreed. Forty-six percent (46%) considered that their access to civil justice has increased due to the availability of third-party litigation funding. However, 40% were undecided while 12% disagreed. Forty-one percent (41%) considered that access to civil justice has increased through increased availability of pro bono legal services. Thirty five percent (35%) were undecided while 22% disagreed. Only 39% agreed they had better access to private lawyers funded by government legal aid — 37% were undecided and 23% disagreed.

1 *Access to Private Lawyers*

The relatively strong support for the suggestion that access to private lawyers has increased over the last 20 years might possibly be explained in a number of ways. First, it may be partly accounted for by private lawyers being increasingly funded through no-win-no-charge agreements, legal aid or third-party litigation funding, as well as acting pro bono. Another factor may simply be the increased number of lawyers in Australia caused mainly by more universities offering recognised law courses. In New South Wales, for instance, the number of solicitors is said to have increased by more than 100% between 1988 and 2006.¹⁸⁴ Increased supply would tend to increase availability and possibly even reduce fees somewhat, at least in theory. The most typical form of funding — simply paying the private lawyer¹⁸⁵ — was most common in wills (69%) and family law (58%), and least common in banking (14%) and class actions (6%).

2 *Legal Aid*

Nowadays, government-funded legal aid tends to be made available almost exclusively for legal problems in criminal law or family law.¹⁸⁶ As criminal law was excluded from the survey, the responses suggesting better availability of legal aid

¹⁸⁴ Suzie Forell, Michael Cain and Abigail Gray, *Recruitment and Retention of Lawyers in Regional, Rural and Remote New South Wales* (Report, Law and Justice Foundation of New South Wales, September 2010) 12. See also Erica Cervini, 'Lawyers, Lawyers Everywhere, and Not a Job To Be Found', *The Age* (online, 12 June 2014) <<https://www.theage.com.au/education/lawyers-lawyers-everywhere-and-not-a-job-to-be-found-20140612-zs55y.html>>. The number of solicitors increased during that time from 9,076 to 19,358, while the population only increased by some 25% (from 5.7 million to 6.8 million): see Australian Bureau of Statistics, *Australian Historical Population Statistics, 2006* (Catalogue No 3105.0.65.001, 23 May 2006).

¹⁸⁵ With a 36% All Problems Average ('AP'). AP represents an aggregate from all legal problems surveyed.

¹⁸⁶ See, eg, 'Find Legal Answers', *Victoria Legal Aid* (Web Page, 12 July 2021) <<https://www.legalaid.vic.gov.au/>>.

appear likely to be limited mainly to the area of family law (though the results suggest that certain other areas may be touched on by legal aid such as contract and defamation and slander).

3 *Third-Party Litigation Funding*

Third-party litigation funding usually involves a commercial funder advancing funds to a litigant's lawyer to meet the legal costs of pursuing a claim for monetary relief. In return, the funder receives a percentage of any monetary relief/compensation or damages successfully recovered.¹⁸⁷ Initially, third-party litigation funding developed in Australia mainly in the insolvency area where insolvency officers such as company liquidators sought funding to pursue claims against directors. In more recent times, litigation funders have become involved in funding class actions in a number of areas including property damage caused by negligence, and increasingly in general commercial claims including investor class actions (often alleging misleading disclosure to securities markets).¹⁸⁸

Third-party litigation funders tend to have minimum claim sizes which might be calculated as fixed sums (such as \$500,000¹⁸⁹) or as a multiple (such as ten times¹⁹⁰) of the requested funding amount so that funding may not be that likely to be available for many single claims by average Australians. This might change in the future with expansion of, and more competition in, third-party litigation funding.¹⁹¹ Nevertheless, an apparent rule of thumb adhered to by funders that requires a ratio of 1:4 costs to damages,¹⁹² combined with somewhat inelastic legal costs to advance a case, may mean that small claims are generally unlikely to be assisted greatly by commercial litigation funders. However, the situation is different if a claim raises issues common to a number of possible claimants whose claims can be aggregated together in a class action. Litigation funding will also not be of assistance to average

¹⁸⁷ See, eg, Duffy, 'Regulating Third-Party Litigation Funding' (n 67); Julie-Anne Tarr and AJ George, 'Third-Party Litigation Funding in Australia: More External Regulation and/or Enhanced Judicial Supervision?' (2018) 36(3) *Company and Securities Law Journal* 262.

¹⁸⁸ See, eg, Vicki Waye and Vince Morabito, 'Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions' in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2016) 155, 156–62.

¹⁸⁹ See, eg, 'About Us', *Litigation Funding Solutions* (Web Page, 2018) <<https://www.litigationfundingsolutions.com.au/>>.

¹⁹⁰ See, eg, 'Commercial Litigation Funding: Criteria', *Omni Bridgeway* (Web Page, 2021) <<https://omnibridgeway.com/litigation-funding/dispute-funding/commercial/>>. Under such criteria, if a claim cost \$100,000 to run, then it would need to be a claim for at least \$1 million.

¹⁹¹ At least one funder, Augusta Ventures, indicates that claims as low as £200,000 (\$360,000) might be considered: 'For Individuals', *Augusta Ventures* (Web Page) <<https://www.augustaventures.com/what-we-do/for-individuals/>>.

¹⁹² See, eg, *ibid.*

Australians who are defending rather than prosecuting claims, even where they have good defences — as, even if successful, there will be no damages recovered.

In the authors' survey, litigation funding was perceived by responders to be most available in contract law (2.18 mean) and class actions (2.50 mean).

4 *Pro Bono Legal Services*

The availability of pro bono legal assistance has always been and remains somewhat ad hoc. A wide variety of activities might be classified as pro bono, ranging from a formalised and subsidised pro bono section in a law firm through to a variety of activities of solicitors and barristers giving their time to organisations, community legal centres or private individuals. Subsidisation might also extend to public interest or test cases. Less obvious activities that have a pro bono element include law firms cross-subsidising less remunerative areas within firms. These may range from complete financial support through to the common practice of reduced fees (sometimes referred to as 'but say' bills) for lower-income clients. Even 'write-offs' of fees due to the impecuniosity of a client might entail an element of pro bono.

The Australian Pro Bono Centre provides a history of the development of pro bono practice in Australia, which does appear to suggest some increasing focus on the area by the profession as well as community organisations and government.¹⁹³ These include the following developments:

- various pro bono clinics, legal centres, co-ordinators and pro bono partners within law firms;
- referral schemes by law societies and charities (such as Justice Connect and the Australian Pro Bono Centre);
- state-based public interest clearing houses;
- pro bono conferences; and
- reports and surveys including the *National Law Firm Pro Bono Survey*.¹⁹⁴

Nevertheless, according to the *National Law Firm Pro Bono Survey*, pro bono participation rates of lawyers have been somewhat variable in the time that surveys have been conducted (2010–18). In that period, the hours of pro bono legal work per lawyer per year appeared to increase from 2010–16 before dipping in 2018 and increasing again in 2020.¹⁹⁵

¹⁹³ Australian Pro Bono Centre, *Report on the Seventh National Law Firm Pro Bono Survey* (Report, February 2021) 2–7.

¹⁹⁴ See, eg, *ibid.*

¹⁹⁵ *Ibid.* 22. The figures are: 29 hours (2010); 29.9 hours (2012); 31.7 hours (2014); 34.8 hours (2016); 30.5 hours (2018); and 35.5 hours (2020).

In the authors' survey, pro bono funding was most common in problems with government (41%) and banking (28%) and least common in superannuation law (8%) and trade practices law (7%).

5 *Private Lawyers Funded by Legal Aid*

Victorian guidelines for applications for legal aid funding to pay the fees of private lawyers make it clear that '[m]ost grants of legal assistance are for criminal or family law matters. A small number of grants are also provided in some other matters such as guardianship, infringements, migration, social security, mental health and discrimination matters.'¹⁹⁶ This limitation in the scope of legal aid may explain why only 39% of responders agreed they had better access to private lawyers funded by government legal aid over the last 20 years, with 37% undecided and 23% disagreeing.

V SOME SECTORAL FINDINGS

A *Problem Areas Where Legal Assistance Is Most Available.*

Responders were most likely to be able obtain legal assistance for problems in wills and least likely for problems with government. The data is as follows in relation to the top three areas of availability and the bottom three areas (where a lower mean indicates higher availability):

Table 6: Mean Availability Score for Legal Problems (responders n = 574)

No.	Legal Problem	Mean
1.	Wills and estates	1.88
2.	Total/permanent disablement	2.15
3.	Personal injury	2.20
24.	Contracts	3.03
25.	Other online issues	3.05
26.	Problems with government	3.31

The high ranking for wills and estates may reflect the ubiquity of this service across city, country, and suburban law firms of various sizes.

B *Dealing with a Legal Problem without Advice*

Responders' perceived inability to deal with a legal problem in the absence of legal advice was most reported in superannuation law where no responders reported dealing with the problem by personal negotiation, 18% used self-help/fixing the

¹⁹⁶ 'Get a Lawyer to Run Your Case', *Victoria Legal Aid* (Web Page, 7 July 2021) <<https://www.legalaid.vic.gov.au/get-legal-services-and-advice/get-lawyer-to-run-your-case>>.

problem themselves and 72% reported the problem as unresolved. Superannuation is undoubtedly a complex area of the law given the layers of statutory regulation imposed over trust law and policy changes made over the years.¹⁹⁷ This level of complexity may have the result that lawyers and other professionals practising in this area are both highly specialised and potentially more costly.¹⁹⁸

C *The Largest Source of Legal Advice*

Private lawyers are the largest source of advice overall,¹⁹⁹ with their services being sought most in wills and personal injury matters. Advice was also sought most in relation to wills (64%) and personal injury (62%), and sought least in relation to online commerce (6%) and competition law (5%).²⁰⁰

D *Areas of Most Satisfaction*

The area of most general satisfaction was wills (defined also to include will disputes), where responders were most successful in getting legal assistance (1.88 mean). Responders were most satisfied with the legal assistance they received in contracts (1.55 mean) and wills (2.12 mean) but least satisfied with legal assistance in property damage (3.14 mean) and medical negligence (3.08 mean).

Responders were most of the belief that they obtained the remedy they needed in wills (1.98 mean) and contracts (2.00 mean) and least for problems with government (3.46 mean) and medical negligence (3.10 mean). They were most satisfied with their remedy in wills (2.08 mean) and competition law (2.47 mean) and least satisfied for problems with government (3.46 mean) and defamation and slander (3.29 mean).

Responders were most satisfied with the litigation process in competition law (2.11 mean) and laws relating to the elderly (2.11 mean) and least satisfied for defamation and slander (3.26 mean) and property damage (2.92 mean). They were most satisfied with the litigation outcome in online commerce (2.05 mean) and other online issues (2.05 mean) and least satisfied for problems with government (3.50 mean) and defamation and slander (3.47 mean).

¹⁹⁷ See, eg, 'Defined Benefit Funds: Notional Taxed Contributions', *Australian Taxation Office* (Web Page, 8 November 2018) <<https://www.ato.gov.au/Super/APRA-regulated-funds/Managing-member-benefits/Defined-benefit-funds---notional-taxed-contributions/>>.

¹⁹⁸ See, eg, Michelle J White, 'Legal Complexity and Lawyer's Benefit from Litigation' (1992) 12(1) *International Review of Law and Economics* 381.

¹⁹⁹ 30% AP average.

²⁰⁰ Limitations as to possible varying interpretations of the notion of 'advice' are noted above: see Coumarelos et al, *Legal Need in Victoria* (n 104) 92.

E Most Litigious Area

Family law might be described as the most litigious area of the law, in that commencement of proceedings was the most popular remedy (25%)²⁰¹ compared to an overall average of only 8%.

F Access to Justice Index Numbers

Access to justice index numbers were calculated to test both general satisfaction with the outcome of a legal problem and the extent to which there was availability for that problem of any or all of government legal aid, pro bono, no-win-no-charge, class actions or third-party litigation funding. That calculation produced an average index number for all problems of 54% and found the highest index number in competition law (64%) followed by the following areas of law.

Table 7: Access to Justice Index Numbers

No.	Legal Problem	Access to Justice Index Number
1.	Laws relating to the elderly	62%
2.	Investment including shares	61%
3.	Online commerce	59%
4.	Superannuation	58%
4.	Wills and estates	58%
6.	Class actions	57%
6.	Money, debt or insolvency	57%
6.	Trade Practices	57%
9.	Employment	56%
9.	Total/permanent disablement	56%
11.	Discrimination	55%
12.	Consumer rights	54%
12.	Housing and tenancy	54%
14.	Banking	53%
14.	Other Online Issues	53%
14.	Personal Injury	53%
17.	Disability	52%
17.	Insurance	52%
19.	Family Law	50%
20.	Medical negligence	49%

²⁰¹ Though this may reflect a requirement to make an application to obtain enforceable consent orders.

No.	Legal Problem	Access to Justice Index Number
21.	Other legal problems	48%
22.	Defamation and Slander	47%
23.	Contracts	45%
23.	Property damage	45%
25.	Problems with government	41%

Note though that the access to justice index numbers do not reflect whether that area of law is one in which legal problems are common. As appears from the earlier Tables, most of the legal problems with high access to justice index numbers are not in areas of occurrence of the most legal problems. The highest, competition law, is the smallest area of legal problems surveyed (26th). Its ranking may result from successful settlements in no-win-no-charge cartel class actions, such as that in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]*.²⁰² The others are, similarly, not main areas of legal problems, with rankings as follows: laws relating to the elderly (22nd); investment including shares (13th); online commerce (12th); and superannuation (25th).

VI CONCLUSION

Access to civil justice remains an important concern for the justice system and for society overall. The civil justice system has a crucial role in peacefully quelling civil disputation while also protecting and vindicating individual rights according to law. The system is an important component of the rule of law, the strength of which itself has been shown to have an empirical correlation with social and economic wellbeing. Access to that system, including access to legal advice, representation and where necessary, court action, are important in protecting the rights of citizens. Private enforcement of such rights entails further value in its deterrent effect on breaches of the law and in supplementing regulatory enforcement.

Barriers to access to civil justice have been noted and legal needs surveys seek to study these while providing a significant literature which intersects with the notion of access to advice, representation and the court system. Such surveys may also provide information on the incidence of justiciable problems, citizens' responses to them, motivations for using or not using court processes, outcomes of different strategies, and public experience and perception of the legal process. This article includes results of a nationwide online survey of access to civil justice, conducted substantially in the tradition of such surveys but also focusing particularly on average Australians and on the effect of developments in Australia, such as no-win-no-charge legal services, pro bono practice, third-party litigation funding and class action procedural machinery.

²⁰² (2006) 236 ALR 322.

Subject to the limitations noted above, some of the more important findings of this article include the following:

1. A majority of Australians subjectively believe that their access to civil justice has increased over the last 20 years. The single largest factor noted as contributing to this perceived increase was the introduction of ‘no-win-no-charge’ fee arrangements;
2. Australians have the most legal problems in the area of employment law, though the area with the greatest impact on their lives was total and permanent disablement. The area in which the second most problems were encountered was family law;
3. Advice is the most popular legal service sought, followed by legal representation in negotiation;
4. Australians most commonly seek a lawyer to defend court proceedings in the area of banking;
5. A majority of Australians surveyed would like to be informed of any rights they have to make civil claims;
6. The area with the most general satisfaction in civil justice was wills and estates;
7. Employment law problems are the most common legal problems in all geographical areas (urban and rural) except for the outer suburbs, where they are the second most common legal problem. Family law problems are the second largest area of problems in all geographical areas except for the outer suburbs, where they are the third most common; and
8. Index numbers calculated to test satisfaction with the outcome of a legal problem and the extent to which there was availability of innovative funding sources produced the highest index number for competition law followed by laws relating to the elderly.

The findings give overall (though not specific) feedback on the success of past access to civil justice initiatives. They are also illuminating in understanding and indicating levels of satisfaction with legal services and with the civil justice system itself in particular legal areas. As such the research provides useful insights for future access to civil justice initiatives.

VII APPENDIX: THE QUESTIONNAIRE

Before commencing the survey, please read, and if necessary, make a note of the following which explains the terms used in the questions in this survey.

EXPLANATION OF TERMS

Your ‘**access to civil justice**’ means your ability to obtain a just or fair outcome in an area of civil justice, including your ability to use and access the court system and the legal system to obtain a just or fair outcome.

‘**Alternative dispute resolution/mediation**’ is a process for solving legal disputes where parties agree to negotiate an outcome, usually with the assistance of an independent third party who assists all parties equally but does not represent any of them. Parties may or may not be individually represented by lawyers.

‘**Civil justice**’ includes getting a just or fair outcome in areas including laws relating to employment, discrimination, housing and tenancy, money, debt or insolvency (bankruptcy or company receivership/administration/liquidation), investment including shares, personal injury, medical negligence, property damage, consumer rights, competition law or trade practices, family law, contracts, wills, laws relating to the elderly, disability, total or permanent disablement, superannuation, government, insurance, banking, class actions or any other legal problem other than a criminal law matter.

‘**Class action proceedings**’ mean proceedings brought by a person on behalf of you and other victims of unlawful conduct where you are notified of the commencement of the proceeding and can participate in any recovery in the case or, alternately, decide to opt out of the case.

‘**Legal aid lawyer**’ means a lawyer employed and funded by a government funded legal aid body.

‘**Litigation**’ means court proceedings between two or more parties.

‘**Private lawyer**’ means a private or non-government lawyer who acts for you, usually in return for fees.

‘**Private lawyer funded by government legal aid**’ means a private lawyer who acts for you but whose fee is paid by a government funded legal aid body.

‘**Pro bono**’ describes the arrangement where a lawyer acts for you but does not charge you for his/her services.

‘**No win no charge**’ includes ‘no win, no pay’ or ‘no win, no cost’ and means a fee arrangement with a private lawyer where the lawyer charges a fee from you only if the outcome of the case is successful for you in recovering money or property (but not if it is unsuccessful).

‘**Remedy**’ means an outcome or solution to your legal problem which may include a payment of money to you or a court order that someone does something that you want them to do and also includes achieving these outcomes by settlement/agreement of the parties as well as by the court hearing the case and ordering the outcome.

‘**Third-party litigation funding**’ means an arrangement where a third-party litigation funding business funds a claim by you against someone (such as a company, business or government body) in return for a share of the compensation or damage recovered by you in the claim.

Q 1

Do you commit to providing your thoughtful and honest answers to the questions in this survey?

- I will provide my best answers
- I will not provide my best answers
- I can’t promise either way

[Note that responders who did not give the first answer were then eliminated from the survey].

Q 2

What Australian state or territory do you live in?

Q 3

What is your age?

- Under 18
- 18–24
- 25–34
- 35–44
- 45–54
- 55–64
- 65–74
- 75–84
- Over 85

Q 4

What is your birthplace?

- Australia
- Outside Australia

Q 5

Are you an Australian citizen?

- Yes
- No

[Note that responders who answered 'No' were eliminated from the survey]

Q 6

Is English your first language?

- Yes
- No

Q 7

What is the highest level of secondary education received?

- Year 9
- Year 10
- Year 11
- Year 12
- Other

Q 8

What is the highest level of post-secondary education received?

- Trade certificate
- Diploma
- Bachelor Degree
- Master's Degree or higher
- Other

Q 9

What is your income level? (per annum)

- Under \$20,000 per annum
- \$20,001–\$50,000
- \$50,001–\$80,000
- \$80,001–\$110,000
- \$110,001–\$140,000
- \$140,001–\$180,000
- \$180,001–\$200,000
- Above \$200,001

Q 10

Which of the following are you? (you may tick more than one box)

- Full time employee
- Part time/casual employee
- Manager
- Business owner
- Contractor
- Domestic duties/homemaker
- Unemployed
- Student
- Self-funded retiree
- Pensioner
- Other

Q 11

Which sector do you work in? (you may tick more than one box)

- Private small business
- Private large business
- Retail
- Health
- Education
- Government
- Professional
- Manufacturing
- Primary production
- Other

Q 12

Where do you live?

- Farm or regional setting
- Regional or rural town or city
- Inner urban
- Middle suburban
- Outer suburban

Q 13

Have you had a legal problem in any of the following areas of civil law in the last 20 years?

- 1 Employment (eg problems with your employer or unfair dismissal)
- 2 Discrimination (eg less favourable treatment based on gender, race, religion, age, disability or sexual preference)
- 3 Housing and tenancy (eg problems with your landlord)
- 4 Money, debt or insolvency (eg credit card or other debt problems or a person or business owing you money but not paying because they have insufficient money)
- 5 Investment including shares (eg being misled by companies or financial advisers about the safety or value of your investments)
- 6 Personal injury (eg physical injury from road or work)
- 7 Medical negligence (eg misdiagnosis or faulty treatment from doctors)
- 8 Property damage (eg someone damaging your car or home intentionally or accidentally)
- 9 Consumer rights (eg faulty or defective products or services)
- 10 Competition law (eg goods being overpriced due to collusion or agreements between businesses)
- 11 Trade practices (eg businesses misleading you)
- 12 Family law (eg custody of and access to your children, child support, and property division following divorce or break up of a relationship)
- 13 Contracts (eg arrangements with electricity, gas, water suppliers or with telephone companies or others)
- 14 Online commerce (eg problems with online suppliers of goods and services)
- 15 Other online issues (eg problems with social media sites, dating or other websites)
- 16 Defamation and slander (eg problems with people trying to publicly hurt your reputation)
- 17 Wills (eg making a will or being left out of someone's will)
- 18 Laws relating to the elderly (eg aged care agreements)
- 19 Disability (eg disability services)
- 20 Total/permanent disablement (eg making a claim on insurance or getting compensation)
- 21 Superannuation (eg getting access to or information about your superannuation)
- 22 Government (eg local government or planning issues or problems with dealings with state or federal government bodies or departments)
- 23 Insurance (eg making a claim on motor or home insurance)
- 24 Banking (eg unethical or illegal behaviour by banks toward you)
- 25 Class actions (eg being a class member in an action dealing any of the areas of civil justice)
- 26 Any other legal problem other than a criminal law matter

Q 14

There is no question 14.

Q 15

I would wish to be informed of any potential civil claims I may have (but am not aware of) for compensation against businesses, companies or governments for breaches of law by them.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

[Note that these same five options were used for Questions 16–18 and 20–7]

Q 16

If a company in which I (or my superannuation fund) owned shares had broken a law, I would wish victims of that breach to be informed of any claims for compensation that they may have against my company.

Q 17

If a federal or state government body had broken a law affecting other people but not me, I would wish victims of that breach to be informed of any claims for compensation that they may have against the government.

Q 18

I and other victims of breaches of law should be informed of any potential civil claims they may have (but are not aware of) against businesses or companies or governments whether or not the businesses, companies or governments are insured to meet such claims.

Q 19

Say how strongly you agree or disagree with the following statements generally and with reference to any civil legal problem(s) you have had over the last 20 years.

Q 20

I consider that my access to legal advice/information from government bodies has increased over the last 20 years.

Q 21

I consider that my access to advice from legal aid lawyers has increased over the last 20 years.

Q 22

I consider that my access to advice from private lawyers funded by government legal aid has increased over the last 20 years.

Q 23

I consider that my access to advice from private lawyers has increased over the last 20 years.

Q 24

I consider that my access to civil justice has been increased over the last 20 years by more private lawyers acting 'pro bono' (for free)?

Q 25

I consider that my access to civil justice has been increased over the last 20 years by the introduction of 'no win no charge' arrangements by private lawyers.

Q 26

I consider that my access to civil justice has been increased over the last 20 years by the introduction of class action proceedings.

Q 27

I consider that my access to civil justice has increased over the last 20 years due to the availability of third-party litigation funding.

Q 28

I consider that my access to civil justice generally has increased over the last 20 years.

- Strongly agree
- Agree
- Neutral
- Disagree
- Strongly disagree

Q 29

In respect of each legal problem you have identified as having had in the last 20 years answer the following questions separately (for each problem).

Q 30

In what area of civil law [set out in Q 13] was your legal problem?

Q 31

What year approximately did your legal problem arise?

- 2014–18
- 2010–14
- 2006–10
- 2002–06
- 1998–2002

Q 32

What was the degree of impact of the legal problem on your life?

- High
- Medium
- Low

Q 33

Were you able to achieve assistance with your legal problem?

- Yes
- Maybe
- No

Q 34

If you were unable to achieve assistance, how was your legal problem dealt with?

- Personal negotiation
- Self-help (taking action to fix the problem yourself)
- Not dealt with
- Other

Q 35

If you were able to achieve assistance for your legal problem, where did you seek advice?

- Friend or family
- Government
- Legal aid lawyer
- Private lawyer
- Other

Q 36

If you saw a lawyer about your legal problem, what service did you seek?

- Advice
- Preparation/drawing of document(s)
- Letter of demand
- Representation in negotiation
- Alternative dispute resolution/mediation
- Arbitration
- Commencement of court proceedings
- Defence of court proceedings

Q 37

If you saw a lawyer about your legal problem, what service and/or remedy did you ultimately get?

- Advice
- Preparation/drawing of document(s)
- Negotiated settlement without court action
- Negotiated settlement after court action commenced
- Settlement from arbitration or mediation
- Court order for damages
- Court orders for other relief such as injunction or declaration
- Court order dismissing a claim against you.

Q 38

If you saw a private lawyer about your legal problem, how was your legal assistance funded?

- Paid the lawyer from my own money
- Legal Aid paid the lawyer
- Pro bono (ie the lawyer did not charge)
- 'No win no charge' arrangement with lawyer
- Third-party litigation funder paid the lawyer
- Insurance company paid the lawyer

Q 39

Questions for access to justice for each legal problem

In relation to your legal problem please say how strongly you agree or disagree with the following statements.

Q 40

I was able to get legal assistance in relation to my legal problem

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

[Note that these same five options were used for Questions 41–50]

Q 41

I was satisfied with the legal assistance I received in relation to my legal problem.

Q 42

From the legal assistance I received for my legal problem was able to obtain the remedy I needed.

Q 43

I was satisfied with the remedy I obtained in relation to my legal problem.

Q 44

I was satisfied with the litigation process in relation to my legal problem.

Q 45

I was satisfied with the litigation outcome in relation to my legal problem.

Q 46

At the time of my legal problem, government legal aid assistance was available to assist me.

Q 47

At the time of my legal problem, some 'pro bono' (free) legal assistance was available to assist me.

Q 48

At the time of my legal problem 'no win no fee' legal assistance from some lawyers was available to assist me.

Q 49

At the time of my legal problem, I could have become part of a relevant class action proceeding to assist me.

Q 50

At the time of my legal problem, third-party litigation funding was available to assist me.

**CONSTITUTIONAL
BATTLEGROUND:
PRIVATE R V COWEN
(2020) 383 ALR 1**

I INTRODUCTION

The High Court in *Private R v Cowen* (2020) 383 ALR 1 (*Private R*) has resolved a longstanding dispute within its constitutional jurisprudence, holding, by majority, that members of the Australian Defence Force ('ADF') may be tried by service tribunal¹ for any offence, pursuant to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) (*DFDA*).² That is so in cases where the conduct charged would also constitute an offence under the civilian criminal law, and regardless of how slight or insubstantial the nexus between that conduct and the member's defence service might be. Expressed in point of constitutional principle, the Court has accepted that s 61(3) is, 'in all its applications',³ a valid law with respect to defence under s 51(vi) of the *Constitution*.

Although *Private R*'s case could have been decided without ruling upon this constitutional issue, it was recognised that to do so 'would effectively perpetuate decades of uncertainty'.⁴ Indeed, as Gageler J put it, 'everything that can be said has been said and nothing would be achieved by putting off its resolution to another case'.⁵ The reasons of Kiefel CJ, Bell and Keane JJ, however, have thrown up a fresh controversy that, similarly, was not strictly in issue. Their Honours suggested that service tribunals exercise executive, rather than judicial, power. Unlike the principal constitutional issue decided by the Court, however, there was in this instance no longstanding dispute to be settled, and no uncertainty to be resolved. This note interrogates the

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¹ A service tribunal may be constituted by a Defence Force magistrate or general court martial: see *Defence Force Discipline Act 1982* (Cth) ss 103(1)(c)–(d) (*DFDA*).

² *Private R v Cowen* (2020) 383 ALR 1, 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J) (*Private R*).

³ *Ibid* 21 [81] (Kiefel CJ, Bell and Keane JJ), 23 [91] (Gageler J), 57 [195] (Edelman J).

⁴ *Ibid* 45 [162] (Edelman J).

⁵ *Ibid* 28–9 [107].

joint judgment, and builds upon the contrary and settled⁶ view taken by three judges (in particular by Edelman J),⁷ that service tribunals exercise judicial power. Despite Gageler J's clarion call for constitutional action, his Honour offered no opinion on the issue.⁸ The result in *Private R* was an even 3:3 split,⁹ bringing into question a most axiomatic and basic tenet of the Court's constitutional jurisprudence, that is, the principled characterisation of governmental power.

This note unfortunately treads a well-trodden path in refuting the view taken by Kiefel CJ, Bell and Keane JJ.¹⁰ After two of those judges teased the trappings of this

⁶ *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 466–7 (Starke J), 481 (Williams J) ('*Bevan*'); *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 9 (Latham CJ), 23 (Dixon J) ('*Cox*'); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 540–1 (Mason CJ, Wilson and Dawson JJ), 564–5, 572–3 (Brennan and Toohey JJ) ('*Re Tracey*'); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 474–5 (Mason CJ and Dawson J), 479 (Brennan and Toohey JJ) ('*Re Nolan*'); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 25–6 (Mason CJ and Dawson J), 29 (Brennan and Toohey JJ), 39 (McHugh J) ('*Re Tyler*'); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 586 [14] (Gleeson CJ), 598–9 [60] (Gummow, Hayne and Crennan JJ) ('*White*').

⁷ *Private R* (n 2) 45 [163], 47–51 [167]–[176]. See also at 29–34 [112]–[122] (Nettle J), 38 [134]–[135] (Gordon J).

⁸ Evidently, the irony was not lost on Edelman J, his Honour citing a certain article in which it was said that 'service tribunals ... discharge basically judicial functions': Stephen Gageler, 'Gnawing at a File: An Analysis of *Re Tracey; Ex parte Ryan*' (1990) 20(1) *University of Western Australia Law Review* 47, 49, cited in *Private R* (n 2) 45 [163] (Edelman J).

⁹ That is so despite s 23(2)(b) of the *Judiciary Act 1903* (Cth), which provides that, 'if the Court is equally divided in opinion' on 'any question', 'the opinion of the Chief Justice ... shall prevail'. Because the discussion of the nature of the power reposed in service tribunals in *Private R* (n 2) was obiter, it would not seem to amount to an 'opinion ... on ... [a] question' so as to attract s 23(2)(b). That is because s 23 is the 'expedient ... for pronouncing upon the rights of the litigants': *Tasmania v Victoria* (1935) 35 CLR 157, 184 (Dixon J), quoted in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 431 (Aickin J) (emphasis added). Indeed, the term 'question' in s 23 'has implicitly been treated as the ultimate question of what order the Court is to make in the disposition of the appeal': *Perara-Cathcart v The Queen* (2017) 260 CLR 595, 623 [77] (Gageler J). See also at 623 [78], citing *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 550–3 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

¹⁰ Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40(2) *Federal Law Review* 161, 163 n 9, citing Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) 179–80. See also Zelman Cowen, 'The Separation of Judicial Power and the Exercise of Defence Powers in Australia' (1948) 26(5) *Canadian Bar Review* 829; RA Brown, 'The Constitutionality of Service Tribunals under the Defence Force Discipline Act 1982' (1985) 59(6) *Australian Law Journal* 319; Andrew D Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27(3) *Federal Law Review* 499.

view in obiter in *Lane v Morrison*¹¹ (*'Lane'*), Jonathan Crowe and Suri Ratnapala warned that developing it further 'would make the rule in the *Boilermakers' Case* vacuous'.¹² That rule, the first limb of the holding in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹³ (*'Boilermakers' Case'*), is that the judicial power of the Commonwealth may only be vested in the courts designated by Ch III of the *Constitution*.¹⁴ A consequence of this holding is the need to characterise governmental power as judicial or non-judicial.¹⁵ This note argues that the principled understanding upon which power is so characterised is undermined by the approach of the plurality in *Private R*. In so arguing, this note arrives at the age-old¹⁶ conclusion that, although service tribunals are not Ch III courts, '[t]he investing of judicial power in military tribunals is ... a true exception [to the first limb of the holding in the *Boilermakers' Case*] that can be explained only on historical grounds'.¹⁷ Before engaging with that discussion, an account is first provided of the decision in *Private R*.

II PRIVATE R'S CASE

A Facts

The plaintiff was and is a member of the ADF, specifically a soldier in the Regular Army.¹⁸ It was alleged that, on 30 August 2015, he assaulted the complainant, a member of the Royal Australian Air Force.¹⁹ The offending was said to have occurred in a private hotel room in Brisbane, following a social event attended by the plaintiff and the complainant.²⁰ Neither the plaintiff nor the complainant was on duty or in uniform at the time.²¹ Aside from these general observations,²² it suffices

¹¹ (2009) 239 CLR 230, 261 [97] (Hayne, Heydon, Crennan, Kiefel and Bell JJ) (*'Lane'*).

¹² Crowe and Ratnapala (n 10) 174.

¹³ (1956) 94 CLR 254 (*'Boilermakers' Case'*).

¹⁴ *Ibid* 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁵ See, eg, Gabrielle J Appleby, 'Imperfection and Inconvenience: *Boilermakers'* and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 271.

¹⁶ See, eg, *Grant v Gould* (1792) 2 H Bl 69; 126 ER 434, 450 (Lord Loughborough); *Dawkins v Lord Paulet* (1869) LR 5 QB 94, 119 (Mellor J); *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 266 (Kelly CB); *Ex parte Reed*, 100 US 13, 23 (Swayne J for the Court) (1879).

¹⁷ *Re Woolley; Ex parte Applicants M76/2003* (2004) 225 CLR 1, 22 [50] (McHugh J) (emphasis added) (*'Re Woolley'*).

¹⁸ *Private R* (n 2) 4 [10], 43 [155].

¹⁹ *Ibid* 2 [1], 40 [144], 43 [155].

²⁰ *Ibid* 4 [11], 43 [155].

²¹ *Ibid* 4 [10], 40 [144].

²² The precise circumstances of the alleged offending are described in the decision of the Court: *ibid* 4 [10]–[12], 40–1 [144]–[145], 43 [155].

to note that the circumstances of the alleged offending were ‘serious’.²³ It is also necessary to observe that the conduct in which the plaintiff was said to have engaged was proscribed by s 339 of the *Criminal Code Act 1899* (Qld).

On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions (‘DMP’) with one count of assault causing actual bodily harm.²⁴ The charge was brought under s 61(3) of the *DFDA*, which provides:

- (3) A person who is a defence member or a defence civilian commits an offence if:
 - (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
 - (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).²⁵

The plaintiff was a ‘defence member’.²⁶ The expression ‘Territory offence’ is defined in s 3(1) of the *DFDA* as including ‘an offence punishable under any ... law in force in the Jervis Bay Territory’.²⁷ Section 24(1) of the *Crimes Act 1900* (ACT), which applies in the Jervis Bay Territory,²⁸ establishes as an offence assault occasioning actual bodily harm. Thus, such conduct constitutes a ‘service offence’ under the *DFDA*.²⁹ Upon being charged by the DMP, therefore, the plaintiff was amenable to trial by Defence Force magistrate.³⁰

²³ Ibid 43 [155]. See also at 40–1 [145].

²⁴ Ibid 4 [10].

²⁵ *DFDA* (n 1) s 61(3).

²⁶ Ibid s 3(1).

²⁷ In respect of which Gleeson CJ had the following to say:

[It] is simply a drafting technique by which the Act, in creating service offences by reference to the content of Australian law, selects one out of the multiplicity of laws potentially available in a federation. It is a form of convenient legislative shorthand which removes the necessity to repeat, in the Act, all the provisions of an Australian criminal statute.

Re Aird; Ex parte Alpert (2004) 220 CLR 308, 311–12 [3] (‘*Re Aird*’), citing *Re Tracey* (n 6) 545 (Mason CJ, Wilson and Dawson JJ). On the broader significance of the Jervis Bay Territory within the defence context, see, eg, James Fettes, ‘Why Does Canberra Have a Beach at Jervis Bay?’, *ABC News* (online, 13 February 2017) <<https://www.abc.net.au/news/specials/curious-canberra/2017-02-13/why-does-canberra-have-a-beach-at-jervis-bay/8193752>>.

²⁸ *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A.

²⁹ *DFDA* (n 1) s 3(1).

³⁰ Ibid 103(1)(c). See also at ss 115, 129.

On 26 August 2019, the plaintiff appeared before the first defendant, a Defence Force magistrate.³¹ The plaintiff unsuccessfully objected to the first defendant's jurisdiction to hear the charge.³² Shortly thereafter, he instituted proceedings in the original jurisdiction of the High Court,³³ seeking a writ of prohibition restraining the first defendant from hearing the charge.³⁴ The Commonwealth was named as second defendant, and it submitted an appearance for the first defendant.

B *Issue and Applicable Law*

The High Court in *Private R* was asked to decide whether s 61(3) of the *DFDA* was, in its application to the plaintiff, supported by s 51(vi) of the *Constitution*, that is, in circumstances where (i) the plaintiff was not on duty or in uniform at the time of the alleged offending, and (ii) the offending charged also constituted an offence under the civilian criminal law, such that trial in the civil courts was available.

Section 51(vi) provides:

The Parliament shall, subject to this *Constitution*, have power to make laws ... with respect to:

...

(vi) the ... defence of the Commonwealth ...³⁵

The starting point is to observe that s 51(vi) is a purposive power. As was said by Dixon J in *Stenhouse v Coleman*,³⁶ “a law with respect to the defence of the Commonwealth” is an expression which seems ... to treat defence or war as the *purpose to which the legislation must be addressed*.³⁷ The question whether a law is appropriately addressed to that end necessitates an inquiry as to whether the law ‘does tend or might reasonably be considered to conduce to ... the defence of the Commonwealth’.³⁸ Relevantly, Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* (*‘Re Tracey’*) observed that ‘the ... defence of the Commonwealth *demands the*

³¹ *Private R* (n 2) 5 [15].

³² *Ibid.*

³³ *Constitution* s 75(v).

³⁴ *Private R* (n 2) 5 [16].

³⁵ *Constitution* s 51(vi).

³⁶ (1944) 69 CLR 457 (*‘Stenhouse’*).

³⁷ *Ibid* 471 (emphasis added). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 192–3 (Dixon J), 253 (Fullagar J), 273 (Kitto J). In this, s 51(vi) is to be contrasted with other powers under s 51 of the *Constitution* that deal with a particular subject matter, questions of validity in respect of which may be decided by ‘consider[ing] whether the legislation operates upon ... the subject matter ... [and by] disregard[ing] purpose or object’: *Stenhouse* (n 36) 471 (Dixon J).

³⁸ *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177, 216 (Dixon CJ).

provision of a disciplined force'.³⁹ Thus, as a general proposition, the enactment of a disciplinary code conduces to the defence of the Commonwealth.⁴⁰ So too, it has long been held,⁴¹ does the establishment of tribunals composed of defence personnel that are invested with jurisdiction to determine disciplinary breaches, and to impose punishment upon offending defence members.

That being so, two⁴² competing approaches to the question raised in *Private R* were expounded in *Re Tracey*. Chief Justice Mason, Wilson and Dawson JJ determined:

It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. ... [T]he proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces.⁴³

Justices Brennan and Toohey, on the other hand, preferred a more limited view. Their Honours highlighted that s 51(vi) is expressed as being 'subject to' the *Constitution* and, concomitantly, the strict insulation of judicial power mandated by Ch III.⁴⁴ Thus, a law proscribing, as a service offence, conduct otherwise amounting to a civil offence, was limited by the requirement that 'proceedings [under such a law] ... be brought against a defence member ... if, *but only if*, those proceedings can reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline'.⁴⁵ In cases where it remained practical for the ordinary courts to exercise their jurisdiction,⁴⁶ the operation of such a law would impermissibly conflict with Ch III, specifically the competing 'constitutional objective ...' of Ch III that the

³⁹ *Re Tracey* (n 6) 540 (emphasis added).

⁴⁰ *Ibid* 540–1. See also *Re Aird* (n 27) 313–14 [8] (Gleeson CJ).

⁴¹ See above nn 6, 16.

⁴² It is noted that alternative approaches emerged: see, eg, James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020) 274–6 [5.90]–[5.92]; Crowe and Ratnapala (n 10) 165–6. Justice Edelman in *Private R* (n 2) documented four possible approaches to the issue: at 41–2 [149]–[151]. For expedience, however, the focus remains on the two positions that drew plural support in *Re Tracey* (n 6) and the decisions following.

⁴³ *Re Tracey* (n 6) 545.

⁴⁴ *Ibid* 563–4.

⁴⁵ *Ibid* 570 (emphasis added).

⁴⁶ The following factors were offered by their Honours as bearing upon the question whether it remained practical for the ordinary courts to exercise jurisdiction: 'the nature of the offence, the circumstances in which the offence was committed and the place and circumstances in which the disciplinary powers were invoked': *ibid* 563. It would not be practical to exercise jurisdiction, their Honours said, 'in relation to offences of a specific naval or military character or in relation to civil offences committed outside the territorial jurisdiction of the ordinary courts': at 563.

jurisdiction of the civil courts remain ‘pre-ordinate’.⁴⁷ Justices Brennan and Toohey in *Re Tracey* drew upon pre-federation history in support of this finding.⁴⁸

The tussle between these views continued in two subsequent decisions of the Mason Court.⁴⁹ More recently, the Court in *Re Aird; Ex parte Alpert* declined to decide which view is to be preferred.⁵⁰ By the time of *Private R*, the competing positions in *Re Tracey* had come to be known as the ‘service status’ test, that being the view of Mason CJ, Wilson and Dawson JJ, and the ‘service connection’ test,⁵¹ as embodied in the reasons of Brennan and Toohey JJ.⁵² While the High Court continued to defer resolution of the question, the Defence Force Discipline Appeal Tribunal in *Williams v Chief of Army*⁵³ decided that the service status test was to be preferred.⁵⁴

It was against this jurisprudential backdrop that the High Court decided *Private R*’s case. The plaintiff argued that the service connection test should be adopted, while the Commonwealth preferred the service status test.⁵⁵ *Private R*’s case demonstrated that the resolution of this question would have real implications for defence members such as the plaintiff, and was far from a matter of mere academic debate. Indeed, were the Court to adopt the service connection test, it remained that the additional finding could be made that the plaintiff’s offending did not satisfy that test, such that he was not amenable to trial by the first defendant. In the event that the service status test was adopted, however, he would be amenable to the first defendant’s jurisdiction without further inquiry.

⁴⁷ Ibid 569–70.

⁴⁸ Ibid 554–63.

⁴⁹ *Re Nolan* (n 6) 474–5 (Mason CJ and Dawson J), 484 (Brennan and Toohey JJ); *Re Tyler* (n 6) 26 (Mason CJ and Dawson J), 28–9 (Brennan and Toohey JJ).

⁵⁰ *Re Aird* (n 27) 312–13 [5], 314 [9] (Gleeson CJ), 324 [45]–[46] (McHugh J, Hayne J agreeing at 356 [156]), 330 [69] (Gummow J, Hayne J agreeing at 356 [156]).

⁵¹ Although it is noted that this designation is perhaps ill-suited to the view of Brennan and Toohey JJ in view of the centrality afforded by their Honours to the purpose of maintaining and enforcing discipline, rather than the connecting factors: see, eg, *Stellios* (n 42) 273–4 [5.89], 281 [5.99].

⁵² See, eg, *Re Aird* (n 27) 321 [36] (McHugh J). While these designations are derived from the United States jurisprudential setting, they serve as a useful shorthand expression of the competing positions: see *O’Callahan v Parker*, 395 US 258, 272–3 (Douglas J for the Court) (1969); *Solorio v United States*, 483 US 435, 440–1, 448–50 (Rehnquist CJ for the Court) (1987).

⁵³ [2016] ADFDAT 3 (Tracey, Brereton and Hiley JJ) (*‘Williams’*).

⁵⁴ Ibid [51] (Tracey and Hiley JJ, Brereton J agreeing at [99]), quoted in *Private R* (n 2) 5–6 [18] (Kiefel CJ, Bell and Keane JJ). The decision in *Williams* (n 53) was followed by the first defendant in dismissing the plaintiff’s objection to his jurisdiction to hear the charge: *Private R* (n 2) 5 [17], 6 [19].

⁵⁵ *Private R* (n 2) 3–4 [6]–[7].

III DECISION

The Court unanimously decided that s 61(3) of the *DFDA* was valid in its application to the plaintiff.⁵⁶ In so holding, Kiefel CJ, Bell and Keane JJ, Gageler J and Edelman J determined that the view propounded by Mason CJ, Wilson and Dawson JJ in *Re Tracey* was to be preferred.⁵⁷ Although Nettle J and Gordon J agreed that the plaintiff was amenable to the jurisdiction of the first defendant, their Honours rejected the majority view on the constitutional issue.⁵⁸

A Majority

Although members of the majority doubted the utility of shorthand expressions,⁵⁹ it may be observed that their Honours have in essence endorsed the service status test.⁶⁰ Chief Justice Kiefel, Bell and Keane JJ determined:

A rule that requires defence force personnel always and everywhere to abide by the law of the land is sufficiently connected with s 51(vi) because observance of the law of the land is readily seen to be a basic requirement of a disciplined and hierarchical force organised for the defence of the nation.⁶¹

⁵⁶ Ibid 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 37 [131] (Nettle J), 40–1 [145] (Gordon J), 54–5 [186], 57 [194]–[195] (Edelman J).

⁵⁷ Ibid 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J).

⁵⁸ Ibid 34–6 [125]–[128] (Nettle J), 40 [142] (Gordon J).

⁵⁹ Ibid 11 [42] (Kiefel CJ, Bell and Keane JJ). Their Honours did, however, acknowledge the convenience of those expressions, tracing their use to the decision of the Defence Force Discipline Appeal Tribunal in *Williams* (n 53), among others: *Private R* (n 2) 11 [41]–[42]. Taken together with the plurality’s earlier quotation of the policy reasons in favour of the service status test offered by Tracey and Hiley JJ in *Williams* (n 53), and the decision ultimately reached by the majority in *Private R* (n 2), the enduring influence of the late Richard Tracey on Australian military law might be discerned: see *Private R* (n 2) 5–6 [18], quoting *Williams* (n 53) [49]–[51]. See generally Transcript of Proceedings, *Ceremonial Sitting of the Full Court to Farewell the Honourable Justice Tracey* (Federal Court of Australia, Allsop CJ, North, Kenny, Greenwood, Rares, Besanko, Tracey, Logan, McKerracher, Yates, Murphy, Davies, Mortimer, White, Wigney, Beach, Moshinsky, Steward and Colvin JJ, 17 August 2018); Justice Anthony Cavanough, ‘Remembering Major General the Hon Justice Richard Tracey AM RFD QC 1948–2019’ (2019) 22 (November) *Melbourne Law School News*; *Re Tracey* (n 6).

⁶⁰ That is to say, their Honours determined that s 61(3) of the *DFDA* (n 1) is valid ‘in all its applications’ to defence members: *Private R* (n 2) 21 [81] (Kiefel CJ, Bell and Keane JJ), 23 [91] (Gageler J), 57 [195] (Edelman J).

⁶¹ Ibid 20–1 [80]. See also at 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J).

In so holding, the plurality, along with Gageler J and Edelman J, rejected the notion that Ch III of the *Constitution* is a limitation upon s 51(vi) in respect of military justice.⁶² Justice Gageler and Edelman J may be seen to have refuted any interaction between s 51(vi) and Ch III in their Honours' endorsement of the approach taken by Mason CJ, Wilson and Dawson JJ in *Re Tracey*.⁶³ Chief Justice Kiefel, Bell and Keane JJ reasoned further that, because 'the system of military justice established under s 51(vi) stands distinctly outside of Ch III',⁶⁴ the 'logical implication ... [is] that the scope of s 51(vi) ... [is] unconstrained by Ch III'.⁶⁵ Thus, the plurality rejected the argument that the trial of the plaintiff by Defence Force magistrate — in circumstances where trial in the civil courts was also available — was offensive to Ch III. To this, Kiefel CJ, Bell and Keane JJ said: 'While there may be an area of concurrent jurisdiction between civil courts and service tribunals, there is no warrant in the constitutional text for treating one as subordinate or secondary to the other. Rather, the two are equally authorised by the *Constitution*.'⁶⁶ Their Honours took one step further, however, suggesting in obiter that any notion that s 51(vi) and Ch III might intersect could be refuted upon the further basis that 'the power ... exercised [by service tribunals] is executive or administrative in character'.⁶⁷ Justice Edelman disagreed with this observation,⁶⁸ while it was left unaddressed by Gageler J.

The notion that Ch III requires that the jurisdiction of the civil courts remain 'pre-ordinate'⁶⁹ was considered in further detail by Gageler J and Edelman J. Their Honours recognised that this proposition had originally been articulated by Brennan and Toohey JJ in *Re Tracey* upon the basis of the historical interaction between service tribunals and the civil courts.⁷⁰ To the contrary, Gageler J concluded:

What ... is relevantly to be drawn from the pre-federation constitutional history ... is the emergence by at least the second half of the nineteenth century of a firm perception that compliance by naval and military personnel with the ordinary criminal law was itself so important to the good order of the naval and military forces as to justify imposition and enforcement of that norm as a matter of naval and military discipline *irrespective of whether civil court enforcement*

⁶² Ibid 12 [46]–[47] (Kiefel CJ, Bell and Keane JJ), 26–7 [101]–[102] (Gageler J), 53–5 [181]–[186] (Edelman J).

⁶³ Ibid 24–5 [95] (Gageler J), 54–5 [186] (Edelman J).

⁶⁴ Ibid 12 [46].

⁶⁵ Ibid 12 [47].

⁶⁶ Ibid 14 [51].

⁶⁷ Ibid 15 [55].

⁶⁸ Ibid 45 [163], 47–51 [167]–[176].

⁶⁹ *Re Tracey* (n 6) 570.

⁷⁰ *Private R* (n 2) 27 [103] (Gageler J), 54–5 [186] (Edelman J). The joint judgment rejected entirely the premise of this argument, determining that 'in point of principle, historical considerations cannot limit the scope of ... s 51(vi) of the *Constitution*': at 18 [69]. Their Honours did, however, undertake a historical analysis, reaching the same conclusion as Gageler J and Edelman J: at 18–20 [69]–[77].

*of the ordinary criminal law against non-compliant naval and military personnel was practicable or convenient.*⁷¹

His Honour recognised that, historically, the role of the civil courts within this context was reserved for circumstances where defence force command failed to punish offending defence members.⁷² To this point, the joint judgment similarly observed that ‘the civil justice system ... [was] available ... as a curb on the mischiefs that might result ... from incidents of lawlessness on the part of the members of the standing army’.⁷³

B *Minority*

Although their Honours joined in declining to adopt the service status test,⁷⁴ and in accepting that there must be some constitutional limitation upon the operation of s 61(3) of the *DFDA*,⁷⁵ Nettle J and Gordon J took differing approaches.

Justice Nettle was emphatic in holding that service tribunals exercise judicial power.⁷⁶ His Honour said that, consequently, it was necessary to consider the interaction between s 51(vi) and Ch III. His Honour embraced the consequence of Brennan and Toohey JJ’s approach in *Re Tracey*,⁷⁷ namely, that Ch III of the *Constitution* is a ‘competing constitutional objective ...’ that must be reconciled with the system of military justice.⁷⁸ His Honour preferred the reasoning of Deane J in that case, however. Justice Deane had determined that, because the system of military justice is admitted as an exception to Ch III for a specific *purpose*, being the discipline of the defence forces, it remains circumscribed by that purpose.⁷⁹ The exercise of

⁷¹ Ibid 28 [105] (emphasis added). See also at 54–5 [186]–[187] (Edelman J). It is noted, however, that s 144(3) of the *DFDA* (n 1) now provides that a person previously tried in a civil court ‘is not liable to be tried by a service tribunal for a service offence that is substantially the same offence’: see *Private R* (n 2) 48 [170] (Edelman J). Section 190(5) of the *DFDA*, now repealed, similarly prohibited trial in a civil court where action had already been taken by a service tribunal. That provision was ruled invalid in *Re Tracey* (n 6): at 547–8 (Mason CJ, Wilson and Dawson JJ), 576, 579 (Brennan and Toohey JJ).

⁷² *Private R* (n 2) 27 [103].

⁷³ Ibid 19 [74].

⁷⁴ Ibid 34 [125] (Nettle J), 40 [142] (Gordon J).

⁷⁵ Ibid 34–5 [126] (Nettle J), 39–40 [141] (Gordon J).

⁷⁶ Ibid 29–33 [112]–[121].

⁷⁷ His Honour said that ‘decisions of the Court ... [have] in effect accepted the Brennan and Toohey JJ [service connection] test’: ibid 34 [123], citing *Re Aird* (n 27) 314 [8] (Gleeson CJ), 322 [37]–[38], 324 [43] (McHugh J), 330 [69] (Gummow J), 356 [156] (Hayne J); *White* (n 6) 589 [24] (Gleeson CJ), 601–2 [73] (Gummow, Hayne and Crennan JJ).

⁷⁸ *Private R* (n 2) 34–5 [126].

⁷⁹ Ibid, citing *Re Tracey* (n 6) 584–5 (Deane J).

jurisdiction for an extrinsic purpose, therefore, would impermissibly ‘*encroach ... upon the ordinary administration of criminal justice by courts of law*’, contrary to Ch III.⁸⁰

Although Gordon J accepted that s 61(3) was valid in its application to the plaintiff,⁸¹ her Honour maintained that there must be some applications that, as a matter of characterisation, could not reasonably be said to conduce to the defence of the Commonwealth.⁸² Her Honour teased out the distinction between the two tests by offering two hypothetical cases. One⁸³ hypothetical case involved ‘accidental ...’ littering by a defence member.⁸⁴ Because an ‘inquiry must be made [in each case] in order to demonstrate that the law *in its relevant operation* is supported by the defence power’,⁸⁵ her Honour rejected the service status test. Justice Gordon would not accept that the defence member in her Honour’s hypothetical situation could be amenable to trial by service tribunal, as would follow on application of the service status test.⁸⁶ Her Honour joined with Nettle J in making the additional finding that applying s 61(3) in the hypothetical case would be to ‘fail to recognise that military discipline is supplementary to, and not exclusive of, the ordinary criminal law’.⁸⁷

IV IN DEFENCE OF WHAT MATTERS

It may be observed that, aside from the approach taken by Nettle J, the nature of the power exercised by service tribunals was not an issue bearing upon the result in *Private R*. It is suggested, however, that the view expressed by Kiefel CJ, Bell and

⁸⁰ *Private R* (n 2) 34–5 [126], quoting *Re Tracey* (n 6) 584–5 (Deane J) (emphasis added). See also *Private R* (n 2) 36 [128] (Nettle J).

⁸¹ *Private R* (n 2) 40–1 [144]–[145].

⁸² *Ibid* 39–40 [141].

⁸³ The other involved a defence member urinating ‘behind a tree on the roadside (for example, because they had a medical condition requiring them to urinate frequently)’: *ibid*. It is noted that warnings have been repeatedly levelled at the use of such ‘exercise[s] in imagination’ for the purposes of asserting the ‘absurd consequences’ that might flow from a constitutional holding of the High Court: see *Love v Commonwealth* (2020) 375 ALR 597, 711–12 [455] (Edelman J), citing *Wainohu v New South Wales* (2011) 243 CLR 181, 240 [151] (Heydon J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ). See also *Western Australia v Commonwealth* (1975) 134 CLR 201, 271 (Mason J). The scenario proffered by Gordon J, however, provides a useful illustration of the situation faced by defence members on application of the service status test.

⁸⁴ *Private R* (n 2) 39–40 [141].

⁸⁵ *Ibid* 40 [142] (emphasis added).

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

Keane JJ on that issue is of broader doctrinal significance, and that is the aspect of the decision critiqued herein.⁸⁸

A *The Boilermakers' Case and Characterising Judicial Power*

The starting point in respect of Ch III of the *Constitution* is what was said by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers' Case*:

Chap. III ... is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III.⁸⁹

As Gabrielle Appleby notes, a consequence of that holding is 'the need to characterise all government powers ... into judicial and non-judicial [categories]'.⁹⁰ However 'inconvenient' it may be,⁹¹ this task remains the 'starting point'⁹² of any Ch III analysis. The 'classic statement of the characteristics of judicial authority',⁹³ despite that concept being incapable of 'exclusive and exhaustive' definition,⁹⁴ is that given by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*⁹⁵ ('*Huddart, Parker & Co*'). His Honour said that judicial power would be exercised where 'some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action'.⁹⁶ The plurality in the *Boilermakers' Case*, however, maintained that there would be 'subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chap. III'.⁹⁷ Thus, there have emerged

⁸⁸ It is noted that Edelman J considered the further issue whether the power exercised by service tribunals is 'judicial power of the Commonwealth' within the meaning of Ch III: *ibid* 52–3 [178]–[180]. Although of interest, this point was discussed only by his Honour and, therefore, is not addressed herein. In any event, Edelman J queried whether the distinction between 'judicial power' and 'judicial power of the Commonwealth' might be 'no more than semantic': at 53 [180]. For the competing views on this issue, see, eg, *Bevan* (n 6) 467 (Starke J); *White* (n 6) 616–21 [123]–[140] (Kirby J). See generally Stellios (n 42) 267–8 [5.86]; Crowe and Ratnapala (n 10) 174–6.

⁸⁹ *Boilermakers' Case* (n 13) 270. It is noted that that rule had emerged prior to the *Boilermakers' Case*, however: see, eg, Stellios (n 42) 76–9 [3.57]–[3.63].

⁹⁰ Appleby (n 15) 271.

⁹¹ *Ibid* 286.

⁹² See, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 413 [304] (Kirby J) ('*Thomas*').

⁹³ *R v Davison* (1954) 90 CLR 353, 387 (Taylor J) ('*Davison*').

⁹⁴ *Ibid* 366 (Dixon CJ and McTiernan J).

⁹⁵ (1909) 8 CLR 330 ('*Huddart, Parker & Co*').

⁹⁶ *Ibid* 357.

⁹⁷ *Boilermakers' Case* (n 13) 278, citing *Davison* (n 93) 366–70 (Dixon CJ and McTiernan JJ). See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178–9 (Isaacs J).

two related concepts: that some powers are not peculiarly ... judicial or executive (innominate powers ...); and that a power may be of 'a chameleon-like nature which takes its colour from the character of' the body vested with the power (the chameleon principle). Although these concepts are often run together in the cases, they are separate ideas.⁹⁸

Against this backdrop, the proposition that service tribunals exercise judicial power was accepted by Mason CJ, Wilson and Dawson JJ in *Re Tracey* with no more than a cursory glance: 'There has never been any real dispute about that.'⁹⁹ Their Honours added that 'a service tribunal has practically all the characteristics of a court exercising judicial power',¹⁰⁰ in that it 'has the power to determine authoritatively the liability of those charged before it, albeit subject to review or appeal. It makes those determinations in accordance with the law prescribed.'¹⁰¹ To hold otherwise, their Honours said, would be 'to admit the appearance of judicial power and yet deny its existence'.¹⁰² In so holding, their Honours joined a score of authorities to the point.¹⁰³ Indeed, at the time of *Re Tracey* there *had* never been any real dispute about the character of the power exercised by service tribunals. Rather, the contrary view has emerged more recently, beginning with the Court's equivocation in *Lane*.¹⁰⁴

B *Accelerated Erosion*

The concern in *Lane* was not with service tribunals, but rather with the Australian Military Court ('AMC') established by the *DFDA*, as amended. Although established 'to make binding and authoritative decisions' in the purported exercise of the judicial power of the Commonwealth,¹⁰⁵ the AMC did not comply with the provisions of Ch III in respect of judicial tenure, and the relevant provisions of the *DFDA* were ruled invalid.¹⁰⁶ In characterising the functions reposed in the AMC, Hayne, Heydon, Crennan, Kiefel and Bell JJ highlighted the significance of the fact that it stood outside the chain of command of the defence forces. That made the AMC unlike service tribunals, the decisions of which remained subject to 'review ... within the chain of command', thus lacking the binding and enforceable character of judicial power described by Griffith CJ in *Huddart, Parker & Co*, and thus remaining consistent with Ch III.¹⁰⁷

⁹⁸ *Stellios* (n 42) 152 [4.89], quoting *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 552 (Gummow J). See also *Crowe and Ratnapala* (n 10) 173.

⁹⁹ *Re Tracey* (n 6) 540.

¹⁰⁰ *Ibid* 537.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

¹⁰³ See above nn 6, 16.

¹⁰⁴ See also *White* (n 6) 649 [240] (Callinan J).

¹⁰⁵ *Lane* (n 11) 261 [98].

¹⁰⁶ *Ibid* 266–7 [115].

¹⁰⁷ *Ibid* 261 [97].

Building upon the view expressed by their Honours in *Lane*, Kiefel CJ and Bell J in *Private R* (on this occasion joined by Keane J) said:

Given that '[a] function may take its character from that of the tribunal in which it is reposed', and given further the long history of the exercise of disciplinary jurisdiction by service tribunals within the chain of command established under s 68 of the *Constitution*, it may be more accurate to say that the power so exercised is executive or administrative in character. And it is convenient to note here that the circumstance that the decisions of service tribunals are amenable to review under s 75(v) of the *Constitution* 'points away' from the conclusion that such tribunals exercise judicial power.¹⁰⁸

While their Honours' reference to s 75(v) of the *Constitution* may swiftly be dispensed with,¹⁰⁹ the invocation of the so-called 'chameleon principle' warrants closer attention.

C A Nominate, or Not Innominate, Power

It may be observed that Kiefel CJ, Bell and Keane JJ invoked the chameleon principle without first asking whether the power exercised by service tribunals is one of those innominate powers to which the chameleon principle may apply.¹¹⁰ Had their Honours undertaken that initial step of characterisation, it would have

¹⁰⁸ *Private R* (n 2) 15 [55] (citations omitted).

¹⁰⁹ Federal judicial officers are amenable to review under s 75(v). The authorities for that proposition may well be 'too numerous to mention': *R v Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190, 215 (Gibbs J) ('*Ex parte WANFL*'). To collate even some of them, however, is to observe at once the difficulty with the view taken by Kiefel CJ, Bell and Keane JJ: at 200–1 (Barwick CJ), 215 (Gibbs J), 241 (Aickin J); Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 78; Stellios (n 42) 389 [7.59], citing *R v Court of Conciliation and Arbitration (Cth); Ex parte Whybrow & Co* (1910) 11 CLR 1, 22 (Griffith CJ), 33 (Barton J), 41–2 (O'Connor J); *R v Court of Conciliation and Arbitration (Cth); Ex parte Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54, 62 (Griffith CJ), 66–7 (Barton J), 79 (Isaacs J), 82–3 (Gavan Duffy and Rich JJ), 85–6 (Powers J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [42] (Gaudron and Gummow JJ); Justice Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 57, citing *R v Court of Conciliation and Arbitration (Cth); Ex parte Ozone Theatres (Australia) Ltd* (1949) 78 CLR 389, 399 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263 (Barwick CJ, Gibbs, Stephen and Mason JJ); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15, 25 (Gibbs J).

¹¹⁰ See, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360 (Gaudron J). Before referring to the chameleon principle, her Honour emphasised that 'some powers are essentially judicial' and therefore not of the kind that may either be reposed in a Ch III Court or executive body. That qualification was also made in the authorities cited by Kiefel CJ, Bell and Keane JJ: see *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 8 (Jacobs J) ('*Quinn*'), cited in *Private R* (n 2) 15 [55].

been observed, as it was by Nettle J and Edelman J,¹¹¹ that the power exercised by service tribunals is in fact ‘*the classic example*’ of that which is ‘exclusively ... judicial’.¹¹² Justices Brennan, Deane and Dawson in *Chu Kheng Lim* (with whom Mason CJ agreed) relevantly said: ‘There are some functions which ... have become established as essentially and exclusively judicial in character. *The most important of them* is the adjudgment and punishment of criminal guilt.’¹¹³ Justice Edelman was the only member of the Court to undertake the requisite analysis to characterise the power conferred by the *DFDA*,¹¹⁴ concluding by reference to *Re Tracey* that ‘a service tribunal has “practically all the characteristics of a court exercising judicial power”’.¹¹⁵ Among other things, his Honour noted that service tribunals are empowered ‘to impose punishments ... the most extreme being imprisonment for life or imprisonment for a specific period’.¹¹⁶ His Honour observed further that the court martial the subject of the decision of the High Court in *R v Bevan; Ex parte Elias and Gordon* had imposed death sentences upon the applicants in that case.¹¹⁷

The last bastion of opposition offered by the plurality, that decisions of service tribunals are subject to confirmation within the chain of command established under s 68 of the *Constitution*,¹¹⁸ and thus ‘lack ... final authority that usually characterises ... judicial power’,¹¹⁹ warrants further discussion. Indeed, it is perhaps the only point taken by their Honours consistent with a principled analysis of governmental power. Justice Edelman responded, again by reference to history, that ‘[t]he original intention of interposing the authority of the Crown ... was assuredly one of mercy. Military tribunals were ... prone to severity, and hence the attribute of mercy was

¹¹¹ *Private R* (n 2) 31 [116] (Nettle J), 47 [168] (Edelman J).

¹¹² *Quinn* (n 110) 11 (Jacobs J) (emphasis added).

¹¹³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (emphasis added) (citations omitted) (*‘Chu Kheng Lim’*), quoted in *Private R* (n 2) 47 [168] (Edelman J). Although Nettle J might have regarded the adjudication of criminal guilt as being a purpose extrinsic to that for which military justice is admitted as an exception to Ch III, his Honour nonetheless observed that service tribunals ‘determine whether a person has engaged in conduct which is forbidden by law and, if so, ... make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct’, which ‘lies at the heart of exclusive judicial power’: *Private R* (n 2) 31 [116], quoting *Re Nolan* (n 6) 497 (Gaudron J).

¹¹⁴ *Private R* (n 2) 47–8 [169]–[170].

¹¹⁵ *Ibid* 48 [170], quoting *Re Tracey* (n 6) 537 (Mason CJ, Wilson and Dawson JJ).

¹¹⁶ *Private R* (n 2) 47 [169], citing *DFDA* (n 1) ss 68(1)(a)–(b).

¹¹⁷ *Private R* (n 2) 46 [164]. See *Bevan* (n 6).

¹¹⁸ That process was explained in further detail by Edelman J: *Private R* (n 2) 50–1 [174]–[176]. The starting point is s 171(1) of the *DFDA* (n 1), which provides that an order made by a service tribunal ‘takes effect forthwith’. An exception is an order for imprisonment, which ‘do[es] not take effect unless approved by a reviewing authority’: at ss 172(1)(a)–(b). See also at s 150. See *Private R* (n 2) 51 [176] (Edelman J).

¹¹⁹ *Private R* (n 2) 14 [52]. See also at 14 [53].

secured to the criminal.’¹²⁰ His Honour suggested that such a function is no different to ‘the traditional executive prerogative to grant mercy’ in respect of decisions of courts,¹²¹ and further that ‘[t]rials by service tribunals have *always* included such confirmation ... yet have *always* been considered as judicial in nature’.¹²² Crowe and Ratnapala argue further that the process of review within the chain of command does not amount to a full *de novo* hearing, and is thus no different to ‘ordinary ... review upon appeal’.¹²³ They highlight the qualification made by Griffith CJ in *Huddart, Parker & Co* upon the requirement that the exercise of judicial power is to involve a ‘binding and authoritative decision’, namely, that such a decision may be ‘subject to appeal or not’.¹²⁴

Returning to the starting point of the present discussion, that ‘[t]he investing of judicial power in military tribunals is ... a true exception that can be explained only on historical grounds’,¹²⁵ it follows that it is neither appropriate nor desirable to depart from a view spanning over a century of legal thinking within Australia,¹²⁶ and long pre-dating federation.¹²⁷ The reasons of Edelman J in *Private R* demonstrate that, on balance, if not necessarily, the power reposed in service tribunals passes muster under any principled understanding of the nature of judicial power.¹²⁸

D *An Unacceptable Trade-Off*

It might be contended that Kiefel CJ, Bell and Keane JJ in *Private R* were committed to the pursuit of ‘maintaining doctrinal purity’,¹²⁹ or ‘constitutional synthesis’,¹³⁰

¹²⁰ Ibid 50 [174], quoting Charles M Clode, *The Administration of Justice under Military and Martial Law* (John Murray, 1872) 145.

¹²¹ *Private R* (n 2) 50–1 [175].

¹²² Ibid 50 [174] (emphasis added).

¹²³ Crowe and Ratnapala (n 10) 172.

¹²⁴ Ibid, quoting *Huddart, Parker & Co* (n 95) 357. See also Henry Burmester, ‘The Rise, Fall and Proposed Rebirth of the Australian Military Court’ (2011) 39(1) *Federal Law Review* 195, 205.

¹²⁵ *Re Woolley* (n 17) 22 [50] (McHugh J).

¹²⁶ The earliest Australian source referred to in *Private R* (n 2) was William H Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910): see *Private R* (n 2) 38 [134] (Gordon J), 45 [163] (Edelman J). It is now recognised that the framers of the *Constitution* ‘were well aware of the role and functions of service tribunals’: *White* (n 6) 583 [8] (Gleeson CJ). See at 582–3 [7]–[8], quoting *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 March 1898, 2255 (Edmund Barton), 2259 (Richard O’Connor).

¹²⁷ See above n 16.

¹²⁸ See also *Re Tracey* (n 6) 536–8 (Mason CJ, Wilson and Dawson JJ).

¹²⁹ Stephen McDonald, ‘“You CAN Handle the ... Trial of Defence Members for Any Offence,” High Court Tells Military Tribunals’, *AUSPUBLAW* (Blog Post, 25 September 2020) <<https://auspublaw.org/2020/09/you-can-handle-the-trial-of-defence-members-for-any-offence-high-court-tells-military-tribunals/>>.

¹³⁰ *Private R* (n 2) 42 [151] (Edelman J).

that is, avoiding the incoherence that may be said to flow from accepting that judicial power may exist outside Ch III.¹³¹ Respectfully, however, their Honours' invocation of the chameleon principle in reaching that view is the kind of reasoning Kirby J in *Thomas v Mowbray* ('*Thomas*') regarded as threatening 'to debase the Court's doctrine',¹³² and to render '[t]he separation of the judicial power ... a chimera'.¹³³ His Honour had earlier said:

[T]he nature of the body in which a function is reposed may assist in determining the 'judicial character' of that function. However, necessarily, this fact cannot eliminate the judicial duty to characterise the function. The most that the 'chameleon doctrine' provides is one way of resolving a *doubt* about the essential nature of the function.¹³⁴

This discussion arose in the context of a submission made by the Commonwealth 'bluntly and with chilling candour ... that *Boilermakers* "does not matter much any more"'.¹³⁵ Justice Kirby noted that 'the chameleon doctrine explained why ... [the Commonwealth] had not, in this or other cases, urged that *Boilermakers* be overruled'.¹³⁶ It is most concerning that a similar approach may be seen to suffuse the reasoning of three members of the Court in *Private R*. It may be that, in other settings, the extension of the chameleon principle is a legitimate and desirable end to enhance governmental efficiency and flexibility in the 'modern regulatory state',¹³⁷ and, in practice, 'to validate the exercise of what would otherwise be the judicial power of the Commonwealth outside ... Ch III'.¹³⁸ As Nettle J in *Private R* noted, however, such considerations do not weigh upon the question whether service tribunals exercise judicial or executive power.¹³⁹ Rather, the system of military justice has long been

¹³¹ See, eg, *White* (n 6), 649 [240] (Callinan J); *Lane* (n 11), 247–8 [47]–[48] (French CJ and Gummow J). But see *Private R* (n 2) 33 [121] (Nettle J): 'the *Constitution* does recognise other forms of judicial power the ultimate source of which is Commonwealth legislative power'. Justice Nettle appeared to have in mind the judicial power of the courts of the territories, which finds its constitutional foundation in s 122: at 33 [121], citing *Spratt v Hermes* (1965) 114 CLR 226, 242–3 (Barwick CJ), 251 (Kitto J), 260–1 (Taylor J), 266 (Menziez J), 278 (Windeyer J), 282 (Owen J).

¹³² *Thomas* (n 92) 427–8 [344].

¹³³ *Ibid* 426 [341].

¹³⁴ *Ibid* 427 [343] (emphasis in original) (citations omitted). See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 371 [70]–[71] (Kirby J); *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381, 393 [41]–[42] (Kirby J), cited in Crowe and Ratnapala (n 10) 174.

¹³⁵ *Thomas* (n 92) 426 [340], quoting Transcript of Proceedings, *Thomas v Mowbray* [2007] HCATrans 76, 11295 (DMJ Bennett QC).

¹³⁶ *Thomas* (n 92) 426 [340].

¹³⁷ *Stellios* (n 42) 165 [4.113]. See Appleby (n 15) 272–3, quoting Fiona Wheeler, 'The *Boilermakers Case*' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 171.

¹³⁸ *Private R* (n 2) 51 [177] (Edelman J).

¹³⁹ *Ibid* 33–4 [122].

admitted as an exception to Ch III, so that its validity does not depend upon an application of the chameleon principle.

Contrary to the approach of Kiefel CJ, Bell and Keane JJ in *Private R*, if the chameleon principle is more broadly to continue to gain ascendance within the High Court's Ch III jurisprudence, then there must be proper argument to the point, and considered debate between members of the Court as to the status of the first limb of the holding in the *Boilermakers' Case* if such a course is to be taken. Such detailed examination is surely necessary in respect of a rule that, finding its origins in *Waterside Workers' Federation of Australia v JW Alexander Ltd*,¹⁴⁰ spans over 100 years of the Court's jurisprudence.

¹⁴⁰ (1918) 25 CLR 434. See at 465–6 (Isaacs and Rich JJ).

**OBLIGATIONS TO TENDER MIXED STATEMENTS:
UPHOLDING THE RIGHT TO A FAIR TRIAL OR AN
UNDUE EROSION OF PROSECUTORIAL DISCRETION?
NGUYEN V THE QUEEN (2020) 380 ALR 193**

I INTRODUCTION

Mixed statements are statements that contain both inculpatory statements, which are against a person's interests, and exculpatory statements, which are self-serving. Inculpatory statements are a well-established exception to the hearsay rule,¹ which generally provides that out-of-court statements cannot be used in evidence to prove the truth of their contents.² However, no such exception exists for exculpatory statements.³ It has been unclear for some time whether prosecutors are obliged to tender mixed statements if they are not being relied upon in the prosecution's case. At first blush, the majority judgment delivered by Kiefel CJ, Bell, Gageler, Keane and Gordon JJ in *Nguyen v The Queen* (2020) 380 ALR 193 ('*Nguyen*') appears to resolve the divergence of opinion as to whether the prosecution has a standing obligation to tender mixed statements, in a rational and uncontroversial fashion.⁴ The plurality placed great emphasis on the obligation of Crown prosecutors to put their case fully and fairly before the jury. We agree — as did Nettle J and Edelman J — that, on this basis, the evidence in question ought to have been tendered. The joint judgment went further, however, clarifying that the Crown's obligation of fairness requires 'the presentation of all available, cogent and admissible evidence'.⁵ This appears to have recognised the existence of a prima facie rule that the prosecution must tender all records of interview containing mixed statements, unless there is a good reason not to do so. In its reasoning, the High Court reaffirmed the fundamental prosecutorial duties of fairness and the accused's right to remain silent. However, the Court left some questions unanswered as to the exercise

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¹ *Cleland v The Queen* (1982) 151 CLR 1, 23 (Deane J); *Pollitt v The Queen* (1992) 174 CLR 558, 578 (Brennan J); *Evidence Act 1995* (Cth) s 81.

² *Walton v The Queen* (1989) 166 CLR 283, 288 (Mason CJ); *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970 (Lord Radcliffe).

³ John Goldring, 'Can Exculpatory Statements be Admissions?' (2004) 25(1) *Australian Bar Review* 14, 15, 26.

⁴ *Nguyen v The Queen* (2020) 380 ALR 193, 200 [32] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ, Nettle J agreeing at 204 [48], Edelman J agreeing at 205 [52]) ('*Nguyen*').

⁵ *Ibid* 201 [36].

of this prosecutorial duty in practice. In this case note, we discuss the responsibilities inherent in the role of the prosecutor and consider how these duties may be fulfilled in light of the erosion of prosecutorial discretion that the joint judgment in *Nguyen* appears to allow. However, overall, whether or not this interpretation of prosecutorial obligations is a necessary or preferable development in the law remains to be seen.

II BACKGROUND

A Facts

The appellant, Van Dung Nguyen, was charged with one count of unlawfully causing harm to another ('count one') and one count of aggravated assault caused by the use of an offensive weapon ('count two') under ss 188(1) and (2)(m) of the *Criminal Code Act 1983* (NT).⁶ According to witnesses, the appellant and the first victim had been playing a singing game at a house party before an argument started about the rules of that game.⁷ It was alleged by the first victim that after the game the appellant followed him outside, 'approached him with something in his hand and hit him on the top of his head'.⁸ A witness said that they saw the appellant hit the victim with a bottle.⁹

Prior to being charged, Nguyen had been interviewed by police about the relevant events, and this interview had been recorded electronically.¹⁰ Before the interview, the appellant was cautioned in accordance with the '*Anunga* rules'.¹¹ With the assistance of an interpreter, the appellant was asked to explain the caution in his own words, to which he said: 'Whatever you ask and whatever I answer will be taken as evidence in the court.'¹² During this interview, Nguyen provided a version of events that could be categorised as a mixed statement,¹³ as it involved both inculpatory and exculpatory material which was capable of forming a basis for a claim to self-defence.

The appellant admitted in the interview to throwing the bottles, however, he explained that this was only done to defend himself from what he had perceived to have been an imminent attack.¹⁴ Nguyen explained that the first victim had become angry with him because of his behaviour during the singing game. When the appellant and the

⁶ Ibid 195 [6].

⁷ Ibid 195 [7].

⁸ Ibid.

⁹ Ibid 195 [8].

¹⁰ Ibid 194 [1].

¹¹ Ibid 213–14 [76]. The *Anunga* rules are a set of guidelines for questioning Indigenous suspects that were formulated by Forster J in *R v Anunga* (1976) 11 ALR 412: at 414–15.

¹² *Nguyen* (n 4) 195 [9], 213–14 [76].

¹³ Ibid 195 [10].

¹⁴ Ibid.

victims went outside to smoke, three of the victims displayed anger towards Nguyen, which led him to believe that they intended to hit him.¹⁵ He explained that two of the other parties obstructed the door to the house, at which point the appellant wielded two beer bottles and threatened to strike the other parties if they hit him.¹⁶ When the first victim moved forward, the appellant ‘said he had no choice but to throw the bottle of beer at him for otherwise he would have been hit’.¹⁷ This formed the basis of count one.¹⁸ After throwing the bottle, the appellant then ran from the house to the road. Nguyen stated that it was only after the other parties followed him that he threw the second bottle as a warning.¹⁹ This bottle was alleged to have been thrown at the second victim,²⁰ which formed the basis of count two.²¹ As such, in his record of interview, the appellant gave a mixed statement which contained both inculpatory and exculpatory statements as he admitted to throwing bottles at the victims, but only in self-defence.²²

B *Procedural History*

The appellant’s charges proceeded twice to trial in the Supreme Court of the Northern Territory. On both occasions the appellant exercised his right not to give evidence.²³ At the first trial, the prosecution played the recorded interview as part of its case.²⁴ However, the jury was unable to reach a verdict.²⁵ Prior to the commencement of the second trial, the prosecution elected not to present the record of interview, and advised the Court of this intention. The trial judge inquired whether this decision was made because removing the record of interview — the only basis for self-defence — would create ‘a better chance of winning’.²⁶ The prosecutor responded: ‘To be blunt, your Honour, yes it’s a tactical decision.’²⁷ The prosecution referred to the fact that the self-serving statements could not be tested in cross-examination, and that the defence was capable of providing evidence about the matters discussed in the record of interview.²⁸ Counsel for the appellant applied to stay the trial on the basis that the

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid 195 [6].

¹⁹ Ibid 195 [10].

²⁰ Ibid 195 [8].

²¹ Ibid 195 [6].

²² Ibid 194 [2].

²³ Ibid 194 [4].

²⁴ Ibid 195–6 [11].

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

record of interview was admissible as a mixed statement, and that the prosecution's obligation of fairness required the evidence to be tendered.²⁹

The prosecutor disputed that the interview was a mixed statement and stated that the prosecution had an absolute discretion as to whether or not to adduce it. The trial judge referred the following questions to the Full Court of the Supreme Court of the Northern Territory under s 21(1) of the *Supreme Court Act 1979* (NT):

'Question 1: Is the recorded interview ... admissible in the Crown case?

Question 2: Is the Crown obliged to tender the recorded interview?'³⁰

C Full Court Decision

The majority of the Full Court (Kelly and Barr JJ, Blokland J dissenting) in deciding these questions applied the Court's decision in *Singh v The Queen* ('*Singh*').³¹ In *Singh*, the majority of the Court of Criminal Appeal of the Supreme Court (Kelly J and Barr J, Blokland J dissenting) held that it is a matter for the prosecution to decide whether to adduce evidence of admissions.³² The majority considered that there was no general principle requiring a prosecutor to tender an accused's exculpatory or mixed out-of-court statement as a matter of fairness.³³ Thus, the majority held that the prosecution was not required to tender the recorded interview in *Nguyen*'s case. Justice Blokland, in dissent, suggested that the prosecutor should reconsider tendering the recorded interview, as Nguyen had understood at the interview that what he said would be put before a jury.³⁴ Thus, her Honour questioned whether the trial could be fair if such evidence was withheld.³⁵ The Full Court's decision was appealed to the High Court.

D Issues and Applicable Law

The legal issues before the High Court were whether the recorded interview was admissible in the Crown case ('Question 1') and whether the Crown was obliged to tender the recorded interview ('Question 2').

To answer Question 1, the Court considered s 81 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('*Uniform Evidence Act*'), which provides that the hearsay rule does not apply to evidence of admissions and statements concurrently made

²⁹ Ibid 196 [12].

³⁰ Ibid.

³¹ (2019) 344 FLR 137 ('*Singh*'). See *R v Nguyen* (2019) 345 FLR 40 ('*Nguyen (NTSC)*').

³² *Singh* (n 31) 166 [68] (Kelly J, Barr J agreeing at 182 [123]); *Nguyen* (n 4) 196 [14], 197 [18].

³³ *Singh* (n 31) 165–6 [66] (Kelly J); *Nguyen* (n 4) 196–7 [15].

³⁴ *Nguyen (NTSC)* (n 31) 52 [46], 54 [53]; *Nguyen* (n 4) 197 [17].

³⁵ *Nguyen (NTSC)* (n 31) 54 [54].

with such admissions.³⁶ In answering Question 2, the Court looked to the common law and the ‘principles or rules which are regarded as fundamental to the conduct of a criminal trial’.³⁷

It was Question 2 that formed the principal issue to be decided. While it was not contentious to find that the Crown has an obligation to present a full and fair case before the jury,³⁸ what was less clear was whether there was a positive duty to present certain evidence, or whether — as a matter of prosecutorial discretion — the Crown was at liberty to present its case however it saw fit.

III HIGH COURT DECISION

A Plurality

The plurality of the Court (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) found that the recorded interview was admissible in the Crown case. Their Honours reasoned that exculpatory statements in a record of interview which also contains admissions will usually satisfy the rules of admissibility at both common law and s 81 of the *Uniform Evidence Act*.³⁹ However, importantly, such statements are only admissible when connected with an admission that is being relied upon as part of the Crown’s case.⁴⁰ Where there is any doubt about the connection between the exculpatory statement and an admission, the plurality held that questions of credibility and reliability are ‘squarely within the province of the jury’ to determine.⁴¹ Their Honours held that where mixed statements are admitted, they must be accompanied by a direction to the jury ‘that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement’.⁴² The plurality agreed with the Full Court’s affirmative answer to Question 1.

The key question for the plurality then became whether the Full Court had erred in deciding that the prosecution was not obligated to tender the record of interview. Their Honours held that this was an error, identifying the prosecution’s obligation to present its case fully and fairly as the fundamental principle that determined this issue.⁴³ Their Honours found that the prosecution’s decision not to tender the mixed

³⁶ *Nguyen* (n 4) 197 [20].

³⁷ *Ibid* 198–9 [26].

³⁸ *Ibid*. See, eg, *R v Soma* (2003) 212 CLR 299, 308–9 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (*‘Soma’*).

³⁹ *Nguyen* (n 4) 198 [22], [25].

⁴⁰ *Ibid* 198 [25].

⁴¹ *Ibid* 198 [22].

⁴² *Ibid* 198 [24], citing *Mule v The Queen* (2005) 221 ALR 85, 94 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

⁴³ *Nguyen* (n 4) 200 [32].

statement did not accord with this obligation, and disadvantaged the appellant.⁴⁴ The factors that led to this conclusion were that: Nguyen's account remained consistent and was not demonstrably false; Nguyen believed that the record of interview was going to be used in court; and the decision not to adduce it was admittedly a tactical one, to favour the prosecution's case.⁴⁵

Their Honours noted that in regards to mixed statements, it is well accepted that if the prosecution wishes to rely on the admissions favourable to its case, the prosecution must tender the whole of the statement and 'take the good with the bad'.⁴⁶ The joint judgment noted that there has been a divergence of opinion in Australian courts as to whether there is a prosecutorial obligation to adduce mixed statements where the prosecution is not seeking to rely on *any* part of the statement as part of their case.⁴⁷ The plurality proceeded to explore this issue and resolve the uncertainty. Their Honours noted that any discussion of the role of the prosecutor begins with the acknowledgement of prosecutorial discretion, and that it is for the prosecutor to decide how their case shall be presented.⁴⁸ However, the concept of 'discretion' was qualified as being a process by which a prosecutor determines the course 'which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused'.⁴⁹

It is a fundamental rule that the prosecution must put its case both fully and fairly before a jury.⁵⁰ There is a non-reviewable prosecutorial discretion to decide which witnesses are called and what evidence is necessary for the proper presentation of its case.⁵¹ The existence of this discretion was not questioned and instead was considered 'fundamental' by the plurality.⁵² In the previous cases of *Ziems v Prothonotary of the Supreme Court of New South Wales*,⁵³ *Richardson v The Queen*,⁵⁴ and *Whitehorn v The Queen*,⁵⁵ the High Court held that the prosecution is bound to call all material witnesses before the court in order to present a complete account to the jury of the events upon which the prosecution's case is based.⁵⁶ The plurality in *Nguyen* reasoned by analogy that mixed statements are subject to the same consideration and

⁴⁴ Ibid 204 [46].

⁴⁵ Ibid.

⁴⁶ Ibid 202 [38], quoting *Soma* (n 38) 309–10 [31].

⁴⁷ *Nguyen* (n 4) 199 [28].

⁴⁸ Ibid 200 [33].

⁴⁹ Ibid 200 [34], quoting *Richardson v The Queen* (1974) 131 CLR 116, 119 (Barwick CJ, McTiernan and Mason JJ) ('*Richardson*').

⁵⁰ *Nguyen* (n 4) 198–9 [26].

⁵¹ Ibid 198–9 [26], 201 [35].

⁵² Ibid 198–9 [26], 200 [33].

⁵³ (1957) 97 CLR 279 ('*Ziems*').

⁵⁴ *Richardson* (n 49).

⁵⁵ (1983) 152 CLR 657 ('*Whitehorn*').

⁵⁶ Ibid 674–5 (Dawson J). See *Ziems* (n 53) 294 (Fullagar J); *Richardson* (n 49) 119.

that all evidence ‘which may properly and fairly inform the jury about the guilt or otherwise of the accused’ must be tendered.⁵⁷

Their Honours also contemplated the risks associated with prosecutorial discretion, namely, that the discretion is not subject to review and that a judge cannot compel the Crown to adduce certain evidence.⁵⁸ Their Honours suggested that the use of discretion can deprive the accused of a fair trial and that, while the concept of a ‘fair trial’ cannot be comprehensively defined, ‘there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence’.⁵⁹ The plurality considered that in some circumstances it will be unfair to an accused to tender a record of interview.⁶⁰ Their Honours considered that ‘the omission of that evidence is justified’ in circumstances where the reliability or credibility of the evidence is clearly lacking.⁶¹ However, the plurality noted that such circumstances ‘may be expected to be rare’.⁶² As such, their Honours identified a *prima facie* rule for the tendering mixed records of interviews:

[W]here an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met.⁶³

In response to the prosecutor’s tactical decision in *Nguyen*, the plurality held that the prosecutorial discretion should not be discharged tactically in a way that will ‘advance the Crown case and disadvantage the accused’.⁶⁴ The fundamental notions of fairness require the prosecution to refrain from tactical considerations when deciding to tender a mixed statement.⁶⁵ On this basis, the plurality held that the Crown was obliged to tender the recorded interview.⁶⁶

B *Justice Nettle and Edelman J*

In separate judgments, both Nettle J and Edelman J agreed with the plurality that the appeal should be allowed. However, their Honours were not convinced with the assertion in the joint judgment that the Crown must present all available, cogent and admissible evidence to the jury to meet its obligations of fairness.⁶⁷ Justice Nettle

⁵⁷ *Nguyen* (n 4) 201 [37].

⁵⁸ *Ibid* 201 [35].

⁵⁹ *Ibid* 201 [36].

⁶⁰ *Ibid* 202 [41].

⁶¹ *Ibid* 202 [41], 203 [44].

⁶² *Ibid* 203 [44].

⁶³ *Ibid* 202 [41].

⁶⁴ *Ibid* 203–4 [45].

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 204 [47].

⁶⁷ *Ibid* 204–5 [48]–[49] (Nettle J), 206 [54], 208–9 [62] (Edelman J).

noted that, as a matter of professional practice, it has been recognised that the failure of a prosecutor to adduce relevant evidence can present the accused with an unfair choice between providing evidence or ‘risking adverse speculation by the jury’.⁶⁸ However, when considering that risk to the accused, his Honour was not persuaded that the Crown was required to present all available evidence.⁶⁹ In particular, Nettle J noted that the Anglo-Australian system of criminal justice is accusatorial and adversarial, and thus there may be many instances where the prosecution is ‘perfectly entitled’ not to adduce certain evidence with no resulting unfairness to the accused.⁷⁰ For Nettle J, whether a prosecutor’s decision not to tender certain evidence was unfair and amounted to a miscarriage of justice could only be determined on appeal.⁷¹

Justice Edelman provided three reasons why the duty of the prosecution to tender a record of interview or to call a witness should not be elevated to a ‘free-standing’ obligation.⁷² First, his Honour stated that such an obligation would require numerous exceptions and qualifications to ‘prevent the obligation from being stated in anything other than vague, contingent terms’.⁷³ Justice Edelman gave many examples of such exceptions, including where the evidence was considered immaterial or unnecessary, and where tendering the evidence would cause unfairness to the accused.⁷⁴ Second, Edelman J considered it ‘curious, even bizarre’ that such an obligation could exist in circumstances where a trial judge would be incapable of enforcing it.⁷⁵ Third, his Honour asserted that if such a rule existed, the question on appeal would be whether the failure to adduce evidence resulted in a miscarriage of justice ‘when viewed against the conduct of the trial taken as a whole’.⁷⁶ This assessment could only be conducted on appeal.⁷⁷ In light of these considerations, Edelman J viewed the prosecution’s duty to tender the recorded interview as ‘a “prima facie rule of practice”, a general guide to the ethical practice which informs the prosecutor’s duty of fairness’,⁷⁸ a departure from which at trial, without good reason, could constitute a miscarriage of justice.⁷⁹

Justice Edelman explained that the prosecutor’s duty to act fairly is not derived from some rule of law, rather it describes one of the functions of the Crown prosecutor,

⁶⁸ Ibid 204 [48] (Nettle J).

⁶⁹ Ibid 204–5 [49].

⁷⁰ Ibid.

⁷¹ Ibid 205 [50].

⁷² Ibid 208–9 [62].

⁷³ Ibid 209 [63].

⁷⁴ Ibid 209 [63]–[65].

⁷⁵ Ibid 209–10 [66], citing *R v Apostilides* (1984) 154 CLR 563, 576 (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ) (*‘Apostilides’*).

⁷⁶ *Nguyen* (n 1) 210 [67], quoting *Apostilides* (n 75) 575.

⁷⁷ *Nguyen* (n 1) 210 [67].

⁷⁸ Ibid 212 [72] (citation omitted).

⁷⁹ Ibid. See also at 212–13 [74]–[75], citing *Mahmood v Western Australia* (2008) 232 CLR 397, 409 [41] (Hayne J).

which has been derived from rules of practice.⁸⁰ Both Edelman J and Nettle J highlighted that prosecutorial obligations impose no rigid requirements — such as the tendering of specific evidence — but rather guide the Crown to uphold overall fairness according to the facts and circumstances of the particular case.⁸¹

IV COMMENT

A *The Role of the Crown Prosecutor*

Inherent in the position of Crown prosecutor are two competing roles of equal importance. The first is that of the impartial minister of justice, and the second is that of the active advocate tasked with robustly representing one side in an adversarial system.⁸² The role of the impartial minister recognises that the right of the accused to a fair trial is a fundamental principle of our criminal justice system.⁸³ Prosecuting counsel represents the state, and in discharging this function it is expected that the ‘whole truth’ shall be established at trial.⁸⁴ While it is perfectly legitimate for the prevailing concern of defence counsel to be to secure a result for their client, no prosecutor should ‘ever feel pride or satisfaction in the mere fact of success’.⁸⁵ However, the role of the active advocate acknowledges that a vigorous presentation of the prosecution’s case may satisfy the prosecution’s obligation to present its case fully and fairly.⁸⁶ The adversarial nature of our criminal justice system is premised on the belief that ‘it is the open conflict between two opponents of equal force, the defence and the prosecution, that best leads to the ascertainment of truth and the rendering of justice’.⁸⁷

The question then becomes how, in practice, can a prosecutor responsibly fulfil both duties when there is an inherent conflict? It is unclear what lengths the prosecution

⁸⁰ *Nguyen* (n 1) 210–11 [70].

⁸¹ *Ibid* 205 [50] (Nettle J), 206 [54], 209 [65] (Edelman J).

⁸² David Plater, ‘The Changing Role of the Modern Prosecutor: Has the Notion of the “Minister of Justice” Outlived Its Usefulness?’ (PhD Thesis, University of Tasmania, 2011) 151.

⁸³ See, eg, *Wilde v The Queen* (1988) 164 CLR 365, 375 (Deane J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ); *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J), 326–7 (Deane J), 353 (Toohey J), 362–4 (Gaudron J).

⁸⁴ *Whitehorn* (n 55) 663–4 (Deane J).

⁸⁵ Christmas Humphreys, ‘The Roles and Responsibilities of Prosecuting Counsel’ (1955) (1) *Criminal Law Review* 739, 740.

⁸⁶ See, eg, *R v Rugari* (2001) 122 A Crim R 1, 10 [52] (Carruthers AJ) (Court of Criminal Appeal of New South Wales).

⁸⁷ Plater (n 82) 6, citing Barry Grosman, ‘The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice’ (1968) 11(1) *Canadian Bar Journal* 580, 580.

must go to in order to ensure that the accused is empowered at trial.⁸⁸ A further question is whether or not this obligation of fairness is bolstered when the defendant is subject to a special vulnerability — such as in *Nguyen*, where the appellant had cultural and linguistic disadvantages.⁸⁹

B *The Importance of Prosecuting Fairly*

It is a fundamental human right to have access to a fair trial.⁹⁰ Throughout the judgment in *Nguyen*, the High Court reiterated and reaffirmed the fundamental responsibility of the Crown to prosecute fairly and in line with this right. The plurality held that to do so, the prosecution must tender all available, cogent and admissible evidence, including mixed statements, to present a full account of its case to the jury and avoid any potential prejudice towards the accused.

In *Nguyen*, the prosecution demonstrated an overtly tactical approach in the discharge of its duties, despite well-established Australian authorities stating that the prosecution should exclude any notion of winning or losing in the exercise of its functions.⁹¹ As the prosecution acts in the public interest, it is inappropriate and at odds with its role for it to be employing tactics to incriminate an accused. Obtaining justice is at the heart of the prosecutor's role,⁹² and seeking a conviction rather than justice for the accused is antithetical to the prosecution's core duties as discussed above.

The accused has the right to remain silent in criminal trials.⁹³ However, in *Nguyen*, by choosing not to tender the record of interview in circumstances where the appellant intended to exercise his right to silence, the prosecution was, in essence, forcing the appellant to give evidence in order to allege self-defence. The employment of such tactics is arguably at odds with other protections of the accused's right to silence that the High Court has ensured.⁹⁴ Thus, by denouncing the use of such tactics by the prosecution in *Nguyen*, the High Court upheld and ensured compliance with the accused's right to remain silent.

⁸⁸ Martin Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25(3) *Criminal Law Journal* 121, 124.

⁸⁹ *Nguyen* (n 1) 213–14 [76]–[77]. See generally, Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41(4) *Language in Society* 471.

⁹⁰ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

⁹¹ *Whitehorn* (n 55) 664 (Deane J); *Libke v The Queen* (2007) 230 CLR 559, 586 [71] (Hayne J), quoting *Boucher v The Queen* [1955] SCR 16, 23–4 (Rand J).

⁹² See, eg, David Plater, 'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2006) 25(2) *University of Tasmania Law Review* 111, 111–12.

⁹³ See, eg, *Azzopardi v The Queen* (2001) 205 CLR 50, 73 [61] (Gaudron, Gummow, Kirby and Hayne JJ).

⁹⁴ See, eg, *ibid.*

C *The Erosion of Discretion*

The plurality decision to impose a positive obligation to adduce mixed statements, from one perspective, upholds the prosecutorial duty to present a full and fair case, as relevant inculpatory and exculpatory evidence must be presented to the jury. Within this standing obligation remains an element of discretion, as such evidence is required to be tendered ‘unless there is good reason not to do so’.⁹⁵

There are, of course, other standing responsibilities of the prosecution, such as the duty to disclose evidence to the defence, even where such material is exculpatory and does not form part of the prosecution case.⁹⁶ This is justified as the accused is opposed by the might of the state, which controls the investigatory process.⁹⁷ However, once the prosecution has discharged its duty of equipping the defence with the requisite tools to present a proper case, arguably the Crown’s role as the minister for justice has been fulfilled. It is certainly not an obligation of the prosecutor to present the defence case on the defendant’s behalf. From this perspective, it is questionable whether it is truly desirable that a *prima facie* rule exists that relies on the existence of ‘good reasons’ not to present particular evidence. Certainly, there will be some scenarios — as demonstrated by the facts in *Nguyen* — where the interests of fairness will necessitate the production of certain evidence by the Crown. As such, there is little question that the decision in *Nguyen*, as it pertained to its facts, was the correct one. Yet, as Nettle J observed, it is not difficult to imagine ‘unexceptional cases’ in which a prosecutor could refrain from presenting all ‘cogent and admissible evidence’.⁹⁸

The plurality expressly stated that ‘a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence’ violates the obligation of fairness.⁹⁹ This may be an indication that the prosecutor would not have been entitled to omit the record of interview purely on the basis that it would be fairer to both parties to have the evidence tested in cross-examination. Such justification by the prosecutor would unlikely constitute a ‘good reason’ not to tender the evidence, as required by the plurality. The inference of this is that some other positive characteristic of unreliability will need to be established. If this is the correct interpretation of the standing obligation, the prospects of the ‘whole truth’ being established at trial may be undermined.¹⁰⁰ There is potential for an accused person to allege a version of events during a record of interview that is self-serving in nature and must be presented before the court; despite this evidence having neither been sworn nor affirmed, and not subjected to the testing involved in cross-examination.

⁹⁵ *Nguyen* (n 4) 202 [41].

⁹⁶ *Hinton* (n 88) 124.

⁹⁷ *Ibid* 122.

⁹⁸ *Nguyen* (n 4) 204–5 [49].

⁹⁹ *Ibid* 203–4 [45].

¹⁰⁰ *Whitehorn* (n 55) 663–4 (Deane J).

The undesirability of this scenario is precisely the reason why the right to provide an unsworn statement has been abolished in every Australian jurisdiction,¹⁰¹ subject to some exceptions.¹⁰² Prior to their abolition, unsworn statements were a useful mechanism, particularly for vulnerable defendants, to avoid the decision between staying silent or ‘being bamboozled by a skilful Crown prosecutor’.¹⁰³ However, ultimately it was accepted that if a statement goes before a jury, the jury then ought to have the tools to assess its veracity, which can only be achieved through cross-examination.¹⁰⁴ The ability to avoid this testing was said to tip the scales of justice against the victim and the community in favour of the accused.¹⁰⁵ Yet, it appears that the High Court’s recognition of the prima facie rule in *Nguyen* may have created a ‘back door’ for unsworn statements to make their way into the courtroom. If this is what becomes of the duty to tender mixed statements, it shall be contrary to the operation of the adversarial system which reveals the truth through ‘argument and counter argument, examination and cross-examination’.¹⁰⁶ Consequently, the erosion of the ability of the prosecutor to decide whether or not the admission of certain evidence contributes to the overall fairness of the case has the potential to tip the scales of justice back towards the accused.

D *The Future of Mixed Statements*

While the plurality of the High Court in *Nguyen* clarified the prosecution’s duty surrounding the tendering of mixed statements, it will be interesting to see the development of this duty moving forward. Both Nettle J and Edelman J had reservations about the plurality’s finding that the prosecution must tender *all* available, cogent and admissible evidence to discharge its duties unless there is ‘good reason

¹⁰¹ See *Evidence Act 1995* (Cth) s 21; *Evidence Act 2011* (ACT) s 21; *Evidence Act 1995* (NSW) s 21; *Criminal Procedure Act 1986* (NSW) s 31; *Criminal Code Act 1983* (NT) s 360(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 21; *Criminal Code Act 1899* (Qld) s 618; *Evidence Act 1929* (SA) s 18A; *Evidence Act 2001* (Tas) ss 21, 30A; *Evidence Act 2008* (Vic) s 21; *Evidence Act 1906* (WA) s 97(2). However, it appears that unsworn statements may not have been abolished in Norfolk Island: see *R v McNeill [No 1]* (2007) 209 FLR 124, 132 [37] (Weinberg CJ) (Supreme Court of Norfolk Island).

¹⁰² For example, in South Australia, the abolition of sworn statements does not extend to circumstances captured in s 9 of the *Evidence Act 1929* (SA) where the court determines that a person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.

¹⁰³ David Brown, ‘Silencing in Court: The Abolition of the Dock Statement in New South Wales’ (1994) 6(1) *Current Issues in Criminal Justice* 158, 162.

¹⁰⁴ See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 20 April 1994, 1425–6 (John Hannaford).

¹⁰⁵ *Ibid* 1426.

¹⁰⁶ Howard Shapray, ‘The Prosecutor as a Minister of Justice: A Critical Appraisal’ (1969) 15(1) *McGill Law Journal* 124, 126.

not to do so'.¹⁰⁷ Though the plurality predicted exceptions to be 'rare',¹⁰⁸ exceptions *will* arise. Some examples given by members of the Court included where the evidence is clearly doctored or false,¹⁰⁹ immaterial,¹¹⁰ unnecessary,¹¹¹ or unfair to the accused.¹¹² It is unclear, however, what will alert prosecutors to false evidence and constitute a good reason to exclude evidence. In their Honours' reasons, the plurality did not consider the appellant's evidence to be demonstrably false, as it remained consistent despite being 'challenged a number of times by the interviewing police officer'.¹¹³ However, what would have made the appellant's evidence demonstrably false was not explored by the Court and remains to be seen. Until further authority builds, it is largely for the prosecution to determine whether a good reason exists for not tendering mixed statements.

Importantly, as stated by both Nettle J and Edelman J, determining whether such an exception exists is only appropriate on appeal, when evaluating retrospectively whether there has been a miscarriage of justice in the exercise of the prosecution's discretion.¹¹⁴ As such, if an accused does not appeal, any unfairness in the exercise of the prosecution's discretion is unlikely to be uncovered. Relying on appeals to determine whether there has been a miscarriage of justice, though necessary, adds to the existing strain on the courts and to the legal costs borne by both the state, in prosecuting the case, and the accused, in defending the charges.

The High Court's divergence in its consideration of the prosecution's duty to tender mixed statements as either an 'obligation' or a 'prima facie rule of practice' is an interesting one. While Edelman J's qualifications tending towards the duty being a rule of practice rather than an obligation are compelling, it is argued that either characterisation will likely result in the same prosecutorial conduct. Moving forward, whether as a duty or general practice, prosecutors will tender mixed statements unless there is a sound reason not to.¹¹⁵

V CONCLUSION

The High Court's decision in *Nguyen* sought to clarify the prosecution's duty regarding the tendering of mixed statements. In doing so, it upheld the overriding duty of the Crown to exercise its prosecutorial functions fairly and to uphold the right

¹⁰⁷ *Nguyen* (n 4) 202 [41].

¹⁰⁸ *Ibid* 203 [44].

¹⁰⁹ *Ibid* 203 [44] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ), 209 [64] (Edelman J).

¹¹⁰ *Ibid* 209 [63] (Edelman J).

¹¹¹ *Ibid*.

¹¹² *Ibid* 209 [65] (Edelman J).

¹¹³ *Ibid* 204 [46].

¹¹⁴ *Ibid* 205 [50] (Nettle J), 210–11 [68]–[69] (Edelman J).

¹¹⁵ See, eg, Supreme Court of South Australia, *South Australian Criminal Trials Bench Book*, September 2020, 97–8.

of the accused to remain silent. Ultimately, the plurality of the High Court held that the prosecution must tender ‘all available, cogent and admissible evidence’, unless good reason exists, in order to discharge its obligation of fairness to the accused.

While the plurality showed great concern for ensuring that Crown prosecutors have no misgivings about their obligation to present a full and fair case, we are unconvinced — as were Nettle J and Edelman J — that a *prima facie* rule of tendering all ‘available, cogent and admissible evidence’ is the best mechanism to achieve this. Mandating the inclusion of mixed statements may erode the role of the prosecutor as an adversarial advocate, but could also impede the ability of the prosecutor to act as a minister for justice, if in particular circumstances the inclusion of such evidence is not necessary for a proper presentation of the Crown case.

Though the High Court attempted to clarify the obligations surrounding the tendering of mixed statements in *Nguyen*, ultimately the Court left many questions unanswered. It is clear that more case law is required to shed light on the plurality’s finding that the prosecution must tender all available, cogent and admissible evidence unless there is good reason not to do so. As such, moving forward, it will be interesting to see how the authorities develop.

The divergence in the High Court as to whether the prosecution’s duty to tender mixed statements is properly classified as an ‘obligation’ or ‘general rule of practice’ was also particularly fascinating in *Nguyen*. It remains to be seen whether this divergence in opinion will again be considered by the Court. However, for now, it is clear that whether by obligation or practice, unless good reason exists, admissible mixed statements must be tendered by the prosecution to discharge its duty of fairness.

Lachlan Blake and Brandon Le***

FOR WANT OF AN EFFECTIVE *CORONERS ACT*: *BELL V DEPUTY CORONER (SA)* [2020] SASC 59

Note: Aboriginal and Torres Strait Islander peoples should be aware that this case note contains the names of people who have passed away.

I INTRODUCTION

In 2020, the Black Lives Matter movement reached an all-time high. Emboldened initially by the death of George Floyd and subsequent protests across the United States, Australia-wide protests were held in the name of the movement. Tensions with police forces, heightened by arrests and fines associated with breaching coronavirus restrictions, have thrust Aboriginal¹ deaths in custody and issues of systemic racism in Australian police and correctional services back into the spotlight.

As at April 2021, there had been more than 470 Aboriginal deaths in custody since the National Report of the Royal Commission into Aboriginal Deaths in Custody (‘Royal Commission’) was released in 1991.² Despite recommendations from the Royal Commission intended to reduce them, incarceration rates for Aboriginal people have increased disproportionately since that time. Even more alarmingly, over half of the Aboriginal people who have died in custody since 2008 had not been convicted of a crime.³

Recurring themes for families of those who have died in custody include delays in investigations and inquests, a lack of available information, and the failure to

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¹ This term is used respectfully as an all-encompassing term for Aboriginal and Torres Strait Islander peoples.

² Lorena Allam et al, ‘The 474 Deaths Inside: Tragic Toll of Indigenous Deaths in Custody Revealed’, *The Guardian* (online, 9 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed>>.

³ Calla Wahlquist, Nick Evershed and Lorena Allam, ‘More than Half of 147 Indigenous People Who Died in Custody Had Not Been Found Guilty’, *The Guardian* (online, 30 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/30/more-than-half-of-147-indigenous-people-who-died-in-custody-had-not-been-found-guilty>>. For information on increasing incarceration rates, see Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper No 84, July 2017) 26 [1.29]–[1.30].

bring to account those responsible for the death.⁴ What happens when correctional services, prison or police officers — those we trust to protect people in custody and often the only witnesses to the events — refuse, during a coronial inquest, to give evidence regarding their personal knowledge of the cause and circumstances of a death in custody, for fear of disciplinary or criminal proceedings? The answer lies in the decision of Blue J in *Bell v Deputy Coroner (SA)* [2020] SASC 59 (*Bell*). His Honour held that penalty privilege is available in such circumstances, and is not abrogated by the *Coroners Act 2003* (SA) (*SA Act*). However, his Honour found that the Deputy State Coroner (*Coroner*) did not deny the plaintiffs penalty privilege on any of the alleged occasions. This decision casts a pall over the future of coronial inquests, especially death in custody inquests, potentially allowing officers to refuse to answer questions of the Coroner on matters which go to the heart of the coronial jurisdiction.

Unlike other coroners' courts in Australia, the South Australian Coroner's Court cannot balance the common law privileges of individuals against the broader interests of justice. This is particularly egregious in light of the epidemic of Aboriginal deaths in custody, which led the Royal Commission to include Recommendation 36, that '[i]nvestigations into deaths in custody should be structured to provide a thorough evidentiary base for consideration by the Coroner'.⁵ The ruling of the Supreme Court of South Australia in *Bell* illustrates these issues and their consequences.

This case note considers the Court's decision in *Bell* from Aboriginal justice and law reform perspectives. It argues that the decision highlights the longstanding issues faced by Aboriginal Australians in the context of law enforcement, compounding delays in inquests and the lack of accountability of police and correctional officers, and that the decision also undermines the role of the Coroner in conducting inquests. Further, this case note suggests that *Bell* is the result of a legislative failure: the *SA Act* does not provide a mechanism by which a Coroner can require a witness to answer questions concerning the cause and circumstances of a death, while at the same time preserving the legitimate interests of a witness in claiming privilege. This case note discusses how the *SA Act* neglects to preserve the very function of the Coroner's Court and examines proposals for legislative change to modernise the *SA Act*, in line with legislation in other jurisdictions.

It should be noted that the *Coroners (Inquests and Privilege) Amendment Act 2021* (SA) received royal assent in early 2021. Its effect, law reform context and relationship to *Bell* is analysed and discussed below. The authors propose that lessons from *Bell* and issues identified in this paper are of continuing relevance to coronial efficacy and ought to be considered in assessing the effectiveness of this new legislation.

⁴ Lorena Allam, "Why Does It Take So Long?" The Desperate Wait for Answers after a Death in Custody', *The Guardian* (online, 25 August 2019) <<https://www.theguardian.com/australia-news/2019/aug/25/why-does-it-take-so-long-the-desperate-wait-for-answers-after-a-death-in-custody>>.

⁵ See *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 5, [36] (*Royal Commission*).

II BACKGROUND

A Facts

Wayne Fella Morrison was a Wiradjuri, Kokatha, Wirangu man.⁶

On 17 September 2016, Mr Morrison was arrested and held at the Holden Hill and later, at the Elizabeth Police Station.⁷ He appeared at the Magistrates Court at Elizabeth on 19 September 2016, where the Magistrate ordered a home detention bail inquiry report. Mr Morrison was remanded in custody to reappear on 23 September 2016.⁸ After this hearing, he was transferred to the Yatala Labour Prison.⁹ At about 9am on 23 September 2016, Mr Morrison was awaiting his appearance in the Magistrates Court by audiovisual link.¹⁰

At about 11:25am — less than an hour before Mr Morrison was scheduled to appear before the Magistrates Court — there was an altercation between Mr Morrison and two correctional officers.¹¹ This escalated until up to 12 officers wrestled Mr Morrison to the ground,¹² and pinned him to the floor with cuffs applied to his hands and ankles.¹³ A spit mask was placed over his head and he was carried by five officers to a prison conveyance van in the prone position, where he was placed face down on the floor.¹⁴ Mr Morrison was in the van for approximately three minutes.¹⁵ By the time he was removed from the van, he ‘did not respond to verbal directions ... and his skin was blue’.¹⁶

Mr Morrison died early on the morning of 26 September 2016.¹⁷

⁶ Paul Gregoire and Rachel Evans, ‘Justice for Wayne Fella Morrison: An Interview with Caroline Andersen’, *Sydney Criminal Lawyers* (Blog Post, 8 July 2020) <<https://www.sydneycriminallawyers.com.au/blog/justice-for-wayne-fella-morrison-an-interview-with-caroline-andersen/>>.

⁷ *Bell v Deputy Coroner (SA)* [2020] SASC 59, [8] (Blue J) (*‘Bell’*).

⁸ *Ibid* [9].

⁹ *Ibid*.

¹⁰ *Ibid* [12].

¹¹ Royce Kurmelovs, ‘Three Missing Minutes, and More Questions: Why Did Wayne Fella Morrison Die in Custody?’, *NITV News* (online, September 2018) <<https://www.sbs.com.au/nitv/feature/three-missing-minutes-and-more-questions-why-did-wayne-fella-morrison-die-custody-1>>. See *Bell* (n 7) [13].

¹² Kurmelovs (n 11). See *Bell* (n 7) [13]–[19].

¹³ *Bell* (n 7) [19].

¹⁴ *Ibid* [20], [21], [26]–[27]; Kurmelovs (n 11).

¹⁵ *Bell* (n 7) [27], [33].

¹⁶ *Ibid* [34].

¹⁷ *Ibid* [56].

Certain correctional officers refused to provide police statements on the basis of the privilege against self-incrimination,¹⁸ and declined to provide incident reports or answer questions in interviews.¹⁹

The Coroner opened an inquest into Mr Morrison's death. During the hearing, the seven officers associated with the incident at the van refused to give evidence, on the ground that it might incriminate them.²⁰ Further, Correctional Officer Shirley Bell, who observed the scene, applied for a discharge of her obligation to attend on the ground that she would invoke penalty privilege in answer to all foreseeable questions.²¹ While the other correctional officers' claims of self-incrimination privilege were a complete response to the Coroner's powers to compel answers to questioning under the *SA Act*,²² no such provision is explicitly made in respect of penalty privilege. Thus, the merits of Ms Bell's claim of penalty privilege were considered by the Coroner.

B *The Decision of The Coroner*

On 17 December 2018, the Coroner ruled that, on the proper construction of s 23 of the *SA Act*, penalty privilege was not available to witnesses required to answer questions during an inquest.²³ This was because penalty privilege, unlike self-incrimination privilege, is not among those privileges explicitly available under s 23 of the *SA Act*, and was thus abrogated.²⁴

The decision of the Coroner was appealed on a number of grounds to the Supreme Court, including that the Coroner had exceeded her jurisdiction in ruling that penalty privilege was not available to witnesses in an inquest.²⁵

C *Applicable Legislation*

The *SA Act* provides for the appointment of the State Coroner and the holding of inquests, and establishes the Coroner's Court.

Section 21(1)(a) of the *SA Act* states that '[t]he Coroner's Court must hold an inquest to ascertain the cause or circumstances of ... a death in custody'. Section 24(a) provides that the Coroner's Court 'is not bound by the rules of evidence and may inform itself on any matter as it thinks fit'.

¹⁸ See *ibid* [58].

¹⁹ See *ibid* [59], [77].

²⁰ *Ibid* [87]–[88].

²¹ *Ibid* [91], [268].

²² *Coroners Act 2003* (SA) s 23(5)(a) ('*SA Act*').

²³ *Bell* (n 7) [95].

²⁴ *Ibid* [95], [155], [164].

²⁵ *Ibid* [132]–[134].

Bell turned on s 23 of the *SA Act* and whether it expressly or impliedly abrogated penalty privilege. Section 23 relevantly provides:

23 — Proceedings on inquests

- (1) The Coroner’s Court may, for the purposes of an inquest —
- ...
- (e) require any person appearing before the Court (whether summoned to appear or not) to answer any questions put by the Court or by any person appearing before the Court.
- ...
- (5) However, a person is not required to answer a question, or to produce a record or document, under this section if —
- (a) the answer to the question, or the contents of the record or document, would tend to incriminate the person of an offence; or
- (b) answering the question, or producing the record or document, would result in a breach of legal professional privilege.
- (6) This section does not derogate from Parts 7 and 8 of the *Health Care Act 2008*.²⁶

Part 7 of the *Health Care Act 2008* (SA) (*‘Health Care Act’*) requires confidentiality to be maintained over certain information relating to medical research, while pt 8 deals with the investigation of certain incidents. Sections 66(3) and 73(3) of the *Health Care Act* expressly state that persons to whom the relevant provisions apply cannot be compelled to disclose any information in court.

D Penalty Privilege (and the Privilege against Self-Incrimination)

Penalty privilege, sometimes referred to as the ‘privilege against self-exposure to a penalty’,²⁷ was developed alongside the privilege against self-incrimination. It is that ‘a person shall not be obliged to discover what will subject him [sic] to a penalty’,²⁸ and its roots stem to 17th century equity and common law courts.²⁹

²⁶ *SA Act* (n 22) s 23.

²⁷ *Environment Protection Authority (NSW) v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 517–19 (Brennan J) (*‘Caltex’*).

²⁸ *Smith v Read* (1737) 1 Atk 526; 26 ER 332, 332 (*‘Smith’*).

²⁹ Nick Yetzotis, ‘Illuminating the Privilege against Exposure to Civil Penalties’ [2008] (May) *Law Society Journal: The Official Journal of the Law Society of New South Wales* 70, 70. See also *Smith* (n 28); *Pye v Butterfield* (1864) 5 B & S 829; 122 ER 1038; *Redfern v Redfern* [1891] P 139 (*‘Redfern’*).

Although practically similar, penalty privilege is theoretically a different privilege to the privilege against self-incrimination. Importantly, the emergence of penalty privilege is not rooted in the protection of human rights, but rather the limitation that courts have placed on the exercise of their own powers.³⁰ The policy of the privilege is that ‘no one is bound to answer so as to subject himself [sic] to punishment’.³¹ In practice, the two privileges have historically been considered together,³² though it is unclear whether this is still the practice. Justice McColl in *Rich v Australian Securities and Investments Commission*³³ said that the two privileges were ‘manifestations of the same core principle that no person should be obliged to accuse himself’.³⁴ The modern penalty privilege ‘serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it’.³⁵

E Issues

To determine whether penalty privilege was available under s 23 of the *SA Act*, Blue J was required to consider the following issues:

1. the standard for abrogation of common law rights in curial and non-curial settings (while the non-curial nature of the Coroner’s Court’s was not in issue, Blue J deemed it necessary to make ‘brief observations’ on this matter);³⁶
2. whether, on the proper construction of s 23 of the *SA Act*, common law penalty privilege was abrogated during inquests;³⁷ and
3. if penalty privilege were indeed available, whether the privilege had actually been unlawfully denied to the plaintiffs by the Coroner.³⁸

³⁰ *Caltex* (n 27) 519.

³¹ *Brownsword v Edwards* (1751) 2 Ves Sen 243; 28 ER 157, 158.

³² See, eg, *Redfern* (n 29) 147. Cf *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335–7 (‘*Pyneboard*’). See also *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 129 (Burchett J): the privileges ‘should not be seen as separate props in the structure of justice, but rather as interlocking parts of a single column’.

³³ *Rich v Australian Securities and Investments Commission* (2003) 203 ALR 671 (‘*Rich*’).

³⁴ *Ibid* 729 [322].

³⁵ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559 [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘*Daniels*’), quoted in *Rich* (n 33) 677 [32].

³⁶ *Bell* (n 7) [155].

³⁷ See *ibid* [164].

³⁸ *Ibid* [202]–[204].

There were several other grounds of appeal³⁹ which were of secondary importance, and each failed.⁴⁰ They are outside the ambit of this case note.

III JUSTICE BLUE'S DECISION

Justice Blue held that the Coroner erred in finding that penalty privilege was not available to witnesses at coronial inquests in South Australia.⁴¹ However, his Honour found that the Coroner did not deny penalty privilege in relation to any specific question on the occasions alleged by the plaintiffs.⁴² In reaching this decision, his Honour first considered whether penalty privilege was available in a non-curial context, then whether the *SA Act* abrogated penalty privilege, and finally whether the Coroner in this case denied any plaintiff the benefit of penalty privilege on the alleged occasions.

A Issue 1: Curial and Non-Curial Standards for Abrogation

Justice Blue noted that the case law regarding the availability of penalty privilege in a non-curial context is unclear.⁴³ His Honour noted that, in *Pyneboard Pty Ltd v Trade Practices Commission* ('*Pyneboard*'),⁴⁴ and *Sorby v Commonwealth*,⁴⁵ the High Court used an identical approach in addressing penalty privilege and self-incrimination privilege.⁴⁶ This is despite the former case having concerned penalty privilege in a non-curial context and the latter having considered self-incrimination privilege in a curial context.⁴⁷

In contrast to this, his Honour recognised that a majority in *Daniels* had 'said that "there seems little, if any, reason why [penalty] privilege should be recognised outside judicial proceedings"'.⁴⁸ The Full Court of the Federal Court in *Migration Agents Registration Authority v Frugtniet*,⁴⁹ considering the above decisions, stated that 'it is not open to regard *Pyneboard* as continuing to be authority, if it ever truly was, for the proposition that the starting point is that penalty privilege is capable

³⁹ Ibid [5].

⁴⁰ Ibid [588]–[689].

⁴¹ Ibid [195], [266], [314]–[316].

⁴² Ibid [200]–[291].

⁴³ Ibid [163].

⁴⁴ *Pyneboard* (n 32).

⁴⁵ (1983) 152 CLR 281 ('*Sorby*').

⁴⁶ *Bell* (n 7) [156].

⁴⁷ Ibid.

⁴⁸ *Bell* (n 7) [160], quoting *Daniels* (n 35) 559 [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴⁹ (2018) 259 FCR 219.

of applying in a non-curial setting'.⁵⁰ This statement, however, was considered by Blue J to be obiter, because the Full Court confined their decision to the availability of penalty privilege in proceedings before the Administrative Appeals Tribunal, under the *Administrative Appeals Tribunal Act 1975* (Cth).⁵¹

Justice Blue recognised the tension between the decisions described above. However, his Honour declined to resolve this issue, stating instead that '[i]t is preferable that this tension be resolved by an authoritative decision of the High Court'.⁵²

B Issue 2: Was the Penalty Privilege Abrogated by the SA Act?

Having established the standard for abrogation, Blue J engaged in a process of statutory construction to determine whether penalty privilege had been abrogated by s 23 of the *SA Act*. His Honour found there was no express provision, nor necessary intention, to abrogate penalty privilege in the *SA Act*.⁵³ Thus, his Honour held that the Coroner had erred in ruling that penalty privilege was not available.⁵⁴

The starting point for this consideration is that there is a presumption that Parliament does not intend to abrogate fundamental common law rights, freedoms and immunities unless the 'legislative intent to do so clearly emerges, whether by express words or by necessary implication'.⁵⁵ In *Bell*, the State conceded that penalty privilege is not expressly abrogated by the *SA Act*, instead arguing that it is abrogated by necessary intendment, in that ss 23(5) and (6) of the *SA Act* provide the grounds on which a person is not required to answer questions or provide documents, and all other 'personal privileges' are therefore abrogated.⁵⁶ Justice Blue found this argument unconvincing,⁵⁷ especially because the State presented the argument that 'public' privileges (such as public interest immunity) are *not* abrogated by s 23.⁵⁸

In Blue J's view, to accept the State's argument would be to impute an intention to Parliament:

- [F]irstly to draw a distinction between personal and public privileges or immunities;
- secondly to cover the field of personal privileges;

⁵⁰ Ibid 235 [52].

⁵¹ Ibid 222 [7], 235 [53]. See *Bell* (n 7) [162].

⁵² *Bell* (n 7) [163].

⁵³ Ibid [165]–[169].

⁵⁴ Ibid [195].

⁵⁵ Ibid [170], quoting *Pyneboard* (n 32) 341; *Sorby* (n 45) 309.

⁵⁶ *Bell* (n 7) [169].

⁵⁷ Ibid [170].

⁵⁸ Ibid [173].

- thirdly to exclude from that covering of the field an exemption created by section 23 itself (tendency to incriminate of an offence); and
- fourthly to exclude from that covering of the field legal professional privilege which is to continue to operate by force of the common law.⁵⁹

Justice Blue felt that this was ‘an artificial and overly complex ... intention to impute to Parliament’.⁶⁰ His Honour stated that ‘[t]he mind and will of Parliament is an objective construct of the law’.⁶¹ Thus, it is not appropriate to examine the ‘subjective knowledge or intent of individual members of Parliament’,⁶² and one should not impute complex reasoning to Parliament without any express evidence of such contemplation.⁶³

In particular, the distinction between ‘personal’ and ‘public’ privileges was considered to be convoluted and obscure.⁶⁴ Furthermore, Blue J noted that the exception carved out by s 23(6), referring to the *Health Care Act*, certainly falls on the ‘public’ side of the dichotomy. If Parliament were to abrogate personal privileges only, the enactment of s 23(6) would be superfluous.⁶⁵

Further, his Honour referred to the lack of contextual clues indicating an intention to abrogate penalty privilege, including a lack of statements to that effect in the *SA Act* or its second reading speech.⁶⁶ If Parliament intended such a complex construction of the *SA Act*, this would be evident in these sources. His Honour was similarly not convinced that, because penalty privilege was of lower status than self-incrimination privilege, it was more likely to be impliedly abrogated.⁶⁷

Finally, Blue J rejected the argument that, if penalty privilege was not abrogated, the work of the Coroner’s Court would ‘grind to a halt’, as the privilege against self-incrimination was more likely to impede the Court’s function in this way.⁶⁸

Accordingly, Blue J reached the conclusion that s 23 of the *SA Act* does not abrogate penalty privilege.⁶⁹ This means that penalty privilege was, and is, available as a ground for declining to answer questions at an inquest, provided that the witness has

⁵⁹ Ibid.

⁶⁰ Ibid [174].

⁶¹ Ibid [175].

⁶² Ibid [175].

⁶³ Ibid [177].

⁶⁴ Ibid.

⁶⁵ Ibid [176].

⁶⁶ Ibid [178]–[182], [187].

⁶⁷ Ibid [190].

⁶⁸ Ibid [194].

⁶⁹ Ibid [195].

established an entitlement to the privilege in answer to a specific question or request for production of a specific document.⁷⁰

C Issue 3: Was Privilege Denied?

Notwithstanding that the Coroner had ruled in December that penalty privilege was not available to the plaintiffs, the State contended that the Coroner had not actually denied penalty privilege to which the plaintiffs might otherwise have been entitled.⁷¹

Justice Blue restated a number of principles relating to claims of penalty privilege: first, a witness seeking to rely on the privilege must ‘make a specific claim to entitlement to the privilege as a ground for not answering a question or producing a document’;⁷² second, ‘the privilege must be claimed in respect of individual questions or documents rather than a blanket objection’;⁷³ third, the onus of establishing an entitlement lies on the person claiming the privilege;⁷⁴ and finally, the apprehended danger of being subject to a penalty must be real and appreciable for a claim to be established.⁷⁵

The plaintiffs in *Bell* were not themselves the subject of any ruling by the Coroner in relation to penalty privilege. However, Blue J held that the plaintiffs nonetheless had standing to impeach the Coroner’s general ruling that penalty privilege was not available during the inquest. That was because the plaintiffs could reasonably anticipate that, given the general ruling that had already been made, the Coroner would deny them penalty privilege if they sought to rely on it.⁷⁶ On the facts of the case, his Honour found that, aside from this general ruling, the Coroner never actually rejected claims of penalty privilege. Further, Blue J held that the Coroner had not asked questions designed to elicit privileged answers, nor had the Coroner failed to intervene in such questioning alleged by the plaintiffs to have been put by counsel.⁷⁷ Finally, on none of the alleged occasions did the plaintiffs make a specific claim of the privilege before answering a question, nor did the plaintiffs demonstrate a real and appreciable danger of being subject to any penalty.⁷⁸ However, Blue J noted that further questions in the inquest could potentially impinge on the privilege.⁷⁹ As a

⁷⁰ Ibid.

⁷¹ Ibid [199].

⁷² Ibid [150].

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid [197]–[198].

⁷⁷ Ibid [202]–[203], [315]. Justice Blue considered in detail the Coroner’s alleged overruling of claims of privilege, and the alleged non-intervention in questions designed to elicit privileged answers: at [273]–[279], [280]–[291].

⁷⁸ Ibid [202]–[204].

⁷⁹ Ibid [312]–[313].

consequence, declaratory relief was granted and the appeal succeeded on the ground that the Coroner had erred in ruling that penalty privilege was not available.⁸⁰

IV COMMENT

In this section, we discuss how *Bell* exposes fundamental weaknesses in the *SA Act*. We then analyse the implications of those deficiencies for the functioning of the Coroner's Court, particularly in light of the Royal Commission. Finally, we discuss equivalent legislation in other Australian jurisdictions, and potential law reform models to ameliorate the deficiencies of the *SA Act*.

A Implications for the Functioning of the Coronial System

Bell highlights the need to balance individual rights against the functioning of the Coroner's Court. The *SA Act* unnecessarily raises barriers for the Coroner's Court by restricting the questioning of witnesses who invoke self-incrimination or penalty privilege. As Craig Longman notes, in practically every situation in which a death has occurred on the watch of responsible officers, there is a threat of a civil penalty.⁸¹ Thus, the *SA Act*'s implicit restrictions on coronial powers, as reflected in its failure to provide for the abrogation of various common law privileges, are deleterious to the effective function of inquests, particularly when key witnesses refuse to testify, and evidence must then be examined without the benefit of their testimony.⁸²

The coronial jurisdiction is ancient and unique in the common law tradition, dating back at least, it has been said, to the year 1194.⁸³ It is a jurisdiction that conducts inquiries of a more inquisitorial character and is concerned mainly with fact-finding and with ascertaining what exactly occurred in a given situation, rather than the resolution of disputes and legal questions. This central function⁸⁴ is reflected in ss 13 and 21 of the *SA Act* as the essence of the Coroner's mandatory jurisdiction: to make findings about the cause and circumstances of the event under inquest, and to provide commentary and recommendations for the purposes of the prevention of further avoidable deaths. This function gained greater prominence as a result of the Royal Commission, in particular Recommendations 12 and 13 of the Royal Commission's National Report. Recommendations 12 and 13 were (respectively) to allow coroners

⁸⁰ Ibid [316].

⁸¹ Craig Longman, 'Police Silence and Aboriginal Deaths in Custody' [2020] (July) *LSJ: Law Society of NSW Journal* 66, 67. This is notwithstanding the fact that no penalties were applicable on the evidence already heard by the inquest in *Bell*.

⁸² Ian R Freckelton and David Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, 2006) 583–5.

⁸³ Chief Justice Wayne Martin, 'The Coronial Jurisdiction: Lessons for Living' (2017) 44(2) *Brief* 42, 42.

⁸⁴ Rebecca Scott Bray, "'Why This Law?': Vagaries of Jurisdiction in Coronial Reform and Indigenous Death Prevention' (2008) 12(Spec Ed 2) *Australian Indigenous Law Review* 27, 28–30.

to investigate the circumstances and causes of deaths thoroughly, and to make appropriate recommendations to prevent future deaths, as well as on the subject of matters arising in the course of the inquest.⁸⁵ This unique role allows a coroner the important opportunity to question and reprimand government officials for their failings, intentional or not, in circumstances such as those in *Bell*. The coroner is uniquely placed to ‘contextualise individual deaths within a wider social and historical sphere’ and thus has obvious relevance to the prevention of Aboriginal deaths in custody.⁸⁶ However, one may argue that the capacity of a coroner’s court to effect preventative change may already be strictly limited by its retrospective view and the non-binding nature of its recommendations. Thus, it is suggested that *all* legal privileges, which serve to impede this important yet limited jurisdiction, ought to be constrained in order to preserve the effective functioning of coroners’ courts.

Interestingly, Blue J in *Bell* was of the view that the availability of penalty privilege would not cause coronial proceedings to ‘grind to a halt’,⁸⁷ in part because his Honour considered that *self-incrimination privilege* would have farther-reaching effects in this regard. Moreover, Blue J reasoned that, on the facts before the Court, penalty privilege only prevented the Coroner from hearing evidence of events *after* the death occurred, which are of ‘incidental, and secondary relevance’.⁸⁸ Notwithstanding that penalty privilege could be used in other cases to withhold relevant information from the Coroner, there was already a paucity of evidence before the Coroner

⁸⁵ See generally *ibid* for an overview of the changing roles of Australian coroners’ courts. See also discussion of coronial reform to allow coroners to perform this function better in Raymond Brazil, ‘Respecting the Dead, Protecting the Living’ (2008) 12(Spec Ed 2) *Australian Indigenous Law Review* 45. See *SA Act* (n 22) s 25, in which the powers of the Coroner to make recommendations and findings are enumerated. See *Royal Commission* (n 5) vol 5, [12]–[13] for Recommendations 12 and 13. It should be noted that Recommendation 12 (for coroners to investigate causes and circumstances of death as well as the relevant quality of care, treatment and supervision) has been uniquely implemented in South Australia through wide judicial interpretation of the relevant provisions, notwithstanding a lack of specific implementation in the *SA Act* (n 22). See *WRB Transport v Chivell* (1998) 201 LSJS 102, 106–7 [21]–[26] (Lander J), in which it was said that South Australian coronial inquiries can consider facts beyond those ‘immediately proximate in time’ to the relevant death, including any facts which relate to the cause of death (even circumstances which explain ‘the interaction between a number of causes of death’). For a more in-depth consideration of the South Australian implementation of the Royal Commission’s Recommendations, and particularly case law surrounding the investigation of deaths, see Christopher J Charles, ‘The *Coroners Act 2003* (SA) and the Partial Implementation of RCIADIC: Consequences for Prison Reform’ (2008) 12(Spec Ed 2) *Australian Indigenous Law Review* 75, 76–7.

⁸⁶ Bray (n 84) 28. See Charles (n 86) 82–5 for a more specific discussion and evaluation of South Australian coronial law as it relates to the implementation of the Royal Commission’s Recommendations (particularly relating to the publishing of reports of the Coroner and delivery of recommendations to the relevant persons).

⁸⁷ *Bell* (n 7) [194].

⁸⁸ *Ibid*.

in *Bell*.⁸⁹ Indeed, Blue J acknowledged that ‘[i]t is conceivable that an issue or issues in relation to penalty privilege may arise in relation to the balance of the evidence yet to be adduced’.⁹⁰ These excerpts from *Bell* illustrate that the gravamen identified in this case note is not penalty privilege per se. All legal privileges that may be used to reduce evidentiary material supplied to the Coroner’s Court can have critical impacts on its effective functioning — including more fundamental privileges, that are invoked to avoid graver consequences for witnesses, than penalty privilege.

Notwithstanding the efforts of the Coroner in *Bell*, South Australia’s coronial system is uniquely susceptible to the issues identified above. It is also uniquely inefficient. First, the South Australian Coroner’s Court has the longest average time between death and resultant inquest, ‘with 3.3 years’.⁹¹ Mr Morrison’s inquest, the subject of the decision in *Bell*, is set to resume in 2021, five years after his death.⁹² Second, in nearly every other Australian jurisdiction, coroners are able to balance the benefits of privilege (when claimed) to the claimant, against the interests of justice. This tempers the potentially obstructive effects of legal privileges and removes barriers to the efficacious functioning of the coronial system, although it is noted that the effect of the relevant legislation is also to allow claimants to maintain privilege in future proceedings through the use of certificates, perhaps only transferring the dilemma of privilege to another forum.⁹³ *Bell* illustrates that the *SA Act* is, by comparison, ineffectual, as well as outdated. We will now briefly consider how these insufficiencies have particular importance in light of the Royal Commission.

⁸⁹ Ibid [27], [32], [79].

⁹⁰ Ibid [313].

⁹¹ Helen Davidson et al, “‘People Will Continue to Die’: Coroners’ “Deaths in Custody” Reports Ignored’, *The Guardian* (online, 31 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/31/people-will-continue-to-die-coroners-deaths-in-custody-reports-ignored>>.

⁹² ‘Critical Report into the Death in Custody of Mr Morrison Is Released’, *National Justice Project* to (Web Page, 10 September 2020) <<https://justice.org.au/critical-report-into-the-death-in-custody-of-mr-morrison-is-released/>>.

⁹³ See *Coroners Act 1997* (ACT) ss 43, 51B; *Coroners Act 2009* (NSW) s 61 (*NSW Act*); *Coroners Act 1993* (NT) s 38; *Coroners Act 1995* (Tas) ss 53, 54; *Coroners Act 2008* (Vic) s 57 (*Vic Act*). The *Coroners Act 2003* (Qld) contains a similar provision regarding the inadmissibility in criminal proceedings of incriminating evidence given at an inquest: at s 39. See discussion in Northern Territory Law Reform Committee, *Privilege against Self Incrimination* (Report No 23, 2001) 8, 9. The powers under the *Coroners Act 1996* (WA) ss 46, 47 are relatively similar to those in South Australia. See the balancing act under the *Coroners Act 1980* (NSW) s 33AA, the predecessor to s 61 of the *NSW Act* (n 93), being performed in *A-G (NSW) v Borland* [2007] NSWCA 201.

B *Bell and Aboriginal Deaths in Custody*

It is well recognised by the judiciary that law enforcement and correctional officers play an important role in society.⁹⁴ It is equally well recognised that there exists a ‘high public policy’ in ensuring public confidence in the administration of criminal justice.⁹⁵ Justice Brennan in *Police Service Board (Vic) v Morris*⁹⁶ acknowledged that ‘[t]he effectiveness of the police in protecting the community rests heavily upon the community’s confidence in the integrity of the members of the police force’.⁹⁷ His Honour stated that ‘[t]he purpose of police discipline is the maintenance of public confidence in the police force’, and that permitting an officer ‘to refuse to give an account of his [sic] activities while on duty’ under a claim of privilege would ‘subvert the discipline of the police force’.⁹⁸ This view rested heavily upon what his Honour considered to be the ‘incompatibility of a claim of privilege with the duty of a police officer to reveal information acquired in the course of his [sic] duty’.⁹⁹

Coroners’ courts, in particular, perform an important function in the pursuit of justice for Aboriginal people who have died in custody, as well as the prevention of such deaths in future, by investigating the causes and circumstances of death and making recommendations.¹⁰⁰ Such deaths may, in some cases, already be difficult to investigate because of institutional stubbornness as to the provision of evidence.¹⁰¹

The pattern of silence and withholding information evident in *Bell* is reprehensible.

Detective Sergeant Lisa Pettinau, who was in charge of the initial police investigation of Mr Morrison’s case, described feeling ‘frustrated’ due to misinformation.¹⁰² Ms Pettinau explained waiting to speak to witnesses and victims on the day that Mr Morrison was restrained. She was told that they had gone home. Later, she would be informed that this was false, and the correctional officers were still on site.¹⁰³

⁹⁴ See, eg, *Gaston v Police* [2004] SASC 222, [12] (Gray J).

⁹⁵ *Pollard v The Queen* (1992) 176 CLR 177, 202–3 (Deane J), cited in *Nicholas v The Queen* (1998) 193 CLR 173, 195–6 [33] (Brennan CJ), 252–3 [198] (Kirby J).

⁹⁶ (1985) 156 CLR 397.

⁹⁷ *Ibid* 412.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* 413.

¹⁰⁰ Prue Vines and Olivia McFarlane, ‘Investigating to Save Lives: Coroners and Aboriginal Deaths in Custody’ (2000) 4(27) *Indigenous Law Bulletin* 8; Raymond Brazil, ‘The Coroner’s Recommendation: Fulfilling Its Potential? A Perspective from the Aboriginal Legal Service (NSW/ACT)’ (2011) 15(1) *Australian Indigenous Law Review* 94, 94; *Royal Commission* (n 5) vol 1, ch 4, [4.5.1]–[4.5.3].

¹⁰¹ See Longman (n 81); Freckelton and Ranson (n 82) 578–9.

¹⁰² Kurmelovs (n 11).

¹⁰³ *Ibid*.

Ms Pettinau further noted that she had not been told of the extent of Mr Morrison's injuries until near the end of her shift.¹⁰⁴

While Mr Morrison was initially admitted to the Royal Adelaide Hospital under his own name, the Department for Correctional Services changed that name to 'Ben Waters' after the Hospital received inquiries seeking Mr Morrison's location.¹⁰⁵ The Department refused to give Mr Morrison's family information or access, and they were escorted out of the Hospital.¹⁰⁶

Silence and a lack of accountability are common features in the way Aboriginal deaths in custody are treated. For example, during the Inquest into the Death of David Dungay in the Coroner's Court of New South Wales, the media was ordered not to publish any identifying features of 21 New South Wales correctional staff.¹⁰⁷ *Bell* is an unsatisfactory decision that perpetuates the pattern of institutional silence, which is too often present in cases of Aboriginal deaths in custody.

The Royal Commission in 1991 identified issues surrounding the effect of the privilege against self-incrimination on coronial powers to investigate Aboriginal deaths in custody, suggesting it formed part of a series of 'fundamental questions relating to the administration of criminal justice'. However, the Commissioners interpreted their Terms of Reference as restricting a broader inquiry into this topic.¹⁰⁸ Conversely, the Royal Commission's investigation into the death of John Peter Pat was scathing of the prevailing practice in Western Australia of allowing witnesses to decline to give evidence on the basis of the privilege against self-incrimination (particularly in circumstances where that State's Coroner had the ability to compel testimony despite such claims). The Royal Commission described this practice as 'totally wrong' and as curtailing 'the effectiveness of the inquest as those who may have very important evidence to give are permitted not to give it'.¹⁰⁹ Despite the conclusion that the broader questions were outside the scope of the Commission's Terms of Reference, the Commissioners recognised the importance of coronial investigations in addressing the systematic dangers facing Aboriginal people in custody, and thus recommended that coroners' courts be structured in such a way as to ensure a sufficient evidentiary base for investigation.¹¹⁰

¹⁰⁴ Ibid.

¹⁰⁵ Ombudsman SA, *Ombudsman's Own Initiative Investigation in Relation to Issues Surrounding the Death in Custody of Mr Wayne Fella Morrison* (Report, August 2020) 95 [349].

¹⁰⁶ Ibid 32 [111], 95 [350].

¹⁰⁷ *Inquest into the Death of David Dungay* (Coroner's Court of New South Wales, Magistrate Lee, 22 November 2019) app B.

¹⁰⁸ *Royal Commission* (n 5) vol 1, ch 4, [4.5.65].

¹⁰⁹ Ibid Individual Death Reports, John Peter Pat, [14.8].

¹¹⁰ Ibid vol 5, [36].

While the Recommendations of the Commission call for broad structural changes to state coronial systems, they naturally do not include specific recommendations regarding the stymieing effect of the privilege against self-incrimination. Regardless, what occurred on the facts in *Bell* is particularly egregious as it had the effect of diluting the recommended evidentiary base for the investigation in that case. It is an example of institutional resistance (manifested in the actions of the correctional officers and their union, as well as in the failures of the Department for Correctional Services, discussed in depth below) to provide information surrounding Aboriginal deaths in custody, and illustrates the *SA Act's* failure to implement effectively the Commission's broader Recommendation. The *SA Act* also fails to contemplate the vital matter of such privileges and their potential effect on coronial investigations. Moreover, *Bell* highlights the imperative need for reform to address this avoidable tragedy.

C Law Reform

The real issue with penalty privilege and the *SA Act* is that penalty privilege bestows a complete objection to correctional officers presenting evidence. Not only does this undermine accountability, the process of claiming and establishing penalty privilege will further delay already problematically inefficient coronial inquests.

In this section, we consider coronial powers of investigation in other Australian jurisdictions that demonstrate how an effective *Coroners Act* ought to be structured. We then analyse two different law reform efforts in South Australia in light of models in other Australian jurisdictions. We note that the Supreme Court acknowledged the need for reform to follow those models as early as 2008, albeit in the context of another aspect of coronial investigation.¹¹¹ We suggest that this early warning perhaps foreshadows the type of legislative failure that precipitated the outcome in *Bell*.

First, most other Australian jurisdictions have moved away from traditional common law models of privilege, allowing courts to compel witnesses to answer questions in spite of claims of privilege. The catalyst for these changes is said to have been the decision in *Decker v State Coroner (NSW)*,¹¹² handed down over two decades ago, in which a geologist who possessed unique knowledge and responsibility with regard to a project linked to a landslide which resulted in 18 deaths successfully invoked privilege against self-incrimination to refuse to provide information to the Coroner's Court of New South Wales. These 'new' legislative schemes balance individual

¹¹¹ *Saraf v Johns* (2008) 101 SASR 87, 101 [43] (Debelle J). See also South Australia, *Parliamentary Debates*, Legislative Council, 29 April 2020, 601–3 (Connie Bonaros).

¹¹² (1999) 46 NSWLR 415 (*'Decker'*). For a discussion of the effect of *Decker*, its subsequent appeal and how it became a catalyst of legislative change, see Ian Freckelton, 'The Privilege against Self-Incrimination in Coroners' Inquests' (2015) 22(3) *Journal of Law and Medicine* 491, 496.

rights with the interests of justice in receiving evidence.¹¹³ We suggest that the same powers should be available to coroners' courts.¹¹⁴

This shift in the judicial system has prompted a legislative bolstering of coronial powers in every state and territory except South Australia. Each allows coroners to compel witnesses to answer questions, even in spite of claims of the privilege against self-incrimination and penalty privilege, if the interests of justice require it.¹¹⁵ For example, s 61 of the *Coroners Act 2009* (NSW) ('*NSW Act*') and s 57 of the *Coroners Act 2008* (Vic) ('*Vic Act*') confer a right to invoke the privilege against self-incrimination and penalty privilege,¹¹⁶ but also empower the Coroner to decide whether there are 'reasonable grounds' for invoking the privilege.¹¹⁷ If there are reasonable grounds, the Coroner must inform the witness that they are not required to give evidence unless ordered to, and that they may be provided a 'certificate' against incrimination or penalty.¹¹⁸ These certificates provide some degree of immunity against criminal or civil consequences for giving evidence.¹¹⁹ While these provisions already go far beyond the *SA Act*, the *NSW Act* and *Vic Act* go further. They require witnesses to give evidence, even if they have reasonable grounds to object on the basis of privilege, if there is no evidence that a penalty will actually arise, or if the interests of justice require it.¹²⁰ In this manner, notwithstanding the fact that this model is a compromise solution, in that the person giving evidence over which privilege has been claimed may be protected in future proceedings through the issue of a certificate, these statutes ensure that coronial investigations are not 'hampered' by the invocation of privileges.¹²¹ Their expanded powers provide multiple opportunities for coroners to assess claims of privilege and override them if necessary. By contrast, the inflexible and severely outdated *SA Act* does not permit the Coroner to investigate the merits of claims of self-incrimination privilege and fails to address penalty privilege whatsoever. While, as previously mentioned, the Royal Commission does not make specific recommendations as regards privilege, and thus may not have provided sufficient impetus for legislative amendments of this kind, the interstate models provide clear examples that ought to have been emulated by the *SA Act*.

¹¹³ Freckelton and Ranson (n 82) 578. See *Evidence Act 1995* (Cth) s 128; *Evidence Act 1995* (NSW) s 128; *Evidence Act 2001* (Tas) s 128; *Evidence Act 1906* (WA) ss 11, 13.

¹¹⁴ See Northern Territory Law Reform Committee (n 93) 7.

¹¹⁵ See above n 93.

¹¹⁶ *NSW Act* (n 93) s 61(1); *Vic Act* (n 93) s 57(1).

¹¹⁷ *NSW Act* (n 93) s 61(2); *Vic Act* (n 93) s 57(2).

¹¹⁸ *NSW Act* (n 93) s 61(3); *Vic Act* (n 93) s 57(3).

¹¹⁹ Freckelton and Ranson (n 82) 497.

¹²⁰ *Vic Act* (n 93) ss 57(4)(a)–(b); *NSW Act* (n 93) ss 61(4)(a)–(b).

¹²¹ See Northern Territory Law Reform Committee (n 93) 7–9; Jumbunna Institute of Indigenous Education and Research, Submission No 115 to Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, Parliament of New South Wales (7 September 2020) 27–8 [89].

A useful practical example of the use of the New South Wales provisions can be found in *Rich v Attorney-General (NSW)*.¹²² This case examined a decision of the New South Wales State Coroner to compel a police officer to give evidence about his involvement in the death of a vulnerable man with a history of mental illness.¹²³ Justice of Appeal Leeming, with whom Bathurst CJ and Beazley P agreed, examined and affirmed the decision of the Coroner, who had found that the ‘minor disciplinary consequences’ the witness may have faced were outweighed by the interests of justice in the investigation of the death of a person with a history of mental illness, particularly in light of systematic failures of police in ‘dealing with’ vulnerable people.¹²⁴ This case provides an illustration of the successes of coronial legislative reform and is particularly salient in the context of *Bell*, given Mr Morrison’s history of mental illness.¹²⁵

It is worth mentioning, in the context of reform, the Recommendations of the South Australian Ombudsman following its investigation into the death of Mr Morrison. The Report reveals that the Department for Correctional Services, for its part, acknowledged that ‘certain matters could have been better handled’ in the involvement of a large number of its staff in Mr Morrison’s death, and in subsequent attempts to avoid giving evidence to internal investigators, police and the Coroner’s Court.¹²⁶ The Ombudsman relevantly found that the Department had failed to identify Mr Morrison as an ‘at risk’ prisoner as an Aboriginal man, had acted ‘unreasonably’ in transporting Mr Morrison in a van without audiovisual recording capacity, failed to record ‘meaningful footage’ of the restraint and transport of Mr Morrison, and failed to retain official records of the death.¹²⁷ Among its various Recommendations, the Ombudsman suggested that cameras be used inside prison vehicles without dedicated ‘recording capacity’, body cameras be worn by prison officers in all State prisons, and that the Department for Correctional Services review and improve its records management systems.¹²⁸ These suggested reforms were also linked to the Recommendations of the Royal Commission.¹²⁹ It is our view that they ought to be implemented. Unlike the bills for reform of the *SA Act*, no legislative reform reflecting the above Recommendations has been presented in Parliament. The Department for

¹²² [2013] NSWCA 419.

¹²³ *Ibid* [3]–[5], [11].

¹²⁴ See *ibid* [24], [42].

¹²⁵ Mitch Mott, ‘Scathing Ombudsman Report Recommends Corrections Apologise to Family of Wayne Fella Morrison for Death-In-Custody Failures’, *The Advertiser* (online, 10 September 2020) <<https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/scathing-ombudsman-report-recommends-corrections-apologise-to-family-of-wayne-fella-morrison-for-deathincustody-failures/news-story/474133742c5f1a2b693be188d3044298>>.

¹²⁶ Ombudsman SA (n 105) 3.

¹²⁷ See *ibid* 107–11.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* 5.

Correctional Services says that it has adopted at least 16 of the 17 Recommendations of the Ombudsman's report.¹³⁰

To that end, the Correctional Services (Accountability and Other Measures) Amendment Bill 2021 (SA) has recently been passed by both houses of the South Australian Parliament. The Bill inserts a new pt 6A into the *Correctional Services Act 1982* (SA) ('*Correctional Services Act*'). The Bill establishes an accountability mechanism wherein the act of failing to comply with a notice to appear, produce a document, or answer a question, constitutes an act of misconduct under the *Correctional Services Act*.¹³¹ However, the Bill also expressly preserves self-incrimination privilege and, if the decision in *Bell* is applied, penalty privilege.¹³² Further, the Bill does not deal with the issue of correctional officers simply refusing to make reports, which was notably an issue in *Bell*.¹³³ While expressly making an officer's refusal to comply with such a request an act of misconduct is a step forward for the South Australian corrections system, the Bill should be making more progress towards the goal of accountability.

D *South Australian Law Reform Models*

Having provided a consideration of interstate models, we will now briefly discuss two recent law reform efforts in South Australia: the Coroners (Miscellaneous Amendments) Bill 2020 (SA) ('CMAB') and the Coroners (Inquests and Privilege) Amendment Bill 2020 (SA) ('CIPAB') (now the *Coroners (Inquests and Privilege) Amendment Act 2021* (SA)).¹³⁴

The CMAB, introduced by the Hon Connie Bonaros of the South Australian Legislative Council, attempts to bring the law 'in line with all other states and territories',¹³⁵ and includes provisions allowing the Coroner to compel witnesses to provide evidence despite claims of penalty privilege or the privilege against self-incrimination if 'the interests of justice require'.¹³⁶ The CMAB does not stipulate

¹³⁰ Brittany Evins, 'Wayne Fella Morrison Was Failed by SA's Prisons Department when He Died in Custody, Report Says', *ABC News* (online, 10 September 2020) <https://www.abc.net.au/news/2020-09-10/prison-mangement-failed-wayne-fella-morrison-death-incustody/12651264?utm_source=abc_news_web&utm_medium=content_shared&utm_content=link&utm_campaign=abc_news_web>.

¹³¹ Correctional Services (Accountability and Other Measures) Amendment Bill 2020 (SA) cl 36.

¹³² *Ibid.*

¹³³ *Ibid.* See, eg, *Bell* (n 7) [664]–[678] for a demonstration of issues with the creation and provision of reports and police statements.

¹³⁴ Coroners (Miscellaneous) Amendment Bill 2020 (SA) ('Coroners (Miscellaneous) Amendment Bill'); Coroners (Inquests and Privilege) Amendment Bill 2020 (SA); *Coroners (Inquests and Privilege) Amendment Act 2021* (SA).

¹³⁵ South Australia, *Parliamentary Debates*, Legislative Council, 29 April 2020, 602 (Connie Bonaros).

¹³⁶ Coroners (Miscellaneous) Amendment Bill (n 134) cl 8.

that the Coroner should assess whether the witness has ‘reasonable grounds’ to claim privilege, unfortunately precluding this safeguard against undue denial of privilege, as provided in the equivalent provisions in other Australian jurisdictions, discussed above. However, the CMAB similarly allows the Coroner’s Court to issue a certificate of protection to witnesses.¹³⁷ The CMAB also contains, as its name suggests, miscellaneous provisions, including provisions which allow the Coroner to make broader recommendations in its findings, publicly identify persons involved in the death, and request Ministers to prepare further compliance reports, which may have the effect of increasing the influence of the Coroner, as well as allowing further public scrutiny of compliance with recommendations, and of institutions involved in deaths.¹³⁸

The CIPAB, having received royal assent and being enacted as the *Coroners (Inquests and Privilege) Amendment Act 2021* (SA), more directly mirrors the provisions in New South Wales and Victoria. The CIPAB empowers the Coroner’s Court to determine whether there are ‘reasonable grounds’ for an objection,¹³⁹ and was at all times the most likely candidate for enactment, due to its support from the government.¹⁴⁰ This Act is a direct response to the decision in *Bell*, with South Australian Attorney-General, the Hon Vickie Chapman, acknowledging the fact that the functioning of the ‘coronial process’ ought to take precedence over the privilege against self-incrimination and penalty privilege.¹⁴¹ The CIPAB, and now the *Coroners (Inquests and Privilege) Amendment Act 2021* (SA), is nearly identical to the provisions in the *Vic Act* and the *NSW Act*, which ought to provide confidence to those interested in a robust and strong Coroner’s Court. It will help implement the Royal Commission’s Recommendations and bring South Australia in line with other Australian jurisdictions.

V CONCLUSION

Bell has arisen during a time when tensions with law enforcement are at an all-time high, making the decision particularly pertinent. It follows a long history of confusing

¹³⁷ See *ibid* cl 8, inserting *SA Act* (n 22) s 23A(3).

¹³⁸ Coroners (Miscellaneous) Amendment Bill (n 134) cls 4, 5, 9. Indeed, the proposed expansion of the Coroner’s power to investigate the causes and circumstances of death and to make recommendations concerning matters arising during the inquest would better implement Recommendation 12 of the National Report of the Royal Commission: see above n 85.

¹³⁹ Coroners (Inquests and Privilege) Amendment Bill (n 134) cl 7.

¹⁴⁰ Mitch Mott, ‘Laws Introduced to Parliament Will Prevent Witnesses in Coronial Inquests from Refusing to Give Evidence on the Grounds it Will Incriminate Them’, *The Advertiser* (online, 16 October 2020) <<https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/laws-introduced-to-parliament-will-prevent-witnesses-in-corial-inquests-from-refusing-to-give-evidence-on-the-grounds-it-will-incriminate-them/news-story/92ab2b0fc15372245ed4ce322cbc34c2>>.

¹⁴¹ *Ibid*.

case law regarding the application of penalty privilege. The decision clarifies how penalty privilege applies to coronial inquests in South Australia, in light of the fact that the *SA Act* does not abrogate penalty privilege, allowing correctional officers and those questioned at coronial inquests to refuse to answer questions on this basis.

The mere fact that the Coroner's ruling that penalty privilege was not available in the inquest was appealed arguably provides a disappointing commentary on institutional responses in Australia (and particularly South Australia) to Aboriginal deaths in custody. The appeal of the nineteen plaintiffs in this case has served to delay the inquest into the death of Wayne Fella Morrison in custody, which occurred in September 2016. The inquest will resume in 2021. The correctional officers concerned are still working in our prison system.

Moreover, *Bell* highlights fundamental flaws in the *SA Act* that, thankfully, are in the process of being addressed. The *SA Act* must be amended to ensure the efficacious functioning of the Coroner's Court, in particular by allowing claims of privilege to be assessed against the interests of justice. Such reform would be a step in the right direction of implementing the Recommendations of the Royal Commission. This legislative reform ought to emulate successful models of other Australian jurisdictions. However, current proposals do not implement changes that strike directly at the issue of Aboriginal deaths in custody, as do the measures recommended by the Ombudsman. Further attention ought to be given to the proper identification and supervision of vulnerable people under the care of State institutions, and the proper oversight and scrutiny of these institutions and those employed by them.

All things considered, the outcome of *Bell* is unsatisfactory, highlighting the need for legislative reform. While the failures encapsulated in *Bell* have already caused significant damage, *Bell* presents an opportunity — which seems likely to be met by current attempts at reform and through the additional Recommendations of the Ombudsman, which are yet to be incorporated into any legislative proposals — to provide South Australians with confidence that Coroners can effectively address the deaths of Aboriginal people, and other vulnerable people, in State institutions.

Greg Taylor*

**LEGAL HISTORY MATTERS: FROM MAGNA CARTA
TO THE CLINTON IMPEACHMENT**

**EDITED BY AMANDA WHITING AND ANN O'CONNELL
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This is an unusual collection of essays — and perhaps also one that poses more than the usual difficulties for the reviewer — but a collection that is to be welcomed.

Rather than the standard collection of learned essays by established scholars on a single theme, *Legal History Matters: From Magna Carta to the Clinton Impeachment*¹ consists of nine essays on a large variety of topics in legal history written by Juris Doctor ('JD') students from Melbourne Law School (one of whom I made the acquaintance of some years ago when she was my research assistant), along with a short but thought-provoking foreword by the Hon Julie Dodds-Streeton and an introduction by the editors Amanda Whiting and Ann O'Connell. Four of the essays concentrate on English legal history: a discussion of how *Magna Carta* assisted in the development of English law in the 16th century;² a consideration of the trial of Anne Boleyn;³ a discussion of the reasons behind the repeal of various parts of *Magna Carta* in the 19th century and its place in the legal reforms of that important

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¹ Amanda Whiting and Ann O'Connell, *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020).

² Matthew Psycharis, 'Meeting More's Challenge: How the *Magna Carta* Helped Build a Robust *Lex Anglicana*' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 11.

³ Lisette Stevens, 'Due Process or Judicial Murder?: Anne Boleyn's Trial Placed in Context' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 42.

and often underestimated era;⁴ and, finally, a look at aspects of the suffragette trials of the early 20th century.⁵ Two Australian topics are featured: the Eureka trials⁶ and the trial for sedition of a young colonial official in New Guinea in the early 1960s.⁷ In three essays, the authors have branched into American legal history with contributions on Alger Hiss,⁸ the manslaughter trial of two factory operators after a fire in 1911 in New York⁹ and the impeachment of President Bill Clinton.¹⁰

Melbourne Law School, the editors and the publishers are all to be commended for the effort and risk they have taken upon themselves in publishing this student work (without any sign of sponsorship by an outside body such as a law firm). Now, I cannot speak for Melbourne Law School, but certainly in many law schools today there is a very long tail of students whose aptitude for and interest in the law appears minimal to non-existent. It is not merely a matter of hoping for the greatest possible return for the minimum effort, for that is the natural human condition that afflicts everyone, but greater deficiencies which cannot be analysed in detail here. This situation means, however, that it is often the least able students who occupy most of the time available to their teachers, while the very able are left to fend for themselves — a task which they can usually discharge quite well on the essential plane of getting through the

⁴ Phoebe Williams, 'A Nineteenth-Century View of the *Magna Carta*' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 65.

⁵ Alexandra Harrison-Ichlov, 'A Symbol, a Safeguard, an Instrument: Reflections on the 1908 "Rush the Commons" Trial and the Campaign for Women's Suffrage in Early Twentieth-Century England' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 137.

⁶ Xavier Nicolo, 'Guilty of Sedition, but Innocent of Treason: The Aftermath of the Eureka Stockade' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 112.

⁷ Simon Pickering, 'A Voice in the Wilderness: Revisiting the Political Trial of Brian Cooper' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 187.

⁸ Samuel O'Connor, 'Alger Hiss as Cipher: The Political and Historical Legacy of the Hiss Case' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Press, 2020) 87. Alger Hiss was the subject of controversial accusations of espionage in the McCarthyist era.

⁹ Jack Townsend, 'The People of the State of New York v Isaac Harris and Max Blank: Putting Capitalism on Trial' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Press, 2020) 164.

¹⁰ Katharine Kilroy, 'Campaigning for a Verdict: Politics, Partisanship and the President on Trial' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne University Publishing, 2020) 214.

law course, but without special attention from academic staff which might further encourage them to make use of and extend their abilities. For this reason, I founded the High Achievers' Programme when at Monash University — to ensure that sufficient attention was directed to the needs of the best students. This book serves, among others, the same aim.

This book pursues a further aim that is dear to my heart, namely, the encouragement of publication by the very top law students. I am the proud 'midwife' of at least three student publications in top-ranking journals and see this activity, among other things, as negating the injustice occasioned by the failure of my own similar attempt to appear in print in this very journal when an undergraduate, owing to the lack of interest shown by academic staff of the era and a certain celebrated legal historian in particular. Such episodes are seared in my mind, as is perhaps every setback in youth, and it is only recently that the wound from nearly three decades earlier healed sufficiently for the piece in question to be dusted off, updated and finally published in a leading journal. Conversely, the students who are the beneficiaries of this work will be rightly pleased and proud to see their names attached to pieces of legal scholarship produced by a leading publisher, and I hope that one or other of them may be encouraged to consider a career in the academy. They have not been subjected to the chief abiding frustration of the young adult: not being taken seriously. It is to the great credit of the two editors that they have not taken the easy path of indolence but rather invested the time, for what is probably minimal reward in terms of publication lists and promotion prospects and so on, to encourage and celebrate the work of their leading students and ensure that their small but worthy research contributions to legal history are not lost forever. I also hope that volumes such as that under review may appear every half-dozen or dozen years or so, that future teachers at Melbourne Law School will be encouraged by this example, and indeed that it spreads to further institutions.

It will be apparent, given the list of topics dealt with in the nine essays described earlier, that it would perhaps be beyond the capacity of even the most learned legal historian to review each of these essays in detail given their broad temporal and geographical scope, and if I do not mention one or other of them specifically below, the fault lies with me and the limitations of my expertise. It must however be said that the narrow selection of countries is a disappointment that applies to the overall collection rather than any one particular contribution. Not only is there nothing outside the English-speaking countries, which is explicable by the need for a researcher to have excellent language skills and often also the time and resources to travel to distant archives; there is nothing from our near neighbours in New Zealand, whose legal history offers an enormous field for research, or from our Commonwealth cousins in Canada. Only the New Guinea sedition trial, conducted of course under Australian colonial rule and culminating in an appeal to the High Court of Australia, adds some diversity to this mixture.¹¹ Another noticeable gap is any consideration of the history of the private law: all of the essays are on some aspect of public or criminal law.

¹¹ Pickering (n 7).

The editors could, needless to say, select only from what was available to them, and they have managed to rescue nine excellent examples of student work from the oblivion that would otherwise have been their fate. Most of the essays are quite detailed: five of the nine take as their text a single trial and analyse it.¹² This too is easily understood given the practical limitations faced by the authors, and certainly such detailed considerations of single incidents can make substantial contributions to legal history. It is the absence of such detailed accounts that can often doom any attempt to write a more general legal history of a particular country or time.¹³ Nevertheless, the contribution relating to the New Guinea sedition trial, for example, would have benefited by a longer consideration of what can be concluded from it for today's law and any need for law reform, matters which are only touched upon at the end of the chapter in question. Generally speaking the essays do not betray their authors' neophyte status: only in the Eureka Stockade chapter¹⁴ do I miss the realisation that the formal and stately language of the indictments was not at all remarkable before the reforms effected by the *Indictments Act 1915* (UK) and its Australian counterparts.¹⁵ Similarly, I was briefly wrong-footed by a reference to a 'Lord Gordon'¹⁶ when it is Lord George Gordon MP who was meant — not merely a quibble given that he held the title 'Lord' only by the courtesy extended to younger sons of the higher nobility and that fact requires by custom his first name to be mentioned, as it indeed always is in discussions by more established historians. However, leaving aside such quibbles, this chapter makes a very useful contribution in what is already a well-ploughed field because it considers insightfully and in detail the trial of a newspaper editor, one Harry Seekamp, for seditious libel, which has been neglected in the past in favour of the principal trials of thirteen diggers for high treason. Another outstanding example of a substantial contribution to a field that is also the subject of many existing works and which might have been wrongly thought unsusceptible of enrichment by student work is the essay on a suffragette trial of 1908 by my former research assistant.¹⁷ It offers a well-argued reinterpretation of an event that had been previously the subject of a small literature in a manner that does great credit to the student and is a very good example of legal history firmly situated within its broader societal context.

One essay at least raises issues which would be beyond the wit of the greatest historian to solve. In the discussion of the trial of Anne Boleyn,¹⁸ the rather startling conclusions are reached that the trial was unfair because of her likely innocence, but not unjust solely because the outcome was determined in advance, the latter being the contemporary standard.¹⁹ This raises a number of very difficult issues at

¹² Stevens (n 3); Harrison-Ichlov (n 5); Pickering (n 7); O'Connor (n 8); Townsend (n 9).

¹³ Jeremy Finn, 'A Formidable Subject: Some Thoughts on the Writing of Australasian Legal History' (2003) 7(1) *Australian Journal of Legal History* 53, 62.

¹⁴ Nicolo (n 6) 119.

¹⁵ See, eg, *Criminal Informations Act 1929* (SA).

¹⁶ Nicolo (n 6) 123.

¹⁷ Harrison-Ichlov (n 5).

¹⁸ Stevens (n 3).

¹⁹ *Ibid* 49.

the intersection of law and politics. I refer here not merely to the obvious questions of the overall relationship between the law — with its claim to effecting justice on a principled basis divorced from everyday concerns and considerations of personal advantage — and the political actors who make the law and appoint its officials; while Anne Boleyn's trial raised such problems in a 16th century context — which it is difficult, although not impossible for us to enter into the mindset of — current events such as confirmation hearings for the Supreme Court of the United States of America may bring to light issues that, at their root, are vaguely similar. More broadly, however, issues around what is sometimes called 'presentism' are raised by the discussion in the chapter in question:²⁰ to what extent is it legitimate to judge past events on the basis of present-day moral standards? We must, in my view, avoid both the Scylla of indiscriminating condemnation of past ages, remembering that their resources and technology were far more limited than those available to us today and that they did not have as much of the experience of the horrors (as well as the achievements) of which our civilisation is capable as revealed in the 20th century's world wars, and also the Charybdis of allowing everything to pass as unobjectionable because it was done in the past and therefore must be considered in accordance with the standards of the past. We cannot simply pass over Stalin's purges or the famines his regime caused, let alone the even greater horrors of Nazism, without some form of moral judgment simply because the principal actors may have believed that their actions were for the greater good and thus justified and in accordance with right standards.

The essay on Anne Boleyn veers, I fear, too far towards the whirlpool of Charybdis, which is not to say that anyone now alive could do much better — indeed, eternal fame awaits the historian who can come up with a coherent and generally accepted theory on the topic of applying present-day standards to past injustices. It would indeed be too much to ask of a neophyte to deal in any detail with a topic of such complexity and vast scope, and I am certainly not going to try here either because I shall fail dismally. However, it is startling to read that 'it can be argued that Anne's trial is unjust because she was innocent, but not unjust because that decision [of guilt] was made prior to trial'.²¹ The reviewer of the student's work might have suggested second thoughts here, not merely because a trial might have been necessary to establish Anne's innocence or guilt, and the mere holding of a genuine trial of an innocent person is unlikely to be unjust in itself, but also because we need to ask, if we raise the question at all by using concepts such as 'unjust', whether any conception of justice can admit of show trials because they were supposedly the standard of the day. This topic is one that an academic would have been justified in raising with a student during the conception of the original piece that was written as part of the JD course and certainly by the point of publication; it might also have been useful to refer to works of historiography such as EH Carr's classic *What Is History?*²²

²⁰ Ibid.

²¹ Ibid 52.

²² EH Carr, *What Is History?* (Penguin Books, 2008) ch 3.

It is easy to imagine the deep sense of satisfaction felt by each student at what for many, if not all, will be a first foray into print. That feeling, despite the occasional reviewer's quibble, is justified, as is the — perhaps less obvious — pride that Melbourne Law School can feel on possessing staff and publishers who were able to bring this project to a successful conclusion.

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In preparing manuscripts for submission, authors should be guided by the following points:

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