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SPECIAL ISSUE: 140 YEARS OF THE ADELAIDE LAW SCHOOL

*Judith McNamara**

CELEBRATING 140 YEARS OF ADELAIDE LAW SCHOOL

I Introduction

It is with great pride that I introduce this special issue of the *Adelaide Law Review* to celebrate the 140th anniversary of the Adelaide Law School. The main body of articles in this special issue were originally presented as part of the School's Law 140: Eminent Speakers Series which took place in 2023. Through the Speakers Series, the Law School honoured the considerable contributions made by individuals who have been pivotal in advancing legal research at our School in recent years and decades.

The history of the Adelaide Law School is told in a number of journal articles,[1] in the book *Law on North Terrace* by Alex Castles, Andrew Ligertwood and Peter Kelly released in its centenary year 1983,[2] and in John Waugh's new book released in celebration of its 140th anniversary: *Adelaide Law: A History of the Adelaide Law School*.[3] This special issue of the *Adelaide Law Review* marks some of the contributions of the Adelaide Law School to legal research across its 140-year history.[4] It also contains a review of Waugh's new book by Professor Paul Babie, Bonython Chair of Law, who I thank for his leadership of the 140th anniversary commemorations.

In this introduction, I offer some thoughts on the tradition of legal research at the Adelaide Law School on Kaurna country as it has developed over the past

* Dean of Law and Professor, Adelaide Law School, The University of Adelaide. I thank Ikhwan Fazli for his excellent research assistance in the preparation of this introduction.

1 Richard Arthur Blackburn, 'Law School Curricula in Retrospect' (1983) 9(1) *Adelaide Law Review* 43; RA Blackburn, 'The Law Faculty Centenary Address, 1983' (1983) 9(2) *Adelaide Law Review* 279; Victor Allen Edgeloe, 'The Adelaide Law School 1883–1983' (1983) 9(1) *Adelaide Law Review* 1; Peter Rathjen, '135 Years: Reflections on the Past, Present and Future of Adelaide Law School' (2019) 40(1) *Adelaide Law Review* 47; Matthew Stubbs, 'The *Adelaide Law Review* at (Volume) 40: Reflections and Future Directions' (2019) 40(1) *Adelaide Law Review* 1; John Waugh, 'Controversy and Renown: Coleman Phillipson at the Adelaide Law School' (2021) 42(1) *Adelaide Law Review* 147.

2 Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School 1883–1983* (University of Adelaide, 1983).

3 John Waugh, *Adelaide Law: A History of the Adelaide Law School* (Wakefield Press, 2024).

4 Further contributions can be found in the collection of research published to mark the 40th volume of the *Adelaide Law Review*: (2019) 40(1) *Adelaide Law Review.*

140 years, providing context for the articles that follow, and reflect on the future of legal research at the new Adelaide University which will succeed the University of Adelaide in 2026. As is evident from the articles in this edition, the Adelaide Law School has a rich legacy of legal research. On behalf of the current faculty of the School, I extend heartfelt gratitude to all those who have contributed to the success and legacy of the Adelaide Law School over the past century and a half. This special issue is a tribute to their dedication, vision, and enduring legacy.

II Legal Research on Kaurna Country

The Adelaide Law School is located on the lands of the Kaurna people. The Kaurna people, whose ancestors have lived on these lands for thousands of years, have a rich history of law and culture which values the essence of the land. This is enriched with the rituals and legends of the Red Kangaroo Dreaming.[5] When Europeans colonised the area and named it Adelaide, they adopted their own legal frameworks. As with the rest of Australia, for much of Adelaide's history the laws and beliefs of the local Aboriginal people were largely disregarded. While the intersection between European laws and those of Australia's Indigenous people is not explicitly acknowledged by the papers in this special issue, it is vital to recognise the indispensable voices of Indigenous people in the School's research endeavours, and the School's tradition of research on issues affecting Aboriginal and Torres Strait Islander peoples.

Professor Irene Watson was the first Aboriginal PhD graduate of the Law School, and from 2016 to 2023 she was the inaugural Pro Vice Chancellor (Aboriginal Leadership and Strategy) and David Unaipon Chair at the University of South Australia. She made significant contributions with her groundbreaking doctoral thesis on First Nations law and the lasting impacts of colonialism, which earned her the Law School's prestigious Bonython Prize in 2000. Her seminal work *Aboriginal Peoples, Colonialism, and International Law: Raw Law*, published in 2015,[6] examined the ongoing tensions between Indigenous and non-Indigenous legal systems. Andrea Mason OAM is another distinguished Aboriginal graduate of Adelaide Law School, whose many contributions include service as a Commissioner of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*.

Sir Richard Blackburn OBE held the Bonython Chair in Law and served as Dean of Law from 1950 to 1957, and continued as a part-time member of faculty until 1965 when he was appointed a Justice of the Supreme Court of the Northern Territory.[7]

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5 Waugh, '*Adelaide Law: A History of the Adelaide Law School*' (n 3) preface 1.

6 Irene Watson, *Aboriginal Peoples, Colonialism, and International Law: Raw Law* (Routledge, 2015).

7 He later served as Justice of the Federal Court of Australia, and Justice and Chief Justice of the Supreme Court of the Australian Capital Territory: Richard Refshauge, 'Sir Richard Arthur (Dick) Blackburn (1918–1987)' in *Australian Dictionary of Biography*, vol 17 (Melbourne University Press, 2007).

In that capacity, Blackburn J decided *Milirrpum v Nabalco Pty Ltd* ('*Gove Land Rights Case*').[8] Although his Honour's ruling was against the Yolngu claimants, the judgment's acceptance that Yolngu law was 'a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence'[9] was a watershed moment for the understanding of Aboriginal law in the Australian colonial legal system. Justice Blackburn took important steps down the path the High Court of Australia would tread 20 years later in *Mabo v Queensland (No 2)*.[10]

Professor James Crawford AC SC FBA was a member of the academic staff of Adelaide Law School from 1977 until 1986, and would later hold the Whewell Professorship in International Law at the University of Cambridge and become the second Australian elected as a judge of the International Court of Justice.[11] In 1982, he was appointed as the Commissioner in Charge of the Australian Law Reform Commission's ongoing inquiry into the Recognition of Aboriginal Customary Laws.[12] The final Report of the inquiry that Crawford had led contained a nuanced consideration of the proper place of Aboriginal customary law in a wide range of legal contexts, and has offered valuable guidance for reform in the intervening decades. The Report continues to offer powerful insights to inform future steps in 'the legal system's search for justice in dealing with the Aboriginal people of Australia'.[13]

The *Adelaide Law Review* has also increasingly published the work of First Nations legal scholars,[14] as well as pieces examining issues relating to Aboriginal peoples and the law.[15] Staff of the Adelaide Law School have also undertaken an increasing

8 (1971) 17 FLR 141.

9 Ibid 267.

10 (1992) 175 CLR 1.

11 See, eg, Rebecca LaForgia and Matthew Stubbs, 'Remembering James Crawford' (2022) 43(1) *Adelaide Law Review* 1, 3.

12 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 12 June 1986).

13 Ibid [1037].

14 See, eg: Irene Watson, 'Colonial Logic and the Coorong Massacres' (2019) 40(1) *Adelaide Law Review* 167; Andrea Mason, 'Where do a Bird and a Fish Build a House? An Alumna's View on a Reconciled Nation' (2019) 40(1) *Adelaide Law Review* 173.

15 See, eg: Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363; Lilly Deluca and Katerina Grypma, 'Putting the Law of Burial to Rest: *South Australia v Ken* [2021] SASC 10' (2022) 43(1) *Adelaide Law Review* 211; Peter Devonshire, 'Indigenous Students at Law School: Comparative Perspectives' (2014) 35(2) *Adelaide Law Review* 309; John Eldridge, '"Paperless Arrests": *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16' (2016) 37(1) *Adelaide Law Review* 283; Martin Hinton, 'A Bail Review' (2019) 40(1) *Adelaide Law Review*

number of research projects addressing First Nations legal issues. Looking ahead, notwithstanding the contributions noted above, it is imperative for the Law School to deepen its engagement with Aboriginal communities in its research, and to continue to expand its exploration of the convergence of colonial laws with those of Australia's Indigenous peoples. Aboriginal law is still alive and reflects the lives of living Aboriginal people today. By actively involving Aboriginal communities in research processes, the Law School can ensure that its scholarship reflects the diverse perspectives and lived experiences of Aboriginal peoples.[16] These efforts not only promote a more inclusive research process and more equitable outcomes, but also acknowledge the Indigenous legal traditions that have long been present in this place. Embracing such inclusivity is essential for fostering meaningful reconciliation efforts and advancing towards a more just and inclusive legal system that respects and honours the rights and sovereignty of Australia's first peoples.

III The Tradition of Legal Research at the Adelaide Law School

Legal education at the Adelaide Law School began in 1883, more than 140 years ago. Established as the second fully operational law school in Australia at the time, following the University of Melbourne's lead, it has since played a significant role in legal education within Australia.[17] Throughout its history, the Adelaide Law School has been deeply connected through its teaching and research to the courts, government and the legal profession, and that connection has influenced the impactful research which has been a signature strength of the School. In the early 20th century, Professor (William) Jethro Brown, who was appointed Chair of

187; Martin Hinton, 'Another Bail Review' (2019) 40(3) *Adelaide Law Review* 627; Martin Hinton, 'A Final Bail Review' (2020) 41(2) *Adelaide Law Review* 625; Serah Kang, 'Hearing Friendly Voices: A Case for Increased Indigenous Constitutional Intervention before the High Court of Australia' (2023) 44(2) *Adelaide Law Review* 532; Justice MD Kirby, 'TGH Strehlow and Aboriginal Customary Laws' (1980) 7(2) *Adelaide Law Review* 172; Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23(2) *Adelaide Law Review* 195; SD Lendrum, 'The "Coorong Massacre": Martial Law and the Aborigines at First Settlement' (1977) 6(1) *Adelaide Law Review* 26; Henry Materne-Smith, 'All is Fair in Love and Remote Indigenous Communities? *ASIC v Kobelt* (2019) 368 ALR 1' (2020) 41(1) *Adelaide Law Review* 325; Marina Nehme and John Juriansz, 'The Evolution of Indigenous Corporations: Where to Now?' (2012) 33(1) *Adelaide Law Review* 101; Holly Nicholls and Eleanor Nolan, 'Calculating Cultural Loss and Compensation in Native Title: *Northern Territory v Griffiths* (2019) 364 ALR 208' (2019) 40(3) *Adelaide Law Review* 879; Sandra Pruim, 'Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples' (2014) 35(2) *Adelaide Law Review* 269; Flyn Wells, 'Heartbeat in the High Court: *Love v Commonwealth* (2020) 375 ALR 597' (2020) 41(2) *Adelaide Law Review* 657.

16 Marcia Langton and Aaron Corn, *Law: The Way of the Ancestors* (Thames and Hudson, 2023).

17 Castles, Ligertwood and Kelly (n 2) 5.

Law at the University of Adelaide in 1906, extolled the importance of the teaching research nexus, noting, '[o]nly by constantly learning himself can a teacher hope to make true learners of others.'[18] Brown was also the first of the Law School's professors to publish on legal education, a tradition that continues through the work of the Research Unit on Law and Education.

Until the 1960s, law at Adelaide was taught by a sole Chair of Law with the support of legal practitioners. As a result, the workload of the Chair of Law was heavy, and the contribution of incumbents to legal scholarship varied in scope. However, there was much important scholarship during this time and Adelaide Law School gained an international reputation in the early 20th century through the work of its professors. Sir John Salmond, Chair of Law from 1897 to 1906, for whom the law library is named, authored important works including *Jurisprudence, or the Theory of the Law*, published in 1902,[19] and *The Law of Torts*, published in 1907.[20] His successor Jethro Brown had an established reputation when appointed as Chair of Law,[21] and he continued to publish during his tenure at Adelaide, including *The Underlying Principles of Modern Legislation* in 1912 and *The Prevention and Control of Monopolies* in 1915.[22]

Research in the Adelaide Law School community in the 1920s, 1930s and 1940s largely flourished through the work of its students.[23] It was during this period that the Doctorate of Laws ('LLD') became a research degree, after being established in 1885 as a relatively practical qualification requiring the completion of an essay and passing of an examination. The Law School encouraged research through the LLD, the Master of Laws and the Bonython Prize for legal research.[24] Adelaide scholars made substantial contributions to Australian constitutional law at this time. Donald Kerr's 1919 doctoral thesis on 'The Judicial Interpretation of the Constitution of the

18 W Jethro Brown, 'Law Schools and the Legal Profession' (1908) 6 *Commonwealth Law Review* 3, 12.

19 John W Salmond, *Jurisprudence, or the Theory of the Law* (Stevens and Haynes, 1902).

20 John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907).

21 See, eg, Castles, Ligertwood and Kelly (n 2) 19, 21.

22 W Jethro Brown, *The Underlying Principles of Modern Legislation* (John Murray, 1912); W Jethro Brown, *The Prevention and Control of Monopolies* (EP Dutton 1915).

23 Coleman Phillipson, Professor of Law from 1920 to 1925, was a distinguished international lawyer prior to arriving in Adelaide, but did not produce research of significance before his resignation from the University: see Waugh, 'Controversy and Renown: Coleman Phillipson at the Adelaide Law School' (n 1). Arthur Campbell, Bonython Chair in Law from 1926 to 1949, had no law degree, and is thought not to have published any research during his long tenure: see Blackburn, 'The Law Faculty Centenary Address, 1983' (n 1) 286–7.

24 See, eg, Edgeloe (n 1) 28–9.

Commonwealth'[25] was published as a book, *The Law of the Australian Constitution* in 1925.[26] Kerr's work was followed by William Anstey Wynes, whose 1933 thesis,[27] first published as *Legislative, Executive and Judicial Powers in Australia* in 1936,[28] went on through its four subsequent editions to become the leading Australian constitutional law text of its time.[29]

The tradition of international law scholarship has been one of the great contributions of the Adelaide Law School. This was significantly shaped by the influence of Daniel P O'Connell who was appointed Reader in 1953 and subsequently to a personal Chair in International Law. O'Connell remained at Adelaide until his appointment as Chichele Professor of Public International Law at the University of Oxford in 1972. His work published during his time at Adelaide included *State Succession in Municipal Law and International Law* (1967),[30] and *Richelieu* (1968).[31] His later works, partially written at Adelaide and continued at Oxford, included *The Influence of Law on Sea Power* (1975),[32] and *The International Law of the Sea* (1982) (published posthumously after his untimely death in 1978).[33] The latter works remain well known and widely consulted to this day. O'Connell's teaching at Adelaide greatly influenced his students,[34] and he has been succeeded by an impressive group of international lawyers, including Ivan Shearer,[35] James Crawford (later the second Australian judge elected to the International Court of

25 Donald Kerr, 'The Judicial Interpretation of the Constitution of the Commonwealth' (LLD Thesis, University of Adelaide, 1919).

26 Donald Kerr, *The Law of the Australian Constitution* (Law Book, 1925).

27 William Anstey Wynes, 'The Legislative and Executive Powers of the Commonwealth and States under the Commonwealth of Australia Act' (LLD Thesis, University of Adelaide, 1933).

28 W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 1936).

29 P Brazil, 'Legislative, Executive and Judicial Powers in Australia by W Anstey Wynes, LLD, of the South Australian Bar' (1977) 8(3) *Federal Law Review* 371. In contrast, and perhaps uncharacteristically, John Bray's 'Bankruptcy and the Winding Up of Companies in Private International Law' (LLD Thesis, University of Adelaide, 1937) was not subsequently published, and Michael Kirby notes that Bray 'later admitted ruefully that he had never once been able to put his thesis, for which he was awarded the rare LLD degree, to practical use': Michael Kirby, 'Book Review: John Jefferson Bray — A Vigilant Life' (2016) 37(2) *Adelaide Law Review* 537, 539.

30 DP O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967) vol 1–2.

31 DP O'Connell, *Richelieu* (Weidenfeld and Nicolson, 1968).

32 DP O'Connell, *The Influence of Law on Sea Power* (Manchester University Press, 1975).

33 DP O'Connell, *The International Law of the Sea*, ed IA Shearer (Clarendon Press, 1982–84) vol 1.

34 IA Shearer, 'Daniel Patrick O'Connell (1924–1979)' in *Australian Dictionary of Biography*, vol 15 (Melbourne University Press, 2000).

35 See, eg, the tributes collected in (2019) 40(2) *Adelaide Law Review*.

Justice), Hilary Charlesworth (later the third Australian judge elected to the International Court of Justice), Judith Gardam, Dale Stephens, Rebecca LaForgia, and Matthew Stubbs.[36]

The steady expansion of the Adelaide Law School's academic staff (and students) from the 1950s onwards means that its research contributions have become substantially broader. The pieces in this special issue provide insights into some of the key contributions that the Adelaide Law School's research has made. The holders of Adelaide Law School's Research Chairs give another indication of some of the key contributors. The Bonython Chair in Law[37] was established in 1926 as part of the Golden Jubilee celebrations of the University of Adelaide.[38] It would later be followed by the John Bray Chair,[39] established in 1990,[40] and the Dame Roma Mitchell Chair,[41] established in 2007. The 1960s also saw the establishment of the *Adelaide Law Review* under the initial leadership of Dean Norval Morris and Alex Castles. The *Review* has evolved over its 60 plus year history with a shift to a focus on the publication of more 'extensive and holistic examinations of areas of law informed by a greater theoretical critique', reflecting 'an increasing maturity and broadening perspective in the legal scholarship published in the *Review*'.[42]

This special issue serves as a testament to the Adelaide Law School's enduring legacy in legal research and its continued relevance in a rapidly evolving legal landscape. Through a diverse array of scholarly contributions, this special issue

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36 See, eg, Stubbs (n 1) 9.

37 The Bonython Chair in Law has been held by:

Arthur Campbell (1926–49)
(Sir) Richard Blackburn (OBE) (1950–57)
Norval Morris (1958–61)
Arthur Rogerson (1964–78)
Alexander Castles (1982–94)
Adrian Bradbrook (1996–2011)
Ngaire Naffine (2012–20)
Melissa de Zwart (2021)
Paul Babie (2021 to present).

38 Edgeloe (n 1) 28.

39 The John Bray Chair has been held by:

Marcia Neave (AO) (1990–91)
Adrian Bradbrook (1991–95)
Hilary Charlesworth (AM) (1995–98)
Paul Fairall (2002–06)
Andrew Stewart (2007 to present).

40 See, eg, Ian Leader-Elliott, 'Norval Morris and the "New Manslaughter" in the *Adelaide Law Review*' (2019) 40(1) *Adelaide Law Review* 75, 86 n 79.

41 The Dame Roma Mitchell Chair has been held by:

Rosemary Owens AO (2007–15)
John Williams AM (2015 to present).

42 Stubbs (n 1) 6.

explores the historical significance of Adelaide Law School's research, celebrates its achievements, and reflects on its enduring values and principles.

IV Articles Published in this Special Issue

The articles featured in this special issue encompass a wide spectrum of legal scholarship, situating the Adelaide Law School in its historical context, demonstrating its strengths in both common law and critical analysis, and addressing Adelaide Law School's ongoing relationship to South Australia and to the reform of the law in its home State. Each contribution offers a unique perspective on the Adelaide Law School's legacy and its enduring impact on legal scholarship.

Bookending this special issue are two distinguished addresses — delivered, respectively, to new students at the commencement of Adelaide Law School's 140th year, and to graduating students who completed their degrees at the end of its 140th year. In his opening oration, Justice Mark Livesey, President of the Court of Appeal of South Australia, explores the founding of the Adelaide Law School, its enduring connections with the legal profession in South Australia, its ongoing role in promoting law reform, and reflects on the contributions of some of its exceptional alumni. Drawing upon anecdotes and achievements from graduates who have gone on to careers ranging from the judiciary to politics to the media, his Honour emphasises the diverse opportunities available to Adelaide Law School graduates, and their capacity to make a positive contribution to society.

Adrian Tembel's graduation oration highlights the importance of Adelaide Law School's graduates to South Australia and its community. A passionate advocate for the possibilities that lie ahead for South Australia, Tembel highlights the role that Adelaide Law School has played as 'a vital source of strength' for its home State, and encourages graduates to pursue opportunities to contribute to the building of a prosperous future for South Australia. There is considerable synergy between Adrian's oration and the strategic ambition of the new Adelaide University to 'enable South Australia to thrive'.[43]

This special issue also features a book review by Paul Babie of John Waugh's *Adelaide Law: A History of the Adelaide Law School*.[44] This serves as a fitting introduction to Waugh's important new work, one which I hope will give readers a sense of the value of this new history of the Adelaide Law School. I encourage everyone associated with the School to read Waugh's book and reflect on the contributions made by the Adelaide Law School over its first 140 years, taking both inspiration and guidance for the future.

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43 'A New for Purpose University: For a Better Australia', *Adelaide University* (Report, 2024) 11 <https://adelaideuni.edu.au/siteassets/docs/au-strategic-ambition-and-direction-2024-34.pdf>.

44 Waugh, '*Adelaide Law: A History of the Adelaide Law School*' (n 3).

Adelaide Law School's proud tradition of scholarship in legal history is continued by Emeritus Professor Wilfrid Prest's contribution 'Law Reform and Legal Change in Augustan England'. He provides an overview of how law reform has been viewed by the historians of early modern England, noting how the English Civil Wars of the 1640s had subjected the legal structure at the time to an unprecedented level of criticism and agitation for progressive change. Prest concludes with a brief assessment of the attempts to reform English law between the Glorious Revolution of 1688–89 and the ultimate accession of King George III in 1760. Law reform remains an equally important task today, and one to which Adelaide Law School has made substantial contributions over its 140 years, a proud tradition now carried on by the South Australian Law Reform Institute based at the School.[45]

The theme of reform continues in Emeritus Professor Christopher Symes' contribution 'Theory and Influences Found in Australian Insolvency Law'. He reflects on some of the influences on insolvency law from the 19th century until today, and the ways in which the alumni of the Adelaide Law School have contributed to these developments. Starting with a brief exploration of the theoretical position of insolvency law in Australia, Symes also goes beyond the State border to consider the many others who have influenced Australian insolvency law and practice, which is now considered one of the world's best examples in this area of law.

Insolvency is also the focus of Andrew Keay's contribution 'The Impact of *Sequana* on the Directors' Obligation to Consider Creditor Interests in Financially Distressed Companies: Was it Worth the Wait?' Keay, an LLB graduate of Adelaide Law School and now Professor at the University of Leeds, explores the United Kingdom Supreme Court's long-awaited and wide-ranging judgment in *BTI 2014 LLC v Sequana SA*,[46] its first regarding the obligation of directors to consider creditor interests when their company is in financial distress. Reviewing the main points decided in *Sequana*, and the plethora of earlier related cases in both Australia and the United Kingdom, Keay identifies the exact impact of the judgment on the law as it relates to directors' obligations and investigates whether the wait for the judgment has been worth it.

Emeritus Professor Geoffrey Lindell AM and the Honourable Christopher Sumner AM then take us in the direction of public law with their contribution 'The Suggested Effect of a South Australian Parliamentary Vote of No Confidence in a Minister: Is it Uncertain?' They examine how Westminster parliamentary principles — especially collective responsibility and responsible government — apply in the political systems of the Australian Commonwealth. In particular, Lindell and Sumner consider the potential consequences of a South Australian parliamentary vote of no confidence in a single Minister, including whether or not the Minister would be expected to resign. This piece also reminds us of the enduring contribution made by Adelaide Law School to constitutional law scholarship.

45 A special forum marking the first decade of the South Australian Law Reform Institute is published in (2022) 43(1) *Adelaide Law Review*.

46 [2022] 3 WLR 709.

In one of two important conceptual pieces, Emerita Professor Rosemary Owens AO examines the question 'Are Labour Rights Human Rights?' She explores the conventions, protocols, and recommendations of the International Labour Organization in order to situate its work within the wider body of human rights discourse. Building on the historical similarities between the areas of labour law and human rights law, Owens argues that there can be a productive interaction between labour law and human rights, and that labour rights are — and should be conceived of as — human rights. She concludes with a reflection on the implications of this for the future of legal education in Australia, reminding us of the essential relationship between teaching and research.

Emerita Professor Ngaire Naffine in her piece 'Policing the Legal Person: How John Finnis and Other Jurisprudential Figures Continue to Unperson Women' reflects on the history of how the common law has regarded legal personhood, and in particular its failures to recognise women's legal personhood. Drawing upon the institutional hurdles faced by the historical movements to recognise women as legal persons, as demonstrated by past case law such as the 'Persons Cases', Naffine examines how this forms part of the wider failure to recognise and evaluate entrenched patriarchy in our law, jurisprudence, and academic commentary. She reminds us of the importance of a critical lens in legal analysis, and mounts a compelling case for a continuing focus in legal scholarship on women as legal persons.

V Conclusion

As we celebrate our 140th anniversary, we also look towards the future with a renewed commitment to legal research and scholarship that contributes to creating just and equitable legal and regulatory solutions to the challenges that face society globally. The Adelaide Law School's 140-year history serves as a source of inspiration for the future, reminding us of the enduring importance of legal scholarship in building more robust legal frameworks, and a more just and equitable society. When we commenced the celebration of our 140th anniversary, the University of Adelaide was in discussions with the University of South Australia to explore the feasibility of the merger of the two institutions,[47] in response to the policy which had been adopted by the State Government to explore university amalgamations in South Australia.[48] The two University Councils reached agreement in June 2023 and the legislation to establish the Adelaide University was passed in December 2023.[49]

47 'Statement of Cooperation on Creating a New University for the Future in South Australia', *Adelaide University* (Statement, December 2022) <https://adelaideuni.edu.au/siteassets/docs/future-university-statement-of-cooperation.pdf>.

48 'A South Australian University Merger: For the Future', *South Australian Labor* (Policy Document, 2023) <https://sa.alp.org.au/wp-content/uploads/2023/07/South-Australian-University-Merger.pdf>.

49 *Adelaide University Act 2023* (SA). Most of the Act entered into force on 8 March 2024: 'Adelaide University Act (Commencement) Proclamation 2023' in South Australia, *South Australian Government Gazette*, No 90, 14 December 2023, 4129, 4135.

The Adelaide Law School now looks forward to a new era as part of the Adelaide University, building on our 140-year tradition of legal scholarship and excellence, contributing to legal and multi-disciplinary research that strengthens and diversifies the South Australian and national economies, and contributes to finding solutions to the array of complex and pressing problems that face society globally. Legal research is crucial to finding solutions to the challenges of sustainability, economic security, societal wellbeing and effective deployment of technology and innovation and to shaping a future we can look forward to while leaving a history of which to be proud.

*Mark Livesey**

OPENING ADDRESS TO STUDENTS AT THE COMMENCEMENT OF THE 140TH YEAR OF THE ADELAIDE LAW SCHOOL

I Introduction

Welcome and congratulations on your acceptance into the Adelaide Law School.

I understand that for many of you this is your first week at university. That you are here, attending in person, is a very good start. Now that the pandemic has abated, I encourage you all to come into the Ligertwood Building during your degree whenever possible. You will be surprised at how much more you will pick up interacting in person, compared with interaction over a backlit screen.

It is only fair to warn you — whilst there is a great deal that you know you do not know anything about, there is much, much more that you do not know that you do not know. As United States Defence Secretary Donald Rumsfeld said in February 2002, when asked for evidence that Saddam Hussein tried to supply weapons of mass destruction to terrorist groups:[1]

> There are known knowns — there are things we know we know … We also know there are known unknowns — that is to say, we know there are some things we do not know. But there are also *unknown* unknowns, the ones we don't know we don't know.

As new law students, there is a lot to learn. I will try to assist you with some of the unknown unknowns. I will speak to you today about the creation of the Law School, its close connection with the legal profession of South Australia, particularly the Supreme Court, as well as some of its remarkable alumni. I will conclude with some reflections and observations for you to consider about the future.

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* President of the Court of Appeal of South Australia.

This is an edited version of the opening address given to commencing students of the Adelaide Law School in February 2023.

1 Dan Zak, '"Nothing Ever Ends": Sorting Through Rumsfeld's Knowns and Unknowns', *Washington Post* (online, 1 July 2021) <https://www.washingtonpost.com/lifestyle/style/rumsfeld-dead-words-known-unknowns/2021/07/01/831175c2-d9df-11eb-bb9e-70fda8c37057_story.html> (emphasis in original).

II A Brief History of the Adelaide Law School

This year we celebrate the 140th anniversary of the establishment of a law school in the University of Adelaide on Tuesday, 3 April 1883. This is amongst the oldest law schools in Australia, having opened after the Melbourne Law School but before the Sydney Law School, and not quite 10 years after this university was founded in 1874.

When the Adelaide Law School was established in 1883, the colony of South Australia had been founded less than 50 years previously when in 1836 around 500 colonists came to the Adelaide Plains where the Kaurna People, the traditional owners whom we acknowledge and to whom we pay our respects, had lived for thousands of years.

The *Constitution Act 1934* (SA) ('*Constitution Act*') has, since 2013,[2] recognised that when the Parliament of the United Kingdom in 1834 passed a Bill to erect South Australia into a British Province and to provide for its colonisation and Government, by Letters Patent dated 19 February 1836, this all occurred without proper or effective recognition, consultation or authorisation of the Aboriginal peoples of South Australia.

Needless to say, that was not a consideration for many in 1883.

Nonetheless, the establishment of a law school was a milestone for the legal profession and the people of South Australia.

The years 1850 to 1880 were turbulent and dramatic.

With the passage of the *Constitution Act* in 1855, the colony achieved self-government and a degree of suffrage that was remarkable for the time. It was in this period that the notorious Justice Benjamin Boothby started to question colonial laws and the appointment of local Queens Counsel, before he was removed from office. The population of the colonists in this period doubled to around 250,000. Mining and wheat exports were profitable to a degree that was hard to imagine in a colony which verged on bankruptcy during the early 1840s. The first German immigrants had arrived and commenced winemaking in, amongst other regions, the Barossa Valley. Many of the fine buildings that now adorn North Terrace were built to house the new Parliament, the State Library, the Art Gallery and the Mitchell Building, then the centrepiece of the University of Adelaide.

The establishment of a law school was a clear sign of the pride, prosperity and confidence of South Australians. All of this was soon to be tested by the financial crises of the late 1880s and early 1890s — as Federation was being discussed — a century before similar problems re-emerged in the wake of the crash of the State Bank of South Australia in 1991.

2 *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* (SA) item 3.

The establishment of the Adelaide Law School represented a remarkable achievement for Sir Samuel Way, who served as Chief Justice between 1876 and 1916.

Way was the University's Vice-Chancellor between 1876 and 1883 and, from 1883 he served as Chancellor until his death in 1916. It is Way's statue that greets you at the North Terrace entrance to the Law School. The Sir Samuel Way building on Victoria Square houses the District Court and most of the serious criminal proceedings in this State.

It was Way and the other two Supreme Court judges — Sir James Penn Boucaut and Richard Bullock Andrews — who had negotiated with the University Council regarding the structure of the degree from late 1882.

Within only a few months the lecturers were appointed, the course was designed, the timetables were set, and the law library was acquired. Before the first 24 law students climbed the stairs to the first floor of the Mitchell Building just before 9:00am on 3 April 1883, the legal education of South Australian lawyers, as regulated by the Supreme Court, had comprised five years of articles followed by a handful of examinations. After a transition period, the new degree of Bachelor of Laws spanned three years, backed by another three years of articles.

Way is famous for rejecting an invitation to join the new High Court. He had said derisively that the High Court 'was no more needed than the fifth wheel to a coach'.[3] When he refused a seat on that Court in 1906, he explained that he was not prepared to 'tramp about the Continent as a subordinate member of the itinerant tribunal'.[4] It is ironic that since Way's refusal nearly 120 years ago a South Australian has not yet been appointed to the High Court. Way was much more interested in his appointment to the Judicial Committee of the Privy Council, where he heard appeals from India, China, South Africa, Jamaica and New South Wales in 1897, as well as the baronetcy he was awarded in 1899.[5]

It is a notable feature of the connection between the University and the Supreme Court that for most of the period between 1883–1983, the Chancellors of the University were all Chief Justices, being Way, Sir George Murray (1916–42), Sir Mellis Napier (1948–61) and Dr John Bray (1968–83). If you are interested, you can see their portraits on the eastern wall of Courtroom One of the Supreme Court on the southern side of Victoria Square. The Ligertwood Building is named after Sir George Ligertwood, a Supreme Court judge and Chancellor of this University during the 1960s before Bray.

3 J J Bray 'Way, Sir Samuel James (1836–1916)' *Australian Dictionary of Biography* (Web Page, 2006) <https://adb.anu.edu.au/biography/way-sir-samuel-james-9014>.

4 Ibid.

5 Ibid.

From the outset, all of the Supreme Court judges were members of the Law Faculty and they approved the appointment of examiners. The close relationship with the Supreme Court ensured that the degree had a 'thoroughly practical character'.[6]

All law students were expected to have matriculation standard Latin, a requirement until the late 1950s, and their first year featured Roman Law and Property Law, the second featured Jurisprudence, Constitutional Law and Obligations (including the Law of Contract). The final year students studied International Law, Wrongs (both civil and criminal) and Procedure.

The formal connection with the Supreme Court remained until the Faculty of Law was abolished in 1996.

It is difficult to imagine it now, but for a very long time there was only one full-time law professor who was assisted by visiting lecturers, usually judges and members of the legal profession. The law students were educated in this way in the Mitchell Building until 1959. Numbers in the Law School varied between 20 and 50 students.

The active role of the legal profession in the formal education of lawyers remained a consistent feature until the Law School's rapid expansion in staff and students during the 1960s and 1970s when the faculty moved to the Ligertwood Building.

Notable visiting lecturers included Chief Justices Sir George Murray and Dr John Bray, as well as Dame Roma Mitchell, Dr Howard Zelling and the Hon Andrew Wells. These lawyers later enjoyed distinguished careers on the Supreme Court. There were many, many other visiting lecturers.

Whilst women attended the Adelaide Law School from its early days, it was not until 1917 that Mary Kitson graduated and was admitted to the Supreme Court. It was not until the 1960s that Dame Roma Mitchell became the first female silk and then the first female Supreme Court judge in Australia. Later she served here as the first female Chancellor and State Governor.

The first Indigenous woman to graduate was Professor Irene Watson, now Pro Vice Chancellor: Aboriginal Leadership and Strategy at the University of South Australia.

By the mid-1980s, there were more women than men studying law here. That remains the case.

I recall being in a similar position to where you all sit today. Professor Simon Palk was the Acting Dean who welcomed the new students in 1982 with the warning that the law was a wonderful profession but there were no jobs. Fortunately, there were plenty of jobs by the time I finished my training in 1986 when I commenced as a

6 Victor Allen Edgeloe, 'The Adelaide Law School: 1883–1983' (1983) 9(1) *Adelaide Law Review* 1, 3.

Judge's Associate in the Supreme Court. There are now many job opportunities here in a wide range of careers.

When I attended this Law School during the 1980s, the Hon Kevin Duggan was a visiting lecturer in Criminal Procedure. Kevin is an urbane, stimulating speaker, who wittily brought to life what might otherwise have been a dry topic. As with a number of the other lecturers I have mentioned, he too was appointed to the Supreme Court where he served with distinction.

Whilst I studied law at Adelaide, we celebrated the Law School's centenary in 1983.

A memorable aspect of that centenary year was the residence of the Hon Gough Whitlam. My recollection is that he lectured on Constitutional Law for one term. By the time he was lecturing in 1983, he had only left politics five or six years before. Whitlam was a distinguished lawyer and silk before he entered politics. Lectures by a former Prime Minister of Australia were very popular. They were delivered without notes to a packed audience in the Elder Hall. Whilst Whitlam was an expert in Constitutional Law, he concentrated on his Government, the 1975 dismissal and the perfidy of Sir John Kerr. He was a commanding presence and a brilliantly entertaining speaker.

Other lecturers during my time at the Law School included Professor Horst Lücke, a tall, imposing man with a deep German accent who lectured on contracts in an academic gown. Another was Professor Alex Castles who published widely on legal history and media law. Professor John Keeler, an Englishman, lectured and published widely on torts; he was keen to tell us that he decided to remain in Adelaide because of Coopers Ale.

Many of the lecturers at this Law School have enjoyed brilliant careers. They include Sir John Salmond, a New Zealander who wrote treatises on *Jurisprudence or the Theory of Law*, the influential *Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* and *Principles of the Law of Contracts*.[7] These books are still in the library.

Another Dean was Sir Richard Blackburn, who left academia here to join the Supreme Court of the Northern Territory. Later, he was appointed Chief Justice of the Australian Capital Territory. He was a well-respected jurist who wrote *Milirrpum v Nabalco*,[8] which represented a starting point for the later decisions of the High Court in *Mabo v Queensland*[9] and *Wik Peoples v Queensland*.[10] Those cases recognised the native title of Aboriginal peoples.

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7 He has been ranked with Pollock in England and Holmes in the United States: HK Lücke, *A Short History of the Adelaide Law School* (Unpublished Manuscript) 5.

8 (1971) 17 FLR 141.

9 (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

10 (1996) 187 CLR 1.

Blackburn was, with Sir George Lush and Andrew Wells, later appointed by the Australian Government to be a Parliamentary Commissioner in a Special Commission of Inquiry to investigate the conduct of Justice Lionel Murphy, who was accused of attempting to pervert the course of justice whilst a member of the High Court.[11]

Another famous lecturer was Professor Daniel O'Connell, after whom a portion of the Law Library has been named. O'Connell was a major figure in international law around the world, who later taught at Oxford. The same is true of Professor James Crawford, who later became the Whewell Professor of International Law at Cambridge. Crawford was one of my lecturers here. He was truly formidable. He expected his students to have read the materials before tutorials. Be warned, some lecturers and tutors still expect that of students.

Crawford later supervised the final year of Dr Chris Bleby's Doctor of Philosophy ('PhD') thesis at Cambridge. Justice Bleby is now a judge on the Court of Appeal and remains involved with the University in the Law Reform elective.

After Sir Percy Spender, Crawford was the second Australian to be appointed to the International Court of Justice.

More recently, Adelaide Law School academics have developed enviable reputations in Constitutional Law and Legal History, Professor John Williams, and in Space Law, Professors Melissa de Zwart and Dale Stephens worked with academics in the United Kingdom and the United States to develop the Woomera Manual, which determines how terrestrial laws apply in times of armed conflict in outer space.[12]

After Natalie Wade left this Law School, she was awarded Australian Young Lawyer of the Year for her work on the South Australian Child Protection Systems Royal Commission. Heading her own firm, she won the 2021 Disabled Women in Business, People's Choice Award. Another recent graduate, Ben Mylius, has enjoyed a stellar academic career, gathering a Master of Laws from Yale. At Columbia he was awarded a Master of Arts and a Master of Philosophy and is currently undertaking a PhD while teaching environmental political theory with a focus on how to use stories to pursue a just, resilient and dynamic climate future.

As you may have gathered, historically this Law School has supplied most of the judges appointed to the Supreme Court, the Adelaide-based Federal and Family Courts and most of the members of the new Court of Appeal of South Australia, including its first President, the Hon Trish Kelly, and the current Chief Justice, the Hon Chris Kourakis.

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11 Sir George Lush, Sir Richard Blackburn and Andrew Wells, 'Parliamentary Commission of Inquiry: Re The Honourable Mr Justice Murphy' (1986) 2(3) *Australian Bar Review* 203.

12 Peter Rathjen, '135 Years: Reflections on the Past, Present and Future of Adelaide Law School' (2019) 40(1) *Adelaide Law Review* 47, 51.

The former Chief Justice, the Hon John Doyle, was an outstanding student at this Law School before being awarded the Rhodes Scholarship, which took him to Oxford. His daughter, Rachel Doyle, is a leading silk in Melbourne. His son, Sam, took silk at an early age and is presently a judge on the Court of Appeal. John's youngest son Ben, a King's Counsel, is in private practice at the Bar here in Adelaide, as is his youngest daughter, Hannah. All came from this Law School.

An alumnus who may surprise you is comedian and television personality Shaun Micallef. Shaun studied law here in the 1980s. I worked with him at an Adelaide law firm, Ward & Partners, during the late 1980s and early 1990s before fame lured Shaun away from the law. A surprising number of Shaun's productions portray his legal background.

Although the phenomenon of the lawyer–politician has waned, there are many former law students from this Law School who have distinguished themselves in politics.

At a state level, they include four Premiers — Henry Barwell, the Hon Don Dunstan, the Hon John Bannon and the Hon Jay Weatherill. The Hon Vickie Chapman became South Australia's first female Attorney-General and Deputy Premier. Apart from introducing the reforms which resulted in the establishment of the Court of Appeal, she was instrumental in reforming laws relating to discrimination, assisted dying and prostitution.

This Law School trained Australia's first female Prime Minister, the Hon Julia Gillard, as well as Australia's first female Foreign Minister, the Hon Julie Bishop, and Senator Penny Wong, the Foreign Minister and the Government's leader in the Senate. Senators Amanda Vanstone and Robert Hill studied here before serving as Federal Ministers.

The Hon Catherine Branson studied here. She is the current Chancellor of this University. She and the Hon John von Doussa were not only Chancellors of this University but they were both distinguished judges of the Federal Court who later presided over the Australian Human Rights Commission.

III Adelaide Law Reform

A particular feature of this Law School has been its contribution to law reform.

A former Dean, Professor Arthur Rogerson, was active in law reform after arriving here from Oxford in the 1960s. He assisted with Consumer Law reform which was taken up by the then Attorney-General and later Chief Justice, the Hon Len King. Rogerson ensured that a law school academic was on the Law Reform Committee and, after Rogerson was appointed to the District Court of South Australia, David Kelly and Alex Castles were founding members of the Australian Law Reform Commission during the 1970s.

Just over 10 years ago, the South Australian Law Reform Institute was established here under Professor John Williams and David Plater. It has published influential reports, including on LGBTQI discrimination[13] and surrogacy. This work allows students a unique experience. Similarly, law students have enjoyed the opportunity to work with me and other judges in intern placement programmes where they get to see how cases are considered, heard and decided by the courts.

IV Concluding Remarks

Whether you view your law degree as a starting point for practising the profession of the law, joining academia, going into politics or business, or simply getting a useful start in life, it will equip you with the means to do a great deal more than just earn a living. A law degree will help you to think critically and to communicate effectively.

A law degree will set you apart. That is so whether or not you ever practise law. I encourage you to recognise that being here, being in this Law School, is more than just about watching lectures online at double speed and cramming for exams, punctuated by the occasional 'pub crawl'. Consider why you are here, and what you expect from the experience.

You have the opportunity to understand and master aspects of the law. Do not expect that this will come to you easily or by osmosis. Learning to read, think and reason effectively takes effort and work, but it is worthwhile. You must recognise that the education you receive and the skills you learn here represent very powerful tools. The better skilled you are, the better you will wield those tools. When speaking or writing, strive to do so simply and clearly. Mooting and mock trials are worth trying because they help you to learn these skills under pressure.

You will become equipped to serve the community in a wide range of roles. Being able to guide and help others, whether clients, colleagues or friends, represents an important exercise in power. You are learning how to assist people to resolve some of life's most fundamental challenges and problems. You will have an opportunity to make a positive difference. You will, I expect, get great satisfaction from assisting others.

Do not overlook cultivating interests outside of the law, whether in the arts, or in literature, history, sport or whatever it is that interests you. This University offers many opportunities to do that. You have access to millions of resources through the Barr Smith Library and the Law Library. Go to these libraries. Exploit their resources. I urge you to take up opportunities to speak with your lecturers and tutors. You will find that most of them are only too willing to engage.

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13 'Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex': Australian Institute of Family Studies, *LGBTIQA+ Glossary of Common Terms* (CFCA Resource Sheet, February 2022).

Do not forget — each of the notable alumni I have mentioned were in exactly the same position as you are now, first year law students who are more than a little unsure about what comes next.

You are at the threshold of a number of exciting opportunities. There are many employment opportunities here in South Australia, as well as interstate and overseas, for hard working and able people. Whether it is in legal practice or elsewhere, taking on challenges in developing areas such as space law, gender equality, disability or climate change, you really are in a privileged position.

The Adelaide Law School and the University have a lot to offer. You will learn a great deal and make life-long friends. You should enjoy your time here but recognise that you should not waste your opportunities. You will enjoy your time more if you are able to take up these opportunities.

Since ancient times, the law has attracted bright and talented people.

I have had the privilege of seeing a number of students from this Law School over the years, whether when occasionally lecturing or when judging moots and other advocacy exercises. I must tell you that I have usually been very impressed. The calibre of the students I have seen coming into the profession has given me confidence and pride. There are some very talented and capable people moving through this Law School.

Make no mistake, you have a bright future. Again, congratulations and welcome to the Adelaide Law School.

*Ngaire Naffine**

POLICING THE LEGAL PERSON: HOW JOHN FINNIS AND OTHER JURISPRUDENTIAL FIGURES CONTINUE TO UNPERSON WOMEN

I Introduction: The Persons Cases

The foundational legal question, which has been my abiding interest, is who is law's subject, who is its person? Who can bear legal rights and duties and therefore act as a person in law? Who does law take its central character to be? Who is it designed for and around?[1] This article forms part of a larger project about law's person, which began with an inquiry into the 'Persons Cases', a series of mainly English decisions from the 1860s to the 1920s, which openly asked whether women were persons for a number of purposes — the franchise, the exercise of various public offices and even for admission to universities and the professions.[2] The governing legislation said 'persons' could assume these offices.[3] The courts

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1 An early book, Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen and Unwin, 1990) represented the beginnings of my inquiry into the characteristics of law's subject. There, I observed that 'he' was not a universal person, as purported, but rather a white middle class man of the market. In 1997, a co-edited collection of essays considered how different branches of law sexed its subject: Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC, 1997). I began a more focussed analytical exploration of the concept of the legal person in Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2002) 66(3) *Modern Law Review* 346, and then expanded on these ideas in Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009).

2 A helpful and now classic overview of these cases is to be found in Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson, 1978).

3 See, eg: *Bebb v Law Society* [1914] 1 Ch 286 ('*Bebb*'). Here, Gwyneth Bebb applied to the Law Society to sit the preliminary exams which would allow her to become a solicitor, but was refused. She had already achieved top marks in law at Oxford University, but that University did not award degrees to women. Section 2 of the *Solicitors Act 1843*, 6&7 Vict, c 73 ('*Solicitors Act*') stated that 'no Person shall act as an Attorney or Solicitor … unless such Person shall after the passing of this Act be admitted and enrolled and otherwise duly qualified to act as an Attorney or Solicitor, pursuant to the Directions and Regulations of this Act'. Bebb brought an action against the Law Society, asking that she be declared such a 'Person'. The High Court and then the Court of Appeal confirmed that as women had never been attorneys, they were not 'persons' for the purposes of the *Solicitors Act* and so were rightfully excluded from sitting the solicitors' exams.

decided that women were not persons for these purposes. Only men were the right kinds of being to be persons.[4]

What is often treated as the final Persons Case, *Edwards v Canada*,[5] an English Privy Council decision out of Canada in 1929, concluded that, yes, women were persons who could sit in the upper house of the Canadian Parliament. According to Lord Sankey LC, the 'exclusion of women from all public offices is a relic of days more barbarous than ours'[6] and 'to those who ask why the word [persons] should include females the obvious answer is why should it not'.[7] This is almost a glib reply to the question Lord Sankey LC posed to himself. There ensued celebration across the Atlantic.[8] Then the story of the personification of women fell silent.

This was the reason for my initial interest in the recognition of women as legal persons: I wanted to know why so little happened in legal thinking about law and its subject, the stuff of basic jurisprudence, when the population of legal persons supposedly doubled. The general impression conveyed at the time, the prevailing explanatory story,[9] was that women had undergone some sort of benign modernisation process; they had caught up with men; they had matured and so they were at last let into public life and graciously ushered into law, as legal persons.[10] They were now assimilated into law, and little more needed to be done. Law and legal theory could proceed as normal.

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4 *Chorlton v Lings* (1868) LR 4 CP 374 decided that women could not vote in Manchester because of a legal incapacity due to their sex; *Beresford Hope v Lady Sandhurst* (1889) 23 QBD 79, 22 excluded women from election to the London County Council; *Nairn v University of St Andrews* [1909] AC 147 upheld the exclusion of women from voting for a parliamentary representative for the universities of St Andrews and Edinburgh; *Bebb* (n 3) endorsed the refusal of the Law Society to enrol women; *Viscountess Rhondda's Claim* [1922] 2 AC 339 disallowed Lady Rhondda from sitting in the House of Lords; finally in *Edwards v A-G (Canada)* [1930] AC 124 ('*Edwards v Canada*'), the Privy Council recognised women as persons able to sit in the Upper House of the Canadian Parliament.

5 *Edwards v Canada* (n 4).

6 Ibid 128.

7 Ibid 138.

8 See the discussion of the reception of the case in Sachs and Wilson (n 2) p 40. Moreover, the so-called Persons Case of *Edwards v Canada* (n 4) is celebrated annually in Canada and there is a set of bronze statues of 'the famous five' (Emily Murphy, Henrietta Muir Edwards, Nellie McClung, Louise McKinney and Irene Parlby), who initiated the case, outside the Canadian Parliament in Ottawa.

9 And on the importance of control of the explanatory story or system by patriarchal forces over the Longue duree, see Gerda Lerner, *The Creation of Patriarchy* (Oxford University Press, 1986).

10 This point was well made in Sachs and Wilson (n 2). See also Albie Sachs, 'The Myth of Judicial Neutrality: The Male Monopoly Cases' (1975) 23(1) *Sociological Review* 104.

II Legal Authorities Opposing Women as Persons

Missing from this benign reform story were the very active efforts of some of the leading men in law to keep women out of the public square and their open displays of contempt at the very idea that women could take an equal part in public life and public decision-making. James Fitzjames Stephen (Virginia Woolf's uncle) and Albert Venn Dicey (Virginia Woolf's cousin once removed) were two of the more prominent legal figures, actively and publicly, working to keep women out of public life. Both were highly exercised by the argument advanced by John Stuart Mill in 1869 that men had positively subjugated women through law and that this was a shameful abuse of male power.[11]

In *The Subjection of Women*, Mill offered his powerful challenge to patriarchy. He declared that

> the legal subordination of one sex to another — is wrong in itself, and now one of the chief hinderances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.[12]

Mill described 'the law of marriage' as 'a law of despotism',[13] with 'the wife [as] the actual bond-servant of her husband':[14]

> Above all, a female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse her master the least familiarity. Not so the wife: however brutal a tyrant she may be unfortunately chained to — though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him — he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function, contrary to her inclinations.[15]

Stephen dedicated a third of a book to a denunciation of Mill and his argument.[16] Dicey wrote an entire book declaring women unfit for public office.[17] And yet the reputations of these legal figures held good. Sustained opposition to women, and the effort to keep women out of public life, did not harm them. These oppositional moves caused them almost no reputational damage. In fact, their anti-woman sentiments

11 See below nn 16–17 and accompanying text.

12 John Stuart Mill, *The Subjection of Women* (JB Lippincott, 1869) 5.

13 Ibid 51.

14 Ibid 53.

15 Ibid 56.

16 See James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Holt and Williams, 1873).

17 See AV Dicey, *Letters to a Friend on Votes for Women* (John Murray, 1909).

are still hardly mentioned in their official biographies and encyclopaedia entries.[18] What they said about, and against, women did not seem to matter; certainly these ideas about the gender hierarchy were not factored into their general writings on law, equality and the legal individual, and then tested for their internal consistency.

With the last Persons Case, women were ushered into law and then went missing as persons, in their own right. Women were both formally recognised as legal persons and yet overlooked as new legal characters: they were visible and invisible. There was no felt need to re-examine the characters of the legal person or legal individual, with their fundamental person-creating rights, even though men had explicitly been the persons in contemplation of law, as the Persons Cases made explicit.

III Keeping the Person Male

A powerful liberal ideology gave richness to the male legal character, who remained the template for law's person — he was firmly bounded and had bodily integrity;[19] he was self-governing, even self-owning.[20] He was an autonomous, rational agent, other excluding and property owning. And a broad range of laws had shored up these fundamental personifying rights of men, from criminal to tort to contract law to property law.[21] Did this set of ideas about the person need to be reconsidered and renegotiated, now women were considered to be more complete legal subjects? Or did they simply apply straightforwardly to women?

What about the fact that women's biology had distinctive features, including the personal capacity to divide and reproduce, which was vital for the perpetuation of the species? For the sake of everyone, women's boundaries needed to be porous for reproduction and so women were not firmly bounded as the ideal man was said to be. So what was to be made of this? These almost existential problems of personhood were not identified, and these questions were not asked, and so they did not disturb the main body of jurisprudence. The prevailing explanatory story was that business as usual could resume with the inclusion of women in the population of legal persons. We were now all persons and legal individuals, and jurisprudence did not need to attend to its explicitly masculine past.[22]

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18 For example, a new intellectual biography of Dicey offers minimal commentary on Dicey's opposition to the exercise of public power by women. See Mark D Walters, *AV Dicey and the Common Law Constitutional Tradition* (Cambridge University Press, 2020).

19 See Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30(1) *Representations* 162.

20 See Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25(2) *Journal of Law and Society* 193.

21 See Naffine and Owens (n 1).

22 The view that general jurisprudence can proceed independently of the fact of profound gender bias within the institutions of law is advanced in Leslie Green, 'Gender and the Analytical Jurisprudential Mind' (2020) 83(4) *Modern Law Review* 893. For the

The perpetuation of two sets of laws directed at women, well after the supposed end of the Persons Cases, however, suggested that women had not been brought into law as full liberal legal subjects and that their personhood was still precarious. First, women were not granted strong rights to exclude others from their person — considered a fundamental legal right for the male person. Women's boundaries were penetrable. Indeed, women if married were expected to remain open and sexually available to their husbands and their non-consent was legally irrelevant (hence the legality of rape in marriage until the 1990s).[23] Second, women were not ceded bodily self-government, in the sense of control over their basic reproductive functions, again a fundamental right of persons, according to Mill with his harm principle. As Mill avowed:

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. … The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[24]

If pregnant, whether by choice or not, women ceased to be sovereign over themselves. Rather, they were subjected to state laws which brought their efforts to discontinue an unwanted pregnancy into the realm of homicide law. Such laws governing women, if pregnant, were treated as separate, special and difficult laws giving rise to strong controversy.[25]

As the South Australian Law Reform Institute ('SALRI') observed in its recent report on the law of abortion:

> Conversations regarding abortion often give rise to sincere, deeply felt and often conflicting views and it is impossible to reconcile the competing views that are held in

contrary view, that society and culture matter, that one cannot make sense of law outside of time and place, see Margaret Davies, *Law Unlimited* (Routledge, 2017). See also: Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016).

23 For a sustained analysis of the husband's immunity from rape prosecution and its accepted place within criminal jurisprudence, see Ngaire Naffine, *Criminal Law and the Man Problem* (Hart, 2020).

24 John Stuart Mill, *On Liberty* (John W Parker, 2nd ed, 1859) 22.

25 See, eg, Sally Sheldon and Jonathan Lord, 'Care not Criminalisation: Reform of British Abortion Law is Long Overdue' (2023) 49(8) *Journal of Medical Ethics* 523.

> this area. SALRI notes that, on occasion and throughout Australia, the debate about abortion has been marked by intemperate, even extreme, language.[26]

Abortion law has tended not to be treated as general law, that is law which can tell us about law in general, and so it has been of little interest to general jurisprudence. But given that abortion law is law governing human reproduction, why? Jurisprudence did not ask this question. These legal difficulties with the personhood of women were not treated as problems for the general theorists of law to sort out and solve, perhaps to remake their subject.

Worse still, the continuing incursions into women's legal lives, because of their female anatomy, were openly acknowledged but then defended by some leading legal figures. It seems that women's biology did matter to law, and it marked women out as lesser persons, who required greater State regulation than men and fewer freedoms. Another generation of legal experts came forward to say that women were the wrong kinds of being for basic personifying rights, because they were women with women's bodies. And again, these assertions did these legal experts little reputational harm.

Two leading legal figures, closely associated with the Adelaide Law School, advanced views that 'unpersonned' women. One was Norval Morris, former Dean of Adelaide Law School, later Dean of Chicago Law School, who offered a sustained defence of the husband's right to rape his wife. The other was John Finnis, who remains a prominent member of the legal pantheon despite his steadfast opposition to women having almost any right to make their own decisions about their pregnancy.

A *Norval Morris*

Norval Morris lived from 1923 to 2004 and was Dean of Adelaide Law School from 1958 to 1962. He was a distinguished and progressive criminal lawyer and criminologist, advancing the rights of the legally disadvantaged, especially prisoners. And yet in the 1950s, not long before he became Adelaide's Dean of Law, Morris openly and explicitly defended the husband's exemption from rape prosecution and even counselled the husband to override his wife's consent. Thus, he spoke on behalf of the husband against the sexual sovereignty of the wife. This caused no perturbation in general theory of law or criminal law. This is hardly surprising given that in England the leading criminal law theorist Glanville Williams was saying precisely the same thing and did so up to the 1990s.[27] Morris, writing with AL Turner, said that

> it must be conceded that the married couple are in law and in fact in a special position and that there are overwhelming reasons why the law of rape should not be applied in the same way to marital as to extra-marital intercourse. In the eyes of the Church,

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26 South Australian Law Reform Institute, 'Abortion: A Review of South Australian Law and Practice' (Report No 13, October 2019) 14 (citations omitted).

27 See my analysis of Williams in Naffine, *Criminal Law and the Man Problem* (n 23).

> the law, and, in general, the parties, marital intercourse is of the essence of marriage. Those who are married according to the traditional rites of the Church of England have this brought home to them in the words of the marriage service stating of marriage that 'it was ordained for a remedy against sin and to avoid fornication that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ's body'.[28]

The necessary legal consequences for the wife were then spelled out:

> Intercourse then is a privilege at least and perhaps a right and a duty inherent in the matrimonial state, accepted as such by husband and wife. In the vast majority of cases the enjoyment of this privilege will simply represent the fulfilment of the natural desires of the parties and in these cases there will be no problem of refusal. There will however be some cases where, the adjustment of the parties not being so happy, the wife may consistently repel her husband's advances.[29]

And then advice was offered to the husband:

> If the wife is adamant in her refusal the husband must choose between letting his wife's will prevail, thus wrecking the marriage, and acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings for rape.[30]

Morris was writing from the point of view of the husband. He was listening to and speaking to men as husbands. He was accepting and approving the rights of the husband and the respective duties of the wife and even giving tacit approval of the husband who proceeded without consent, should his wife refuse his sexual advances.

Morris said that the wife could be lawfully, forcefully sexually penetrated by the husband because a certain sexual order was embedded in marriage, to the point that such an act was within the normal bounds of the relationship. As a criminal law scholar, Morris had a strong clear orientation. He was speaking to married men about their rights with respect to their wives. He expected agreement, which is evident from his tone. And general theory of law went along with him. He spoke from the point of view of the husband; the point of view of the wife was missing. Anna Funder made this very point in *Wifedom* on the erasure of George Orwell's wife, Eileen, from his body of writing and from the biographies of Orwell.[31] Wives easily disappear from the narrative. Morris was not challenged by his peers because he was not going against general thinking.

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28 Norval Morris and AL Turner, 'Two Problems in the Law of Rape' (1954) 2(3) *University of Queensland Law Journal* 247, 259.

29 Ibid.

30 Ibid.

31 Anna Funder, *Wifedom: Mrs Orwell's Invisible Life* (Hamish Hamilton, 2023).

B *John Finnis*

I now turn to John Finnis, his general theory of law and his writings on personhood. Finnis too renders the personhood of women precarious. A little about Finnis first, who was born in 1940. Finnis was awarded a Rhodes Scholarship while at Adelaide Law School where he was awarded his first degree. He went on to study for his doctorate at Oxford. Finnis was supervised by HLA Hart who was to commission his book, *Natural Law and Natural Rights*,[32] published in 1980, which established Finnis' reputation as a legal theorist. He became a prominent character in the legal canon and stayed there. In 2017, Queen Elizabeth II appointed him honorary Queen's Counsel for his 'prolific and peerless contribution to legal scholarship'.[33] In 2023, King Charles made Finnis a Commander of the Order of the British Empire 'for services to legal scholarship'.[34] So my point is that Finnis is squarely within the pantheon of legal scholars.

In *Natural Law and Natural Rights*, Finnis argued that we are all entitled to the fundamental goods of life, which include life itself and also the ability to make decisions about how it should be lived (practical reasonableness) and law naturally should reflect and embody these rights.[35] So his theory is ostensibly applied to all human beings. But without too much searching, if you are looking, it becomes apparent that, within the logic of his theory, women must remain precarious persons for whom these goods can and should be legitimately removed by law.

Life is Finnis' first good, as he asserts in *Natural Law and Natural Rights*, but for Finnis 'people begin at their conception — neither earlier nor later'[36] when in his view an individual person comes into being, a being who must be protected at almost all costs. Immediately he compromises women as legal persons. For the woman, if pregnant now houses an 'unborn child',[37] as he calls the embryo. Her personhood is no longer the primary consideration. When conception has occurred, life in her uterus must be sustained at almost any cost to her. This immediately eclipses the personhood of the woman who has conceived this individual, this 'child'.

To the present day, Finnis has sustained a deep conviction in the essentially and exclusively heterosexual nature of marriage in which sexual intercourse should have an 'open[ness] to procreation'.[38] This is the fundamental form that intimate relations

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32 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1st ed, 1980).

33 Kevin Allen, 'Professor Emeritus John Finnis Made a Commander of the Order of the British Empire', *University of Notre Dame* (Blog Post, 6 January 2023).

34 Ibid.

35 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 100–27.

36 John Finnis, *Intention and Identity: Collected Essays* (Oxford University Press, 2011) vol 2, ch 16.

37 John Finnis, 'The Priority of Persons Revisited' (2013) 58(1) *American Journal of Jurisprudence* 45, 49.

38 Ibid 56.

must take, in his view, and it places men and women in highly orthodox positions and relations:

> The assault on social justice entailed by the epochal disconnect between sexual intercourse and procreation which is characteristic of our age … One of its most important elements obtains wherever same-sex relationships are held out by a society and its laws as marriages, that is, as publicly and privately approvable. For: approval of the pseudo-marital sex acts of same-sex couples, or of any of the many kinds of non-marital sex act, entails a kind of conditional willingness to engage in sexual activity in a way that is in truth non-marital, that is, in a way that does not allow the parties to the act to thereby actualize, express and experience their marriage as a committed, permanent, exclusive friendship *open to procreation*. Such willingness, while it endures, is incompatible with genuinely marital acts, and thus wounds the marriage of those couples one or both of whom has such a willingness, however remote and conditional.[39]

IV Women as Intermittent Persons

In Finnis' analysis of human reproduction and the laws which should govern it, women are effectively intermittent persons, because they must be open to procreation and at any moment, within a marriage, they might be carrying what he calls an 'unborn child'.[40] Thus, Finnis demands of women, but not of men, decisions and a mode of existence in which they cannot have the essential basic goods of persons: they cannot decide for themselves about how to live their lives. In Finnis' world for women, there is an expectation of sex without contraception (because marital sex should always be 'open to procreation' as he calls it) and then almost no possibility of termination of any resulting pregnancy (for abortion, he insists, is a variety of homicide); then birth and child care; and then this process all over again, and again.[41]

Thus, the personhood of women is most affected by Finnis' thinking, just when they begin to emerge as women, that is when pregnant; but this is when women are least in evidence as individual autonomous beings in his writing. For, consistently his focus has been what he calls the 'prenatal human individual' by which he means the embryo or foetus not the pregnant woman.[42] To Finnis, 'the essence and powers of the soul seem to be given to each individual complete … at the outset of his or her existence as such'.[43] And for Finnis this is the moment of conception when,

39 Ibid (emphasis altered).

40 Finnis, 'The Priority of Persons Revisited' (n 37) 49.

41 See above nn 37–8 and accompanying text.

42 John M Finnis and Robert P George, 'Brief of Amici Curiae in Support of Petitioners', Submission in *Dobbs v Jackson Women's Health Organisation* 597 US 215 (2022), 16 ('Brief of Amici Curiae').

43 Finnis, 'The Priority of Persons Revisited' (n 37) 48.

for the purposes of his analysis, the woman with the fertilised egg ceases to be an individual.

In fact, Finnis does not directly examine women as individuals or their personhood. Women as persons, indeed as individual women, are, paradoxically, least visible in Finnis' writing when he is actually talking about women. In Finnis' 60 years of writing about the meaning of life and how law should honour it, women if specified tend to appear as wives, married to men, within a sanctified institution, marriage, designed for procreation.[44] Here they should be ever ready for procreation, not interfering with life with contraception. Then, if and when pregnant, they are instantaneously designated 'mothers' of 'unborn children'. And the relevant laws that should govern them now are homicide laws, should they choose against pregnancy.

Indeed, Finnis tends positively to avoid any explicit talk of women as individuals and as persons. Rather, when he is considering the nature of human life and reproduction, women feature as 'the womb',[45] where the individual embryo (called an unborn child) resides, or as mothers and from the moment they become pregnant, when they are potentially the destroyers of embryonic persons, if allowed to do so, though the man who inseminated the woman is not held to account. Even though he argues for 'the priority of persons',[46] embryos are included in his population of legal persons, which immediately creates the problem for women's personhood, though this is never said.

It follows that Finnis' theory of law's person has fundamentally different implications for men and women, about which he says almost nothing. His theory creates an existential conundrum for women, as persons, if pregnant. The act of insemination has none of these effects for men. Finnis does not refer directly to this fact. Nor does he seem interested in it. His driving interest is to assert the personhood of the embryo and to bring that personhood into law.

So where are women and their personhood in Finnis' analysis? Women are necessarily suspended as individual persons the moment that one of their eggs is fertilised, and this is what they should be striving to achieve, for their proper place is in a heterosexual marriage where they should always be open to procreation. They should be ever ready, willing, and able to be suspended at any time. And because women if pregnant have always been problematic persons, this incoherence is not pointed out as a contradiction within his jurisprudence. There is therefore a missing step in Finnis' analysis and it is this necessary extinguishment of the individual woman the moment her egg is fertilised and her replacement by the embryo as the

44 See John Finnis, *The Collected Essays of John Finnis* (Oxford University Press, 2013) vol 1–5, which endeavour to integrate his work, canvassing such topics as 'the nature of divine revelation' and 'the morality of abortion'.

45 John Finnis and Robert P George, 'Equal Protection and the Unborn Child: A *Dobbs* Brief' (2022) 45(1) *Harvard Journal of Law and Public Policy* 927, 934.

46 Finnis, 'The Priority of Persons Revisited' (n 37).

morally and legally significant person. The point is there by necessary implication. He intends it but does not spell it out.

Finnis has moral absolutes which he says are simply in the world and divined by reason but they also rely heavily on Catholic theology, which he also makes clear.[47] Women bear the brunt of his moral absolutes as they must be willing almost unconditionally to create and bear life. The dramatically different effects of his theory on men and women remain unexamined. Women are not allowed their own life, to pursue as they wish. And yet a life of uncontrolled reproduction does not square with his basic goods. This contradiction is built into his theory but not challenged by mainstream theorists.

The analytical theorists of jurisprudence who invoke Finnis, as an important theorist of the legal canon, do not press the point about women's personhood. There is a forbearance, possibly out of respect for his theology. As Tamas Pataki has observed, 'religious toleration is largely a creature of secular humanism, and in its spirit the majority of critics manqué have simply declined to fire'.[48] Thus, mainstream theorists of law, in liberal spirit and out of respect for the religious, have often declined to criticise the contents of religious belief and indeed have treated such belief as intellectually respectable, even when it is discriminating and damaging to certain sectors of the population, especially women. For in Finnis' religious understanding of women, by necessary implication, they cease to be human individuals if pregnant and are no longer meant to be recipients of the basic goods. So the goods are male goods, which only the male individual can and should sustain. But this does not strike a false chord within analytical jurisprudence.

Why are the jurisprudential writers not saying this? Why is there no working out of the practical implications for men and women in Finnis' thinking? Perhaps because the silent understanding is that the goods need only work for men not women. This seems to be the inevitable logic. Women are notionally admitted to the public square; they can inhabit it like a man; but the idea of female inclusion starts and stops here. There is no further inquiry into the basic facts of human life and how they play out entirely differently for men and women, especially when they are within a heterosexual marriage. The general failure to consider the differences between male and female modes of reproduction leaves male physiology as the unstated form of the individual. And it leaves the way open for religious explanations of the facts of life, rather than science and embryology.[49]

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47 See, eg: John Finnis, 'Abortion is Unconstitutional', *First Things* (online, April 2021) <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional#:~:text=Plainly%2C%20there%20is%20an%20individual,equal%20to%20a%20born%20child.>; John Finnis, 'Abortion and Health Care Ethics' in Raanan Gillon (ed), *Principles of Health Care Ethics* (John Wiley, 1994) 547.

48 Tamas Pataki, *Against Religion* (Scribe, 2007) 11.

49 See Scott F Gilbert, 'Pseudo-Embryology and Personhood: How Embryological Pseudoscience Helps Structure the American Abortion Debate' (2022) 3(1) *Natural Sciences* 1.

Neither Finnis nor his followers spell out the precarious personhood of women in his general theory of law. It shows the ease with which women slip from view and Finnis takes full advantage of it.[50] With the work of Finnis, it is possible to observe the willingness of legal theorists to place him in and of the canon (as the theorist of natural law, who can authoritatively identify and delineate the basic human goods), while implicitly separating out his extensive writings on marriage, intercourse, procreation and abortion, though Finnis does not do this himself. He keeps all his ideas going in law reviews and books and conference papers. What he does not do is consider the consequences for the personhood of women and the legal protection of their basic goods if they are pregnant. There is a large missing part in his theory. In fact, women are necessarily ousted as humans requiring the basic goods. There is therefore a continuing division of humanity, with women as the special case of the human. While male and female sex and reproduction remain unexamined in their respective implications for the personhood of men and women, we have an epistemology of law and the polity which is based on a male individual.

So why have jurisprudential scholars accepted Finnis' claim that he is theorising the human being? It is probably because the exceptionalising of women and pregnancy is so normal. As a standard analytical practice, women if pregnant and the laws of abortion are readily set aside: they are about special people and special law. Reproduction is not built into the general theory of law or the theory of the person. And this is accepted by jurisprudential thinkers who still treat his work as foundational. Finnis can count on normal practice which is so close to his theology that little jars.

V Why Does Finnis Matter Now?

Finnis is one of my two exemplars of patriarchal thinking within law, which has been largely unquestioned by mainstream legal theorists, and Finnis, in particular, is known as a legal intellectual and theorist of considerable influence. But Finnis has not been an open intellectual. Rather, he has sustained the one explicitly conservative Catholic view on abortion and the nature of persons (that the foetus is the person of consideration, not the woman) for nearly 60 years.

There has been no scholarly doubt or revision in this aspect of his work. If anything, he has dug deeper into the past for his understandings of biology, human beings, morality and law, invoking Thomas Aquinas. But his reputation as a leading scholar, especially of legal personality, has been sustained. This matters for women, for law, and for jurisprudence.

In 2021, Finnis made good use of his continuing place in the legal canon when, with his former student, Robert George, he submitted an amici curiae brief to the United States Supreme Court in the case of *Dobbs v Jackson Women's Health Organization*

50 Funder kept finding this with the biographers of Orwell: see above n 31 and accompanying text.

('*Dobbs v Jackson*')[51] in which he declared that abortion should be considered a serious crime because life 'begins in contemplation of law'[52] at conception, at which point there is a child and a person and the woman immediately becomes a mother, and necessarily ceases to be an individual. Indeed, her existence, in Finnis' account, is subordinate to that of the foetus, unless she is in mortal danger. In his brief, Finnis takes us back to old and ancient ways of thinking about the legal subject, invoking William Blackstone and Thomas Aquinas.[53] While professing to be expert on legal personality, again he resists positive consideration of women and their legal personality, steering analysis away from any discussion of women as legal actors and persons, and the necessary conditions for their lives as individuals. Again, he does not openly consider women as individuals in law.

As we know, the United States Supreme Court reversed *Roe v Wade*.[54] The Supreme Court held 'that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives'.[55] This meant that the American states could remove the right to abortion as many were waiting to do, in anticipation of the judgment. In essence, the Court found in a manner which was consistent with the intentions of Finnis and George's amici curiae brief. We might note that Associate Justice Gorsuch, an appointment by Donald Trump, who spoke with the majority, was a former doctoral student of Finnis and that he was questioned about his relationship with Finnis at his confirmation hearing. Another Trump appointment, Associate Justice Barrett, was Finnis' colleague at Notre Dame University.

In his brief, Finnis does not discuss what this hoped for Supreme Court decision will do to the personhood of women. Generally speaking, he is uninterested in it. He presents himself to the Supreme Court as a general expert on legal personality, but his interest is almost exclusively in the embryo as a person. What is absent is frank and open discussion of the diminution of the personality of pregnant women, as a direct consequence of the supposed personality of the foetus.

So Finnis matters because the legal and biological position of men and women as persons is radically different, in his understanding, and this has not been spelled out and general jurisprudence has not taken him to task; it has let his work sit. It has been let sit because women have yet to be factored into the idea of the legal person, as women. And women seem to pose a hard problem for legal theory. Consequently, abortion laws are typically put to the side in philosophy of criminal law, because women prove to be too awkward, but not so men.

To spell out the jurisprudential problem clearly: individual personhood, as interpreted in Finnis' own theory, is interrupted by pregnancy as, according to Finnis himself,

51 597 US 215 (2022) ('*Dobbs v Jackson*').

52 Finnis and George, 'Brief of Amici Curiae' (n 42).

53 Ibid 3, 12, n 27.

54 410 US 113 (1973), revd *Dobbs v Jackson* (n 51).

55 *Dobbs v Jackson* (n 51) 292.

women are morally (and should be legally) required to continue the pregnancy and so theorists need to consider whether women's full individual personhood is now suspended. Are there two persons now? Are true legal persons necessarily men? For an intellectually honest and robust theory of the person, this needs to be considered. Is the personhood of women and men of a different nature? Are men the only true persons who can apparently maintain their bodily integrity throughout their lives and not have their boundaries breached or penetrated?

This implicitly masculine understanding of the legal individual is still with us. It has not gone away. The reproducing person is not to be found within the dominant view of the individual. It is an oxymoron. It jars horribly with the very idea of the person and consequently is typically put to the side in the main theories of law's subject.

In a practical sense, this leaves women vulnerable to invasive and controlling law because their reproductive and heterosexual lives have not been worked into law's understanding of its person. There is a great failure to attend to this existential chasm still. Again, typically this great hole in law and its theory is ignored and so in jurisprudential discussion 'the individual' is inserted (as the working term), and the business of legal theory proceeds as usual.

Women remain incoherent as legal persons, because the idea of the male legal individual has not been reconsidered and reworked so that it can encompass a female legal individual whatever her reproductive state. And because of this incoherence of women as persons, Finnis can do his work of neglecting women's existence, using theories of the person, while putting himself forward as a general theorist of legal personality who is interested in everyone.

There has also been a serious failure to recognise and evaluate deep patriarchy in law and we feel the effects of this failure. There has been an implicit division of labour, in legal theory, about who can say what about whom, with a retention of religious authority on such matters as sex, reproduction and abortion such that the female subject in these areas is almost incoherent in conventional liberal legal terms of legal agency and legal individualism. There has been almost no reworking of the person to draw upon and an immensely powerful tradition of the male non-reproducing individual has come to provide the template. The blithe transition of women into 'persons' came with no reconsideration of who the person is. So Finnis has had open slather. He can use individualism, the rights-bearing person (with no woman in the way), the right to life, in other words he can effectively draw on the uninspected male tradition of the individual, without effective conceptual opposition, because the pregnant woman has not been thought out as a person. The legal person does not get pregnant.

The ongoing failure, refusal, or reluctance of jurisprudence to endeavour to reconcile the laws of abortion, whatever form they take, with the liberal idea of the individual (as essentially self-governing and other excluding) is an active thing. Law and legal theory still operate with this basic presupposition that there is a single standard physiology which is implicitly male. It preserves a model of the legal actor which

is incompatible with the female body, and its capacity for reproduction, and with female personhood.

And law is supported by the wider culture in standardising its human and taking him to be male. It does not operate in isolation. Many religious understandings of the supposedly complementary and hierarchical nature of men and women, feed the legal view. And legal deference to religious views has helped to preserve the male legal and social order. A developed theory of female personhood might have done something to counter *Dobbs v Jackson*.

VI Conclusion: Rivers Taking Over

Anna Funder observed that women and wives easily disappear from dominant narratives, especially when strong glamourous characters take the limelight. I fear this is happening again in the current writing about the legal person. Other more exciting characters are drawing the attention of scholars. Though sympathetic with the new writing on persons, I am concerned that women are going missing again in favour of rivers and artificial intelligence.

There is now a substantial literature on rivers as legal persons. In 2017, the Whanganui River on the north island of New Zealand was made a legal person which means that it has legal standing, and its interests are directly protected by law.[56] If you do a search for 'rivers as persons', you are likely to turn up more new writing than a search for 'women as persons' will produce. The personhood of artificial intelligence is also being debated and of course there is great interest in whether artificial intelligence could do the work of humans and perhaps do it even better.

I fear that the personhood of women lacks this appeal. Again, this renders women vulnerable to moves against them, as the women of the United States are now experiencing.

56 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

Rosemary Owens AO*

ARE LABOUR RIGHTS HUMAN RIGHTS?

I Opening Remarks

I begin by acknowledging the Kaurna people and their deep, unbroken and ongoing connections to this land on which we gather this evening. I pay my respects to their Elders, past, present and emerging, and to all Australia's First Nations peoples. I am deeply disappointed at the failure of the recent referendum to recognise them and to establish 'the Voice' in the *Constitution*. I pause to reflect that a voice regarding legislative and administrative decisions affecting their interests is their human right: it is enshrined in art 6 of the International Labour Organization's ('ILO') *Convention (No 169) concerning Indigenous and Tribal Peoples In Independent Countries*, 1989;[1] and recognised in arts 18 and 19 of the United Nations' ('UN') *Declaration on the Rights of Indigenous Peoples* in 2007.[2] My firm hope is that we move forward as a nation telling the truth about our history, ensuring social justice for our First Nations people, and recognising their human rights.

This seminar series marks the 140th anniversary of the establishment of a law school at The University of Adelaide. As one of the oldest in the common law world, it is important to celebrate that milestone. Recognising that First Nations people have been gathering in this place to discuss, learn about and practice law for an estimated sixty thousand years provides another important perspective from which to view that history. I thank the Dean, Professor Judith McNamara, for the invitation to participate in this series; and Professors Paul Babie and Matthew Stubbs for their roles in relation to it. I am humbled to be included in the company of the other speakers.

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1 *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*Indigenous and Tribal Peoples Convention*').

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

I am proud to have been a part of this law school as a student and as a member of its academic staff, and to be able to continue that connection as an Emerita Professor. We stand tall on the shoulders of those who have gone before us. As a student, I was taught by many fine academics and surrounded by many fellow students, who together stimulated my curiosity and nurtured my love of the law. Those academics are too many to name here, but I owe each of them a debt of gratitude. I also had the privilege of working here with many wonderful colleagues. Given my topic, I would like to pay two special tributes. First, I thank my labour law colleagues, Kathleen McEvoy and Professor Andrew Stewart, who taught me as an undergraduate student and later became my colleagues and research collaborators, and from whom I continue to learn so much. Secondly, I thank my feminist colleagues. Fortunately, there were a good number of us when I was a staff member. In particular, I applaud the leadership role taken by Professors Judith Gardam and Ngaire Naffine in establishing Feminist Legal Theory as an undergraduate course (making Adelaide, I think, one of the first law schools in Australia, if not the first, to include it in the curriculum). I have always been committed to equality and social justice, with a particular focus on women's equality, and being steeped in feminist scholarship at the Adelaide Law School gave me a very solid intellectual foundation for working with many others, including in the international sphere, who are also dedicated to it. Finally, I wish to acknowledge my students. Without a doubt, the opportunity to engage with the brightest young minds is one of the greatest privileges of academic life and, as is so often the case, I frequently learnt more from them than they did from me. Associate Professor Laura Grenfell was one such student (and now a distinguished human rights expert). I would also like to thank her for providing some assistance as I prepared this seminar.

II Introduction: Are Labour Rights Human Rights?

It is sometimes said, in both politics and the law, that it is prudent not to ask a question unless you already know the answer! Therefore, let me say from the outset in response to the title of this seminar: 'yes, definitely. Labour rights are human rights!' Nevertheless, I framed the topic as a question because there is not always, more widely, the same clarity or conviction about it — indeed, labour rights and human rights are still seldom spoken about together in the same sentence.

The first sections of this seminar, therefore, consider that issue with a focus on international law. I examine the ILO, its Conventions and Recommendations, as well as its supervisory system, as they are less well known in human rights discourse than their equivalents in the mainstream UN system. To my way of thinking, some of the more interesting questions follow from the fact that labour rights are human rights, and I turn to some of these in the latter part of the seminar. What are the implications, not only for international law but also for a national legal system? If labour law and human rights law are thought of as two separate spheres (as I would say is certainly currently the case in Australia), is it enough for there to be a broad coherence between these two areas of law? At best, perhaps, are they

'complementary and mutually reinforcing'?[3] Or does the separation introduce differences, complexities or inconsistencies, that are damaging and compromise the purpose and the ultimate attainment of the goals of both? And, if that is the case then, ideally, should those differences be removed? In suggesting some answers, I conclude with some thoughts about the implications for legal education.

III Joint Statement on Human Rights (24 February 2023)

Clear recognition within the broad UN system of governance that labour rights are human rights is evidenced by the recent and important Joint Statement by the ILO's Committee of Experts on the Application of Conventions and Recommendations ('CEACR') and the UN Human Rights Treaty Bodies with responsibility for overseeing compliance with relevant UN Conventions ('Joint Statement').[4] The Treaty Bodies that are signatories to the Joint Statement are: the Committee on the Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Rights of the Child; the Committee on Migrant Workers and Members of their Families; the Subcommittee on Prevention of Torture; the Chairperson of the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.

I highlight three points from the Joint Statement. First, it reaffirms the 'common values of universal peace, freedom, equal rights, human dignity, social justice and the rule of law' that underlie the work of all human rights bodies, including the CEACR, at the global level and, importantly, it underscores that they are 'complementary and mutually reinforcing'.[5] Further, it reminds us that 'inequalities within and among countries, [undermine] the exercise of fundamental rights'.[6] Secondly, it recognises that labour rights are human rights and integrating them into economic and legal policies is important for reducing inequalities and creating an environment that is more conducive to equitable and inclusive economic development and, thereby, to realising the UN's ambition that 'no one is left behind'. Thirdly, it emphasises that the UN Human Rights Treaty Bodies and the ILO's supervisory bodies, which include the Committee on the Application of Standards ('CAS'), the Committee on Freedom of Association ('CFA'), and the CEACR, are critical to realising human rights in practice. Reaffirming the role of these bodies, it calls upon stakeholders to maximise efforts to implement their recommendations and

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3 These words replicate those used in the Committee of Experts on the Application of Conventions and Recommendations: *Application of International Labour Standards 2023: Report III Addendum (Part A)*, International Labour Conference, 111th sess (28 February 2023) 3 ('*Addendum to CEACR Labour Standards Report*').

4 See ibid. See generally 'International Labour Standards and Human Rights', *International Labour Organization* (Web Page) <https://www.ilo.org/global/standards/WCMS_839267/lang--en/index.htm>.

5 *Addendum to CEACR Labour Standards Report* (n 3) 3.

6 Ibid.

'join efforts to fully respect, defend, fulfil and promote all human rights, including international labour standards'.[7]

Issued on 24 February 2023, the Joint Statement marked the third anniversary of the *Call to Action for Human Rights* by the UN Secretary-General, Antonio Guterres,[8] emphasising the importance of making human rights central to both the implementation of the 2030 Agenda regarding the UN's Sustainable Development Goals and UN action at all levels (national, regional, and at the UN headquarters). Amongst other things, it also highlighted the aspirations and values set out by the UN Secretary-General in *Our Common Agenda*, the report requested in September 2020 by the UN on its 75th anniversary.[9] On that occasion, the UN committed

> to leave no one behind; to protect our planet; to promote peace and prevent conflict; to abide by international law and ensure justice; to place women and girls at the centre; to build trust; to improve digital cooperation; to upgrade the United Nations; to ensure sustainable financing; to boost partnerships; to listen to and work with youth; and to be prepared.[10]

As Secretary-General Guterres indicated, the aim was to turbocharge global efforts to make real the Agenda for Sustainable Development and the Sustainable Development Goals by 2030.[11] The *Summit for the Future*, to be convened in September 2024, will follow-up *Our Common Agenda*.

The Joint Statement also followed the call for a Global Coalition for Social Justice from the Director-General of the ILO, Gilbert Houngbo, a week earlier on Social Justice Day, 17 February 2023.[12] Its context, and that of the above UN report, was the impact in recent times of not only the COVID-19 pandemic but also geopolitical turmoil, economic crises and natural disasters. Globally, in 2022, more than 200 million workers were living in extreme poverty and employment growth was slowing.[13] This led Director-General Houngbo to examine 'the stark realities facing the world of work today — the persistent injustice, inequalities and insecurities — on

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7 Ibid.

8 *The Highest Aspiration: A Call to Action for Human Rights — Report of the Secretary-General*, UN Doc A/75/982 (5 August 2021).

9 See ibid.

10 Ibid 57. See also *Draft Resolution — Declaration on the Commemoration of the Seventy-fifth Anniversary of the United Nations*, UN Doc A/75/L.1 (16 September 2020).

11 See 'Our Common Agenda', *United Nations* (Web Page) <https://www.un.org/en/common-agenda>.

12 This proposal had been previously outlined to the Governing Body at the end of 2022: see *Report of the Director-General — First Supplementary Report: A Global Coalition for Social Justice*, Governing Body of the International Labour Organization, 346th sess, ILO Doc GB.346/INS/17/1 (17 October 2022).

13 International Labour Office, *World Employment and Social Outlook: Trends 2023* (Report, 16 January 2023) 12.

which we must now act', and to highlight 'the strategic opportunities that exist, both nationally and internationally, for furthering our human-centred and rights-based approach, including through integrated inter-agency action'.[14] Given the complexity of the challenges facing the world, nothing short of a multi-faceted response was required: 'a Global Coalition with other key actors, including the multilateral system, that works to advance social justice and renew the social contract'.[15]

IV The ILO and Labour Rights as Human Rights: A Brief History

A *The International Labour Organization*

The call for a Global Coalition for Social Justice echoes the sentiment expressed more than a century ago in the *Treaty of Versailles*, which ended the First World War ('WWI') in 1919. Part XIII of the *Treaty of Versailles* established the ILO.[16] Since then, it has been the pre-eminent international institution with oversight of international labour standards. The premise of its *Constitution* is that universal and lasting peace can only be achieved if it is based on social justice and improved working conditions for all.[17]

In December 1946, the ILO became the first of the UN's specialized agencies, pursuant to an agreement between the ILO and the UN.[18] The Protocol governing its entry into force arranged for reciprocal representation of the ILO and the UN in various assemblies and committees.[19] Importantly and uniquely, following the ILO's existing constitutional arrangements, art IX indicated that the General Assembly authorised the ILO

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14 *Advancing Social Justice — Report of the Director-General: Report I(A)*, International Labour Conference, 111th sess, ILO Doc ILC.111/I(A)(Rev.) (2 June 2023) 3.

15 Ibid.

16 See *Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol*, signed 28 June 1919, ATS 1 (entered into force 10 January 1920) pt XIII ('*Treaty of Versailles*').

17 See *Constitution of the International Labour Organization*, contained in *Treaty of Versailles* (n 16) ('*ILO Constitution*'). Currently, the ILO has 187 Member States (cf 193 members of the UN).

18 *Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization*, opened for signature 14 December 1946, 1 UNTS 183 (entered into force 19 December 1946) ('*UN and ILO Protocol*'). The *Charter of the United Nations* sets out the characteristics of specialized agencies that could be brought into a relationship with the United Nations: art 57. The *Charter* also provides that the Economic and Social Council may enter agreements defining the terms of that relationship: art 63.

19 *UN and ILO Protocol* (n 18) art 2.

> to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.[20]

The ILO is distinctive in the UN system, being tripartite in nature: the International Labour Conference ('ILC') (its general assembly) comprises two government representatives and one each from employer organisations and trade unions from every Member State. Likewise, the 56 members of the Governing Body ('GB') of the Labour Office (its executive arm) are made up of representatives in the same proportion (two from government, one from employer organisations and one from trade unions). Two of the ILO's supervisory committees, the CFA and the CAS, are also tripartite.

The ILO was a pioneer in the articulation of international human rights standards. In legal terms, one of the most important responsibilities of the ILC is the adoption of labour standards, with the tripartite structure intended to ensure that the views of the 'social partners' are reflected in the process. Over time, there have been in total 191 conventions and five protocols, which, upon ratification, bind Member States. A further 208 recommendations supplement the conventions and provide further guidance in relation to them, but are not legally binding. There is a process for reviewing, updating and abrogating conventions, and currently a comprehensive 'Standards Review Mechanism' is being undertaken.[21]

The *Treaty of Versailles* identified nine principles of 'special and urgent importance'.[22] The first of these is critical to understanding labour rights as human rights and has remained at the heart of ILO thinking since 1919: 'labour should not be regarded merely as a commodity or article of commerce'.[23] The seventh principle, 'that men and women should receive equal remuneration for work of equal value', is also worthy of mention here because, in 1919, it was ahead of its time and remains so (by way of contrast, the *Universal Declaration of Human Rights* ('*UDHR*')[24] and the *Convention on the Elimination of Discrimination against Women* ('*CEDAW*')[25] refer simply to 'equal pay').

There are some clear differences between the human rights instruments of the ILO and the UN: an obvious one is that the scope of ILO conventions is generally limited

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20 Ibid art 9(2). See *Treaty of Versailles* (n 16) art 423.

21 See generally International Labour Organization, *Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization* (4th ed, 2019).

22 *Treaty of Versailles* (n 16) art 427.

23 Ibid.

24 *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (10 December 1948) ('*UDHR*').

25 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

to the world of work, albeit understood broadly, whereas UN conventions extend more widely. However, most notable is their differing conceptual foundation and articulation of rights, with a social justice or a contextual approach taken by the ILO and a focus on the individual as a rights bearer at the UN.

B *The Declarations of the ILO*

An overview of the ILO's history of labour rights as human rights can be conveniently traced in various declarations of the ILC, issued to mark some of the most significant developments in global history impacting rights.[26] The Preamble to the *ILO Constitution* was revised in 1944 by the *Declaration Concerning the Aims and Purposes of the International Labour Organization* (*Declaration of Philadelphia*), reaffirming the importance of the foundational principles placing work in a broad economic, social and cultural context.[27] In the 1960s and 70s, there were two important human rights declarations. On 8 July 1964, the ILC unanimously adopted a *Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa*.[28] After the democratic election of Nelson Mandela's government, South Africa was readmitted as a member of the ILO and this Declaration was rescinded by Resolution on 22 June 1994.[29] In 1975, the ILC adopted a *Declaration on Equality of Opportunity and Treatment for Women Workers*.[30]

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26 See 'ILO Declarations', *International Labour Organization* (Web Page) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/organigramme/jur/legal-instruments/WCMS_428589/lang--en/index.htm>.

27 *ILO Constitution* (n 17) annex ('*Declaration concerning the Aims and Purposes of the International Labour Organisation* (*Declaration of Philadelphia*)').

28 *Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa*, International Labour Conference, 48th sess (adopted 8 July 1964). Revisions were incorporated on 18 June 1981, 16 June 1988 and 20 June 1991, see: *Declaration concerning the Policy of Apartheid in South Africa*, International Labour Conference, 67th sess (adopted 18 June 1981); *Declaration concerning Action against Apartheid in South Africa and Namibia*, International Labour Conference, 75th sess (adopted 16 June 1988); *Declaration concerning Action against Apartheid in South Africa*, International Labour Conference, 78th sess (adopted 20 June 1991).

29 *Resolution concerning Post-Apartheid South Africa*, International Labour Conference, 81st sess (adopted June 1994).

30 *Declaration on Equality of Opportunity and Treatment for Women Workers*, International Labour Conference, 60th sess (adopted 25 June 1975). It was further updated by resolutions of the ILC in 1981, 1985, 1991, 2004 and 2009: see *Resolution concerning the Participation of Women in ILO Meeting*, International Labour Conference, 67th sess (adopted 11 June 1981); *Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment*, International Labour Conference, 71st sess (adopted 27 June 1985); *Resolution concerning ILO Action for Women Workers*, International Labour Conference, 78th sess (adopted 25 June 1991); *Resolution concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection*, International Labour Conference, 92nd sess (adopted 15 June 2004); *Resolution concerning Gender Equality at the Heart of Decent Work*, International Labour Conference, 98th sess (adopted 17 June 2009).

In 1998, as part of a strategy to enhance and revitalise compliance with its conventions, the ILO adopted a *Declaration on Fundamental Principles and Rights at Work and its Follow-Up* ('*Fundamental Rights at Work Declaration*').[31] Originally identifying four fundamental principles and rights at work, it was amended in 2022 by the addition of a fifth.[32] This Declaration has been hugely influential: the fundamental principles and rights at work are at the heart of the UN's *Global Compact*; they are often incorporated into international trade agreements; and form part of various 'soft law' instruments, such as the Organisation for Economic Co-operation and Development's *Guidelines for Multinational Enterprises*.[33]

In 2008, the relevance of the principles in the context of 21st century globalisation was restated by the ILO in the *Declaration on Social Justice for a Fair Globalization*, which reaffirmed that 'labour is not a commodity and that poverty anywhere constitutes a danger to prosperity everywhere'.[34] It also recognised the particular significance of fundamental rights in attaining the fundamental objective of social justice. This Declaration, which expressed the aspiration to promote sustained, inclusive and sustainable economic growth, 'full and productive employment and decent work for all',[35] also clearly supported the UN's 17 'Sustainable Development Goals' ('SDGs') set out in the *2030 Agenda for Sustainable Development* which was adopted in September 2015 and came into force at the beginning of 2016.[36] One hundred years after the *Treaty of Versailles*, the ILO issued its *Centenary Declaration for the Future of Work*, again reaffirming its foundational value that 'labour is not a commodity'. It also looked forward and, among other things, committed to a 'world … free from violence and harassment'.[37]

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31 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, International Labour Conference, 86th sess (adopted 18 June 1998). The Follow-Up to the Declaration was also revised in 2010.

32 In 2022, the ILC adopted the *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work*, International Labour Conference, 110th sess (adopted 10 June 2022).

33 See, eg: 'The Ten Principles of the UN Global Compact', *United Nations Global Compact* (Web Page) <https://unglobalcompact.org/what-is-gc/mission/principles>; *Free Trade Agreement*, Australia–United States of America, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 18; *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD, 2023).

34 *ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 97th sess (adopted 10 June 2008). This Declaration was updated following the 2022 *Resolution on the Inclusion of a Safe and Healthy Working Environment*.

35 Ibid.

36 *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015). Note especially to '[e]nd poverty in all its forms everywhere', '[a]chieve gender equality and empower all women and girls' and '[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all': at 14.

37 *ILO Centenary Declaration for the Future of Work*, International Labour Conference, 118th sess (adopted 21 June 2019) 2.

C *ILO Conventions*

While some have critiqued the ILO Declarations as not providing specific guidance,[38] that guidance can generally be found in the conventions underpinning them. For instance, the five fundamental principles and rights at work set out in the *Fundamental Rights at Work Declaration* as amended in 2022 are each underpinned by two Conventions, as well as one Protocol, as follows:

1. Freedom of association and the effective recognition of the right to collective bargaining:
   - *Convention (No 87) concerning Freedom of Association and Protection of the Rights to Organise*, 158 ratifications;[39]
   - *Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, 168 ratifications;[40]
2. The elimination of all forms of compulsory labour:
   - *Convention (No 29) concerning Forced or Compulsory Labour*, 181 ratifications;[41]
   - *Convention (No 105) concerning the Abolition of Forced Labour*, 178 ratifications (2 denounced, Malaysia and Singapore);[42]
   - *Protocol to the Convention (No 29) concerning Forced or Compulsory Labour*, 60 ratifications;[43]
3. The effective abolition of child labour:
   - *Convention (No 138) concerning Minimum Age for Admission to Employment* ('*Minimum Age Convention*'), 176 ratifications;[44]

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38 See, eg, Philip Alston and Jackson Gandour, 'The ILO's Centenary Declaration and Social Justice in the Digital Age' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 565, 586.

39 *Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

40 *Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

41 *Convention (No 29) concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

42 *Convention (No 105) concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

43 *Protocol to the Convention (No 29) concerning Forced or Compulsory Labour*, opened for signature 11 June 2014, 3175 UNTS 4 (entered into force 9 November 2016).

44 *Convention (No 138) concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976).

- *Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 187 ratifications;[45]

4. The elimination of discrimination in employment and occupation:
   - *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* ('*Equal Remuneration Convention*'), 174 ratifications;[46]
   - *Convention (No 111) concerning Discrimination in respect of Employment and Occupation* ('*Discrimination (Employment and Occupation) Convention)*'), 175 ratifications;[47]
5. A safe and healthy working environment:
   - *Convention (No 155) concerning Occupational Safety and Health and the Working Environment*, 79 ratifications;[48]
   - *Convention (No 187) concerning the Promotional Framework for Occupational Safety and Health* ('*Framework for OSH Convention*'), 62 ratifications.[49]

With the exception of those concerning work health and safety, these conventions are widely ratified. As an aside, Australia ratified the *Minimum Age Convention* in 2022, leaving the *Framework for OSH Convention* as the only one of these fundamental Conventions not ratified by it.

The identification of 10 conventions as concerning 'fundamental principles and rights' is not to say that other ILO conventions are not also concerned with human rights. Importantly, ILO standards are linked to one another and operate in a unitary framework making the relationships and implications clear. Thus, one of the advantages of the ILO system is that, in many instances, there are a number of conventions elaborating a particular aspect of a human right and in so doing they both support and strengthen it. An example is the right to equality as it impacts women.[50] The basic statement

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45 *Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

46 *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953) ('*Equal Remuneration Convention*').

47 *Convention (No 111) concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 1(3).

48 *Convention (No 155) concerning Occupational Safety and Health and the Working Environment*, opened for signature 22 June 1981, 1331 UNTS 279 (entered into force 11 August 1983).

49 *Convention (No 187) concerning the Promotional Framework for Occupational Safety and Health*, opened for signature 15 June 2006, 2564 UNTS 291 (entered into force 20 February 2009).

50 See also Committee of Experts on the Application of Conventions and Recommendations, *Achieving Gender Equality at Work: Report III (Part B)*, International Labour Conference, 111th sess (2023) ('*CEACR Gender Equality Report III(B)*').

of the right to be free from discrimination on the basis of sex in 'employment and occupation' including 'access to … training, access to employment … and terms and conditions of employment' is set out in the *Discrimination (Employment and Occupation) Convention*. It is bolstered by various other conventions, including:

- The earlier *Equal Remuneration Convention*, which includes a broad definition of remuneration extending beyond 'pay'[51] and imposes obligations relating to the objective determination of work value,[52] thus tackling the problems arising from the vertical and horizontal segregation by sex of jobs.
- *Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, and its accompanying Recommendation, 1981 (No 165), which applies to 'all branches of economic activity and all categories of workers'.[53] It stresses the equality rights of both men and women workers with family responsibilities and the duty of the state to adopt enabling policies concerning, for example, the provision of community child care and family services, public education regarding the equality of workers with family responsibilities, and their protection against discrimination and termination.
- *Convention (No 183) concerning the Revision of the Maternity Protection Convention* and accompanying Recommendation 2000 (No 191) revises an earlier convention of 1952.[54] In the Preamble, there are references to the *UDHR* (1948), *CEDAW* (1979), *Convention on the Rights of the Child* ('*CRC*') (1989),[55] *Beijing Declaration and Platform for Action* (1995),[56] ILO's *Declaration on the Equality of Opportunity and Treatment for Women Workers* (1975),[57] the *Fundamental Rights at Work Declaration* and other ILO conventions. It establishes a right to a minimum of 14 weeks leave[58] and cash benefits to enable new mothers to support themself and their child 'in proper conditions of health and with a suitable standard of living'.[59]

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51 *Equal Remuneration Convention* (n 46) art 1(a).

52 Ibid art 3.

53 *Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983) art 2.

54 *Convention (No 183) concerning the Revision of the Maternity Protection Convention*, opened for signature 15 June 2000, 2181 UNTS 253 (entered into force 7 February 2002) ('*Maternity Protection Convention Revision*').

55 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

56 *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1 (15 September 1995) ch 1.

57 *Declaration on Equality of Opportunity and Treatment for Women Workers*, International Labour Conference, 60th sess (adopted 25 June 1975).

58 *Maternity Protection Convention Revision* (n 54) art 4.

59 Ibid art 6.

- Some of the early ILO conventions were 'protective' in nature, making what are now generally considered to be inappropriate assumptions regarding women (for example, by prohibiting their access to night work). Nonetheless, the ILO continues to have an important role in identifying some of the most vulnerable workers and spelling out their rights. For example, there are significant conventions on issues in particular economic sectors where women are over-represented and typically low paid and vulnerable to exploitation, such as in nursing and domestic work.[60] Their situation worldwide and the importance of these workers has been increasingly evident with the growth of the care economy, and was brought to the fore dramatically during the COVID-19 pandemic.[61]
- Finally, I highlight *Convention (No 190) concerning the Elimination of Violence and Harassment in the World of Work* ('*Violence and Harassment Convention*'),[62] which Australia recently ratified. At the international level, there has long been condemnation of harassment and violence, especially against women.[63] But the importance of protection against harassment and violence is something that also extends more broadly. In some ILO instruments, there are provisions protective of particular groups, such as indigenous and tribal peoples and domestic workers.[64] However, in 2019 the adoption of the *Violence and Harassment Convention* gave the issue a true human rights focus, requiring ratifying States to put in place measures to protect a broad range of workers against all forms of abuse, harassment and violence. In its Preamble, this Convention notes that

60 See, eg: *Convention (No 149) concerning Employment and Conditions of Work and Life of Nursing Personnel*, opened for signature 21 June 1977, 1141 UNTS 123 (entered into force 11 July 1979) and the accompanying Recommendation (No 157); *Convention (No 189) concerning Decent Work for Domestic Workers*, opened for signature 16 June 2011, 2955 UNTS 407 (entered into force 5 September 2013) ('*Convention concerning Decent Work*') and the accompanying Recommendation (No 201).

61 See Committee of Experts on the Application of Conventions and Recommendations, *Securing Decent Work for Nursing Personnel and Domestic Workers, Key Actors in the Care Economy: Report III (Part B)*, International Labour Conference, 111th sess (2022). The World Health Organization declared 2021 as the International Year of Health and Care Workers.

62 *Convention (No 190) concerning the Elimination of Violence and Harassment in the World of Work*, opened for signature 21 June 2019, 3447 UNTS 1 (entered into force 25 June 2021) ('*Violence and Harassment Convention*').

63 *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993, adopted 23 February 1994). See Committee of Experts on the Application of Conventions and Recommendations, *General Report and Observations Concerning Particular Countries: Report III (Part 1A)*, International Labour Conference, 91st sess (2003) 463. See also *CEACR Gender Equality Report III(B)* (n 50).

64 See: *Indigenous and Tribal Peoples Convention* (n 1) art 20(3)(d); *Convention concerning Decent Work* (n 60) art 5.

'violence and harassment … can constitute a human rights violation or abuse'.[65] The scope of this Convention is comprehensive in relation to both the workers and the situations covered by its protection. The workers protected include: employees as defined by national law and practice; workers irrespective of their contractual status; persons in training, including interns and apprentices; workers whose employment has been terminated; volunteers; jobseekers and job applicants; and individuals exercising the authority, duties or responsibilities of an employer.[66] The protection extends to workers in all sectors, in the formal and informal economies, and in urban and rural settings,[67] and to 'other persons' in the workplace, for instance clients and service providers, who may be victims or authors of harassment or violence.[68] The protection covers broadly violence and harassment 'in the course of, linked with or arising out of work', specifying a wide range of places and situations:

(a) in the workplace, including public and private spaces where they are a place of work;
(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
(c) during work-related trips, travel, training, events or social activities;
(d) through work-related communications, including those enabled by information and communication technologies;
(e) in employer-provided accommodation; and
(f) when commuting to and from work.[69]

Thus, the protection of the instrument extends beyond the traditional workplace to, for instance, cyberspace, which can be an arena for cyberbullying. As in most ILO conventions, the obligations on ratifying states are broad-ranging, requiring measures: to prevent and to deal with violence and harassment at work when it occurs; to develop and adopt policies and strategies to realise the goals of the convention; to adopt effective enforcement and monitoring mechanisms; to provide remedies for individuals impacted; and to set up education programs to broaden compliance.[70]

65 See generally Anne Trebilcock, 'What the New Convention on Violence and Harassment Tells Us about Human Rights and the ILO' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 1031.

66 *Violence and Harassment Convention* (n 62) art 2(1).

67 Ibid arts 2(2), 8.

68 Ibid art 2(1).

69 Ibid art 3.

70 Ibid arts 4–12.

D *The Supervisory System of the ILO:*[71] *Making Human Rights Effective*

At the ILO there is a strong emphasis on effective enforcement. Its supervisory system, overseeing compliance with its conventions, is one of the most sophisticated of the UN systems and includes mandatory reporting systems, complaint mechanisms, fact-finding investigative processes, global peer pressure and both ad hoc and permanent quasi-judicial mechanisms.

The CEACR is the main supervisory body of the ILO, and comprises 20 independent legal experts. First established in 1926 by the GB, the CEACR meets annually and undertakes an impartial and technical analysis of the application of ILO conventions and compliance by Member States with their international obligations.[72]

Matters come to the CEACR in several ways. First, and most commonly, under art 22 of the *ILO Constitution*, which requires Member States to report regularly on their compliance with ratified conventions. This reporting cycle is now every three years for fundamental conventions and six years for others, although it can be disrupted if the CEACR requests an earlier report. Trade unions or businesses may submit comments on these reports. The CEACR may consider other sources of information relating to law and practice, such as reports from other UN treaty bodies as well as authorised government material (legislation, executive orders, court decisions, and reports of government authorities), but nothing else (such as academic writing, reports from journalists etc). In many instances, after considering relevant information, the CEACR addresses a direct request to the Member State, thereby initiating a conversation that continues through the ongoing reporting/supervision process. Although direct requests are available on the ILO website, they are not public in the sense that they are not taken further forward through the ILO's supervisory system. When there is a more serious issue, the CEACR issues an observation, which may request further information or action, or suggest that the Member State seek technical assistance from the International Labour Office which has many regional offices. Cases of progress are also noted.[73] Observations are included in the CEACR's report to the GB, which then goes forward for further consideration and discussion within the ILO's supervisory system and ultimately the ILC.

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71 See generally: International Labour Organization, *Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Convention and Recommendations* (International Labour Office, 2019) ('*Monitoring Compliance with International Labour Standards*'); International Labour Organization, *The Committee on the Application of Standards of the International Labour Conference: A Dynamic and Impact Built on Decades of Dialogue and Persuasion* (International Labour Office, 2011) ('*Committee on the Application of Standards of the International Labour Conference*').

72 For a complete statement of the 'Mandate' of the Committee of Experts on the Application of Conventions and Recommendations see, eg, Committee of Experts on the Application of Conventions and Recommendations, *Application of International Labour Standards 2023: Report III (Part A)*, International Labour Conference, 111th sess (2023) [33] ('*CEACR 2023 Report III(A)*').

73 See also *Monitoring Compliance with International Standards* (n 71).

Secondly, matters may come to the CEACR following complaints procedures. Unlike under other UN conventions, within the ILO system representations cannot be made by individuals but only by other Member States, trade unions or employer representative bodies, whom individuals may approach. Some matters arise under arts 24 and 25 of the *ILO Constitution*, following a representation made to the GB by an industrial association of either workers or employers against a Member State that, in its view, has failed to comply with a ratified convention. In such cases, the first step is for the GB to establish a three-member tripartite committee to prepare a report and, depending on the response it receives, the GB may request the CEACR to supervise any on-going issues as a follow-up. Representations regarding freedom of association usually go to the tripartite CFA, which is another arm of the ILO's supervisory system and meets three times a year.

There is also a procedure under arts 26–34 of the *ILO Constitution* for dealing with complaints regarding non-compliance made by another Member State, which has ratified the same convention, or a delegate to the ILC or the GB on its own motion. In the case of persistent and serious violations, a commission of inquiry comprising three independent persons is set up to investigate the matter and make recommendations. To date, there have been 15 reports in total by commissions of inquiry.[74] Depending on the response of the Member State, a range of actions may be taken as a follow-up to a commission of inquiry, including ongoing supervision by the CEACR. In instances where there is little or no co-operation by a Member State in addressing the recommendations of a commission of inquiry, the consequences can be serious and may include the imposition of sanctions.[75]

Finally, in its annual General Survey, the CEACR also considers the application of specified conventions, whether or not ratified, and recommendations. The topic for each general survey is selected by the GB, which devises a questionnaire to all ILO Member States designed to provide a comprehensive picture of law and practice in relation to the selected instruments, regardless of their ratification status.[76] Completed questionnaires then form the foundation of the general survey.

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74 See 'Complaints/Commissions of Inquiry (Art 26)', *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50011:0::NO::P50011_ARTICLE_NO:26>.

75 In 2000, for example, art 33 was invoked by the ILC for the first time: see 'International Labour Conference adopts Resolution targeting Forced Labour in Myanmar (Burma)', *International Labour Organization* (Web Page, 14 June 2000) <https://www.ilo.org/resource/news/international-labour-conference-adopts-resolution-targeting-forced-labour>. This arose from an art 26 complaint against Myanmar in relation to forced labour: see International Labour Organization, *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No 29)* (2 July 1998).

76 This reporting is mandated under the *ILO Constitution* (n 17) arts 19.5(e), 19.6(d). For the General Surveys: see 'General Surveys', *International Labour Organization* (Web Page) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm>.

The deliberations of the CEACR are reported each year to the GB in two parts: Part A, containing a general report (Part I) and the observations regarding compliance by counties with their international obligations (Part II); and Part B containing the general survey. From the GB, the CEACR's report goes to the ILC for discussion at its annual conference. In the first place it is considered by the CAS, a tripartite standing committee of the ILC. The CAS selects a limited number (approximately 40) of observations for a more focused discussion, and governments of the selected cases are requested to respond with any further relevant information. The CAS draws up conclusions, for instance recommending specific action to be taken by the Member State or suggesting it request the ILO for technical assistance. The ILC in plenary session discusses and adopts the report of the CAS.[77]

E *Challenges in the ILO's Supervisory System*

In summary, the ILO has a very sophisticated supervisory system and it is one that is, generally, highly effective. The ILO's extensive network of regional and country offices worldwide is an important element of this supervision, contrasting as it does with the more limited presence of such offices emanating from the Office of the High Commissioner for Human Rights.[78]

This is not to say that the ILO's supervisory system does not face challenges. Ultimately, the international system, like all legal systems, depends on goodwill, trust and respect. In this context, I highlight two examples of the challenges evident in recent times. The first is drawn from Afghanistan. In its 2023 report, the CEACR formulated a very strongly worded observation, noting with 'deep concern' the situation of women and girls there in relation to obligations under the *Convention concerning Discrimination in Respect of Employment and Occupation*.[79] It also noted the numerous reports and findings of the Security Council on the violation of rights in Afghanistan. The CAS also noted the situation with 'deep concern' and further 'deeply deplored' the discrimination against women, and it included a special paragraph dealing with Afghanistan in its report.[80] However, the situation in Afghanistan is complicated because the Taliban, which is in de facto control of much of the country, is not recognised internationally as its lawful government.

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77 On the work of the Committee on the Application of Standards: see *Committee on the Application of Standards of the International Labour Conference* (n 71).

78 Vitit Muntarbhorn, 'Labour Rights, Human Rights and Challenges of Connectivity' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 531, 536.

79 *CEACR 2023 Report III(A)* (n 72) 570–2; *Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

80 See *Report of the Committee on the Application of Standards: Part One: General Report*, International Labour Conference, 111th sess, ILO Doc ILC.111/Record No. 4A/P.I (16 June 2023) 45; *Report of the Committee on the Application of Standards: Part Two: Discussion on the General Survey and on the Situation Concerning Particular Countries*, International Labour Conference, 111th sess, ILO Doc ILC.111/Record No. 4B/P.II (17 July 2023) 70–84 ('*CAS Report: Part Two*').

In the CAS discussions, the Afghan government representative had agreed that there is a 'gender apartheid' in the country, but emphasised the work being done to achieve a political settlement and suggested that the CEACR and the CAS defer consideration of this issue.[81] In contrast to this, the Afghan worker representative had advocated 'practical and serious measures' to address the problem.[82] There were also contributions endorsing the call by the CEACR including from: Sweden (speaking for the European Union and with whom candidate and EFTA countries also aligned themselves); the United Kingdom (also on behalf of Australia, Canada, and the United States); Switzerland; and Japan. However, there were no comments from Africa, Arabic or Muslim countries. In summary, as several (including the government representatives) noted, the real threat to the whole international system was the takeover of the country by a group that does not believe in this Convention.[83]

The second challenge that I mention here has been referred to as the 'right to strike crisis' at the ILO.[84] Since the 1950s, the CEACR has treated the *Convention concerning Freedom of Association and Protection of the Right to Organise* ('*Convention No 87*') as protecting the right to strike, although the Convention does not expressly refer to it.[85] The right to strike is, of course, also recognised explicitly in the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[86] Despite its long history as a recognised right at the ILO, in 2012, when the CEACR report came to the tripartite CAS, the employer group refused to deal with this issue and the supervisory system came to a halt.[87] The stance of the employers questioned the competence of the CEACR to 'interpret' conventions, and thereby effectively questioned the supervisory system in general, indeed almost all of the operations of the ILO.[88] In the view of some commentators, the crisis arose

81 *CAS Report: Part Two* (n 80) 70–1.

82 Ibid 74–5.

83 Ibid 75–83.

84 See: Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers Group's 2012 Challenge to the Right to Strike' (2013) 42(4) *Industrial Law Journal* 338; Francis Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10(1) *International Organizations Law Review* 117; Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29(2) *International Journal of Comparative Labor Law and Industrial Relations* 199.

85 *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950) ('*Convention No 87*').

86 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8 ('*ICESCR*').

87 See *Report of the Committee on the Application of Standards*, International Labour Conference, 101st sess, PR No 19/Pt I (13 June 2012) [134]–[226].

88 See Thomas Lieby, 'The Interpretation of International Labour Conventions and the Principle of "Systemic Integrations": The Way Forward for an ILO Tribunal' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 923.

simply because the ILO's supervisory system was so effective and its decisions were frequently cited by national courts.[89]

For several years following, there was 'political' agreement between the social partners, enabling the supervisory process to continue, and the ILO also set up the standards review mechanism.[90] However, the period continued to be marked by on-going 'skirmishes' and 'stand-off', the ramifications of which continued to overshadow the international labour system. This prompted discussions about the possibilities of a legal solution.

One option was the establishment of an internal tribunal at the ILO under art 37(2) of the *ILO Constitution*. The advantage of an internal tribunal was that it could lead to a more expeditious settlement. However, difficult questions also arose both as to the role and impact of any new in-house tribunal. Thomas Leiby articulated two of the most important:

> The first question that comes to mind concerns the implications of a new tribunal on the international legal system. The second, undeniably more sensitive in the ILO context, is the extent to which that tribunal will take into account rules of international law shaped outside the ILO's 'world parliament of labour'.[91]

He went on to argue that, for the sake of coherence and legal certainty, any ILO in-house tribunal must consider other rules of international law, noting that they too are enmeshed with the impact in domestic courts.[92] The importance of coherence at the international level is clearly paramount, and is something that has been recognised by the International Law Commission,[93] and by both the UN[94] and the ILO.

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89 See Laurence R Helfer 'Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 257.

90 International Labour Office, *The Standards Initiative: Follow-Up to the 2012 ILC Committee on the Application of Standards*, 322nd sess, Agenda Item 5, ILO Doc GB.322/INS/5(Add.3) (16 October 2014) [5], [49]. See also International Labour Office, *The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association*, 236th sess, Agenda Item 3, ILO Doc GB.326/LILS/3/1 (29 February 2016).

91 Leiby (n 88) 931.

92 Ibid 948. See also Eric Gravel and Chloe Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamic and Impact* (International Labour Office, 2003).

93 See, eg, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006).

94 In the UN human rights system there is no mechanism to formally review the normative output of the UN treaty bodies, although the ICJ has had occasion to interpret human rights conventions. In 2009, the UN General Assembly and the High Commissioner

The *ILO Constitution* also makes clear that, even if such an internal tribunal were to be established, any of its decisions would not be final. A clear hierarchy exists with the International Court of Justice ('ICJ') at the pinnacle. Having raised the question of 'interpretation' of the conventions, the other possibility was to seek an 'advisory opinion' from the ICJ under art 37 of the *ILO Constitution*.[95] Although an 'advisory opinion' is formally non-binding, it has always been understood as having decisive effect.[96]

Post Script: Since this seminar, there has been a very important development. In November 2023, two special sessions of the GB were convened as provided for in art 7.8 of the *ILO Constitution* to consider the way forward in relation to the right to strike issue. At these meetings there was support for the request by 36 governments and the Workers Group to seek a legal solution to the crisis and refer the dispute over the right to strike and *Convention No 87* to the ICJ for an advisory opinion. An alternative pathway put forward by the employers — advocating a political solution by placing the issue of the right to strike on the agenda of the next International Labour Conference and, ultimately, adopting a protocol on the topic — was not supported.[97] The advisory opinion ultimately handed down by the ICJ will be not only very important for the ILO, but also for international human rights law more generally.

V The UN System of Human Rights including Rights at Work

Understanding that labour rights are human rights and the role of the ILO in relation to them involves a recognition that, at the international level, there is more than

for Human Rights launched a process aimed at 'strengthening and streamlining' the treaty body system: see *Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System*, GA Res 68/268, UN Doc A/RES/68/268 (9 April 2014, adopted 21 April 2014). A review was concluded in 2020 with a report presented to the President of the General Assembly: see *Report of the Co-Facilitators on the Process of the Consideration on the Process of the Consideration of the State of the UN Human Rights Treaty Body System*, UN Doc A/75/601 (17 November 2020). For an overview of developments since the adoption of GA Res 68/268, see 'Treaty Body Strengthening: Treaty Bodies', *Office of the High Commissioner for Human Rights* (Web Page) <https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening>.

95 See *ILO Constitution* (n 17) art 37.

96 Ibid art 37(2).

97 For further information about these meetings, see: '349th bis (Special) Session of the Governing Body', *International Labour Organization* (Web Page, 10 November 2023) <https://www.ilo.org/ongoing-and-forthcoming-meetings-and-events/ilo-governing-body/governing-body-sessions/349th-bis-special-session-governing-body>; '349th ter (Special) Session of the Governing Body', *International Labour Organization* (Web Page, 11 November 2023) <https://www.ilo.org/ongoing-and-forthcoming-meetings-and-events/ilo-governing-body/governing-body-sessions/349th-ter-special-session-governing-body>.

one arena of labour rights as human rights because the conventions of the UN also clearly extend to work. As well as some rights specifically expressed as relating to work, such as 'the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment' enshrined in the *UDHR*[98] and various aspects of the 'right to just and favourable conditions of work' and the right to join trade unions recognised in *ICESCR*,[99] there are also a number of other international conventions recognising, for instance, the right to be free of discrimination or the rights of children, and migrants and members of their families, which seek to provide protection that is more comprehensive than, but also necessarily extends to, the world of work.

And yet over time the treaty bodies monitoring those UN conventions have had comparatively little to say on matters related to work. More than a decade ago Sarah Joseph noted that the general UN system had not played a very significant role in relation to human rights at work.[100] As she observed, internationally, labour rights have been largely left to the ILO with the contribution of the main UN bodies to their development being 'modest'.[101] Citing Bob Hepple, she mused that the explanation for this might be found in the different historical origins of the ILO and UN: 'It is perhaps because international labour rights movements started earlier than other human rights movements that labour rights tend to have been separated, and arguably even marginalised, within the mainstream human rights bodies at the global level.'[102]

In recent times, this situation has provoked wider discussion. Making similar observations, Virginia Brás Gomes has emphasised the duty of the UN treaty bodies to deal with these matters:

> Treaty bodies, therefore, have a mandate to interpret and monitor the right to work and rights at work in their respective treaties even running the risk of duplicating recommendations in their Concluding Observations, as States parties to the different treaties often claim.[103]

98 *UDHR* (n 24) art 23.

99 *ICESCR* (n 86) arts 7, 8.

100 Sarah Joseph, 'UN Covenants and Labour Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Bloomsbury, 2010) 331, 331.

101 Ibid 331.

102 Ibid 331–3. See also Bob Hepple, *Labour Laws and Global Trade* (Bloomsbury, 2005) 21–3.

103 Virginia Brás Gomes, 'Right to Work and Rights at Work: Is there a Role for the Human Rights Treaty Bodies?' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 485, 486.

With rights relating to work found in various UN treaties and ILO conventions, she bemoaned the fact that UN treaty bodies themselves work, for the most part, in silos:[104]

> Human rights treaty bodies have a triple role to play — monitoring, standard-setting and considering individual communications related to specific treaties. In these areas, some synergies exist (too few, in my opinion) amongst the treaty bodies themselves, [and importantly] with other human rights mechanisms as well as with UN agencies and specialized bodies.[105]

Gomes concluded that rather than the limited coordination between the UN treaty bodies themselves and other UN agencies, such as ILO, there should be, in her view, a 'mutually reinforcing relationship'.[106]

The fact that there is a 'duplication' in international instruments of some human rights at work may have potential benefits. Vitit Muntarbhorn has identified a variety of productive relationships between human rights conventions of the UN and ILO.[107] These include:

1. Complementarity, for example where the detail of the ILO's *Minimum Age Convention (No 138*) can support provisions in the *CRC*;
2. Gap filling, for instance the ILO has a *Convention (No 169) concerning Indigenous and Tribal Peoples Convention in Independent Countries* that among other things advocates both consultation and participation rights in programs of concern to them, which is binding upon ratification, whereas there is otherwise only the non-binding UN General Assembly Resolution *Declaration on the Rights of Indigenous Peoples*;[108] and
3. Clarification, strengthening and invigoration where the rights in one instrument are express but implied in another, such the right to strike which is explicit in the *ICESCR* but implicit in ILO *Convention No 87.*

Gomes also picks up on these points and notes the way that the Committee on Economic, Social and Cultural Rights has relied on ILO Conventions, for example in its General Comment 23, to strengthen its concluding statements, and likewise the fact that UN conventions on discrimination can also influence the ILO convention.[109]

In their conclusions, both Gomes and Muntarbhorn stress that the test of any human rights system is the extent to which it makes a difference in people's lives. Working in silos can often frustrate that goal, whereas integration is more likely to deliver

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104 Ibid 501.

105 Ibid 487.

106 Ibid 487.

107 Muntarbhorn (n 78) 532–5.

108 *Declaration on the Rights of Indigenous Peoples* (n 2).

109 Gomes (n 103) 495. See also *CEACR Gender Equality Report III(B)* (n 50) 51–3.

improvements in efficiency and thereby ultimately benefit rights holders on the ground.[110] Both are also agreed that the benefits of an integrated or holistic approach are needed, not only at the international level but also at national levels. In the words of Gomes:

> The one fundamental requirement that is still not complied with is the mainstreaming of human rights across all public policies. The implementation of coherent and effective cross-cutting public policies remains weak and fragmented. The holistic approach at national level — that brings together systematically the recommendations of a human rights treaty body and of the ILO, or any other specialised agency with a human rights mandate, for that matter — needs to be under permanent scrutiny in order to be strengthened.[111]

Muntarbhorn agrees: 'if catchphrases are needed, there is the call for the "whole-of-the-UN" approach, "whole of Government" approach and "whole of society" approach as a test of connectivity in terms of implementation.'[112]

Given those observations, it is worth noting that at the international level there are an increasing number of examples of a willingness to adopt a more integrated approach. The recent joint statement noted at the outset of this seminar is a particularly important one.[113]

VI Labour Rights and Human Rights in Australia: Complexity and Coherence?

In light of the pressures for greater integration at the international level, it is interesting to consider the complex situation concerning human rights in Australia especially in relation to rights at work.

In Australia, there are many different provisions dealing with labour rights in many different statutes — be they labour statutes, anti-discrimination statutes, work health and safety statutes — some of which are also replicated at both federal and state level. In addition, many other legal instruments — awards and enterprise agreements being two of the most important — also impact labour rights.

There can be no doubt that complexity can have huge disadvantages: there are impacts in a very immediate and practical sense arising from the different approaches in the statutes and other legal instruments for citizens, litigants, legal advisers, trade unions, industrial advocates, commercial and charitable businesses, human resource professionals, judges, commissioners and tribunal members, government agencies,

110 See: Gomes (n 103) 501; Muntarbhorn (n 78) 573.

111 See Gomes (n 103) 501.

112 Muntarbhorn (n 78) 573.

113 See *Addendum to CEACR Labour Standards Report* (n 3).

all of which can result in confusion, inefficiency, increased costs and more. In the result, that can mean rights are not protected.

Are there any advantages arising from this complexity? Arguably in such a system there are sometimes new ways of looking at things, resulting in the introduction of more effective ways to attain policy objectives.[114] However, because so often the disadvantages seem to outweigh the advantages, there has also been discussion from time to time about how best to eliminate some of the complexity. In 2010, there was an initial proposal for the harmonisation of anti-discrimination law to 'remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user friendly'.[115] Although it was agreed in the aftermath of the 2010 discussions that there were lots of good reasons to harmonise anti-discrimination laws,[116] in the end that never eventuated.[117] Instead, the resulting new *Australian Human Rights Framework* ('*Framework*') focused on the provision of information and education, although the Parliamentary Joint Committee on Human Rights was also established to report on the compatibility of proposed Australian legislation with Australia's international human rights obligations.[118] The then government intended that there be a review of the *Framework* in 2014, but nothing was done.[119]

In 2023, the issue came back onto the policy agenda. Earlier that year, in March, the Attorney-General requested the Parliamentary Joint Committee on Human Rights to

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114 The 'adverse action' provisions in the *Fair Work Act 2009* (Cth) ('*FW Act*') deal with 'discrimination' issues differently from anti-discrimination legislation: at ss 340–5.

115 Attorney-General's Department, *Australia's Human Rights Framework* (April 2010) 9.

116 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) comment at xii that

> [a]nti-discrimination law in Australia still lacks coherence. … The single reform — simply stated but the most enormously challenging to do — of harmonising provisions, most notably exceptions, would significantly reduce the size of this book. Throughout the book we repeatedly observe on the often irrational, and always confusing, variations in legislation, from one jurisdiction to another and even within the same jurisdiction.

See also Anne Hewitt, 'Can a Theoretical Consideration of Australia's Anti-Discrimination Laws Inform Law Reform?' (2013) 41(1) *Federal Law Review* 35.

117 The Gillard Labor Government released an exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) aimed at simplifying the various anti-discrimination statutes, harmonising them and proposing various changes (for example, expanding the list of 'protected attributes' and simplifying the legislative concept of what it is 'to discriminate'). However, only more limited amendments were made: see *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

118 See: Attorney-General's Department (n 115); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

119 Attorney-General's Department (n 115) 3.

conduct a review of the *Framework* launched in 2010.[120] On International Women's Day on 8 March 2023 the Australian Human Rights Commission ('AHRC') launched its proposed model for a national Human Rights Act for Australia in its 'Free and Equal: Position Paper: A Human Rights Act for Australia'. Its proposed statute would include reference to 28 rights, to be interpreted broadly in light of what it refers to as the six core treaties ratified by Australia, along with the *UN Declaration on the Rights of Indigenous Peoples*.[121] Noting that Australia, with no statutory, let alone constitutional, bill of rights, is an outlier when it comes to the legal protection of human rights,[122] the AHRC proposes comprehensive legislation, far wider in scope than anti-discrimination issues and that would provide remedies for breaches.[123] As I understand it, the proposed legislation would impose obligations on federal policy and decision makers, on parliament and courts — that is, it would be limited to the formal public sphere. Complaints by individuals where there is an alleged breach would be made to the AHRC, with conciliation as the first approach but access to a court for determination where there is no agreed outcome.[124] Remedies could be, for example, injunction or compensation.[125]

Without going into any detailed discussion on the merits of this proposal, I note the limited frame of reference and focus of the AHRC in relation to human rights. Clearly, the AHRC is not thinking of labour rights as human rights, or ILO conventions as embodying human rights. What does that mean for its aspiration that the proposed legislative scheme is 'comprehensive' in relation to human rights? Will it alone deal with human rights at work? And what does it mean to suggest that any dispute settlement system would be appropriately focused around the mechanisms of the AHRC? What about the roles of the Fair Work Commission, the Fair Work Ombudsman, not to mention the bodies overseeing compliance with work, health and safety regimes, and more besides?

120 See Mark Dreyfus, 'Review into Australia's Human Rights Framework' (Media Release, 22 March 2023).

121 The core treaties identified are the following: *ICESCR* (n 86); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), and the rights taken from the *Declaration on the Rights of Indigenous Peoples* (n 2). See Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022).

122 Australian Human Rights Commission (n 121) 7.

123 Ibid 268.

124 Ibid 275, 277.

125 Ibid 275.

In whichever way our policy makers choose to resolve these issues, I suspect it is at least clear that we will continue to have several areas of law that deal with human rights at work. Is this a problem? I would argue that it is not, although clearly it is desirable to try to minimise confusion for citizens and others alike and is highly desirable for there to be a broad coherence in that respect between different regulatory regimes.[126]

There are distinct and important advantages in retaining provisions in labour statutes that address human rights issues. If we compare the regulatory scheme of the *Fair Work Act 2009* (Cth) and that of the various anti-discrimination regimes, we can see that the former has the capacity to address and introduce the kinds of structural reforms that are so often needed to deliver real equality. The provisions regarding equal pay, low paid bargaining reforms etc, pay secrecy provisions, provisions for seeking flexible work arrangements, are not the kind of provisions or reforms that would be possible through the AHRC approach. Likewise, the problems of harassment and violence may well be dealt with in a regulatory scheme akin to what we already know as discrimination law, but the inclusion of provisions regarding those matters in awards and agreements, or the application of a work, health and safety approach are more likely to lead to real and systemic change. Human rights are not simply the rights of individuals who can be treated as isolated beings: rather individuals exist, and must be enabled to flourish, in economic, social, political and cultural contexts.

In conclusion: to my way of thinking, there can be a productive interaction between different regulatory schemes dealing with labour rights as human rights. However, the one thing that is necessary to all is the understanding of and commitment to the idea that labour rights are human rights — that is the high road to decent work, social justice and a better, and ultimately more peaceful, future for all.

VII Concluding Thoughts on Legal Education and Labour Rights as Human Rights

I wish to conclude with some thoughts on legal education in Australia, which appears to me to be perpetuating the separation of labour rights and human rights.

Looking at courses on 'International Human Rights Law', it is as if labour rights and the system of international labour law do not exist. Therese MacDermott lamented more than 25 years ago, that the law of work has been for the most part ignored by mainstream public international law and human rights law.[127] There are, of course,

126 There is a small internal effort at coherence in the *FW Act* (n 114) s 351(2)(a).

127 See Therese MacDermott, 'Labour Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 194.

many scholarly works now noting that labour rights are human rights.[128] However, most major human rights textbooks still reveal an almost total lack of concern with labour rights. To take one example: many of the chapters in one of the major texts, *International Human Rights Law*,[129] proceed as if human rights law only commenced after the Second World War ('WWII'):

> Prior to the 1940s there was no real conception within international law of the idea that one state had a right to interfere in the sovereign affairs of another state as regards how it treated its own citizens. International law was virtually a blank canvas as far as the protection of human rights was concerned. We say this from the perspective of a basic definition of human rights as the rights owing to human beings by nature of their humanity.[130]

While conceding that the League of Nations was 'the key international organization established after WWI with the principal objective of maintaining peace and stability in the world' and noting the 1926 *International Convention on the Abolition of Slavery and the Slave Trade* and the recognition of the importance of the protection of minorities, Ed Bates clearly thinks international human rights arrived post WWII.[131] Even granted that a different conceptual framework may have dominated thinking about rights prior to WWII, this is an astonishing view.

In her chapter in the same text, Christine Chinkin lists the principal UN human rights treaties and then goes on to comment:

> The most important of the common features shared by the treaties of the UN human rights system is the establishment of specialist committees ('treaty bodies') in accordance with their terms. Each committee, whose members serve in their personal capacity, monitors implementation of the relevant treaty and their work has been central to the development of human rights law. No account of the sources of human rights law at the global level is complete without taking the work of the treaty bodies into account.

128 See, eg: Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, 2002); Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005); Janice Bellace and Beryl ter Haar (eds), *Research Book on Labour, Business and Human Rights Law* (Edward Elgar, 2019); Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart, 2010).

129 See Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018).

130 See Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) 3, 11.

131 Ibid 11–16.

However, she then adds: 'There are many other multilateral treaties that include human rights obligations but which do not have such monitoring mechanisms.'[132] To a labour lawyer, that comment is also astonishing in its failure to reference the ILO's conventions and its sophisticated supervisory system.

When it comes to textbooks for courses focused on domestic law there also is often a disconnect from international law. Textbooks for discrimination law courses often pay only scant attention to the UN human rights instruments that underpin the major anti-discrimination statutes of our domestic law, and even less attention is given to international labour law, even when the adverse action provisions in Australian labour legislation are acknowledged and discussed.[133] When we examine labour law texts, we see a parallel failure to include reference to the major UN human rights instruments that concern work. Even more surprisingly, there is also often a failure in labour law texts to consider the international system of labour rights.[134] At most, there is sometimes an isolated chapter addressing such matters, mainly focussed on the ILO, its conventions and supervisory system. Only rarely are considerations of labour rights as human rights integrated throughout.[135]

Of course, objections may be raised that the above comments do not recognise the constraints of the real world: 'there is already a bewildering array of material for law teachers and students to wrap their head around, and you cannot possibly teach everything in every course, nor can you include everything in every textbook!' So I would like to reframe these thoughts on legal education as it relates to labour rights as human rights to make the following points:

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132 Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) 63, 67.

133 See, eg, Rees, Rice and Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (n 116) where the last chapter deals with '[d]iscrimination in the *Fair Work Act*'. See also Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An ntroduction* (Cambridge University Press, 2017) which devotes limited attention to the *FW Act* (n 114).

134 See, eg, Andrew Stewart, *Stewart's Guide to Employment La*w (Federation Press, 6th ed, 2018) makes limited reference to the ILO and its conventions.

135 Cf WB Creighton, WJ Ford and RJ Mitchell, *Labour Law: Text and Materials* (Lawbook, 1983) was a groundbreaking book with various references to ILO conventions. Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) (and with Jill Murray in its second edition in 2011) made a more concerted effort to mainstream some of the themes related to labour rights as human rights that had been peripheral in earlier texts. Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) contained a separate chapter on 'International Labour Standards and Australian Labour Law', but thereafter the discussion was somewhat variable perhaps according to the interests of the various participating authors. See also, Joellen Riley Munton, *Labour Law: An Introduction to the Law of Work* (Oxford University Press, 2021) ch 1.

- Our university system of legal education should be underpinned by a whole range of values: encouraging and fostering curiosity, extending the boundaries of knowledge, developing a rigorous analytical and critical approach, developing innovative and new ways of solving problems, and understanding the nature of the legal system, including its role and function in its social, economic, political and cultural contexts. There is no place in a good university, in a good law school, for a 'trade school' approach to legal education.
- A positivist approach to the law, and to our learning and teaching of it, is in this context futile — there is no point in trying to master every detail of every law when you are a student at university (the time for that, if it comes at all, is later in the contexts of policy development, advice to clients, court work). Rather it is the big picture, the big questions that should be the concern at university law schools. Our focus should always be expanding, bringing together the areas not traditionally thought of as intersecting (labour law and education, labour law and human rights law) because that will assist in understanding more clearly both the possibilities for, and limitations of, law — delivering a better world for all.
- If we think of labour law as human rights law, then we must necessarily also realise that we cannot simply teach some limited version of employment law as labour law. Labour rights as human rights mean we must extend our horizons: beyond employment, to all the other types of work and the workers who are often ignored — the interns, the gig workers, the volunteers, the franchisors and franchisees, and so on. We must also extend the scope of our thinking beyond the formal economy, to the informal economy. And so on. Such thinking can only help to contribute to solving the issues we are more likely to face (as policy makers, solicitors or barristers, tribunal decision makers, judges, or in other roles) in the future.
- For us as scholars of human rights law and labour law, this work is already well begun — but these points I hope also remind us that good university teachers are also always good researchers, for it is through research, by definition, that we expand our horizons.

To conclude: as I watch on from the sidelines and see this law school reach the end of its 140-year life as part of The University of Adelaide and begin a very new chapter as two universities merge to become a new 'Adelaide University', I hope that its new law school will take forward some of the best aspects of the past to build an even better one in the future. I wish it well.

*Christopher Symes FAAL, FIPA, FFA**

THEORY AND INFLUENCES FOUND IN AUSTRALIAN INSOLVENCY LAW

Abstract

The 140th anniversary of the Adelaide Law School gives me the occasion to reflect on some of the influences upon insolvency law that have occurred from the 19th century up until today. Locally the reflection includes the doctoral pursuits at Adelaide Law School by one of the South Australian Supreme Court's greatest Chief Justices, and the work of recent post-graduates, the teaching and scholarship of Adelaide academics past and present, or by the many Adelaide Law School undergraduates who have gone on to careers in law, journalism, politics or a multitude of other callings. My reflection goes beyond the state border to consider the many others who have influenced Australian insolvency law and practice, which is considered one of the world's best examples of insolvency and bankruptcy law. An Australian theory of insolvency does not yet exist or remains unidentified, and I start with a brief exploration of the theoretical position of insolvency law in Australia.

I Introduction

In July and August 2023, the Senate and House of Representatives respectively released and tabled its long-awaited joint report on corporate insolvency in Australia. One of the first recommendations is that Australian insolvency law should have a clear statement of objectives.[1] In particular, recommendation 1 of the 28 recommendations is that '[t]he committee recommends that as soon as practicable the government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency.' Recommendation 2 states that 'the committee recommends that the comprehensive review, as part of its early work, consider and report on the appropriate principles and objectives of insolvency law.' Later, the recommendations talk of re-examining

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1 Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency in Australia* (Final Report, 1 August 2023) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000055/toc_pdf/CorporateinsolvencyinAustralia.pdf>.

the principles, purposes, and objectives of the insolvency law. It seems therefore that insolvency law is very relevant at present.

Where do we go to establish the objectives? Perhaps the *General Insolvency Inquiry* or '*Harmer Report*' of 1988[2] which lists the '[a]ims of insolvency law' at its paragraph 33, or perhaps Roman Tomasic's early textbook on insolvency titled *Australian Corporate Insolvency Law*[3] — especially in chapter 1, where he also talks of the 'aims' — or potentially even the Parliamentary Joint Committee on Corporations and Financial Services' ('PJC on CFS') own report titled 'Corporate Insolvency Laws: a Stocktake' ('Stocktake Report') from 2004 which noted that

> [t]he Committee appreciates that a wide range of policies and objectives must be taken into consideration in the design of an insolvency law. An effective insolvency regime must achieve a careful balance of multiple and even conflicting policies and objectives. The foremost objective, in the Committee's view, is to promote and maximise trust and confidence in the operation of insolvency law on the part of the community in general and the business and corporate sector in particular.[4]

In addition, we could go to Michael Murray and Jason Harris' practitioner text which, in its latest edition, adds to the regular list with some new objectives such as to 'recycle.'[5]

II Theories of Insolvency Law

Let me start this reflection with a discussion on theory, although I am not going to spend a lot of time on it. On 1 April 2019, in Singapore, I made a presentation to an international audience of insolvency academics which was titled 'The Opals of Insolvency'[6] — noting that Australia has 95% of the world's opals — and in preparing the presentation I was searching for an Australian insolvency theory while somewhat

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2 See Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, September 1988) 15 ('*Harmer Report*').

3 Roman Tomasic, *Australian Corporate Insolvency Law* (Butterworths, 1993) 4–17. His list includes the orderly processing of insolvencies; the facilitation of debtor and creditor participation; impartiality, efficiency and expedition; convenience in recovering property; equality between creditors; release or discharge from obligations; compatibility with commerce; harmonization with the general law; cross frontier insolvency; divesting directors of their managerial powers; the disqualification of directors and the maintenance of standards by insolvency practitioners.

4 Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (Final Report, June 2004) <https://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2002_04/ail/report/ail_pdf.ashx> ('*Stocktake Report*').

5 See Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 11th ed, 2022).

6 See Christopher Symes and Sylvia Villios, 'The Opals of Insolvency' (Speech, INSOL 2019 Academics Colloquium Singapore, 1 April 2019).

playing the jester. In the presentation I identified theories that did not originate in Australia, being the two primary ones: Creditors Bargain or Contractarianism and Communitarianism. I then added others with less import such as the Multiple Values or Eclectic Approach, the hybrid Forum and Ethical vision theories, and the Prospects and Systems from authors such as Vanessa Finch[7] who try to identify 'aims, objectives and benchmarks.' Afterwards, I spoke about getting away from insolvency theories and said that we could explore insolvency theory through the lens of Montesquieu's *The Spirit of the Laws* (1748)[8] and could also consider corporate law theories such as realism. In the same year as my presentation, Dr John Tribe of Liverpool University had written on why we (being the common law countries) do not have insolvency theories, and had mooted that this is because such theories would emanate from insolvency practitioners, legal practitioners, judges, academics and governments, who all are too darn busy to worry about theories![9] In 2024, Tribe is publishing a book[10] on this and we await what he will make of the United Kingdom ('UK') and if any parallels can be ascertained for Australia.

In the Singapore presentation I then quoted from Jay Lawrence Westbrook et al that 'each jurisdiction will have insolvency laws closely linked with its other laws and [they] will inevitably reflect its fundamental values.'[11] I observed that in Australia we had fundamental values, or what we might call our precious opals. These 'opals' included concepts such as '[a] fair go', 'ave a go ya mug', 'trust ya gut', 'the banks

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7 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (Cambridge, 2002) 28–42.

8 See Montesquieu, *De l'Esprit des Loix* [The Spirit of the Laws] (Barrillot & Fils, 1748) ('*The Spirit of the Laws*'). On Montesquieu's view, the key to understanding different laws and social systems is to recognise that they should be adapted to a variety of different factors, and cannot be properly understood unless one considers them in this light. Specifically, laws should be adapted

> to the people for whom they are framed, … to the nature and principle of each government, … to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

Montesquieu, *The Spirit of the Laws* pt 1.3. When we consider legal and social systems in relation to these various factors, Montesquieu believes, we will find that many laws and institutions that had seemed puzzling or even perverse are in fact quite comprehensible.

9 See John Tribe, 'Why the Theory of English and Welsh Bankruptcy Law is Not Yet Written' (2019) 30(9) *International Company and Commercial Law Review* 473, 473–89.

10 John Tribe, *Corporate Insolvency Law: Challenging Orthodoxies in Theory, Design and Use* (Edward Elgar Publishing, 2024).

11 Jay Lawrence Westbrook et al, *A Global View of Business Insolvency Systems* (Brill, 2010) 2.

are bastards', and others such as 'we're the most multicultural society of Earth', 'we look after our mates', we 'hate the tall poppy' — and I concluded with the justification that '50 million blowflies can't be wrong.' Of course, all of this was tongue in cheek, but the real point was 'how do you identify fundamental values'?[12]

I then said that Aussies love statutes, which aligns with what Professor Ian Ramsay wrote in 1992 when he stated that 'the way in which significant social [and commercial] problems are resolved is through legislation.'[13] Therefore, if we try to identify a theory, we should not concentrate on the courts but on the process of statute law making (eg lobbying, government committees, stakeholder consultation, academic commentary etc) — and yet all these lack theory. I also noted that Professor Paul Finn, in a 1993 article, began with the important observation that 'we were born to statutes'.[14] For Finn, 'the age of statutes is no contemporary legal phenomenon but a foundational and enduring characteristic of the constitutional system of governance'.[15] I then said that we should look to insolvency statutes of the future, and suggested that these would focus on the ease of doing business, the attitude to entrepreneurship/public private divide for determining government involvement and the United Nations Commission on International Trade Law's ('UNCITRAL') development of Model Laws (in areas such as Micro, Small and Medium Enterprises, and Corporate Groups). I concluded that the history, objectives, philosophy and even theoretical underpinnings in Australian insolvency legislation and jurisprudence are based upon fundamental values, and that these might suggest an opal theory of the future. Finally, I reminded them all of what day it was — April Fool's Day! When I was ultimately asked a serious question of what if I had to settle on what Australian insolvency's main objective would be, my reply was 'fairness'.

In the textbook *Australian Insolvency Law*, I also suggest that it

> is early days in the discussion on theories for corporate insolvency law in Australia. The next few decades will probably provide an Australian theoretical perspective that has been absent in the past. Currently, two main perspectives are emerging, predominantly from the United States with some flavor added from the United Kingdom — one grounded in a 'nexus of contracts' argument, referred to below as creditors' primacy, and another that goes beyond the contract to incorporate other factors such as community interests and values.[16]

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12 And whilst it might have been tongue in cheek, I have seen two attempts at referencing it in scholarly works!

13 Ian Ramsay, 'Corporate Law in the Age of Statutes' [1992] (14) *Sydney Law Review* 474, 474.

14 Paul Finn, 'Statutes and the Common Law' [1992] (22) *University of Western Australia Law Review* 7, 8.

15 Dan Meagher, 'One of My Favourite Law Review Articles: Paul Finn's, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7' (2016) 35(1) *University of Queensland Law Journal* 135, 140.

16 Christopher F Symes, David Brown and Sulette Lombard, *Australian Insolvency Law* (LexisNexis, 5th ed, 2022) [1.27].

A *Is Australian Theory of Insolvency Merely Fairness?*

While acknowledging that there is no Australian theory, is it reasonable to consider fairness as an objective? In *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd*, our current Vice Chancellor and alumnus, Branson J spoke of the role of an insolvency practitioner (here an administrator) and said:

> In such role he or she is, in my view, obliged to consider not only means to maximise the chances of the company, or as much as possible of its business, continuing in existence (s 435A), but also issues of fairness between the company and its creditors, and between the company's creditors inter se.[17]

Recently, when looking at independence in an insolvency in *ASIC v Jones*, Buss, Mitchell and Beech JJ of the Western Australian Court of Appeal discussed what the 'fair-minded observer might reasonably apprehend.'[18] Two very legalistic concepts were examined together — 'fair' and 'reasonable.'

Arguably Adelaide Law School's most well-known theorist or legal philosopher, John Finnis has something to say about fairness.[19] In his exploration of legal theory, Finnis suggests that rival interpretations of any law can be compared on two dimensions: its fit with the legal materials (eg precedent) and moral soundness. He notes that hard cases occur when the best interpretation on fit is different from the best interpretation on moral soundness. He also states that, since fit and moral soundness are incommensurable, there cannot be a uniquely right interpretation of the hard case, and that the solution must be achieved on the basis of fairness.[20] In insolvency we have both the legal materials in the form of precedents dating back centuries and legislation, and we also have plenty of stakeholders looking for moral soundness from that insolvency law. A wonderful example of this is the law of preferences where there is the 'hard case' of the lawful payments to creditors, balanced

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17 (1996) 63 FCR 391, 405–6 (Branson J).

18 [2023] WASCA 130, [17].

19 See John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 221–3. Moral decision-making involves seeking integral human fulfilment by responding to 'the reasons for action, the practical reasons, that each basic good provides'. From this it follows for Finnis that one must not intentionally do harm to others or intend evil to achieve good; on the contrary, one must act fairly towards others. Fairness does not involve rational commensuration of good vs bad; rather it is guided by the Golden Rule through commensuration of alternative options based on 'one's own differentiated feelings toward various goods and bads as concretely remembered, experienced, or imagined' in view of integral human fulfilment (cf the Aristotelian mature person of reasonable character). Analogously, decisions about what speed to drive on a private road, or whether to have the institution of trusts in English Law, are made by communities not based on rational judgement but instead on decisions reached as aforesaid. For a criticism of this, see Richard Stith, 'A Critique of Fairness' (1982) 16(3) *Valparaiso University Law Review* 459, 459–81.

20 See Finnis (n 19).

with the fairness that comes with the concept of pari passu and equal treatment to all creditors, which could be seen as moral soundness.

I also attended a fairness workshop in Canada where much was discussed on fairness, and the published proceedings includes a chapter where I identify 'fairness' in some aspects of Australian insolvency law, particularly the statutory provisions. I commenced the chapter with a quote from the song 'Beds are Burning' by Midnight Oil: 'The time has come to say fair's fair.'[21]

B *Other Considerations on Insolvency Theory*

Elsewhere I have said that corporate law has developed in a pragmatic and piecemeal way.[22] An alumnus and my former colleague Associate Professor Kath Hall (Australian National University) has observed that there has been a lack of attention to theory in corporate law scholarship,[23] and so it must be considered what can be expected from corporate insolvency if not even corporate law theory is developed or developing in Australia.

Whenever legal theory in insolvency is considered in the Australian context, Professor Helen Anderson's article 'Theory and Reality in Insolvency Law: Some Contradictions in Australia' is oft referenced.[24] Despite its title it is not about insolvency law theory, although it considers the reality of creditor protection for three types of unsecured creditors — the Commissioner of Taxation, unsecured trade creditors, and employees — against a backdrop of the theory underpinning corporate insolvency law.[25] Anderson discusses the American and English work on theories and then concludes for her purposes that insolvency law theory can therefore be seen to explain the three types of ex-post legislative protection of creditors. In her view, creditor welfare maximisation is a powerful objective which underpins all three forms. In addition, deterring opportunistic behaviour upon approaching insolvency was also seen to be the aim of lifting the corporate veil to impose liability on directors. She then concludes that 'Thomas Jackson's "creditors' bargain" provided, for the purpose of this paper, a useful lens through which insolvency laws could be considered for three specified cohorts of creditors.'[26]

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21 Christopher Symes, 'Fair's Fair in Australian Insolvency, Tacitly' in Janis Sarra (ed), *An Exploration of Fairness: Interdisciplinary Inquiries in Law, Science and the Humanities* (Carswell Thomson, 2013) 317, 317–28.

22 Christopher F Symes, *Statutory Priorities in Corporate Insolvency Law* (Ashgate, 2008) 51.

23 Katherine Hall, 'The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia' (1996) 7(1) *Australian Journal of Corporate Law* 1, 6.

24 Helen Anderson, 'Theory and Reality in Insolvency Law: Some Contradictions in Australia' (2009) 27(8) *Company and Securities Law Journal* 506, 506–23.

25 Although at this point her reference is to torts: ibid 506.

26 Ibid 510.

Recently, in the matter of *BCA National Training Group Pty Ltd (in liq)*,[27] Black J cited the reasoning of Lord Hoffmann in *Buchler v Talbot*, who had posited that 'the winding up of a company is a form of collective execution by all its creditors against all its available assets.'[28] Whilst this may be true, I do not think that it captures all of insolvency — I think that, in going forward with the development of insolvency theory, we should reflect a little on what Dr John Tribe wrote in 2022 in support of the wider communitarianism in that

> Communitarian insolvency law and policy exemplifies a humane approach to dealing with a company's stakeholders. Forged in the boiling pressures of insolvency at a time of crisis communitarianism insolvency law policy has much to teach us about general company usage and it should be our guiding hand as we move forward. It is then perhaps time to reimagine companies as being collectives of humanity striving for a common goal, as they were envisaged in their earliest developmental stages, as opposed to being central points for the agglomeration of capital and ruthless accumulation of profit.[29]

III Influences

If we do not have an identified theory at work in Australian insolvency law then we must have at least some influences. I have identified eight influences: historical, media, judicial, academic, politicians, the profession, reform bodies, and overseas influences.

A *Historical Influences*

'A lawyer without a sense of history is a mere mechanic.' These are the words of McPherson J, about whose influence will be dealt with later and whose sapiency we should adopt.

1 *Companies Acts/Bankruptcy Acts in the UK and the Colonies*

The UK had a winding up statute since 1844,[30] while the New South Wales ('NSW') Crown Colony passed its own *Companies Winding Up Act* in 1847. The South Australian Crown Colony then passed its own winding up act known as the *Companies Act of 1854* (No 5 of 18 Vic, 1854), which was to provide for the dissolution and winding up of the affairs of joint stock companies. It was 13 pages long and provided for 45 sections. After much criticism, the UK then passed the *Companies*

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27 [2023] NSWSC 366, [47].

28 [2004] UKHL 9; [2004] 2 AC 298.

29 John Tribe, 'Communitarianism Bankruptcy Law & Policy as a Bulwark against Neo-Liberalism: Forging a Humane Future with Stakeholder Insolvency Responses to Public Interest and Sports Club Insolvency' (2022) 15(6) *Corporate Rescue and Insolvency* 183, 183–7.

30 See *Joint Stock Companies Winding-Up Act 1844*, 7 & 8 Vict c 111.

Act in 1862 which contained provisions dedicated to corporate insolvency.[31] In 1864, an updated *Companies Act* was passed in the South Australian colony.[32] Part IV of it governed the winding up of trading companies, featuring 87 sections covering 21 pages of legislation.[33] By 1883, and the commencement of the Adelaide Law School that year, the South Australian colony had a passed a number of Acts during a period in-between the application of the *Insolvency Act 1880*[34] and the *Insolvency Act 1886*,[35] being two influential pieces of legislation. The *Bankruptcy Act 1883* in England was also a substantial piece of legislation,[36] which became the basis for both the Commonwealth's first *Bankruptcy Act* in 1924 and South Australian bankruptcy law after Federation. The English *Bankruptcy Act* created the role of an Official Receiver and gave the courts power to approve schemes, noting that this was incorporated into the *Companies Act 1862* by amendment.[37]

2 *The 1890s Depression*

The Adelaide Law School had been going just eight years when a major economic depression was experienced in the colonies:

> Counting 'banks' as 'any institution that called itself a bank and solicited public deposits', 54 of the 64 institutions operating in 1891 had closed by mid-1893. The widespread runs on building societies and land banks, which were forcing institutions to conduct fire sales of assets, prompted both the NSW and Victorian colonial governments to pass emergency legislation revising liquidation procedures in 1891. The aim of the legislation was to give financial institutions more time to resolve their difficulties by delaying bankruptcy proceedings and deferring depositors' claims. In NSW, the legislation provided that any single creditor's ability to force compulsory liquidation could be overridden by an agreement amongst a numerical majority of creditors holding three-quarters of a company's liabilities. The Victorian arrangements were slightly different. The *Voluntary Liquidation Act* (which was passed on 3 December 1891 and applied for one year) provided that compulsory liquidation of a company could only go ahead if one-third of creditors, both by number and by value of shares, joined in application to the court.
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> …
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> The *Voluntary Liquidation Act* also allowed many companies to be wound-up without any independent investigation. While the pretext of the Act was that companies

31 25 & 26 Vic c 89.

32 13 of 27 & 28 Vic.

33 See ibid ss 70–157.

34 No 185 of 43 & 44 Vic.

35 No 385 of 49 & 50 Vic.

36 46 & 47 Vic c 52.

37 We know this from the work of the Adelaide Law School graduate Professor Bill Cornish: see William Cornish et al, *Oxford History of the Laws of England 1820–1914* (Oxford University Press, 2010) vol XI.

> needed secrecy in order to avoid panicking investors, it allowed past dishonesties to be hidden (Cannon 1966). In contrast, under the NSW legislation, bank directors had to at least convince creditors of the soundness of any reconstruction scheme.[38]

South Australia was not exempt, noting that, in the year the Law School started (1883), it was stated in the *History of South Australia* publication that '[d]uring most of this time insolvency courts were beset with work. The papers were full of assignments and it seemed as though our commerce were utterly unstable.'[39]

3 *The Constitutional Debates of the 1890s and Federation*

Some of the delegates to the constitutional debates of the 1890s,[40] including Samuel Griffith (Queensland), Andrew Inglis Clark (Tasmania) and John Downer (South Australia) in particular, had especially strong views on corporate and personal insolvency. Yet it was only the 1891 National Australasian Convention which gave some expressed consideration to corporate insolvency through a clause dealing with sub-clause 13 of the draft, that related to 'banking, the incorporation of banks, and the issue of paper money of the draft'. Unsurprisingly a relevant topic during the 1890s Depression, Andrew Thynne (Queensland) argued for bankruptcy and insolvency to be left with the state parliaments. However his Queensland colleague, Thomas MacDonald-Paterson, stated:

> The laws relating to bankruptcy, to banking to bills of exchange and promissory-notes, are laws which we would all be happy to see upon a level footing all over Australia. I unhesitatingly say that the absence of uniformity as to these several matters has tended very much, especially within the last fifteen or twenty years, to clog the wheels of commerce and finance. It is a trouble, for instance, to Victorian capitalists to find that we have in Queensland a law which does not exist in Victoria. While the disparity in the law is not of much moment, still it is these little grains of sand falling in between the wheels of commerce, causing hesitation in investment in different parts of Australia, which do so much to clog the whole machinery.[41]

MacDonald-Paterson, a butcher and solicitor, went on to be a Member of the House of Representatives for the seat of Brisbane in the first Federal parliament.

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38 Bryan Fitz-Gibbon and Marianne Gizycki, 'A History of Last-Resort Lending and Other Support for Troubled Financial Institutions in Australia' (Research Discussion Paper, Reserve Bank of Australia, October 2001) ch 6 <https://www.rba.gov.au/publications/rdp/2001/2001-07/1890s-depression.html>.

39 Edwin Hodder, *The History of South Australia* (1893) vol II, ch XVI.

40 These were the 1890 Australasian Federation Conference, 1891 National Australasian Convention, and the 1897 and 1898 Australasian Federation Conventions, including the conference hosted in Adelaide in March 1897 which was held approximately one kilometre from the Adelaide Law School in North Adelaide.

41 *Official Record of the Debates of the National Australasian Convention*, Sydney, 8 April 1898, 685 (Thomas MacDonald-Paterson).

Subsequently, at Federation, the Commonwealth was given the power to legislate with respect to 'bankruptcy and insolvency' as per s 51(xvii) of the *Constitution*.

4 Huddart *and the Early Years*

Chief Justice Bathurst wrote in 2014 that, despite the term 'insolvency' being used in the Constitution, the High Court in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('*Huddart*') gave a 'restrictive interpretation of the Commonwealth's corporation power' and this meant that the insolvency of companies was dealt on a 'state-by-state basis even after Federation'.[42]

This was a case heard by the High Court consisting of Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ and did not deal with corporate insolvency. Chief Justice Griffith and Barton J were rather opaque in dealing with the corporations power, and the clearest statement is instead from O'Connor J who stated:

> Except in the sub-section under consideration the Constitution gives no general power to deal with corporations. Speaking generally, therefore, the power of creating corporations, that is, the power to give them legal existence and to regulate their form, their incidents, the relations of their members to the corporation and to one another, is left to the States.[43]

Justice Isaacs agreed, commenting that

> [a]nother thing is clear, that corporations to come within the legislative reach of the Commonwealth must be corporations already existing. It is not a power to create corporations. When such a power was intended to be given it was expressly mentioned as in paragraph (xiii.), and federal incorporation necessarily includes a granting of all capacities and the enactment of all ancillary provisions for internal procedure, even though these matters would otherwise be exclusively within State jurisdiction.[44]

By implication, if there is no federal power to create corporations, then there is no federal power to wind them up. Justice Higgins supported the reasoning of the other judges while also giving examples of why the Constitution cannot be interpreted to give wide power over corporations.[45]

Around the same time, in 1907, the Commonwealth Attorney-General proposed the introduction of a Commonwealth Companies Act based upon the structure of English company law and including provisions for the registration, management

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42 Chief Justice Tom F Bathurst, 'The Historical Development of Insolvency Law' (Speech, Francis Forbes Society for Australian Legal History, 3 September 2014) [73] <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Bathurst/bathurst_20140903.pdf>.

43 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 371.

44 Ibid 393.

45 Ibid 418–19.

and winding up of companies in the one Act.[46] However, with the 1909 High Court decision in *Huddart* casting doubt upon the constitutional authority of the Commonwealth to fully legislate for companies, what was drafted as the Companies Bill 1908 (Cth) did not proceed further.

So, while the Commonwealth continued during most of the 20th century to make laws for the peace, order and good government of bankruptcy and insolvency they did not attempt to legislate for corporate law or corporate insolvency law.

5 *Referral*

As stated by Bathurst CJ, '[u]nity in corporate insolvency was not fully achieved until the successful referral of state power to the Commonwealth allowing for the introduction of the current *Corporations Act*.'[47] This followed the failed attempts to confer jurisdiction on the Federal Court in the early 1990s.[48] Chief Justice Bathurst suggests that '[t]he establishment of this referral has finally ensured a unified method of dealing with bankruptcies and corporate insolvencies, only 100 years after Federation'.[49] With respect I think that this is overstating it, and that we do not yet have a unified method of dealing with bankruptcies and corporate but rather that one level of government is dealing with these areas of law. Although they are not uniform, we must consider for example the differing amounts to issue a bankruptcy notice/statutory demand.

The historical influence therefore has been somewhat shared by the colonial and then state and federal governments since Federation.

B *Media Influences*

If there has been a disappointing or negative influence on corporate insolvency law, it is the media. While accepting that corporate insolvency law in Australia is complex, it is unfathomable why the media struggles with the basics. They regularly confuse receivership with voluntary administration, voluntary administration with liquidation and would clearly never recognise a pt 5.1 scheme of arrangement. They also refer to the bankruptcy of companies — consider for instance how, just before Christmas in 2023 on ABC Television's Media Watch, the host Paul Barry talked about how poorly the free-to-air television station Channel 10 was travelling and

46 Rob McQueen, 'Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia' (1990) 19(3) *Federal Law Review* 245, 247.

47 Bathurst (n 42) [81]. See also: *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA).

48 See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

49 Bathurst (n 42) [81].

said that 'bankruptcy' was possible! It is abundantly clear that Australia, unlike the United States, does not refer to a company entering 'bankruptcy'. The weight of the influence from the media is strong, noting that you only have to consider for example the television footage in 1998 of workers finishing a shift at Cobar Mines and being told that the company is to be liquidated and that they have lost their entitlements.

1 *Australian Financial Review*

This has been the newspaper that seems to have been an influence on insolvency for a long time. Starting in 1951 as a Fairfax publication, it is now a daily newspaper that aims to provide information regarding the Australian business landscape. The Fairfax merger with Nine Entertainment has seen it still continuing its positive influence.

2 *Business Review Weekly*

Business Review Weekly ('*BRW*') was helpful in my understanding of commercial law. Started by Robert Gottliebsen in 1981, it continued to be published until 2013 and went online from 2013 until finally closing in 2016. One outstanding journalist from the BRW days is Tim Boreham (BA Journ from RMIT University), who did Accounting Week and now writes for Small Caps. BRW journalists such as Boreham seemed to understand the complexities of pt 5 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and reported corporate insolvency in an informed way and created a positive influence.

3 *Insolvency News Online and Sydney Insolvency News Blog*

This is a media outlet created by Peter Gosnell (BA Journ from University of Technology Sydney and former Business Editor of the Daily Telegraph) that has kept up with news of insolvency since 2011. This blog site is a positive influence and accurate in its reporting of corporate insolvency.

4 *Free-to-Air Television*

Programs like the *7.30 Report*, *60 Minutes*, and *A Current Affair* are occasionally unhelpful or a negative influence on corporate insolvency. They tend towards the 'sensational' and will drop an already prepared and recorded insolvency story just before going to air if there is a more 'interesting' story. Many insolvency professionals and academics are disadvantaged as they have had their time wasted and input discarded. There are some experienced journalists who, to my observations, do not listen to the experts they interview about corporate and personal insolvency, and are often unclear and negative about the different insolvency appointments and industry.

5 *ABC Radio*

Current affairs programs on ABC Radio such as *AM* and *PM* regularly tackle corporate insolvency content. The interviewers and program directors generally

provide a positive influence, being sensitive and grateful for the input of insolvency professionals and academics.

C *Judges and Judicial Influences*

As the law of corporate insolvency has 'blossomed' and grown more complex, while the statutory provisions have grown larger and without a specialist court for personal and corporate insolvency, it is not surprising that there is judicial influence upon the law which is large and can be either positive and negative.

1 *Justice Deane*

Justice Sir William Deane was an important positive influence on insolvency law. In fact, Allsop CJ called him 'one of the masters of bankruptcy in this country'.[50] Before his time on the bench, he had lectured in equity at the University of Sydney, worked for the Attorney-General's Department in Canberra, and was also the author of the standard practitioner text of its day: *McDonald, Henry and Meeks on Bankruptcy Law*.[51] Justice Deane then served on both the Federal Court and the High Court and there are numerous reported cases as examples of Deane J's influence. For example, with reference to *Kleinwort Benson Australian Ltd v Crowl* (1988) 165 CLR 71; HCA 34, his separate and dissenting judgment on bankruptcy notices and by implication statutory demands are still apposite in an area of law that sees thousands of cases determined each year. Also, it is worthy to recall his Honour's judgment in *Re Tyndall; Ex parte Official Receiver* where he reminds us all that '[b]ankruptcy does not, of itself, involve any criminal offence.'[52] This is true too of the company and its directors when an external administrator has been appointed.

2 *Justice Kirby*

Justice Michael Kirby has had an enormous influence generally on Australian law but has he spent any time thinking about the specialist area of corporate insolvency? The answer is yes and the evidence provided is from a speech given in Adelaide at the Insolvency Practitioners Association of Australia's ('IPAA') national conference.[53] This speech was given in 2010 just after he had stepped down from the High

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50 *Hutchings v Australian Securities and Investments Commission (ASIC)* [2017] FCA 858, [5]. See also Chief Justice James Allsop, 'Values in Public Law' (Speech, James Spigelman Oration, 27 October 2015).

51 See WP Deane, LG Bohringer and NTF Fernon, *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice Embodying the Commonwealth Bankruptcy Act 1966 and the Rules and Forms Thereunder Annotated and Explained* (Law Book Co, 4th ed, 1968).

52 (1977) 30 FLR 6, 15.

53 Michael Kirby, 'Bankruptcy and Insolvency: Change, Policy and the Vital Role of Integrity and Probity' (Speech, Insolvency Practitioners' Association of Australia National Conference, 19 May 2010) <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2453-SPEECH-INSOLVENCY-PRACTITIONERS-ASSOC-CONF-ADELAIDE-MAY-2010.pdf>.

Court. He opened by saying '[a] Justice of the High Court of Australia does not ordinarily get many opportunities to meet the highly talented lawyers, accountants and other professionals who work in the field of insolvency, in all of its diversity.'[54] In his speech he also refers to his dissent in *Coventry v Charter Pacific Corporation*.[55] In that judgment, he tried in his words to 'engage in a little careful surgery, in an attempt to avoid an interpretation that they [the courts] decide is so inconvenient, contrary to policy and inimical to legal history, that it could not have been intended.'[56] This case also involves proof of debts under the *Bankruptcy Act 1966* (Cth), which as we know also applies to corporate insolvency.

In this 2010 speech, he also refers to *Cannane v J Cannane Pty Ltd* (in liq) (1998) 192 CLR 557.[57] The case involved an exploration of fraudulent transactions that designed and had the intent to defeat creditors. Again, the examination was focused on behaviour under the *Bankruptcy Act 1966* (Cth) but one that had implications for corporate insolvency. In a comprehensive dissenting judgment, Kirby J traces the history, lists six general principles, uses precedent cases and writings, and even compliments counsel stating that

> I pay tribute to the ingenuity of the appellants' arguments. However, in my view, they were rightly rejected in the Federal Court. To adopt the construction urged by the appellants would not only ignore the language of s 121 [of the *Bankruptcy Act 1966* (Cth)] but also undermine the achievement of the broad purpose, protective of creditors, which the Parliament clearly envisaged. The broad approach to the ascertainment of an "intent to defraud creditors", favoured by the Full Court in this case and in the earlier decision in Garuda, is correct. The narrower approach requiring proof of an intention to "swindle" creditors of their entitlements is not appropriate to s 121. Adopting such an approach would seriously undermine the section's effectiveness.[58]

His judgment seems to have been given support in New Zealand and Hong Kong. While not his speciality, Kirby J did leave a positive influence both from his time on the NSW bench and the High Court.

3 *Justice Ray (Roman) Finkelstein*

Justice Finkelstein from 1971 and 1975 worked in Melbourne as a solicitor and also as a tutor at Monash University. He was called to the Bar in 1975, specialising in equity, commercial and corporate law (dubbed in chambers as 'Bankruptcy Chambers'). He was appointed a Judge of the Federal Court in 1997, retired in 2011, and then returned to private practice and is still there at 77! As can be seen, his Honour had wide experience of commercial law and this extended to corporate insolvency law. His time on the court also saw him take novel approaches to

54 Ibid 1.

55 Ibid 9, discussing *Coventry v Charter Pacific Corporation* [2005] HCA 67, [75]–[144].

56 *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234, [77].

57 Kirby (n 53) 14–15.

58 *Cannane v J Cannane Pty Ltd* (in liq) (1998) 192 CLR 557, [96].

insolvency. In an article in the *Monash Law Review*, for instance, he writes 'that, while he opposes judges acting as "ad hoc legislators", it is naïve to think that a judge's background, education, heritage and personal ethical views do not influence their decisions.'[59] That was certainly true of his corporate insolvency decisions.

One area of Finkelstein J's influences was in the Court's determination of remuneration for insolvency practitioners. The task of the Court was, under s 473(10) of the *Corporations Act*, to fix reasonable remuneration having regard to the evidence before it and taking into account the matters mentioned in the Act. Justice Finkelstein in *Re Korda, in the matter of Stockyard Limited (subject to DOCA*),[60] explained his 'Lodestar' approach which was then found as an appropriate method of undertaking remuneration. Another example of his Honour's influence and understanding of corporate insolvency law is his judgment in *Fitzgerald, Re Advance Healthcare Groups Pty Ltd (Administrators Appointed)* [2008] FCA 1604. There, Finkelstein J was called upon to interpret a new provision of the *Corporations Act*: s 444DA. He took the view that 'Part 5.3A [which contained s 444DA] did not require creditors to be treated equally',[61] and, 'nor did it require adoption of the priorities that applied in a winding up'. He also noted that 'the main objective of Part 5.3A was to keep corporations "alive"'.[62] He further observed that the objective is somewhat compromised by the wording of s 444DA: 'if a company in difficult financial circumstances cannot be saved because priority must be given to its employees'.[63] Such a judgment demonstrated his understanding of what corporate insolvency law was in 21st century Australia and his judicial approach was refreshing and a positive influence on insolvency law.

4 *Justice Paul Brereton*

Justice Paul Brereton was a judge of the Court of Appeal of the NSW Supreme Court from 2005, retiring in 2023 to head the National Anti-Corruption Commission. Probably best known for the Brereton Report on defence issues, he also had a spotlight in the insolvency space. For instance, when the judgment in *Sakr Nominees Pty Ltd* [2016] NSWSC 709 ('*Sakr*') was given it was said to be 'the latest in a series of controversial decisions on insolvency practitioner remuneration'[64] that had started in 2014. In *Sakr*, Justice Brereton indicated disapproval of hourly rates as a basis for remuneration and suggested that a percentage or commission basis was preferable. His Honour also mentioned that proportionality was a touchstone, and

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59 Raymond Finkelstein, 'Decision-Making in a Vacuum?' (2003) 29(1) *Monash University Law Review* 11, 17.

60 [2004] FCA 1682, [47].

61 *Fitzgerald, Re Advance Healthcare Groups Pty Ltd (Administrators Appointed)* [2008] FCA 1604 [10].

62 Ibid [13].

63 Ibid.

64 Thomas Russell, 'Court of Appeal to Rule on Brereton Remuneration Decisions', *Piper Alderman* (Blog Post, 8 June 2016) <https://piperalderman.com.au/insight/court-of-appeal-to-rule-on-brereton-remuneration-decisions/>.

recommended starting points such as '2.5% of realisations and 3% on distributions', or '10% on the first $100,000 of realisations, and 5% thereafter.' All of this was highly inflammatory to corporate insolvency practitioners. This decision came after numerous other judgments of Brereton J dealing with the same issue, namely: *In the matter of AAA Financial Intelligence Ltd (in liquidation) (No 2)* [2014] NSWSC 1270; *Re Hellion Protection Pty Ltd (in liq)* [2014] NSWSC 1299; *Re Gramarkerr Pty Ltd (No 2)* [2014] NSWSC 1405; *In the matter of On Q Group Limited (in liquidation) (subject to deed of company arrangement)* [2014] NSWSC 1428; and *In the matter of Independent Contractor Services (Aust) Pty Limited (in liquidation) (No 2)* [2016] NSWSC 106. Ultimately, however, a five-member bench (Bathurst CJ, Beazley P, Gleeson JA, Barrett and J Beach AJJA) of the NSW Court of Appeal in 2017 overturned the *Sakr* decision and its previous guidance on how to deal with a liquidator's remuneration claim.[65] As Thomas Russell of Piper Alderman put it after the appeal decision:

> Despite yesterday's decision, Justice Brereton's impact on contemporary attitudes to IP remuneration has been profound. If his aim was to jolt the profession out of complacency and to get liquidators and the courts thinking more critically about what 'fair and reasonable' remuneration really entails, he has certainly achieved his goal.[66]

5 *Chief Justice Len King*

Chief Justice Len King of the South Australian Supreme Court had a unique life being both an Attorney-General of South Australia and later Chief Justice. Additionally, as a trained accountant, he was able to bring a practical commercial approach to commercial cases. Amongst a number of high-profile cases that he gave judgments in, the case of *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 has been important of late given that the question of trusts and corporate insolvency have been a rich topic of litigation. There, King CJ had decided that a liquidator appointed to a trustee of a trading trust may be paid his or her remuneration from trust assets to the extent that remuneration is incurred in relation to the trust. The influence of this judgment is clear when looking at the 174 'cases referring to this case' on LawCite. In particular, the High Court later supported King CJ's views in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors* [2019] HCA 20.[67]

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65 See *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38.

66 Thomas Russell, 'Sakr Punched', *Piper Alderman* (Blog Post, 9 March 2017) <https://piperalderman.com.au/insight/sakr-punched/>.

67 Pravin Aathreya and Sara Gaertner, 'A Matter of Trust: High Court Rules on Distribution of Assets of an Insolvent Corporate Trustee', *Johnson Winter Slattery* (Blog Post, June 2019) <https://jws.com.au/insights/articles/2019-articles/a-matter-of-trust-high-court-rules-on-distribution#_ftn1>.

6 *Other Judicial Influences*

Of course, there are so many more judges who have exerted influence on corporate insolvency but there are four that must be mentioned here. First, Jessell MR (1873–83) had a huge impact in the 1880s when new problems were arising after modern corporate law began in the middle of the century.[68] Second, an honourable mention must be given to Master Craig Sanderson from Western Australia who has been a Master of the state's Supreme Court since 1996. It is said that 'Master Sanderson is well-known for his eccentric style of judgment-writing. His decisions are often brief, and make use of humour and literary references.'[69] As has been quoted elsewhere, his decision in *Bell Group (UK) Holdings Limited (In liquidation)* [2020] WASC 347 effectively ended the 'Bell litigation' which had been ongoing for 25 years — the longest-running and most expensive civil litigation in Western Australia's history. His decision contains the catchwords '[o]de to a dying corporation', opens with the phrase '[t]hese reasons are not so much a judgment as a requiem', and ends simply with '[a]men'. The decision also states that the Master was tempted to 'drive a wooden stake through the heart of the company to ensure it does not rise zombie-like from the grave', or alternatively to order that 'the files be removed to a secure facility in Roswell and marked: "[n]ever to be opened"'.[70] Overall, Master Sanderson has given judgments over nearly 30 years of dealing with many corporate insolvency matters including complex receiverships and liquidations which often arose from the mining industry. Thirdly, in South Australia, Sir Herbert Kingsley Paine was an Insolvency Court Judge for 22 years (1926–48). Born in Gawler, he was an alumnus from 1904 and kept doing judicial jobs until he was 88! Finally, in the last decade, Justice Brigitte Markovic of the Federal Court has certainly embraced the international corporate insolvency law 'influence' work.[71]

D *Academic Influences*

1 *Dr John Bray*

A former Chief Justice of South Australia (1967–78), Bray CJ did what is likely to be the second doctoral thesis in Australia on insolvency[72] — the first having been

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68 See generally: *Griffith v Paget* (1877) 5 Ch D 894, which involved a scheme of arrangement in insolvency; *In re David Lloyd & Co* (1877) 6 Ch D 339, when a winding up order takes effect assets become those of creditors; *Re Rica Gold Washing Co* (1879) 11 Ch D 36, fraud in winding up; and *In re Hallett's Estate* (1880) 13 Ch D 696, 710, tracing of trust assets.

69 See, eg, Jack Oakley and Brian Opeskin, 'Banter from the Bench: The Use of Humour in the Exercise of Judicial Functions' (2016) 42(1) *Australian Bar Review* 82, 86.

70 *Bell Group (UK) Holdings Limited (in liquidation)* [2020] WASC 347, [1], [8], [9].

71 'Biography of Justice Markovic', *Federal Court of Australia* (Web Page, 24 August 2015) <https://www.fedcourt.gov.au/about/judges/current-judges-appointment/current-judges/markovic-j>.

72 See John Bray, 'Bankruptcy and the Winding Up of Companies in Private International Law' (LLD Thesis, University of Adelaide, 1937).

PD Philips's 'A Treatise in the Insolvency Law in Force in the Colony of Victoria with an Historical Review of the English Bankruptcy Legislation' as published in 1899 by the University of Melbourne.[73] However, I moot that he was also the first academic influence, noting that he spent time at the University of Adelaide teaching jurisprudence and legal history. In 1937, this doctoral thesis was submitted (330 pages long) and entitled 'Bankruptcy and the Winding up of Companies in Private International Law.'[74] It commences with several questions such as how '[i]n many cases, our propositus the man or company concerned has property situated in more than one country or the rights of the claimants upon his or its property may arise under different systems of law'. He also finishes his introductory chapter with the statement that

> if our propositus is discharged as a result of some bankruptcy or liquidation proceeding in one country, in what cases if at all will that discharge be a good answer to an action brought against him [it its] by one of his [or its] former creditors in the courts of another country? It is the object of this thesis to endeavour to discover the principles which guide the solution of these and similar questions.[75]

He further treats a large number of topics including immovables, creditor protection and domicile. For those not familiar with international insolvency law, these topics are still a matter for great debate today.

2 *Dr Bruce McPherson*

Bruce McPherson was born in Zululand and attended the University of Natal and the University of Cambridge. He was a lecturer at the University of Queensland ('UQ') in 1960 when he started to do his PhD. He later received his PhD in 1967, and in 1968 it was published as the first edition of what is now *McPherson's Law of Company Liquidation* after updating it with the new Companies Rules of NSW. He was a lecturer who was 'urbane, amiable, articulate' and delivered his course with 'lucidity and wit.'[76] It is claimed by P Sayer that McPherson's treatment of the subject of company insolvency as an academic 'was clear, concise and authoritative making its study all the more pleasurable.'[77] He then went from academia to the

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73 See PD Phillips, 'A Treatise in the Insolvency Law in Force in the Colony of Victoria with an Historical Review of the English Bankruptcy Legislation' (JC Stephens, 1899) <https://www.austlii.edu.au/au/journals/AUColLawMon/1899/3.pdf>.

74 Bray (n 72).

75 Ibid.

76 Justice Stanley Jones, 'A Judicial Hero' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honorable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 10.

77 P Sayer, 'Agony and Ecstasy: The Progress of Bankruptcy Reform in 1860s England and its Reception in Queensland' in Rahemtula (n 76) 262, 262–99. See also 'The Honourable Bruce Harvey McPherson', *Supreme Court Library of Queensland* (Web Page) <https://www.sclqld.org.au/collections/explore-the-law/judicial-profiles/mcpherson-126890>.

Queensland Bar and was appointed to the bench in 1982 before retiring in 2006. He was even the Acting Chief Justice of Queensland in 1991, and Acting Governor of the State at different times. Justice Pincus, at the time of McPherson's appointment to the bench, said that 'it is likely [that he is] the best qualified lawyer in an academic sense ever appointed to the Bench in this State.'[78] In *Re Karaganison (Construction) Pty Ltd (in liq)* [1982] QR 695, he decided his first case on the topic of his PhD thesis, albeit in a Court of Appeal where the principal judgment of Andrews J, being the Senior Pusine Judge, cited *McPherson The Law of Company Liquidation* with approval — with McPherson also agreeing! McPherson also published several important academic papers in the 1960s.

3 *Professor Roman Tomasic*

Professor Roman Tomasic was a polymath, but his interests also included corporate insolvency. First, Roman's corporate insolvency influence in this space was from his early textbook *Australian Corporate Insolvency Law*, as published by Butterworths in 1993. Not only did it present the law at a critical time following the introduction of pt 5.3A of the *Corporations Act*, but it also helpfully tried to summarise the 'objectives' of corporate insolvency law in Australia.[79] Second, Tomasic worked in the comparative law field for most of his academic life and so his 'influence' was with detailing and analysing corporate insolvency in other parts of the world including East Asia and the UK. Third, as I said in a recent editorial for a special issue of the *Australian Corporate Law Journal* dedicated to his memory: 'During Roman's long academic career, we recalled he worked with many academics and students and was generous in co-writing with a number of scholars across the world.'[80] This is certainly true of his involvement with corporate insolvency, as he attended local and international conferences and supervised many PhD students. He was a regular visitor to Adelaide Law School during the time that he lived in Adelaide and provided a substantial positive influence to insolvency law over 40 years.

4 *Professor Andrew Keay*

Professor Andrew Keay may have been born in England, and has now spent 21 years at Leeds University and 5 years at Wolverhampton before that, but he is also a law graduate from the University of Adelaide, and practiced law in Adelaide and other parts of Australia. He completed an LLM thesis at UQ in 1991 titled 'The Power to Conduct Public Examinations pursuant to the Bankruptcy Act',[81] and a PhD dissertation at the same university in 1996 on 'The Avoidance of Pre-Liquidation

78 'Swearing in of the Honourable Bruce McPherson', *Supreme Court of Queensland* (Web Page, 1982) <https://archive.sclqld.org.au/judgepub/1982/wanstall19820202.pdf>.

79 Roman Tomasic, *Australian Corporate Insolvency Law* (Butterworths, 1993) 4–12.

80 Christopher Symes, 'Professor Roman Tomasic Special Issue' (2023) 38(3) *Australian Journal of Corporate Law* (2023) 271, 271–4.

81 See Andrew Richard Keay, 'The Power to Conduct Public Examinations Pursuant to the Bankruptcy Act' (LLM Thesis, University of Queensland, 1991).

Transactions: the Corporations Law Regime'.[82] Both theses' topics focus on crucial law that operates in both bankruptcy and corporate insolvency law. He also has a massive amount of academic writing on Australian corporate insolvency law, from academic and practitioner journals to book chapters and books.[83] He was the inaugural editor of *Insolvency Law Journal* in 1993 and continued as editor until 1997. Even these days, he continues with his Australian influence, writing mainly comparative writings which draw in Australian corporate law and corporate insolvency law with English law. He presented in the University of Adelaide's 140th Anniversary series (Law 140) in May 2023 on 'The Impact of *Sequana* on the Directors' Obligation to Consider Creditor Interests in Financially Distressed Companies: Was the Wait Worthwhile?', and his presentation features as a chapter in this issue of the Adelaide Law Review.

5 *Emerita Professor Rosalind Mason*

Emerita Professor Ros Mason has played a significant influence, particularly in making Australian corporate insolvency law recognise cross-border issues. She did her 2003 doctoral dissertation at UQ on 'Insolvency and Private International Law: Principal Interests in the Resolution of Multistate Insolvency Issues'.[84] Cross-border issues were part of the Federal Government's Corporate Law Economic Reform Program ('CLERP') when they released a paper in 2002 seeking comments on the possible enactment by Australia of the UNCITRAL Model Law on cross-border insolvency.[85] From the 1990s, she has also had an extensive publishing history on cross-border corporate insolvency. Professor Mason was General Editor of the Insolvency Law Journal from 1997–2006 and Co-General Editor from 2017–19. She has also assisted numerous younger academics in their careers through her guidance and research functions.

6 *Other Academics*

While those mentioned above have provided the biggest influence, many others deserve an honourable mention including Professor Helen Anderson from the University of Melbourne. Anderson has received the highest amount awarded to date from the Australian Research Council to an insolvency researcher for her project 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form'. Running from 2014 to 2018, it had received an ARC Discovery Project Grant of $403,000,

82 See Andrew Richard Keay, 'The Avoidance of Pre-Liquidation Transactions: The Corporations Law Regime' (PhD Thesis, University of Queensland, 1996).

83 A brief look at the UQ library indicated over 400 such items catalogued and available.

84 Rosalind Mason, 'Insolvency and Private International Law: Principal Interests in the Resolution of Multistate Insolvency Issues' (PhD Thesis, University of Queensland, 2003).

85 See 'Cross-Border Insolvency: Promoting International Cooperation and Coordination' (CLERP Paper No 8, Department of the Treasury, 17 October 2002) <https://treasury.gov.au/publication/clerp-paper-no-8-proposals-for-reform-cross-border-insolvency>.

with 34 publications resulting.[86] Prior to this, Anderson had also received a grant for her project 'Reform of the Personal Liability of Directors for Unpaid Employee Entitlements' for the period of 2010 to 2016, with 11 publications resulting.[87] Keith Bennetts worked for both the University of Adelaide and the South Australian Institute of Technology (later the University of South Australia) and also had an outstanding technical mind for the complicated law and procedure that is corporate and personal insolvency. He taught at Adelaide Law School in both undergraduate and postgraduate subjects, including courses I undertook in Company Receivership and Company Liquidation. Similarly, Associate Professor David Brown has been at Adelaide Law School since 2009, and since 2011 has co-directed the research unit originally known as Bankruptcy and Insolvency Law Scholarship (BILS) and now known as Regulation of Commercial Insolvency and Taxation (ROCIT). His outstanding scholarship in comparative insolvency law, property law and all areas of local insolvency law continues to be influential. Overall, the current crop of insolvency academics across Australia offers a bright future. This list includes Professor Jason Harris (University of Sydney), Dr David Morrison (Reader in Law, UQ), Associate Professor Sulette Lombard (University of South Australia), Associate Professor Mark Wellard (Southern Cross University), Dr Robin Bowley (University of Technology Sydney), Anil Hargovan (University of NSW), Dr Catherine Robinson (University of Technology Sydney), Dr Catherine Brown (Queensland University of Technology), Dr Jennifer Dickfos (Griffith University), Dr Casey Watters (Bond University), Dr Paulina Fishman (Deakin University) and many others.[88] Professor James O'Donovan (University of Western Australia) was also active in the 1990s, authoring McPherson's third edition and writing on receivership and related articles. Likewise, Associate Professor Colin Anderson (Queensland University of Technology) obtained his doctorate on corporate rescue, most likely Australia's first one on the topic, and co-authored the text *Crutchfield's Corporate Voluntary Administration*.[89] He also produced an extensive list of academic articles before retiring recently.

In a category of his own is Michael Murray, a former lawyer with the Australian Government Solicitor and Visiting Fellow of the Queensland University of Technology. Murray has been one of most influential individuals in corporate and personal insolvency law and practice in Australia for over 30 years. Amongst his long list of contributions to influencing insolvency law are his foundation editorship

86 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form', *University of Melbourne* (Web Page) <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/phoenix-activity-regulating-fraudulent-use-of-the-corporate-form>.

87 'Reform of the Personal Liability of Directors for Unpaid Employee Entitlements', *University of Melbourne* (Web Page) <https://findanexpert.unimelb.edu.au/project/16322-reform-of-the-personal-liability-of-directors-for-unpaid-employee-entitlements>.

88 Professor Jason Harris, Dr Catherine Robinson and Dr Paulina Fishman are all alumni of Adelaide Law School, having completed their doctoral studies in Adelaide.

89 See Colin Anderson and David Morrison, *Crutchfield's Corporate Voluntary Administration* (Lawbook Company, 2003).

of *Insolvency Law Bulletin*, his role as co-author of *Keay's Insolvency*,[90] his membership of the Corporations and Markets Advisory Committee ('CAMAC'), and his maintenance of the active blog *Murray's Legal*.

E *The Politicians*

1 *Senator John ('Wacka') Williams*

Senator Williams was a Nationals Senator from NSW with offices in Newcastle. He was in the Senate from 2007 through to 2019. He was born in Jamestown, South Australia in 1955 and had been a truck driver, shearer, farmer on the Yorke Peninsula, and later a businessperson before being elected to the Senate. Unfortunately, his interactions with the misconduct of the disgraced insolvency practitioner Stuart Ariff, also from Newcastle, coloured Senator Williams' approach to insolvency. Senator Williams was also a member of the PJC on CFS in 2009 and 2014–19, and a member of the Senate Economic References Committee in 2010 and 2011–14. This saw him become very active in the Senate Economic References Committee inquiry and the associated report known as 'The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework' in 2010.[91] He had attended the University of Adelaide on a scholarship for three months before going back to Jamestown. During his time in the Senate he certainly made known his sceptical views about insolvency laws and practice, and exerted what was adjudged by the insolvency profession as a negative influence.[92]

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90 See, eg, Michael Murray and Jason Harris, *Keay's Insolvency: Personal & Corporate Law and Practice* (Thomson Reuters, 11th ed, 2022).

91 'The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework' (Senate Economic References Committee, September 2010) <https://www.aph.gov.au/parliamentary_business/committees/senate/economics/completed_inquiries/2008-10/liquidators_09/report/index>.

92 Senator John Williams also disliked banks — having had foreign currency loans with Commonwealth Bank which resulted in losing five generations of family farmland — and was a member of the PJC on CFS when it held an inquiry into proposals to lift the professional, ethical and education standards in the financial services industry in 2014, after the previous 2009 *Inquiry into Financial Products and Services*. He also disapproved of ASIC and wanted a royal commission on white collar crime: see the Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (Final Report, June 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/~/media/Committees/Senate/committee/economics_ctte/ASIC/Final_Report/report.pdf>. Lastly, Senator Williams also disliked insurers: see Parliamentary Joint Committee on Corporations and Financial Services, *Life Insurance Industry* (Final Report, March 2018) <https://www.aph.gov.au/-/media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en&hash=E290F9E521D8626F832DC19904BC812F75937C4D>.

2 *Senator Gareth Evans*

Senator Gareth Evans was a Senator from 1977–96, and was responsible for setting up the Harmer Inquiry in 1983 (which resulted in the *Harmer Report*) — where he pleaded in the Terms of Reference for the 'desirability of examining all aspects of the law and practice relating to insolvency.'[93] He had been Shadow Attorney-General from 1980 to 1983, and was acutely aware of the need to reform insolvency. Senator Evans was also responsible for the Bankruptcy Amendment Bill 1985 (Cth), which made amendments to the *Bankruptcy Act 1966* (Cth) following a review of the latter's operation and objective, inter alia, to achieve greater uniformity with comparable provisions of the *Companies Act 1981* (Cth), particularly in the area of priority of debts and the registration and control of trustees. Also in Opposition at the time was Senator Alan Missen, a small-l liberal, who should be acknowledged for having supported the Harmer Inquiry. Senator Missen crossed the floor 41 times during his time in parliament and was described by Senator Evans as 'right over at the far, idealistic end of the political spectrum'.[94] Both senators exhibited a positive influence on insolvency laws.

3 *The Downer Brothers of the South Australian Colony*

Henry Downer arrived in the South Australian colony in 1838 and was a shopkeeper and tailor in Hindley Street. He had three sons, John, Henry Edward, and George, who were all educated in England. All had an influence on Australian insolvency law. First, Sir John Downer was a barrister who later became a member of the colonial House of Assembly, and ultimately Premier of the colony in 1885 and 1892. He was also a leading figure in the Federation debates, having sailed to London in 1887 for the Imperial Federation and argued strongly for uniform law with respect to winding up of estates in bankruptcy. Second, Henry Edward Downer was also a barrister and politician. He was the South Australian Commissioner for Insolvency from 1865 to 1881, and was later the colony's Attorney General who oversaw the passage of amendments to the *Insolvency Act 1882* (SA).[95] Third, George Downer was a barrister whose practice included insolvency. Other members of the Downer family have held political seats in more recent times such as Alick Downer — who was Minister for Immigration from 1958–63 — and Alexander Downer who was Federal Opposition leader in the 1990s, although neither had much to do with significantly influencing insolvency laws.

4 *Current Political Figures Influencing Insolvency Laws*

Current politicians have also recognised the need for insolvency law reform, such as Senator Deborah O'Neil who chaired the recent PJC on CFS. The current Federal Treasurer Dr Jim Chalmers had opposed the Fair Entitlements Guarantee

93 Harmer Report (n 2) ix.

94 Anton Hermann, 'Alan Joseph Missen (1925–1986)' in Melanie Nolan et al (eds), *Australian Dictionary of Biography* (Melbourne University Press, 2012) vol 18.

95 276 of 45 & 46 Vic.

Amendment Bill in 2014, saying it took 'fair' out of the Fair Entitlements Guarantee ('FEG'). Bill Shorten, the Minister for Government Services and the National Disability Insurance Scheme, also influenced the insolvency law as it related to employees by initially introducing FEG legislation in 2012.

F *The Insolvency Profession and Government Departments Influence*

1 *ARITA*

The Australian Restructuring Insolvency & Turnaround Association or 'ARITA' (formerly the Insolvency Practitioners of Association of Australia known as 'IPAA') is the major influence from the professions upon corporate insolvency. Regulation of insolvency practitioners had started with the Uniform *Companies Acts* of 1961 and 1962, and one of the requirements for registration was membership of either the Institute of Chartered Accountants in Australia ('ICAA', later known as 'CAANZ') or the Australian Society of Accountants (later to become the Australian Society of Certified Practising Accountants and then CPA Australia).[96] It is not surprising therefore that the IPAA sprang partly from the ICAA. While there were numerous accounting bodies since the 1890s, from 1931 onwards there was an organisation known as the Bankruptcy Trustees & Liquidators Association ('BTLA') which later became the IPAA in 1982. As noted previously, in 2014, the IPAA became ARITA.

ARITA as a membership organisation is well-positioned to influence corporate insolvency, and dedicates significant resources to government submissions and reform activity including discussion papers. This work is carried out by its in-house staff, members, academics, and stakeholders. For example, the December 2022 submission to the PJC on CFS was 90 pages long and received accolades for its depth.[97] Some outstanding individuals have been employed or have served on committees of this organization including Hugh Parsons, Michael Mount, Michael Murray, John Winter, Kim Arnold, Narelle Ferrier, Scott Atkins, Alan Scott and others too many to mention.

2 *Law Council of Australia*

The Law Council of Australia, through its Business Law Section and particularly its Insolvency and Restructuring sub-committee, exerts a positive influence. The Law Council was set up in 1933 as the peak national body representing the legal profession. Given that lawyers are not necessarily registered as insolvency practitioners, the influence tends to be on the law and less on the practice of the

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96 See, eg: *Companies Act 1961* (Qld) s 9(7); *Companies Act 1962* (SA) s 9(7); *Companies Act 1961* (Vic) s 9(1); *Companies Act 1961* (WA) s 8(2).

97 'ARITA Makes Submission to Parliamentary Inquiry into Corporate Insolvency in Australia', *Australian Restructuring Insolvency & Turnaround Association* (Web Page, 7 December 2022) <https://www.arita.com.au/ARITA/News-2023/Submissions/ARITA_makes_submission_to_parliamentary_inquiry_into_corporate_insolvency_in_Australia.aspx>.

practitioner. For example, its submission in December 2022 to the PJC on CFS' inquiry into corporate insolvency in Australia was prepared by the Insolvency and Restructuring Committee of the Business Law Section — with additional input from the SME Business Law Committee, Financial Services Committee, Taxation Committee, and the Corporations Committee.[98] It was over 60 pages. The work on public policy advocacy is also performed almost entirely by volunteer members. This subcommittee has monthly meetings in most capital cities and has been active for over 30 years.[99]

3 *Government Departments as 'Active Creditors'*

As would be expected in most countries, the taxation or revenue department of government would be expected to sometimes play a major role in corporate insolvency, particularly in the collection of debt. The Australian Taxation Office ('ATO') exerts influence on corporate insolvency in Australia. There are also specialist taxation officers who are specialists in corporate insolvency matters. The ATO will frequently fund litigation which has played a significant role in clarifying the law.

More recently, the government department responsible for administering FEG legislation — at present called the Department of Employment and Workplace Relations — has become a major influence and funder of litigation involving corporate insolvency matters mainly related to the consequences of which creditors will be paid. There is also an FEG Recovery Program, where liquidators of companies (where FEG advances have been made) can apply for funding to pursue recovery proceedings such as litigation. This may increase the returns available to creditors in the external administration including by helping to recover some of the money paid by the government to employees for their entitlements. A new phrase entered the Australian corporate insolvency environment when FEG officers started to refer to their office as being an 'active creditor'.[100] This is a phrase that was previously used mainly in United States literature, and describes creditors who attend creditors' committees, and vote and adopt a role which is often the opposite of the apathetic creditor which has historically hindered practice — especially with the requirements of quorums to approve insolvency practitioner remuneration. The FEG office wants to be an informed and engaged creditor, and so they are an

98 Law Council of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Corporate Insolvency in Australia (1 December 2022) <https://lawcouncil.au/resources/submissions/corporate-insolvency-in-australia>.

99 The subcommittee has had outstanding contributions from many individuals. Amongst the Adelaide group providing 'influence' have been a number of legal practitioners such as David Proudman, Ray Mansueto, James Jarvis, Jon Clarke, David Colovic, Kym Ryder, Peter Leech, Ben Renfrey and Madeleine Harland.

100 'Fair Entitlements Guarantee Recovery Program', *Department of Employment and Workplace Relations* (Web Page) <https://www.dewr.gov.au/fair-entitlements-guarantee/recovery-program#:~:text=FEG%20Active%20Creditor&text=attends%20creditors'%20meetings,the%20recovery%20of%20FEG%20advances>.

'active creditor' because they attend creditors' meetings, take part in Committees of Inspection, review anticipated distributions, and engage with insolvency practitioners on issues of law that concern the recovery of FEG advances.

4 *Other Professional Groups*

The accounting bodies have always maintained some interest in insolvency, though obviously not as much as in the areas of tax or audit where most of the members practice. In particular, CAANZ, CPA Australia and the Institute of Public Accountants ('IPA') all have members who are actively involved in corporate insolvency. They have exerted influence by making submissions to government — in 1984, for instance, I contributed to the Institute of Affiliate Accountants' submission to the Harmer Inquiry (the Institute of Affiliate Accountants' now being the IPA). However, these submissions are usually not as detailed as those prepared by bodies mentioned earlier such as ARITA, and as seen by how CAANZ made a 12 page submission to the PJC on CFS in 2022.[101] Other recent groups that offer some choice of professional development membership bodies for insolvency professionals include the Association of Independent Insolvency Practitioners ('AIIP'), the Turnaround Management Association ('TMA'), and also bodies focused on empowering women such as the Women's Insolvency Network Australia ('WINA').

G *Reform Bodies' Influence*

1 *Australian Law Reform Commission*

Two major reports from the Australian Law Reform Commission ('ALRC') have influenced Australian insolvency law. The first report to deal with insolvency was titled *Insolvency: The Regular Payment of Debts* ('ALRC Report 6' and tabled in November 1977).[102] It 'considered whether the *Bankruptcy Act 1966* (Cth), as it applied to small debtors, made adequate provision for the compromise or discharge of their debts from present or future assets and earnings',[103] and so had little influence on corporate insolvency. As mentioned above, the second extensive ALRC report had a massive impact on corporate insolvency. Known as the *Harmer Report*, or the 'General Insolvency Inquiry' and tabled on 13 December 1988, it thoroughly examined corporate insolvency including the developments of overseas jurisdictions in relation to insolvency — and identified that existing forms of voluntary administration were unnecessarily complex, confusing, and uncoordinated, and suggested

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101 Chartered Accountants Australia and New Zealand, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Corporate Insolvency in Australia (30 November 2022) <https://www.charteredaccountantsanz.com/-/media/c9cdfd9a526e46c5a706d458f1cbb75c.pdf>.

102 Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts* (Report No 6, November 1977).

103 'Insolvency: The Regular Payment of Debts (ALRC Report 6)', *Australian Law Reform Commission* (Web Page) <https://www.alrc.gov.au/publication/insolvency-the-regular-payment-of-debts-alrc-report-6/>.

revolutionary changes.[104] There was a limited South Australian connection in the form of Professor David St L Kelly, an alumnus and former Adelaide Law School professor. He was a Law Reform Commissioner from 1976 to 1980, and so was present for *ALRC Report 6* and ultimately wrote a book on debt recovery titled *Debt Recovery in Australia* based on the ALRC's work.[105]

2 *Productivity Commission*

The Productivity Commission is the Australian Government's principal review and advisory body on microeconomic policy, regulation and a range of other social and environmental issues. It was founded in 1998 and is located under the purview of the Department of the Treasury. It has a budget of over $34 million and has 164 employees. Its Inquiry Report No 75, published in September 2015 and known as *Business Set-Up, Transfer and Closure*, extended to subject matter such as insolvency and reform. However, ordinarily, the Productivity Commission does not spend much time or resources on insolvency reform.

3 *Corporations and Markets Advisory Committee and Company and Securities Advisory Committee*

The Corporations and Securities Advisory Committee or 'CASAC' was established in 1989 under the *Australian Securities and Investments Commission Act 2001* (Cth) to provide advice and recommendations to the Minister about matters relating to corporations and financial services law, administration and practice.[106] The name was then changed in 2002 to the Corporations and Markets Advisory Committee or 'CAMAC'. Later, as part of the 2014–15 Budget, the Commonwealth Government announced its decision to cease the operation of CAMAC and its legal committee. Specifically, CAMAC was abolished by sch 7 of the *Statute Update (Smaller Government) Act 2018* (Cth), which commenced on 21 February 2018. Ramsay states that '[f]rom 1983 until the abolition of the Corporations and Markets Advisory Committee (CAMAC) in 2018, there existed an independent body to provide advice to the government on matters of corporate law reform.'[107] A forerunner of these two bodies was the Companies and Securities Law Review Committee, which 'was established under the formal agreement made on 22 December 1978 between the Commonwealth and the States regarding the first Commonwealth-State co-operative regime for the regulation of companies' and corporate insolvency.[108]

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104 *Harmer Report* (n 2).

105 David St L Kelly, *Debt Recovery in Australia* (Australian Government Publishing Service, 1977).

106 See generally Ian Ramsay, 'History of the Corporations and Markets Advisory Committee and its Predecessors' in P Hanrahan and A Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt* (LexisNexis, 2019) 56, 56–72.

107 Ibid 56.

108 See ibid 57.

For insolvency reform, there was also the report *Corporate Voluntary Administration* (June 1998) published by CASAC. Its advisory committee included Adelaide-based practitioners Gary Watts, a partner at Fisher Jeffries, and Dick Whitington QC of Hanson Chambers. CASAC, from 1998 onwards, had the two insolvency specialists Anne Trimmer and Berna Collier, who held minor interests. Later, CAMAC published the report titled *Rehabilitating Large and Complex Enterprises in Financial Difficulties* in October 2004,[109] although the Committee did not have an expert insolvency person as a member when it released this. Finally, the report titled *Issues in External Administration* ('*Issues Report*') in November 2008 was the last dedicated report by CAMAC.[110] In 2008, when the *Issues Report* was released, David Proudman of JWS Adelaide and our alumnus provided the sole corporate insolvency expertise.

The removal of CAMAC attracted much criticism, with Ramsay stating that it has resulted in a weakened law reform process.[111] Similarly, ARITA submitted that

> CAMAC has delivered sophisticated and important advice and reports to policy makers and industry. Indeed, CAMAC's work continues to be instructive for much of the work we do … It is ARITA's view that, without CAMAC, important, authoritative studies like these would not have been completed and reform processes likely to have been less-well informed … CAMAC has delivered real value to the efficient and robust operation of corporations, financial markets and the economy as a whole and we urge the rejection of this Bill.[112]

H *Overseas Influence*

1 *Chapter 11 of the US Bankruptcy Code*

In the United States, under the Bankruptcy Code, there is ch 11 which is often mentioned in comparison to our own pt 5.3A of the *Corporations Act*. It may be said that there is some influence exerted by making comparisons to what the United States law provided rescuing businesses. Some attempts to set out the differences and reasons for why these direct comparisons are appropriate have been attempted, particularly by Harris.[113]

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109 Corporations and Markets Advisory Committee, Parliament of Australia, *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (Final Report, October 2004) <https://treasury.gov.au/sites/default/files/2019-12/camac_large_enterprises_report_oct04.pdf>.

110 Corporations and Markets Advisory Committee, Parliament of Australia, *Issues in External Administration* (Final Report, November 2008) <https://takeovers.gov.au/sites/takeovers.gov.au/files/2021-04/external_administration_report_nov_2008.pdf>.

111 Ramsay (n 106) 61.

112 Ibid 61.

113 See, eg, Jason Harris, 'Restructuring Nirvana? Chapter 11 Bankruptcy and Australian Insolvency Reform' (2015) 16(1) *Insolvency Law Bulletin* 42, 42–6.

As the PJC on CFS said in its Stocktake Report in 2004:

> Most submissions that commented on the US Chapter 11 model argued strongly against its adoption. Two of the major concerns expressed about a Chapter 11 regime were of the company remaining in the hands of the debtor and the length of the process.
>
> The Committee is not persuaded to the view that an insolvency procedure modelled on Chapter 11 of the US Bankruptcy Code is appropriate for the Australian corporate sector. Nor does it consider that wholesale amendments to the voluntary administration procedure to conform to Chapter 11 would have the potential to make a significant improvement in outcomes that are presently achievable under the VA procedure.[114]

2 *Forum of Asian Insolvency Reform*

The Asian Financial Crisis in the late 1990s caused concern about corporate insolvency laws. A Forum for Asian Insolvency Reform ('FAIR') was conceived in Australia and has been a biennial event which has been committed to bringing stakeholders together to discuss insolvency reform in Asia. Paul Keating built strong bilateral links with Australia's Asia-Pacific neighbours and was a driving force in establishing the Asia Pacific Economic forum ('APEC') heads of governments meeting, with its commitment to regional free trade. As the economies in Asian countries grow in global prominence, it has become increasingly important that they create insolvency regimes that provide creditors with sufficient protection to encourage the lending of capital. In November 1999, the Organisation for Economic Co-operation and Development ('OECD'), the World Bank, Australian Treasury, Australian Aid, and APEC organized a meeting on 'Insolvency Systems in Asia: An Efficiency Perspective', which was held in Sydney. Approximately 80 policy-makers, members of the judiciary, private sector practitioners, insolvency experts, and academics from 14 Asian non-OECD countries and nine OECD member countries came together and expressed a great desire to continue dialogue on insolvency reform. They also urged the sponsoring organisations to remain active in this area. Since this first meeting, there have been FAIRs in Bangkok (2002), Seoul (2003), Beijing (2006), Kuala Lumpur (2010), Manilla (2013), Hanoi (2016), Bangkok (2018), and in 2024 it will be in Singapore.

This influence was outward facing rather than internal, with Australian corporate insolvency law being considered by other Asian nations. Sadly, however, the Australian government has lost interest — after attending some meetings with a large Australian delegation, and accompanied by Professor Roman Tomasic, on more recent occasions such as at Manila in 2013 and Hanoi in 2016 I was the sole Australian representative.

114 Stocktake Report (n 4) xxi.

3 *Other Overseas Influences*

Other groups with more outward influence are the UNCITRAL National Coordination Committee Australia (UNCCA) and the Law Association for Asia and the Pacific (LAWASIA). They have provided annual lectures on corporate insolvency here in Australia (an Annual May Seminar), and they have also attended and participated at the United Nations — in particular the UNCITRAL Working Group V, which meets in December at Vienna and in April at New York each year.

IV Conclusion

In choosing the topic of theories and influences on insolvency law, I hope that I have kept alive the subject of insolvency law at Adelaide Law School that has been going here for over 120 years. We know that in 1900, amongst the special subjects for the four-year law degree, there were already Equity and Insolvency classes. However, in 1901, it was replaced with Property II. While I was an undergraduate student here in the 1980s, there were no insolvency classes, but in the 1990s Keith Bennetts renewed the teaching of insolvency at least at the Master's level — with separate courses on Company Receiverships and Company Liquidation, and in the 2000s on Corporate Rescue. Later, from the early 2010s, Associate Professor David Brown and I have saturated undergrad and postgrad teaching at Adelaide Law School with a smorgasbord of insolvency courses. We have also conducted an active research unit that has made over a dozen submissions to government on insolvency reform, produced a textbook now in its fifth edition and a casebook in its second edition, published numerous papers, received research grants funding, hosted insolvency law glitterati from around the world, and also organised professional and academic conferences.[115] One could say that Adelaide Law School has been a centre of attention for insolvency law.

To conclude then, let me take you back to 1866 some 17 years before the Adelaide Law School commenced. Commissioner Henry Downer is the Commissioner of Insolvency, and a farmer comes before him to be made bankrupt as he has over-extended himself and bought a second farming property which then failed financially. His property, including 98 acres of wheat, one acre of barley, two iron ploughs, one pair wooden harrows, four ducks, four fowls, 50 posts and railings, 50 loads of building limestone and a stack of straw, are all assigned. Two years later, the final dividend is paid. We can ask what were the principles and objectives of insolvency then and are they the same now as queried by the PJC on CFS in 2023? If we return to the fundamental values of a fair go, or simply fairness, then the principles and objectives that result in our insolvency statutes should be guided by this and they appear to have been for at least 158 years. Historically, the farmer who had 10 children did return to farming on the Adelaide Plains after what appears to

115 The research unit is immensely grateful to Adelaide law firm Lynch Meyer's partners James Neate and Alice Carter, and the Australian firm Piper Alderman — particularly its partner Mike Hayes — for their ongoing support.

be the orderly processing of the estate — including debtor and creditor participation, convenient property recovery, equality between creditors, compatibility with commerce and harmony with general laws, and even the recycling of the assets (ploughs and harrows) — and importantly, the discharge of obligations which gave him a fresh start. I know this because one such farmer was my great, great grandfather, James Symes, and that ironically, I taught an undergraduate insolvency law course to the great, great, great grandson of that Insolvency Commissioner — who I note was recently recognised as a member of the Restructuring Team of the Year in 2023 in his role as a partner of Willkie Farr and Gallagher in London.

My hope for Adelaide Law School is that its staff, students and alumni will continue to add to the development of insolvency law through engagement with many of the 'influences' as identified above, and that a unique insolvency law theory emerges — or that, at the very least, an answer to the PJC on CFS' quest for the appropriate principles and objectives of insolvency law can be found.

*Wilfrid Prest AM, FRHistS, FASSA, FAHA**

LAW REFORM AND LEGAL CHANGE IN AUGUSTAN ENGLAND[1]

I

The Adelaide Law School has been the source of much congenial companionship and intellectual stimulation even before and certainly after my move from the Napier Tower to the Ligertwood Building just over twenty years ago. So I was delighted as well as honoured by Paul Babie's invitation to contribute to a lecture series celebrating the Law School's 140th anniversary. I am also grateful to Paul for chairing my talk, and to members of the audience, whose questions and comments have helped shape the final form of this article.

It aims to provide a general account of how law reform has been viewed by historians of early modern England, and how my own interest in that topic has developed, concluding with a brief assessment of efforts to reform English law between the Glorious Revolution of 1688–89 and the accession of George III in 1760. That final part draws on work for the forthcoming ninth volume of the *Oxford History of the Laws of England*, generously supported by the tax-payer through the Discovery Projects scheme of the Australian Research Council ('ARC').[2]

II

What is the difference, if any, between law reform and legal change? Many early modern lawyers, not least Sir Edward Coke, purported to believe in an immemorial, unchanging common law. Of course, we know, as did they, that like other social artefacts law is not fixed and static, but flexible and even unstable, whether in terms of doctrine, forms, procedures or personnel. But the concept and practice of 'law reform', as a conscious endeavour to improve the equity and efficiency of

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1 'Augustan England' is a term and concept borrowed from literary scholarship, where it characterises poetry and drama from the age of Dryden, Swift and Pope as reminiscent of the flowering of classical Latin culture in the era of the Roman Emperor Augustus. Here it is used more broadly, with reference to English society in the later seventeenth to mid-eighteenth centuries. Cf Geoffrey Holmes, *Augustan England: Professions, State and Society: 1680–1730* (Allen and Unwin, 1982).

2 More specifically by grants DP120101749 (PI) and DP160100265 (CI).

substantive and procedural law is a relatively new phenomenon. So is the phrase itself. Although its first use has been attributed to John Cook(e) — the idealistic Gray's Inn barrister who, as solicitor-general for the Commonwealth, was appointed to lead the prosecution case at the trial of King Charles I in 1649 — there is no record of him employing that precise expression.[3] It seems rather to have been a nineteenth-century neologism, appearing for the first time in the late 1820s, on the eve of Britain's 'Age of Reform'.[4]

Irrespective of semantics, English historians have traced law reform, in the sense of an impulse to improve the workings of the law in the interests of the public good, much further back in time. The most recent general study, by the late Barbara Shapiro, begins with the reign of Henry VIII (1509–47) and runs through to the mid-eighteenth century.[5] Historians' attention has focused particularly on two decades of the mid-seventeenth century when, during and after the civil wars which broke out in 1642, the existing legal structure and its practitioners were subject to an unprecedented torrent of criticism and proposals for reform. Legal historians have traditionally depicted these as at best 'mild and obvious' and at worst 'extreme and absurd' — the product of ignorant and irrational outbursts of populist or theocratic prejudice.[6] By contrast, many general historians have tended to celebrate demands for law reform during the 1640s and 1650s as a genuine reflection of communal

3 The spelling of Cook's surname varies, as did those of many contemporaries. I follow the usage of the original *Dictionary of National Biography*, whereas his most recent biographer claims that Cook himself signed his name with an 'e': Geoffrey Robertson, *The Tyrannicide Brief* (Chatto and Windus, 2005) 3. Although no source is cited, this may refer to the missing original letter to Strafford from the manuscripts of William Knowler printed by CH Firth in the *Camden Miscellany* (1895) vol 4, 14–20. Most of Cook's numerous works published during his lifetime use the shorter spelling.

4 Michael Lobban, '"Old Wine in New Bottles": The Concept and Practice of Law Reform: *c* 1780–1830' in Joanna Innes and Arthur Burns (eds), *Rethinking the Age of Reform: Britain 1780–1850* (Cambridge University Press, 2003) 118 nn 23, citing Donald Veall, *The Popular Movement for Law Reform: 1640–1660* (Oxford University Press, 1970) 73, who misquoted a passage in Cook's letter of August 1655 to Lord Deputy of Ireland Charles Fleetwood, transcribed and printed from Bodleian Library MS Rawlinson A 189 in Edward MacLysaght, *Irish Life in the Seventeenth Century* (Cork University Press, 1950) 442. Although 'legal reform' occurs from the 1790s onwards (in the sense of a beneficial change to law, as distinct from a legally valid one), 'law reform' is not found in the 'Making of Modern Law' database earlier than Joseph Parkes, *A History of the Court of Chancery* (Longman, 1828) 77, 110: my thanks to Michael Lobban for this last point. The phrase quickly gained general currency, doubtless helped by Henry Brougham's celebrated six-hour speech on the subject to the House of Commons in February 1828: Michael Lobban, 'Henry Brougham and Law Reform' (2000) 115(5) *English Historical Review* 1184.

5 Barbara J Shapiro, *Law Reform in Early Modern England: Crown, Parliament and the Press* (Hart, 2019) ('*Law Reform in Early Modern England*').

6 John Baker, *An Introduction to English Legal History* (Oxford, 5th ed, 2019) 228. See also William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 6, 411–30.

sentiment targeting narrow professional self-interest and anticipating in numerous respects the legislative programme enacted from the 1830s onwards.

Geoffrey Elton, the eminent historian of Tudor England, addressing the Selden Society in 1978 as Professor of English Constitutional History at the University of Cambridge, considered that effective law reform — indeed any kind of reform — requires five components: (1) recognition of the need for reform; (2) belief that reform is feasible; (3) broad agreement on a programme of reform; (4) public opinion favouring reform; and (5) 'leadership from those who can translate ambition and aspiration into action'.[7] In Elton's view, a lack of this last component is fatal; without it you have only 'loose, moralistic preaching talk' that 'does not get you anywhere'.[8] Someone like Thomas Cromwell, Elton's (as later, Hilary Mantel's) hero, is required to translate talk into positive deed, which is why, according to Elton, the only real law reform of the sixteenth century occurred between 1536 and 1540.[9]

Although he later served a three-year term as president of the Selden Society — the body founded in 1887, largely on the initiative of FW Maitland, 'to encourage the study and advance the knowledge of the history of English law' — Elton was not legally trained and always insisted that he himself was no legal historian. Indeed, his interest in law reform extended little further than parliamentary legislation enacted to that end. But even today efforts to improve the efficiency and equity of legal processes are not implemented solely by legislation — public discussion and opinion, judicial officers, legal bureaucrats, the legal profession and other legal institutions, not least law schools as well as dedicated non-legislative bodies like the South Australian and Australian law reform commissions all play their part. So once did English monarchs, from Anglo-Saxon times until the nineteenth century.

As another non-lawyer ignoramus — like Geoffrey Elton, in that respect at least — I have usually felt uncomfortable, at worst incapable, when confronted by the more or less arcane technicalities of legal rules and doctrine. The law's institutions — courts, lawyers, and their relations with the laity — are far more readily accessible to the mere historian. On returning to Australia in 1966 to take up an Adelaide history lectureship after three years postgraduate study and six months employment as a trainee publisher in England, law reform was very much in the air. It became increasingly so through the early to mid-1970s. After the conservative post-World War II 1950s, campaigns to abolish the death penalty, end the restrictive White Australia immigration policy, decriminalise homosexual acts between consenting adults, and to reform consumer law, electoral law and family law were all part of a refreshingly new cultural and political climate, associated in Australia with the names of Don Dunstan, Gough Whitlam, and Lionel Murphy, who as Attorney-General established the Australian Law Reform Commission and appointed the late

7 GR Elton, *English Law in the Sixteenth Century: Reform in an Age of Change* (Selden Society, 1979) 7–8.

8 Ibid 9.

9 Ibid 6–11. Cf Clive Holmes, 'GR Elton as Legal Historian' (1997) 7(1) *Transactions of the Royal Historical Society* 267.

Alex Castles, our former Adelaide Law School colleague, as an inaugural member. So in retrospect my developing interest in law reform proposals, with particular regard to legal education in early modern England, seems scarcely surprising. My recent doctoral thesis on the inns of court during the half-century before the Long Parliament, when these four London-based voluntary associations served as liberal academies as well as law schools for would-be barristers, discussed John Cook's proposals for reforming the role of the inns in legal education.[10]

In 1646, Cook published a defence of the common law and its practitioners against the attacks of critics who sought a radical reconstruction and democratisation of the entire legal system. Resisting such calls, while accepting that many aspects of legal process needed 'reformation', Cook also condemned the lack of academic support for students at the inns of court, which unlike the two English universities had no tutorial system.[11] He therefore proposed that there should be in each of the four inns 'two at the least appointed as professors of the Law to direct young Students in the Method and Course of their Studies, that they may rather apply themselves to cases profitable than subtil, for the difficulty of the study discourages many' — indeed 'to put a young Gentleman to study the Lawe without direction, is to send a Bark without a steeres-man, saile, or anchor into an angry Sea'.[12]

My interest in Cook grew during my first years at Adelaide; some surviving correspondence from 1967–68 suggests that I was then contemplating a biography. By late 1972 that project had stalled, following failure to locate any personal papers or other primary sources of significance beyond those used by CH Firth for his *Dictionary of National Biography* memoir of Cook, and the unexpected arrival of a publisher's contract to prepare a facsimile reprint of his *Vindication* with a substantial introduction, as part of a prospective series of legal classics edited by a Cambridge law don. Duly drafted, that introduction never appeared in print, thanks to the publisher's equally unexpected decision to renege on the contract. It was some slight consolation that my new Cambridge friend John Baker shared the same dispiriting experience. Twenty-five years later, however, some of this research and writing was put to use as part of a commissioned brief life of Cook for what became the *Oxford Dictionary of National Biography* ('*ODNB*').[13] A little later still, that

10 WR Prest, 'Some Aspects of the Inns of Court, 1590–1640' (DPhil Thesis, University of Oxford, 1965) 292–5, the basis for my first book, Wilfrid R Prest, *The Inns of Court under Elizabeth I and the Early Stuarts: 1590–1640* (Longman, 1st ed, 1972).

11 For Cook's general law reform proposals, see Veall (n 4) index of persons *sv* Cook, John.

12 John Cook, *Vindication of the Professors and Profession of the Law* (London, 1646) 55, 94. In view of the discontinuance of the inns' traditional twice-yearly lectures or 'readings' on statutes after the outbreak of civil war in 1642, Cook further urged that these should now acquaint their audience 'with the most usefull knowledge and daily occurrences in actions of debt, upon the case, of trespasses and ejectments, the present Law of the times, which is worth our best studie': at 56.

13 Wilfrid Prest, 'Cook, John (*bap* 1608, *d* 1660): Judge and Regicide' (2015) *Oxford Dictionary of National Biography*.

ODNB memoir attracted the interest of Geoffrey Robertson; after an excellent dinner in Adelaide our discussion of Cook's life and works continued by email, although I can claim no credit for the book-length biography Robertson published in 2005, to general if not entirely unqualified applause.[14]

Cook was not the first or only critic of the shortcomings of the early modern inns of court as educational institutions. Two Elizabethan publicists addressed this issue, albeit from opposite ideological positions. The author, lawyer and anti-catholic activist MP Thomas Norton (*c* 1532–84), devised a series of orders 'for the better government of the fower houses of court' in the early 1580s, while the exiled Jesuit missionary and controversialist Father Robert Persons (1546–1610) composed and circulated from Spain ten years later a manuscript 'Memorial for the Reformation of England' which proposed a total transformation of the inns' educational functions.[15]

Norton's Calvinistic concern was simply to rid the inns of any idler who 'shall not be and continue to be a studient', whether of the common law, or 'some other gentlemanlike activitie', including the acquisition of a foreign language.[16] Persons advanced a far more ambitious agenda, maintaining that since England's break from Rome at Queen Elizabeth's accession, excessive 'liberty and dissolution' had allowed the inns of court to become, as he put it, 'schools of mere vanity, pride and looseness'.[17] So after the eagerly-anticipated accession to the throne of the Spanish Infanta following Elizabeth I's death, the inns were to be inspected by a commission of Catholic lawyers who would recommend how best to re-order their 'discipline, form of apparel, conversation and the like; as in other universities and colleges of laws is accustomed abroad in the world'.[18] The academic regimen of the four societies would also be strengthened by providing for students to 'write and make repetition of their lessons' within a pre-determined time-frame in order 'to proceed and take degrees'.[19] No evidence has yet come to light of any contemporary reaction or response to either of these attempts to establish a more demanding pedagogical structure at the inns, nor was either circulated in print during its author's lifetime. The same apparent lack of concern or interest would greet Cook's published proposals in the 1640s, as also the more obviously self-interested agenda of the royalist courtier-politician, former MP and crown law officer Sir Peter Ball KC, who in a 1649 manuscript advocated for the appointment of a salaried 'publike lecturer and reader of the law' to expound the whole body of legal knowledge according to

14 See: Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 49–55, originally published in the *London Review of Books* (2006); Wilfrid Prest, 'The Lawyer's Tale: Review Essay' (2007) 66(3) *Meanjin* 61.

15 Wilfrid R Prest, *The Inns of Court under Elizabeth I and the Early Stuarts: 1590–1640* (Cambridge University Press, 2nd ed, 2023) 213 ('*Inns of Court*').

16 Ibid.

17 Ibid 214.

18 Ibid.

19 Ibid 215. See also JJ Scarisbrick, 'Robert Persons's Plans for the "True" Reformation of England', in Neil McKendrick (ed), *Historical Perspectives: Studies in English Thought and Society in Honour of JH Plumb* (Europa, 1974) 19.

a 'scientificall method' (which Ball claimed to have himself devised), in order to guide students through the 'chaos of our bookes'.[20] Quite apart from the practical problems of filling and funding any such post, the self-perpetuating bodies of senior lawyers who ruled the inns clearly saw no pressing reason to alter the educational regime which had brought them to their present eminence, while radical critics of the law and lawyers had much larger targets in view.

The erudite William Lambarde (1556–1601) was another early modern lawyer of slightly earlier vintage anxious to reform his own profession. Besides compiling a history of the county of Kent, the earliest known example of what would become a standard English historical genre, and a pioneering edition of Anglo-Saxon laws and customs, Lambarde wrote a frequently reprinted manual on the office and duties of justices of the peace, and *Archeion, or a Discourse upon the High Courts of Justice in England* (first published in 1635). He ended his life as a legal office-holder in the Court of Chancery and an archivist, as keeper of the records in the Tower of London.[21] But his antiquarian and historical interests were not divorced from a concern with current issues, especially those relating to judicial and professional ethics. A manuscript tract entitled *Against Auricular (or private) Information of Judges*, written in Lambarde's hand and now in the Harvard Law School Library, dates from 1590. It is essentially a condemnation of what are represented as pervasive and persistent efforts to influence judicial decision making in favour of specific parties to litigation, directed especially at judges sitting alone in so-called 'English-bill' courts like Chancery, which operated without recourse to the juries empanelled on the assize circuits and in the common-law courts of Westminster Hall. Lambarde's circumstantial and detailed indictment of the solicitation of judges and judicial favouring of individual barristers and their causes is far removed from the frequent broad-brush contemporary accusations of judicial corruption and impropriety, which historians have understandably tended to discount or dismiss as based upon little more than ill-informed lay prejudice.[22] It is also significant for our understanding of the extent to which concern with abuses of the (highly unsystematic) early modern English legal system persisted from the sixteenth century into the 1630s and 1640s. For Lambarde's tract not only circulated in manuscript but reached a far wider potential audience via two printed editions recently identified as his work. The first was published by the veteran London printer-bookseller George Purslowe in 1631, under the title *The iust Lawyer his Conscionable Complaint against Auricular or private Informing and soliciting of Judges By their Menialls, Friends and Favourites With a sure Advice for the Reformation thereof: As also an Appendix with obiections against Favourites at the barre of Justice*.[23] The second, also issued from London, was one of the first books printed for the bookseller/

20 Prest, *Inns of Court* (n 15) 216–17. See also Wilfrid Prest, 'Law Reform and Legal Education in Interregnum England' (2002) 75 *Historical Research* 112–22.

21 JD Alsop, 'Lambarde, William (1536–1601): Antiquary and Lawyer' (2008) *Oxford Dictionary of National Biography*.

22 Wilfrid Prest, 'William Lambarde, Elizabethan Law Reform, and Early Stuart Politics' (1995) 34 *Journal of British Studies* 464.

23 Ibid 474.

publisher George Lindsey; it appeared on the very brink of outright warfare between the forces of King and Parliament in August 1642, with a racier title, reflecting the extent to which the courts, judiciary and legal profession were already under attack, both within and outside Parliament: *The Courts of Iustice Corrected and amended. Or The Corrupt Lawyer untrust, Lasht and quasht. Wherein the Partial Iudge, Counsellour, Great Mover, whispering informer, Favourite at the Bar are fully displayed, convicted and directed. By WL Esquire*.[24] The title page of this completely reset but textually almost identical printed version added the striking claim that the work had been 'Presented to the Honourable House of Commons and by Them approved of'.[25] The law reform movement of the revolutionary 1640s and 1650s was no simple sudden outburst of populist anti-professionalism, class hatred and religious fanaticism, but rather reflected long-standing and widely-held concerns and grievances.

III

It was once thought that after the tumultuous years of civil war and republic, the 1660 return of the monarchy in the person of King Charles II effectively put an end to law reform attempts until the early nineteenth century, when much of the extensive agenda for change advanced during the revolutionary decades finally began to be implemented.[26] That view has turned out to be mistaken. For in 1975 Shapiro demonstrated that criticism of the legal system and efforts to improve it, far from being cut short by the fall of the republic, continued well into the eighteenth century.[27] Indeed Charles II's long-sitting 'Cavalier' Parliament (1661–79) debated numerous law reform measures, and enacted at least one statute, the *Habeas Corpus*

24 Ibid.

25 Ibid 474–5. See also: RB McKerrow (ed), *A Dictionary of Printers and Booksellers in England, Scotland and Ireland: And of Foreign Printers of English Books: 1557–1640* (London, 1910) 222; HR Plomer (ed), *A Dictionary of the Booksellers and Printers Who Were at Work in England, Scotland and Ireland from 1641–1667* (London, 1907) 118. While no corroboration of Lindsey's title page claim has been found, it may well refer to an event in the unminuted proceedings of a Commons' committee for courts of justice. The unpredictable and possibly severe consequences of a false assertion of this nature at this juncture increase the likelihood that Lindsey's claim was no mere marketing puff. I am grateful to Dr Andrew Thrush and Professor Jason Peacey for their comments on this matter.

26 'Lawyers supported first the offer of the crown to Cromwell, then the restoration of Charles II. The law remained unreformed till the nineteenth century': Christopher Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (Temple Smith, 1972) 218. For a more balanced assessment, see Christopher Hill, *The Century of Revolution 1603–1714* (Nelson, 1961) 225–7, 289–90.

27 Barbara Shapiro, 'Law Reform in Seventeenth-Century England' (1975) 19(1) *American Journal of Legal History* 280.

Act 1679, 31 Car 2, c 2, which has been seen, rightly or wrongly, as a major constitutional bulwark and safeguard of individual liberty.[28]

As it happened, the first test of the *Habeas Corpus Act* involved a challenge to the imprisonment by the House of Commons in December 1680 of Thomas Sheridan (1646–1712). Sheridan was an Irish-born follower of James, duke of York, Charles II's younger brother and a Catholic convert who stood next in line to the throne. James was hence the supposed beneficiary of an alleged 'Popish Plot' to assassinate King Charles and restore England to communion with Rome. Sheridan succeeded in using the new statute, which had been designed to prevent the Crown and its ministers evading the issue or return of the common law writ of habeas corpus, to secure his release from confinement, thus defeating a politically-motivated attempt by the dominant Whigs to expand the jurisdiction of the lower house, going well beyond the Commons' traditional power of commitment associated with breaches of privilege.[29] But Sheridan is also a particularly interesting individual for our present purposes. Just before the Popish Plot (or 'Exclusion') crisis erupted he published anonymously a *Discourse on the Rise and Power of Parliaments*, advocating a wide range of what were by then fairly routine demands of would-be legal reformers, including regulation of lawyers' numbers and fees and simplification of legal rules, doctrines and procedures. But Sheridan's leading proposal was no part of the standard agenda, because he called for Parliament to legislate the total abandonment of capital punishment, long the accepted penalty in English law for many criminal offences, including larceny or theft.[30]

It is easy to assume that law reform is now and always has been a progressive if not radical activity, advocated in the mid-seventeenth century by sectarian activists like the Levellers and Diggers, proponents of political and agrarian democracy, and in the 1820s and 1830s by the forward-looking utilitarian philosopher-activist Jeremy Bentham and his followers. Yet as we have already seen, the Jesuit Robert Persons who wished to undo the Protestant Reformation, and the royalist courtier Sir Peter Ball KC both proposed reforming the educational role of the inns of court. Sheridan, who would reveal his own conversion to Catholicism after his royal master came to the throne as James II in 1685, went a good deal further even than Persons.[31]

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28 Ibid 299–310; William Blackstone, *Commentaries on the Laws of England* (Oxford University Press, 1765–9; 2016) vol 4, 282 ('*Commentaries*'); Paul D Halliday, *Habeas Corpus: From England to Empire* (Harvard University Press, 2010) 237–46.

29 Halliday (n 28) 243–4.

30 John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 552–3.

31 Peter Garnsey and Wilfrid Prest, 'Thomas Sheridan against the Death Penalty' (2023) 135(2) *Rivista Storica Italiana* 443, 449. Shapiro in Shapiro, *Law Reform in Early Modern England* (n 5) 183–4, credits Sheridan with an earlier anonymous work: *Enchiridion Legum: A Discourse Concerning the Beginnings, Nature, Difference, Progress and Use, of Laws in General; and in Particular, of the Common and Municipal Laws of England* (London, 1673), but unfortunately provides no evidence for this claim.

Sheridan's case against the death penalty was multi-faceted. Neither God nor Nature permitted governments to exercise rights of life and death over their subjects, nor subjects to abandon their right to life as part of their original contract with government. The purpose of punishment was to reform and deter, yet a dead criminal could hardly be reformed, and common experience showed that capital punishment was an ineffective deterrent. Influenced by his association with the pioneering political economist William Petty, Sheridan also presented a utilitarian argument against the death penalty: already experiencing a labour shortage due to declining population, England could afford no further diminution of available manpower via the gallows.

This rejection of the death penalty was not unprecedented. Sheridan was familiar with the arguments against capital punishment presented in Thomas More's *Utopia* (1515–16), while some of his readers may have been aware of the abolitionist critique mounted from the 1650s onwards by radical puritans, especially Quakers, and Gerrard Winstanley, the leading Digger. Nor was Sheridan's appeal clearly or immediately successful. Indeed, parliamentary legislation saw the number of offences carrying the death penalty rise from around 50 to over 500 in the course of the eighteenth century. Yet at the same time various countervailing forces did something to weaken the impact of what would come to be known as 'the Bloody Code'. Many convicted felons escaped an otherwise mandatory death sentence by pleading 'benefit of clergy', a relic of the pre-Reformation church's claim to criminal jurisdiction over accused priests; this concession became available to women as well as men during the 1690s, while the previous formal requirement of ability to read was abandoned in 1706.[32] Juries also continued to commit 'pious perjury' by undervaluing stolen goods, since theft of items worth less than one shilling was petty larceny, which did not carry the death penalty.[33] Moreover alternative penal sanctions were becoming more readily available, in particular transportation to the English colonies across the Atlantic and imprisonment at hard labour. Statutes of 1718 and 1720 significantly boosted the transportation of felons. While it is difficult to generalize about the motivation underlying these various ameliorative developments and practices, both legislative and judicial, concern about excessive reliance on the death penalty almost certainly played some part; if so, ongoing criticism of capital punishment was far from wholly ineffectual. It also helped provide the groundwork for later, more systematic and potent attacks on the death penalty. The assertion that executions did not deter criminals long preceded the more sophisticated versions of this claim elaborated by mid-eighteenth-century abolitionists like Cesare Beccaria. It must also be remembered that more than two centuries elapsed between the appearance of Beccaria's main treatise in English translation and the effective abolition of capital punishment in the United Kingdom, and subsequently all Australian jurisdictions; of course, it remains in full force today in many other places. Law reform can be a very protracted process.

32 Blackstone, *Commentaries* (n 28) vol 4, 238–9. However, Blackstone also pointed out that 'in many cases of simple larceny', including horse-stealing, 'the benefit of clergy is taken away by statute': at vol 4, 159.

33 Ibid vol 4, 158–9.

Although still claiming to be an orthodox Anglican when examined by the House of Commons in 1678, Sheridan married into a Catholic family before the death of Charles II and went public with his own conversion in 1686; six months later he became secretary to King James II, whom he followed into exile across the Channel early in 1689, subsequently writing pamphlets which 'show him as both a bigoted Catholic and a forceful proponent of absolute monarchy'.[34] So he might well be characterised as a man on the wrong side of history, even if he also escaped the Protestant compulsion to follow scriptural precept, with particular reference to Old Testament accounts of God's dispensation of civil or judicial law for the Jewish people, which was in most respects far from abolitionist or hostile to the notion of death as ultimate penalty.

Nevertheless, it seems likely that Sheridan's Catholic-Jacobite identity helps explain why his pioneering attack on capital punishment had no obvious contemporary impact. Another reason was doubtless the rather diffuse and poorly-organised fashion in which his case was presented, something which also did little to ensure its subsequent influence on the development of abolitionist theory. Yet Sheridan may well have been the very first person to issue a public denunciation of the ultimate penal sanction, cast not merely in the form of a utopian fantasy or visionary ideal, but as a concrete proposal placed before legislators in the immediate here and now.

IV

I had first become aware of the disputed relationship between Mosaic law and early modern English law long before encountering Sheridan, in connection with the legal author, Puritan politician and proto-Zionist Henry Finch (1558–1625). In the mid-1580s Finch drafted a manuscript dedicated to and possibly commissioned by the Protestant hero Sir Philip Sidney: '*Nomotexnia*, or the Common Law of England in such lawful method written as it may justly challenge the name of an art. With a Conference or Reformation of the same law by the law of God'.[35] John Cooper, the internal examiner of my thesis, encouraged me to work on this tract after I completed converting that thesis into a book. It soon became clear that a complex series of subsequent drafts and revisions extending over several decades had transformed the first and shorter part of Finch's manuscript overview of English law into a much longer and more comprehensive account, which now exists not only in numerous manuscript versions, but as two printed volumes: the law-French

34 John Miller, 'Sheridan, Thomas (1646–1712): Government Official and Jacobite Pamphleteer' (2006) *Oxford Dictionary of National Biography*.

35 Wilfrid R Prest, 'The Art of Law and the Law of God: Sir Henry Finch (1558–1625)' in Donald Pennington and Keith Thomas (eds), *Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill* (Oxford University Press, 1978) 94, 97–8, citing Bodl Rawlinson MS C 43. See also Timothy D Crowley, 'Sidney and Finch's *Nomotexnia* (Art of Law): Religion, Politics, and Patronage?' (2021) 72(306) *The Review of English Studies* 663.

Nomotexnia (1613) and the English *Law, or a Discourse thereof* (1627).[36] While *Nomotexnia* did not appear in English translation until 1759, the posthumous English book was frequently reprinted, summarised and re-issued as an introductory text for law students until the mid-eighteenth century. Yet detailed comparison of their contents and the cases cited by both versions shows that although published later, the English *Law* was actually compiled before the law-French *Nomotexnia*. More than a century afterwards, introducing the printed syllabus of his Oxford law lectures, Dr William Blackstone would characterise Finch's *Law* as 'greatly superior' to all previous attempts at 'reducing the Elements of Law from their former Chaos to a regular methodical Science'.[37] Indeed, Finch's methodology, heavily indebted to the scheme of analytical exposition associated with the influential sixteenth-century French Calvinist academic philosopher and rhetorician Peter Ramus, influenced both the form and content of Blackstone's lectures from 1753 onwards, and through them his celebrated *Commentaries on the Laws of England*.[38]

So the most important and influential common-law book of all time, the work of the first ever common-law academic, Oxford's inaugural Vinerian Professor of the Laws of England, represents the culmination of attempts extending over more than two centuries at 'reducing our Laws to a System'.[39] For Finch's project was but one of many efforts to impose order and method on the jumbled chaos of statutes, cases, rules and processes which confronted early modern students of the common law. If proposals to improve the educational functions of the inns of court were a type of law reform, the same surely goes for endeavours to ease the labours of law students increasingly dependent on reading and private study, rather than the traditional oral 'learning exercises' handed down from the medieval inns, especially after the disruptions of the mid-seventeenth century civil wars. Blackstone's great achievement a hundred years later was to build upon his predecessors' work, 'to explain the law to laymen' (as the late Toby Milsom put it), by expounding 'the substantive rules without reference to the procedural framework in which they existed for lawyers'.[40] Finch in the sixteenth and seventeenth century and Wood in the early eighteenth century had written books which attempted to provide an accessible, authoritative and comprehensive general account of English law, while Sir Matthew Hale had outlined the plan for such a book. But none of them quite managed to pull it

36 Henry Finch, *Nomotexnia Cestascavoir un Description del Common Leys Dangleterre Solonque les Rules del Art* (London, 1613); Henrie Finch Knight, *Law, or A Discovrse Thereof*, *In Foure Bookes* (London, 1627).

37 William Blackstone, *Analysis of the Laws of England* (Oxford, 1756) vi.

38 Wilfrid Prest, 'The Dialectical Origins of Finch's *Law*' (1977) 36(2) *Cambridge Law Journal* 326.

39 William Blackstone, *Analysis of the Laws of England* (Oxford, 1756) v. On the national and international influence of the *Commentaries*, see: Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries* (Hart, 2014); Wilfrid Prest, 'Blackstone's *Commentaries*: Modernisation and the British Diaspora' in Philip Payton (ed), *Emigrants and Historians: Essays in Honour of Eric Richards* (Wakefield Press, 2016) 77.

40 SFC Milsom, *The Nature of Blackstone's Achievement* (Selden Society, 1981) 6.

off. That Blackstone was able to succeed where they failed owed much to a young man's energy and determination, allied to a wide range of reference and intellectual curiosity, and a poet's sensitivity to words and sentence structure.[41]

But Blackstone was also a law reformer in the more conventional sense, an advocate for progressive change in the doctrines and procedures which the courts administered. This may be hard to believe, in view of Jeremy Bentham's depiction of his former teacher as 'a bigotted or corrupt defender of the works of power', who 'openly sets his face against civil reformation', 'everything-is-as-it-should-be' Blackstone.[42] It is certainly true that Blackstone was a Tory in politics and an Anglican in religion, as well as a patriotic expositor of the virtues of English law and the British constitution. On the other hand, he was unhappy with many aspects of contemporary criminal law, especially its excessive dependence on capital punishment, and sought to develop a practical penal alternative through the last years of his life, drafting and promoting successive versions of what became the *Penitentiary Act 1779*, 19 Geo 3, c 74, providing for the construction of a prison where convicted felons could be sentenced to confinement at hard labour, rather than Tyburn's gallows.[43] Blackstone's Tory politics developed in opposition to the one-party rule of Robert Walpole and his oligarchic Whig successors from the 1720s through to the 1750s, not to mention their supporters among the gerontocratic college heads who resisted the young college fellow's active and ultimately successful campaign to reform Oxford's university press. Blackstone's religious stance understandably earned him the opprobrium of Protestant dissenters, but he was anxious to distinguish human from divine law, while maintaining that 'affronts to christianity' were punishable not because they offended God, but lest they should weaken the efficacy of oaths sworn by judges, jurors and witnesses, on which the entire legal system depended.[44] He upheld individual liberty and the rights of private property in a fashion which appeals to modern right-wing ideologues. But the *Commentaries* give little comfort to advocates of small government. For they support the provision of public welfare measures rather than private charity to maintain the poor and find jobs for those able to work, while as a Member of Parliament in the 1760s their author contributed to the drafting of legislation which sought to rationalise the provision of poor relief on a county or regional basis.[45] In short, Blackstone's political and social views, including his stance on gender issues, were not all of a piece, and cannot be reduced

41 Ibid 7–8.

42 Jeremy Bentham, *A Fragment on Government* (London, 1776) in JH Burns and HLA Hart (eds), *A Comment on the Commentaries and a Fragment on Government* (Athlone Press, 1977) 398, 406, 407.

43 Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008) 297–301.

44 Wilfrid Prest, 'William Blackstone's Anglicanism' in Mark Hill and RH Helmholz (eds), *Great Christian Jurists in English History* (Cambridge University Press, 2017) 213, 231.

45 Wilfrid Prest, 'William Blackstone and the "Free Constitution of Britain"' in DJ Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press, 2014) 210.

to simple stereotypes of radical or conservative, reactionary or progressive, let alone Whig or Tory.[46]

I don't recall when I first came across Blackstone. As a non-lawyer history postgrad with an interest in early modern legal literature it would have been difficult to avoid his name. It may even have been invoked as a kind of talisman in an orotund course of lectures delivered by the practitioner PD Phillips QC to the 1958 first-year Melbourne University Law School 'Introduction to Legal Method' class, of which I was a reluctant member (following short-lived parental directives to do something useful in addition to an Arts degree). I certainly knew very little about Blackstone or his *Commentaries* when in the early 1990s Michael Lobban enquired whether there was any individual lawyer from the early to mid-eighteenth century whom I might like to write up for the new *Dictionary of National Biography* (Michael being then, like myself, an associate editor charged with finding contributors for entries on a 'block' of subjects, in our case lawyers, from a given chronological period). It is still slightly puzzling to me that I unhesitatingly nominated Blackstone, about whom I then knew little more than that there was no recent scholarly biography. Perhaps compiling a relatively brief biographical memoir seemed to offer an interesting challenge, besides a good way of filling a large gap in my own understanding.

For since completing *The Rise of the Barristers*, a sequel to my inns of court book in the mid-1980s, my research interests had been moving forward from the later sixteenth and early seventeenth centuries to what historians now termed 'the long eighteenth century'. This chronological progression was accelerated by the arrival in Adelaide of David Lemmings, a recent Oxford doctoral graduate. For David and I had begun work on another ARC-funded project, aiming to produce a general history of the English bar 'in the context of a century when popular participation in litigation declined, parliamentary legislation increased, and the imperial state expanded'.[47] This quotation comes from the dust-jacket of David's deservedly influential and very well-received *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century*, which remains the most substantial outcome of that project. My own involvement had largely ceased in the early 1990s, after David moved to a lectureship at Newcastle, when I was persuaded to write a general textbook covering English history from 1660 to 1815, in which Blackstone and his *Commentaries* made a fleeting appearance.[48] It was not until a sabbatical year at the National Humanities Center in North Carolina in 1998–99 that I came to think Blackstone might merit more than 1500 words in what was now officially termed the *Oxford Dictionary of National Biography*. Researching and writing that biography was what brought me into the Law School in 2003, thanks to further ARC support enabling me to devote myself full-time to the task. Having completed

46 Cf: Wilfrid Prest, 'William Blackstone and the Historians' (2006) 56(7) *History Today* 44; Anthony Page and Wilfrid Prest (eds), *Blackstone and His Critics* (Hart, 2018).

47 David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press, 2000).

48 Wilfrid Prest, *Albion Ascendant: English History 1660–1815* (Oxford University Press, 1998) 136, 199–200.

and published the life (and previously a volume of Blackstone's surviving correspondence, a partial substitute for the lack of any family, personal or professional papers), the next priority was to produce a new edition of the *Commentaries* — with modern typography, translated passages in foreign languages, footnote glosses on unfamiliar words and names, and substantial scholarly introductions — to replace the more rudimentary and somewhat user-unfriendly facsimile volumes published by the University of Chicago Press.[49]

V

That editorial project happened to fit in neatly with another endeavour undertaken by my now returned Adelaide colleague David Lemmings, who had accepted an invitation to write the ninth volume of the *Oxford History of the Laws of England* ('*OHLE*'), covering the period 1689–1760. Like much else in the booming cottage industry of English legal history over the past half-century or so, the *OHLE* is the brainchild of Professor Sir John Baker, the first legal historian to be knighted for service to scholarship.[50] It was intended to supersede or at least complement Holdsworth's monumental multi-volume *History of English Law*, compiled in the early twentieth century almost entirely from printed sources. By contrast the distinctive contribution of Baker has been to identify and exploit the wealth of unpublished material generated by the operation of the courts and the legal profession, much of which became available and readily accessible only after World War II. However, apart from being widely dispersed on both sides of the Atlantic and even further afield, such manuscript sources, often existing in few or unique copies, are generally more time-consuming than printed material to locate and consult. The intensifying pressures of modern academic life also help to explain why only half the original dozen *OHLE* volumes commissioned in the late twentieth century have as yet been published. Unfortunately, the passage of time only worsens the problem. For while the advent of digital technology has generally helped make historical sources of all kinds more readily accessible, most early printed books are available online, whereas this is true of only a fraction of the immense existing bulk of relevant manuscript and archival material. Moreover, authors signed up more than twenty years ago are inevitably and increasingly subject to all the ills the flesh is heir to. It was the incapacity of the late Henry Horwitz, the original contracted author of *OHLE* volume 9, which led to David being asked to take his place; my own involvement followed shortly thereafter, along with that of Mike Macnair from Oxford's Faculty of Law. We agreed upon a rough division of labour, whereby Mike would be responsible for the history of legal doctrine during our seventy-year period,

49 WR Prest (ed), *The Letters of Sir William Blackstone 1744–1780* (Selden Society, 2006); Wilfrid Prest et al (eds), *Commentaries on the Laws of England* (Oxford University Press, 2016).

50 Sir William Holdsworth, the other possible aspirant to that distinction, gained his honour for services to the British Empire as a member of the 1929 Indian States Inquiry Committee: HG Hanbury and David Ibbetson, 'Holdsworth, Sir William Searle (1871–1944): Legal Historian' (2015) *Oxford Dictionary of National Biography*.

I would handle the institutional aspects (courts, litigation, the legal profession and law reform), and David would write on expectations and representations of the law, its practitioners and processes. This is still the basic plan, although we have recently recruited Emily Ireland, who wrote her doctoral thesis at the University of Adelaide, to provide chapters on gender and the law, and legal personality, for David and Mike's respective sections. She thereby became the first female legal historian contracted to contribute to the *OHLE*.

Legal history has never been an exclusively male preserve. The first 100 volumes of texts published in the Selden Society's main series between 1887 and 1987 include 17 edited by a woman (co-edited with a male in two cases). Yet after the first two volumes on medieval borough customs compiled by Mary Bateson were published in 1904 and 1906, a quarter century would pass before the work of the next female editor appeared. This gender imbalance no doubt reflected the Society's dominance by professional lawyers well into the second half of the twentieth century. Over the same period the sex ratio among academic historians may not have been any more favourable to women, but the sub-discipline of medieval history had long tended to attract a disproportionate representation of female scholars, while it was only in the 1960s that the Selden Society begin to publish the occasional post-medieval text.[51] More recently, women have become increasingly prominent practitioners of legal history, as is readily apparent from the programs of the biennial British Legal History conference and the annual conferences of the American Society for Legal History and the Australia and New Zealand Law and History Society, as well as the pages of the *Journal of Legal History*, the *American Journal of Legal History*, the *Law and History Review* and *Law&History*.

At this point of widening opportunities for female scholars in the field of legal history, it is particularly regrettable that the Adelaide Law School seems to have turned its back on a homegrown tradition of innovative legal-historical scholarship, with the abandonment of legal history as a stand-alone subject in both the undergraduate syllabus and taught postgraduate courses.[52] Some of the reasons why legal history, once a significant and often mandatory curricula component, is now largely absent from Australian law schools — for Adelaide is by no means unique in this respect — have been well summarised by Justin Gleeson, while two former High

51 JH Baker and DEC Yale, *A Centenary Guide to the Publications of the Selden Society* (Selden Society, 1987) 13, 53–206; Laura Carter, 'Women Historians in the Twentieth Century' in Heidi Egginton and Zoe Thomas (eds), *Precarious Professionals: Gender, Identities and Social Change in Modern Britain* (University of London Press, 2021) 263.

52 While legal history at Adelaide has been largely dominated by male scholars (among others Ralph Hague, Horst Lücke, Alex C Castles, Greg Taylor, and John M Williams), it should not be forgotten that Suzanne Corcoran became founding editor of the *Australian Journal of Legal History* in 1995. Cf Horst Lücke, 'Legal History in Australia: The Development of Australian Legal/Historical Scholarship' (2010) 34(1) *Australian Bar Review* 109.

Court judges have eloquently stated the case for its return or retention.[53] An instrumentalist approach to legal education, manifest in a desire to produce graduates who are employment-ready, equipped with the analytical techniques to deal with the law as it is now and in the future, is not necessarily an unworthy goal in itself. But given that most law graduates will not work as lawyers, and that much of the work done by legal practitioners today is likely to be seriously intruded upon, if not made redundant, by the future application of generative artificial intelligence, it may be that the virtues of a broader curriculum which encourages a more reflective approach to law as a social practice have been too easily overlooked.

To return to law reform, and the *OHLE*. The close textual study required to produce a new edition of Blackstone's *Commentaries* was a very appropriate preparation for research on a new historical account of English law in the seventy years following the 'Glorious Revolution' of 1688. For Blackstone's Oxford lecture course — a radical departure in itself, since the university's formal curriculum made no provision for teaching English common law, the Faculty of Law being then concerned solely with Roman or civil law — on which the *Commentaries* were closely based, provided a comprehensive and well-informed overview of English law in the last decade of our allotted period, which was also the final decade of George II's reign. Like the *Commentaries* themselves, the lectures (in so far as they can be reconstructed from surviving student notes) demonstrated Blackstone's dissatisfaction with many aspects of the legal system, informed by his experience as a practising barrister.

Blackstone's views indeed supported the argument advanced in a 1991 British Legal History conference paper (the last relic of my involvement with David Lemmings in co-authoring a history of the eighteenth-century bar), which maintained that Shapiro's characterisation of law reform activity, as 'interest in obtaining cheaper, less dilatory and more equitable legal services [which] continued at a low but by no means insignificant level … into the early years of the eighteenth century,' remained valid up to George III's accession in 1760.[54] Three main phases of parliamentary law reform activity can be identified: (1) the early 1700s, centred around a House of Lords committee chaired by John Lord Somers which produced a bill that became an act for 'amendment of the law' (4 & 5 Anne, c 16, 1706); (2) the early years of George II's reign, which saw legislation regulating attorneys and solicitors (2 Geo 2, c 23, 1729), the 'Englishing' act of 1731 (4 Geo 2, c 26), a House of Commons committee's enquiry into the notorious and shocking abuses and conditions prevalent in

53 Justin Gleeson, 'Re-Imagining Legal History' in Justin T Gleeson and Ruth CA Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 58; William MC Gummow, 'Law and the Use of History' in Justin T Gleeson and Ruth CA Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 61; Michael Kirby, 'Is Legal History Now Ancient History?' (2009) 83(1) *Australian Law Journal* 31; Michael Kirby, 'Foreword' in Sarah McKibbin, Libby Connors and Marcus Harmes (eds), *A Legal History for Australia* (Hart, 2021) v–viii ('*A Legal History for Australia*').

54 Wilfrid Prest, 'Law Reform in Eighteenth-Century England' in Peter Birks (ed), *The Life of the Law: Proceedings of the Tenth British Legal History Conference, Oxford, 1991* (Hambledon Press, 1993) 113, 115.

the capital's court-administered but privately-operated prisons, and two eventually unsuccessful bills for reforming the functions and powers of the national network of ecclesiastical courts and their jurisdiction over 'spiritual' and 'moral' matters; and (3) the late 1740s to early 1750s, more or less coinciding with the years of peace from the end of the War of the Austrian Succession (1748) and the start of the Seven Years War (1756), when fears of a violent crime wave led to a spate of measures intended to improve criminal law enforcement, together with numerous statutes affecting civil proceedings, by among other things shortening Michaelmas term (24 Geo 2, c 48, 1751), prohibiting clandestine marriages (26 Geo 2, c 33, 1753), and establishing small debts courts exercising summary jurisdiction ('courts of conscience'), in London and various provincial urban centres.

In addition to these bursts of debate and legislative activity, hardly any of the now annual parliamentary sessions from 1689 onwards failed to see at least one law reform measure brought forward, even if many more such bills were presented than actually enacted. Outside Parliament an explosion of print media following the collapse of pre-publication press censorship in 1695 facilitated dissemination of a more or less continuous critique of the law's shortcomings, as well as proposals to remedy them, sometimes including draft bills. Law reform advocates, both lawyers with direct personal experience of what they complained about and lay persons, showed an increasingly realistic appreciation of the need not merely to enumerate and excoriate legal deficiencies and abuses, but to persuade their readers that remedial action of a specific nature was called for. They also seemed more conscious than their mid-seventeenth century predecessors of the previous history of attempted law reform in England, and frequently sought to reinforce their case by invoking the virtues of other legal and penal systems, especially those in the Netherlands, Denmark and Prussia. At the same time there was greater recognition of the difficulties created by the need to work through Parliament, of the value of expert independent advice on the merits of proposed law reform measures, and of the practical limits on what real-world changes could be achieved by legislative means.

The long final chapter on law reform in my contribution to *OHLE* volume 9 incorporates these points from the 1991 paper, while providing much more detail on both parliamentary and extra-parliamentary pressure for legal change. It also argues that we have tended to underestimate the significance of what was achieved over the whole period 1689–1760, especially with regard to the regulation of attorneys and solicitors and criminal law reform. At the same time, we must recognise the limits of such intermittent incremental change, which did little to tackle the dilatory proceedings of the Court of Chancery, the vested interests of the possessors of venal legal office who controlled the 'back-stage' fee-for-service workings of all the central common law and equity courts, the plight of imprisoned debtors, the appalling state of the gaols in which they languished, and much else besides.

In the later eighteenth century and early nineteenth century, law reform never became a cause as popular or widely-supported as the emancipation of slaves or electoral reform, perhaps because the law and its workings seemed less central to most people's lives and less shocking to their sentiments of common humanity. But then it still took more than half a century after Mansfield's decision in Somerset's

case to accomplish the legislative abolition of slavery, while the Reform Act of 1832 was even further distant chronologically from the parliamentary reform agitation which had first erupted with cries of 'Wilkes and Liberty' in the 1760s. And what might seem to some today the cardinal fault of the eighteenth-century English legal system — its apparent total exclusion of women from legal practice — took still longer to be recognised and acted upon. Yet even at the very outset of the eighteenth century we hear the occasional proto-feminist voice, like that of the 'Gentlewoman' who on the 'Question … Why a Woman should not be admitted in to Government as well as Men … argued, That Women … exceed Men in quickness of Apprehension … Men she said, out of the Robustness of their Nature, kept them from it'.[55] A little later Mary Astell famously demanded to know 'If *all Men* are *born free*, how is it that all Women are born Slaves?'[56] Some men and women agreed that the problem was one of upbringing or education: 'How many ladies have there been, and still are, who deserve places among the learned; and who are more capable of *teaching* the *sciences* than those who now fill most of the *university chairs*', asked the anonymous author of *Woman not Inferior to Man*.[57] She (assuming the authenticity of her authorial persona) went on to claim that '[i]f we were to apply to the *law*, we should succeed in it at least as well as the *Men* … were we to fill the offices of *counsel*, *judges*, and *magistrates*, we shou'd shew a capacity in business which very few Men can boast of'.[58] In point of fact, there is some evidence that a few women actually were working as lawyers during our period. According to Dr Nehemiah Grew FRS, research scientist, physician and political economist, writing a few years into the reign of Queen Anne, the excessive proliferation of attorneys in and around London was exacerbated by many persons who

> tho' no sworne Attorneys, yet Sollicit Causes, and Practise as Attourneys, in other men's Names; of which Number there are above 500 in this City. And among them, some Women; of whom one Hawkins, a Female Sollicitor, is said to be knowne to most of the Judges.[59]

While it has not so far proved possible to identify Mistress Hawkins, we do know a little more about the Herefordshire heiress Lucy Rodd, who after separating from her barrister husband Robert Price in 1690 seemingly resided in chambers at Gray's

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55 Joseph Coles, *England to be Wall'd with Gold, and to Have Silver as Plentiful as Stones in the Street* (London, 1700) 8.

56 Mary Astell, *Reflections upon Marriage* (London, 4th ed, 1730)

57 Sophia [pseudonym], *Woman Not Inferior to Man*: *Or, a Short and Modest Vindication of the Natural Right of the Fair Sex, to a Perfect Equality of Power, Dignity and Esteem, with the Men* (London, 1739).

58 Ibid 40–1.

59 Nehemiah Grew, 'Nehemiah Grew and England's Economic Development: The Meanes of a Most Ample Encrease of the Wealth and Strength of England in a Few Years' in Julian Hoppit (ed), *Records of Social and Economic History: New Series 47* (Oxford University Press, 2012) 87; Wilfrid Prest, '"One Hawkins, a Female Sollicitor": Women Lawyers in Augustan England' (1994) 57(4) *Huntington Library Quarterly* 353.

Inn, 'and often took upon her to act as a Counsellour at Law', and so gained the title of the '*Petticoat Counsellor*'.[60] Further research may uncover more corroborative detail about the activities of these two individual practitioners, as well as evidence of other women undertaking roles as chamber counsel or unofficial legal agents during and after this period.[61] It will hardly modify the general point already insisted upon, that law reform is often a very long drawn-out process. How far that holds true of law reform in Australia's various jurisdictions is another question which still awaits its historian.

60 WR Chetwood, *The British Theatre, Containing Lives of the English Dramatic Poets* (Dublin, 1750) 164; Paul Baines and Pat Rogers, *Edmund Curll, Bookseller* (Clarendon Press, 2007) 233–4; Stuart Handley, 'Price, Robert (1655–1733): Judge and Politician' (2007) *Oxford Dictionary of National Biography.*

61 Cf: Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* (Random House, 1986); McKibben, Connors and Harmes (eds), *A Legal History for Australia* (n 53) 51–3.

Geoffrey Lindell AM and Christopher Sumner AM***

THE SUGGESTED EFFECT OF A SOUTH AUSTRALIAN PARLIAMENTARY VOTE OF NO CONFIDENCE IN A MINISTER: IS IT UNCERTAIN?

I Address by Geoffrey Lindell

A *Introduction*

As a proud graduate of the Adelaide Law School, I feel very honoured to be selected to contribute this address to the special issue of the *Adelaide Law Review* which celebrates its 140th anniversary.[1] It is pleasing to have been associated with a Law School which has had, and continues to have, an excellent national and international reputation. The foundations of my own career were provided by such fine academics who taught at this Law School, being the late Emeritus Professors Alex Castles, Daniel O'Connell, Colin Howard, and Professor Horst Lucke who I am glad to say is still with us, to name the most outstanding scholars and teachers who taught me.

The subject of this address illustrates a lifelong interest and a lifetime of research into how the principles of the British Westminster parliament and government operate in relation to the parliaments and governments of the Australian Commonwealth. It is much influenced by Alex Castles and, in particular, his teaching of

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* Geoffrey Lindell has taught and published widely in the field of Australian constitutional law which was recognised by his appointment as a Member of the Order of Australia. He has also assisted in major reviews of the *Australian Constitution* by serving as a member of the Advisory Committee to the Constitutional Commission (1986–87), and acted as a consultant to the Australian Constitutional Convention (1975–85). He has also provided constitutional advice to governments and parliaments. He is currently an Emeritus Professor of Law at the University of Adelaide. His publications have most recently included, as author, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016).

** Christopher Sumner was a barrister and solicitor from 1967 to 2022. He was a Member of the Legislative Council in South Australia from 1975 to 1994 and the holder of numerous ministerial portfolios including Attorney-General in the Corcoran, Bannon and Arnold Labor Governments. His appointment as a Member of the Order of Australia cited his service to the law including in establishing basic principles of justice for victims of crime as well as to multiculturalism. From 1995 to 2012 he was a Member/Deputy President of the National Native Title Tribunal involved in future act inquiries and mediations. He received the Italian Honour of Commendatore in 1989.

1 The subject of this address was originally presented as part of the Adelaide Law School's Law 140: Eminent Speakers Series.

British and Australian State Constitutional Law or, as it was known then, Constitutional Law I, in first year. The question to be addressed concerns the effect of a South Australian parliamentary vote of no confidence in a Minister and whether it is uncertain. It is acknowledged that the collective responsibility of the government to the South Australian House of Assembly requires all Ministers in a government to resign if the government loses the confidence of the House. I am going to argue that the individual responsibility of a single Minister to the same House requires a Minister to do likewise even when that lack of confidence is confined to that Minister without extending to the rest of the ministry. I will also deal with whether that individual responsibility is affected when the House or its committees decide to refer the Minister's personal wrongdoing to the South Australian Ombudsman for investigation and report.

The idea for the subject was prompted by the publication of a detailed 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' written by the Hon Chris Sumner and me ('*Statement of Constitutional Principles*').[2] It was first published in the *History Council of South Australia Newsletter* on 2 March 2023 and is now republished in this special edition of the *Adelaide Law Review* with the kind permission of the editors of the *History Council of South Australia Newsletter*. This address does not summarise or repeat the text of the *Statement of Constitutional Principles*, but instead emphasises the main argument advanced in it, in a shortened form and structure, more appropriate for the oral delivery of the talk by the author which took place as part of the Adelaide Law School's 'Law 140: Eminent Speakers Series'. At this stage I wish to pay tribute to the co-author of the *Statement of Constitutional Principles* as a distinguished former reforming South Australian Attorney-General and long serving Member of the Legislative Council. He is therefore well qualified to write about the conventions followed by the South Australian Parliament.

It is desirable at the outset to explain what will not be covered in this address. I am not going to discuss whether the issues I am going to cover have now become judicially reviewable or deal with the controversial scope of the reserve powers of the Governor. The situations I am about to deal with are intended to be hypothetical although they are admittedly prompted by the facts in what can be described as the 'Kangaroo Island Affair'. That affair involved the rejection of a proposal for a deep-water port facility at Smith Bay on Kangaroo Island in August 2021 by the then Deputy Premier and Attorney-General, the Hon Vickie Chapman as Minister

2 CJ Sumner and Geoffrey Lindell, 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' (2 March 2023) *History Council of South Australia Newsletter*. Hereinafter, all reference is made to the version of the *Statement* republished at the conclusion of this article ('*Statement of Constitutional Principles*'). For previous writing on the subject of the *Statement of Constitutional Principles*, see: David Blunt, 'Responsible Government: Ministerial Responsibility and Motions of "Censure"/"No Confidence"' (2004) 19(1) *Australasian Parliamentary Review* 71; Geoffrey Lindell, 'The Effect of a Parliamentary Vote of No Confidence in a Minister: An Unresolved Question?' (1998) 1(1) *Constitutional Law and Policy Review* 6 ('The Effect of a Parliamentary Vote of No Confidence').

for Planning and Local Government when it was alleged she had a conflict of interest in taking that action.[3] Insofar as there is any resemblance with that affair, I do not intend to suggest expressly or by implication that the Minister involved actually did have a conflict of interest or had misled the Parliament. That said I am aware of parliamentary findings to that effect and the contrary finding of the Ombudsman which denied the existence of the conflict of interest.[4]

The approach adopted in this address speaks to four hypothetical situations stated in an abstract form. The address will then end with a brief word about which of those situations most closely resemble the Kangaroo Island Affair and the lessons to be learnt for the future. Readers interested in knowing how the principles developed with reference to the hypothetical situations applied to the Kangaroo Island Affair will need to read the *Statement of Constitutional Principles* mentioned earlier.

B *Role and Place of Conventions and Responsible Government in Constitutional Law Operating in South Australia*

The constitutional law of South Australia can be found in the *Constitution Act 1934* (SA) ('*Constitution Act*'), other legislation and constitutional conventions developed over centuries of practice in the United Kingdom ('UK') and elsewhere.[5] South Australia has enjoyed a system of representative government known as responsible government since 1856.[6] Its existence is partially recognised in:

- section 66 of the *Constitution Act* which requires Ministers to be Members of the South Australian Parliament within three months of their appointment; and
- section 28A of the *Constitution Act* as regards the early dissolution exception to the adoption of a fixed term of Parliament.

What was said of the position in New South Wales by the New South Wales Court of Appeal in *Egan v Willis* is equally applicable to the position in South Australia.[7] It was said in that case that 'responsible government … is a concept based upon a combination of law, convention, and political practice'.[8] Conventions in the ordinary sense of that word can refer to a custom or customary practice.[9] In the constitutional

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3 See Wayne Lines, *Investigation of a Referral by the Select Committee on the Conduct of the Hon Vickie Chapman MP* (Final Report, 2 May 2022) 12–33.

4 The affair is described in detail in pt II of the *Statement of Constitutional Principles*.

5 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt IV.

6 The history of its introduction in the State is recounted in Boyle Travers Finniss, *The Constitutional History of South Australia: During Twenty-One Years from the Foundation of the Settlement in 1836 to the Inauguration of Responsible Government in 1857* (WC Rigby, 1886) and Gordon D Combe, *Responsible Government in South Australia: From the Foundations to Playford* (Wakefield Press, rev ed, 2009) vol 1, chs 5–9.

7 (1996) 40 NSWLR 650.

8 Ibid 660 (Gleeson CJ).

9 *Australian Oxford Dictionary* (2nd ed, 2004) 'convention'.

context, conventions have been defined as 'binding rule[s] … of behaviour accepted as obligatory by those concerned in the working of the constitution' or alternatively, as 'the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly'.[10] Those rules when operating only as mere conventions are not traditionally thought to be legally binding in the sense of being enforceable in the courts or that a breach of them would entail direct legal consequences.

This is not the place to deal with the elusive and subtle distinction drawn by the courts between *recognising* the existence of conventions when interpreting the law — which was and is permissible — and the courts *enforcing* obedience to them which was not thought to be acceptable. Nor is it the place to deal with whether, as a result of implications drawn from the *Australian Constitution*, certain basic conventions which form part of responsible government are now recognised as being judicially enforceable.[11]

It suffices to state for the present purposes, that the position is well summarised in an equation suggested by the Canadian Supreme Court when a majority of that Court stated 'constitutional conventions plus constitutional law equal the total constitution of the country'.[12]

C *Hypothetical Situations*

This brings us to the first hypothetical situation which is relatively easy to resolve.

1 *Situation One: Collective Responsibility*

In situation one, the reader is asked to assume the existence of the following facts. The opposition party in the South Australian House of Assembly combines with the independents to pass a vote of no confidence in a minority government because of the alleged misconduct of a Minister who refuses to resign and the failure of the minority government to advise his dismissal. The question to be asked is whether that government should resign at least as a matter of convention as traditionally understood.

The answer it is suggested is relatively simple and not contested, namely, that the government should resign and can be dismissed by the Governor if it does not resign.

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10 Blunt (n 2) 73, quoting Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7, 12.

11 For discussion of these issues, see: Geoffrey Lindell, 'Responsible Government and the Australian Constitution: Conventions Transformed into Law?' (Law and Policy Paper No 24, Centre for International and Public Law, 2004); Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?' (2014) 38(2) *Australian Bar Review* 118, 128–38.

12 *Re Resolution to amend the Constitution* [1981] 1 SCR 753, 883–4 (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ) ('*Re Resolution to amend the Constitution*').

There are at least three essential rules or conventions which apply under the British system of responsible government in South Australia:[13]

(1) Ministers must be Members of the parliament as required by law as well as convention;
(2) Ministers must enjoy the support of a majority of Members in the House of Assembly in order to hold office; and
(3) the Governor must usually act on the advice of those Ministers which is also frequently required by law as well as convention.

In other words, and in short, Ministers must be responsible to Parliament.

The democratic explanation for this is not hard to find. The authority of the government and its Ministers to govern on behalf of the citizens that have elected them and the other Members of Parliament derives from the support that they enjoy in the House of Assembly. It is in this way that our governments gain their authority from the people. It is also one of the important ways in which the parliament asserts its authority and it is supposed to assure the accountability of government to the parliament.[14]

Whatever might be said of *individual* ministerial responsibility, there is no doubt whatsoever about the acceptance of the *collective* responsibility of Ministers to Parliament. A government can only govern if it obtains and retains the confidence of the House of Assembly, whether or not the majority is comprised of Members of the governing party in their own right or those Members governing with the support of independents. Confidence in this context simply means support for the appointment of Ministers and their continuance in office.

The loss of that confidence can be manifested by a defeat of the government on 'votes of confidence' or 'votes of no confidence'.[15] It can either be manifested *explicitly* or *implicitly* as where a lower house of parliament refuses to grant supply.[16]

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13 But, as has been stated in what must be regarded as the non-essential aspects of the way the principles developed in Westminster, 'the conventional ordering of government in South Australia, as elsewhere, has necessarily always derived some of its character from local conditions, from its evolving political traditions, and from provisions of the State *Constitution Act* which may be quite distinct and different from the position under the British constitution': Alex C Castles and Michael C Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia: 1836–1986* (Wakefield Press, 1987) 274.

14 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt IV.

15 Philip Norton, 'Government Defeats in the House of Commons: Myth and Reality' [1978] (Spring) *Public Law* 360, 362–5.

16 Ibid 364–5. An Australian illustration of a refusal of supply being treated as a vote of no confidence is when the Fadden Government resigned in 1941 after the House of Representatives passed a motion that the first item in the federal budget be reduced by one pound, where such a resolution was described as 'one of the traditional forms of no confidence …': Geoffrey Sawer, *Australian Federal Politics and Law: 1929–1949*

Retention of the confidence of the relevant house of parliament is a critical aspect of the Westminster system of responsible government. This is so even if the passage of confidence votes is rarely passed or has to be passed in order to lead to a change of government once the requisite confidence is lost or not obtained after a government is defeated following the holding of general elections.[17]

It should be emphasised that the responsibility dealt with here is owed to only the lower house despite the powers of upper houses, such as the South Australian Legislative Council, to reject supply.[18] The consequences of the loss of confidence in the lower house are resignation, followed by a change of government, and sometimes, an early election or withdrawal of supply and likely dismissal by the State Governor if a government does not resign.

2 *Situation Two: Ministerial or Individual Responsibility*

It is now necessary to turn to the second situation which requires the reader to assume the existence of the following facts which give rise to the critical issue addressed in this address. The opposition party and the independents in the South Australian House of Assembly combine to pass a motion of no confidence in a Minister in a minority government. This occurred following findings made by a House of Assembly Select Committee that the Minister in question:

- was guilty of a conflict of interest in respect of a decision made by him in his ministerial capacity; and
- had misled the Parliament in answering questions in the House of Assembly which, although they had arisen out of the conflict of interest, did not turn on whether the Minister was guilty of such a conflict.

The question to be asked in these circumstances is whether the Minister should resign (or be dismissed if they do not resign).

(Melbourne University Press, 1963) 129. The withdrawal of confidence was shown by the defeat of the Government on other questions: see DR Elder (ed), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 320–3.

17 Unless there is some doubt about whether a government has obtained the support of a majority of Members of the House in which case the Premier is entitled to have the matter tested on the floor of the House. For instances of this happening in South Australia following elections in 1968 (Dunstan) and 2002 (Kerin), see Robert Martin, *Responsible Government in South Australia*: *Playford to Rann 1957–2007* (Wakefield Press, 2009) vol 2, 52, 161–2.

18 The power to reject supply is not one of the exceptions to the equal powers possessed by both houses in relation to the enactment of money bills, see: *Constitution Act 1934* (SA) ss 10, 60–4 ('*Constitution Act*'); Chris J Sumner, 'Constitutional and Parliamentary Reform for South Australia' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 22, 29–30.

In this connection it is important to distinguish a vote of *no confidence* from a mere vote of *censure* which falls short of requiring resignation (ie it is only, in effect, an expression of criticism). Again no attempt is made in this address to deal with the status of votes of no confidence in the Legislative Council as the upper house of the South Australian Parliament.

We have been told that in order to test the existence of a convention

> [w]e have to ask ourselves three questions: first, what are the precedents; secondly, didthe actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[19]

The reason which supports the individual Minister's responsibility is not hard to find. It is that the role of Parliament is not only to pass laws, but also to scrutinise and hold to account the conduct of Ministers. This is so even though the notion of ministerial responsibility for the actions of their departments has become somewhat attenuated.[20] But what is in issue here is accountability for a Minister's *own* conduct and personal wrongdoing.

As was stated in the *Statement of Constitutional Principles*, it is true that the duty of individual Ministers to resign when a vote of no confidence has been passed against them is perhaps not as explicitly or well recognised as the duty of a government to resign in the same circumstances, but this does not negate the existence of the convention.[21]

The main difficulty here is absence of modern instances to support the resignation or dismissal of individual Ministers after the passage by the House of Assembly of an explicit vote of no confidence. Not surprisingly, this casts some doubt on whether such a convention *exists* as distinct from whether it *should* exist. One explanation is that the passage of such resolutions has become rare because of the emergence of strong party discipline and the small likelihood of that kind of resolution ever being passed when governing parties secure majorities in their own right.[22] Indeed the

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19 Sir W Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 136. The test was adopted by the Supreme Court of Canada in *Re Resolution to amend the Constitution* (n 12) 888 (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ).

20 As was recognised regarding South Australia in Castles and Harris (n 13) 283–4.

21 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(A) n 30 and associated text where the authors cited in support of that statement Blunt (n 1) 71 and Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 6.

22 It has been suggested that the doctrine of individual responsibility of a Minister has been rendered ineffectual 'given the practical realities of party dominance in political affairs' for 'so long as a party retains its discipline and the majority in a lower house,

same explanation accounts for the rare occasions when votes of no confidence against governments are passed.

Another explanation is that the instances of ministerial misconduct resulting in resignation or dismissal would have made it unnecessary for the misconduct to be taken further so as to require the formalised passage of an explicit vote of no confidence.

These factors narrow the occasions where the issue is ever likely to arise. If, as has been acknowledged, there is an absence of modern instances where Ministers have resigned following a vote of no confidence, it is equally the case, that both authors of the *Statement of Constitutional Principles* were not aware of instances where a Minister did *not* resign despite the passage of such a vote properly so called as distinct from a mere vote of censure.[23] The distinction between the two kinds of votes was illustrated when the then South Australian Treasurer was censured by the House of Assembly over his handling of the State's electricity industry, which had allegedly left customers facing price rises of up to 100%. Two independents had voted with the opposition to censure the Treasurer on 3 May 2001, having previously indicated they would not support a vote of no confidence.[24]

But perhaps the strongest argument in favour of the duty of a Minister to resign or be dismissed for lacking or losing the confidence of the House of Assembly rests on an inference involving the application of *inductive* reasoning applied in a normative sense arguing in effect from the particular to the general. In other words, if there are instances of Ministers resigning because they have lost the confidence of the House of Assembly either expressly or impliedly then it should be logically possible to infer that those instances should be seen as mere examples of a wider rule that requires Ministers to resign *whenever* and, in all cases, where they lose that same confidence. The inference can be drawn if there is a common thread running through all those instances which here is a lack of confidence and the need for accountability to Parliament. The two particular instances relied on here are: (1) the loss of confidence in the ministry as a whole (ie *collective* responsibility

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the possibility that an individual Minister will be censured [and under a duty to resign] … is remote indeed!': Castles and Harris (n 13) 283. The term 'censure' was here used in the sense of meaning more than mere criticism of a Minister, as explained in the following footnote (see below n 23). However, while this factor helps to explain why the issue has rarely arisen in modern times, the doctrine of individual responsibility may nevertheless still apply and fails to anticipate the resurgence of minority governments especially at the state level of government.

23 As was arguably the case with the State Attorney-General who refused to resign despite the passage of a vote of no confidence in the Queensland Legislative Assembly in 1997. In the author's view it was not really such a vote because of the admission by the independent (who combined with the opposition to pass the vote) that she did not intend the Attorney-General to resign: see especially Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 6, 9.

24 'Treasurer Censured', *The Australian* (Canberra, 4 May 2001) 6.

of Ministers); and (2) instances where an individual Minister resigned for specific examples of personal wrongdoing.

(a) Collective Responsibility of Ministers

If the ministry as a whole must resign or be dismissed when it ceases to enjoy the confidence of the House, why should the same not apply when an individual Minister also ceases to enjoy the same confidence? After all the same rationale seems applicable to the need for Ministers to be held to account for the performance of their duties.

In the UK, the convention requiring a Minister to resign upon losing the confidence of the House of Commons is a long standing one. The convention was described by Professor Albert Venn Dicey, who was regarded as the leading constitutional scholar of his day, as follows: 'It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.'[25]

Indeed, it has been stated by more modern respected English constitutional scholars that '[h]istorically … the principle of individual ministerial responsibility preceded the doctrine of collective responsibility'.[26]

Closer to home, the Constitutional Commission echoed these views in 1988 when it stated:

> Part and parcel of the notion of parliamentary government is 'responsible government', whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the 'confidence' of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.[27]

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25 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 325.

26 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 197. In his famous lectures, Professor Frederic William Maitland had occasion to refer to

> the principle of common responsibility to parliament, by which is meant that the ministry, if defeated, will resign in a body. This principle was not fully admitted until the last century was far advanced. We may find one minister resigning because he cannot get on with parliament, while his colleagues retain office; quarrelling with him is not quarrelling with them, nor are they in honour bound to support his cause.

FW Maitland, *The Constitutional History of England: A Course of Lectures Delivered*, ed HAL Fisher (Cambridge University Press, 1908) 396.

27 Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 84 [2.177].

(b) Instances where Individual Ministers Resigned for Specific Examples of Misconduct or Wrongdoing

As was amply demonstrated and documented in the *Statement of Constitutional Principles* and from my co-author's own knowledge drawn from his extensive parliamentary experience, it is accepted, at least in South Australia, that Ministers found guilty of misconduct (such as, for example, seriously and intentionally misleading the Parliament or having a conflict of interest) have resigned without the need for a formal or explicit vote of no confidence. In these kinds of cases the Minister's personal wrongdoing rises to such a level as to warrant the withdrawal of the support of the House for the continuance in office of the Minister.[28] It is for that reason that it is argued that those kinds of examples amount in effect to *implicit* votes of no confidence — comparable to the refusal of the lower house to grant supply and the defeat of the government on other questions — being tantamount to a withdrawal of confidence in the Ministry as a whole.[29]

It follows that I disagree with the contrary view that a Minister is responsible only to the Premier.[30] To accept such an argument would hardly make for the effective accountability of the executive to Parliament.

Far reaching changes have already had to be made to administrative law and the creation of other extra-parliamentary institutions such as the Ombudsman and Independent Commissions Against Corruption, in order to deal with the sad but continuing decline in the accountability of Ministers to Parliament. A failure to recognise that a Minister should resign or be dismissed when the Minister loses the confidence of the House would reduce even further the relevance of Parliament in holding Ministers to account.

Finally, it may also be questioned why the majority in the House (comprising the opposition and independents in such cases) should be forced to choose between two

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28 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B).

29 See above n 16 and accompanying text.

30 See generally, *Ministerial Code of Conduct* (2002) ('*Code of Conduct*'). By way of part of the introduction to the *Code of Conduct*, paragraph 1.1 states: 'The Premier must take responsibility for his or her Ministers and deal with their conduct in a manner that retains the confidence of the public. The Premier and the Ministry will ultimately be judged by the public at a general election.' In relation to enforcement, paragraph 1.4 of the *Code of Conduct* states:

> If a Minister engages in conduct which prima facie constitutes a breach of this *Code*, or a Minister is charged with an offence, the Premier shall decide, in his or her discretion, the course of action that should be taken. A Minister may, among other things, be asked to apologize, be reprimanded or be asked to stand aside or resign.

The same can presumably be said of the Prime Minister in the case of the Commonwealth Parliament and the corresponding code of conduct applicable to those Ministers.

opposite extremes — on the one hand, allowing a Minister to continue in office even though the Minister has ceased to enjoy its confidence; and on the other, passing a vote of no confidence in the whole government for not insisting on the Minister's resignation or dismissal, thereby potentially triggering an early election of the Parliament under s 28A of the *Constitution Act*.[31]

In conclusion I adhere to the view expressed on this issue in the *Statement of Constitutional Principles*. Whatever the position in other jurisdictions, the most authoritative commentator on the *Constitution Act* is the late Bradley Selway QC, former Crown Solicitor, Solicitor-General and Federal Court judge. He clearly stated: 'By convention, a minister who suffers a vote of no confidence in the House of Assembly should resign.'[32]

3 *Situation Three: The First Complication Involving the South Australian Ombudsman*

It is now necessary to turn to the first complication in the situation last discussed,[33] which this time involves the South Australian Ombudsman. The facts which the reader is asked to assume are similar in that the opposition party and independents in the South Australian House of Assembly combined to pass a motion of no confidence in a Minister in a minority government. This followed findings made by a Select Committee of the House of Assembly that the Minister in question: (1) was guilty of a conflict of interest; and (2) had misled the Parliament in answering questions in the House of Assembly as before. These facts are different to Situation Two in that after the House passed a vote of no confidence it also passed a further motion referring to the Ombudsman for investigation the question of whether the Minister had been guilty of a conflict of interest. It is also different in that the Ombudsman subsequently found, after investigating the matter, that the Minister had *not* been guilty of holding such an interest without being required to make any findings about whether the same Minister had misled the Parliament.

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31 The latter option being the solution advanced by the author to minimise the scope of the contentious reserve powers of a Governor and thereby avoid the Governor having to dismiss the recalcitrant Minister: Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 8–9.

32 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 39. In 2003, while noting that ministerial accountability had been much reduced in practice, Selway cited this reference to confirm his view that '[a] Minister would probably be expected to resign if there was a vote of "no confidence" in that Minister at least in the lower house': Brad Selway, 'The "Vision Splendid" of Ministerial Responsibility versus the "Round Eternal" of Government Administration' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 164, 166–7. See also Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(A) where the same conclusion was drawn.

33 See Situation Two described above at Part I(C)(2).

The circumstances of this situation raise the question of whether the Minister involved should have resigned or been dismissed if he did not resign, without waiting for, and in light of, the findings of the Ombudsman.

The reason for the complication is to be found in the *Ombudsman Act 1972* (SA) which makes it possible for the houses of the South Australian Parliament and their committees to refer to the Ombudsman, for investigation and report, any matter within his or her jurisdiction.[34] I should emphasise that in this situation the referral to, and contrary conclusion reached by, the Ombudsman was only in regard to one of the two critical findings of the Select Committee upon which the vote of no confidence was based (ie the one relating to a conflict of interest). This gives rise to the potential, which actually materialised in the Kangaroo Island Affair, for an overlap of authority to deal with ministerial misconduct.

It is easy to see how such an overlap could lead to dual and conflicting decisions regarding one of the critical findings which formed the basis of the no-confidence vote in the Minister in the hypothetical situation now under discussion and in the Kangaroo Island Affair. The unsatisfactory nature of such an overlap was acknowledged by the Ombudsman himself in the Kangaroo Island Affair.[35]

But arguably in the hypothetical situation the vote of no confidence still stands because the reader was not asked to assume that any doubt was cast on the remaining parliamentary finding of misleading the House subject to one possible qualification. That qualification is that the House of Assembly did not intend the Minister to resign by reference to both parliamentary findings, namely the conflict of interest *and* the misleading of the House, as the reasons for withdrawing its support for the Minister in question.

Had the finding over the conflict of interest been the only finding which led to the vote of no confidence, the House of Assembly would have had the unenviable task of deciding whether to accept the finding of the Ombudsman and in effect reverse its vote of no confidence or disagree with the finding of the Ombudsman and confirm its vote of no confidence based on the conflict of interest.

4 *Situation Four: The Second Complication Involving the South Australian Ombudsman*

It is now necessary to turn to the question illustrated by the final hypothetical situation which the reader is asked to assume. It involves a second complication regarding the Ombudsman. This time the reader is asked to assume the same facts as in the last situation,[36] except that the findings of the Ombudsman were handed down *after* a general election for the South Australian Parliament was held at which

34 *Ombudsman Act 1972* (SA) s 14 ('*Ombudsman Act*').

35 Lines (n 3) 6–7 [19]–[21].

36 See Situation Three described above at Part I(C)(3).

the opposition party gained the right to form a new government in its own right after the former government resigned.

The circumstances of this situation raise the question of whether the same Minister should still have resigned or been dismissed if they had not resigned, without waiting for, and in the light of, the finding of the Ombudsman even if those findings were handed down *after* the minority government was defeated at a general election for the House of Assembly.

It is worth emphasising that it is essentially the same situation as the last one except that defeat of the minority government occurred *after* intervening elections and *before* the conclusion reached by the Ombudsman. The Minister concerned is not able to be reappointed by a minority government because that government lost office. The problem of whether the individual Minister should have by then resigned or been reappointed, goes away altogether because of collective responsibility and not individual responsibility although it might have been a small contributing political factor in explaining that defeat.

The incident would still stand as a precedent in support of the duty to resign if, as in the previous situation, the vote of no confidence was based on the parliamentary finding that the Minister misled the House when the Ombudsman did not deal with that allegation and the misleading of the House did not turn on whether the Minister had a conflict of interest.

5 *Reiteration of the Effect of the Vote of No Confidence in the Hypothetical Situations Discussed*

It is now possible to sum up the effect of a vote of no confidence in the various situations discussed in this address:

- no doubt exits regarding the duty of a government to resign or be dismissed in Situation One;
- the Minister should have resigned or been dismissed in Situation Two notwithstanding the paucity of modern instance where this has occurred;
- the Minister should have resigned or been dismissed in Situations Three and Four despite the contrary finding of the Ombudsman on the question of a conflict of interest but only because the reader was asked to assume that the Ombudsman did not deal with the other finding of misleading the Parliament. However it would have been different and inconclusive if the Ombudsman reached contrary conclusions on both findings upon which the vote of no confidence arose.

D *The Kangaroo Island Affair and Lessons to be Learnt for the Future*

The fourth and last situation discussed most closely resembles, but is not identical in all respects, to what happened in the Kangaroo Island Affair.[37] Before the

37 See Situation Four described above at Part I(C)(4).

elections were held that led to a change of government in March 2022, the Minister concerned did in fact resign as Deputy Premier and as Minister for Planning and Local Government, but not as Attorney-General.[38] Although even then, however, her functions as Attorney-General were transferred to another Minister presumably pending the results of the Ombudsman's investigation on whether there had been a conflict of interest.[39] The referral to the Ombudsman was made: (1) by the House of Assembly Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application ('Select Committee') and not the House itself;[40] and (2) before the House passed the vote of no confidence in the Minister.[41] Both the Select Committee's referral to the Ombudsman and the vote of no confidence occurred on 18 November 2021. Finally, the details of how the Ombudsman came to be authorised to inquire into a conflict of interest was more complicated than in the simplified and abstract description of the last two hypothetical situations.

It is now possible to offer some brief observations about the lessons that can be learnt from the above analysis and its application to the Kangaroo Island Affair.

1 *Lesson Number One*

Turning first to resignation, as will be clear from the Addendum to the *Statement of Constitutional Principles* both co-authors thought, and still think, that the Minister should have resigned from *all* of her portfolios because the vote of no confidence was also based on the independent parliamentary finding of misleading the House of Assembly. On the face of it, misleading the House is a serious matter on its own and probably would not have been affected by the finding of the Ombudsman denying the existence of a conflict of interest. It is of course not possible to be completely sure of the intentions of the House, but there was nothing in the parliamentary debates to suggest that the vote was to take effect only if an adverse finding was made against the Minister on *both* grounds.

This lesson stems from the importance of insisting on a Minister resigning for misleading the House either with or without a formal vote of no confidence because of the need to avoid further erosion of ministerial accountability to Parliament.

An important feature of conventions is the development and maintenance of precedents that support the existence of rules which the major actors feel bound to obey even though they are judicially unenforceable. If a Premier declines to

38 South Australia, *South Australian Government Gazette: Supplementary*, No 75, 23 November 2021, 4120.

39 Ibid 4121.

40 Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application, Parliament of South Australia, *Final Report* (Report PP 396, 18 November 2021) vii ('*Select Committee Report*').

41 South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8711–30.

dismiss a Minister who refuses to resign for misleading the House and losing the confidence of the House, this will not only breach conventional rules recognised in the past, but will also mean that those conventions may ultimately cease to have effect in the future. Such a development can only eat away at the fabric of responsible government in Australia.

2 *Lesson Number Two*

Another lesson that can be drawn is that the houses of parliament should weigh up carefully the implications of referring questions of ministerial misconduct to the Ombudsman for investigation and report. It can be acknowledged that there are both advantages and disadvantages in following that course of action.

The main advantage is procedural in that it would reduce the scope for arguments that are based on a lack of procedural fairness when members of parliament sit in judgment on each other. This would avoid the chances of attracting the criticisms which were, whether rightly or wrongly, levelled at the way the Select Committee conducted its proceedings.[42] If such an avenue is to be pursued the question arises whether the role of the Houses becomes, in effect, relegated to that of establishing a prima facia case which warrants further investigation by non-parliamentary bodies or authorities.

One aspect of the Kangaroo Island Affair which was not highlighted was that the report of the Ombudsman did not appear to consider whether parliamentary privilege should have required him to assume correctness of parliamentary findings of the Select Committee and House of Assembly because of art 9 of the *Bill of Rights 1688* (UK) 1 Wm & M sess 2, c 2 ('*Bill of Rights*') which states '[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[43]

Suffice it to say that future referrals will need to take care to avoid the overlapping of authority to investigate and report on substantially the same issues. Further, referrals will also need to have regard to whether parliamentary privilege would restrict the extent to which the Ombudsman deals with issues which arose during a proceeding of either house of parliament or their committees.

It should also be remembered that the Ombudsman's findings on the Kangaroo Island Affair were not beyond scrutiny. They were in fact the subject of serious

42 *Select Committee Report* (n 40) appendix E.

43 Applicable to the South Australian Parliament by reason of the *Constitution Act* (n 18) s 38 whose operation is not effected by any the provisions of the *Ombudsman Act* (n 34) by reason of s 4A of that Act. Such an issue gives rise to vexing issues which lie beyond the scope of this address.

criticism regarding his conclusion that there was no conflict of interest which came as a surprise to informed observers.[44]

Furthermore, if, and when, the Houses do decide to refer matters for investigation to the Ombudsman, they run the risk of having ceded their authority. As a practical matter this could entail agreeing, at least politically, to abide by the findings of the Ombudsman on whether the alleged misconduct of Ministers has been established. Whether or not the referral does in effect cede the authority of a House when such a referral does take place, it is strongly arguable that Ministers should usually stand aside pending the results of the Ombudsman's inquiry — which is what actually happened in the Kangaroo Island Affair.

Alex Castles and Michael Harris concluded their lively account of the constitutional and legal history of South Australia, by foreshadowing the likely need for future changes to be made to the system of law and the government in South Australia and by observing that

> the condition of governance in South Australia, particularly in the last quarter of this century, under governments of all political outlooks, does not unequivocally preclude the possibility of an erosion of former constitutional values by inadequately checked governmental power.[45]

This address has focussed on the need to give effect to an existing part of the constitutional structure and values that underlie the system of responsible government in this State.

II Comment by Christopher Sumner

Along with Professor Lindell, I also attended in 1961 the lectures given by Professor Alex Castles in Constitutional Law I, mainly on the principles of the Westminster system. I was also privileged to be lectured by Professor Trevor Wilson in History IC on British constitutional history. At the end of that year, I was in no doubt about the existence of a constitutional convention that required a government that no longer had the confidence of the House of Assembly to resign, and that the same convention applied to an individual Minister. Nothing has happened since then in my experience — which includes nearly 20 years in the South Australian Legislative Council and over 11 years as Attorney-General — to cause me to alter this view.

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44 Who included the Hon CJ Sumner, one of the co-authors of the *Statement of Constitutional Principles*: see CJ Sumner, 'Is that the End of the Matter? Chris Sumner Says No' (Spring, 2022) *Labour History News* 15 ('Ombudsman Report: Response'). See also Tom Richardson who was 'adamant Chapman had a conflict': Tom Richardson, 'Richardson: I Was Adamant Chapman Had a Conflict. The Ombudsman Says She Didn't', *InDaily* (online, 9 May 2022) <https://www.indaily.com.au/opinion/2022/05/06/richardson-i-was-adamant-chapman-had-a-conflict-she-didnt>.

45 Castles and Harris (n 13) 384.

My conclusion is not surprising as the fundamental principle of the Westminster system of democracy as described in our *Statement of Constitutional Principles* is that a government and its Ministers derive their authority from elected Members of a lower house and are responsible to that lower house. It is surely clear as a matter of principle, and indeed of common sense and decency, that if those elected to the house that gave a Minister their authority later withdraw it, then that Minister should go.

In 1885, Professor Dicey enunciated the principles around these conventions and other aspects of the law relating to the UK Constitution.[46] Professor Lindell has referred to Dicey and the authorities which have subsequently echoed his views.[47] In 1867, *The English Constitution* by Walter Bagehot was published,[48] now relied on particularly in relation to the constitutional monarchy. The elected Parliament had assumed supremacy. There have been subsequent changes, particularly in extending the voting franchise, but for 150 years the essential elements of the UK system of responsible government have been in place.

This did not happen overnight; it was over two centuries in the making — a bloody civil war and a continuing dispute about the relative powers of Parliament and the Monarch; the so-called Glorious Revolution and *Bill of Rights*; the French and American revolutions and independence of the American colonies; the *Reform Act 1832*, 2 Will 4, c 45; the philosophers and writers of the 'Enlightenment' who drew on reason and rationality and provided the principled bases for these political movements and political and legal systems that arose from them.

Some such as Thomas Paine and Edmund Burke were active participants in the politics of the day.[49] Whatever differences existed (and there were many) the major actors were concerned with that which by the middle of the 19th century had produced the foundations of our modern liberal democracy.

Given this history there is a substantial onus on anyone who wishes to try to diminish the principles of democratic and responsible government described by Dicey to show that the convention relating to individual ministerial responsibility no longer exists. In the South Australian context, the *Statement of Constitutional Principles* establishes that this onus cannot be discharged.

It is up to those who argue against the convention to demonstrate cases where individual Ministers have stayed in office after a vote of no confidence in them.

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46 See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885).

47 See above Part I(C)(2)(a).

48 See Walter Bagehot, *The English Constitution* (Chapman and Hall, 1867).

49 See: Yuval Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left* (Basic Books, 2014); John Keane, *Tom Paine: A Political Life* (Bloomsbury, 1995).

According to my research, until the Kangaroo Island Affair controversy involving Attorney-General Chapman, there had been none.[50]

On the other hand, there have been examples of ministerial resignations which reinforce the existence and strength of a convention that requires a ministerial resignation in the face of certain categories of wrongdoing. These include instances of resignations for deliberately misleading Parliament in anticipation of a motion of no confidence ('MNC').

The circumstances of these ministerial resignations are included in the *Statement of Constitutional Principles*.[51] In 2001, Premier John Olsen resigned after a finding by Dean Clayton QC that he had misled Parliament, and in anticipation of a MNC.[52] In 2001, following an Auditor-General's finding of a conflict of interest, Minister Joan Hall resigned specifically citing the likelihood of a successful MNC.[53] In 1998, Minister Graham Ingerson survived a MNC after a Privileges Committee finding that he had misled Parliament,[54] but then resigned two weeks after that.[55] Ministerial resignations have also occurred for mismanagement (Graham Ingerson — Liberal, 2001)[56] and after adverse findings by a court (John Cornwall — Labor, 1988).[57]

The fact that there are examples of Ministers resigning before a MNC is passed strengthens the case for the existence of the convention of individual ministerial responsibility.

Even in the matter involving Attorney-General Chapman there was substantial compliance because she resigned from all portfolios other than Attorney-General and delegated her functions and powers as Attorney-General to another Minister.[58]

The complication identified by Professor Lindell which became apparent after the Ombudsman's finding that Attorney-General Chapman did not have a conflict of

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50 See generally: Combe (n 6); Martin (n 17).

51 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B).

52 For a summary of Dean Clayton QC's findings, see South Australia, *Parliamentary Debates*, House of Assembly, 23 October 2001, 2440–1 (Michael Rann). See also Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B) nn 43–45 and associated text.

53 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2384 (Joan Hall).

54 South Australia, *Parliamentary Debates*, House of Assembly, 21 July 1998, 1449–50 (Mark Brindal); South Australia, *Parliamentary Debates*, House of Assembly, 22 July 1998, 1493–1501.

55 South Australia, *South Australian Government Gazette*, No 114, 3 August 1998.

56 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2387 (Graham Ingerson).

57 South Australia, *Parliamentary Debates*, Legislative Council, 4 August 1988, 6 (Legh Davis).

58 See above nn 38–39 and associated text.

interest needs to be considered by application of normal democratic processes. The Select Committee can be justifiably criticised for referring to the Ombudsman the issue that had already been determined even though the referral was not just on this ground but also because the advice of Counsel Assisting, Dr Rachael Gray QC, was that there had been a significant failure of good governance.[59]

Whether on the conflict of interest issue the views of the Select Committee assisted by and based on the advice of Dr Gray are to be preferred over those of the Ombudsman falls back to the House of Assembly and ultimately to the electorate to consider. I have expressed the view that the Ombudsman's report is seriously flawed.[60]

We know that in many parts of the world there are significant attacks on democracy including in the United States where even the established rules relating to the transfer of presidential power are no longer accepted by a substantial number of electors.[61] In the UK the Brexit decision and the appointment of Boris Johnson as Prime Minister has led to tensions unprecedented in recent times.

In a 2022 speech, former British Conservative Prime Minister Sir John Major reflected on the features of UK democracy:

> It relies also upon respect for the laws made in Parliament; upon an independent judiciary; upon acceptance of the conventions of public life; and on self-restraint by the powerful. If any of that delicate balance goes astray — as it has — as it is — our democracy is undermined. Our Government is culpable, in small but important ways, of failing to honour these conventions.[62]

These concerns have now been partly allayed as the House of Commons Committee of Privileges (with a conservative majority) conducted an extensive inquiry and found that Johnson was in contempt of Parliament by intentionally misleading it about parties at Downing Street during the coronavirus lockdown.[63] Johnson has resigned from Parliament.[64] The House of Commons properly upheld the longstanding convention that Ministers should not deliberately mislead the Parliament. The House of Commons performed the essential constitutional role of Parliament in holding the executive government to account.

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59 *Select Committee Report* (n 40) 16 [2.3].

60 See Sumner, 'Ombudsman Report: Response' (n 44).

61 See Jennifer Agiesta and Ariel Edwards-Levy, 'CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win Was Illegitimate Ticks Back up Near 70%', *CNN* (online, 3 August 2023) <https://edition.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html>.

62 Sir John Major, 'In Democracy We Trust?' (Speech, Institute for Government, 10 February 2022).

63 See Committee of Privileges, House of Commons, *Matter Referred on 21 April 2022 (Conduct of Rt Hon Boris Johnson)* (Final Report, 15 June 2023) 6 [15].

64 Ibid 62 [215].

In establishing the Select Committee and adopting its recommendations, the South Australian House of Assembly acted in a similar manner. It helped ensure the rules of democratic engagement were upheld.

We should all endorse the requirement for Members of Parliament, Ministers, public officials and judicial officers to act not just technically within the law, but in accordance with the ethical principles that inform it.

STATEMENT OF CONSTITUTIONAL PRINCIPLES OF 20 FEBRUARY 2022 BY GEOFFREY LINDELL AND CHRISTOPHER SUMNER, WITH ADDENDUM OF 17 JANUARY 2023

I Purpose of Statement

To provide information to the public on the constitutional principles applicable to the actions of the Hon Vickie Chapman MP, Attorney-General, in relation to the Kangaroo Island Port, conflicts of interest, misleading the House of Assembly and motions of no confidence.[1]

II Background Facts

Because of their fundamental nature, constitutional principles and rules are meant to operate to whichever political party happens to be in power or in opposition. Compliance with them should not depend on whether it will advantage or disadvantage any particular political actors or parties. Nor should their application be seen as the mere subject matter of party–political conflict.

On 9 August 2021, the Attorney-General the Hon Vickie Chapman, Member of Parliament ('MP') as Minister for Planning and Local Government blocked a proposal for a deep-water port facility at Smith Bay on Kangaroo Island in South Australia that had been recommended by the State Planning Commission.[2] The proposal was not taken to Cabinet.[3] The Attorney-General had a long family history on the Island.[4] She decided on her own advice that she did not have a conflict of interest so did not declare the interests she had nor disqualify herself from making the decision.[5]

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1 This Statement is a republication of the version first published in the *History Council of South Australia Newsletter*, subject to minor editorial revisions and the addition of the text associated with nn 53–56 below: see CJ Sumner and Geoffrey Lindell, 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' (2 March 2023) *History Council of South Australia Newsletter*. The events discussed herein reflect the circumstances as they existed on 20 February 2022 (concerning the Statement) and 17 January 2023 (concerning the Addendum).

2 Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application, Parliament of South Australia, *Final Report* (Report PP 396, 18 November 2021) 3, 26–7, 33, appendix G, 23, 29–31 ('*Select Committee Report*').

3 See ibid 17 [2.4], appendix G, 78, annexure H, 93.

4 Ibid appendix G, annexure H, 33–5.

5 See, eg, ibid 14, appendix G, 25, 28–9.

The proposed port facility was to be used to transport plantation timber from the Island. After being invited by government, the proponents had been working for five years and spent several million dollars to get the project ready for approval.[6] It was to be a $40 million investment in a multipurpose port that would ensure the continuing existence of a plantation forestry industry with significant long term economic benefits to Kangaroo Island and the State.[7]

The House of Assembly in the South Australian Parliament, set up a Select Committee on the Conduct of the Hon Vickie Chapman MP ('Select Committee') regarding the Kangaroo Island Port Application to examine issues relating to this matter and engaged prominent Adelaide law firm, LK Law, to brief Dr Rachael Gray QC as Counsel Assisting the Committee.[8] This was a unique process for South Australia, at least in recent times, made possible because the opposition Labor Party had the support of independent Members (including former Liberals).

On 18 November 2021 the *Final Report* of the Select Committee ('*Select Committee Report*') was tabled in and noted by the House of Assembly.[9] Pursuant to standing orders, the *Select Committee Report* was published.[10] The Select Committee had accepted the extensive submissions made to it by Dr Gray and rejected those of the Attorney-General made by Ms Frances Nelson QC.[11] The *Select Committee Report* was supported by a majority of three of its members (two Labor and one independent).

The Select Committee found that the Attorney-General had a perceived conflict of interest because of her friendship with the Mayor of Kangaroo Island, Michael Pengilly, an opponent of the proposal, and her pecuniary interest in land adjacent to a forest contracted to the proponent.[12] The Attorney-General had a meeting with Mr Pengilly and the proponent company in which she suggested the port be located elsewhere, knew that the proposed truck routes passed Mr Pengilly's house and made decisions that were inevitably in favour of Pengilly's position — all of which led to the perception of conflict by a reasonable person.[13] The Select Committee also found that the Attorney-General held a pecuniary interest in land adjacent to

6 Ibid appendix G, annexure H, 5, 14.

7 State Planning Commission, *Deep Water Port Facility: Smith Bay, Kangaroo Island* (Assessment Report, July 2021) 12–13, 26–7.

8 South Australia, *Parliamentary Debates*, House of Assembly, 12 October 2021, 7822–7. See *Select Committee Report* (n 2) 2 [1.3].

9 South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8687.

10 Ibid.

11 See, eg, *Select Committee Report* (n 2) v [5]–[8].

12 Ibid 14–15.

13 See ibid.

a forest contracted to the proponent company and that an actual conflict of interest existed because the Smith Bay port impacted on the Attorney-General's interests.[14]

The two Liberal Members on the Select Committee filed a very short dissenting statement which complained about the behaviour of one of the Labor Members on the Select Committee, Tom Koutsantonis, who made accusations about the Attorney-General in the House of Assembly, and endorsed Ms Nelson's submissions.[15] They concluded that the Attorney-General, as a 'senior, experienced and respected legal practitioner', had 'brought an open mind to the matter' and 'dealt with it rigorously, properly and honestly'.[16] We note that this is not the test for whether a conflict of interest exists.

On 18 November 2021, the House of Assembly carried a motion of no confidence in Ms Chapman continuing 'in her role as Deputy Premier, Attorney-General and Minister for Planning and Local Government and as a member of the Executive Council, for deliberately and intentionally misleading the House of Assembly and breaching the *Ministerial Code of Conduct*'.[17]

On 30 November 2021, the House of Assembly carried a motion whereby it:[18]

- agreed with the recommendations in the *Select Committee Report* and found the Attorney-General guilty of contempt for deliberately misleading the Parliament in relation to three separate statements that were false and known to be false by the Attorney-General at the time those statements were made and were intended to mislead the House;
- resolved to suspend the Attorney-General from the service of the House for six days;
- found the Attorney-General acted in a position of conflict of interest, both actual and perceived, based on the Committee's factual findings, and was guilty of contempt;
- found that the Attorney-General breached the *Ministerial Code of Conduct* (2002) ('*Code of Conduct*'), based on the Committee's factual findings; and
- considered the breach of the *Code of Conduct* involved conduct of sufficient severity to amount to contempt.

Consequent upon finding 11 of the Select Committee and pursuant to s 14(1) of the *Ombudsman Act 1972* (SA), the following matters were referred to the Ombudsman by the Select Committee: (1) any matter relevant to whether the Attorney-General had a conflict of interest in determining the application; (2) any breach of the *Code*

14 See ibid 15–16.

15 Ibid 29.

16 Ibid 30.

17 South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8711–30.

18 South Australia, *Parliamentary Debates*, House of Assembly, 30 November 2021, 8779–95.

of Conduct; and (3) the role that any other public officer undertook relevant to the Attorney-General's decision including the role and responsibility of the Premier, Chief Executives and other public officers including Crown Law Officers.[19]

The Attorney-General has resigned as Deputy Premier and Minister for Planning and Local Government but has not resigned as Attorney-General and the Premier has refused to advise the Governor to dismiss her from that position.[20] While the Attorney-General still holds the office of Attorney-General, all the functions and powers of the office have been conferred on the newly appointed Minister for Planning and Local Government, the Hon JB Teague MP.[21]

The Attorney-General and her Liberal colleagues with the full support of the Premier rejected the findings of the Select Committee and voted against the motions passed by the House of Assembly.[22] This does not alter the status of the Select Committee's findings which were arrived at after a thorough inquiry and the Attorney-General was given a full opportunity to put her case. Neither does it alter the same status of the resolutions which were passed by the House of Assembly after the conclusion of a full debate. Parliament (in this case, the House of Assembly) as the democratically elected legislative arm of government has an important role in holding the government of the day (the executive arm) to account. There were legitimate issues of concern to be investigated viz, the Attorney-General's conflict of interest and the impact this had on the company proposing the port and the public interest in a forestry industry on Kangaroo Island and in South Australia generally. The House was doing no more than fulfilling its proper constitutional role by establishing the Select Committee and acting on its recommendations made after a full inquiry.

We argue in this Statement that the facts described above give rise to two breaches of well-established constitutional conventions essential to responsible government and a proper functioning democracy. First, that Ministers must resign if they no longer have the confidence of the House of Assembly in which the government is formed (the practice in the Legislative Council or upper house is not relevant). Second, Ministers must resign if they have deliberately misled the House. The reference of certain matters to the Ombudsman does not alter this situation.

III Constitutional Law, Convention and Practice

The constitutional law of South Australia can be found in the *Constitution Act 1934* (SA) ('*Constitution Act*'), other legislation and constitutional conventions developed over centuries of practice in the United Kingdom ('UK') and elsewhere. These are a

19 *Select Committee Report* (n 2) 16–17.

20 South Australia, *South Australian Government Gazette: Supplementary*, No 75, 23 November 2021, 4120.

21 Ibid 4121.

22 See South Australia, *Parliamentary Debates*, House of Assembly, 30 November 2021, 8794–5.

consolidation of the values and ethical norms of civil society that enable democracy to flourish. It is known as the Westminster system of responsible government.

Not all of the constitutional law is contained in written legislation. Much of it depends on conventions developed in a practical way over the centuries.

Constitutional conventions have been defined as 'binding rule[s] … of behaviour accepted as obligatory by those concerned in the working of the constitution' or alternatively as 'the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly'.[23]

Such rules operate in Australia which is in this respect similar to the UK and Canada except for the absence of a British written constitution.

A *United Kingdom*

As described in the recent UK case of *R (Miller) v The Prime Minister* (for this case the Supreme Court comprised a full bench of 11 judges — the decision was unanimous):

> Although the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. … The legal principles of the constitution are not confined to statutory rules but include constitutional principles developed by the common law.[24]

The purpose of this quotation is not to argue that the same approach as was taken by the UK Supreme Court on the role of the courts would necessarily be followed in Australia, but to confirm in clear undisputed terms the nature of conventions — ie they can be regarded as part of our constitution even if they are not expressed in a written constitution or in legislation.

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23 David Blunt, 'Responsible Government: Ministerial Responsibility and Motions of "Censure"/"No Confidence"' (2004) 19(1) (Spring) *Australasian Parliamentary Review* 71, 73, quoting Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7, 12.

24 [2019] UKSC 41, [39]–[40].

B *Canada*

Similar views have been expressed by the Supreme Court of Canada in *Re Resolution to amend the Constitution* per Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ:

> That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words 'constitutional' and 'unconstitutional' may also be used in a strict legal sense, for instance with respect to a statute which is found ultra vires or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.[25]

One such unwritten convention which is clearly also applicable in South Australia is that the Governor must act on the advice of the Premier who commands the confidence of the House of Assembly. This convention is central to the operation of democratic government. Without it, a Governor could assume autocratic powers.

IV Responsible Government

South Australia has enjoyed a system of representative government known as responsible government since 1856. Its existence is partially recognised in s 66 of the *Constitution Act* which requires Ministers to be Members of the South Australian Parliament. What was said of the position in New South Wales by the New South Wales Court of Appeal in *Egan v Willis* is equally applicable to the position in South Australia. It was said in that case that 'responsible government … is a concept based upon a combination of law, convention, and political practice'.[26]

The same combination establishes the framework for democratic government from which all else emanates. The parliament elected by the people is supreme within the limits of area and subject matter prescribed by the *Australian Constitution*. The people of South Australia elect their representatives to two houses of parliament in free and fair elections. The government of the day is formed because it can command the support of a majority of those elected to the House of Assembly. The authority of the government and its Ministers to govern on behalf of the citizens that have elected them derives from this support in the House of Assembly. In this way, our governments gain their authority from the people.

It is a system of responsible government. Those accorded the privilege of governing are responsible and accountable to the parliament. There are many ways in which the parliament asserts its authority over and ensures the accountability of the government to it.

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25 [1981] 1 SCR 753, 883–4.

26 (1996) 40 NSWLR 650, 660.

Sir Robert Menzies, Australia's longest serving Prime Minister, was a great respecter of parliamentary democracy and the Westminster tradition. In 1967 he argued that the people's democratic control over the executive through a parliament of elected representatives negated the need for a bill of rights:

> With us, a Minister is not just a nominee of the head of the government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question.[27]

Technically Menzies is not correct. Ministers are appointed by the Governor-General on the Prime Minister's advice but this does not affect his argument that they are answerable to Parliament.

In an article Menzies wrote in the Sydney Daily Telegraph of 18 February 1968 (quoted by Prime Minister the Hon EG Whitlam QC, MP in his Chifley Memorial Lecture delivered on 14 August 1975), he said:

> In Australia we practise the system of 'responsible government'. Indeed it has been judicially declared that it is embodied in our *Constitution* by necessary implication. In that system Ministers sit in and are responsible to Parliament; but Cabinet may be displaced by a vote of the House of Representatives … and therefore holds office at the *will* of the House of Representatives.[28]

V Applicable Constitutional Conventions

There are two fundamental principles which have the status of constitutional conventions that are relevant to the present case: (1) the confidence of the House; and (2) the obligation not to mislead Parliament.

A *The Confidence of the House*

There is a clear and undisputed convention that a government is formed in the House of Assembly (or lower house of the parliament) and hence must retain the confidence of that House and should resign if that confidence is lost. Not to do so strikes at the very heart of responsible and democratic government.

In South Australia, as a matter of principle and practice, this collective responsibility of government to the House of Assembly also applies to individual Ministers

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27 Brian Galligan, *Parliamentary Responsible Government and the Protection of Rights* (Papers on Parliament No 18, December 1992), quoting Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 54.

28 EG Whitlam (Chifley Memorial Lecture, University of Melbourne, 14 August 1975) 8 (emphasis in original), quoting Robert Menzies, *Daily Telegraph* (Sydney, 1968).

losing the confidence of the lower house. The authorities and examples of ministerial resignations given in this Statement confirm this position.[29]

It is true that the duty of individual Ministers to resign when a vote of no confidence has been passed against them is perhaps not as explicitly or well recognised as the duty of a government to resign in the same circumstances, but this does not negate the existence of the convention.[30]

In the UK, the convention requiring a Minister to resign upon losing the confidence of the House of Commons is a long standing one. It was described by Professor AV Dicey (1835–1922), who was regarded as the leading constitutional scholar of his day, as follows: 'It means in ordinary parlance the responsibility of ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.'[31]

The Australian Constitutional Commission in 1988 echoed these views:

> Part and parcel of the notion of parliamentary government is 'responsible government' whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the 'confidence' of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.[32]

Whatever the position in other jurisdictions, the most authoritative commentator on the South Australian Constitution is the late Bradley Selway QC, former Crown Solicitor, Solicitor-General and Federal Court judge — he is clear:

> By convention, a minister who suffers a vote of no confidence in the House of Assembly should resign. (A vote of no confidence in the Legislative Council is insufficient to create an obligation to resign, even if the Minister is a member of that House).[33]

In 2003, even while noting that accountability had been much reduced in practice, Selway cites this reference to confirm his view that 'a Minister would probably be

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29 See below Part V(B).

30 See, eg: Blunt (n 23) 71; Geoffrey Lindell, 'The Effect of a Parliamentary Vote of No Confidence in a Minister: An Unresolved Question' (1998) 1(1) *Constitutional Law and Policy Review* 6.

31 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 325.

32 Constitutional Commission, Commonwealth, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 84 [2.177].

33 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 39 ('*The Constitution of South Australia*').

expected to resign if there was a vote of "no confidence" in that Minister at least in the lower house'.[34]

These authorities make clear that ministers individually, as well as collectively, owe their responsibility to the lower house of parliament.

In recent times, at least in South Australia, there have been no examples of the convention not being followed until the present case concerning the Hon Vickie Chapman. There have been no examples of a Minister losing a vote of confidence in the House of Assembly, let alone not resigning because of it. This may be due partially to the small likelihood of the withdrawal of parliamentary confidence in a Minister except in a minority government situation which, although not unknown before, have only begun to recur more frequently in about the last two decades. That said, the examples of ministerial resignations in South Australia given below suggest either that the Minister took a principled approach, or in some cases there was a recognition that a motion of no confidence would be passed if a resignation was not forthcoming.[35]

In South Australia, because Ministers have resigned for various wrongdoings including misleading the House and having a conflict of interest, the Premier of the day has not hitherto been faced with a situation of what to do if a Minister refused to resign. Unlike in relation to the precedents established by the ministerial resignations referred to below, there are no precedents for what a Premier would do if a Minister refused to resign. Based on the general principles asserted in this Statement, the Premier should advise the Governor to dismiss the Minister on the basis of the lack of confidence. It is acknowledged that if a Premier refused to do this then that is where the matter would rest so far as the role of the Governor is concerned.

There is a very strong convention that the Governor must act on the advice of the Premier and so would have no independent role to play in the case of a Minister losing the confidence of the House. By their very nature (in that they develop pragmatically and retain flexibility) not all conventions are given equal weight. The convention that the Governor acts on the advice of the Premier takes precedence over the convention that an individual Minister should resign for lack of confidence.

What the Attorney-General and the Premier have done in this case has no recent precedent. No doubt this situation is because the strict party discipline that previously existed meant that the passage of motions of no confidence in Ministers were rare or even non-existent. If the trend of greater numbers of independents being elected

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34 Brad Selway, 'The "Vision Splendid" of Ministerial Responsibility versus the "Round Eternal" of Government Administration' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 166–7 ('The "Vision Splendid" of Ministerial Responsibility').

35 See below Part V(B).

at both the state and federal level continues then the situation now faced is likely to occur more often. It is important that the relevant principles grounded in the idea of responsible government, including the personal responsibility of Ministers, be affirmed.

It is difficult to see why the logic of accountability that lies behind the *collective* responsibility of Ministers to the lower House does not also apply to their *individual* responsibility to the same House of the legislature. The current circumstances point to maintaining the convention in this form.

In the current social and political environment where there is increasing concern about integrity in government, it is desirable to reaffirm the principles of democracy inherent in responsible government, to ensure accountability of individual ministers as well as governments by reaffirming high standards of integrity and by emphasising the accountability of the executive government to Parliament as described by the High Court in *Egan v Willis*.[36] The underlying policy reasons for maintaining the convention of individual responsibility are compelling.

B *The Obligation Not to Mislead Parliament*

Ministers must not deliberately mislead or provide false information to the parliament and should resign if found to have done so. This convention can operate independently of and in the absence of a motion of no confidence. Whatever questions can be raised in relation to the consequence of a motion of no confidence, there are none in relation to the convention of resignation for deliberately and seriously misleading Parliament.

A core ethical value for the maintenance of civil society is that citizens should strive to be truthful. In our elected Parliaments there can be no more important a duty than this. Citizens cannot ensure that an elected Parliament and its Ministers are responsible to it unless they can rely on the accuracy of what they say. If there is no consequence (ie resignation) for failing in this duty then democracy and civil society are demeaned.

Once a precedent is established that Ministers are free to deliberately mislead Parliament without consequence, then responsible government and democracy are undermined.

Historically, the precedents and practice are clear. The Select Committee cites the authoritative text from the UK Parliament, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, which states that the deliberate misleading of the House can be treated as contempt.[37]

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36 (1998) 195 CLR 424, 501–3 [153]–[155] (Kirby J).

37 David Natzler and Mark Hutton (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 25th ed) [15.27] ('*Erskine May*').

Menzies, on misleading Parliament, said: 'A government must respect the opposition by never lying to it or deliberately misleading it. … Under those circumstances, you will get the business of the House through'.[38]

This historically long-standing principle and convention has more recently been recognised in the *Code of Conduct*. Cabinet approved the *Code of Conduct* to provide guidance to Ministers 'in order to uphold the highest standards and avoid conflicts of interest'.[39] Amongst the general requirement to act honestly, diligently and with propriety,[40] Ministers must ensure that they do not deliberately mislead the public or Parliament on any matter of significance arising from their functions.[41]

The duty in question is not only owed to the Premier and Cabinet under the *Code of Conduct*, but it is more importantly a duty that is owed to Parliament and thereby to the public. The *Code of Conduct* in this regard merely supplements the parliamentary duty, a breach of which can constitute contempt of Parliament. It is therefore a duty that is not absolved by the failure of the Premier to enforce compliance by requiring the resignation of the Minister.[42]

The convention that Members should not mislead Parliament has always been clear, accepted and acted on and treated with utmost seriousness in South Australia and accords with the usual criteria for the existence of a convention.

On 19 October 2001, Liberal Premier John Olsen resigned after Dean Clayton QC found that he gave, misleading, inaccurate and dishonest evidence to the 1998 Second Software Centre Inquiry (known as the 'Cramond Inquiry') into his handling of a government mobile communications system contract involving Motorola.[43] He resigned before a motion of no confidence was moved, perhaps motivated by the possibility that independents might support it. Olsen strenuously objected to Claytons' findings but still resigned because he was a 'political realist'.[44] He later said he had resigned on a point of principle and that the standard he applied to himself seemed to have 'disappeared from modern politics'.[45]

On 6 July 1998, Graham Ingerson MP resigned as Deputy Premier and although he still remained at that stage the Minister for Industry, Trade and Tourism his portfolio responsibilities with respect to racing were transferred to the new Deputy

38 Troy Bramston, *Robert Menzies: The Art of Politics* (Scribe Publications, 2019) 178.

39 *Ministerial Code of Conduct* (2002) [1.2].

40 Ibid [1.1].

41 Ibid [2.4].

42 See ibid [1.4].

43 See South Australia, *Parliamentary Debates*, House of Assembly, 23 October 2001, 2439 (Michael Rann).

44 'New Liberal Premier for SA', *7.30* (ABC News, 22 October 2001).

45 Michael McGuire, 'The Political Return of John Olsen', *The Advertiser* (Adelaide, 22 June 2018).

Premier.[46] This was pending a Privileges Committee investigation and report on whether he had misled the House regarding a telephone call to a senior Liberal Party figure on the future of the South Australian Thoroughbred Racing Authority Chief Executive Officer, Mr Merv Hill.[47] On 21 July 1998, the Privileges Committee found statements in Parliament to have been deliberately misleading and not a matter of little consequence.[48]

An ensuing motion of no confidence moved by the Leader of the Opposition, the Hon MD Rann on 22 July 1998, was defeated on the casting vote of the Speaker.[49] Despite this, some two weeks later, Mr Ingerson resigned from his remaining portfolio as Minister for Industry, Trade and Tourism.[50]

There have been other relevant resignations.

1 *Resignation for Conflict of Interest*

On 4 October 2001, Liberal Member and Minister for Tourism Joan Hall resigned when the Auditor-General's report into the Hindmarsh Stadium upgrade accused her of having a conflict of interest because of her role as Ambassador for Soccer.[51] In her ministerial statement, Mrs Hall said she resigned because the government did not have a majority in its own right and she would not put the government at risk with a vote of no confidence in the hands of the independents.[52]

On 13 February 1997, the Hon Dale Baker, Minister for Mines, resigned following questions in Parliament about an alleged conflict of interest in 1994 when he was Minister for Primary Industries relating to the purchase of a property by a company with which he was associated.[53] The Premier, the Hon John Olsen, established an inquiry undertaken by Mr Tim Anderson QC to establish the facts about the

46 South Australia, *South Australian Government Gazette: Extraordinary*, No 93, 7 July 1998.

47 See: South Australia, *Parliamentary Debates*, House of Assembly, 1 July 1998, 1212–13 (Kevin Foley); South Australia, *Parliamentary Debates*, House of Assembly, 7 July 1998, 1304 (John Olsen).

48 See South Australia, *Parliamentary Debates*, House of Assembly, 21 July 1998, 1449–61.

49 South Australia, *Parliamentary Debates*, House of Assembly, 22 July 1998, 1493–1501.

50 South Australia, *South Australian Government Gazette: Extraordinary*, No 114, 3 August 1998.

51 See South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2382–4 (Joan Hall).

52 Ibid 2384.

53 South Australia, *Parliamentary Debates*, House of Assembly, 6 February 1997, 887 (Dale Baker); South Australia, *South Australian Government Gazette*, No 22, 13 February 1997, 912. The details of the Hon Dale Baker's resignation were not included in the Statement of Constitutional Principles published in the *History Council of South Australia Newsletter* (see above n 1).

allegations.[54] The Premier then determined that there had been a conflict of interest and said that Mr Baker would not be returning to the Ministry then or following the upcoming election.[55] A vote of no confidence was not necessary as the Premier observed the conventional rules about the Minister taking individual responsibility for the wrongdoing. He made an important statement about the need for accountability in government:

> Australians need to have confidence in the accountability of the political process. Governments must at all times be seen to be above reproach. We must never ignore nor seek to hide from conflict of interest allegations, nor from alleged breaches of our own ministerial code of conduct. … It was a promise of clean Government to the people of South Australia. Society has rules; politics as part of this cannot be any different.[56]

2 *Resignation for Mismanagement*

On 3 October 2001, Liberal Member Graham Ingerson resigned as Cabinet Secretary.[57] This followed an adverse report from the Auditor-General into the Hindmarsh Stadium and Mr Ingerson's dealings with Treasury, Crown Law, Services SA and the Public Works Committee.[58] Mr Ingerson was criticised for pursuing cost increases in the stadium upgrade without proper or adequate due diligence.[59]

3 *Resignation After Critical Findings by a Court*

On 4 August 1988, Dr John Cornwall, Member of the Legislative Council ('MLC') and the Minister of Health in the Bannon Labor Government, resigned following adverse findings by the District Court in a defamation case.[60]

An award of damages for defamation and costs was made by the District Court against Dr Cornwall for statements made about a medical practitioner at a press conference during the carrying out of his official duties.[61]

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54 South Australia, *Parliamentary Debates*, House of Assembly, 11 February 1997, 906 (John Olsen).

55 South Australia, *Parliamentary Debates*, House of Assembly, 10 July 1997, 1899 (John Olsen).

56 Ibid. See also Robert Martin, *Responsible Government in South Australia*: *Playford to Rann 1957–2007* (Wakefield Press, 2009) vol 2, 52.

57 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2387 (Graham Ingerson).

58 Ibid 2395 (Graham Ingerson).

59 KI Macpherson, *Final Report of the Auditor-General on the Hindmarsh Soccer Stadium Redevelopment Project* (Report, 2 October 2001) 3.

60 South Australia, *Parliamentary Debates*, Legislative Council, 4 August 1988, 6 (Legh Davis).

61 See ibid 7, 11–13.

The Government agreed to indemnify Dr Cornwall.[62] The Premier, JC Bannon, said that he had not forced Dr Cornwall to resign.[63] Nevertheless, it was apparent to CJ Sumner, the Attorney-General at the time, that Dr Cornwall had lost the support of his Cabinet colleagues because of the nature of the Court's criticism.

Selway acknowledges that a Minister would be expected to resign if the Minister was knowingly involved in a significant administrative error by an agency for which the Minister was responsible, and if the Minister was knowingly involved in a misrepresentation to the parliament.[64]

Each of these Ministers acted with constitutional propriety and in the best traditions of the Westminster system. These are compelling examples of the existence and strength of constitutional conventions in South Australia relating to Ministers resigning and particularly so in the cases of misleading the Parliament.

As a Member of the Legislative Council and a Minister between 1975 and 1994 CJ Sumner considers that these resignations reflect a well-established convention of individual ministerial responsibility that were generally accepted by other Members of both Houses.

VI Strong Convention Against Deliberately Misleading Parliament in South Australia: Relevance of the Upper House

It has already been mentioned that votes of no confidence in a Minister passed by the Legislative Council have not the same significance as those passed by the House of Assembly. The British notion of responsible government envisages that a government and its Ministers are responsible to the lower house of parliament.

As Dixon J of the High Court stated: 'The principles of responsible government impose upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the Administration has done.'[65]

Nevertheless, the extent to which South Australia's parliamentarians acknowledge the seriousness of a Minister deliberately misleading Parliament was emphasised in the Legislative Council in 1992. The debate related to allegations that the Minister of Tourism, the Hon Barbara Wiese MLC, had misled Parliament.

62 Ibid 6 (Martin Cameron).

63 South Australia, *Parliamentary Debates*, House of Assembly, 4 August 1988, 25 (John Bannon).

64 Selway, 'The "Vision Splendid" of Ministerial Responsibility' (n 34) 167; Selway, *The Constitution of South Australia* (n 33) 60.

65 *New South Wales v Bardolph* (1934) 52 CLR 455, 509.

The debate followed the tabling by the Attorney-General (the Hon CJ Sumner MLC) of a report prepared by Mr Terry Worthington QC on his inquiry into allegations of conflict of interest against the Minister ('Worthington Report') as well as the Attorney-General's report for Cabinet on the principles relating to conflict of interest.[66]

The current Treasurer, the Hon RI Lucas MLC, was the Leader of the Opposition in 1992 and because of his longevity as a Member of the Legislative Council and oft times the holder of ministerial office in Liberal governments, he represents an important and continuous thread from the past to the present.

On 26 August 1992, Mr Lucas moved that the

> Council concludes that the Minister of Tourism … has mislead the Legislative Council, declares that it has no confidence in the Minister and calls upon her to resign as Minister but, if she will not do so, calls on the Premier to dismiss the Minister from office.[67]

As a result of an amendment moved by the Hon MJ Elliott MLC for the Australian Democrats, a simple motion of censure for misleading the Council was passed.[68]

In speaking to his motion, Mr Lucas said that 'motions of no confidence are the most serious parliamentary procedure that a parliamentary Chamber can adopt' and that misleading a parliament is the most serious charge that can be addressed against a Minister of the Crown.[69]

He asserted that there were a number of examples of where Minister Wiese had seriously misled Parliament and said:

> It is the view of the Liberal Party that, if there are any standards of accountability left in this Government, with this Premier and with this Minister, then she can no longer remain in office. Either she takes the honourable course and resigns, or for once in his life the Premier should take the tough decision and dismiss her from office.[70]

The Hon CJ Sumner MLC said that a motion of no confidence in the Legislative Council (the upper house) has no effect as far as the Government is concerned as there is no convention that Ministers are required to resign following a motion of

66 South Australia, *Parliamentary Debates*, Legislative Council, 25 August 1992, 172 (Christopher Sumner).

67 South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 195 (Robert Lucas).

68 Ibid 206 (Michael Elliott), 214.

69 Ibid 195 (Robert Lucas).

70 Ibid.

no confidence in the upper house as it is a matter for the House of Assembly.[71] This position was not seriously disputed.

The Shadow Attorney-General (and long-standing Attorney-General in a number of Liberal governments), the Hon KT Griffin MLC, probably expressed the correct approach when he said:

> It is perfectly proper for the Legislative Council — the House in which the Minister is a member — to debate the issue of its confidence in the Minister and to make a request to the Premier. If the Premier decides not to take notice if that request, that is a matter for him. However, this Council, being the place in which the Minister is a member, is perfectly entitled to debate the issue.[72]

On the question of the consequences of misleading, the Hon KT Griffin also set out correctly the well-established position:

> Misleading the Parliament is a serious matter. If it is inadvertent then one would normally expect that a Minister, immediately on becoming aware of the fact that a misleading statement had been made, would make a statement to the Council and apologise for the inadvertent misleading of the Parliament. But if it is deliberate, an apology is not sufficient; resignation is the proper and honourable course.[73]

Mr Griffin cited *Erskine May*, the most authoritative work on parliamentary practice and procedure in the UK House of Commons, which provides that '[t]he House may treat the making of a deliberately misleading statement as a contempt'.[74] He referred to the notorious Profumo affair in 1963 and concluded that '[t]he consequences of contempt of the Parliament … is that the Minister should resign'.[75] In the present case concerning the Hon Vickie Chapman, the House of Assembly has found that the Attorney-General was in contempt of the House of Assembly.[76]

The Hon LH Davis MLC also participated in the debate echoing the views expressed by Mr Lucas.[77] The reference to Mr Davis is of significance because, although he is no longer in Parliament, he is at present, the President of the Liberal Party of South Australia.

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71 Ibid 199–200 (Christopher Sumner).

72 Ibid 205 (Kenneth Griffin).

73 Ibid 206 (Kenneth Griffin).

74 Ibid, citing *Erskine May* (n 37) [15.27].

75 South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 206 (Kenneth Griffin).

76 See above n 18 and associated text.

77 See South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 203–5 (Legh Davis).

The matters raised in the debate on the Worthington Report were a powerful statement by the parliamentary actors at the time of the importance attached to Ministers not deliberately misleading Parliament.

The fact that the debate and proposed motion of no confidence took place in the upper house where governments are not formed or dismissed and could therefore have no binding practical effect on the status of the Minister does not detract from the important principles enunciated. What is also significant, however, is that the strong enunciation of basic principles provides some foundation for hoping that there may be bipartisan support for their application to the current Attorney-General.

It is worth noting that in the federal Senate (or upper house) a practice has developed of not generally moving motions of no confidence against Ministers but moving to censure them.[78]

VII Relationship Between Misleading Parliament and Votes of No Confidence

The above discussion focuses attention on the relationship between a parliamentary finding that a Minister has deliberately misled the House of Assembly on a serious matter and a vote of no confidence in a Minister. A common thread which runs through both resolutions when the criticism of the Minister rises above the level of mere censure and seeks the resignation of the Minister, is that the House recommends that the Minister no longer remains in office because it regards him or her as unfit to do so.

The practical effect of each type of resolution is the same. In the case of deliberately misleading Parliament, the resolution specifies the precise reason for thinking that the Minister is unfit to remain in office which amounts to an implicit vote of no confidence. In the other case, the unfitness for office is expressed by an explicit vote of no confidence for any number of reasons including as in this case for deliberate misleading but which may for example also go to the Minister's misconduct, maladministration or incompetence.

In South Australia at least, the examples of resignations for misleading the House outlined in Part V(B) above can be treated as precedents in support of the convention which requires the Minister to resign for what were tantamount to votes of no confidence.

78 Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Commonwealth, 14th ed, 2016) 635; Richard Pye (ed), *Odgers' Australian Senate Practice: Fourth Supplement* (Commonwealth, 2022) 64.

VIII Consequences of Failing to Follow Conventions

An important feature of conventions is the development and maintenance of precedents that support the existence of rules which the major actors feel bound to obey even though they are judicially unenforceable.

If a Premier declines to dismiss a Minister who refuses to resign for misleading the House and losing the confidence of the House, this will not only breach conventional rules recognised in the past, but will also mean that those conventions may ultimately cease to have effect in the future. Such a development can only eat away at the fabric of responsible government in Australia.

While one example of a breach does not negate the existence of a convention, allowing a vote of no confidence to be ignored without a Minister resigning merely because he or she retains the confidence of a Premier helps to accelerate a gradual drift away from the individual responsibility of a Minister to Parliament. What is left in its wake is only a responsibility owed to the Premier of a government that retains the confidence of Parliament.

As a consequence, Parliament is left with only the disproportionate and drastic remedy of voting the whole government out of office and possibly resulting in an early election.

This may be so even though there might be sound reasons why the majority does not seek a change of government or early elections and it is surely not a sound recipe for stable and accountable government. The contemporary circumstance of more independents reinforces this approach. If more governments are formed with the support of independents, it is likely to be more common that the House will want to express no confidence in individual Ministers without necessarily putting the whole of the government at risk of dismissal and a premature election. The maintenance of individual responsibility provides a more flexible solution in this changing environment.

It has been acknowledged that by the changes made to administrative law and the creation of other extra-parliamentary institutions such as the Ombudsman and Independent Commissions Against Corruption, remedies have been enacted to deal with the sad decline in the accountability of Ministers to the parliament. Undermining the basic rules of convention discussed in this Statement would reduce even further the relevance of the parliament in holding Ministers to account. All Australians need to understand that the more Parliament becomes powerless or even irrelevant then the less power voters and citizens have to influence events through normal democratic processes.

The Attorney-General has already resigned from her position as Deputy Premier and Minister for Planning and Local Government, as well as having ceased performing her functions as Attorney-General.[79]

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79 See above nn 20–21 and associated text.

Some might find the fact that the Premier has agreed to such an odd arrangement, which has left the Attorney-General with a title but no powers or functions to perform, difficult to understand. The foregoing considerations explain why it is necessary for the Premier to seek her resignation as the Attorney-General to reaffirm her individual responsibility to the Parliament as well as to the Premier.

IX Conclusion

South Australia (along with other jurisdictions that operate under the Westminster system) has an established system of responsible government as part of its Constitution and the conventions which are part of it should be adhered to. These constitutional principles are precious and ensure that South Australians live in a proper functioning democracy. They should not be lightly cast aside.

The motion of no confidence and findings that the Attorney-General was in contempt of Parliament for misleading it related to issues in the administration of the portfolios from which the Attorney-General has resigned. This means that the relevant constitutional conventions discussed in this Statement have been substantially complied with.

But the Attorney-General is the First Law Officer of the Crown with attendant responsibilities to uphold the law and our Constitution. The House of Assembly no longer recognises her authority as a Minister of the Crown. She should accept that her duty under the Constitution is to resign from her remaining position of Attorney-General.

ADDENDUM OF 17 JANUARY 2023

On 19 March 2022, a State election was held which resulted in the election of a Labor Government and the defeat of the Liberal Government in which the Hon Vickie Chapman, MP was a Minister.[80] Ms Chapman has now resigned from Parliament after having been re-elected albeit with a reduced majority.[81]

On 2 May 2022 the Ombudsman, Mr Wayne Lines, finalised the investigation referred to him by the Select Committee.[82]

On 3 May 2022 the Ombudsman's report was tabled in the new Parliament.[83] The Ombudsman found that the Hon Vickie Chapman MP, the former Attorney-General:

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80 See South Australia, *South Australian Government Gazette: Supplementary*, No 18, 21 March 2022.

81 See South Australia, *Parliamentary Debates*, House of Assembly, 1 June 2022, 483.

82 See Wayne Lines, *Investigation of a Referral by a Select Committee on the Conduct of the Hon Vickie Chapman MP* (Final Report, 2 May 2022).

83 South Australia, *Parliamentary Debates*, House of Assembly, 3 May 2022, 4.

- 'did not have a conflict of interest, whether actual, potential or perceived, when she decided the Smith Bay application';[84]
- 'did not breach the *Ministerial Code of Conduct* by not advising the former Premier of South Australia, the Hon Steven Marshall MP, of having a conflict of interest';[85] and
- 'did not commit maladministration in deciding the Smith Bay application'.[86]

Not surprisingly the Members of the newly elected Leader of the Liberal Opposition and the former Attorney-General treated the findings as having cleared her of wrongdoing and vindicated the position she had consistently asserted before the elections.[87] Others were surprised and highly critical of the decision — including CJ Sumner one of the authors.[88]

The authors consider that the constitutional principles enunciated in this Statement remain valid. What is now in dispute are the facts to which the principles are applied.

The Ombudsman's findings on conflict of interest and the *Code of Conduct* contradict those of the Select Committee. If he is correct, then part of the factual basis for the motion of no confidence is not justified.

The Ombudsman was critical of the House of Assembly for referring to him a question already determined by it.[89] This criticism is valid. In any future matter it would be advisable for Parliament to either deal with the matter itself according to its own procedures or, if the conduct of a Minister is to be referred to the Ombudsman or some other person or body, to await their findings before making a decision on whether the Parliament still has confidence in the Minister.

The question of whether Ms Chapman had misled Parliament was not referred to the Ombudsman and the issue was not specifically dealt with by him. There were a number of grounds for the finding that Ms Chapman misled Parliament which were not contradicted by the Ombudsman. The convention for which the authors have argued that Ministers should resign if found to have deliberately misled Parliament and any resulting loss of confidence by the House is not affected by the Ombudsman's decision on conflict of interest and the *Code of Conduct*.

The convention relating to the consequences of a Minister misleading Parliament has arisen recently in Westminster around the conduct of the former Prime Minister

84 Lines (n 82) 68.

85 Ibid.

86 Ibid.

87 See Tom Richardson, 'Chapman Cleared by Ombudsman After Conflict Probe', *InDaily* (online, 3 May 2022) <https://www.indaily.com.au/news/2022/05/03/chapman-cleared-by-ombudsman-after-conflict-probe>.

88 See CJ Sumner, 'Is that the End of the Matter? Chris Sumner Says No' (2022) (Spring) *Labour History News* 15.

89 Lines (n 82) 6–7 [19]–[21].

Boris Johnson in relation to parties held at 10 Downing Street and the Cabinet Office contrary to rules prohibiting such events because of the coronavirus pandemic.[90] Statements made in the House of Commons by Mr Johnson have been referred to the Privileges Committee to determine if they were misleading.[91] This inquiry is ongoing. The United Kingdom *Ministerial Code* says:

> It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister.[92]

In a wide-ranging speech on the importance of ethical behaviour in government and the 'acceptance of the conventions of public life', former Prime Minister Sir John Major confirmed the convention when he said '[t]hat is why deliberate lies to Parliament have been fatal to political careers — and must always be so'.[93]

The issue of whether the views of the Select Committee, assisted by Dr Rachael Gray QC whose legal expertise includes public and constitutional law, are to be preferred over those of the Ombudsman now falls back to Parliament and the electorate to consider. The Premier has announced that the Government will be considering the issues raised by the conflicting reports.[94] Parliament will also be able to consider them along with the concerns expressed by the Ombudsman on the undesirability of the Select Committee referring to him matters about which it had already decided.

The authors' views were based on the findings of fact made by the Select Committee which were endorsed by the House of Assembly. With respect to the misleading of Parliament, the convention requiring ministerial resignation for misleading remains unaffected.

In the unusual circumstances of the present case on the issues of a conflict of interest and breach of the *Code of Conduct* there is a dispute about the facts. This has had the effect of creating a duality of authority. Future parliaments and governments will need to consider the relevance of these aspects of the present case to any situation involving a motion of no confidence against a Minister. It is to be hoped that in future the creation of a dual authority on the facts would be avoided.

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90 United Kingdom, *Parliamentary Debates*, House of Commons, 21 April 2022, vol 712, col 351 (Keir Starmer).

91 Ibid.

92 *Ministerial Code* (2022) [1.3].

93 Sir John Major, 'In Democracy We Trust?' (Speech, Institute for Government, 10 February 2022).

94 Tom Richardson, 'Ombudsman's Finding "Extraordinary": Premier', *InDaily* (online, 25 May 2022) <https://www.indaily.com.au/news/2022/05/25/ombudsmans-chapman-finding-extraordinary-premier>.

The authors are still of the view that based on the concept of responsible government for which they have argued in this Statement the fundamental underlying constitutional principle is that the House of Assembly is the elected body from which the government and its Ministers derive their authority and Ministers should have the confidence of it to remain in office individually as well as collectively.

*Andrew Keay**

THE IMPACT OF *SEQUANA* ON THE DIRECTORS' OBLIGATION TO CONSIDER CREDITOR INTERESTS IN FINANCIALLY DISTRESSED COMPANIES: WAS IT WORTH THE WAIT?

Abstract

In many Commonwealth jurisdictions, including Australia and the United Kingdom ('UK'), it has been established that, as part of their duty to act in the best interests of the company, directors have an obligation to consider the interests of their company's creditors when their company is in some form of financial distress. In October 2022, the UK Supreme Court delivered its long-awaited judgment in *BTI 2014 LLC v Sequana SA* on this issue. This judgment, which was lengthy and wide-ranging, was the first one handed down by the most senior court in the UK on the topic. Undoubtedly, because of the seniority of the Court and the fact that the judgment is wide-ranging, the case will be cited in many subsequent cases in various jurisdictions that have to rule on whether directors are in breach of the obligation. This article analyses the impact of the judgment on the law as it relates to the directors' obligation and asks whether the wait for the judgment was worth it. Does the decision add anything to the law that we have on the obligation, and if so, what? Or does the judgment leave stakeholders still floundering when it comes to the critical issues that have been raised in relation to the obligation?

I Introduction

In many Commonwealth jurisdictions, including Australia and the United Kingdom ('UK'), it has been established that, as part of their duty to act in the best interests of the company, directors have an obligation to consider the interests of their company's creditors when their company is in some form of financial distress.[1] There has been a plethora of cases in both Australia and the UK, and particularly over the past 30 years, that have dealt with this issue, and a

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1 See below Part II.

substantial jurisprudence has developed.[2] However, there continues to be uncertainty in relation to some aspects of the obligation that directors have in respect of creditors. Every time a superior court, in whatever jurisdiction, hears an appeal in relation to a case involving the obligation, there is hope in the legal profession and among those practising as insolvency practitioners that the resultant judgment will clarify the law concerning the obligation.

On 5 October 2022, the UK Supreme Court delivered its long-awaited judgment in *BTI 2014 LLC v Sequana SA* ('*Sequana*')[3] on this issue. One of the justices of the Court said that the decision was momentous for company law.[4] The appeal had been heard by the UK Supreme Court in May 2021 and it is fair to say that corporate and insolvency lawyers as well as insolvency practitioners who act as liquidators and administrators of insolvent companies had been eagerly waiting for the judgment. Some liquidators and administrators had, certainly in the UK, been refraining from instituting proceedings against directors until the Supreme Court's judgment had been handed down. The judgment, which was lengthy and wide-ranging, was the first one handed down by the most senior court in the UK on the topic. Undoubtedly, because of the seniority of the Court and the fact that the judgment is wide-ranging, the case will be cited in many subsequent cases in various jurisdictions that have to rule on whether directors are in breach of the obligation and may have an impact on future decisions in a variety of jurisdictions.

This article analyses *Sequana* and endeavours to assess the impact of the judgment on the law as it relates to the director's obligation and asks whether the wait for it was worth it. Does the decision add anything to the law that we have on the obligation, and if so, in what way? Or does the judgment leave stakeholders still floundering when it comes to the critical issues that have been raised in relation to the obligation?

After providing a short explanation of the background to the obligation, this article explains the facts and discusses how the case arrived before the Supreme Court. Next, the article identifies and examines the main elements of the judgment. The final substantive part of this article reflects on what the judgment means for the law and practice in relation to the obligation to consider creditor interests. The article ends with some concluding remarks.

II Background to the Obligation

The obligation with which we are concerned in this article has its roots in the Australian case of *Walker v Wimborne*,[5] decided in 1976. In this judgment, Mason J said (with Barwick CJ concurring) that the directors of an insolvent company in

2 See below Part II.

3 [2022] 3 WLR 709 ('*Sequana*').

4 Ibid 780 [248] (Lady Arden JSC).

5 (1976) 137 CLR 1 ('*Walker v Wimborne*').

'discharging their duty to the company must take account of the interests of its shareholders and its creditors'.[6] The approach taken by Mason J was followed in the 1980s by other Australian courts as well as those in New Zealand. The best known and perhaps most relevant cases include the New Zealand case of *Nicholson v Permakraft (NZ) Ltd*[7] and the Australian decision of *Kinsela v Russell Kinsela Pty Ltd (in liq)* ('*Kinsela*').[8] The latter case was referred to by Lady Arden JSC in *Sequana* as seminal.[9] *Kinsela* was approved of by many subsequent Australian and Commonwealth cases, including by the English Court of Appeal in the first UK case that considered the obligation in 1988.[10] The obligation was considered in the late 1990s by the Company Law Review Steering Group ('CLRSG'), established by the UK government to engage in a comprehensive examination of UK company law. Ultimately, in its final report, a majority of the CLRSG advocated for the inclusion of reference to the obligation in any new legislation that was enacted.[11]

The case law has, often without comment as to its genesis, accepted the existence of the obligation. The UK Supreme Court in *Sequana* unequivocally acknowledged the obligation.[12] There has been no doubt cast in any case on the fact that the obligation is triggered when a company is insolvent.[13] Many cases have also stated that the obligation arises when a company is in a state short of insolvency but in some kind of financial distress.[14] There has been a host of ways that this has been expressed, particularly in Australia. The trigger for the obligation has been described as where the company is 'near-insolvent',[15] 'approaching insolvency',[16] 'in the face of an

6 Ibid 7.

7 [1985] 1 NZLR 242 ('*Nicholson*').

8 (1986) 4 NSWLR 722 ('*Kinsela*').

9 *Sequana* (n 3) 791 [288].

10 *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30.

11 Company Law Review Steering Group, *Modern Company Law: For a Competitive Economy* (Final Report, June 2001) vol 1, xvii.

12 *Sequana* (n 3) 734 [76], 744 [111] (Lord Reed PSC), 752 [138] (Lord Briggs JSC), 779–80 [247] (Lord Hodge DPSC), 780 [248] (Lady Arden JSC).

13 See, eg: *Kinsela* (n 8); *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885 ('*Colin Gwyer*'); *BTI 2014 LLC v Sequana SA* [2017] Bus LR 82 ('*Sequana High Court*').

14 See: Andrew Keay, 'The Director's Duty to Take into Account the Interests of Company Creditors: When is it Triggered?' (2001) 25(2) *Melbourne University Law Review* 315; Rosemary Teele Langford and Ian Ramsay, 'The Contours and Content of the "Creditors' Interests Duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85.

15 *Nicholson* (n 7) 249 (Cooke J). See also: *Re New World Alliance (rec and mgr apptd); Sycotex Pty Ltd v Baseler [No 2]* (1994) 51 FCR 425, 444 (Gummow J) ('*Re New World Alliance*'); *Liquidator of Wendy Fair (Heritage) Ltd v Hobday* [2006] EWHC 5803 (Ch), [66] (Peter Smith J).

16 *Geneva Finance Ltd (rec and mgr apptd) v Resource & Industry Ltd* (2002) 169 FLR 152, 164 [26] (Heenan J) ('*Geneva Finance*').

imminent insolvency',[17] 'facing insolvency',[18] 'borderline solvency',[19] 'on the verge of insolvency',[20] in some sort of 'dangerous financial position'[21] or is financially unstable.[22] In *Re HLC Environmental Projects Ltd (in liq)*[23] John Randall QC (sitting as a deputy High Court judge) said that he did not detect any difference in principle between the various expressions that had been used by a range of courts.[24] In *Kalls Enterprises Pty Ltd (in liq) v Baloglow*,[25] Giles JA, in giving the leading judgment in the New South Wales Court of Appeal, identified a trigger that was to become very important later on in the UK. His Honour said that for the obligation to arise the company need not be insolvent at the time; the directors must consider creditor interests if 'there is a real and not remote risk that they will be prejudiced' by any dealing or action the directors are contemplating.[26] Notwithstanding being robustly argued for by the claimant in the *Sequana* litigation, it was rejected at all levels, that is, before the English High Court, the English Court of Appeal and the UK Supreme Court.[27] The Court of Appeal declined to approve of any of the existing formulae.[28] Lord Justice David Richards (with Longmore and Henderson LJJ concurring) held that the obligation arises 'when the directors know or should know that the company is or is likely to become insolvent'.[29] However, on appeal, the UK Supreme Court did not approve of this approach and maintained that the trigger is when the company 'is insolvent or bordering on insolvency',[30] or 'insolvent liquidation or administration is probable'.[31] Lord Reed PSC in that case felt that the 'bordering on insolvency' trigger was to the same effect as many of the other formulae identified in other cases to indicate the triggering of the creditor duty prior to insolvency.[32]

17 Ibid 161 [20].

18 *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557, 589 [162] (Giles JA) ('*Kalls Enterprises*'), cited in *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692, [1106] (Stevenson J).

19 *Eastford Ltd v Gillespie* [2011] SC 501, 511 [15] (Lord Hardie for the Court).

20 *Colin Gwyer* (n 13) 906 [74].

21 *Facia Footwear Ltd (in administration) v Hinchliffe* [1998] 1 BCLC 218, 228.

22 See *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465, 478 (Giles JA).

23 [2013] EWHC 2876 (Ch) ('*Re HLC Environmental Projects*').

24 Ibid [89].

25 *Kalls Enterprises* (n 18).

26 Ibid 589 [162]. In the same paragraph his Honour also said that the obligation is triggered when the company is facing insolvency.

27 *Sequana High Court* (n 13); *BTI 2014 LLC v Sequana SA* [2019] Bus LR 2178 ('*Sequana Court of Appeal*'); *Sequana* (n 3).

28 *Sequana Court of Appeal* (n 27) 2232 [213]–[216] (David Richards LJ).

29 Ibid 2233 [220].

30 *Sequana* (n 3) 727–8 [51], 737 [88] (Lord Reed PSC), 768–9 [207], 779–80 [247] (Lord Hodge DPSC), 788–9 [279] (Lady Arden JSC).

31 Ibid 788–9 [279] (Lady Arden JSC).

32 Ibid 737 [88].

When the obligation applies, there is anecdotal evidence that there has been some uncertainty as to what the directors must do.[33] Some English[34] and most Australian[35] cases have said, when the company is in a state close to insolvency or in financial distress, that the director must take into account the interests of the shareholders and the creditors, something that is consistent with the comments of Mason J in *Walker v Wimborne*.[36] However, the vast majority of English cases at first instance, as well as the Court of Appeal in *BTI 2014 LLC v Sequana SA*,[37] have said that when the company is insolvent the interests of the creditors are paramount.[38] The judges in the majority of English cases have also opined that the creditors' interests are to be regarded as paramount when the company is not insolvent but nearing it.[39] However, the Supreme Court in *Sequana* rejected this approach and said that until a company is insolvent, or insolvent liquidation or administration is inevitable, directors must consider the interests of shareholders as well as creditors.[40] According to Lord Briggs JSC (with whom Lord Hodge DPSC and Lord Kitchin JSC agreed), creditor interests in fact *may* not even be paramount in insolvency.[41] There is clear Australian obiter dicta to support the view that creditors' interests are not paramount after the obligation is triggered but before a company becomes insolvent. According to Australian authority, even when a company is insolvent, the creditors' interests may not be paramount.[42]

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33 Uncertainty is noted in *BCI Finances Pty Ltd (in liq) v Binetter [No 4]* (2016) 348 ALR 227, 276 [277] (Gleeson J).

34 *Re MDA Investment Management Ltd; Whalley v Doney* [2005] BCC 783, 805 [70] (Park J); *Goldtrail Travel Ltd (in liq) v Aydin* [2014] EWHC 1587 (Ch), [115].

35 See, eg, *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2009) 39 WAR 1, 544 [4436] (Owen J).

36 *Walker v Wimborne* (n 5).

37 *Sequana Court of Appeal* (n 27) 2233 [222] (David Richards LJ).

38 See, eg: *Colin Gwyer* (n 13) 906 [74]; *Re Capitol Films Ltd (in administration)* [2010] EWHC 2240 (Ch), [49] ('*Capitol Films*'); *Roberts v Frohlich* [2012] BCC 407, 433 [85]; *Re HLC Environmental Projects* (n 23) [89], [92]; *Re Bowe Watts Clargo Ltd (in liq)* [2017] EWHC 7879 (Ch); *Ball v Hughes* [2018] BCC 196, 206 [64] ('*Ball*'). The comments of Lord Toulson and Lord Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir [No 2]* [2015] 2 WLR 1168 ('*Bilta*') suggest that they acceded to this: at 1212 [126]. Cf Kristin van Zwieten, 'Director Liability in Insolvency and its Vicinity' (2018) 38(2) *Oxford Journal of Legal Studies* 382, 388.

39 See, eg: *Colin Gwyer* (n 13) 906 [74]; *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [165]; *Re HLC Environmental Projects* (n 23) [192]; *Ball* (n 38) 204 [64]. See also the discussion in Langford and Ramsay (n 14).

40 *Sequana* (n 3) 716 [11], 727 [50], 734 [77] (Lord Reed PSC), 758 [164], 761 [172], 765–6 [190] (Lord Briggs JSC), 779–80 [247] (Lord Hodge DPSC), 792 [290] (Lady Arden JSC).

41 Ibid 761–2 [172]–[175], 766–7 [190].

42 See, eg, *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 366 [2046] (Drummond AJA) ('*Bell*').

While some have argued that the dictum of Mason J in *Walker v Wimborne*[43] should be limited to corporate groups,[44] the jurisprudence provides for a much wider ambit and it has now become so well established that it has got to the point where it will not be reversed in any significant way. As Drummond AJA said in the appeal in *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* ('*Bell*'),[45] it is now firmly entrenched in company law jurisprudence in Australia, New Zealand and the UK, with the result that in numerous cases, courts have found directors liable for a breach of the duty to properly consider the interests of creditors.[46] Nevertheless, Drummond AJA made the point in *Bell* that the doctrine is still being developed.[47] This was also the view of David Richards LJ in his leading judgment of the English Court of Appeal in *BTI 2014 LLC v Sequana SA*[48] and that of the judges in the Supreme Court in *Sequana*.[49]

In completing this background to the obligation, it must be emphasised that the obligation does not provide that directors owe a duty to creditors.[50] The duty is owed to the company to act in its best interests but requires directors to consider the interests of creditors in discharging the duty. If there is any breach of the duty, the company or a person acting on behalf of it, usually a liquidator, must bring any legal proceedings, as creditors are not able to do so. The UK Supreme Court in *Sequana* regarded the obligation as a qualification[51] or modification[52] to the duty contained in s 172(1) of the *Companies Act 2006* (UK), that is, the duty to promote the success of the company for the members, which is the successor to the duty to act in the best interests of the company as a whole.

Finally, it should be noted that the obligation has been recognised legislatively in both the UK, in the form of s 172(3) of the *Companies Act 2006* (UK), as well as in Ireland, in the form of ss 224(A) and 228 of the *Companies Act 2014* (Ireland).

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43 *Walker v Wimborne* (n 5) 7.

44 See Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' (2014) 38(2) *Melbourne University Law Review* 795, 800.

45 *Bell* (n 42).

46 Ibid 365–6 [2043].

47 Ibid 364–5 [2039].

48 *Sequana Court of Appeal* (n 27).

49 *Sequana* (n 3) 715 [4], 717 [15] (Lord Reed PSC), 757 [153], 764–5 [186] (Lord Briggs JSC).

50 See, eg: *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Libera [No 2]* [1998] 1 WLR 294; *Spies v The Queen* (2000) 201 CLR 603, 636–7 [95] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Spies*'); *Bilta* (n 38) 1212 [125], [126] (Lord Toulson and Lord Hodge JJSC); *Sequana* (n 3) 716 [11] (Lord Reed PSC), 768 [205] (Lord Briggs JSC).

51 *Sequana* (n 3) 773–4 [225] (Lord Briggs JSC), 783 [258], 785 [265] (Lady Arden JSC).

52 Ibid 733 [74], 739 [96] (Lord Reed PSC), 782 [252] (Lady Arden JSC).

III The Background to *Sequana*

In 1978, Appleton Papers Inc ('API'), a wholly-owned subsidiary of BAT Industries plc ('BAT'), acquired two paper coating businesses operating in Wisconsin, United States of America.[53] Under the terms of the business acquisition, API took over the liabilities of the seller, National Cash Register Co ('NCR'), including certain environmental liabilities, and BAT agreed to indemnify NCR against any failure by API to meet those liabilities.[54] In 1989, BAT established Wiggins Teape Appleton plc ('WTA') as the holding company of API.[55] The following year, WTA was demerged from BAT and later merged with a French paper manufacturer, changing its name to Arjo Wiggins Appleton plc ('AWA').[56] The paper businesses acquired by BAT had been responsible for extensive pollution.[57] Commencing in the 1990s, claims were notified against, among others, NCR and API. The claims related to clean-up costs and natural resources damages resulting from the pollution.[58] Under an agreement made in 1998 between NCR, API and BAT, it was agreed that liabilities of the parties related to the pollution would be shared up to a total of $75 million as to 45% by NCR and as to 55% by API and BAT.[59] In 2000, AWA was acquired by Sequana SA.[60] In 2001, API was sold by AWA. As part of the sale, AWA indirectly indemnified API against all liabilities relating to the pollution.[61] API assigned to AWA its rights against third parties, including rights under insurance policies that had been taken out by BAT between 1978 and 1986 to cover any liability for the pollution.[62] Through a subsidiary, AWA purchased from an insurer, AIG a guaranteed investment contract, to provide funds to pay for all aspects of the liability for the pollution.[63]

Subsequent to the sale of API, AWA ceased to be a trading company.[64] The proceeds of sale of its businesses and other receipts were lent over the years to Sequana SA.[65] Thereafter, Sequana SA and the directors of AWA explored ways of reducing the debt of Sequana SA.[66] At that time AWA's only significant obligations were in relation to its contingent indemnity liabilities.[67] A provision of €62.8 million was made against

53 *Sequana High Court* (n 13) 91 [8]–[9].

54 Ibid 91 [9].

55 *Sequana Court of Appeal* (n 27) 2183 [9].

56 *Sequana High Court* (n 13) 91 [11]–[12].

57 *Sequana Court of Appeal* (n 27) 2183 [10].

58 Ibid 2183 [10].

59 Ibid 2183 [11].

60 *Sequana High Court* (n 13) 91–2 [14].

61 Ibid.

62 Ibid.

63 Ibid 92 [15].

64 Ibid 92 [16].

65 Ibid.

66 *Sequana Court of Appeal* (n 27) 2184 [14].

67 Ibid.

its contingent liabilities in AWA's interim accounts approved in December 2008.[68] The provision represented the difference between the amount recoverable under the insurance that it had taken out in relation to any liability relating to the pollution and the directors' best estimate of the liability.[69] To the extent that the debt of Sequana SA exceeded the provision, 'it represented net assets in the accounts that were, on the face of the accounts, surplus to AWA's requirements'.[70] The net assets shown in the interim accounts amounted to €517 million.[71] Sequana SA and the directors of AWA decided that a dividend of €443 million should be paid to Sequana SA.[72] In order to achieve this, the board of AWA resolved to make a capital reduction.[73] The board of AWA resolved on 17 December 2008 to pay a dividend by way of set-off against the debt owed to AWA by Sequana SA, reducing the debt to €142.5 million.[74] Following these steps, AWA's paid-up share capital was €1 million and its distributable reserves, as shown in its final accounts for the year ended 31 December 2008, were €137 million.[75]

In 2009, the insurance policy was deemed sufficient to cover the best estimate of the liability for the pollution and, therefore, it was not necessary to include a provision in the accounts for the liability.[76] An audit provided AWA's accounts with 'an unqualified certificate that they gave a true and fair view'.[77] The final accounts for 2008 showed distributable reserves of €137 million.[78] On 18 May 2009, the board of AWA resolved to pay an interim dividend of €135,181,358 by way of set-off against what Sequana SA owed to AWA, reducing it to about €3.1 million.[79] The dividend was paid in contemplation of the sale by Sequana SA of AWA. At the time of the sale of AWA, Sequana SA was no longer exposed to the risk that its debt to AWA would be called to fund indemnity payments.[80]

Later, AWA, acting through its new board, challenged both of the dividends made to Sequana and in each case on several bases. The two most important ones were, first, the payment of the dividends fell within s 423 of the *Insolvency Act 1986* (UK), which is broadly equivalent to s 121 of the *Bankruptcy Act 1966* (Cth) and s 588FE(5) of the *Corporations Act 2001* (Cth) and is a successor to the *Fraudulent Conveyances*

68 Ibid 2184 [15].

69 Ibid.

70 Ibid.

71 Ibid.

72 Ibid 2184 [16].

73 Ibid.

74 Ibid.

75 Ibid.

76 Ibid 2184 [17].

77 Ibid.

78 Ibid 2185 [18].

79 Ibid.

80 Ibid 2185 [20].

Act 1571, 13 Eliz 1, c 5 and meant that Sequana SA had to compensate AWA.[81] Alternatively, and the claim with which this article is concerned, the dividends were paid in breach of the duty of the directors of AWA to have regard to the interests of its creditors on the basis that the directors had a duty to consider the interests of creditors when they paid the dividend, because at that point there was a real and not remote risk of AWA becoming insolvent.[82] The claims were originally brought by AWA, but it was replaced as claimant by BTI to which AWA had assigned the claims. BTI was a corporate vehicle established by BAT for this very purpose. BAT brought the claim under s 423 in its own capacity as a potential creditor of AWA and thus as a 'victim' of the payment of the dividends.[83]

At first instance Rose J dismissed the claim that the former AWA directors failed to take account of the interests of AWA's creditors in paying the dividends but found against Sequana SA on the s 423 claim.[84] Sequana SA appealed against the judgment given against it under s 423, and BTI appealed against the dismissal of the claim, that the directors were not liable for breach of duty, arguing that directors had a duty to take into account creditors' interests when there was a real as opposed to a remote, risk of insolvency. The Court of Appeal dismissed all appeals.[85] Importantly for our purposes, David Richards LJ, with whom Longmore and Henderson LJJ concurred, rejected the argument that the obligation was triggered where there was a real, as opposed to a remote, risk of insolvency as it would not be appropriate, in the light of the policy considerations and other provisions of the *Companies Act 2006* (UK) (thinking particularly of s 172(3)), for the courts to introduce such a test as a development of the common law.[86] His Lordship held that the obligation arose when the directors knew or should have known that the company was or was likely to become insolvent.[87]

BTI appealed on the decision to accede to the argument concerning the breach of duty claim. The appeal in the Supreme Court was heard by Lord Reed PSC, Lord Hodge DPSC, Lords Briggs and Kitchen JJSC and Lady Arden JSC. All of the Supreme Court justices gave a separate judgment save for Lord Kitchin JSC, who concurred with the judgment of Lord Briggs JSC. Although his Lordship wrote a separate judgment, Lord Hodge DPSC agreed with Lord Briggs JSC.[88] The judgment was very lengthy. While there were differences in some areas, all justices agreed that the appeal should be dismissed. The Court made a number of comments relating to the obligation, but members of the Court felt that many of these comments should

81 See ibid 2182 [1]–[4].

82 Ibid 2182 [1].

83 Ibid 2182 [3].

84 Ibid 220–1 [526]–[527].

85 *Sequana Court of Appeal* (n 27) 2236 [237] (David Richards LJ, Henderson LJ agreeing at [238], Longmore LJ agreeing at [239]).

86 Ibid 2227–8 [192]–[195].

87 Ibid 2228 [195],

88 *Sequana* (n 3) 768 [207].

be regarded as provisional as there was no need for the Court to provide a final decision.[89] The ratio of the case is relatively narrow and many of the comments of the Court are, therefore, obiter.

IV The Main Points Decided in *Sequana*

The judgments of the justices in *Sequana* were quite wide-ranging and covered matters that were not necessary to deal with in the appeal before them. Obviously, they felt, especially given the submissions of counsel, that this was an opportunity to make pronouncements on several issues that are related to the obligation. There are a number of points made by the Court that are of interest. Nevertheless, it is submitted that there are four elements of the judgments given by the justices that warrant particular emphasis and consideration in addressing the aim of this article. Arguably, they encompass the primary comments of the justices. We will return to some of the points made in this Part, in Part V below.

A *Acknowledgement of the Existence of the Obligation*

While the obligation has been applied in case law for over 40 years and might well be regarded as established, in arguments to the Supreme Court, the respondent to the appeal argued that the obligation should not apply in UK law. This argument was completely rejected, and all of the justices accepted that the obligation was part of UK law.[90] What is more, the Court said that the obligation had a sound legal basis,[91] thus it was not a matter of the Court grudgingly accepting the obligation's existence because it had been applied for more than 40 years and could not now be overturned.

Lord Briggs JSC said that undoubtedly the obligation's existence rather than its denial was more consistent with both company law, as reflected in the *Companies Act 2006* (UK), and with insolvency law as largely codified in the *Insolvency Act 1986* (UK).[92] It was accepted that the obligation is 'a rule of law' within s 172(3) of the *Companies Act 2006* (UK),[93] and that s 172(3) expressly preserved the existing common law rule requiring directors to consider the interests of creditors.[94]

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89 See, eg, ibid 715 [4], 734 [78] (Lord Reed PSC).

90 Ibid 734 [76], 744 [111] (Lord Reed PSC), 752 [138] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed), 779 [247] (Lord Hodge DPSC), 780 [248] (Lady Arden JSC).

91 Ibid 734 [76] (Lord Reed PSC), 752 [138] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed), 775 [228] (Lord Hodge DPSC).

92 Ibid 756 [151].

93 Ibid 732 [68]–[69].

94 Ibid 717 [13], 732–3 [72], 733 [73], 740 [99] (Lord Reed PSC), 756 [152], 758 [160] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed), 777 [237] (Lord Hodge DPSC), 782 [252], 784 [262], 816 [386] (Lady Arden JSC). A majority of the justices of the Supreme Court in *Bilta* (n 38) had earlier taken the same view: at 1207–8 [104] (Lord Sumption JSC), 1212 [123]–[124] (Lord Toulson and Lord Hodge JJSC).

The need for the obligation was explained in *Sequana* by Lord Hodge DPSC when his Lordship said:

> I am not persuaded that the existing law without the directors' fiduciary duty to the company to have proper regard to the interests of its creditors covers the field adequately where there is a significant conflict between the interests of the shareholders and the interests of the company's creditors when it is insolvent or bordering on insolvency.[95]

His Lordship had said earlier in his judgment that if the Court rejected the obligation's existence

> it would be going against the recognition by Parliament of the existence of the common law duty to creditors and its expectation that the courts will develop the law in this area. It would also be creating incoherence between our company law and our law of corporate insolvency and would place directors in a position in which their duties and their personal interest were in conflict.[96]

Some arguments had been espoused over the years to the effect that the obligation was not necessary when one takes into account the many provisions providing for the avoidance of transactions occurring before administration or liquidation and establishing liability in insolvency, including wrongful trading (equivalent in some ways to insolvent trading in Australia).[97] Lady Arden JSC scotched that argument and said that there was a need for the obligation.[98]

While the justices acknowledged the existence of the obligation, they emphasised that the obligation did not constitute a self-standing or standalone duty.[99] Lord Reed PSC said that the effect of the obligation is

> to preserve the directors' duty to act in the interests of the company, but to modify the sense of the latter expression so that, where the rule applies, the interests of the company are no longer regarded as solely those of its shareholders but are understood as including those of its creditors as a whole.[100]

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95 *Sequana* (n 3) 778 [242].

96 Ibid 775–6 [232].

97 See, eg: LS Sealy, 'Directors' Duties: An Unnecessary Gloss' (1988) 47(2) *Cambridge Law Journal* 175, 177; LS Sealy, 'Personal Liability of Directors and Officers for Debts of Insolvent Corporations: A Jurisdictional Perspective (England)' in Jacob S Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press, 1994) 488; Peter Watts, 'Why as a Matter of English-Law Principle Directors do not Owe a Duty of Loyalty to Creditors upon Insolvency' [2021] (2) *Journal of Business Law* 103.

98 *Sequana* (n 3) 783 [258].

99 Ibid 768 [205] (Lord Briggs JSC), 784 [260], 785 [265], 788 [277] (Lady Arden JSC).

100 Ibid 734 [79].

The position taken by the Supreme Court accords with the views expressed in *Spies v The Queen*[101] where the High Court of Australia made the same point. Lady Arden JSC said in relation to the notion that the obligation constituted a self-standing duty that

> [i]t would be very curious to have a self-standing duty in relation to creditors obliging the directors to promote the success of the company for the benefit of creditors if the remedies were only as described in the preceding paragraph. Moreover, if there is an independent self-standing duty to creditors, there is a governance issue: the directors can act without being made accountable for the way in which they perform it until liquidation.[102]

While her Ladyship is perfectly correct in saying this, the fact of the matter is that if there is accountability to shareholders, they are likely to do nothing if the directors do breach the obligation to consider creditor interests and thus the impact of the obligation is otiose until an officeholder is appointed.

Of some note is the fact that the Court said that the obligation exists even in relation to when the directors are considering the company entering into lawful transactions.[103]

Although the Supreme Court did not consider the obligation as a duty, the justices referred to it as 'the creditor duty'.[104]

B *The Trigger for the Obligation*

The issue of when the obligation arises has been troublesome ever since the time when the obligation was first propounded by courts. Lord Justice David Richards in the Court of Appeal in *BTI 2014 LLC v Sequana SA* made the following astute observation: 'The precise moment at which a company becomes insolvent is often difficult to pinpoint. Insolvency may occur suddenly but equally the descent into insolvency may be more gradual.'[105]

The appellant's leading ground of appeal involved this issue. The appellant argued that the obligation was triggered if there was a real, as opposed to a remote, risk of insolvency of the company. This was unequivocally rejected by the justices, as it had been in the courts below. Therefore, this cannot be the trigger for the obligation as far as the UK is concerned, as clearly the Court's rejection of the argument formed part of the ratio of the case and so is binding on all UK courts. Where this leaves Australian courts is discussed later.

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101 *Spies* (n 50) 635–7 [93]–[95] (Gaudron, McHugh, Gummow and Hayne JJ).

102 *Sequana* (n 3) 786 [268].

103 Ibid 758 [162] (Lord Briggs JSC), 779–80 [247] (Lord Hodge DPSC).

104 See, eg, ibid 739 [95] (Lord Reed PSC), 744 [112] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed).

105 *Sequana Court of Appeal* (n 27) 2233 [218].

Insolvency has always been regarded as a trigger for the obligation, going back to the time of the seminal judgment of Mason J in *Walker v Wimborne*. The Court of Appeal in *Sequana* certainly accepted it as a trigger and the Supreme Court agreed,[106] although Lord Briggs JSC favoured a more restrictive approach, saying that insolvency could only be a trigger where insolvent liquidation or administration is probable and there is no light at the end of the tunnel for the company.[107] The reason for saying this is that companies can go in and out of insolvency. What does insolvency mean? Lord Reed PSC stated in *Sequana* that argument was not heard as to what did it mean in the context of the obligation, but his Lordship expressed a provisional view that insolvency for the purposes of the obligation meant cash flow or balance sheet insolvency and, showing signs of agreeing with Lord Briggs JSC, temporary commercial insolvency should be excluded.[108] Lady Arden JSC agreed with Lord Reed PSC on this point. In this context her Ladyship said that this meant, in relation to these tests, that the directors should have regard to liabilities which they can foresee will arise in the reasonably near future.[109] Lady Arden JSC opined that the cash flow and balance sheet tests should be the starting point in considering whether a company was insolvent, but they should be 'applied with the degree of flexibility appropriate to the rationale and context of the rule'.[110] Unlike in Australia where only the cash flow test is provided as the test for insolvency,[111] the UK provides in ss 123(1)(e) and 123(2) of the *Insolvency Act 1986* (UK), both the cash flow and balance sheet tests respectively.

The main area of debate has always been: does the obligation arise before insolvency and, if so, at what point? It is evident from a survey of the cases in Australia and the UK that all agree that the obligation may arise before insolvency, but there has been a lack of precision in expressing it. As mentioned earlier, there has been a number of formulae devised for expressing when, before insolvency, the obligation arises. It is not within the scope of the article to discuss them. Many of the formulae perceive that the obligation arises when the company is close to, near to or verging on insolvency and others merely refer to the company being in some sort of financial distress. In the UK Court of Appeal decision in *BTI 2014 LLC v Sequana SA*, David Richards LJ observed that judges had shied away from a single form of words in identifying the trigger, and they had chosen instead to employ a variety of expressions.[112] His Lordship declined to give his imprimatur to any of the existing formulae and was critical of many of them. His Lordship said that some of the descriptions considered conveyed something less than insolvency, but he felt that they were too

106 *Sequana* (n 3) 737 [90] (Lord Reed PSC), 768 [203] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed).

107 Ibid 758–9 [164], 762 [176].

108 Ibid 737 [88].

109 Ibid 795–6 [308].

110 Ibid 795 [308].

111 See *Corporations Act 2001* (Cth) s 95A.

112 *Sequana Court of Appeal* (n 27) 2232 [216].

vague to serve as a useful test for determining when the obligation arose.[113] It will be recalled that in the Supreme Court in *Sequana*, the appellant sought, as it had in earlier hearings, to argue that the obligation arose if there was a real, as opposed to a remote, risk of insolvency of the company. Lord Briggs JSC said that the test argued for in the case by the appellant was too remote from the event which changes a creditor's prospective entitlement into an actual one.[114] There are several Australian cases which have accepted this as a trigger[115] and so the opinion of the Court in *Sequana* diverges from the views of several Australian courts in this aspect. As noted earlier, the argument of the appellant had been submitted at all levels in the proceedings and it had been rejected in every Court.

Three of the justices in *Sequana*, Lord Reed PSC, Lord Hodge DPSC and Lady Arden JSC, referred to the trigger as being when a company is bordering on insolvency,[116] a point previously recognised by Lord Toulson and Lord Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir*.[117] However, Lord Briggs JSC did not refer to the obligation being triggered when a company is bordering on insolvency. His Lordship said:

> I would prefer a formulation in which either imminent insolvency (ie an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know, are sufficient triggers for the engagement of the creditor duty.[118]

Thus, Lord Briggs JSC favoured imminent insolvency as a trigger, and in his Lordship's judgment, Lord Reed PSC while also identifying 'bordering on insolvency' as the point when the obligation occurred, seemed to agree with imminent insolvency being a trigger.[119]

A trigger that was mentioned in the above quotation from Lord Briggs JSC's judgment, and which has never been identified previously, was accepted by all of

113 Ibid 2232 [213].

114 *Sequana* (n 3) 766 [193].

115 See, eg: *Kalls Enterprises* (n 18) 589 [162] (Giles JA); *Termite Resources NL (in liq) v Meadows* (2019) 370 ALR 191, 231 [202] (White J); *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146, 153 [31] (Gleeson J); *ACN 152 546 453 Pty Ltd (in liq)* [2022] NSWSC 974, [83] (Williams J); *Re Bryve Resources Pty Ltd* (2022) 163 ACSR 310, 324 [73] (Williams J).

116 *Sequana* (n 3) 717 [12], 737 [88] (Lord Reed PSC), 768–9 [207], 779 [246], 779–80 [247] (Lord Hodge DPSC), 789–90 [279] (Lady Arden JSC).

117 *Bilta* (n 38) 1212 [123]–[124].

118 *Sequana* (n 3) 768 [203].

119 Ibid 739–40 [96], 741 [101].

the justices in *Sequana* and it is when insolvent liquidation or administration of a company is probable.[120]

Thus, we find that the justices did not plump for one trigger, but there could be more than one, and it can arise before the advent of insolvency.

C *The Content of the Obligation*

Where the obligation is triggered, what are directors to do? The case law often refers to the need for directors to consider the interests of the creditors. That remains the case given what was said by the Supreme Court, but a comment of Lord Briggs JSC is really important for understanding what this means for directors in the field. His Lordship said:

> There is a large difference between a duty merely to consider the interests of creditors as a class of potential stakeholders and a duty to act in the interests of that class. The former assumes a wide discretion as to the weight (if any) to be given to those interests, in what may be a task of balancing them against the potentially conflicting interests of another class, such as shareholders. The latter suggests that the creditors' interests predominate, if in conflict with the interests of another class, a duty sometimes described as treating the creditors' interests as paramount.[121]

In recent times there has tended to be a difference between the UK courts and the Australian courts on what directors are to do when the obligation is triggered. All are agreed that prior to the trigger occurring the directors must act in the best interests of the company and this means considering the interests of shareholders. However, on the obligation arising the directors must consider the interests of creditors. Does this mean that the shareholders' interests fall out of the picture or do directors have to consider the interests of both shareholders and creditors? The vast majority of English cases at first instance[122] and the Court of Appeal in *Sequana*[123] took the approach that the creditors' interests were paramount when a company was insolvent. While more cases at first instance took the view that where the company was not insolvent, but the obligation had arisen, directors had to consider both shareholder and creditor interests, the majority still favoured the paramountcy of creditors' interests just as when a company was insolvent. The position in Australia has generally been that both creditor and shareholder interests should be considered whatever the financial state of the company (if the obligation has been triggered),

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120 Ibid 737 [90], 739–40 [96] (Lord Reed PSC), 768 [203] (Lord Briggs JSC, with whom Lord Kitchin JSC agreed), 768–9 [207] (Lord Hodge DPSC), 788–9 [279] (Lady Arden JSC).

121 Ibid 746 [118].

122 See, eg: *Re Pantone 485 Ltd* [2002] 1 BCLC 266, [69]; *Colin Gwyer* (n 13) [74]; *Capitol Films* (n 38) [49]; *Re Oxford Pharmaceuticals Ltd* [2009] EWHC 1753 (Ch), [92]; *Roberts v Frohlich* [2011] EWHC 257 (Ch), [85]; *Re HLC Environmental Projects* (n 23) [92].

123 *Sequana Court of Appeal* (n 27).

although the closer a company got to insolvency there was justification for placing greater weight on creditor interests.

The Supreme Court in *Sequana* expressed a view that was closer to the position taken in Australia rather than that espoused in the majority of UK courts. The justices all seemed to say that the interests of both creditors and shareholders must be considered by directors and the closer a company gets to insolvency, the more weight should be given to creditors because it was they who began to assume the greater risk and had the greater economic interest. The relative weight that is placed on each might be determined by a sliding scale, that is, as a company's financial becomes more and more dire and the closer to insolvent liquidation or administration the company gets, the greater concern must be for creditor interests and more weight should be given to those creditor interests. This seems to mean that a balancing exercise must be undertaken in respect of the interests. In *Sequana* Lord Reed PSC said that where there is a conflict between the interests of the creditors and the shareholders, the balancing should reflect their respective weight in the light of the gravity of the company's financial difficulties.[124] This appears to chime with some of the comments of Owen J in *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]*,[125] where his Honour seemed to envisage some form of balancing and also appeared to suggest that the balancing that occurs should very much depend on the company's circumstances at the time of any decision-making and when one assesses whether the directors have complied with the obligation and the circumstances should dictate what weight one places on the respective interests.

The justices accepted that paramountcy of creditors' interests could occur, but as to when the justices did not speak with a consistent voice. Lord Reed PSC said that the interests of creditors acquire a discrete significance from those of shareholders, and require separate consideration, once the company's insolvency is imminent or its insolvent liquidation or administration becomes probable.[126] Earlier his Lordship had said that it is only where an insolvent liquidation or administration is unavoidable that the shareholders can be said to have no remaining interest in the company.[127] Lord Briggs JSC was, arguably, more restrictive on this issue. His Lordship said that practical common sense pointed strongly against a duty to treat creditors' interests as paramount at the onset of insolvency for it might only be temporary insolvency. His Lordship said that it is when an insolvent liquidation or administration is inevitable the directors must treat the interests of the creditors as paramount.[128] Lord Briggs JSC rejected insolvency, either balance sheet or cash flow, of itself as advancing the status of creditors beyond being contingent main stakeholders and this remained until liquidation eventuates rather than insolvency. His Lordship went on to say that if there is 'light at the end of the tunnel', the contingency may never occur. The reason for the existence of the obligation did

124 *Sequana* (n 3) 735 [81], 740–1 [96].

125 (2008) 39 WAR 1, 545 [4440].

126 *Sequana* (n 3) 740–1 [96].

127 Ibid 727 [50].

128 Ibid 761 [173].

not go so far, in the view of the judge, as to render creditors' interests necessarily paramount upon insolvency.[129] Lord Briggs JSC said that if the creditors' interests became paramount when insolvency occurs rather than inevitable liquidation, that would appear to run contrary to the statutory insolvency scheme, and indeed would make the wrongful trading provision (s 214 of the *Insolvency Act 1986* (UK)) largely redundant.[130] Thus, in his Lordship's view creditors' interests would not become paramount at insolvency unless insolvent liquidation or administration was inevitable. Although Lord Hodge DPSC appeared to agree with much of this, his Lordship did say that it was where a company was irretrievably insolvent that the interests of creditors become a paramount consideration in the directors' decision-making.[131] It is not clear whether 'irretrievably insolvent' is the same as insolvent liquidation or administration being inevitable. Lady Arden JSC thought that it was hard to see creditor interests becoming paramount before irreversible insolvency,[132] which seems to suggest something close to or the same as irretrievable insolvency.

Both the Australian jurisprudence and the UK Supreme Court in *Sequana* advocated the position that directors were to consider the shareholders and the creditors' interests, and, certainly, in the case of the Court in *Sequana*, until a company's insolvent liquidation or administration is inevitable when the creditors' interests may become paramount.

D *Need for Director's Knowledge*

Another area of uncertainty that has been the subject of some concern is whether the directors must know of the circumstances that would normally trigger the obligation, before the obligation can be said to have arisen in the particular situation. In other words, is a subjective test to be applied as far as the directors are concerned? On this issue it is possible to identify some difference in the Australian case law. For instance, *Grove v Flavel*[133] suggested that there had to be knowledge on the part of the director in order for the obligation to be triggered. Justice Jacobs said that a director was to have regard to the interest of creditors when the company is known to be insolvent and there is *knowledge* of a real risk of insolvency.[134] Yet, in *Australian Securities and Investments Commission v Somerville*[135] it was indicated that the interests of creditors should be taken into consideration 'where objective circumstances require this'.[136] Little has been said about this issue in the UK authorities, however, in *Sequana* we do find some judicial opinion expressed.

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129 Ibid 762 [175]. See also 765–6 [190], 766 [194].

130 Ibid 761 [172].

131 Ibid 779–80 [247].

132 Ibid 792 [290].

133 (1986) 43 SASR 410.

134 Ibid 421.

135 (2009) 77 NSWLR 110.

136 Ibid 123 [37] (Windeyer AJ).

Lord Briggs JSC (with whom Lord Kitchin JSC concurred)[137] and Lord Hodge DPSC[138] considered that the obligation would arise if the directors knew or ought to have known that the company was insolvent or bordering on insolvency or that an insolvent liquidation or administration was probable.[139] Whereas Lord Reed PSC was less certain than Lord Briggs JSC and Lord Hodge DPSC that it was essential that the directors 'know or ought to know' that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable, and felt that it was unnecessary and inappropriate to express a concluded view on the issue without hearing argument on the matter.[140] Likewise, Lady Arden JSC said that her Ladyship would leave open the matter to another day.[141] However, her Ladyship did say that directors ought to be aware of the company's financial position and that if they assert that they were not aware of the financial straits of the company the onus should be on them to show that they reasonably ought to be excused, for whatever reason.[142] The approach taken by the majority is consistent with comments made in some earlier cases. In *Re HLC Environmental Projects Ltd (in liq)*[143] John Randall QC (sitting as a deputy Judge of the High Court) rejected the submission that the obligation is only triggered if the director was aware that the company was in the financial state that triggered the obligation.

The majority's test means that it is not dependent totally on subjective considerations, which is the way that legislatures have proceeded with other creditor protection devices. For instance, the tests for both wrongful trading in the UK,[144] and insolvent trading in Australia[145] provide for subjective and objective elements. The wrongful trading test provides that directors are liable if they knew *or ought to have concluded* that there was no reasonable prospect of the company avoiding insolvency liquidation. The test for insolvent trading does not require directors to know that their company was insolvent when debts were incurred before they are liable. They can be liable if there were reasonable grounds for suspecting that the company was insolvent.[146]

137 Ibid 768 [203].

138 Ibid 775 [231].

139 Ibid 768 [203] (Lord Briggs JSC), 775 [231], 777 [238] (Lord Hodge DPSC).

140 Ibid 737 [90].

141 Ibid 789 [281].

142 Ibid 789 [280]. For further discussion of exculpation of directors who are held liable, see Andrew Keay, *Directors' Duties* (LexisNexis, 4th ed, 2020) ch 17.

143 *Re HLC Environmental Projects* (n 23).

144 *Insolvency Act 1986* (UK) s 214.

145 *Corporations Act 2001* (Cth) s 588G.

146 Ibid.

V Reflections and Analysis

The UK Supreme Court, echoing comments made by other judges, some in other jurisdictions, such as Drummond AJA in the Western Australian Court of Appeal in *Bell*,[147] made it clear that the obligation was developing[148] and needed fleshing out,[149] so the Supreme Court judgment in *Sequana* is far from the end of the story, and the justices acknowledged that very fact. Lord Hodge DPSC in *Sequana* said that the scope of liability pursuant to the obligation is to be determined in future in a case in which the matter is relevant to the outcome of the appeal.[150]

The judgment of the UK Supreme Court was never going to provide absolute certainty on all aspects of the obligation. It is arguable that the only things that the Supreme Court said which are binding on lower UK courts is that the obligation clearly exists, it does not arise when there is a real, as opposed to a remote, risk of insolvency of the company and the making of a lawful payment like a dividend could involve a breach of the obligation. It is submitted that much of what the Court said was obiter, as the ratio of the case was quite narrow. Of course, the obiter of a senior court like the Supreme Court will be relied on by counsel in the formulation of their arguments, and it will be shown great respect by judges in lower courts.

Whether or not it is thought that the judgment was worth waiting for is, to a point, likely to depend on the position one holds. For instance, some things will appeal to officeholders and other things to directors.

It is submitted that there are some things that the Supreme Court said that were worth waiting for. First, the fact that the Supreme Court said, without equivocation, that the obligation exists was clearly a positive as far as many are concerned, and this is particularly good news for officeholders who wish to recover funds for creditors. While the respondent in *Sequana* argued strongly that it should not exist, the obligation was surely too well entrenched in the legal systems of several countries including the UK and Australia,[151] to be rejected, unless there were strikingly good reasons to do so, and the Supreme Court said that there were not. Thus, in this regard it was worth waiting for the decision. While a director/respondent might well have some good arguments as to why the obligation does not apply in their case, the respondent is not able to say that the obligation does not exist. Given the corpus of case law that already existed in the UK on the obligation, together with the existence of s 172(3) of the *Companies Act 2006* (UK), it was always going to be difficult for directors to deny the existence of the obligation, but it is comforting for UK officeholders to have the Supreme Court's imprimatur of the obligation's existence and the reasons that are given to justify its existence. The decision will

147 *Bell* (n 42) 364–5 [2039].

148 See also *Sequana* (n 3) 717 [15] (Lord Reed PSC).

149 See also ibid 781 [250] (Lady Arden JSC).

150 Ibid 778 [239].

151 See *Bell* (n 42) 364–5 [2039] (Drummond AJA).

also be comforting to officeholders in other jurisdictions where the obligation has been applied hitherto as it provides another pillar supporting a claim for breach of duty.

Secondly, the decision does provide some further guidance on the trigger for the obligation. It does not provide precision, but some might argue that what the Court has given us is as good as, if not better than, what we previously had from earlier decisions.

Thirdly, the Court has made it plain concerning what directors are to do when the obligation is triggered. That is, until insolvent liquidation or administration is inevitable, when the directors must, generally speaking, treat the interests of the creditors as paramount, shareholders' interests must be considered as well as creditors' interests and thus a balancing exercise needs to be undertaken between creditor and shareholder interests, while there is a consideration of the particular circumstances of the company and its financial position at a given time.[152] Whilst the balancing exercise between shareholders and creditors in such circumstances may not always be easy, this approach does potentially allow businesses to try and work through financially difficult periods for longer than had previously been the case.[153]

Fourthly, some concerns have been expressed from time to time that the obligation might dissuade directors from seeking a restructuring of their distressed company because of fear that they might be liable for a breach of the obligation.[154] Yet, they should take comfort from the fact that Lord Hodge DPSC was of the view that a reasonable decision by directors to attempt to rescue a company's business in the interests of both its shareholders and its creditors would not involve a breach of the common law duty.[155] That is the positive or quasi-positive. What are those matters on which we did not get any certainty, or even guidance? That is, why was the judgment not worth waiting for?

First, the Court did not address directly how the creditor interest duty, as it referred to the obligation, is applied where the interests of individual creditors may not

152 *Sequana* (n 3) 735 [81], 746 [118] (Lord Reed PSC), 762 [177] (Lord Briggs JSC), 829 [430] (Lady Arden JSC).

153 'UK Supreme Court Confirms Creditor Duty in Zone of Insolvency: *BTI v Sequana*', *Katten* (Blog Post, 10 October 2022) <https://katten.com/uk-supreme-court-confirms-creditor-duty-in-zone-of-insolvency-bti-v-sequana> ('UK Supreme Court Confirms Creditor Duty').

154 See, eg, Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433.

155 *Sequana* (n 3) 770 [213]. See also Andrew Keay, 'Financially Distressed Companies, Restructuring and Creditors: What is a Director to do?' [2019] *Lloyds Maritime and Commercial Law Quarterly* 297 in which the author argues that directors should not hold grave fears in attempting restructuring if they consider creditors' interests and act reasonably.

be aligned or where the position of certain creditors has worsened in contrast to creditors as a whole. The friction between considering the interests of creditors as a whole and individual creditors is likely to remain.[156]

Secondly, while it is admitted that identifying when the obligation arises is not an exact science, and there is plenty of art (and possibly good fortune) in determining when the obligation applies, identifying the trigger for the obligation is likely to remain challenging and thus can produce uncertainty. There is probably some uncertainty in the legal community as to what is meant by 'bordering insolvency' or 'imminent insolvency' or when does insolvent liquidation or administration become 'probable'? Determining whether a company is insolvent or bordering on insolvency is heavily fact-sensitive and will require the exercise of careful, commercial judgment by directors and the taking of advice. Even then directors might argue that they cannot really be sure that they are doing the right thing.[157] The issue which remains is: when does a 'real' risk of insolvent liquidation (which is not the trigger according to *Sequana*) tip over into a 'probable' one (which is a trigger). How is this going to be assessed in practice? Directors might find it difficult to be comfortable that 'the risk is say 49% … and not 51%', with the former not sparking the obligation but the latter does.[158] It is plainly difficult to know where the line that cannot be crossed without consideration of creditors' interests is placed.

Thirdly, a balancing exercise must be undertaken by directors until the point where insolvent liquidation or administration is inevitable, when the creditors' interests are likely to become paramount, but it is not clear the weight that needs to be placed on the creditors' interests as against those of the shareholders when discharging the balancing exercise. So, just as it remains challenging for directors and their advisers to be sure, in the context of a company's particular circumstances, what is the point where the obligation arises,[159] directors may well not be able to discern when insolvent liquidation is inevitable and, therefore, when the creditors' interests are to be regarded as paramount.

Fourthly, the result of the decision is that directors would not be subject to the obligation if the company is in financial distress, but insolvent liquidation is not probable, thus there does not seem to be anything to prevent directors from entering into a highly risky venture, even if it can be envisaged that if the venture turns sour it would likely lead to insolvent liquidation. Some might feel that that fact gives 'the green light' to directors to embrace extreme risk in an effort to extricate the company from its financial malaise. Directors might be willing to take on such risk as the shareholders will reason that they have likely lost their investment unless

156 'UK Supreme Court Confirms Creditor Duty' (n 153).

157 Ibid.

158 Kevin Lloyd et al, 'Creditor Duty: The Position after the Supreme Court Decision in BTI v Sequana and Others', *Hogan Lovells* (Blog Post, 5 October 2022) <https://www.engage.hoganlovells.com/knowledgeservices/news/creditor-duty-the-position-after-the-supreme-court-decision-in-bti-v-sequana-and-others>.

159 'UK Supreme Court Confirms Creditor Duty' (n 153).

something is done dramatically to turn around the company's situation. If the high-risk venture does not work then the shareholders are not in a worse position.

How might the various stakeholders regard the judgment? The decision might provide more detail for lawyers in order to advise clients, but it might not provide much succour for officeholders and directors. Officeholders, who have to make the final decision about whether or not to instigate proceedings, and funders who will provide the necessary financial support in many cases, might understandably feel that the Supreme Court has made their job of holding directors accountable more difficult. While the formulae that has been used in the past were never precise, many of them were suggestive of the fact that the company did not have to be as close to insolvency as the *Sequana* decision seems to indicate. The Court's triggers for the obligation are, generally, further down the track towards insolvency than many that have been propounded both in the UK and Australia. Clearly the Court did not approve as a trigger the fact that a company was in financial distress or was experiencing a risk of insolvency. That might well give officeholders less leeway in making their final decisions as the window in which the obligation arises appears to have got smaller. Thus, this might lead to the instigation of fewer claims against directors. All of this might, on the contrary, be seen as something positive as far as directors are concerned as it does not restrict them, potentially, as much when a company is financially distressed but not bordering on insolvency. Nevertheless, as mentioned above, directors might have some difficulty knowing when their company has passed into the zone of bordering on insolvency.

Directors may feel more pleased than officeholders. However, in the light of *Sequana*, judgment calls will remain difficult where they are required to assess where on the sliding scale of insolvency the company is actually situated in order to permit them to ascertain where the balance of competing interests between the company's various stakeholders should lie.[160] In her Ladyship's judgment, Lady Arden JSC said:

> The progress towards insolvency may not be linear and may occur not as a result of incremental developments but as a result of something outside the company which has a sudden and major impact on it. The task for directors is not simply to weigh the interests of shareholders against those of creditors. It is to manage all the interests in the company unless and until the point is reached whereby, they must treat creditors' interests as predominant.[161]

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160 'BTI v Sequana: Key Supreme Court Insolvency Ruling Clarifies Stance on Creditor Duties', *Herbert Smith Freehills* (Blog Post, 18 Oct 2022) <https://www.herbertsmithfreehills.com/latest-thinking/bti-v-sequana-%E2%80%93-key-supreme-court-insolvency-ruling-clarifies-stance-on-creditor> ('Key Supreme Court Insolvency Ruling').

161 *Sequana* (n 3) 794 [303].

One law firm has noted:

> despite best-laid plans, directors may still face significant challenges when it comes to identifying and responding promptly and effectively to circumstances which may threaten the existence of the company so as to minimise the risk of personal liability.[162]

The law firm which acted for the appellant in *Sequana* has stated that it seems odd that the Court found the payment of the dividend to be in breach of s 423 of the *Insolvency Act 1986* (UK), which involves finding that the purpose of the transaction, the paying of a dividend, was to put assets beyond the reach of creditors, but at the same time the authorisation of the dividend payment was found not to be in breach of the obligation. The reason that the firm finds it odd is that it seems clear that such a transaction is not in the interests of the company's creditors,[163] although, of course, the Court said that the main point was that at the time of the making of the dividend the obligation had not been triggered. In many respects the process that directors employ should not be changed by the decision and they must be well-informed in carrying out their decision-making. In *Sequana*, Lady Arden JSC said:

> Directors should always have access to reasonably reliable information about the company's financial position. The message which this judgment sends out is that directors should stay informed. The company must maintain up to date accounting information itself though it may instruct others to do so on its behalf. Directors can and should require the communication to them of warnings if the cash reserves or asset base of the company have been eroded so that creditors may or will not get paid when due. It will not help to resign if they remain shadow directors. In addition, directors can these days without much difficulty undertake appropriate training about their responsibilities, and about the penalties if they disregard them.[164]

How does the decision impact Australia? Obviously the *Sequana* decision is not binding on Australian courts, but it is likely to be persuasive, and the comments of the justices in *Sequana* will be relied on by some counsel to support their arguments. As in the UK, the acceptance of the existence of the obligation will be heartening for liquidators, not that there is any suggestion in the judicial opinion in Australia that the obligation does not exist. Also, there were several comments made by the justices that will be of assistance to liquidators and directors alike concerning the nature of the obligation. Where there might be a more limited embracing of the decision is in relation to the trigger for the obligation. There has been an acceptance in several Australian superior courts[165] that the obligation arises when there is a real and not remote risk of insolvency. Clearly, *Sequana* rejected that as a trigger and so what the justices said about the trigger may well be of restricted use. However, with the content of the obligation there is greater agreement between *Sequana* and what

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162 'Key Supreme Court Insolvency Ruling' (n 160).

163 Lloyd et al (n 158).

164 *Sequana* (n 3) 794–5 [304].

165 See, eg: *Kalls Enterprises* (n 18) 589 [162] (Giles JA); *Termite Resources NL (in liq) v Meadows [No 2]* (2019) 370 ALR 191.

has been said generally in Australia. This is particularly in relation to the fact that the obligation means that the directors must consider the interests of shareholders and creditors except where the company's financial position is very bad.

VI Conclusion

While a UK Supreme Court judgment is always usually worth waiting for and this applies to an extent where the *Sequana* decision is concerned, clearly the decision is not the panacea that all would like in order to resolve the issues that have been related to the obligation ever since its early days. There remains uncertainty concerning the point where the obligation is triggered and it is not totally clear what directors have to do when the obligation has been triggered and how they are to treat the interests of the shareholders and the creditors.

Everyone probably had unreasonable expectations of the judgment. All issues could not be resolved completely, and this is the case given the fact that much of what the judges said was obiter. Nevertheless, it can be said that it constitutes a milestone in the development of the obligation, and it does provide some guidance and some assistance.

The Supreme Court judgment will be construed by a wide range of affected people as well as those not directly or indirectly affected. It will be considered by directors, shareholders, financiers, auditors, litigation funders, investors, and officeholders, as well as lawyers and academics, and all may see different positives and negatives in the judgment. As far as the future is concerned, it will be interesting to see three things. First, will the decision lead to changes in the conduct of directors? Secondly, will it result in fewer proceedings being commenced by officeholders, particularly in the UK? Thirdly, how will lower courts in both the UK, and other common law jurisdictions like Australia where the obligation has been relied on successfully, treat the comments of the justices in *Sequana* which do not form the ratio of the case.

*P T Babie**

LAW ON NORTH TERRACE *REDUX*[1] *ADELAIDE LAW: A HISTORY OF THE ADELAIDE LAW SCHOOL*

BY JOHN WAUGH
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Quite a lot, actually, has been written about the story of the Adelaide Law School ('ALS').[2] All of it, though, was written before we began to realise how the English common law (taught in Australia, and all British colonial jurisdictions) ignored those who were already present long before the arrival of the British. Marcia Langton and Aaron Corn, in *Law: The Way of the Ancestors*,[3] demonstrate the richness of the Indigenous Law that existed before the British invasion of the Australian continent and its violent suppression of the laws of Australia's Aboriginal and Torres Strait Islander Peoples. Fernanda Pirie shows, in *The Rule of Laws: A 4000-Year Quest to Order the World*,[4] that there is, indeed, more than one way to understand law. Manifold in nature, law can only be understood as temporally and contextually specific. Viewing the imposed law of the coloniser through these lenses forces us to consider afresh its nature, status, and validity.

So it is with *Adelaide Law: A History of the Adelaide Law School*,[5] the first comprehensive scholarly treatment of its subject, written by John Waugh, the dean of

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1 The title is an adaptation of Alex Castles, Andrew Ligertwood and Peter Kelly, *Law on North Terrace: 1883–1983* (Faculty of Law, University of Adelaide, 1983).

2 See: Helen Mills and Charles Bagot, 'The Early History of the Law Faculty' (1968) *Obiter Dicta* 32; Victor Edgeloe, 'The Adelaide Law School 1883–1983' (1983) 9(1) *Adelaide Law Review* 1; Castles, Ligertwood and Kelly (n 1).

3 Marcia Langton and Aaron Corn, *Law: The Way of the Ancestors* (Thames & Hudson, 2023).

4 Fernanda Pirie, *The Rule of Laws: A 4000-Year Quest to Order the World* (Profile Books, 2022).

5 John Waugh, *Adelaide Law: A History of the Adelaide Law School* (Wakefield Press, 2024).

Australia's law school historians,[6] to focus not only on 'the narratives of progress',[7] but also, and much more importantly, on those who were either left entirely out of the story, or who only entered it comparatively recently, 'reflect[ing] … changed perspectives and new sources'[8] to offer a fresh account of a history that people thought they knew. Earlier histories of the ALS fall into two groups: those adopting a 'light' tone[9] resulting in 'a colourful, unofficial, history in magazine format',[10] or those, while demonstrating great rigour, that nonetheless remain an 'administrator's history'.[11] Still, each of those earlier histories offer glimpses of substance, with the recollections of graduates and faculty members revealing lasting themes in the interpretation of the Law School's history. Among them is the importance of compulsory university study, unusual in the common-law world in the 19th century; the transition from lecturers who were practising lawyers to full-time teaching staff; patterns of student life; and the long-delayed entry of women into the law course.[12] But Waugh's history adds important structure to those glimpses of substance, providing 'a fresh look at the themes of earlier writing, with particular attention to controversies, broader contexts, and the way the Law School was run.'[13]

This very brief review presents the highlights of the 141-year story Waugh tells. Dividing the account into seven stages or eras, *Adelaide Law: A History of the Adelaide Law School* examines: (i) foundations, from 1883 to 1896; (ii) the arrival of scholars between 1897 and 1925; (iii) the building of community from 1926 until 1957; (iv) physical movements between 1958 and 1967; (v) fights over curriculum from 1968 to 1979; (vi) the role of the Law School as gatekeeper to the profession from 1980 to 1989; and (vii) the transition from faculty to school after 1990. Rather than examining each in detail — for those either already familiar with the story as they think it has been told, or those coming new to it through Waugh's masterful telling — this review merely pauses over seven turning points, eclectically selected, from each of those stages.

I Turning Points

The first and obvious turning point, about which the ALS can be justifiably proudest, is simply the 1883 establishment itself. In the late 1870s, South Australia made it compulsory to complete a Bachelor of Laws ('LLB') for admission to practice

6 John Waugh has now written definitive histories of each of the first two Australian law schools, the first being John Waugh, *First Principles: The Melbourne Law School: 1857–2007* (Melbourne University Press, 2007).

7 Waugh (n 5) 3.

8 Ibid.

9 Ibid 1–2.

10 Ibid 2.

11 Ibid.

12 Ibid.

13 Ibid 3.

law — this was a rarity in legal training in the common-law world. It was foreign to the English legal system, from which the colonial laws of South Australia were derived; English legal education was instead provided largely outside the universities. In Australia, only Victoria (since 1872) made all new local entrants to the profession study at university, and the University of Melbourne had the country's only law school, in the sense of educating students to become practitioners.[14] It is this requirement that hastened the establishment of a law school at the University of Adelaide, becoming only the second Australian university to do so, making it the second oldest law school in Australia today. This foundation represents one of the 'firsts' for which the ALS is recognised.

Near the end of the first stage, and ushering in the second, the ALS took a step which placed it again among 'firsts' in Australian university legal education: the establishment of the Chair of Law, making Adelaide the third Australian university to have such a chair. The other chairs were established at the University of Melbourne in 1889 (Edward Jenks was its first holder) and at the University of Sydney in 1890 (William Pitt Cobbett).[15] As Waugh recounts, in December 1890, the university attached its seal to this 'grandiloquent commission':

> Confiding in your learning, ability, and integrity the University of Adelaide aforesaid by virtue of the above mentioned Act, and by virtue of the Statutes made & passed thereunder, and by virtue of all other enabling powers doth nominate and appoint you the said Frederick William Pennefather to be Professor of Laws in our University.[16]

In 1926, during the tenure of the chair's sixth holder, Arthur Lang Campbell, it was endowed by a gift of Sir John Langdon Bonython, converting it to the Bonython Chair in Law.[17] Frederick William Pennefather — Irish-born and educated at Trinity College, Cambridge, taking a Bachelor of Arts in Theology, and a Master's Degree in Law, and later the Doctor of Laws — arrived in Adelaide in 1887 as a lecturer, and was elevated to the chair on its establishment.[18] By the time Pennefather left in 1896,[19] he had given the ALS its motto — '*Fiat justitia ruat coelum*' ('let justice be done though the heavens fall')[20] — and opened the way for significant changes in legal education that would follow, as well as significant legal scholarship by the chair's second and third holders, Sir John Salmond and Coleman Phillipson. The establishment of the chair heralded the emergence of a community of scholars that would clearly delineate the second and third eras of the Adelaide Law School's history, and which has continued unbroken to the present day.[21]

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14 Ibid 14.

15 Ibid 40.

16 Ibid.

17 Ibid 101.

18 Ibid 33–6.

19 Ibid 53.

20 Ibid 51.

21 Ibid 99.

The third era, it must be said, contains a part of the story that does not place the ALS among the firsts of university legal education in Australia: the failure to admit women to the LLB degree. While women were admitted as students in the university from 1876, and the first two LLB students enrolled in 1903 (Emily Meredith Moulden) and 1911 (Doris Egerton Jones),[22] 'the first woman to complete the law course was Mary Kitson (later Mary Tenison Woods), whose LLB was conferred in 1916. She enrolled in law in 1912, the year after legislation confirmed women's eligibility to enter the profession.'[23] It would take 33 years, then, from the establishment of the ALS for the first woman to graduate LLB. Any sense of achievement that can even be taken in that long-delayed accomplishment is offset by the treatment women received in those early days, with 'the hostility of some male students … displayed for all to see' — 'the most confronting disadvantage for women law students … their exclusion from the Law Students' Society'.[24] John Waugh writes that 'women responded to their exclusion from the LSS by forming the Women's Law Students' Society, in 1932' in which they were supported by Arthur Lang Campbell.[25] While it cannot discount the long delay of their admission to study, and in no way excuse their treatment once they were, before too long, women were graduating and winning ALS prizes, as were their counterparts at other Australian law schools.[26] Sadly, though, it would take another fifty years before Roma Mitchell became the first female appointed to the academic staff, and it would take until 1986 for the appointment of the first woman professor, Marcia Neave.[27]

Physical movement marks the fourth era. From 1958 to 1967, the School would occupy three of its four homes. In 1958, Waugh writes:

> The Law School had been housed for seventy-five years in the university's original building, soon to be named after the former vice-chancellor, Sir William Mitchell. Its tenure there was precarious, as the central administration, the Law School's immediate neighbour, sought room for expansion. Law had moved from the basement to the top floor, after an extension gave the university some badly needed additional space in 1912. Reconfigured after the Barr Smith Library moved to its ornate new home in 1932, the Law School's accommodation consisted of a lecture room and the Law Library, which had a partitioned office for the professor and a cubicle for the Law School's secretary–librarian.[28]

From there, the ALS took up a home in the newly opened Napier Building. The change of home coincided with other changes: increasing enrolments, changes in curriculum, the establishment of the *Adelaide Law Review* (in 1960), and an

22 Ibid 78–9.

23 Ibid 80–1.

24 Ibid 82.

25 Ibid 83–4.

26 Ibid 146.

27 Ibid 146, 210.

28 Ibid 142.

expanding law library.[29] All of that, though, meant that the School was bursting at the seams in the overcrowded Napier. And so, in 1967, the School moved into 'the glorious new building', as the president of the Law Society put it at the time, named by the council, at the School's request, after Sir George Ligertwood, who had recently retired as the University's Chancellor.[30] Two upper floors were added in 1990–91, but it was not until 2015 that the ALS occupied the entire building.[31]

The ALS community, ensconced in its new Ligertwood home, continued to expand in both staff and students throughout the fifth period of its history, which brought with it greater democratic governance, in varying degrees and with mixed success.[32] It seems that with greater agency and greater numbers, tension increased among members of academic staff. The workload of administration, until this period borne entirely by the dean of law, began to weigh too heavily on one person and so, in 1971, the deanship was split from the headship.[33] Changes to the University governance structure renamed department heads as 'chairmen', with diminished authority.[34] Rotation of the deanship would mean that from 1970 to 1991 there were no fewer than twelve different deans.[35] Most significant during this period was the 'first class fight' waged between the ALS and the Supreme Court over the place of history and theory in the LLB curriculum. What might surprise modern readers, however, is which camp held the relevant positions: it was 'the judges [who] opposed the diminished role for history and jurisprudence[!]'[36] Many today would no doubt expect the combatants to line up rather differently.

The sixth stage of the ALS's development, Waugh's 'gatekeeping' of 1980 to 1989, bears witness to some minimal and long overdue redress for the greatest injustice of Australian history: the European treatment of Australia's Aboriginal and Torres Strait Islander Peoples. The centenary of the Law School, in 1983, coincided with a change, long delayed, in its relationship with the First Nations of the University's home. Indigenous people were powerfully affected by the laws taught at the Law School, including the legal foundations of colonisation, which rejected their laws, and the colonial law of property, which supported the expropriation of their lands. They had no access to the Law School as students, still less as staff, with limited access to higher schooling and other patterns of discrimination making entry to tertiary education difficult or impossible. First Nations people sought access to schooling despite these obstacles. Education was among the opportunities that drew Aboriginal people to Adelaide from the 1940s onwards.[37] Waugh writes:

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29 Ibid 142–58.

30 Ibid 160.

31 Ibid 162–3.

32 Ibid 170.

33 Ibid 179–80.

34 Ibid 180.

35 Ibid 181.

36 Ibid 183.

37 Ibid 206.

> the Law School's first Indigenous graduate was Irene Watson, of the Tanganekald, Meintangk and Boandik peoples of the south-east of South Australia. Working at the Aboriginal Legal Rights Movement sparked her interest in law. Watson enrolled in the law course in 1979, after completing a diploma in Aboriginal studies at the South Australian College of Advanced Education.[38]

Still, as women had experienced when they entered the ALS three-quarters of a century earlier, mere admission did nothing to overcome the discrimination Watson encountered at the Law School as an undergraduate, which was expressed as racism:

> Can you say an openly polite racist way? … It was the colonial frontier. It was hostile, it was aggressive, it was doing me a favour, enabling or allowing an Aboriginal woman to enter the Law School and to sit amongst them, study them. … It was the kind of general Aussie ocker racism of the time, you know, but it had a kind of refined way of being within, you know, Adelaide establishment law school.[39]

Irene Watson graduated LLB in 1985 and would later gain a PhD in Law for a thesis on First Nations Law and the impact of colonialism which would win the Bonython Prize for legal research in 2000 and form the basis of a widely influential book.[40] Irene Watson led the way, and throughout this period

> the number of Indigenous students grew, particularly after the commencement in 1988 of an Indigenous special entry scheme and, in 2012, a pathway into the LLB course through the Aboriginal Law Program at the vocational education provider TAFE SA. In 2018 the Law School had twenty-seven Indigenous students, mostly in the LLB program.[41]

The seventh and final stage of the story told by Waugh began in 1990. Various changes to curriculum and university governance interacted and overlapped during this time, but above all, the ALS's projects of 1998–99 showed imagination and ambition. In some ways, they were ahead of their time. They identified growing trends in legal education: the harnessing of information technology; the teaching of dispute resolution beyond the technical details of litigation; and the integration of practical experience into legal study. The Law School's early commitments to the use of technology had lasting effects. An anonymous student of the 2010s wrote: 'Having had various overseas study opportunities, I am astonished at how well IT facilities were integrated into the Law School — both physically within the

38 Ibid 207.

39 Ibid 208, citing 'The History of a Lie: The Mabo Case after 30 Years', *Countersign* (Countersign, 31 May 2022) <https://countersignisapodcast.com/podcasts/the-history-of-a-lie-the-mabo-case-after-30-years/>.

40 Waugh (n 5) 208, referring to Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

41 Waugh (n 5) 209.

building and in terms of the curriculum.'[42] Yet, not every innovation proved an unmitigated success — the vision and the ambition was often bold, but resources hampered delivery. Perhaps, though, this interplay between vision and reality is one of the best ways to think of the entire span of the ALS's history — the very idea of university-based legal education itself required a bold vision that was not always easy to implement and led, as at many institutions, to growing pains. And yet, the ALS finds itself here, 141 years later, 'a reassuring sign of continuity'[43] between the original bold vision of university legal education, sometimes imperfectly realised, yet still seeking to deliver on the idea that as 'a matter of the highest importance for the welfare of the community[,]… law should be treated, not as a trade, but as a science.'[44]

II Seeing the Future Through the Past

These turning points cannot do justice to the story Waugh tells — there is simply not the space to detail all that he reveals. But, then, trying to do so would be bound to fail, for the story, with its subtlety and nuance, can be told no better than by Waugh. And it needs to be known to answer questions about the future; now more than ever. For what will the impending merger of the ALS's parent university, the University of Adelaide, with the University of South Australia, hold for the future of university legal education in South Australia? The words of physicist Niels Bohr seem apt: 'Prediction is very difficult, especially if it's about the future!' We can, though, see the past, and that provides lessons for how the future might look. How clearly we can see the past depends on our guide. The only way to see the ALS's past, to know that story, to know that history, is to take John Waugh as our guide.

42 Ibid 259–60, citing Anonymous Response to Adelaide Law School History Questionnaire, 2019.

43 Waugh (n 5) 270.

44 Ibid 13, citing Sir William Jervois, 'Opening of the New University Building' *South Australian Advertiser* (Adelaide, 6 April 1882) 5.

*Adrian Tembel**

GRADUATION ORATION TO GRADUATES FROM THE 140TH YEAR OF THE ADELAIDE LAW SCHOOL

I Opening

Thank you for your warm and generous welcome, Chancellor Catherine Branson AC KC and thank you for your distinguished career of service to South Australia and more recently this University. Thank you to the University for inviting me to speak today, I'm delighted to be here.

II My Graduation

Graduates, it is clichéd to say, but it only seems like yesterday that I sat in my graduation robe in this magnificent hall, just as you do now. I was happy, but in my innocence — perhaps better described as ignorance — I had no appreciation at that moment of the wonderful possibilities that lay ahead.

With the benefit of all the intervening years, and sadly as you can see from my receding hairline, there have been many intervening years, I wish to address you today on why I believe Adelaide Law School graduation ceremonies are significant.

Not just significant for you, your families and friends, but for all South Australians.

III State History

South Australia is a wonderful State. But it is yet to fulfill its potential.

It has enjoyed periods of strength and national leadership but its long-term economic performance has been mixed.

Fortunately, our recent performance has been stronger and we are now at a critical and positive stage of our history.

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* Chief Executive Partner at Thomson Geer; Chair of the South Australian Productivity Commission; and Director of Menzies Research Centre.

This is an edited version of the oration presented at the Adelaide Law School Graduation Ceremony in May 2024.

Will we seize the long-term economic opportunity or not?

This will depend a little on luck, but mainly it will depend on the quality and energy of our most talented young people.

IV Special

Meanwhile, a little east of this hall sits the Adelaide Law School.

Since its establishment in 1883, this special South Australian institution has been a vital source of strength for our State.

Adelaide Law School graduates have not just enjoyed prosperous, interesting and respected lives, but just like Chancellor Branson, they have traditionally formed the nucleus of our legal system, government and in more recent years, business.

That means that you are all a select and important group of South Australian women and men.

You are not just fortunate, but you are the talented young people I was referring to a moment ago, the group who will decide our State's future.

V Adelaide Will Be Rewarding

Many of you will feel compelled or attracted to leave Adelaide soon to experience different worlds.

I do not discourage or encourage you to do so. You must choose your own path.

I do, however, want you to know that a deeply stimulating and influential life is available if you stay in Adelaide or return home in your professional prime.

This opportunity is open to every one of you. Not just the established or gifted, but also those of you who perhaps like me, may have at the start of your law school life, felt socially and culturally a little out of your depth.

For me, leading and then building this city's largest national law firm, the only major Australian law firm today that is not headquartered in Melbourne or Sydney, has been a rewarding experience.

In parallel, as the Chair of the South Australian Productivity Commission, helping drive our economic policies towards prioritising education and research has been fulfilling.

All of this and more has been experienced while living in Adelaide. A city with a rich history of its women and men making their mark nationally and internationally in the sciences, industry and public affairs.

VI Choose South Australia

So, while as a graduate of the Adelaide Law School I want you to know that each of you now has personal prosperity within reach; I want you to also understand that you have the unique and important opportunity to play a lead role in the development of our State in a historically significant way.

That is why this ceremony is not just important to you as graduates, and your families and friends, but to all South Australians.

Because if the talent in this hall grasps the local opportunity I described, I am confident our State will capitalise on its current momentum and finally take its rightful place as one of the great cities and states of not just Australia, but the world.

This outcome would benefit all South Australians, particularly those less fortunate than us.

VII Closing

From the heights of these exciting possibilities, I close this speech with some measure that I believe will serve you well.

As my grandfather would quote to my father, and my father would quote to me, and I'll also say to my children, including my little 11-year-old daughter Ginger who is here today (she only agreed to come so she could get the afternoon off school!): 'Life wasn't meant to be easy'.[1] This was of course a phrase made famous in Australia by our former Prime Minister Malcolm Fraser.[2] It has a slightly gloomy outlook.

But it was based on George Bernard Shaw's quote that gets the balance right: 'Life is not meant to be easy, my child; but take courage: it can be delightful.'[3]

Congratulations to all graduates. I wish you all long and happy lives, that are hopefully South Australian lives.

1 Interview with Malcolm Fraser (Mike Walsh, Mike Walsh Show, 16 August 1978).

2 Ibid.

3 George Bernard Shaw, *Back to Methuselah* (Floating Press, rev ed, 2010) 519.

SUBMISSION OF MANUSCRIPTS

In preparing manuscripts for submission, authors should be guided by the following points:

1. Submissions must be made via email to <alr@adelaide.edu.au>.

2. Authors are expected to check the accuracy of all references in their manuscript before submission. It is not always possible to submit proofs for correction.

3. Biographical details should be starred (*) and precede the footnotes. They should include the author's current employment.

4. Submissions should comply with the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 4th ed, 2018) <http://law.unimelb.edu.au/mulr/aglc>.

5. An abstract of between 150 and 200 words should also be included with submissions (excluding case notes and book reviews).

6. As a peer-reviewed journal, the *Adelaide Law Review* requires exclusive submission. Submissions should be accompanied by a statement that the submission is not currently under consideration at any other journal, and that the author undertakes not to submit it for consideration elsewhere until the *Adelaide Law Review* has either accepted or rejected it.

7. Any figures in manuscripts that are of too low a resolution to produce a suitable print quality will be re-drawn by the *Adelaide Law Review*'s typesetters at the author's cost.

8. If the submission is accepted by the *Adelaide Law Review*, it will be published in hard copy and electronically.

9. Authors must sign an Author Agreement (available at <http://www.adelaide.edu.au/press/journals/law-review/submissions/>) prior to the publication of their submission. The Editors prefer that a signed Author Agreement be included at the time of submission.

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