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TABLE OF CONTENTS

VALE ASSOCIATE PROFESSOR TONY MOORE

P T Babie, Andrew Parkinson and Richard Sletvold — *In Memoriam*: Anthony Peter (Tony) Moore, 1945–2023 — 191

ARTICLES

Gabrielle Wolf — Sentencing Criminal Offenders with Autism: A Comparative Analysis of Three Jurisdictions — 207

Juan Diaz-Granados — Exclusive Possession, 'Contractualisation' and the Lease-Licence Dichotomy: A Reconsideration of Legal Categorisation in the Airbnb Era — 250

Nina Cheles-McLean — Sex, Money and the Law: Financial Discrimination Against Sex Workers — 273

Murray Wesson — The *Mineralogy Act* and the Rule of Law — 310

Kathy Douglas and Lola Akin Ojelabi — Civil Dispute Resolution in Australia: A Content Analysis of the Teaching of the Topic of ADR in the Core Legal Curriculum — 339

Ian Murray and Natalie Silver — Use of Cy-près and Administrative Schemes by Australian Higher Education Providers to End Dead Hand Control of Charitable Assets — 362

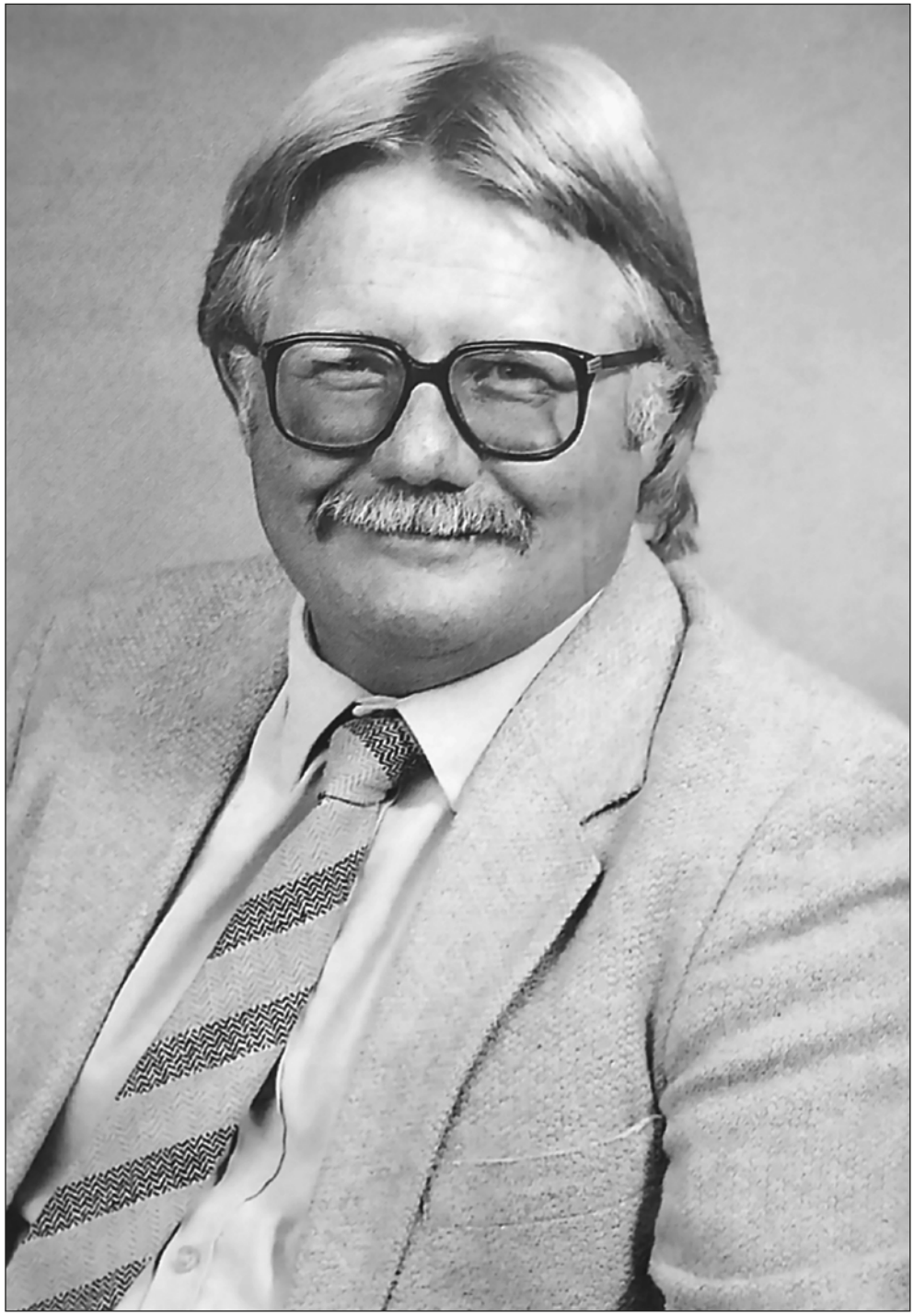
COMMENTS

Joanna Jarose — Revisiting the Limit on Small Claims in South Australia's Minor Civil Jurisdiction — 393

CASE NOTES

Nora Peat and Ashwini Ravindran — The Jury is Out: *Vunilagi v The Queen* (2023) 411 ALR 224 — 404

Annalise Delic and Monique Blight — Santos' Pipe(Line) Dream: *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124 — 420



Associate Professor Anthony Peter (Tony) Moore

P T Babie, Andrew Parkinson** and Richard Sletvold****

IN MEMORIAM: ANTHONY PETER (TONY) MOORE, 1945–2023

I Introduction

On 21 December 2023 the legal community lost a long-time and deeply respected scholar, teacher, mentor, colleague, and friend, when Associate Professor Anthony Peter (Tony) Moore died at the age of 78 after a long battle with cancer.

Born on 22 September 1945 in Springvale, Melbourne, Tony was the eldest of five children. He was destined for the academy from the outset. Declaring to his carers that 'I'm not here to play games, I'm here to learn how to read and write', Tony was for a time expelled from his kindergarten class. Any ill-effects of that experience were, though, short-lived; he subsequently excelled at every stage of his studies, proceeding first to Brighton Grammar School, Melbourne — where, true to his word about learning to read and write as much as he could, he was the only student in his cohort to study Russian as a language[1] — then to the University of Melbourne, studying as a resident of Queen's College,[2] and graduating with a Bachelor of Laws with Honours in 1967,[3] and a Master of Laws in 1970,[4] writing a thesis examining the legal control of outdoor advertising in Victoria.[5]

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* Bonython Chair in Law and Professor of Law, Associate Dean of Law (International), Adelaide Law School, The University of Adelaide. We are profoundly grateful to Adrian Bradbrook, Rob Fowler, Gabrielle Golding, Janey Greene, John Keeler, Paul Leadbeter, Kath McEvoy, and Rosemary Owens for offering their thoughts and recollections. This tribute draws upon curricula vitae prepared by Anthony P Moore (20 October 1994 and 7 May 2008) and Richard Sletvold (2023–24) and on notes prepared by John Keeler dated 1 March 2024, all on file with P T Babie and Richard Sletvold.

** Senior Project Officer, Department for Infrastructure and Transport, South Australia.

*** Special Counsel, FAL Lawyers.

1 Family memory conveyed to Andrew Parkinson.

2 University of Melbourne, *University of Melbourne Calendar 1965* (1965) 753 ('*University of Melbourne Calendar 1965*').

3 University of Melbourne, *University of Melbourne Calendar 1968–69* (1968) 731 ('*University of Melbourne Calendar 1968–69*').

4 University of Melbourne, *University of Melbourne Calendar 1971–72* (1971) 822.

5 Anthony P Moore, 'Outdoor Advertising: An Examination of the Legal Control of Outdoor Advertising in Victoria' (LLM Thesis, University of Melbourne, 1969).

Tony enjoyed a glittering career as a law student,[6] winning numerous awards (still recorded on the public Honour Board of the Melbourne Law School), including the Wright Prize for Legal History,[7] the Jessie Leggatt Scholarship for Principles of Property in Land,[8] the Robert Craig Exhibition in Company Law,[9] and the EJB Nunn Scholarship.[10] His degree was capped with the Supreme Court Prize for first place in his class in 1966;[11] Tony was particularly proud that he shared both the Nunn Scholarship and the Supreme Court Prize that year with Gareth Evans,[12] later an Australian Senator, Cabinet Minister and Chancellor of the Australian National University. Tony's brilliance as a student earned him a Fulbright Scholarship in 1969 to study as a Fulbright Fellow in the United States,[13] which he took up, along with a Commonwealth Program Fellowship,[14] at the University of Chicago, where he received a Juris Doctor with honours in 1970.[15]

Tony had already embarked on a scholarly career during his time at Melbourne, being appointed a Tutor in Law in Ormond College[16] and a Tutor in the Faculty of Law in 1967 and then a Senior Tutor in the Faculty from 1968–69.[17] And so it came as no surprise that on his return to Australia he continued where he had left off, accepting a Lectureship in Law at the University of Adelaide in 1970. Over the course of almost a quarter century in the Adelaide Law School, Tony would be promoted: in 1975, to a Senior Lectureship, in 1984 to Reader, and finally to Associate Professor in 1989. Tony also held important administrative roles throughout his time

6 Email from John Keeler to PT Babie, 4 February 2024 ('Email from Keeler').

7 University of Melbourne, *University of Melbourne Calendar 1964* (1964) 732.

8 *University of Melbourne Calendar 1965* (n 2) 753.

9 University of Melbourne, *University of Melbourne Calendar 1967–68* (1967) 801.

10 Ibid 804.

11 Melbourne Law School, 'MLS Honour Board', *University of Melbourne* (Web Page) <https://law.unimelb.edu.au/alumni/alumni-profiles-and-accomplishments/honour-board>.

12 Email from Keeler (n 6).

13 'About', *Ormond College* (Web Page, 2024) <https://ormond.unimelb.edu.au/about/>.

14 University of Chicago, *Law School Announcements 1970–1971* (10 September 1970) 63 <https://chicagounbound.uchicago.edu/lawschoolannouncements/126>. There is a brief comment on the Commonwealth Fellowship Program started by Professor Sheldon Tefft in Geoffrey Palmer, 'Profiles: Sheldon Tefft' (1969) 17(1) *The University of Chicago Law School Record* 21 <https://chicagounbound.uchicago.edu/lsr/vol17/iss1/6/>.

15 The University of Chicago, *The Three Hundred Thirty-Second Convocation: The Spring, Second Session* (The University of Chicago Convocation Programs, 12 June 1970) <https://campub.lib.uchicago.edu/view/?docId=mvol-0447-1970-0612-02>.

16 *University of Melbourne Calendar 1968–69* (n 3) 832; University of Melbourne, *University of Melbourne Calendar 1969–70* (1969) 876 ('*University of Melbourne Calendar 1969–70*').

17 *University of Melbourne Calendar 1969–70* (n 16) 95; *University of Melbourne Calendar 1968–69* (n 3) 91.

at Adelaide, serving as Associate Dean of the Faculty in 1974–75, Chairman of the Department in 1979–81, the latter of which coincided with renovations, including the addition of two new floors, to the Ligertwood Building, which continues to house the Adelaide Law School today. Tony later served as Chairman of the Higher Degrees Committee from 1983–89, as Deputy Chairman of the Department from 1985–86, as a Member from 1984–85 of the Honours Committee and then later as Chairman from 1986–87, as Coordinator of Research and Postgraduate Studies from 1989–92, and then as Director of the Corporate and Business Law Centre from 1991–94. Tony also gave his time freely and selflessly to the administration of other parts of the university. Tony was a member of numerous university bodies including the Committee on Environmental Studies (1970–77), the University Consumer Protection Group (1972–75), the Matriculation Committee (1971–78), the Committee on Ethical Use of Animals for Experimental Purposes (1974–81), the Staff Development Committee (1974–75), the Board of Adult Education and then the Board of Continuing Education (1975–79),[18] and the Advisory Board of the Environmental Law and Policy Unit (1991–93), among many others. Tony is remembered, in each of these roles, for his excellent managerial and interpersonal skills.[19]

Leaving the Adelaide Law School in 1994, Tony took up an Associate Professorship in the newly established Flinders University Law School. Tony approached his work at Flinders with the same inspirational energy and vigour which had so impressed his Adelaide colleagues, serving first as Associate Dean from 1995–97, and then as Dean of Law from 1998–2001. He also served as Director of Postgraduate Studies, Convenor of the Research Committee and of the Honours Committee, and Coordinator of the Health Law Program. Tony retired from Flinders in 2004 after over 35 years of teaching, research, and scholarship. Following his retirement, Tony continued to teach property law and pursue his research and scholarship as an Adjunct Associate Professor in both the Adelaide and Flinders law schools. He continued to teach and write until his passing.

Tony was also a long-standing member of Lincoln College, Adelaide, joining the Council in 1974 and remaining in that position until his retirement from the Council in 2009.[20] During his almost forty-year association with the College, he held numerous appointments including as Vice-Master from 1971–74, Acting Master in 1972–73, Academic Tutor in Law in 1972–73, Council Member from 1974–78,

18 Never merely a passive committee member, Tony took to the airwaves in 1975 to deliver a 10-unit radio show on the Law and the Environment with a number of colleagues for the then Department of Adult Education's Radio 5UV. At the time, Radio 5UV was a relatively new venture, having only commenced broadcasting in 1972 as Australia's first licensed community radio station. That station continues today on the FM band as Radio Adelaide. See 'Law and the Environment' (Radio 5UV, 1975), archived on cassette tape in the University of Adelaide Archives as part of Series S-695, IDs 1695-0345–1695-0349 <https://archives.adelaide.edu.au/#details=ecatalogue.37807>.

19 Email from Robert Fowler to PT Babie, 4 January 2024 ('Email from Fowler').

20 Email from Toula Pantelis to Andrew Parkinson, 12 March 2024.

Council Secretary and Public Officer from 1978–2009, and College Principal in 1990. Tony authored significant revisions to the College Constitution and, as College Archivist, collaborated with Ian LD Forbes on the writing of *A History of Lincoln College*.[21] For his service to the College, he was awarded an Honorary Life Membership in 1972 and an Honorary Fellowship in 2009.

Tony's life in the academy is known above all, though, for his outstanding scholarship, and through that work he made enormous contributions to legal education and to the legal profession in Australia and internationally. Tony possessed a 'sharp intellect and … deeply entrenched social conscience … [which] impregnated … his teaching and scholarship'.[22] While Tony had varied interests in law, including consumer protection and planning law, he particularly brought his skills to bear on his chosen field, real property law, and especially residential tenancies law — his 'primary concern throughout his academic life had been with the law's treatment of the ordinary individual in the fulfilment of such basic needs as housing'.[23] Tony 'saw areas such as planning law and [residential] tenancy law from a perspective that was deeply concerned with the protection of those at a disadvantage in society. He was not a proselytiser on these matters, but rather an analyser and prescient commentator.'[24] But his analysis and commentary made novel and deeply influential contributions which reached many. He remained, until his passing, one of the original authors of *Australian Real Property Law*,[25] one of the leading Australian texts in the field, now in its seventh edition, and known to students and practitioners alike as 'Bradbrook, MacCallum and Moore'. He was also one of the original authors of its accompanying casebook, *Australian Property Law: Cases and Materials*,[26] as well as being the Title Editor of 'Title 28: Real Property Law' of *The Laws of Australia*, a leading Australian legal encyclopaedia.[27] Tony's impressive list of publications, a selection of which is published as an appendix to this tribute, bears witness to the significant contributions he made to the scholarship in his fields of expertise.

But Tony did not see scholarship as merely a solitary pursuit. He spent his entire career encouraging and fostering the growth of many others as scholars and as legal practitioners. A generosity of spirit that allowed others to flourish, both in the academy and in the practice of law, characterised Tony's life as scholar and teacher. He is remembered as generous, kind, thoughtful, deeply caring, and profoundly

21 Ian Forbes, *A History of Lincoln College* (Lincoln College, 2007) (written in conjunction with Anthony Peter Moore).

22 Email from Fowler (n 19).

23 Notes from John Keeler to PT Babie, 1 March 2024 ('Notes from Keeler').

24 Email from Fowler (n 19).

25 Anthony Moore, Scott Grattan, and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020).

26 Anthony P Moore, Scott Grattan, Lynden Griggs, *Australian Property Law: Cases and Materials* (Thomson Reuters, 5th ed, 2016).

27 Thomson Reuters, *The Laws of Australia* (online at 24 March 2024) 28 Real Property Law.

good.[28] Time and again those most influenced by Tony — students and practitioners — recount how his teaching and research, grounded in theory, placed the concerns of practitioners and citizens — those who must use the law and those subject to it — foremost in view. Over the course of his career, Tony taught and mentored generations of law students, and that mentorship extended to those making the transition from student to scholar. As a senior colleague in the Adelaide Law School, Tony took an active interest in the career development of those in the early stages of their own careers,[29] frequently offering sage advice.[30] Tony always took time for those who were building their own careers; as one remembers, he 'was always pleased to see me and loved to hear how things were going with me and my work'.[31] Robert Fowler recalls:

> Tony had a huge influence on my own career as an academic. [He] was the supervisor of my Master's thesis in environmental law, at a time when this field was virtually non-existent. He was extremely helpful with his feedback and provided me with the kind of firm but enthusiastic support that provided the template for how I approached the task of supervision in subsequent years. He also afforded me the opportunity during my thesis-writing years to give the lectures on planning law that he had introduced into the property law course. He sat in the back row of the lecture theatre and would provide gentle, but helpful feed-back afterwards. After being appointed as a lecturer, I taught property law with Tony for many years and he became both a valued colleague and a good friend.[32]

And Paul Leadbeter recounts:

> Tony, together with Simon Palk, taught me Property law … in 1978. He did a couple of weeks on town planning law and the property system, which was my first exposure to such a topic. … I found it incredibly interesting [and] I subsequently did my Honours thesis in the area, with Tony as my supervisor. He was always very kind, patient, and incisive. He introduced me to an area of law that became my practice and academic speciality and I always credit him for giving me the initial impetus to work in that area.[33]

He had a profound influence on all who knew him; he was, simply and in every way, 'an excellent colleague'.[34]

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28 Fowler (n 19); email from Rosemary Owens to PT Babie, 2 January 2024 ('Email from Owens'); email from Paul Leadbeter to PT Babie, 3 January 2024 ('Email from Leadbeter'); email from Kathleen McEvoy to PT Babie, 2 January 2024 ('Email from McEvoy').

29 Email from Janey Greene to PT Babie, 29 December 2023.

30 Email from Owens (n 28).

31 Email from Leadbeter (n 28).

32 Email from Fowler (n 19).

33 Email from Leadbeter (n 28).

34 Email from McEvoy (n 28).

One of the most important, and enduring, ways in which Tony allowed others to develop as scholars was through his work with the *Adelaide Law Review*, serving as a member of the Adelaide Law Review Association from 1974–81 and from 1985–86, as Chairman of the Association from 1977–81, and later as an Editor of the *Adelaide Law Review* from 1985 until his departure to Flinders University in 1994.[35] During his time with the *Review*, Tony significantly expanded its scope and reach, 'play[ing] a unique personal role in making the University of Adelaide one of the largest, most significant non-commercial centres for the publication of legal periodicals and other law materials in Australia',[36] and 'maintained and expanded the role of the … Adelaide Law School as an important centre of legal scholarship … provid[ing] a unique service to the South Australian legal profession and the wider local community'.[37]

But more than this, Tony saw the *Review* as a vehicle which would allow students to develop and hone their own skills as emerging scholars.

> [Tony] encouraged and extended the involvement of students and recent graduates in the Law School's publishing activities. This … provided many with very special opportunities to develop high level skills in legal writing and research. For a number it … made it possible for them to gain an acknowledged standing for their expertise considerably in advance of the norm.[38]

Moreover, as Editor, Tony used the *Review* as a means of widening the scope and reach of legal scholarship in many important fields, establishing the *Corporate and Business Law Journal* and the *South Australian Planning and Environment Decisions* loose-leaf service (under his editorship), and assuming the editorship of *An Annual Survey of Australian Law.* He supervised the publication of monographs and books under the imprint of the Adelaide Law Review Association and was instrumental in the foundation of the *Australian Journal of Legal History.*[39] Tony's conception of the scholar as one pursuing not only one's own research but also as encouraging that of others went with him to Flinders where, as a Founding Editor of the *Flinders Journal of Law Reform*, he opened publication pathways for countless scholars. Uniting his scholarly collegiality and his understanding of the scholarly endeavour, Tony used the first article in the *Flinders Journal of Law Reform* to pay tribute to the outgoing Foundation Dean of the School of Law at Flinders University.[40]

An important hallmark of Tony's scholarship was its practical focus — while everything he wrote bore the impress of the underlying theory of law, that never

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35 Note, 'Thank you to AP Moore' (1994) 16 *Adelaide Law Review* 225.

36 Ibid 225.

37 Ibid 226.

38 Ibid.

39 Ibid 225.

40 Anthony P Moore, 'Tribute to Rebecca Bailey-Harris' [1995] 1(1) *Flinders Journal of Law Reform* 1.

detracted from the law in practice, used by lawyers and judges to solve real-world problems, as the primary focus of the scholar. As one colleague remembers, his 'broad and integrated view of the law … inevitably influenced his teaching'.[41] Tony had an unparallelled 'capacity to blend the pursuit of academic excellence with a clear understanding that law cannot be isolated from the practical day to day circumstances which expose its real character and meaning'.[42]

This practical approach typified his work in the three areas of his expertise: property law, residential tenancies, and consumer protection. Indeed, it is Tony's teaching in these areas, combined with his 'fearlessness in … expressing the strength of his convictions' that best exemplifies his concern for the practical application of law.[43] While at Adelaide, he redesigned the Property Law subject, transforming it from essentially a subject about the English doctrines of tenure and estates into one which was truly Australian, placing at its heart, as it ought to be, the Torrens system of title by registration.[44] Tony also had a significant role in the development of residential tenancies law in South Australia, starting with the publication of *Residential Tenancy Law and Practice: Victoria and South Australia* with Adrian Bradbrook and Susan MacCallum in 1983.[45] This was to become the first of many successful Bradbrook, MacCallum and Moore collaborations — and, despite now having the patina of 40 years of legal developments, it continues to be cited today.[46] Seeking, characteristically, to put his mastery of legal theory into practice, within a few years Tony had begun serving in 1987 as a Member of the Residential Tenancies Tribunal of South Australia and continued as a Member until 2003,[47] delivering a

41 Notes from Keeler (n 23).

42 'Thank you to AP Moore' (n 35); see also Anthony Moore, 'Reflections on Publishing the *Adelaide Law Review*' (2019) 40(1) *Adelaide Law Review* 45.

43 Email from Fowler (n 19).

44 Notes from Keeler (n 23).

45 Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (Lawbook, 1983).

46 See, eg, ibid, cited in Enid Young, 'Appellant's Submissions', Submission in *Young v Chief Executive Officer (Housing)*, D5/2022, 4 November 2022, [28] n 35, [34] n 42, [79] n 140.

47 'DPCA, 32/16/81' in South Australia, *South Australian Government Gazette*, No 37, 2 July 1987, 3; 'Erratum' in South Australia, *South Australian Government Gazette*, No 39, 16 July 1987, 153; 'DPCA, 90/16/81' in South Australia, *South Australian Government Gazette*, No 57, 21 June 1990, 1644; 'DPCA 19/60/81' in South Australia, *South Australian Government Gazette*, No 77, 8 July 1993, 476; 'OCBA 8/93CS' in South Australia, *South Australian Government Gazette*, No 125, 16 November 1995, 1343; 'Erratum' in South Australia, *South Australian Government Gazette*, No 129, 23 November 1995, 1413; 'OCBA 008/93CS' in South Australia, *South Australian Government Gazette*, No 125, 31 October 1996, 1460; 'OCBA 008/93CS' in South Australia, *South Australian Government Gazette*, No 169, 26 November 1998, 1601; 'ATTG 7/99CS' in South Australia, *South Australian Government Gazette*, No 182, 16 November 2000, 3197; 'OCBA 013/02CS' in South Australia, *South Australian Government Gazette*, No 124, 7 November 2002, 4043.

large number of decisions on matters arising under the *Residential Tenancies Act 1978* (SA) and, later, under the *Residential Tenancies Act 1995* (SA).

Of paramount importance in relation to residential tenancies, Tony was concerned with fair outcomes for ordinary people, adamant that having fit for purpose law was one thing, but that a fair legal system includes the right of pursuing a person's due by adjudicative means. He stressed the need for low-cost fora in which the law could be applied to a dispute. For Tony, disputes in the Tribunal were not conciliated or mediated as a softer form of justice, and applicants received reasons to explain why a decision had been made. This was also the case for the Tribunal's novel jurisdiction regarding disputes under the *Retirement Villages Act 1987* (SA); indeed, for some time after Tony left the Tribunal, successive groups of elderly applicants crammed into one of the hearing rooms on Grenfell Street citing previous reasons of 'Mr Moore' in reverential terms.

In consumer protection law, Tony advocated for, researched, and taught consumer rights for over 30 years. He was a founder of the Consumers' Association of South Australia, serving as its President from 1992–96, its Secretary from 1998, and as a Council Member from 1987–91 and again from 1996–97. Tony's enormous contributions to that organisation were recognised with a Life Membership in 2015. His work with the Consumers' Association also saw Tony serve as a Council Member of the Australian Federation of Consumer Organisations from 1992–93, as a Member and Consumer Representative of the Energy Consumers' Council of South Australia (from 2003 advising the Minister responsible for energy policy), and as a member of the Standing Consumer Advocacy Committee on the implementation of the former Uniform Consumer Credit Code. His expertise in this area was frequently called upon by governments. He acted as a consultant to the then Law Reform Commission (later the Australian Law Reform Commission) on the references that led to the Commission's reports on insolvency, debt recovery, insurance contracts, and class actions.[48] Alongside Tony's numerous submissions on consumer protection law reforms and his research in this area, Tony wrote a landmark report for the Attorney-General of South Australia in 1978 on the reform of consumer debt laws, which led to the *Debts Repayment Act 1978* (SA), *Enforcement of Judgments Act 1978* (SA), *Sheriff's Act 1978* (SA), *Local and District Criminal Courts Act Amendment Act 1978* (SA) and the *Supreme Court Act Amendment Act 1978* (SA). As with his teaching of Property Law, Tony also took the opportunity to redesign the existing sale of goods and consumer credit courses at the Adelaide Law School to account for the *Consumer Transactions Act 1972* (SA); this work ultimately played a pivotal role in the enactment of the *Mock Auctions Act 1972* (SA). All the while, Tony continued to promote public awareness of consumer rights and present on these issues well into his retirement. A little over 30 years after writing *Contract, Credit and the Law*

48 Law Reform Commission, *Insolvency: The Regular Payment of Debts* (Report No 6, 1977) vii; Law Reform Commission, *Insurance Contracts* (Report No 20, 1982) xvii; Law Reform Commission, *Debt Recovery and Insolvency* (Report No 36, 1987) xiv; Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) xix.

with Donald A Sinclair,[49] Tony continued his lifelong project of expounding the law in practice, and demonstrating his versatility as a legal educator, by authoring a lay guide to debt for consumers.[50]

Through the combination of his experience in the Tribunal and the experience he gained as a student at the University of Chicago — at the peak of the period dominated by the Chicago school of economics — Tony held the view that, rather than breaking up concentrations of market power, consumers are best protected by competition even if it is only between a few large firms in an industry. Still, he understood that now and again markets fail, for want of balance of power between the parties or even outright abuse of it, and so he saw justification in intervening on both sides of the market, both through legislation and on a case-by-case basis. Tony therefore welcomed the wide availability of injunctive relief under s 80 of the *Trade Practices Act 1974* (Cth) (as it then was) to restrain conduct that would constitute a breach of the anti-trust provisions of pt IV and also the traditional consumer protection rules of pt V.

This concern with the law in practice extended to Tony's contributions to the wider legal community as well. He served as a Council Member of the Law Foundation of South Australia and of the Law Society of South Australia from 1998–2001, and as a Council Member of the South Australian Legal Practitioners Education and Admission Council from 1998–2001. Outside of legal and consumer advocacy fields, Tony also made significant contributions to other community organisations including as a long-serving Council Member of the Civic Trust of South Australia from 1972–92 including a stint as its Chairman from 1978–79. Tony also served as a Member of the Council of the South Australian College of Advanced Education from 1986–91,[51] in the lead up to the College's merger with the South Australian Institute of Technology in 1991 to become the then new University of South Australia.

While Tony dedicated his life to the study and teaching of law, making it clear from the very outset of his scholarly life that he was 'not here to play games', at least one game *did* later become a passion: Australian Rules Football. Everyone who knew Tony knew of his love for the Carlton and Norwood Football Clubs. Margaret Castles, whose father, the renowned legal historian Alex Castles, was one of Tony's greatest friends, remembers that Tony and Alex would often attend games together at the Norwood Oval.[52] It was therefore fitting that a gathering in honour of Tony was held at the Norwood Oval on 28 March 2024. Friends and colleagues reminisced about Tony and his contributions to the South Australian community

49 Anthony P Moore and Donald A Sinclair, *Contract, Credit and the Law* (Longman Cheshire, 1978).

50 Anthony Moore and Steve Bucci, *Debt Repair Kit for Dummies* (Wiley Publishing, Australian Edition, 2010).

51 'MEFE, 298/1986' in South Australia, *South Australian Government Gazette*, No 78, 4 December 1986, 1777; 'MEFE, 298/1986' in South Australia, *South Australian Government Gazette*, No 110, 22 December 1988, 2098.

52 Email from Margaret Castles to PT Babie, 28 February 2024.

before watching Norwood face long-time rivals Sturt in the opening round, with the Redlegs running out winners, 11.11 (77) — 7.8 (50).

Yet perhaps we find Tony's most profound and lasting legacy is what might seem simplest: his willingness always to make time for those most in need of support, and doing so with deep humility, without any need whatsoever to draw any attention to that fact. As two former Deans of the Adelaide Law School remember, Tony's 'many private, kind and generous actions' came with 'no great fanfare, no blowing his trumpet about his own kindness, just quietly giving support', seeking no public recognition.[53] In short, Tony was a truly good and lovely person.

Tony's warmth as scholar, teacher, mentor, colleague, and friend will be sadly missed and his loss deeply felt by all who knew and worked with him. Vale Tony Moore.

53 Email from McEvoy (n 28); Email from Owens (n 28).

Associate Professor Anthony P Moore
LLB (Hons), LLM (Melbourne), JD (Hons) (Chicago)
Supreme Court Prize, Fulbright Fellow

Adjunct Associate Professor of Law in the University of Adelaide, 1994–2023
Adjunct Associate Professor of Law in Flinders University, 2004–23
Dean of the School of Law in Flinders University, 1998–2001
Associate Dean of the School of Law in Flinders University, 1995–97
Associate Professor of Law in Flinders University, 1994–2004
Associate Professor in Law in the University of Adelaide, 1989–94
Deputy Chairman of the Department of Law in the University of Adelaide, 1985–86
Visiting Professor of Law in the University of Maryland, 1984
Reader in Law in the University of Adelaide, 1984–89
Chairman of the Department of Law in the University of Adelaide, 1979–81
Senior Lecturer in Law in the University of Adelaide, 1975–84
Associate Dean of the Faculty of Law in the University of Adelaide, 1974–75
Lecturer in Law in the University of Adelaide, 1970–75
Tutor and Senior Tutor in Law in the University of Melbourne, 1967–69

Editor of the *Adelaide Law Review*, vols 10–16
Founding Editor of the *Flinders Journal of Law Reform*, vols 1–3
Editor of *South Australian Planning and Environment Decisions*, vols 1–9
Editor of the *Annual Survey of Australian Law*, 1991–95
Title Editor of *The Laws of Australia*, 28 Real Property

Council Secretary and Public Officer 1978–2009, Council Member 1974–78, Acting Master 1972–73, Vice-Master 1971–74, College Principal 1990, Honorary Life Member and Honorary Fellow since 2009 of Lincoln College, Adelaide

Member of the Residential Tenancies Tribunal of South Australia, 1987–2003[*]

Council Member of the Law Society of South Australia,
the Law Foundation of South Australia, and
the South Australian Legal Practitioners Education and Admission Council, 1998–2001

President 1992–96, Secretary from 1996, Council Member 1987–91 and 1996–97
and Life Member since 2015 of the Consumers' Association of South Australia

Council Member 1972–92 and Chairman 1978–79 of the Civic Trust of South Australia

Member of the Council of the South Australian College of Advanced Education, 1986–91

Consultant to the Australian Law Reform Commission,
the Attorney-General of South Australia and other government bodies

[*] A selection of Tribunal decisions written by Moore can be found in the South Australian Residential Tenancies Tribunal database maintained by the Australasian Legal Information Institute: 'South Australian Residential Tenancies Tribunal Decisions', *AustLII* (Web Page, 24 June 2024) <https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/sa/SARTT/>. This database includes only selected Tribunal decisions from 1996 and is therefore not exhaustive.

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*Gabrielle Wolf**

SENTENCING CRIMINAL OFFENDERS WITH AUTISM: A COMPARATIVE ANALYSIS OF THREE JURISDICTIONS

Abstract

A growing number of defendants in criminal proceedings are bringing their diagnosis of Autism Spectrum Disorder ('ASD'), a neurodevelopmental condition, to courts' attention. Where an offender with ASD is found guilty of committing a crime, the sentencing court may need to take their condition into account in order to ensure it reaches an outcome that is fair to the defendant and achieves sentencing objectives. This article undertakes a comparative analysis of the potential for an offender's ASD symptoms to influence sentencing decisions in three jurisdictions: the State of Victoria in Australia; the federal jurisdiction of the United States of America; and England and Wales in the United Kingdom. The article focuses on whether courts are able to apply factors relevant to the sentencing process in light of a defendant's ASD impairments and if those symptoms can have an impact on the types of sanctions that courts impose. It recommends approaches for courts to adopt in sentencing offenders with ASD and highlights features of the examined jurisdictions that would best guide judges to follow them.

I Introduction

Individuals who have Autism Spectrum Disorder ('ASD') are not by virtue of this neurodevelopmental condition predisposed to engaging in criminal behaviour.[1] Indeed, research suggests that many people with ASD are law-abiding.[2] Nevertheless, an increasing number of defendants in criminal proceedings are bringing

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1 Clare S Allely, *Autism Spectrum Disorder in the Criminal Justice System: A Guide to Understanding Suspects, Defendants and Offenders with Autism* (Routledge, 2022) 54 ('*Autism Spectrum Disorder*').

2 Tony Attwood, *The Complete Guide to Asperger's Syndrome* (Jessica Kingsley, rev ed, 2015) 347. See also Neil Brewer and Robyn L Young, *Crime and Autism Spectrum Disorder: Myths and Mechanisms* (Jessica Kingsley, 2015) 39; Caitlin Eve Robertson, 'Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations' (PhD Thesis, Deakin University, 2017) 3.2.2.

their ASD diagnosis to courts' attention.[3] Where this is the case and a defendant has been found guilty of committing a crime, the sentencing court may need to take their condition into account in order to ensure an outcome that is fair to the defendant, but also achieves sentencing objectives, including community protection.

As discussed further in Part II, the main diagnostic criteria for ASD are problems in social interaction and communication, and narrow, repeated behavioural patterns, interests or activities.[4] These impairments manifest in a broad range of ways and differently between individuals with ASD.[5] The potential for sentencing courts to overlook a defendant's ASD symptoms may be high because they are often not immediately evident to those untrained in psychology and, as Ian Freckelton observed, their 'effects can be subtly significant and counter-intuitive'.[6] A defendant's diagnosis of ASD alone does not confirm that their symptoms influenced their criminal offending or that they are pertinent to the sanctions they should receive.[7] Yet where a court receives cogent evidence of the defendant's experience of ASD impairments and the clear connection between them and their criminal conduct, judges should consider whether to take them into account in sentencing.[8]

In particular, it may be appropriate for a sentencing court to reflect on: (1) whether a defendant's ASD impairments should influence its application of factor relevant to the sentencing process in their case; and (2) if those symptoms should affect the kinds of sanctions imposed. This article compares the potential for an offender's ASD diagnosis to have an impact on sentencing in these respects in three criminal justice systems: the State of Victoria in Australia; the federal jurisdiction of the United States of America ('US'); and England and Wales in the United Kingdom. These jurisdictions have been chosen for analysis because they have commonalities owing to their shared common law, adversarial tradition and, though there are similarities, there are also differences between their sentencing systems. This study

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3 Colleen M Berryessa, 'Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism' (2016) 46(8) *Journal of Autism and Developmental Disorders* 2770, 2770.

4 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 31, 50; World Health Organization, *International Classification of Diseases*, WHO Doc 6A02 Rev. 11 (2019) <https://icd.who.int/browse/2024-01/mms/en#437815624> ('*ICD-11*').

5 American Psychiatric Association (n 4) 53.

6 Ian Freckelton, 'Expert Evidence by Mental Health Professionals: The Communication Challenge Posed by Evidence about Autism Spectrum Disorder, Brain Injuries, and Huntington's Disease' (2012) 35(5–6) *International Journal of Law and Psychiatry* 372, 377 ('Expert Evidence'). See also Ian Freckelton and David List, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16(1) *Psychiatry, Psychology and Law* 16, 35.

7 Freckelton, 'Expert Evidence' (n 6) 377.

8 Ibid; Jamie Walvisch and Andrew Carroll, 'Sentencing Offenders with Personality Disorders: A Critical Analysis of *DPP (Vic) v O'Neill*' (2017) 41(1) *Melbourne University Law Review* 417, 441.

therefore provides an opportunity to ascertain which approaches are most likely to lead to sentencing of defendants with ASD that is just and achieves sentencing objectives.

The next Part of this article outlines symptomatology of ASD and its possible relevance for sentencing a defendant with this neurodevelopmental condition. Part III explains some key features of the sentencing systems in the examined jurisdictions and discusses the potential for courts to apply factors relevant to the sentencing process in light of a defendant's ASD impairments. Part IV considers possibilities for courts in the three jurisdictions to take those symptoms into account in selecting the types of sanctions to impose. Parts III and IV propose approaches for courts to adopt in sentencing defendants with ASD, and identify features of the examined jurisdictions that permit judges to follow these approaches and provide guidance to them in doing so.

II Sentencing Defendants with Autism

ASD symptoms, which are related to brain development, can impair an individual's personal, social, educational and/or occupational functioning.[9] The American Psychiatric Association's ('APA') *Diagnostic and Statistical Manual of Mental Disorders* and the World Health Organization's *International Classification of Diseases* identify two key domains of impairment in ASD, which are often evident from early childhood.[10]

Deficits in social interaction and communication constitute the first diagnostic criterion of ASD.[11] This can manifest in problems with: engaging in back-and-forth conversation; noticing and reacting appropriately to social cues; understanding and using non-verbal means of communication (for example, eye contact and facial expression); behaving appropriately for particular settings; and forming, maintaining and understanding relationships.[12] Difficulties with social interaction and communication can also be reflected in an impairment of 'theory of mind' ('ToM') or 'cognitive empathy', which is the capacity to differentiate another person's mental state from one's own, and imagine, recognise and understand their perspective, thoughts and feelings.[13]

9 American Psychiatric Association (n 4) 31, 50; World Health Organization, *ICD-11* (n 4).

10 American Psychiatric Association (n 4) 55–6; World Health Organization, *ICD-11* (n 4).

11 American Psychiatric Association (n 4) 50; World Health Organization, *ICD-11* (n 4).

12 American Psychiatric Association (n 4) 31, 50, 53–4; World Health Organization, *ICD-11* (n 4).

13 World Health Organization, *ICD-11* (n 4); Attwood (n 2) 124; Tessa Grant et al, 'Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning' (2018) 59(1) *Canadian Psychology* 65, 66–7; Clare Sarah Allely, 'Contributory Role of Autism Spectrum Disorder Symptomology to the Viewing of Indecent Images of Children (IIOC) and the Experience of the Criminal Justice System' (2020) 11(3) *Journal of Intellectual Disabilities and Offending Behaviour* 171, 172.

An individual with ToM impairment may not appreciate the impact of their behaviour and could misinterpret others' attitudes and intentions, and have difficulty predicting their actions.[14] Cognitive empathy is, however, distinguished from emotional empathy, which is the ability to share or have an affective response to another person's emotional state.[15] People with ASD may empathise with others in this way, especially when made aware of their feelings.[16] The second major diagnostic criterion of ASD is '[r]estricted, repetitive patterns of behavior, interests, or activities'.[17] These can involve: rigidly following rules, rituals or routines and discomfort with change; preoccupation with 'special interests'; and intense interest in or unresponsiveness or aversion to sensory stimuli.[18]

'Asperger's syndrome/disorder' was previously categorised as a subtype of ASD that applied to individuals whose language and cognitive development was not delayed, but recent revisions to the abovementioned diagnostic manuals subsume it within ASD.[19] This change is consistent with the recognition that ASD encompasses a broad range of impairments, and high and low functioning classifications can be misleading. People with ASD may mask their difficulties with compensatory mechanisms, their symptoms can change as they develop, and intelligent people can have an 'uneven profile' of functional abilities.[20]

Courts should be wary of assuming that a defendant's ASD diagnosis is necessarily relevant to their criminal offending and to sentencing them. Diagnostic descriptions of ASD are limited. They overlook the strengths and skills of people who are neurodivergent, and do not encapsulate the variability and nuanced manner in which ASD symptoms can manifest,[21] though they recognise that ASD — as the term indicates — incorporates a 'spectrum' of impairments.[22] Academic Stephen Shore aptly observed, '[i]f you've met one person with autism, you've met one person with

14 Attwood (n 2) 124; Brewer and Young (n 2) 95.

15 Grant et al (n 13) 67.

16 Ibid; Kathrin Hippler et al, 'Brief Report: No Increase in Criminal Convictions in Hans Asperger's Original Cohort' (2010) 40(6) *Journal of Autism and Developmental Disorders* 774, 775; Robertson (n 2) 3.3.1.1.

17 American Psychiatric Association (n 4) 50; World Health Organization, *ICD-11* (n 4).

18 American Psychiatric Association (n 4) 50, 54; World Health Organization, *ICD-11* (n 4).

19 World Health Organization, *International Classification of Diseases*, WHO Doc F84.5 Rev. 10 (2016) <https://icd.who.int/browse10/2016/en#/F84.5>; American Psychiatric Association (n 4) 32, 51, 53.

20 American Psychiatric Association (n 4) 31–2, 55. The *Diagnostic and Statistical Manual of Mental Disorders* does nonetheless specify '[s]everity levels for autism spectrum disorder': at 52.

21 Rosie Cope and Anna Remington, 'The Strengths and Abilities of Autistic People in the Workplace' (2022) 4(1) *Autism in Adulthood* 22, 23–4, 26–9.

22 American Psychiatric Association (n 4) 53.

autism'.[23] Not only are there differences in the presentation of ASD between people, but an individual's impairments can vary depending on their life circumstances.[24] Inaccurate suggestions that ASD connotes the propensity to engage in criminal behaviour, or that there is a simple causal relationship between ASD symptoms and offending, can lead to false constructions of people with ASD as dangerous and requiring harsh sanctions to protect the public.[25] In fact, researchers have found that individuals with ASD do not have an elevated tendency to offend and that they infrequently commit crimes (especially violent offences), perhaps due to their inclination to observe learnt rules rigidly.[26]

Notwithstanding these observations, courts should be vigilant for the possibility that some ASD symptoms could be relevant to criminal offending. Forensic psychologist Clare Allely explains, 'in the small subgroup [of individuals with ASD] who do offend, certain features of ASD may be a contributory factor or provide the context of vulnerability to engaging in the offending behaviour'.[27] This might especially be the case if those impairments are severe and/or the individual has comorbid developmental or psychiatric conditions, and they experience social, economic or environmental factors that increase their risk of offending.[28] The APA estimates that 'about 70% of individuals with [ASD] may have one comorbid mental disorder'.[29] However, it would only be appropriate for a court to take into account a defendant's ASD symptoms where it receives clear evidence of their specific effects on that individual and their connection to their offending.[30]

Where a court determines that a defendant's ASD impairments did contribute to their offending, it may find that they are not legally responsible for and thus not guilty of committing the crime for which they have been charged. A court might conclude that a defendant with ASD did not have the mens rea — the mental intention to commit a crime — which is a precondition to conviction for the offence. This could be due to their impaired ability to observe or predict the effects of their conduct on others, their obsessive focus on special interests or details, or their tendency to respond

23 Lime, 'Leading Perspectives on Disability: A Q&A; With Dr Stephen Shore' (Web Page, 22 March 2018) <https://www.limeconnect.com/opportunities_news/detail/leading-perspectives-on-disability-a-qa-with-dr-stephen-shore>.

24 American Psychiatric Association (n 4) 53; Lorna Wing, *The Autistic Spectrum: A Guide for Parents and Professionals* (Robinson, 1996) 27–8, 59, 149; Brewer and Young (n 2) 40, 47.

25 See Claire Spivakovsky, 'Making Risk and Dangerousness Intelligible in Intellectual Disability' (2014) 23(3) *Griffith Law Review* 389, 397, 399–403.

26 Clare Sarah Allely and Ann Creaby-Attwood, 'Sexual Offending and Autism Spectrum Disorders' (2016) 7(1) *Journal of Intellectual Disabilities and Offending Behaviour* 35, 35–6; Wing (n 24) 175–6; Hippler et al (n 16) 777; Grant et al (n 13) 69.

27 Allely, *Autism Spectrum Disorder* (n 1) 54.

28 Ibid 54, 67; Brewer and Young (n 2) 20–1, 39, 52–3, 57, 60, 73–4, 81.

29 American Psychiatric Association (n 4) 58.

30 Walvisch and Carroll (n 8) 441; Freckelton, 'Expert Evidence' (n 6) 377.

impulsively to stressful circumstances.[31] As discussed in Part III, a defendant with ASD might refer to their impairments in seeking to establish various defences to their criminal responsibility.[32]

The focus of this article is nonetheless on the sentencing phase of the judicial response to a defendant with ASD, so its recommendations apply to cases where a court has found the defendant guilty of committing a crime. An offender's ASD impairments could potentially be pertinent to the application of factors relevant to the sentencing process, including the court's consideration of whether it should aggravate or mitigate a sentence. An offender's ASD symptoms could be relevant, too, to the court's predictions of the impact of particular sanctions on the offender and their efficacy in achieving sentencing objectives, and thus to its choice of penalties to impose.

III Application of Sentencing Considerations in Cases Involving Defendants with Autism

There are differences between the sentencing systems discussed in this article, but in each there is no impediment to the court applying factors relevant to the sentencing process in light of an offender's ASD symptoms. In all the examined jurisdictions, courts can potentially treat an offender's ASD symptoms as a matter that mitigates or aggravates their sentence, and those impairments can have an impact on courts' pursuit of sentencing objectives. Nevertheless, the extent and nature of guidance that legislation, case law and sentencing advisory bodies provide to courts regarding how they sentence offenders with a mental impairment varies between the jurisdictions.

One commonality between the jurisdictions is that an offender's mental impairment may be a mitigating sentencing factor if it reduces their culpability for their offending.[33] If they are found to have intentionally committed an offence and are thus legally responsible for it, an offender will be culpable for it at least to some extent. Further, the mere fact that a defendant has a diagnosis of a mental impairment may have no bearing on their moral culpability for their offending.[34] Nevertheless, where a court receives evidence indicating that a defendant's mental

31 Freckelton and List (n 6) 31–2, 35.

32 Ibid.

33 See, eg: *Sentencing Act 1991* (Vic) ss 5(2)(d), (g) ('*Sentencing Act* (Vic)'); *R v Verdins* (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA) ('*Verdins*'); United States Sentencing Commission, *Guidelines Manual* §§ 3E1.1, 5K2.13 (November 2023) ('*Guidelines*'); 'Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments', *Sentencing Council* (Web Page, 1 October 2020) 2 [9] <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/> ('Sentencing Offenders').

34 Freckelton and List (n 6) 34.

impairment was connected with and contributed to their offending, it might find that the defendant is not wholly morally blameworthy for their crime.[35] This could be a reasonable finding if, for example, the defendant's symptoms diminished their capacity to understand the wrongfulness of or control their behaviour, compromised their judgement, or otherwise led to their offending.[36]

It would be appropriate for a sentencing court to consider whether the symptoms of a defendant with ASD might decrease their culpability for their offending. Some researchers hypothesise that there can be a connection between ToM impairment and a deficit in the capacity for complex moral reasoning.[37] This problem may diminish the ability of an offender with ASD to understand the moral impropriety of their conduct and/or its implications, even if they realise it is illegal.[38] For instance, a defendant with ASD may believe their offending was a morally legitimate response to another person's perceived breach of moral rules,[39] or bullying of them (which people with ASD can be susceptible to experiencing due to their symptoms).[40] Also owing to their impaired ToM, an individual with ASD might incorrectly infer that another person is intending to mistreat them, and offend by harming them.[41] If they have endured social rejection or are socially naïve, people with ASD may be influenced to participate in the commission of crimes by offenders whom they wish to befriend,[42] or imitate offenders they revere. A person with ASD may also commit a crime where they respond impulsively and aggressively to a disruption to their usual routines or their sensory overload.[43]

Researchers have identified the risk of ASD impairments resulting in some individuals with ASD committing certain types of crimes.[44] For example, a person who has an obsessive interest in fire and perceives it as a means of resolving problems

35 Freckelton, 'Expert Evidence' (n 6) 377.

36 *Verdins* (n 33) 275 [26]; Christine Cea, 'Autism and the Criminal Defendant' (2014) 88(2) *St John's Law Review* 495, 522–3.

37 Grant et al (n 13) 66–70, 73.

38 Ibid 69; Colleen Berryessa, 'Defendants with Autism Spectrum Disorder in Criminal Court: A Judge's Toolkit' (2021) 13(4) *Drexel Law Review* 841, 861 ('Defendants with Autism Spectrum Disorder').

39 Grant et al (n 13) 69.

40 Clare Allely et al, 'Violence is Rare in Autism: When it Does Occur, is it Sometimes Extreme?' (2017) 151(1) *The Journal of Psychology* 49, 60; Brewer and Young (n 2) 75–7.

41 Grant et al (n 13) 68; Robertson (n 2) 3.3.2.6.

42 Felicity Gerry, Clare Allely and Andrew Rowland, 'Autism Spectrum Disorder and the Criminal Law', *Libertas Chambers*, (Web Page, 1 June 2021) <https://www.libertaschambers.com/wp-content/uploads/Autism-Spectrum-Disorder-and-the-Criminal-Law-Felicity-Gerry-June-2021.pdf>; Wing (n 24) 176.

43 Freckelton and List (n 6) 21; Robertson (n 2) 3.3.2.2, 3.3.2.5.

44 Robertson (n 2) 3.4.

could commit firesetting offences.[45] Evidence suggests that people with ASD commit sexual offences less frequently than the general population,[46] but impaired ToM and difficulties forming relationships and observing social norms and cues may contribute to a small number engaging in crimes such as stalking and sexual assault.[47] Individuals with ASD who rely on the internet for social connection and have problems interpreting other people's facial expressions and estimating their ages, may access child pornography without realising they are offending.[48] They might also hoard such material ritualistically (without this reflecting their propensity for committing other sexual offences).[49]

Notably, some of the abovementioned ways in which a defendant's ASD symptoms could diminish their moral culpability for their offending might also substantiate a defence to their commission of a crime (in which case they would be found not guilty and avoid sentencing). Owing to their impairments, a defendant with ASD might be able to establish the following defences in jurisdictions where they are available: mental impairment (for instance, if they did not appreciate that they were committing a crime or that their offending was wrong, or they were unable to control their behaviour); self-defence or provocation (if they misconstrued another's intentions and inaccurately believed they needed to protect themselves); and duress (if they were vulnerable to others' pressure to offend).[50]

Where an offender with ASD has been found guilty of committing a crime, it might be appropriate for a court to mitigate their sentence if, due to their impairments, it would be unnecessary, difficult, or counterproductive to pursue sentencing objectives — either at all, or to the extent that it otherwise would be. If a court finds that a defendant with ASD has reduced moral culpability for their offending, it could decide to pursue less vigorously the sentencing goal of punishment that is common to the examined jurisdictions,[51] and also the aim in Victoria of denunciation.[52] As discussed in Part IV, owing to a defendant's ASD impairments, a prison term might be unlikely to improve, and could reduce, their prospects of rehabilitation, which is

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45 Clare Allely, 'Arson and Firesetting in Individuals with Autism Spectrum Disorder: A Systematic PRISMA Review' (2019) 10(4) *Journal of Intellectual Disabilities and Offending Behaviour* 89, 96.

46 Kalpana Dein and Marc Woodbury-Smith, 'Asperger Syndrome and Criminal Behaviour' (2010) 16(1) *Advances in Psychiatric Treatment* 37, 38.

47 Allely, *Autism Spectrum Disorder* (n 1) 133–4, 243–7.

48 Clare Allely and Larry Dubin, 'The Contributory Role of Autism Symptomatology in Child Pornography Offending: Why There is an Urgent Need for Empirical Research in This Area' (2018) 9(4) *Journal of Intellectual Disabilities and Offending Behaviour* 129, 134.

49 Ibid.

50 Ian Freckelton, 'Asperger's Disorder and the Criminal Law' (2011) 18(4) *Journal of Law and Medicine* 677, 678; Freckelton and List (n 6) 32.

51 *Sentencing Act* (Vic) (n 33) ss 1(d)(iv), 5(1)(a); *Sentencing Act 2020* (UK) s 57(2)(a) ('Sentencing Code'); 18 USC § 3553(a)(2)(A).

52 *Sentencing Act* (Vic) (n 33) ss 1(d)(iii), 5(1)(d).

a central sentencing objective in Victoria and England and Wales,[53] though less of a focus of US sentencing.[54] If that is the case, a court may mitigate the sentence by reducing or refraining from imposing a term of imprisonment.

In addition, owing to the impairments of an offender with ASD, a tough sanction may not help achieve the sentencing objective in all the jurisdictions of deterrence.[55] It might therefore be inappropriate to reach a sentence that is designed for deterrent purposes. A sentence focused on general deterrence is intended to discourage other would-be offenders from committing crimes.[56] Yet if a defendant's impairments contributed to their offending, and especially if they did not understand its moral wrongfulness, their sentence may not provide a useful example of the consequences of committing crimes.[57] Further, harsh punishment of an offender with ASD might not deter others from offending if the public has sympathy for them and considers this sanction unjust.[58] Such a sentence might also be unlikely to deter other people with ASD in particular from offending where, for example, they commit a crime inadvertently or for reasons they deem morally defensible.[59]

A court may also be unable to achieve the objective of specific deterrence by imposing a harsh sentence on an offender with ASD. Punishment might not discourage them from reoffending if they were not wholly culpable for their crime; where they were not driven to offend by malice or believed their offending was morally justified, they may not appreciate the purpose of the sentence and thus it would not have a deterrent function in their case.[60] Where offending by a defendant with ASD was attributable to an unusual circumstance in which they found themselves, they may be unlikely to reoffend and it would thus be unnecessary to increase the severity of the sentence for the purpose of specific deterrence.[61] Further, young people with

53 Ibid ss 1(d)(ii), 5(1)(c); Sentencing Code (n 51) s 57(2)(c).

54 Lisa Seghetti, *Federal Sentencing Guidelines: Background, Legal Analysis and Policy Options*, (Report, Congressional Research Service, 16 March 2009) 4.

55 *Sentencing Act* (Vic) (n 33) ss 1(d)(i), 5(1)(b); Sentencing Code (n 51) s 57(2)(b); 18 USC § 3553(a)(2)(B).

56 Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 9th ed, 2022) 217.

57 *Verdins* (n 33) 273–4 [18]–[22].

58 Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis' (2010) 17(2) *Psychiatry, Psychology and Law* 187, 193 ('Sentencing').

59 See Jamie Walvisch, Andrew Caroll and Tim Marsh, 'Sentencing and Mental Disorder: The Evolution of the Verdins Principles, Strategic Interdisciplinary Advocacy and Evidence-based Reform' (2022) 29(5) *Psychiatry, Psychology and Law* 731, 734.

60 Clare Allely, Sally Kennedy and Ian Warren, 'A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending' (2019) 66(1) *International Journal of Law and Psychiatry* 1, 3; Walvisch, 'Sentencing' (n 58) 193–4.

61 Walvisch, 'Sentencing' (n 58) 194.

ASD in particular can be motivated more by reward than punishment.[62] Courts should be wary of presuming that they need to prioritise specific deterrence because an offender with ASD appears unremorseful.[63] Even if they are remorseful, they may convey the impression that they are unremorseful due to their unusual facial expressions, avoidance of eye contact, limited demonstration of emotion, and reduced response to others' emotional states.[64] Nevertheless, a defendant with ASD may not experience remorse if they consider their offending was justified and/or if, due to deficient cognitive empathy, they cannot appreciate the harm they have caused, in which case punishment may be unlikely to discourage their reoffending.

Despite finding that a defendant's ASD symptoms reduced their moral culpability for their offending, a court might be reluctant to mitigate their sentence if it determines that those impairments also increase the need to protect the community, which is a key sentencing objective in all the examined jurisdictions.[65] Courts could effectively treat a defendant's mental impairment as an aggravating sentencing factor that outweighs any mitigation of sentence that it may warrant.[66] A court might be inclined to impose a harsh sentence, prioritising community protection, if it concludes that, owing to their symptoms, a defendant has a high risk of reoffending.[67] A court may reach this conclusion if it finds that a defendant with ASD: does not understand or lacks insight into the moral impropriety and/or illegality of their conduct and its impact; is unable to control their impulsive behaviour; has a tendency to become preoccupied with matters they believe are wrong; and/or engages in obsessive behaviour that could lead to criminal activity.[68]

The potential for courts to apply sentencing considerations in light of the impairments of an offender with ASD, and guidance they receive in this respect in each of the examined jurisdictions, is now analysed.

A *Victoria, Australia*

Australia has nine jurisdictions: six states; two territories; and the federal jurisdiction. This article examines the sentencing system of the State of Victoria because it produced a landmark decision regarding sentencing offenders who have a mental impairment, which most other Australian jurisdictions follow: the judgment of

62 Wing (n 24) 107, 130, 158.

63 See Allely, Kennedy and Warren (n 60) 3.

64 Allely, *Autism Spectrum Disorder* (n 1) 89–90; Penny Cooper and Clare Allely, 'You Can't Judge a Book by Its Cover: Evolving Professional Responsibilities, Liabilities and "Judgecraft" When a Party Has Asperger's Syndrome' (2017) 68(1) *Northern Ireland Legal Quarterly* 35, 49–50.

65 *Sentencing Act* (Vic) (n 33) s 5(1)(e); Sentencing Code (n 51) s 57(2)(d); 18 USC § 3553(a)(2)(C).

66 Walvisch, Carroll and Marsh (n 59) 735.

67 See, eg, *Channon v The Queen* (1978) 20 ALR 1, 4 (Brennan J).

68 Freckelton and List (n 6) 34.

the Victorian Court of Appeal in *R v Verdins* ('*Verdins*').[69] Victorian sentencing courts have substantial discretion, particularly where legislation does not stipulate penalties for offences.[70] Legislation and case law guide and to some extent constrain courts' exercise of that discretion. Judges have clear latitude to mitigate an offender's sentence in light of their mental impairment, though also to impose a harsher sentence due to their condition.

Victorian judges must reach sentences by undertaking an 'instinctive synthesis of all the various aspects involved in the punitive process'.[71] This methodology entails: '[identifying] all the factors that are relevant to the sentence'; assigning 'greater and lesser weight' to 'factors depending on their relevance' to the offender and the crime; and making 'a value judgment as to what is the appropriate sentence'.[72] The *Sentencing Act 1991* (Vic) ('*Sentencing Act* (Vic)') outlines factors that courts need to consider, including the 'purposes for which sentences may be imposed' — punishment, deterrence, rehabilitation, denunciation and community protection[73] — and other matters to which courts must 'have regard' as set out below.[74] An offender's mental impairment might have relevance for any of the sentencing purposes.[75]

A Victorian court could reduce the severity of a sentence due to its consideration of an 'offender's culpability and degree of responsibility for the offence' and 'the presence of any … mitigating factor concerning the offender'.[76] The court must, nonetheless, balance these matters against: 'current sentencing practices' (statistics about sentences imposed in comparable cases); 'the nature and gravity of the offence'; 'any injury, loss or damage resulting directly from the offence'; 'any aggravating … factor concerning the offender'; and any 'maximum penalty' and 'standard sentence' prescribed by legislation for the offence.[77] Victorian legislation stipulates minimum sentences for certain crimes, but as discussed in Part IV(A), a court can sometimes depart from them owing to a defendant's 'impaired mental functioning'.[78] In addition, the Court of Appeal can give 'guideline judgments' indicating factors that apply to particular offences, offenders, or penalties, which sentencing courts should take into account.[79] Victoria's Sentencing Advisory Council provides its 'views' on

69 Bagaric, Alexander and Edney (n 56) 402; *Verdins* (n 33).

70 See, eg, *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) ('*Markarian*').

71 *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

72 *Markarian* (n 70) 377–8 [51], 387 [73] (McHugh J).

73 *Sentencing Act* (Vic) (n 33) s 5(1).

74 Ibid s 5(2).

75 Walvisch, 'Sentencing' (n 58) 198.

76 *Sentencing Act* (Vic) (n 33) ss 5(2)(d), (g).

77 Ibid ss 5(2)(a)–(c), (db), (g).

78 Ibid s 10A(2)(c).

79 Ibid ss 6AA–C.

guideline judgments and also 'statistical information on sentencing', and advises the Attorney-General,[80] but does not issue formal sentencing guidelines.[81]

The Court in *Verdins* emphasised that 'the proper exercise of the sentencing discretion frequently calls for a consideration of the offender's mental state at the time of the offending or at the time of sentence or both'.[82] It articulated six ways in which 'impaired mental functioning' could be 'relevant to sentencing' ('*Verdins* principles'),[83] the application of which would generally result in mitigation of a sentence (including, if relevant, the minimum sentence).[84] Three *Verdins* principles are discussed here and the other three are examined in Part IV(A) as they concern the courts' choice of sanctions, but they could also have this effect on a sentence. Courts are, however, usually only required to consider *Verdins* principles that a defendant raises through counsel representing them, and can only apply the principles after their 'scrutiny and assessment, based on cogent evidence, of the relationship between the mental disorder and the offending and other relevant matters'.[85]

The first *Verdins* principle recognises that a defendant's mental impairment 'may reduce the moral culpability of the offending conduct', and the Victorian Court of Appeal stated that, '[w]here that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective'.[86] As noted above, if an offender has been found guilty of offending and legally responsible for their crime, they will receive a sentence.[87] Nevertheless, they may not require a severe sentence if the court finds that they are not completely morally responsible for their offending due to their mental impairment.[88] Victorian case law confirms that a court can only reach this conclusion if it finds a 'causative link' between the defendant's impaired mental functioning and

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80 Ibid ss 108C(a)–(b), (f).

81 Julian Roberts and Lyndon Harris, 'Sentencing Guidelines Outside the United States' in Cassia Spohn and Pauline Brennan (eds), *Handbook on Sentencing Policies and Practices in the 21st Century* (2019, Taylor & Francis) 68, 70.

82 *Verdins* (n 33) 270 [1].

83 Ibid 276 [32]. This Court reformulated principles expressed in *R v Tsiaras* [1996] 1 VR 398.

84 *R v Vuadreu* [2009] VSCA 262, [36]. For an analysis of the application of these principles in some recent Australian cases involving offenders with ASD diagnoses, see Gabrielle Wolf, 'Growing Enlightenment: Sentencing Offenders with Autism Spectrum Disorder in Australia' (2021) 44(4) *University of New South Wales Law Journal* 1701.

85 *R v Zander* [2009] VSCA 10, [29] (Dodds-Streeton JA, Nettle JA agreeing at [36]); *Verdins* (n 33) 272 [13]. See, eg: *Davey v The Queen* [2010] VSCA 346, [101] (Neave, Redlich JJA and Hollingworth AJA); Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2022) 6.2.2.11; Walvisch and Carroll (n 8) 441.

86 *Verdins* (n 33) 276 [32].

87 Walvisch, 'Sentencing' (n 58) 189.

88 Ibid.

their offending.[89] The Court in *Verdins* gave the following non-exhaustive list of ways that a defendant's mental impairment could diminish their culpability, which might apply to an offender with ASD:

> (a) impairing the offender's ability to exercise appropriate judgment;
> (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
> (c) making the offender disinhibited;
> (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
> (e) obscuring the intent to commit the offence; or
> (f) contributing (causally) to the commission of the offence.[90]

The Court in *Verdins* did not, however, expressly refer to the possibility that a defendant's mental impairment might reduce their culpability if it accounted for their susceptibility to being influenced by others to offend.[91]

Courts have applied this *Verdins* principle in cases involving defendants with ASD. For instance, in *Director of Public Prosecutions v Bowen*, Gaynor J found the moral culpability of an offender reduced where expert evidence confirmed that, owing to his 'neurodevelopmental deficits', he was 'influenced to utilise antisocial means to have his various needs met'.[92] Justice Gaynor found that the defendant's ASD 'had some part to play' in his breaching of parole and possessing and trafficking a drug of dependence because these crimes were otherwise 'inexplicable' (he was 'doing well', yet 'engaged in an activity which completely destroyed … everything [he] did').[93]

The third and fourth *Verdins* principles contemplate that a court could 'moderate' or 'eliminate' general deterrence and specific deterrence, respectively, as 'sentencing considerations' due to the 'nature and severity' of the defendant's 'symptoms', and

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89 See, eg, *Bowen v The Queen* [2011] VSCA 67, [33] (Warren CJ).

90 *Verdins* (n 33) 275 [26].

91 It appears that a defendant would still be found at least legally responsible for the offence in this circumstance. The *Crimes Act 1958* (Vic) states: 'a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty', and '[a] person may be involved in the commission of an offence, by act or omission … whether or not the person realises that the facts constitute an offence': at ss 324(1), 323(3)(b).

92 [2021] VCC 516, [60], [81] (Gaynor J).

93 Ibid [1], [17], [60], [78]–[79]. In another case, the Victorian Court of Appeal held that the sentencing judge was not precluded from concluding that this *Verdins* principle was engaged, despite finding that the defendant, who was convicted of arson, 'must have known of the risk' created by lighting a fire. Relying on an expert report, Coghlan J found that the offender's moral culpability was reduced due to his ASD impairments, as he did not 'set out to achieve' the 'awful result' of his conduct: *DPP (Vic) v Sokaluk* [2013] VSCA 48, [16], [37] (Maxwell P, Neave JA and Kaye AJA); *R v Sokaluk* [2012] VSC 167, [38], [53]–[55], [58], [66]–[67] (Coghlan J).

their 'effect' on their 'mental capacity' at the time of offending and/or sentencing.[94] Victorian cases have clarified that a court can consider specific deterrence to be a less relevant sentencing objective if, owing to their impairment, a defendant does not recognise their responsibility for their offending.[95]

Victorian courts have explained that less weight can be applied to general deterrence as a sentencing purpose if, due to the offender's mental impairment, they are 'not an appropriate medium for making an example to others'.[96] As noted above, this might be the case if the community has sympathy for the defendant and would not understand why they received a harsh sanction.[97] Victorian case law also confirms that a sentencing court can only moderate the objective of general deterrence in the case of an offender with a mental impairment on the basis of its 'proper, and informed, consideration of how that impairment might have either materially diminished the capacity of the offender to reason appropriately at the time of the offence concerning the wrongfulness of his or her offending, or of how the offender's condition might make the full application of the principles of general deterrence repugnant to the underlying sense of humanity which guides proper sentencing'.[98] In *Hladik v The Queen*, for example, the Victorian Court of Appeal reduced a prison sentence where it found that, due to his ASD symptoms, the offender 'ha[d] the mental age of a child' and 'cannot be regarded as a suitable vehicle for general deterrence'.[99] The Court nonetheless emphasised that, given the seriousness of the offender's crimes — sexual abuse of a child and production and possession of child pornography — the sentence still needed to 'denounce conduct of this type and ensure an appropriate measure of punishment'.[100] Other cases have indicated that a court may only moderate pursuit of the goal of general deterrence marginally 'if the offender acts with knowledge of what he is doing and … the gravity of his actions'.[101]

Victorian law allows a sentencing court to take an offender's remorse into account, but if a defendant with ASD did not express or experience remorse, this would not necessarily prevent mitigation of their sentence. The *Sentencing Act* (Vic) states, '[i]n sentencing an offender a court may have regard to the conduct of the offender on or in connection with the trial or hearing as an indication of remorse or lack of remorse'.[102] Yet, while a defendant's demonstration of remorse will be a mitigating

94 *Verdins* (n 33) 276 [32].

95 Judicial College of Victoria (n 85) 6.2.2.5; *R v Imadonmwonyi* [2008] VSCA 135, [22] (Ashley JA, Buchanan and Nettle JJA agreeing at [32]–[33]).

96 *R v Mooney* (Victorian Court of Criminal Appeal, Young CJ, 21 June 1978) 5; Judicial College of Victoria (n 85) 6.2.2.4.

97 Judicial College of Victoria (n 85) 6.2.2.4.

98 *DPP (Vic) v O'Neill* (2015) 47 VR 395, 410 [59] (Warren CJ, Redlich, and Kaye JJA).

99 [2015] VSCA 149, [8], [48]–[49] (Ashley, Redlich and Weinberg JJA).

100 Ibid [1], [52].

101 *R v Wright* (1997) 93 A Crim R 48, 51 (Hunt CJ), quoted in *Verdins* (n 33) 273–4 [20].

102 *Sentencing Act* (Vic) (n 33) s 5(2C).

factor, as it is regarded as '[reducing] the need for specific deterrence',[103] a court cannot treat failure to display remorse as an 'aggravating factor'.[104] Indeed, in *R v Van Zoelen* ('*Van Zoelen*'), Curtain J accepted that, due to the defendant's ASD symptoms, he was 'unable to express true remorse' for his crime of manslaughter.[105] An offender's neglect to consider the effect of their crime on their victims will also not be an aggravating factor in Victoria if this was attributable to their mental impairment.[106]

Notwithstanding the potential for a court to mitigate a defendant's sentence if it finds that *Verdins* principles are enlivened, it might conclude that, due to the offender's mental impairment, a harsh sentence is required to achieve the sentencing objective of community protection. Victorian courts have held that, while an offender's mental impairment may diminish their culpability for their offending, it could simultaneously increase their danger to the public and thus also the significance of this aim.[107] Further, if the court deems the defendant to be a 'serious offender' who has committed an especially grave crime, it must treat community protection as the main purpose of sentencing, irrespective of their mental impairment.[108] Yet the goal of community protection could also be given less weight in the case of a defendant with a mental impairment if their condition is found to have been a principal cause of their offending and is treatable, and they are considered unlikely to reoffend if they receive treatment.[109]

Victorian courts have also held that a defendant's mental impairment may have an impact on the pursuit of the sentencing objective of rehabilitation.[110] A court may assess the offender's 'prospects of rehabilitation' in light of their impairment.[111] If a defendant's mental impairment contributed to their offending, whether the court considers the defendant has good prospects of rehabilitation may depend on if the condition is considered treatable.[112] In *Van Zoelen*, Curtain J refused to grant the defendant's request for a longer than usual parole period so he could obtain behavioural therapy that might be unavailable in prison, for the reason that 'the Court must be cautiously guarded about [his] prospects for rehabilitation'.[113] Justice Curtain considered that, while the defendant 'may benefit from appropriate

103 *Barbaro v The Queen* (2012) 226 A Crim R 354, 365 [39] (Maxwell P, Harper JA and Forrest AJA).

104 *R v Duncan* [1998] 3 VR 208, 215 [2] (Callaway JA).

105 [2012] VSC 605, [23] (Curtain J) ('*Van Zoelen*').

106 *R v Broadbent* [2009] VSCA 320, [18] (Maxwell P and Buchanan JA).

107 Judicial College of Victoria (n 85) 6.2.2.7.

108 Ibid; Walvisch, 'Sentencing' (n 58) 197.

109 Walvisch, 'Sentencing' (n 58) 197.

110 Judicial College of Victoria (n 85) 6.2.2.8.

111 *DPP (Vic) v Weidlich* [2008] VSCA 203, [17] (Vincent and Weinberg JJA and Mandie AJA).

112 Walvisch, 'Sentencing' (n 58) 196.

113 *Van Zoelen* (n 105) [25]–[26] (Curtain J).

psychological therapy', his ASD would 'not abate', and he would 'always have difficulties with impulsive behaviour and regulation of it and this must impact upon [his] prospects for rehabilitation and the likelihood of [him] presenting as a further risk to the community'.[114]

B *The Federal Jurisdiction of the United States of America*

In the US, the federal jurisdiction and each of the states have their own sentencing systems. In recent years, to increase consistency in sentencing, many of these jurisdictions have shifted from discretionary, indeterminate sentencing systems to prescriptive guideline systems.[115] In those jurisdictions, sentencing commissions established by statute — the US Sentencing Commission was formed in the federal jurisdiction — have created sentencing grids that prescribe fixed, minimum or presumptive penalties.[116] This article focuses on the federal jurisdiction because the United States Sentencing Commission's *Guidelines Manual 2023* ('*Guidelines*'), which governs the sentencing of offenders who are convicted of federal crimes, has influenced many of the states' sentencing systems.[117] The *Guidelines* are intended to reduce sentencing courts' discretion and direct how they exercise it.[118] Nevertheless, the *Guidelines* and policy statements issued by the US Sentencing Commission give courts some latitude to mitigate a sentence due to an offender's mental impairment, and also allow for the potential for such a condition to aggravate a sentence.

The *Sentencing Reform Act of 1984* (US) ('*Sentencing Reform Act* (US)') empowers the US Sentencing Commission to develop the *Guidelines* to achieve the sentencing objectives of: 'just punishment'; 'deterrence'; protection of the public; and provision to the defendant of 'needed educational or vocational training, medical care, or other correctional treatment in the most effective manner'.[119] This statute requires a sentencing court to take into account: 'the need for the sentence imposed' to achieve these purposes; 'the nature and circumstances of the offense and the history and characteristics of the defendant' (which could include their mental impairment); 'any pertinent policy statement … issued by the Sentencing Commission'; and 'the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines'.[120]

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114 Ibid [25].

115 Mirko Bagaric and Gabrielle Wolf, 'Sentencing by Computer: Enhancing Sentencing Transparency and Predictability, and (Possibly) Bridging the Gap between Sentencing Knowledge and Practice' (2018) 25(3) *George Mason Law Review* 653, 662–3; Roberts and Harris (n 81) 68.

116 Roberts and Harris (n 81) 81; Bagaric and Wolf (n 115) 657.

117 Mirko Bagaric, Gabrielle Wolf and Daniel McCord, 'Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties — But Science Has the Answer' (2020) 53(3) *Indiana Law Review* 499, 502.

118 *Guidelines* (n 33) § 1B1.1.

119 Ibid ch 1 pt A, 1–2; 18 USC § 3553(a)(2).

120 18 USC §§ 3553(a)(1), (2), (4)(A), (5)(A).

The sentencing ranges specified in the *Guidelines* are calculated according to various combinations of 'offense conduct' (types of crimes committed, ranked according to their seriousness) and 'offender characteristics' (offenders' criminal history).[121] The US Supreme Court has confirmed that, while courts sentencing for federal offences must take these ranges into account and use them as their 'starting point and initial benchmark', they are only 'advisory' in nature.[122] In any event, the *Guidelines* envisage that a court will diverge from the ranges in response to any applicable mitigating and aggravating factors.[123] They permit 'adjustments' and 'departures',[124] which, if applied, could potentially result in a defendant with ASD receiving a less or more severe sentence than a court might have imposed on an offender who did not have their impairments.

Adjustments are matters that can inform a court's decision to increase or decrease the 'offense level'.[125] A court could possibly apply an adjustment if a defendant with ASD was influenced by others to offend.[126] The *Guidelines* permit the offender's role in the commission of a crime to affect the court's determination of the applicable guideline range,[127] though they do not refer specifically to the circumstance where a defendant has a mental impairment. If more than one person was involved in the offending, an adjustment can be applied in relation to an offender who was 'substantially less culpable than the average participant in the criminal activity'; their role may have been 'minimal' (indicated by their 'lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others') or 'minor'.[128]

A court can impose a sentence that is outside the range prescribed by the *Guidelines* in the form of a downward or upward 'departure', if a case has 'atypical features',[129] which could potentially encompass an offender's ASD impairments. The *Guidelines* '[identify] some of the [mitigating and aggravating] circumstances that the Commission may not have adequately taken into consideration in determining the applicable guideline range'.[130] The *Guidelines* confirm that a departure based on those circumstances 'may be warranted'.[131] To establish whether the Sentencing Commission adequately took a circumstance into consideration, the court can

121 Roberts and Harris (n 81) 68; *Guidelines* (n 33) ch 5, pt A.

122 *Gall v United States*, 552 US 83 586, 587 [1]–[3], [5]–[7] (Stevens J) (2007); *United States v Booker*, 543 US 220, 738 (2005); Seghetti (n 54) 1; *Guidelines* (n 33) ch 1, pt A.5.

123 Bagaric, Wolf and McCord (n 117) 502.

124 *Guidelines* (n 33) chs 3, 5, pt K.

125 Seghetti (n 54) 14; *Guidelines* (n 33) ch 3.

126 *Guidelines* (n 33) § 3B1.2.

127 See *Guidelines* (n 33) §§ 3B1.2, 5H1.7.

128 Ibid § 3B1.2, application notes [3]–[4].

129 Ibid ch 1 pt A; 18 USC § 3553(b).

130 *Guidelines* (n 33) § 5K2.0(a)(2)(A). See also 18 USC § 3553(b)(1).

131 Ibid.

consider the *Guidelines* and the Commission's policy statements and official commentary.[132]

'Diminished [c]apacity' is one such circumstance identified by the *Guidelines*.[133] The Sentencing Commission's policy statement on this matter could possibly apply to an offender with ASD.[134] It states:

> A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.[135]

The definition of 'significantly reduced mental capacity' in this policy statement could reflect an offender's decreased culpability. It states that the defendant 'has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful'.[136] This is illustrated by the Court's determination in *United States v Knott* ('*Knott*') that a downward variance in the sentence was warranted because the defendant's 'ASD diminished his moral culpability'.[137] The Court received evidence confirming that the defendant's commission of the offence of possessing child pornography 'was strongly influenced by his ASD'; he did not realise that real children were involved in the production of pornography.[138]

'Diminished [c]apacity' nonetheless prioritises the sentencing objective of community protection. It prohibits a departure 'below the applicable guideline range' on the basis of the offender's diminished capacity if 'the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence', or 'the defendant's criminal history indicates a need to incarcerate the defendant to protect the public'.[139] Such matters influenced the Court in *United States v Welshans* to refuse to grant a downward variance of the sentence below the bottom of the range for a defendant with ASD.[140] The Court referred to the defendant's 'history and characteristics', 'the nature and circumstances of this offense' — possessing and distributing child

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132 18 USC § 3553(b)(1).

133 *Guidelines* (n 33) § 5K2.13.

134 Cea (n 36) 522–3.

135 *Guidelines* (n 33) § 5K2.13, application notes [1].

136 Ibid.

137 638 F Supp 3d 1310, 1320 [21] (Thompson J) (2022) ('*Knott*').

138 Ibid.

139 *Guidelines* (n 33) § 5K2.13.

140 803 Fed Appx 626, 627 (Porter J) (2020) ('*Welshans*').

pornography — which the Court deemed 'very serious', and its '[concern] about protecting the public'.[141]

The *Sentencing Reform Act* (US) lists the defendant's 'mental and emotional condition' among 'matters … with respect to a defendant' — which the *Guidelines* describe as 'specific offender characteristics'[142] — that the Sentencing Commission should take into account 'in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences'.[143] The *Guidelines* explain that specific offender characteristics 'may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines'.[144] The Sentencing Commission has issued a policy statement titled, 'Mental and Emotional Conditions', which could apply to offenders with ASD, and confirms that a defendant's mental impairment 'may be relevant in determining whether a departure is warranted'.[145] It also indicates that 'a downward departure may be appropriate to accomplish a specific treatment purpose'.[146] Nevertheless, a court can only sentence outside the range on this basis if it 'finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed'.[147] This might only apply to offenders with ASD who have a comorbid psychiatric condition.

The Sentencing Commission has not provided further advice on when an offender's mental condition could warrant a departure. Nevertheless, a departure can be based on a circumstance that the Sentencing Commission has not identified if the case is 'exceptional' and the matter is 'relevant to determining the appropriate sentence'.[148] Thus, a court could potentially justify a downward departure on the basis that, due to the offender's ASD impairments, pursuit of the objective of deterrence by imposing a sentence within the range would be inappropriate. Indeed, in *Knott*, the Court determined that it was unnecessary to incarcerate the offender with ASD for the purposes of specific or general deterrence.[149] The Court received evidence that indicated the defendant was unlikely to reoffend and his risk of recidivism could be

141 Ibid. Notably, in another case where the defendant committed offences of distributing and possessing child pornography and sexually exploiting children, which the Court described as 'horrendous', the Court concluded that the defendant's ASD was not a mitigating factor because it found that he 'knew' his conduct 'was wrong': *United States v Lucarell* (6th Cir, No 22-3732, 1 June 2023) slip op 4–5 (Mathis J for the Court).

142 *Guidelines* (n 33) ch 5 pt H.

143 28 USC § 994(d)(4); *Guidelines* (n 33) ch 5 pt H.

144 *Guidelines* (n 33) ch 5 pt H, introductory commentary.

145 Ibid § 5H1.3.

146 Ibid.

147 Ibid § 5C1.1, application notes [6].

148 Ibid § 5K2.0(a)(2)(B).

149 *Knott* (n 137) 1322, [25]–[26].

lowered by him receiving counselling that was unavailable in prison.[150] Further, the Court considered that, given the defendant's ASD 'deficits' and their impact on his behaviour, 'other defendants' who did not have those deficits (including defendants with ASD) 'cannot expect to receive a similar sentence'.[151]

'Coercion and [d]uress' is another ground of departure,[152] which could possibly be applied to mitigate the sentence of a defendant with ASD who was influenced by others to offend. The Sentencing Commission has issued a policy statement confirming, '[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward'.[153] However, this policy statement does not alert courts that this circumstance may arise due to an offender's mental impairment, and confines the application of this ground. It notes, '[o]rdinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency'.[154]

A defendant's demonstration of 'acceptance of responsibility for his offense' is a basis for an adjustment.[155] Yet the *Guidelines* do not indicate whether a defendant's failure to accept responsibility for their offending, or their remorse or absence of remorse, could influence their sentence. It therefore appears that a court could not justify either declining to mitigate or increasing the harshness of the sentence of an offender with ASD where their impairments affected their capacity to express or feel remorse for their offending.

Courts in the US federal jurisdiction have not received specific direction regarding whether they can mitigate a sentence owing to an offender's mental impairment where they have committed offences for which no sentencing guidelines have been developed. The *Sentencing Reform Act* (US) simply requires the court, 'in the absence of an applicable sentencing guideline', to have 'due regard for' the sentencing 'purposes' and, if the crime is not 'a petty offense', for 'the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission'.[156]

C *England and Wales*

England and Wales has been selected as the third jurisdiction for comparative analysis due to the relatively detailed direction provided to its courts regarding

150 Ibid.

151 Ibid.

152 *Guidelines* (n 33) § 5K2.12.

153 Ibid.

154 Ibid.

155 Ibid § 3E1.1.

156 18 USC § 3553(b)(1).

the potential to mitigate or aggravate the sentence of an offender with a mental impairment, and specifically ASD.

The *Sentencing Act 2020* (UK) — referred to as the 'Sentencing Code' — prescribes minimum and maximum sentences for certain offences, but gives sentencing courts substantial discretion.[157] The Sentencing Council of England and Wales ('Sentencing Council') was established by statute for the purpose of issuing guidelines to assist courts in exercising their discretion.[158] Although the Sentencing Code requires courts to 'follow' the Sentencing Council's guidelines that are relevant to defendants' cases, it allows courts to diverge from them if 'satisfied that it would be contrary to the interests of justice' to adhere to them,[159] and the guidelines also permit courts some latitude.[160]

The Sentencing Council has issued the 'overarching guideline', 'Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments' ('Sentencing Offenders').[161] It expressly applies to sentencing of offenders with ASD,[162] and highlights features of ASD that could be relevant. It emphasises the 'variation' in the impact of ASD symptoms, recommends that courts 'recognise the mix of abilities and difficulties in each individual', and observes that interruption to the 'inflexible' routines of an individual with ASD could provoke 'aggression'.[163]

'Sentencing Offenders' provides advice about determining the culpability of an offender who has a mental impairment. It recommends that the court 'make an initial assessment' pursuant to 'any relevant offence-specific guideline' and 'then consider whether [the offender's] culpability was reduced by reason of the impairment or disorder'.[164] Yet it reinforces that '[c]ulpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour'.[165] 'Sentencing Offenders' provides a non-exhaustive list of

157 'About Sentencing Guidelines', *Sentencing Council*, (Web Page) <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/>.

158 Ibid; Roberts and Harris (n 81) 72–3.

159 Sentencing Code (n 51) s 59(1).

160 Roberts and Harris (n 81) 79.

161 'Sentencing Offenders' (n 33).

162 Ibid Annex A.

163 Ibid.

164 Ibid [10].

165 Ibid [11]. In a case where the defendant had a diagnosis of ASD and was convicted of offences relating to sexual activity with children, the Court of Appeal agreed with the sentencing judge that 'the psychiatric evidence … did not support any conclusion that his neuro-diverse condition was relevant to or reduced his culpability for the offences' and 'all the material … indicated that the applicant was able to function very well in the community': *R v Marsden* [2023] EWCA Crim 1211, [2]–[3], [22] (Recorder Menary for the Court).

possible relevant inquiries, including whether the defendant's impairment diminished their capacity at the time of offending to 'exercise appropriate judgement', 'make rational choices' and/or 'understand the nature and consequences of their actions'.[166] In addition, it suggests the court consider 'relevant expert evidence', but notes it 'is not bound to follow' it.[167] 'Sentencing Offenders' does not, however, direct the court to consider whether a defendant with a mental impairment was influenced by others to offend and if such a circumstance might reduce their culpability. *R v W* demonstrates a Court's application of this guideline; it found that the culpability of the defendant with ASD for engaging in sexual activity with a child was 'reduce[d]' (though not 'extinguish[ed]').[168] The sentencing judge observed that the offender's emotional development age was 'significantly lower' than his chronological age and this may have contributed to his '[failure] to realise the wholly inappropriate nature of' his 'relationship' with the victim.[169] The Court of Appeal also considered that the defendant's 'failure to comprehend his wrongdoing is likely to be a product of his autistic traits'.[170]

The Sentencing Council has also produced guidelines for sentencing for the major categories of offences ('offence-specific guidelines'), which outline 'steps' for the court to follow that could permit it to mitigate or aggravate a sentence on the basis of an offender's ASD impairments.[171] Step one involves the court '[d]etermining the offence category' by reference to the defendant's 'culpability' and the 'harm' their offence caused.[172] Some of the guidelines list factors that can justify a finding of 'lesser culpability' and might apply to a defendant with ASD, namely, the offender's: 'mental disorder or learning disability' (provided it is 'linked to the commission of the offence');[173] 'limited awareness or understanding of offence';[174] involvement in the offending 'through coercion, intimidation or exploitation';[175] and performance

166 'Sentencing Offenders' (n 33) [15].

167 Ibid [13].

168 [2023] EWCA Crim 1257, [2], [15] (Judge Leonard for the Court).

169 Ibid [15].

170 Ibid [16].

171 Roberts and Harris (n 81) 75; 'Magistrates' Courts Sentencing Guidelines', *Sentencing Council* (Web Page) <https://www.sentencingcouncil.org.uk/offences/>; 'Sentencing Guidelines for Use in Crown Court', *Sentencing Council* (Web Page) <https://www.sentencingcouncil.org.uk/crown-court/>.

172 See, eg, 'Attempted Murder', *Sentencing Council* (Web Page, 1 July 2021) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/attempted-murder-2/> ('Attempted Murder').

173 See, eg, 'Domestic Burglary', *Sentencing Council* (Web Page, 1 July 2022) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/domestic-burglary/> ('Domestic Burglary'); 'Sentencing Offenders' (n 33) [16].

174 See, eg, 'Abstracting Electricity', *Sentencing Council* (Web Page, 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/abstracting-electricity/> ('Abstracting Electricity').

175 See, eg, 'Bribery', *Sentencing Council* (Web Page, 1 October 2014) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/bribery/>.

of a 'limited function under direction' in the commission of the crime.[176] The Sentencing Code similarly allows a court to impose the minimum prescribed sentence for some offences if the defendant 'suffered from any mental disorder' that 'lowered' their 'degree of culpability'.[177]

If the Sentencing Council has issued offence-specific guidelines, the court must impose a sentence within the specified offence range.[178] Nevertheless, according to the offence-specific guidelines, step two entails the court using a prescribed 'starting point to reach a sentence within the appropriate [specified] category range' and then considering whether to make an 'upward or downward adjustment' due to 'aggravating or mitigating factors'.[179] The non-exhaustive lists in several guidelines of factors that could '[reduce] seriousness or [reflect] personal mitigation' include: the defendant's 'mental disorder or learning disability' (some guidelines indicate that this matter can be taken into account at step two if it is not linked to the offending);[180] and 'the offender was in a lesser or subordinate role if acting with others' or 'performed limited role under direction'.[181] While these matters might be relevant to an offender with ASD, the court must avoid 'double counting factors including those already taken into account in assessing culpability', and therefore could only consider them at one of the steps.[182] Lists of aggravating factors in these guidelines do not include an offender's mental impairment, but it might be relevant to some of the specified considerations that reflect a heightened need to protect the community.[183]

The Sentencing Council's guideline for sentencing in relation to crimes for which it has not issued offence-specific guidelines requires the court, 'where possible', to follow a similar 'stepped approach'.[184] At step one, the court reaches a 'provisional sentence' by assessing the seriousness of the offence through determining the offender's culpability and the harm their offence caused, but also considering which of the sentencing purposes 'it is seeking to achieve' and weighing their 'importance' against the 'offence and offender characteristics'.[185] The Sentencing Code identifies the following sentencing purposes: 'punishment of offenders'; 'reduction of crime (including its reduction by deterrence)'; 'reform and rehabilitation of offenders';

176 See, eg, 'Benefit Fraud', *Sentencing Council* (Web Page, 1 October 2014) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/benefit-fraud/>.

177 See, eg, Sentencing Code (n 51) sch 21 cls 8, 10(c).

178 Ibid s 60(2).

179 See, eg, 'Abstracting Electricity' (n 174).

180 See, eg, 'Attempted Murder' (n 172); 'Sentencing Offenders' (n 33) [16].

181 See, eg, 'Domestic Burglary' (n 173).

182 'General Guideline: Overarching Principles', *Sentencing Council* (Web Page, 1 October 2019) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> ('General Guideline').

183 See, eg, 'Abstracting Electricity' (n 174).

184 'General Guideline' (n 182).

185 Ibid.

'protection of the public'; and 'making of reparation by offenders to persons affected by their offences'.[186] Nevertheless, the Sentencing Council has not explicitly directed courts to consider whether they should modify their pursuit of an objective in light of 'offender characteristics', such as a mental impairment, and aggravate or mitigate a sentence on that basis. At step two, the court considers aggravating and mitigating factors, including the abovementioned matters if relevant, and whether they 'should result in any upward or downward adjustment' from the provisional sentence.[187]

This guideline and the offence-specific guidelines confirm that a court can mitigate a sentence if 'satisfied that the offender is genuinely remorseful for the offending', but emphasise that '[l]ack of remorse should never be treated as an aggravating factor'.[188] Also potentially relevant for sentencing an offender with ASD is the Sentencing Council's implied caution that the court should not assume a defendant is unremorseful based on their presentation and must be vigilant for unconventional expressions of remorse, though it does not refer to a defendant's mental impairment in this context. It advises: '[r]emorse can present itself in many different ways … The court should be aware that the offender's demeanour in court or the way they articulate their feelings of remorse may be affected by, for example: 'nervousness', 'a lack of understanding of the system', 'mental disorder', 'communication difficulties', 'a belief that they have been or will be discriminated against' and 'a lack of maturity'.[189] The Sentencing Council suggests the court consult a pre-sentence report if available for guidance in this regard.[190] In *R v Simmonds* ('*Simmonds*'), the Court reduced a defendant's sentence for robbery on appeal because it took into account various mitigating factors and a pre-sentence report that noted that her failure to display remorse might be attributable to her ASD impairments.[191]

D *Best Practices and Lessons from the Examined Jurisdictions*

From the above discussion, it is clear that courts in all the examined jurisdictions, notwithstanding differences between their sentencing systems, can consider some sentencing factors in light of a defendant's mental impairment, though in divergent ways. Below are proposed best practices to ensure that courts take into account a defendant's ASD symptoms in applying sentencing considerations where appropriate. Also discussed are features of the examined jurisdictions that allow courts to do so and provide helpful guidance to them in this regard.

The greater a court's discretion in reaching sentences, the more opportunities it may have to apply factors relevant to the sentencing process in light of a defendant's

186 Sentencing Code (n 51) s 57(2).

187 'General Guideline' (n 182).

188 Ibid. See, eg, 'Arson (Criminal Damage by Fire)', *Sentencing Council* (Web Page, 1 October 2019) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/arson-criminal-damage-by-fire/>.

189 'General Guideline' (n 182).

190 Ibid.

191 [2023] EWCA Crim 1063, [13], [23], [25] (Steyn J for the Court) ('*Simmonds*').

ASD impairments. Courts in the examined jurisdictions have latitude to attach varying weight to sentencing factors according to their relevance to the offender and their specific characteristics, including any mental impairment. All courts would nonetheless benefit from guidance in how to take into account a defendant's mental impairment, and particularly ASD symptoms, in applying sentencing considerations. Especially helpful is the Sentencing Council of England and Wales's guideline, 'Sentencing Offenders', as it alerts judges to specific impairments that some defendants with ASD might have and that could be relevant for sentencing purposes. Also useful is the emphasis in that guideline, and in case law in Victoria, on the need for courts to consider whether a defendant's mental impairment should influence their application of factors relevant to the sentencing process if there is evidence of its link to their offending.

If courts receive such evidence where a defendant has ASD, for the reasons discussed above, it is important that they can consider whether the offender's symptoms reduced their moral culpability for their offending and mitigate their sentence where appropriate. This is possible in all the jurisdictions, and advice provided to courts about how an offender's mental impairment might diminish their culpability is valuable. In its policy statement, 'Diminished Capacity', the US Sentencing Commission identifies two ways in which a defendant's culpability might be reduced. The lists of inquiries courts can make to determine if it is appropriate to mitigate the sentence of a defendant with a mental impairment owing to their reduced culpability provided by the Victorian Court of Appeal in *Verdins*, and the Sentencing Council in 'Sentencing Offenders', are comparatively more expansive. As both lists are indicated to be non-exhaustive, they may encourage judges to consider other ways in which a defendant's impairment could affect their culpability for their offending.

As previously discussed, it might be appropriate for a court to find that a defendant's culpability is reduced if, due to their ASD symptoms, they were vulnerable to others' influence to offend. The offence-specific guidelines produced by the Sentencing Council of England and Wales are useful in highlighting for courts that a defendant's involvement in criminal conduct due to 'coercion, intimidation or exploitation' could lead to a finding of their diminished culpability, and that the offender's performance of a limited role in the crime under others' direction could lower the gravity of their offence. The confirmation by the US Sentencing Commission in its policy statement, 'Coercion and Duress', that imposing a sentence outside the prescribed range in the form of a downward departure may be warranted if the defendant committed their crime due to coercion or duress is similarly helpful. The US Sentencing Commission's *Guidelines* also draw courts' attention to the possibility of decreasing the offence level for an offender who, together with others, commits a crime, but did not know or understand its scope, which might be the case for certain defendants with ASD.

Courts should also be encouraged to consider whether it is appropriate for an offender's ASD symptoms to influence their pursuit of sentencing objectives. Some of the ASD impairments discussed above may heighten a defendant's risk of reoffending and posing a danger to others. Victorian case law helpfully alerts sentencing

courts that they may need to prioritise the objective of community protection where a defendant has a mental impairment, and especially if it is untreatable, even though it might also reduce their culpability for their offending. The US Sentencing Commission's policy statement, 'Diminished Capacity', is similarly useful in warning courts not to impose a sentence below the guideline range if, despite the offender's 'significantly reduced mental capacity', there is a need to protect the public.

Courts should nonetheless also be urged to contemplate if it is unnecessary, counterproductive or inappropriate to seek to achieve sentencing objectives in light of an offender's ASD symptoms. For judges who find that the moral culpability of a defendant with ASD is reduced, the Victorian Court of Appeal's advice in *Verdins* could encourage them to consider whether this affects the importance of punishing the offender and if they should treat denunciation as a less relevant sentencing goal. The statement in *Verdins* that courts may moderate or eliminate general and/or specific deterrence as sentencing considerations owing to a defendant's mental impairment could also be especially useful for judges who are sentencing offenders with ASD; for the reasons previously noted, a harsh sentence might not achieve these aims.

As discussed, an offender's ASD impairments could affect their demonstration of remorse for their offending. Courts should therefore not rely on the failure to exhibit remorse by a defendant with ASD as confirming that it is necessary to prioritise the sentencing objectives of specific deterrence or community protection. Victorian case law and the guidelines of the Sentencing Council of England and Wales helpfully reinforce that a court cannot regard a defendant's neglect to demonstrate remorse as an aggravating factor. Particularly pertinent for courts that are sentencing defendants with ASD is the Sentencing Council's implied warning that judges should not rely on an offender's presentation as reflecting their lack of remorse, and in fact may need to look for unconventional manifestations of remorse (including where the defendant has a 'mental disorder'). Also useful is judges' advice in Victoria that courts should not treat as an aggravating factor a defendant's failure to consider the impact of their offending on their victims if this is attributable to their mental impairment.

Courts should also be directed to consider whether, given the nature of ASD impairments, it is worthwhile to pursue the objective of rehabilitation in sentencing a defendant with this condition. Victorian case law is helpful in advising courts to contemplate whether a defendant's mental impairment is treatable and if it affects their potential for rehabilitation.

IV Choosing Sanctions for Defendants with Autism

To ensure fairness in sentencing an offender with ASD and achieve sentencing objectives, the court may need to take their impairments into account in selecting the types of sanctions to impose. Relevant matters that a court could consider, which may also result in mitigation of the sentence of an offender with ASD, are how their symptoms might affect their experience of certain sanctions, and the likely impact of different penalties on their symptoms and risk of recidivism.

Punishment of offenders is a sentencing goal in all the examined jurisdictions.[192] Nevertheless, some sanctions, and especially imprisonment, may punish an offender with ASD more harshly than a neurotypical offender. Due to their impairments, incarcerated individuals with ASD can face greater challenges in the prison environment than neurotypical inmates: they may find unexpected changes to daily routines distressing; owing to their social communication difficulties, they could alienate prison staff and provoke conflict with and experience bullying from other prisoners; they may suffer from social anxiety and isolation; and they might find the noises and lighting upsetting and struggle to adapt to them.[193] Given these issues, to achieve the objective of punishment without penalising an offender with ASD unduly, a court could consider reducing the prison sentence that it would otherwise have imposed or selecting an alternative sanction. Yet if a court finds that an offender's ASD symptoms contributed to their offending, are untreatable, and are likely to lead to their reoffending, it may conclude that a long prison term is the only sanction that could protect the community.

While a prison sentence would ensure the public was protected and punish an offender with ASD, it may not achieve the sentencing objective of rehabilitation if it has the abovementioned impact on them.[194] Incarceration could even lead to a deterioration in the mental health and impairments of an offender with ASD,[195] for example, if it heightens their anxiety, and it may not educate them about the wrongfulness of their conduct.[196] The rehabilitative capacity of prisons generally has not been well established.[197] Rehabilitation has not been a central purpose of sentencing in the US in recent decades owing to the focus on other sentencing objectives of just punishment, community protection and deterrence,[198] but it is a sentencing goal in the other two examined jurisdictions. Moreover, rehabilitation of offenders can be imperative to achieving the sentencing purpose of community protection, which the jurisdictions share. The public could be endangered if incarceration does not rehabilitate an offender with ASD, and especially if it increases their likelihood of reoffending.

192 *Sentencing Act* (Vic) (n 33) s 5(1)(a); Sentencing Code (n 51) s 57(2)(a); 18 USC § 3553(a)(2)(C).

193 Allely, *Autism Spectrum Disorder* (n 1) 252, 255–8; Caitlin Robertson and Jane McGillivray, 'Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues' (2015) 26(6) *The Journal of Forensic Psychiatry and Psychology* 719, 727–9.

194 Robertson and McGillivray (n 193) 728–9.

195 Allely, *Autism Spectrum Disorder* (n 1) 274.

196 Cea (n 36) 525.

197 See, eg, Tina Bloom and GA Bradshaw, 'Inside of a Prison: How a Culture of Punishment Prevents Rehabilitation' (2022) 28(1) *Peace and Conflict: Journal of Peace Psychology* 140.

198 Megan Kurlychek and John Kramer, 'The Transformation of Sentencing in the 21st Century' in Cassia Spohn and Pauline Brennan (eds), *Handbook on Sentencing Policies and Practices in the 21st Century* (2019, Taylor & Francis) 19, 22, 26.

To achieve the objectives of rehabilitation and community protection in sentencing an offender with ASD, a court could impose sanctions that give them opportunities to obtain treatment that is directed towards reducing their risk of recidivism. ASD is a lifelong condition,[199] but therapies are continually being developed to address ASD symptoms, including those that could potentially play a role in offending. Such treatment can involve assisting people to recognise others' mental states and manage their emotions, social skills and communication training and, in the case of sex offenders, treatment programs that are adapted for individuals with ASD.[200] In most prisons, offenders with ASD would lack opportunities to participate in treatment programs that are tailored to their needs and delivered by appropriately trained personnel.[201] A sentencing court could, however, reduce the prison term and/or non-parole period of an offender with ASD or, in the US federal jurisdiction and England and Wales, order a suspended sentence (suspended sentences have been abolished in Victoria),[202] so they can obtain therapy that is available outside prison. A court could also impose sanctions that have a therapeutic focus, such as requirements to undergo mental health treatment, participate in a rehabilitation program, or be subject to community-based supervision.[203]

It might not always be appropriate for a court to take into account an offender's diagnosis of ASD in deciding which penalties to impose.[204] The court would need to receive evidence about the defendant's ASD impairments, the likely impact of certain sanctions on them due to those symptoms, and their potential for rehabilitation.[205] Such evidence might also help the court determine the defendant's probability of reoffending, as no risk assessment tools have yet been adapted to evaluate the effect of an offender's ASD symptoms in particular on their risk of recidivism.[206]

The following is an analysis of the potential for an offender's ASD impairments to influence sentencing courts' choice of sanctions in the examined jurisdictions. Pre-trial diversion schemes that could possibly shift some defendants with ASD

199 World Health Organization, *ICD-11* (n 4).

200 Dein and Woodbury-Smith (n 46) 41; Attwood (n 2) 163, 349, 352; Allely and Creaby-Attwood (n 26) 45–6.

201 Robertson and McGillivray (n 193) 729; Grant et al (n 13) 71, 73; Clare Allely, 'Experiences of Prison Inmates with Autism Spectrum Disorders and the Knowledge and Understanding of the Spectrum Amongst Prison Staff: A Review' (2015) 6(2) *Journal of Intellectual Disabilities and Offending Behaviour* 55, 60–2.

202 'Suspended Sentences and Other Abolished Sentencing Orders', *Sentencing Advisory Council* (Web Page, 3 November 2022) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/suspended-sentences-and-other-abolished-orders>; Bagaric, Alexander and Edney (n 56) 782.

203 Berryessa, 'Defendants with Autism Spectrum Disorder' (n 38) 866–7; Allely, Kennedy and Warren (n 60) 11.

204 Freckelton, 'Expert Evidence' (n 6) 377.

205 Walvisch and Carroll (n 8) 442.

206 Allely, *Autism Spectrum Disorder* (n 1) 43–4.

out of the criminal justice system and into mental healthcare are available in these jurisdictions,[207] but a detailed discussion of them is beyond the scope of this article.

A *Victoria, Australia*

In deciding on the sanctions to impose on any offender, Victorian courts must follow the principles of proportionality (the harshness of the penalty must match the seriousness of the crime) and consistency,[208] but also the principle of parsimony (the court should impose the most lenient sentence that can still achieve the sentencing objectives).[209] Notwithstanding these principles, an offender's ASD impairments could potentially influence the types of sanctions that a court imposes if it applies the *Verdins* principles discussed below. From this decision and other cases, Victorian courts have received some direction to consider the appropriateness of certain sanctions in light of an offender's mental impairment, and in particular their potential to have a harsher impact than intended and worsen the offender's condition. Victorian legislation prescribes sentences for various offences,[210] but the *Sentencing Act* (Vic) permits the court in some instances to impose alternative penalties, including sanctions that have a rehabilitative focus, due to an offender's mental impairment and specifically ASD.

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207 For instance, some magistrates' courts in England and Wales have diversion schemes that involve admission of a defendant with a mental impairment to a psychiatric or forensic hospital unit where necessary, either 'as a sentence after a finding of guilt or the discontinuance of a charge' in cases involving minor offending, or 'pending trial' where they have been charged with more serious crimes: David James, 'Court Diversion in Perspective' (2006) 40(6–7) *Australian and New Zealand Journal of Psychiatry* 529, 533–4. Some Victorian lower courts have options to defer for a maximum of 12 months sentencing an offender who has been found guilty of committing minor offences, inter alia, so they can participate in 'programs aimed at addressing the underlying causes of the offending', and 'on the review' of this order can decide to 'take no further action': *Sentencing Act* (Vic) (n 33) ss 83A(1), (1A)(c), (1D)(a). 'Mental health courts' in the United States, such as the 'Conviction and Sentence Alternatives Program' in the US District Court, which has divisions within federal courts, hear matters involving defendants with mental impairments who have committed minor offences and can compel them to participate in treatment programs and dismiss federal charges if they complete them successfully: 'Conviction and Sentence Alternatives Program (CASA)', *United States Department of Justice* (Web Page, 17 July 2023) <https://www.justice.gov/usao-cdca/programs/conviction-and-sentence-alternatives-program-casa>; Benjamin Barsky, Heather Ellis Cucolo and Dominic Sisti, 'Expanding Therapeutic Jurisprudence Across the Federal Judiciary' (2021) 49(1) *Journal of the American Academy of Psychiatry and the Law* 96.

208 Bagaric, Alexander and Edney (n 56) 8. The proportionality principle theoretically also applies in England and Wales and the US: see Roberts and Harris (n 81) 70.

209 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 245.

210 'Sentencing Schemes', *Sentencing Advisory Council* (Web Page, 3 November 2022) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes>.

The second *Verdins* principle states that an offender's 'impaired mental functioning' 'may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served'.[211] A court could apply this principle by finding that an offender's ASD impairments increase their risk of reoffending and therefore that it is necessary to impose a long prison sentence to achieve the objective of community protection.[212] Yet Victorian courts have also applied this principle by finding that an extended prison sentence would be an 'inappropriate disposition' if it is likely to have a 'devastating effect' on the offender's 'mental health' and if their rehabilitation could occur most effectively outside prison.[213] As noted above, incarceration could detrimentally affect the mental health of an offender with ASD and efficacious treatment for them is more likely to be available outside prison. In some cases, Victorian courts have sought to enable the rehabilitation of an offender with a mental impairment, especially one that cannot be adequately treated in prison, through reducing the usual non-parole period, so they can be treated in the community, but also still be monitored.[214]

The fifth *Verdins* principle states that impaired mental functioning is relevant to sentencing where '[t]he existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health'.[215] Thus, a Victorian court may impose a more lenient kind of sanction if a harsher penalty, such as a long prison term, would inflict a 'greater burden' on a defendant due to their mental impairment than on another offender.[216] Judge Smallwood accepted that this principle was enlivened in *Director of Public Prosecutions v Hardwick (a Pseudonym)* because, due to the defendant's ASD, incarceration would 'be far more difficult than it would be for a person without it'.[217] His Honour was concerned that the defendant would 'give' and 'take offence unintentionally', leading to other prisoners bullying or threatening him, and predicted that his 'time in custody will be spent in fear'.[218]

A Victorian court could also select an alternative sanction to a lengthy prison sentence pursuant to the sixth *Verdins* principle if it finds that incarceration would lead to an exacerbation of the impairments of an offender with ASD or a deterioration in their mental health generally. This principle states, '[w]here there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment'.[219] Justice Beale found this principle to be engaged in *R v Chey*, as a psychiatrist provided evidence that it

211 *Verdins* (n 33) 276 [32].

212 See, eg, Judicial College of Victoria (n 85) 6.2.2.7.

213 *R v Vardouniotis* (2007) 16 VR 269, 235–6 [33] (Maxwell P).

214 Judicial College of Victoria (n 85) 6.2.2.8.

215 *Verdins* (n 33) 276 [32].

216 Ibid 275 [27], quoting *R v Smith* (1987) 44 SASR 587, 589 (King CJ).

217 *DPP v Hardwick (a Pseudonym)* [2019] VCC 1528 [37] (Judge Smallwood).

218 Ibid [37]–[38].

219 *Verdins* (n 33) 276 [32].

was 'probable' that the mental health of the defendant with ASD would 'deteriorate' in prison, due to the 'likelihood of tensions developing', the defendant's 'vulnerabilities being exposed' and the defendant being 'targeted'.[220]

Victorian courts can diverge from sentences stipulated by legislation for certain crimes if they make the findings in the *Sentencing Act* (Vic) outlined below, which echo the *Verdins* principles. This statute permits the court to depart from the statutory minimum prison sentence and non-parole period for specified offences if it finds that a 'special reason exists'.[221] One such reason is if an 'offender proves on the balance of probabilities' either that: 'at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability'; or 'he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment'.[222] The definition of 'impaired mental functioning' in this provision includes ASD.[223]

The *Sentencing Act* (Vic) also allows the court to impose penalties other than the prescribed sentences for certain serious crimes that are classified as 'category 1' and 'category 2' offences in specified circumstances due to the offender's mental impairment.[224] If a defendant who has committed a 'category 2 offence' provides the abovementioned evidence about their impaired mental functioning, the court can pass an alternative sentence to a 'custodial order'.[225] In these cases, the court has the option of making a 'community correction order' to which it can attach a 'treatment and rehabilitation condition', requiring the offender 'to undergo treatment and rehabilitation specified by the court' and as outlined in the statute.[226] Especially useful for an offender with ASD might be 'psychological' treatment, programs that '[address] factors related to' the 'offending behaviour', and/or 'employment, educational, cultural and personal development programs'.[227]

Provisions of the *Sentencing Act* (Vic) ensure that courts receive expert evidence to inform their decision to make a community correction order, which could be helpful in sentencing an offender with ASD. Before making this order, the court

220 [2021] VSC 843, [30].

221 See, eg: *Sentencing Act* (Vic) (n 33) ss 9B(2), 10A(2); 'Guide to Sentencing Schemes in Victoria 2021', *Sentencing Advisory Council* (Web Page, 2021) 7–8 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-01/Guide_to_Sentencing_Schemes_in_Victoria_2021.pdf> ('*Guide to Sentencing*').

222 *Sentencing Act* (Vic) (n 33) ss 10A(2)(c)(i)–(ii).

223 Ibid s 10A(1)(d).

224 'Guide to Sentencing' (n 221) 4–5.

225 *Sentencing Act* (Vic) (n 33) ss 3(1) (definition of 'category 2 offence'), 5(2H)(c), pt 3, div 2.

226 Ibid ss 37(a), 48D(1), (3).

227 Ibid ss 48D(3)(e)–(g).

must have 'received a pre-sentence report' and 'had regard to any recommendations'.[228] Further, before attaching a treatment and rehabilitation condition to this order, the court 'must have regard to the need to address the underlying causes of the offending' and 'matters identified in the pre-sentence report in relation to the treatment and rehabilitation of the offender'.[229] A pre-sentence report can comment on: the offender's 'medical and psychiatric history' and 'any special needs'; 'services that address the risk of recidivism from which the offender may benefit'; 'courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit'; and 'the relevance and appropriateness of any proposed condition'.[230]

Instead of imposing a 'custodial order' on an offender with a mental impairment (including ASD) who has committed certain 'category 1 offences', a court may be able to make a 'mandatory treatment and monitoring order', 'residential treatment order' or 'Court Secure Treatment Order'.[231] A mandatory treatment and monitoring order is a community correction order with mandatory conditions attached, such as 'a treatment and rehabilitation condition'.[232] While that order could be useful for an offender with ASD, a residential treatment order, which involves detention of the offender for up to five years 'in a specified residential treatment facility to receive specified treatment',[233] might only be appropriate for such an offender if they have a comorbid condition. An offender who is subject to a Court Secure Treatment Order can 'be compulsorily taken to, and detained and treated, at a designated mental health service'.[234] As this is intended to apply to offenders who have a 'mental illness' and require 'mental health treatment to prevent serious deterioration in their health or to prevent serious harm to the offender or another person',[235] it may also be inappropriate for offenders with ASD and not result in their rehabilitation.[236] The court can only make these orders if the offender proves 'on the balance of probabilities' that they 'had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces' their 'culpability', and 'the court is satisfied that' such an order is 'appropriate'.[237] In addition, the court must have first received and 'had regard to' a report addressing these matters

228 Ibid ss 37(b), 8A(2).

229 Ibid s 48D(2).

230 Ibid ss 8B(1)(c), (k)–(n).

231 Ibid ss 3(1) (definition of 'category 1 offence'), 5(2GA)(b), (2HB), 10A(1)(d).

232 Ibid s 44A(1).

233 Ibid s 82AA(1).

234 Ibid s 94A.

235 'Mental Impairment and Sentencing', *Sentencing Advisory Council* (Web Page, 1 September 2023) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/mental-impairment-and-sentencing>.

236 Robertson and McGillivray (n 193) 729, 731–2.

237 *Sentencing Act* (Vic) (n 33) s 5(2GA)(b).

prepared by a psychiatrist or psychologist 'who has examined the offender in relation to the offending' and 'any other evidence that the court considers relevant'.[238]

B *The Federal Jurisdiction of the United States of America*

In the US federal jurisdiction, courts have discretion to deviate from the guideline range in selecting the kinds of penalties to impose on an offender in light of a mental impairment such as ASD. Nevertheless, the US Congress and Sentencing Commission have provided minimal guidance to courts about the types of sanctions that might be appropriate for them to choose in this circumstance.

The *Sentencing Reform Act* (US) requires the court, in deciding on the sentence, to take into account 'the kinds of sentences available' and 'the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines'.[239] Yet this statute also indicates that the court must consider the offender's 'characteristics' in determining the sentence,[240] and can impose a sentence of a different 'kind' if it finds a 'mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described'.[241] As noted above, to determine if the Sentencing Commission took a mitigating circumstance into consideration, the court must refer to its policy statements.[242] Application of the Sentencing Commission's policy statement, 'Mental and Emotional Conditions',[243] could lead to the court imposing sanctions on an offender with ASD that diverge from the types of penalties stipulated in the relevant guideline range.

As previously discussed, 'Mental and Emotional Conditions' confirms that an offender's mental impairment 'may be relevant in determining whether a departure is warranted' and 'a downward departure may be appropriate to accomplish a specific treatment purpose'.[244] While, as noted, the circumstances in which a departure can be made for this reason are limited, the *Guidelines* provide examples of alternative sanctions that could be imposed to accomplish a specific treatment purpose. They provide for

> a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) …[245]

238 Ibid s 5(2GB).

239 18 USC §§ 3553(3), (4)(A).

240 Ibid § 3553(a)(1).

241 Ibid § 3553(b)(1).

242 Ibid.

243 *Guidelines* (n 33) § 5H1.3.

244 Ibid.

245 Ibid § 5C1.1, application notes [6].

In *Knott*, the Court substituted the defendant's original sentence of incarceration with 'home detention as one of the conditions of seven years of supervised release', because it received evidence that his ASD '[rendered] him exceptionally vulnerable to both decompensation and [emotional and physical] abuse in a prison setting', and he was 'likely … to experience mental deterioration if he is not able to receive the same frequency and quality of mental-health treatment that he has received in the community'.[246]

An offender's mental impairment could have an impact on the court's choice of sanctions in this jurisdiction in other ways. The *Guidelines* indicate that a court can consider 'specific offender characteristics', including mental and emotional conditions, 'in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence'.[247] Further, the *Guidelines* state that the court can impose 'discretionary' conditions on 'probation' and 'supervised release' — which effectively constitute a suspended sentence — that are 'reasonably related' to the defendant's 'characteristics'.[248]

'Mental and Emotional Conditions' explains that these characteristics 'may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program'.[249] The *Guidelines* recommend that '[i]f the court has reason to believe that the defendant is in need of psychological or psychiatric treatment', a 'condition' be attached to probation or supervised release 'requiring that the defendant participate in a mental health program approved by the United States Probation Office'.[250] In *United States v Peters*, for example, the Court required the defendant with ASD (who was convicted of producing child pornography and on whom it imposed a 26-year prison sentence and a life term of supervised release) to undergo mental health treatment.[251] The Court nonetheless noted, 'you can't snap your fingers and make [the condition that led to the defendant's offending] go away', and 'therapy for people on the autism spectrum is not easy', it is 'complicated and difficult and long term'.[252]

246 *Knott* (n 137) 1312 [1], 1315–6 [10]–[11], 1318 [17], 1321 [24]. By contrast, in *Welshans* (n 140), the Court recognised the potential difficulties of imprisonment for people with ASD, but considered that it would in fact 'benefit' the defendant: at 627 (Porter J).

247 *Guidelines* (n 33) ch 5, pt H, introductory commentary.

248 Ibid § 5B1.3(b), § 5D1.3(b); Richard Frase, 'Suspended Sentences and Free-Standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment' (2019) 82(1) *Law and Contemporary Problems* 51, 51–2, 57–8.

249 *Guidelines* (n 33) § 5H1.3.

250 Ibid § 5B1.3(d)(5).

251 (7th Cir, No 22 C 50389, 20 July 2023) slip op 1–2 (Kennelly J).

252 Ibid.

C *England and Wales*

Sentencing courts in England and Wales have opportunities to take an offender's mental impairment such as ASD into account in choosing the sanctions to impose on them. The Sentencing Code and the Sentencing Council's guidelines generally give courts considerable direction in this respect, including by encouraging them to consider how offenders might experience certain penalties due to their impairments and how those sanctions could affect their symptoms and potential for rehabilitation. They also seek to ensure courts will receive evidence about an offender's impairments that can assist them in selecting a sentence.

In this jurisdiction, sentences for certain serious offences are 'fixed by law': legislation prescribes a 'mandatory sentence requirement'.[253] Nevertheless, for some of those offences, the Sentencing Code permits the court to diverge from the stipulated minimum custodial sentence if 'there are exceptional circumstances which relate … to the offender and justify not' imposing that sanction.[254] The Sentencing Council advises that, in such a case, 'the court must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence'.[255] The Sentencing Council's guidelines do not, nonetheless, confirm if an offender's mental impairment, such as ASD, could constitute sufficient justification for the court to impose a sanction other than the minimum sentence, but they imply that whether this is the case may depend on the type of crime committed.[256]

For offences that are 'punishable with a custodial sentence' under relevant legislation,[257] but to which no mandatory sentencing requirements apply, the Sentencing Code sets a '[t]hreshold for imposing [a] discretionary custodial sentence'.[258] A court can only 'pass a custodial sentence' if 'it is of the opinion that … the offence … was so serious that neither a fine alone nor a community sentence can be justified for the offence'.[259] To form this opinion, 'the court must take into account' any 'mitigating

253 Sentencing Code (n 51) s 399.

254 See, eg, ibid s 311(2).

255 See, eg, 'Firearms — Possession of Prohibited Weapon', *Sentencing Council* (Web Page, 1 January 2021) [13] <https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-possession-of-prohibited-weapon/>.

256 See, eg, ibid [12]: this guideline states that 'the mere presence' of 'one or more mitigating factors' 'should not in itself be regarded as' an 'exceptional circumstance' that would 'justify not imposing the statutory minimum sentence'. Cf 'Bladed Articles and Offensive Weapons — Possession', *Sentencing Council* (Web Page, 1 June 2018) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/bladed-articles-and-offensive-weapons-possession/>: '[t]he court should consider the following factors to determine whether it would be unjust to impose the statutory minimum sentence; any strong personal mitigation …'.

257 For the meaning of 'custodial sentence', see Sentencing Code (n 51) s 222.

258 Ibid s 230.

259 Ibid s 230(2).

factors',[260] including the offender's reduced culpability if relevant,[261] which could be attributable to their mental impairment, and a 'pre-sentence report', which could refer to an offender's symptoms and make suggestions for the sentence.[262] If the court does pass a custodial sentence, it must impose 'the shortest term … that in the opinion of the court is commensurate with the seriousness of … the offence'.[263] Even if the court finds that the crime 'was so serious that a community sentence could not normally be justified for the offence', also in response to mitigating factors, it can pass a 'community sentence'.[264] As discussed below, a court might consider this an appropriate sanction in the case of an offender with ASD.

The Sentencing Code reinforces that its provisions regarding discretionary custodial sentences do not require a court 'to pass a custodial sentence … on an offender suffering from a mental disorder'.[265] Further, it states that if 'an offender is or appears to be suffering from a mental disorder', before imposing a 'custodial sentence other than one fixed by law', 'the court must consider … any information before it which relates to the offender's mental condition', and 'the likely effect of such a sentence on that condition and on any treatment which may be available for it'.[266] Unless 'in the circumstances of the case' the court deems it 'unnecessary', 'the court must obtain and consider' a report from a medical practitioner with 'special experience in the diagnosis or treatment of mental disorder' about the offender's condition.[267] The Sentencing Council's guideline, 'Sentencing Offenders', suggests matters regarding the offender's impairment that could be relevant to the court's choice of sanctions, and on which it could request this report comment, including: 'how the condition relates to the offences committed'; 'the level of impairment due to the condition at the time of the offence and currently'; 'if a particular disposal is recommended'; and 'the expected length of time that might be required for treatment'.[268]

'Sentencing Offenders' also provides guidance about matters the court could take into account when an offender with a mental impairment 'is on the cusp of

260 Ibid s 230(6).

261 'Imposition of Community and Custodial Sentences', *Sentencing Council* (Web Page, 1 February 2017) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/> ('Imposition of Community and Custodial Sentences').

262 Sentencing Code (n 51) ss 230(7), 30–31; Jane McCarthy et al, 'Defendants with Intellectual Disability and Autism Spectrum Conditions: The Perspective of Clinicians Working Across Three Jurisdictions' (2022) 29(5) *Psychiatry, Psychology and Law* 698, 706.

263 Sentencing Code (n 51) ss 231(1)–(2).

264 Ibid ss 77(1)–(2).

265 Ibid s 78(1)(a).

266 Ibid ss 232(1), (3).

267 Ibid ss 232(2), (6).

268 'Sentencing Offenders' (n 33) Annex B.

custody or detention'.[269] It states, 'the court may consider that the impairment or disorder may make a custodial sentence disproportionate to achieving the aims of sentencing and that the public are better protected and crime reduced by a rehabilitative approach'.[270] If, however, the court concludes that 'custody' is 'unavoidable', the Sentencing Council suggests that 'consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence and to the issue of whether any sentence may be suspended', as it 'may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairments or disorders'.[271] Further, this guideline requires the court to 'have regard' to 'any additional impact of a custodial sentence on the offender because of an impairment or disorder, and to any personal mitigation to which their impairment or disorder is relevant'.[272] The Court of Appeal appears to have applied this guideline in reducing the prison sentence of a defendant with ASD in *Simmonds*. The Court found that incarceration was 'likely to have a particularly severe impact on the appellant due to her "extreme vulnerability"', and her ASD — which the Court noted 'was of sufficient severity for her to have been placed in a special school' — was one of various 'elements to her vulnerability'.[273]

As noted above, in relation to crimes for which the Sentencing Council has issued an offence-specific guideline, the court must impose a sentence within the offence range it stipulates.[274] Nevertheless, this does not restrict the sentencing court's 'power' 'to deal with an offender suffering from a mental disorder in the manner it considers to be most appropriate in all the circumstances'.[275] 'Sentencing Offenders' emphasises that an offender's impairment may 'be relevant to the decision about the type of sentence imposed', though it also observes, '[m]any offences committed by an offender with an impairment or disorder may not require any therapeutic intervention or the offence may be so minor that the appropriate disposal is a fine or discharge'.[276]

Sentencing courts in England and Wales have options to impose sanctions that could improve an offender's mental health. These sanctions may help achieve the sentencing purpose of 'the reform and rehabilitation of offenders', but are still intended to meet the objectives of the 'punishment of offenders' and 'protection of the public'.[277] 'Sentencing Offenders' encourages courts, in deciding whether to make a 'mental health sentence', to 'weigh up' various 'factors', including 'the nature of the offence',

269 Ibid [22].

270 Ibid.

271 Ibid.

272 Ibid. See, eg, *Mottram v The Queen* [2022] EWCA Crim 954, [30].

273 *Simmonds* (n 191) [25], [27].

274 Sentencing Code (n 51) ss 60(1)–(2).

275 Ibid ss 59(3), 62(1) (definition of 'mental disorder); *Mental Health Act 1983* (UK) s 1(2): '"mental disorder" means any disorder or disability of the mind'.

276 'Sentencing Offenders' (n 33) [16]–[17].

277 Sentencing Code (n 51) ss 57(2)(a), (c)–(d).

'the offender's insight into their condition', 'the speed at which risk factors may escalate' and 'the need to protect the public'.[278] The Sentencing Council recognises that '[i]mpairments or disorders may be relevant to an assessment of whether the offender is dangerous',[279] which entails, as the Sentencing Code clarifies, a determination of 'whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences'.[280] 'Sentencing Offenders' advises, '[t]he graver the offence, and the greater the risk to the public on release of the offender, the greater the emphasis the court must place upon the protection of the public and the release regime'.[281] Following this guideline, in *R v Solomon*, the Court took into account the defendant's ASD, but having received evidence from psychiatrists that his condition was 'not sufficiently severe to explain his violent offending', it concluded that he 'should be treated as dangerous and that extended custodial sentences were necessary'.[282]

If the offence committed by an offender with a mental impairment 'is punishable with imprisonment', but is not subject to a mandatory sentence requirement, a court can make a 'community order' to which a 'Mental Health Treatment Requirement' ('MHTR') and/or 'Rehabilitation Activity Requirement' ('RAR') is attached.[283] While this sanction has a rehabilitative aim,[284] 'the order must include at least one … requirement imposed for the purpose of punishment', unless 'the court also imposes a fine, or there are exceptional circumstances' that would 'make it unjust … for the court to impose' this requirement or a fine.[285]

A community order to which an MHTR is attached is potentially a suitable sanction for an offender with ASD. This could be the case if the court receives evidence indicating that mental health treatment could improve the offender's capacity for moral reasoning, and their abilities to observe social norms and cues, interpret other people's attitudes and intentions, appreciate the impact of their behaviour, and/or control their responses to unexpected and stressful circumstances. The order would require the offender to 'submit' during a specified period to 'mental health treatment', such as 'in-patient treatment', 'institution-based out-patient treatment' or 'practitioner-based treatment', provided by, or under the direction of, a medical practitioner or psychologist 'with a view to improvement of the offender's mental condition'.[286] The court can only attach an MHTR to a community order if it is satisfied of various matters, including that: the offender's mental condition 'requires' and 'may be susceptible to treatment', but 'does not warrant the making of a hospital

278 'Sentencing Offenders' (n 33) [23].

279 Ibid [16].

280 Sentencing Code (n 51) s 308(1).

281 'Sentencing Offenders' (n 33) [23].

282 [2023] EWCA Crim 1375, [21], [23] (Holgate LJ for the Court).

283 Sentencing Code (n 51) ss 201, 202(1)(b), (3), 399, sch 9, pts 2, 9.

284 'Imposition of Community and Custodial Sentences' (n 261).

285 Sentencing Code (n 51) ss 208(10)–(11).

286 Ibid sch 9, pt 9, cls 16(1)–(2).

order'; arrangements have been or can be made for the intended treatment; and 'the offender has expressed willingness to comply with the requirement'.[287]

'Sentencing Offenders' contemplates that a community order to which an MHTR is attached might reduce an offender's risk of recidivism more effectively than a brief prison sentence.[288] Further, it states that this may be a more appropriate sanction than incarceration if 'the offender's culpability is reduced by their mental state and/or the public interest is served by ensuring they receive appropriate treatment', provided the offender is likely to comply with it.[289] A community order to which an RAR is attached might also be beneficial for an offender with ASD. To encourage the offender's rehabilitation, it requires them to 'attend appointments' or an 'accredited programme' and/or 'participate in activities' that have a 'reparative' 'purpose', 'such as restorative justice activities'.[290]

A court can compel an offender to comply with a community order to which an MHTR or RAR is attached as part of a 'suspended sentence order', which a court can make if it passes a prison sentence of between 14 days and 2 years.[291] The prison sentence only takes effect if the offender commits another offence or 'during the supervision period, contravenes any community requirement imposed by the order', and the court orders this.[292] In some of its guidelines, the Sentencing Council lists factors that may indicate that a suspended sentence is appropriate, including 'strong personal mitigation' and a 'realistic prospect of rehabilitation',[293] which might apply to an offender with ASD.

Another 'mental health disposal' that is available in this jurisdiction if the offence is punishable by imprisonment, but the sentence is not 'fixed by law', is an order authorising the offender's 'admission to and detention in' a hospital.[294] A court can make this order if 'satisfied, on the … evidence of two registered medical practitioners, that the offender is suffering from mental disorder' 'of a nature or degree' that makes the order appropriate, and 'medical treatment is available for' them.[295] A court might deem this sanction suitable for an offender with ASD if they have comorbid mental health issues.[296]

287 Ibid sch 9, pt 9, cl 17.

288 'Sentencing Offenders' (n 33) [19].

289 Ibid.

290 Sentencing Code (n 51) sch 9, pt 2, cls 4(1), 5(1), (6)–(7).

291 Ibid ss 277(2), 286(2).

292 Ibid ss 286(1), (3).

293 See, eg, 'Imposition of Community and Custodial Sentences' (n 261).

294 *Mental Health Act 1983* (UK) s 37(1); 'Sentencing Offenders' (n 33) [23]–[24], Annex C.

295 *Mental Health Act 1983* (UK) s 37(2)(a)(i).

296 See, eg, *Cleland v The Queen* [2020] EWCA Crim 906.

D *Best Practices and Lessons from the Examined Jurisdictions*

Pursuant to sentencing laws in all the examined jurisdictions, an offender's ASD impairments could potentially influence the court's choice of penalties, at least to some extent. Outlined below are recommendations for guidance to be provided to courts in determining which sanctions to impose on an offender with ASD, and penalties they should have the opportunity to select. Also highlighted are aspects of the examined jurisdictions that provide useful direction to and options for courts in these respects.

It is important that courts are alerted to the possibility that they can take a defendant's ASD symptoms into account in choosing penalties to impose. Guidance provided to courts in all the jurisdictions might encourage them to do so. This includes the Victorian Court of Appeal's second *Verdins* principle, which recommends that courts contemplate whether an offender's mental impairment should have an impact on the 'kind of sentence' they select. The Sentencing Council of England and Wales provides similar direction in 'Sentencing Offenders', indicating that an offender's mental impairment could be pertinent to the court's determination about the types of sanctions to impose. The US Sentencing Commission's *Guidelines* also confirm that a court can take into account an offender's mental condition in choosing sanctions from the available sentencing options.

In addition, courts should be directed to consider the likely experience of certain sanctions by a defendant with ASD as a consequence of their impairments, and the potential impact of different penalties on their symptoms. As previously discussed, due to their ASD impairments, an offender might find incarceration in particular more burdensome than an offender without their impairments, and imprisonment could lead to a deterioration in their symptoms. Courts could be encouraged to consider whether there is a risk that imprisonment could have this effect on an offender with ASD and, if so, contemplate reducing a custodial sentence or imposing an alternative sanction to a prison term. A shorter prison sentence or another penalty might punish an offender with ASD to the same extent and achieve an equivalent level of general deterrence as a long prison term in the case of a neurotypical offender.

Courts in Victoria and England and Wales receive valuable guidance in these respects. Particularly helpful is the confirmation in Victorian case law applying the second *Verdins* principle that a court can elect not to impose a lengthy prison term if it would worsen the offender's mental health. The fifth *Verdins* principle alerts courts to the possibility that, owing to the defendant's mental impairment, a certain sentence might impose a greater burden on them than on another offender. Likewise, the *Sentencing Act* (Vic) reinforces that a court can depart from the statutory minimum custodial sentence owing to an offender's mental impairment, including if it would inflict a greater than usual burden on them. Also useful is the suggestion in the sixth *Verdins* principle that courts choose a less severe sanction if there is a high risk of incarceration detrimentally affecting the mental health of an offender with a mental impairment. In 'Sentencing Offenders', England and Wales's Sentencing Council similarly highlights for courts the potential for a custodial sentence to worsen the effects of an offender's mental impairment. It usefully suggests that

courts contemplate reducing the length of a custodial sentence or suspending it if it would place a greater burden on the offender due to their impairment than on another offender. The confirmation in England and Wales's Sentencing Code that courts are not required to impose a prison sentence where it is not prescribed by legislation and an offender has a mental impairment is also valuable.

Courts should be guided to consider, and have options to impose, sanctions that may give offenders with ASD opportunities to obtain treatment that is directed towards their rehabilitation and reducing their risk of recidivism. 'Sentencing Offenders' helpfully suggests to courts that they might conclude that a 'rehabilitative approach' would provide greater protection to the public than another sanction where the offender has a mental impairment. If an offender with ASD in England and Wales receives a 'community order' to which an MHTR or RAR is attached, they could obtain treatment for symptoms that led to their offending and thereby potentially lower their risk of recidivism. 'Sentencing Offenders' indicates that this order could be more efficacious in reducing this risk than a prison term. The *Sentencing Act* (Vic) similarly permits courts in Victoria to make a 'community correction order' to which it can attach a 'treatment and rehabilitation condition', where an offender with a mental impairment commits certain serious offences. The US Sentencing Commission usefully highlights in its policy statement, 'Mental and Emotional Conditions', that a downward departure in a sentence may be appropriate for an offender with a mental impairment to achieve a 'specific treatment purpose'. Additionally, in its *Guidelines*, it provides options to impose a sentence of community confinement or home detention rather than a prison term. 'Mental and Emotional Conditions' and the *Guidelines* also helpfully alert courts to the possibility of attaching a condition to probation or supervised release requiring an offender to participate in a mental health program.

Sentencing courts should also be directed only to take an offender's ASD into account in deciding which penalties to impose if they receive persuasive evidence about relevant matters. They might include the offender's likely experience of certain sanctions owing to their impairments, the probable effects on their symptoms of different penalties, their potential for rehabilitation in light of their impairments, and possible treatment for their condition.

Especially useful is the requirement of England and Wales's Sentencing Code that, before imposing a custodial sentence that is not prescribed by legislation on an offender who has a mental impairment, courts must: consider information regarding the impairment, the probable impact of a sentence on it, and any available treatment; and (unless they consider it unnecessary) request a medical practitioner's report on the offender's condition. The articulation in 'Sentencing Offenders' of matters regarding the offender's impairment on which a court should ask the practitioner to comment, including which sanctions might be appropriate, is also valuable. Under the Sentencing Code, a court must also consider a pre-sentence report, which could discuss an offender's mental impairment and make recommendations for sanctions, before imposing a custodial sentence for their commission of a crime that is punishable under legislation with this sanction. Similarly helpful is the requirement of the *Sentencing Act* (Vic) for courts to base decisions to make a community

correction order, and attach a treatment and rehabilitation condition to it, on expert reports regarding the offender's mental impairment, and available treatment that could reduce their risk of reoffending.

Notwithstanding the above recommendations, courts should also be directed to consider if an offender's ASD symptoms contributed to their offending, are untreatable, and are likely to lead to their reoffending, and thus whether it needs to impose a lengthy prison term to protect the community. 'Sentencing Offenders' is particularly helpful in encouraging courts, in deciding on the types of sanctions to impose on an offender with a mental impairment, to consider their 'insight into their condition' and 'risk factors'. It also highlights that the impairment may indicate the threat the offender poses to the community through reoffending if they are not incarcerated.

V Conclusion

An individual's ASD diagnosis does not signify their heightened risk of committing criminal offences. Nevertheless, certain ASD impairments could contribute to offending by the small subgroup of people with ASD who commit crimes. Where a defendant has been found guilty of a crime and the sentencing court receives evidence of a connection between their ASD symptoms and their offending, it might be necessary for it to take their condition into account to reach an outcome that is fair to the defendant and achieves sentencing objectives.

As this article has explored, in Victoria, the US federal jurisdiction and England and Wales, a defendant's ASD impairments could potentially influence courts' application of sentencing considerations and their decisions regarding the kinds of sanctions to impose. Yet the ways in which an offender's ASD symptoms could have an impact on their sentence vary between the examined jurisdictions, as does the relevant guidance that sentencing courts receive from legislation, case law and advisory bodies. This article has made recommendations for approaches for courts to adopt in sentencing offenders with ASD and direction to be provided to them, and highlighted lessons that can be learned from optimal features of the three sentencing systems analysed in the article.

The article has proposed that courts have discretion to apply factors relevant to the sentencing process in light of a defendant's ASD impairments, but that they receive advice about the potential relevance of those symptoms. In particular, it might be appropriate for courts to consider if the defendant's symptoms reduced their moral culpability for their offending, and thus whether to mitigate their sentence. Also important is that courts are encouraged to contemplate whether an offender's ASD symptoms should influence their pursuit of the sentencing goals of punishment, denunciation, community protection, deterrence and rehabilitation, and potentially through mitigation or aggravation of the sentence.

In addition, this article has recommended that courts receive guidance about when and how they might take a defendant's ASD symptoms into account in selecting the

types of sanctions to impose. This instruction could encourage courts to consider the probable experience of particular penalties by a defendant with ASD due to their impairments, and the potential impact of different sanctions on their symptoms. For the reasons discussed, it might be important for courts to contemplate imposing on an offender with ASD alternative penalties to a lengthy custodial sentence, including sanctions that give them opportunities to obtain treatment. Nevertheless, courts would also need to consider if an offender's ASD symptoms are treatable, and the potential for them to lead to their reoffending.

*Juan Diaz-Granados**

EXCLUSIVE POSSESSION, 'CONTRACTUALISATION' AND THE LEASE-LICENCE DICHOTOMY: A RECONSIDERATION OF LEGAL CATEGORISATION IN THE AIRBNB ERA

Abstract

Airbnb is one of the most disruptive companies in the 'Sharing Economy'. Its business model is built upon a triangular structure of legal relationships that remains poorly understood and inadequately analysed in terms of legal classification. This article examines the issue of legal categorisation vis-à-vis the relationship between the Airbnb host and the Airbnb guest. Focusing on the common law distinction between leases and licences, this article re-evaluates the analysis of the lease-licence dichotomy in the context of Airbnb. It argues that the elements of possession — physical control (*factum possessionis*) and relevant intention (*animus possidendi*) — should be considered in the lease-license analysis. With this normative claim, this article concludes that contrary to the decision in *Swan v Uecker*,[1] the contractual arrangement between the Airbnb host and the Airbnb guest should be categorised as a licence relationship, rather than a lease.

I Introduction

Airbnb is a benchmark of the new platform-based models that are often included under the umbrella concept of the 'Sharing Economy', and one of the most notorious and disruptive technology-based models in recent times.[2] From a small business challenging incumbent firms in 2008, to a $30 billion firm in 2019 (pre COVID-19), to an undisputable corporate giant today, Airbnb has become

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1 (2016) 50 VR 74.

2 See Orly Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87, 94.

an undeniable global market force in the accommodation industry.[3] In the words of Member Campana of the Victorian Civil and Administrative Tribunal ('VCAT'), 'Airbnb is to the residential tenancy market what Uber is to the taxi industry'.[4]

Since its creation, Airbnb has changed how people offer, search for, and find accommodation. It has created an alternative market where individuals provide lodging in private homes or investment properties to a semi-public audience comprised of those registered on the digital platform. This differs from the conventional accommodation paradigm in which incumbent firms rely on inns and hotel chains to offer accommodation to the general public. Airbnb has given guests broader accommodation options at competitive prices, while creating a new way for hosts to monetise private spaces. Additionally, Airbnb has reconfigured the dynamics between hosts and guests. Unlike the orthodox accommodation model where inns and hotels interact directly with guests, Airbnb intermediates the connection between hosts and guests through its digital platform. It plays an active role in the creation, execution, and termination of the model's legal relationships,[5] while reducing information asymmetries and transaction costs.[6]

One of the main legal issues of the Airbnb model that has bedevilled legislators, judges, and analysts is the legal categorisation of the relationship between the Airbnb host and the Airbnb guest.[7] Specifically, it is unclear whether the relationship should

3 See: Bryan P Schwartz and Ellie Einarson, 'The Disruptive Force of the Sharing Economy' (2018) 18(1) *Asper Review of International Business and Trade Law* 221, 228; Harriet Sherwood, 'How Airbnb Took Over the World', *The Guardian* (online, 5 May 2019) <https://www.theguardian.com/technology/2019/may/05/airbnb-homelessness-renting-housing-accommodation-social-policy-cities-travel-leisure>; Airbnb, *2023 Annual Report* (Report, 16 February 2024) 68 <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001559720/312a8de0-4be0-4a09-a442-e5fa3ffea0a6.pdf>.

4 *Swan v Uecker* [2016] VCAT 483, [1] ('*Swan VCAT*').

5 Juan Diaz-Granados and Benedict Sheehy, 'The Sharing Economy & the Platform Operator-User-Provider "PUP Model": Analytical Legal Frameworks' (2021) 31(4) *Fordham Intellectual Property, Media and Entertainment Law Journal* 997, 1035.

6 See: Orly Lobel, 'Coase and the Platform Economy' in Nestor M Davidson, Michèle Finck and John J Infranca (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press, 2018) 67, 70; Roberta A Kaplan and Michael Nadler, 'Airbnb: A Case Study in Occupancy Regulation and Taxation' (2015) 82 *University of Chicago Law Review Dialogue* 103, 103; Rashmi Dyal-Chand, 'Regulating Sharing: The Sharing Economy as an Alternative Capitalist System' (2015) 90(2) *Tulane Law Review* 241, 258.

7 See, eg: *CAPREIT v Wagstaff* [2020] NSJ No 470, [25] (Nova Scotia Small Claims Court); *McGillis v Department of Economic Opportunity*, 210 So 3d 220, 223 (Fla 3d Dist App, 2017) (Logue J).

be categorised as a *lease* or a *licence*,[8] a 'finely balanced'[9] and 'slightly elusive' distinction.[10] In Australia, the pivotal case on this issue is *Swan v Uecker*[11] ('*Swan*'). Sitting as a single judge in the Supreme Court of Victoria, Croft J categorised the relationship between an Airbnb host and an Airbnb guest as a lease. This decision has important implications. First, it is the leading case on the categorisation issue of the Airbnb model domestically, which 'potentially affects thousands of tenants; not only in Victoria, but Australia-wide'.[12] Second, the decision was surprising in that it departed from previous decisions on this issue.[13] According to Bill Swannie, '[t]he decision is arguably inconsistent not only with established principles of tenancy laws, but also with previous Supreme Court decisions which seek to protect tenants from arbitrary eviction'.[14] Third, the scope of the decision was limited to rental agreements of entire apartments,[15] thus leaving uncertain the legal categorisation of agreements involving only parts of the premises, such as a bedroom.[16] Finally, the High Court of Australia has not tested the approach adopted in *Swan*. Therefore, the legal categorisation of the Airbnb host-guest relationship remains uncertain at common law.[17]

This article proposes a reconsideration of the analysis of the lease-licence dichotomy in the context of platform-mediated models such as Airbnb. It argues that the elements

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8 The terms 'lease' and 'tenancy' are used in this article interchangeably to refer to the same legal category: see *Re Negus* [1895] 1 Ch 73, 79. See also Juan Diaz-Granados, 'Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 2' (2022) 62 (Spring) *Jurimetrics* 241, 271–9.

9 *Living and Leisure Australia Ltd v Commissioner of State Revenue* (2018) 108 ATR 736, 738 [2], 742 [23] (Ferguson CJ and Whelan JA).

10 Kevin J Gray, 'Lease or Licence to Evade the Rent Act?' (1979) 38(1) *Cambridge Law Journal* 38, 41 ('Lease or Licence to Evade the Rent Act?').

11 (2016) 50 VR 74 ('*Swan*').

12 Bill Swannie, 'Trouble in Paradise: Are Home Sharing Arrangements "Subletting" under Residential Tenancies Legislation?' (2016) 25(3) *Australian Property Law Journal* 183, 184 ('Trouble in Paradise'). In *Li v Yang*, for instance, Member Boddison observed that although all the factors of the case suggested 'that the Airbnb arrangement did not create a tenancy agreement', she was 'bound to follow' *Swan* (n 11), leading to the categorisation of the relationship as a sublease: *Li v Yang* [2018] VCAT 293, [33], [36].

13 See, eg, *Alex Taxis Pty Ltd v Knight* [2016] VCAT 528, [27]–[31] ('*Alex Taxis*'). See also Bill Swannie, 'Airbnb and Residential Tenancy Law: Do "Home Sharing" Arrangements Constitute a Licence or a Lease?' (2018) 39(2) *Adelaide Law Review* 231, 245 ('Airbnb and Residential Tenancy Law').

14 Swannie, 'Trouble in Paradise' (n 12) 184.

15 For the purposes of this article, the legal category 'rental agreements' includes both leases and licences.

16 See Swannie, 'Trouble in Paradise' (n 12) 189.

17 Melissa Pocock, 'Blurred Lines or Stark Contrasts: Are By-Laws to Restrict Short-Term Holiday Letting Permissible in Queensland Community Titles Schemes?' (2021) 44(4) *University of New South Wales Law Journal* 1524, 1551.

of possession *should* be considered in the analysis. Given that the applicable common law test to differentiate a lease relationship from a licence is whether exclusive possession is granted,[18] the determination should evaluate the elements of possession: physical control (*factum possessionis*), and relevant intention (*animus possidendi*). Possession is a property law artefact and, as such, its transfer and verification should consider property law doctrines, not exclusively contract law principles — as is the current approach. This approach reflects a phenomenon known as the 'contractualisation' of lease law, referring to 'the favouring of the contractual nature of the lease and a subversion of the proprietary side'.[19] According to Nicholas Shaw

> [a]pplying modern contractual doctrines to leases might not just be extending contract law, as an initial step, it may also interfere with the operation of property law principles and, more profoundly, the accepted mode of settling inconsistency between the two systems.[20]

Analysis of the elements of possession, thus, in the context of Airbnb, helps determine whether the host transfers possession of the property to the guest, and thus helps address the categorisation issue.

Taking the analysis of exclusive possession and the right to possess seriously, this article argues that the usual arrangement between the Airbnb host and Airbnb guest, unlike the conclusion reached in *Swan*, creates a licence relationship rather than a lease relationship. When the elements of possession are examined, it is possible to conclude that the Airbnb host does not transfer the right to possess the property but rather the right to use it. As a result, the Airbnb rental agreements between hosts and guests *should* be categorised as licences.

This article presents a normative argument developed around the common law distinction between leases and licences. Its primary focus is to provide an alternative approach for analysing this distinction in the Airbnb model and other similar platform-based models, rather than delving into the intricacies of state-level legislative and regulatory aspects operating in standard real property lease relationships, which vary across Australia.[21] Thus, this article aims to contribute to a national-level

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18 *Swan* (n 11) 85–6 [31]; *Street v Mountford* [1985] AC 809, 816 ('*Street*'). See also Swannie, 'Airbnb and Residential Tenancy Law' (n 13) 231.

19 Nicholas Shaw, 'Contractualisation and the Lease-Licence Distinction' (1996) 18(2) *Adelaide Law Review* 213, 213. See also Jack Effron, 'The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities' (1988) 14(2) *Monash University Law Review* 83, 84.

20 Shaw (n 19) 224.

21 Paul Latimer explains that examining the different Residential Tenancy Acts in Australia is problematic, 'as there is no uniform and national approach to the regulation of residential tenancies and there are differences in detail in each state and territory': see Paul Latimer, 'A Flatmate in a Sharehouse — A Tenancy or a Licence to Occupy?' (2020) 49(3) *Australian Bar Review* 506, 507. Latimer later notes that there is also an absence of uniform national approach to categorising and regulating short-term rental accommodations: at 524.

discussion of common law principles that should apply to the categorisation issue around platform-based, accommodation-focused legal models such as Airbnb.

This article is divided into three parts, besides the introductory and concluding remarks. Part II explores the article's theoretical framework, which frames the discussion within platform-mediated models like Airbnb and focuses the analysis and argument of this article. Part III conceptually analyses the elements of exclusive possession together with the rights to possess and use. Lastly, Part IV applies the analysis to the Airbnb host-guest relationship in developing the article's argument.

II Theoretical Framework: The TMP-PUP Model

The Airbnb model is often associated with the so-called 'Sharing Economy'.[22] The Sharing Economy, however, is an obscure concept without technical legal meaning. It is an umbrella term that is used to describe multiple activities, businesses, and sectors without a clear conceptual delineation.[23] The multidisciplinary analysis of the phenomenon exacerbates this ambiguity. The Sharing Economy phenomenon has been examined and defined from various perspectives, narratives, and theoretical foundations across multiple disciplines.[24] Adopting a framework suitable for each area of analysis is, thus, necessary.

From a legal perspective, the term 'Sharing Economy' is a misnomer.[25] Transactions completed via the digital platforms frequently associated with this phenomenon, such as Airbnb, are not intended to 'share'. 'Sharing' refers to '*gratuitous transfer[s]* of one or more — but not all — property rights a person has in respect of a thing — an excludable resource'.[26] In contrast, the platform operator and the supplier of goods and services in the Sharing Economy transactions seek profit and expect payment for the services and goods provided. These actors are motivated by profit, not altruism. From a legal perspective, the Airbnb model is better described as a 'time-limited, monetary-consideration-based, profit-driven platform

22 See Michelle Maese, 'Rethinking Host and Guest Relations in the Advent of Airbnb and the Sharing Economy' (2015) 2(3) *Texas A&M Journal of Property Law* 481, 484.

23 See Ryan Calo and Alex Rosenblat, 'The Taking Economy: Uber, Information and Power' (2017) 117(6) *Columbia Law Review* 1623, 1670.

24 See Diaz-Granados and Sheehy (n 5) 1005–6.

25 Abbey Stemler, 'The Myth of the Sharing Economy and Its Implications for Regulating Innovation' (2017) 67(2) *Emory Law Journal* 197, 207.

26 Diaz-Granados and Sheehy (n 5) 1018 (emphasis added). This definition adopts Tony Honoré's incidents of ownership to define 'property rights': at 1010–12. According to Honoré, the standard incidents of ownership (or bundle of rights) include the rights to possess, use, income, capital, security, transmissibility, absence of term, and residuality: Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987) 166–79.

operator-user-provider' ('TMP-PUP') model.[27] The TMP-PUP model, a subcategory of the 'platform operator-user-provider' model ('PUP'), has been defined as

> a for-profit, triangular legal structure where two parties (Providers and Users) enter into binding contracts for the provision of goods (partial transfer of the property-bundle of rights) or services (ad hoc or casual services) in exchange for monetary payment through an online platform operated by a third party (Platform Operator) with an active role in the definition and development of the legal conditions upon which the goods and services are provided.[28]

The Airbnb model falls within this definition. Airbnb runs a for-profit enterprise in which hosts partially transfer the bundle of property rights to guests for accommodation purposes in exchange for monetary payment. The Airbnb platform enables this interaction, and Airbnb, a third party to the transaction with an active role in the definition of the legal conditions through which the accommodation takes place, operates the platform.

The TMP-PUP model is crucial to frame the discussion. It makes it possible to explain that the Airbnb model has three different actors with three distinct legal relationships. The actors are: (1) the platform operator, in this case Airbnb, 'which using technology provides aggregation and interactivity to create a legal environment by setting the terms and conditions for all the actors';[29] (2) the provider, the Airbnb host, 'who provides a good or service also abiding by the Platform Operator's terms and conditions';[30] and (3) the user, the Airbnb guest, 'who consumes the good or service on the terms and conditions set by the Platform Operator'.[31] In this triangular structure, Airbnb (the platform operator) plays a crucial role in the creation, execution, and termination of the legal relationships comprising the structure.[32] It creates the internal legal environment of the model. Using the Airbnb terms of service,[33] Airbnb establishes the rights and duties of the actors involved. It also aggregates information on listings, profiles and payment mechanisms, facilitates interactions between hosts and guests, provides customer support, and resolves disputes.[34]

The TMP-PUP model also explains the three legal relationships that are part of platform-based models such as Airbnb: (1) the platform operator-provider

27 See generally Diaz-Granados and Sheehy (n 5) 1032.

28 Ibid 1038.

29 Ibid 1028.

30 Ibid.

31 Ibid.

32 Ibid 1029–30.

33 See 'Terms of Service', *Airbnb* (Web Page, 25 January 2024) <https://www.airbnb.com.au/help/article/2908>.

34 See Dyal-Chand (n 6) 258, 297.

relationship; (2) the platform operator-user relationship; and (3) the provider-user relationship.[35] Taking the TMP-PUP framework, the Airbnb model involves: Airbnb as the platform operator; the host as the provider; and the guest as the user.

The transaction between the provider and the user is essential because the whole TMP-PUP model is designed to support this transaction.[36] It provides the revenue required to run the model and make a profit.[37] In the Airbnb model, this transaction refers to the partial transfer of the bundle of rights — notably the right to possess or the right to use — from the host to the guest ('core transaction').[38] For this transaction to occur, the host lists the property on the Airbnb platform and the interested guest must submit a request via the platform, the digital environment where the transaction occurs. Upon acceptance of the host and payment of the agreed price, the parties enter into a binding contract which defines the rights and duties of the core transaction.[39]

Importantly, apart from the specific conditions identified by the Airbnb host in the listing, Airbnb dictates the primary contractual conditions of the core transaction via the terms of service. In these terms, Airbnb defines the legal nature of the core transaction and the different rights and duties of the parties involved. The terms of service take the legal form of an electronic standard form contract (or electronic adhesion contract) and are usually incorporated in a browse-wrap agreement — those 'where the online host dictates that assent is given merely by using the site'[40] — or a click-wrap agreement — those where the user 'must click "I agree," but not necessarily view the contract to which she is assenting'.[41]

The TMP-PUP model, therefore, frames the discussion and focuses the analysis of this article. The issue this article addresses refers to the potential legal categorisation of the relationship between the Airbnb host (provider) and the Airbnb guest (user). This relationship involves correlative contractual rights and duties between the Airbnb host and the Airbnb guest, and a potential transfer of the right to possess the Airbnb property.

35 Diaz-Granados and Sheehy (n 5) 1028.

36 Juan Diaz-Granados, 'Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 1' (2022) 62 (Winter) *Jurimetrics* 197, 211.

37 Ibid.

38 Ibid.

39 '[I]n the TMP-PUP the goods and services are provided exclusively on a contract-basis': see Diaz-Granados and Sheehy (n 5) 1035.

40 *Berkson v Gogo LLC*, 97 F Supp 3d 359, 394 (EDNY, 2015).

41 Ibid 395.

III Conceptual Analysis: Exclusive Possession and the Right to Possession

Apart from being contract-based, the Airbnb core transaction involves a proprietary element.[42] As discussed above, the Airbnb host transfers to the Airbnb guest part of their bundle of rights in respect of the Airbnb property.[43] Primarily, these rights are: (1) the right to possess, which involves a substantial concentration of power; or (2) the right to use, where the concentration of power is weaker.[44] The transfer of one of these rights is central to the analysis. It defines the application of one of the legal categories comprising the lease-licence dichotomy.

It has been accepted that the central factor determining the application of one of these mutually exclusive categories — lease or licence — is whether the transferor gives the transferee the right to possess, resulting in exclusive possession of the property, or the right to use, allowing its use and enjoyment.[45] In *Swan*, Croft J explained that '[i]t is well accepted that, as a matter of law, the test to be applied to distinguish between a lease and a licence is whether or not what is granted is exclusive possession'.[46] While the transfer of the right to possess creates a lease, transferring the right to use creates a licence. Exclusive possession is therefore 'the *sine qua non* of any tenancy'.[47] A lease creates a proprietary interest and a right in rem on the transferee, whereas a licence creates a non-proprietary legal relationship, usually contractual, and a right in personam.[48] In *Radaich v Smith*, Windeyer J opined:

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42 Diaz-Granados and Sheehy (n 5) 1010, 1037.

43 See above Part II. For a discussion of the 'bundle of rights' perception of property, see: Shane Nicholas Glackin, 'Back to Bundles: Deflating Property Rights, Again' (2014) 20(1) *Legal Theory* 1, 9; JE Penner, 'The Bundle of Rights Picture of Property' (1996) 43(3) *UCLA Law Review* 711, 712; Juan Diaz-Granados, '"Standard Jural Relations of Ownership": A Novel Theoretical Framework Informed by Wesley Hohfeld and Tony Honoré' (2023) 49(2) *Monash University Law Review* 134, 134–6.

44 Brendan Edgeworth et al explain that substantial concentration of power over a thing is one of the factors differentiating property rights and contractual rights: Brendan Edgeworth et al, *Sackville and Neave Australian Property Law* (LexisNexis Butterworths, 10th ed, 2016) 9.

45 *Radaich v Smith* (1959) 101 CLR 209, 222 ('*Radaich*'); *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1, 8; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, 408; *Landale v Menzies* (1909) 9 CLR 89, 99–100 (Griffith CJ), 111–12 (Barton J); *Swan* (n 11) 85 [31].

46 Ibid.

47 Gray, 'Lease or Licence to Evade the Rent Act?' (n 10) 40.

48 Unless the licence is coupled with a grant or interest: see Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 154, 1288. Wesley Hohfeld explains that rights in personam avail against a determinate person or persons, while rights in rem avail against persons in general: Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 718.

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant.[49]

In his influential and generally accepted work on the 'standard incident of ownership', Tony Honoré provides valuable insights into the delineation of the right to possess and the right to use.[50] He argues that the 'standard incidents of ownership' are required to categorise a person as the 'owner' of the thing, as they refer to 'those legal rights, duties, and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system'.[51] The right to possess and the right to use are part of these incidents. Honoré defines the right to possess as the right to exclusive control of the thing,[52] which is consistent with the view that the right to possess is a right to exclude others from the thing.[53] He further explains that the right to use 'refers to the owner's personal use and enjoyment of the thing owned'.[54] Although conceptually accurate and taxonomically useful, further analysis is required to define the conceptual foundations to identify whether possession and the right to possess the Airbnb property are transferred in the Airbnb core transaction.

In the landmark case *Mabo v Queensland (No 2)*,[55] possession was defined as 'a conclusion of law defining the nature and status of a particular relationship of control by a person over land'.[56] In their leading work on possession, Frederick Pollock and Robert Samuel Wright add:

> possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law, whether necessary or not, that a possessor should be able to deal with his apparent interest in the fashion of an owner not only by physical acts but by acts in the law, and that as regards every one not having a better title those acts should be valid.[57]

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49 *Radaich* (n 45) 222 (Windeyer J) (emphasis in original).

50 Honoré (n 26) 166–8.

51 Ibid 161. This article adopts Honoré's approach to define the elusive concept of 'ownership' and 'owner'.

52 Ibid 166.

53 *Lewis v Bell* (1985) 1 NSWLR 731, 734 (Mahoney JA) ('*Lewis*').

54 Honoré (n 26) 168.

55 (1992) 175 CLR 1 ('*Mabo*').

56 Ibid 207 (Toohey J).

57 Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 19.

However, physical possession does not necessarily imply a right to possess (possession in law).[58] The physical relation is distinct from the legal relation.[59] Pollock and Wright differentiate three concepts of possession. One is the physical possession of the thing, another is its legal possession, and another is the right to possess.[60] The first concept — also known as custody or detention — refers to possession 'as an actual relation between a person and a thing, is matter of fact'.[61] Physical possession is prima facie evidence of legal possession and the right to possess.[62] The second concept applies to those situations where a person devoid of the right to possess is entitled 'for the time being to repel and to claim redress for all and any acts of interference done otherwise than on behalf of the true owner'.[63] An instance of this concept is when B steals A's coat. Once B has physical control of the coat, B has legal possession, even if it is wrongful.[64] Lastly, the right to possess refers to the incident of ownership.[65] In Pollock's and Wright's opinion, the right to possess 'is a normal incident of ownership', which 'can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed'.[66] Thus, following the previous example, after B has physical control of the coat, A will retain the right to possess, not so the physical possession.

This article assumes that the potential transfer of the right to possess as a result of the Airbnb core transaction includes physical possession of the property; namely, that guests acquire possession in law in all instances in which they receive possession in fact from hosts.[67] If the right to possess — an incident of ownership — is transferred in the Airbnb model, it is accompanied by the physical and legal possession of the property. The term possessor(s), thus, is used in this article to refer to the TMP-PUP actors possessing the Airbnb property with an immediate right of possession.

58 See 'it is the legal right to possession, not the physical fact of exclusive "possession" or occupation, that is decisive': *Western Australia v Ward* (2002) 213 CLR 1, 223 [503] (McHugh J) ('*Ward*'). See also *Kamidian v Holt* [2008] EWHC 1483 (Comm) [75].

59 Hohfeld (n 48) 721.

60 Pollock and Wright (n 57) 26–7.

61 Ibid 26.

62 See: *NRMA Insurance Ltd v B&B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273, 279; *Mabo* (n 55) 163 (Dawson J).

63 Pollock and Wright (n 57) 17.

64 Ibid 26–7. See also: *Newington v Windeyer* (1985) 3 NSWLR 555, 563 (McHugh JA); *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1015 [87] (Lord Millett).

65 See above n 50 and accompanying text.

66 Pollock and Wright (n 57) 27.

67 'When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, we have possession in law as well as in fact': Pollock and Wright (n 57) 16.

Possession and the right to possess are intrinsically related.[68] Possession can be the cause or the consequence of the right to possess.[69] The law, first, may recognise a right to possess in favour of a person acquiring physical possession, even wrongfully (possession as *cause*).[70] Alternatively, a transfer of the right to possess between two contractual parties entitles the transferee to possess the property (possession as consequence). The Airbnb core transaction falls into the latter.

The crux of the analysis in both situations, possession as cause and possession as consequence, is exclusive possession.[71] The difference lies in the subsequent test to determine exclusive possession. For one thing, the analysis of possession as cause, usually conducted in cases of adverse possession and possessory title, has traditionally examined the elements of possession: factual or physical control (*factum possessionis*), and relevant intention (*animus possidendi*).[72] These elements are discussed below. For another thing, following the 'contractualisation' of lease law, the analysis of possession as consequence requires verifying the parties' intention to transfer exclusive possession.[73] Intention prevails when it is clear and, as a result, no categorisation issue arises in this situation.[74] The problem emerges when the intention of the contractual parties, in this case the Airbnb host and the Airbnb guest, is unclear.[75] It has been established that when the parties' intention is disputed, it is not decisive whether the contract classifies the relationship as a lease or a licence, or whether the right transferred is categorised as a right to possess or a right to use.[76] In this situation, the courts must follow contract law principles of

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68 Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co, 1881) 214:

> Every right is a consequence attached by the law to one or more facts which the law defines … [w]hen a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights … [t]he word 'possession' denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation.

For an in-depth discussion of the intrinsic relation between possession and the right to possess see Albert S Thayer, 'Possession and Ownership' (1907) 23(2) *Law Quarterly Review* 175.

69 Thayer (n 68) 187.

70 See above n 64 and accompanying text.

71 See: *Bayport Industries Pty Ltd v Watson* (2006) V ConvR 54-709 [39] ('*Bayport*'), quoting *Powell v McFarlane* (1977) 38 P & CR 45, 470–2 (Slade J) ('*Powell*'); *Swan* (n 11) 85–6 [31], quoting *Lewis* (n 53) 734–5 (Mahoney JA).

72 See *Bayport* (n 71) [39].

73 *Swan* (n 11) 85–6 [31], quoting *Radaich* (n 45) 221–3; *Street* (n 18) 827.

74 *Swan* (n 11) 85–7 [31]–[32].

75 Ibid.

76 *Radaich* (n 45) 214 (McTiernan J), 221–3 (Windeyer J); *Swan* (n 11) 85–6 [31]; *Western Australia v Brown* (2014) 253 CLR 507, 524 [43].

construction to determine the substance and effect of the instrument, 'having regard to relevant surrounding circumstances'[77] (the test of possession as consequence).[78]

The test of possession as consequence, however, falls short in the Airbnb context and, therefore, is insufficient to identify exclusive possession accurately. First, the application of the test of possession as *consequence* independently considered has been uncertain in the Airbnb context. Using the same test, Croft J in *Swan* took a different approach from relevant precedents that existed at the moment of the decision.[79] For instance, in *Alex Taxis Pty Ltd v Knight*,[80] Member Kirmos concluded: 'I do not accept that offering rooms on Airbnb constitutes assigning or sub-letting, or purporting to assign or sub-let, the whole or part of the premises.'[81] This situation illustrates what Member Proctor accurately noted in *Pettit v Murray Valley Aboriginal Cooperative*: '[t]he Court's decision [in *Swan*] that the agreement between the parties in the context of an AirBnB arrangement was a residential tenancy agreement is an example of broad application of the "exclusive possession test"'.[82] Similarly, legal scholars have flagged the inherent uncertainty of the test.[83]

Second, *Swan* showed that even when the parties' intention is not contested, the courts can still question the legal categorisation of the agreement. As explained below,[84] in this case, the Airbnb host and the Airbnb guest agreed that the accommodation arrangement was a licence, following the terms of service established by Airbnb. Ignoring this factor, the Court questioned and ultimately modified the legal categorisation agreed upon by the host and the guest. Consequently, the situations in which the courts can construe the rental agreement to determine intention for categorisation purposes are also uncertain.

Finally, the application of the test is problematic in TMP-PUP models like Airbnb. As discussed above, these models are structured as a tripartite set of contractual relationships, where the platform operator dictates the main conditions of the agreements through the terms of service.[85] This situation adds complexity to

77 *Swan* (n 11) 91 [40].

78 See: *Radaich* (n 45) 214 (McTiernan J), 220–1 (Menzies J); *Rial v Gray* [2023] VSC 302 [49]–[51], quoting Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources — The Laws of Australia* (Thomas Reuters, 2013) 545 [25.3.620].

79 See Swannie, 'Airbnb and Residential Tenancy Law' (n 13) 245.

80 [2016] VCAT 528. In this case, factually similar to *Swan* (n 11), the tenant advertised rooms on the rented premises for accommodation purposes on Airbnb and the landlord applied for an order of possession on the basis that the respondent had sublet the premises without the landlord's consent: at [1]–[6].

81 Ibid [31].

82 [2022] VCAT 85 [64].

83 See, eg, Swannie, 'Airbnb and Residential Tenancy Law' (n 13) 242.

84 See below n 126 and accompanying text.

85 See above Part II.

the determination of the parties' intention which does not exist in traditional rental agreements.

As a result, solutions must be found elsewhere. Property law arises as a clear alternative, considering exclusive possession is an artefact of property law. The proprietary dimension of the analysis can be observed, this article argues, through the incorporation of the test of possession as cause; that is, via the introduction of the elements of possession into the analysis. This approach reconsiders the proprietary nature of possession and the role of the 'contractualisation' of lease law underpinning the test of possession as consequence.[86]

It is argued that the elements of possession — the test of possession as cause — can effectively supplement the test of possession as consequence in the context of TMP-PUP models, such as Airbnb. The common law has recognised these elements as essential factors to determine exclusive possession — the final aim of the lease-licence dichotomy analysis — in cases of adverse possession and possessory title.[87] The elements of possession are twofold: factual or physical control (*factum possessionis*), and relevant intention (*animus possidendi*).[88] These elements were explained in detail in *JA Pye (Oxford) Ltd v Graham* ('*JA Pye*'):

> there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). … [T]here has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession.

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86 See above n 19 and accompanying text.

87 See, eg: *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56 ('*Whittlesea*'); *Forrester v Bataille* (2003) 175 FLR 41 ('*Forrester*'); *Bayport* (n 71).

88 These elements resemble the work and thinking of Friedrich Savigny, one of the most influential figures of legal thinking of the nineteenth century: Richard A Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 *Virginia Law Review* 535, 535. Savigny considered that '*possessio* consisted of a physical element called "*corpus possessionis*", namely, effective control, and a mental element, which he called "*animus domini*" or "*animus sibi habendi*," the intention to hold as owner': RMW Dias, 'A Reconsideration of Possessio' (1956) 14(2) *Cambridge Law Journal* 235, 236 (emphasis in original).

> It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.[89]

The first element of possession, factual control or *factum possessionis*, refers to the exercise of an appropriate degree of physical control.[90] To satisfy this requirement, it is necessary 'that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.'[91] Factual control, thus, depends on the specific circumstances of each case.[92] Examples of factual control include building a fence,[93] enclosing and cultivating strips of land,[94] closing a fishing net to obtain possession of the fish caught,[95] and using salvage work vessels while keeping position through means of buoys to obtain control of a shipwreck.[96] Possession does not require immediate physical custody, provided the possessor 'enjoys both the means and the mentality of some immediate control'.[97] Charles Harpum, Stuart Bridge and Martin Dixon explain:

> Even if the grantee is exclusively entitled to occupy the premises, in the sense that no one else is entitled to live there, he may not have exclusive possession because the grantor may retain control of the premises. Conversely, a grantee may have exclusive possession although he does not occupy the property himself but is in receipt of the rents and profits as a result of subletting it.[98]

If this element is applied to the analysis, the Airbnb guest must have a level of physical control comparable to that exercised by the owner, the Airbnb host, while interacting with or occupying the property to confirm that the Airbnb host has transferred the right to possess the property.

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89 [2003] 1 AC 419, 435–6 ('*JA Pye*'). This case was applied in *Whittlesea* (n 87) 78 [91] and *Forrester* (n 87) 419 [36].

90 *Powell* (n 71) 471.

91 Ibid. See generally Albert S Thayer, 'Possession' (1905) 18(3) *Harvard Law Review* 196.

92 *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, 288; *Powell* (n 71) 470–1. See also Comment, 'Tenant, Lodger, and Guest: Questionable Categories for Modern Rental Occupants' (1955) 64(3) *Yale Law Journal* 391, 393–4 ('Tenant, Lodger, and Guest').

93 *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464.

94 *Marshall v Taylor* [1895] 1 Ch 641.

95 *Young v Hichens* (1844) 6 QB 606.

96 *The Tubantia* [1924] P 78.

97 Norman Palmer, *Palmer on Bailment* (Sweet and Maxwell, 3rd ed, 2009) 136. See generally *Burnett v Randwick City Council* [2006] NSWCA 196.

98 Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Sweet and Maxwell, 8th ed, 2012) 753. See also: *Mabo* (n 55) 166; *Ward* (n 58) 228–9 [519]; *Allan v Liverpool Overseers* (1874) LR 9 QB 180, 191–2 (Blackburn J) ('*Allan*'); *R v The Assessment Committee of St Pancras* (1877) 2 QBD 581, 588; *Elwes v Brigg Gas Company* (1886) 33 Ch D 562, 568–9.

The second element of possession, relevant intention or *animus possidendi*, 'involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor'.[99] *Animus possidendi* has, in turn, two additional elements: subjective intention to possess, and an outward manifestation indicating the subjective intention.[100] As a result of the second element, following Lord Hope in *JA Pye*, 'the best evidence of intention is frequently found in the acts which have taken place'.[101] The application of this element to the Airbnb analysis means that an Airbnb guest should have relevant intention to exclude the world at large, including the Airbnb host, and show an outward manifestation of this intention.

To sum up, the existence of possession in the Airbnb model can be further determined by the factual control of the property and the intention of the putative possessor, the Airbnb guest, to exclude others, including the Airbnb host.

Relevantly, the right to use, independently considered, is typically regarded as a licence.[102] Like Honoré's right to use, a licence is considered a permission, usually contractual, to enjoy personal or real property within the limits of an authorisation.[103] Unless the licence is coupled with a grant of an interest, the permission does not create a proprietary interest.[104] The right to use is a right in personam, often contractual in nature, rather than a right in rem in the form of a proprietary interest, such as the right to possess.[105] Considering its contractual nature, the essential elements for the formation of contracts constitute the elements required for the creation of a contractual licence; that is, the licensor and the licensee must have legal capacity and agree on the transfer of the right to use for consideration.

99 *Powell* (n 71) 471–2.

100 *Smith v Waterman* [2003] All ER (D) 72 [19]; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, 87.

101 *JA Pye* (n 89) 446. According to Kevin Gray and Susan Gray, this statement in *JA Pye* (n 89) means that 'possession is necessarily reinforced by a demonstrable state of mind (or animus) which encapsulates the possessor's own perception of the permanence and defensibility of his rights in relation to the land': Gray and Gray (n 48) 154.

102 See *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 5 ('*King*').

103 Yet not all licences are strictly related to the use or enjoyment of the thing. For example, some real estate licences also allow to enter, traverse, or occupy the land of another person. Further, not all licences are contractual in nature: see Gray and Gray (n 48) 1288.

104 *Street* (n 18) 814.

105 See generally: *King* (n 102) 61–3; *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483.

IV Airbnb Core Transaction: Analysis

Analysing the Airbnb core transaction for categorisation purposes, which has been identified and explained above,[106] requires first an examination of the *Swan* decision, the leading precedent on the categorisation issue that this article examines. This article later evaluates the core transaction through the lens of the elements of possession, showing that typical Airbnb accommodation arrangements create a licence relationship between the host and the guest.

A *Swan v Uecker*

As noted earlier, *Swan* constitutes the leading common law analysis on the legal categorisation of the Airbnb host-guest relationship in Australia.[107] In this single-judge case, with Croft J exercising the jurisdiction of the Supreme Court of Victoria, the Court categorised the legal relationship between the Airbnb host and the Airbnb guest as a lease — specifically, a sublease.[108]

In this case, the respondents leased an apartment which they later listed on the Airbnb platform as a short-term rental. The apartment owners, the lessors, sought an order for possession, asserting that the respondents breached the terms of the lease by subletting the apartment.[109] VCAT heard the case first and found that the respondents did not grant exclusive possession to the Airbnb guests and, consequently, did not sublet the apartment but granted a licence. The Tribunal found that several factors contributed to characterising the agreement as a licence, including the intention of the parties — which was correctly incorporated in the Airbnb agreement as a 'licence' — the short-term nature of the Airbnb guests' stay, the payment method, the respondents' power to access the premises during the stay and force overstaying guests to leave, and the fact that the apartment continued to serve as the respondents' primary residence.[110] As a result, VCAT found that there was no basis for a possession order.[111]

On appeal, the Supreme Court of Victoria overruled VCAT's decision, finding the arrangement between the respondents and the guests to rent the entire apartment through Airbnb[112] was a lease and not a licence.[113] First, the Court did not find evidence to prove that the respondents could access the apartment during the Airbnb

106 See above n 38 and accompanying text.

107 See above n 11 and accompanying text.

108 *Swan* (n 11) 103 [75]. 'The legal test for creating a lease is essentially the same as that for creating a sublease': Swannie, 'Airbnb and Residential Tenancy Law' (n 13) 235.

109 *Swan* (n 11) 75–6 [2].

110 *Swan VCAT* (n 4) [41]–[46].

111 Ibid [48]–[49].

112 Ibid 82 [19].

113 Ibid 103 [75].

stay, a factor that would have supported the licence categorisation.[114] Second, the Court noted that the respondents' power to make an overstaying guest vacate the property is a power that arises from both leases and licences. Accordingly, this factor could not serve as a basis for classifying the short-rental agreement as a licence, as decided by VCAT.[115] Third, the Court observed that — contrary to VCAT's reasoning[116] — '[w]hether the tenants retained the rented premises as their principal residence is not relevant to the question whether an Airbnb guest had exclusive possession of that premises'.[117] Lastly, in contrast to VCAT's decision, Croft J found that retention of the apartment keys by the respondents was, in itself, 'not decisive in terms of the characterisation of the nature of the Airbnb guests' occupation'.[118] Therefore, according to the Court, the substance of the agreement reflected that the Airbnb guests enjoyed a right of exclusive possession.[119] In this respect, Croft J held:

> The evidence and the provisions of the Airbnb Agreement indicate, in my view, that although the occupancy granted to the Airbnb guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a 'lodger' or an hotel guest. Rather, it was the possession — exclusive possession — that would be expected of residential accommodation generally. In the present circumstances, it is no different from the nature of the occupancy — the exclusive possession — granted to the tenants, the Respondents, under the Lease from the Applicant. They have, by means of the Airbnb Agreement, effectively and practically passed that occupation, with all its qualities, to their Airbnb guests for the agreed period under the Airbnb Agreement.[120]

The Court ultimately found that the respondents sublet the apartment when they rented the property through the Airbnb platform and, as a result, were in breach of the lease agreement they had concluded with the lessor, the property owner.[121]

B *Application of the Elements of Possession to the Airbnb Core Transaction*

If the Court had considered and analysed the elements of possession — that is, the proprietary dimension of the transaction — rather than focusing exclusively on its contractual analysis, it could have arrived at a different conclusion: that the Airbnb core transaction creates a licence relationship and not a lease.

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114 Ibid 96 [53], 98–9 [56], [59].

115 Ibid 80 [17], 95–6 [51], 101 [68].

116 Ibid 102 [73].

117 Ibid 80–1 [17].

118 Ibid 98 [57].

119 Ibid 93 [46].

120 Ibid.

121 Ibid 103 [75].

The Airbnb terms of service in Australia categorise the core transaction as a 'limited license to enter, occupy, and use the Accommodation'.[122] If this provision represents the intention of the Airbnb host and the Airbnb guest, the licence categorisation should prevail. This accords with the VCAT's findings.[123] However, and as *Swan* exemplifies,[124] the characterisation of the agreement itself is not determinative.[125] If the provision does not reflect the parties' intention, or if their intention is unclear as to what right is transferred and what legal relationship is created, then the licence categorisation is not conclusive and further analysis is required. Problematically, *Swan* also showed that even in those cases where the intention of the Airbnb host and the Airbnb guest is not disputed, the Court could question and ultimately modify the legal categorisation agreed upon by the contractual parties. As Swannie explains:

> it appears clear that neither the tenant in the *Swan* decision, nor any Airbnb guests, intended (or expected) to create a tenancy relationship, with all the statutory rights and duties this would entail. … The parties were not seeking to 'escape the legal consequence of a [tenancy] relationship' — because neither of them intended this relationship.[126]

This test of possession as consequence, traditionally used to determine whether exclusive possession has been transferred, only examines the contractual dimension of the transaction, and is, therefore, insufficient to address the issue of categorisation in the Airbnb context. As a result, a reconsideration of the contractual analysis of the transaction vis-à-vis its proprietary components is required. The test of possession as cause arises as an additional test that helps address the issue for TMP-PUP models by supplementing the determination of possession and the associated transfer of the right to possess. It introduces the elements of possession into the analysis and, consequently, the proprietary dimension of the transaction, refocusing the 'contractualisation' of lease law.

As discussed above, the first element of possession, *factum possessionis*, refers to a degree of physical control comparable to the control the owner has while interacting with and occupying the property.[127] It amounts to a control of the 'premises as against all the world, including the owner'.[128] The holder of the right to possess

122 'Terms of Service', *Airbnb* (Web Page, 25 January 2024) [1.3] <https://www.airbnb.com.au/help/article/2908>.

123 *Swan VCAT* (n 4) [45].

124 See *Swan* (n 11) 95–6 [51]–[53].

125 See above nn 76–77. According to Denning LJ, 'the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it': *Facchini v Bryson* [1952] 1 TLR 1386, 1389–90, quoted in *Radaich* (n 45) 214 (McTiernan J).

126 Swannie 'Trouble in Paradise' (n 12) 187.

127 See above nn 90–92.

128 *BA Oil Co & Halpert* [1960] OR 71, 77.

is considered an owner pro tempore.[129] The second element, *animus possidendi*, indicates the intention 'to exclude the world at large',[130] which requires subjective intention and an outward manifestation of this intention.[131] It follows that the Airbnb guest should control, and intend to control, the Airbnb property as if he or she owned the property in order to correctly categorise the Airbnb host-guest relationship as a lease.[132]

The Airbnb guest, however, does not act as the property owner or intend to exclude the world at large as an owner would. The Airbnb guest is just that, a guest, who behaves and interacts with the property and the world at large as such. *Factum possessionis* remains with the Airbnb host, the party in control of the Airbnb property. Airbnb hosts, for instance, establish the conditions of use, define the amenities of the property, and instruct on the arrival and departure times. Conversely, Airbnb guests use a furnished, rent-adapted place for short-term stays according to the instructions and conditions established by hosts. Airbnb guests do not have the sufficient concentration of power necessary to have a right of possession, even if they exercise physical custody of the property. Although Airbnb hosts' factual control is more apparent in cases of co-occupation — namely, 'shared room' or 'private room' rental arrangements[133] — it is irrelevant that they do not occupy the premises.[134] Exclusive occupation is not synonymous with the right to possess.[135] Airbnb guests keep acting in law as guests and Airbnb hosts as owners even when an entire property is the object of the core transaction. Airbnb guests, therefore, fail to meet the first element of exclusive possession.

Additionally, Airbnb guests lack *animus possidendi*. Airbnb guests do not intend to act as property owners but as visitors. Similar to guests at inns or hotels, Airbnb guests know and agree to have temporary access to someone else's property.

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129 Gray and Gray (n 48) 334.

130 *Powell* (n 71) 471.

131 See above nn 99–101.

132 In *Street* (n 18) 816, referred to in *Swan* (n 11) 87–89 [33]–[35], the Court explained that

> [t]he tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. … A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land.

133 For an explanation of the different types of listings in Airbnb, see Tom Slee, 'Airbnb's Business and Arguments about Data: Address to the Asper Review of International Business and Trade Law' (2018) 18(1) *Asper Review of International Business and Trade Law* 293, 299:

> One type is the "shared room" … A second listing type is the "private room," which is what many people think of when they think of Airbnb: it corresponds to renting out a spare room. The third type is the "entire home/apartment," which means that a guest has sole use of a complete living space.

134 See above n 98 and accompanying text.

135 Ibid.

They rent the Airbnb property accepting that a reasonable degree of intervention by the Airbnb host is possible.[136] Airbnb guests do not intend to exclude the world at large, including the host, but to peacefully enjoy the property for a short time. As Nettle JA opined in *Genco v Salter*

> I doubt that a paying guest in short term hotel style serviced apartment accommodation of two or three days' duration would be a "lessee" or "tenant" within the meaning of the definition. … Usually, the owner of an hotel retains dominion over a hotel room or suite with right to enter for cleaning and other purposes and power to forbid the guest from allowing others to stay there. Depending on the facts, the same considerations would apply to a guest taking short term hotel style accommodation for a period of a few days in a serviced apartment.[137]

Even if the Airbnb guest's subjective intention differs, its outward manifestation is that of a non-owner. Airbnb hosts, Airbnb guests, and the world in general, supported by the Airbnb terms of service, acknowledge that a limited licence characterises the Airbnb core transaction. Airbnb's business model and legal structure revolve around the idea of short-term accommodation, similar to hotels and inns, which explains why Airbnb is a direct competitor of hotels and has disrupted the short-term accommodation market.

Further, the Airbnb host does not intend to create a proprietary interest or an estate on the Airbnb guest but to grant a contractual right to use the property for a limited period. Correspondingly, Airbnb guests have no intention to acquire an interest of a proprietary nature, just like hotel guests. They attempt to gain access to a property owned and controlled by someone else and use it temporarily without trespassing. The Airbnb host's permission to use the Airbnb property 'only makes an act lawful which would otherwise be unlawful'.[138] The intention of the Airbnb host and the Airbnb guest is, therefore, to transfer and acquire, respectively, a contractual right to use the Airbnb property on a temporary basis. Airbnb guests, thus, fail to satisfy the second element of exclusive possession.

Considering the analysis must be conducted on a case-by-case basis,[139] courts may conclude that an Airbnb guest acts as an owner in terms of control and intention in particular cases.[140] However, multiple factors that have been recognised as indicative of the transferor's general control of the property are usually found in the Airbnb core transaction. These factors are as follows: (1) the property owner resides in the

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136 The Airbnb guest is legally comparable to a lodger, who 'has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation': *Allan* (n 98) 192 (Blackburn J).

137 *Genco v Salter* (2013) 46 VR 507, 514 [28].

138 *Street* (n 18) 816. See also *Thomas v Sorrell* (1673) 89 ER 100, 101.

139 See above nn 92, 101 and accompanying text. For instance, the decision in *Swan* was limited to the facts of that case. According to Croft J, the case addressed the legal character of that particular Airbnb arrangement: *Swan* (n 11) 104 [80].

140 See, eg, *Swan* (n 11).

same premises as the occupant; (2) both the owner and the occupant co-occupy the premises; (3) the owner retains a key to the rented property; (4) the parties intend to create a limited licence; (5) the premises are furnished; (6) towels and linens are supplied; (7) public utilities are provided; and (8) the host has the power to accept new guests.[141] Each of these factors often characterises the Airbnb core transaction, rejecting, again, the idea that the Airbnb guest has exclusive possession of the Airbnb property.

If the *Swan* decision is analysed through the lens of the elements of possession, it can be argued that, first, the respondents' power to make an overstaying guest leave the property, contrary to Croft J's position,[142] *is* indicative of a sufficient degree of physical control comparable to that of the owner to exclude the world at large (*factum possessionis*). Further, the respondents defined the conditions of use of the property, including restrictions on noise, rules about the use of the apartment amenities, and a stringent non-smoking policy.[143] They also established the services and facilities offered, including the possibility to provide tourist information to guests.[144] These factors, again, evince that the *factum possessionis* remained with the respondents.

Second, the fact that the respondents retained the property as their principal residence *is* a relevant question to determine whether the Airbnb guest had exclusive possession of the premises. This factor suggests that the Airbnb guests did not have the intention required to have exclusive possession (*animus possidendi*) but, instead, intended to act as visitors rather than owners. A lease usually involves the use of the property as 'usual residence' with an expectation of 'continued occupation'.[145] Similarly, '[t]he threshold physical requirement for possession is complete and absolute dominion rather than a temporary or fleeting control.'[146] These characteristics are absent in short-term rental agreements, especially those 'for days or even hours', which Croft J deemed had the potential of creating a lease.[147]

Third, the occupation of the entire apartment by the Airbnb guests, which allows them to stay on the premises without the physical presence of the respondents, is not indicative of exclusive possession, as Croft J accepted.[148] As explained above, exclusive possession — particularly its element, *factum possessionis* — does not require immediate physical custody.[149] Lastly, the fact that the respondents retained the keys to the apartment indicates factual control and relevant intention and, as

141 See: *Parkins v Westminster City Council* [1998] 1 EGLR 22; 'Tenant, Lodger, and Guest' (n 92) 393–4.

142 *Swan* (n 11) 95–6 [51].

143 *Swan VCAT* (n 4) [23]–[24]; *Swan* (n 11) 82 [20]–[21].

144 *Swan* (n 11) 82 [21].

145 *Alex Taxis* (n 13) [30].

146 Samantha Hepburn, *Australian Property Law* (LexisNexis, 4th ed, 2018) 67.

147 *Swan* (n 11) 92 [42].

148 Ibid 96 [53].

149 See above n 97.

a result, *does* suggest that the respondents retained exclusive possession of the apartment.

If these factors, which represent the proprietary dimension of the transaction, are considered together with the characterisation of the relationship as a licence by the Airbnb Terms of Service — the contractual dimension that prima facie reflects the intention of the respondents and the Airbnb guests — it can be concluded that these parties created a licence relationship rather than a lease.

The preceding analysis suggests that, as a general rule, an Airbnb host does not transfer the right to possess the Airbnb property to the Airbnb guest and so prevents the creation of a lease. Instead, the Airbnb host transfers a right to use the Airbnb property, creating a licence relationship in which the Airbnb host acts as a licensor and the Airbnb guest as a licensee.

V Conclusion

The Airbnb model — a type of TMP-PUP model — has disrupted the accommodation industry. It has significantly affected the traditional short-term rental business and the legal arrangements necessary for its success. The influx of Airbnb rentals has created an alternative market in which individuals offer their homes or private investment properties via a digital platform for accommodation purposes. A technology-based triangular legal model supports this new accommodation option. Unlike the traditional interaction between inns/hotels and guests, a third actor, Airbnb, intermediates the host-guest relationship. Airbnb operates the platform through which hosts and guests connect and interact, playing an essential role in the creation, execution, and termination of the legal relationships that comprise the model. It aggregates supply and demand, facilitates the interaction — including dispute resolution mechanisms — between the parties, provides customer support, and dictates the terms and conditions that create the internal legal environment of the model.

The disruptive nature of the Airbnb model has also created significant issues in law. One of the most critical issues is the legal categorisation of the relationship between the Airbnb host and the Airbnb guest as a lease or a licence. This article reconsiders the analysis and determination of the lease-licence dichotomy in the context of the Airbnb model. It argues that the analysis of exclusive possession, the common law test to differentiate a lease relationship from a licence, should consider the elements of possession: physical control (*factum possessionis*) and relevant intention (*animus possidendi*). These elements represent the proprietary dimension of an analysis that has been focused on the contractual aspects of the transaction, a reflection of the 'contractualisation' of leases.

Taking the leading precedent in *Swan*, this article argues that Airbnb guests, in general, and the Airbnb guests in *Swan*, in particular, do not satisfy these elements. Airbnb guests do not control the Airbnb property as owners, nor intend to exclude the world at large as owners would. The interaction these actors have with the property,

the hosts, and the world at large is fundamentally different; it is that of persons with the level of control and intention of visitors, similar to hotel guests. Airbnb guests do not have the concentration of power required to demonstrate exclusive possession, even when they have sole custody of the property. The absence of these elements prevents the transfer of exclusive possession of the Airbnb property and, consequently, precludes the existence of a lease.

Contrary to Croft J's findings in *Swan*, this article finds that the Airbnb core transaction usually grants a right to use the Airbnb property, thereby creating a licence relationship between the Airbnb host and the Airbnb guest. The scope and substantive content of this categorisation differ significantly from the scope and content of a lease. It makes the Airbnb host-guest relationship purely contractual, rather than proprietary, and creates rights and duties in personam, not jural relations in rem. Consequently, the rights and duties applicable to licence relationships, not those characterising lease arrangements, *should* define the interaction between hosts and guests in the Airbnb model.

Taking the analysis of exclusive possession and the right to possess seriously, this article provides a fundamental, albeit overlooked, analysis to address the categorisation issue in the context of Airbnb and similar TMP-PUP models. Such is especially useful in the current state of affairs, where the High Court has yet to test the approach set out in *Swan*. It offers judges and adjudicators an analytical framework that advances the common law understanding of platform-based models that, like Airbnb, are increasingly dominant in the Australian accommodation market.

*Nina Cheles-McLean**

SEX, MONEY AND THE LAW: FINANCIAL DISCRIMINATION AGAINST SEX WORKERS

Abstract

Financial discrimination is a fundamental challenge for many sex industry workers seeking to earn a living from their chosen profession. It occurs when lawful businesses are denied the banking services required to operate, such as business bank accounts and merchant facilities. Despite the prevalence of media reports and sex worker advocacy, there is a paucity of legal research on this type of discrimination. This article contributes to addressing this gap, drawing on doctrinal research and a qualitative study to explore sex industry workers' experiences of financial discrimination and investigate remedies. It finds that sex industry workers are sometimes discriminated against by financial institutions on the basis of their occupation. This discrimination can force sex industry workers into the cash economy, and compromises their financial security, reputation, mental health, and physical safety. There is no certain legal remedy for sex industry workers who are unjustifiably denied financial services — analysis of banking and anti-discrimination law shows banks can likely discriminate with impunity. While there is no single solution to this problem, anti-discrimination laws should be strengthened to promote financial inclusion. This would involve introducing a carefully drafted protected attribute, which offers substantive protection to the full spectrum of workers within the sex industry.

I Introduction

Australia is currently a leading jurisdiction in sex workers' rights,[1] with multiple states and territories decriminalising sex work and recognising it as a legitimate form of labour. Despite this significant law reform, sex workers

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1 In this article, 'sex work' refers to the provision of sexual services, including sexual intercourse with, or masturbation of, another person, for financial gain: see Linda Selvey et al, *Western Australian Law and Sex Worker Health (LASH) Study: A Summary Report to the Western Australian Department of Health* (Report, 2017) 2–3.

continue to experience high levels of stigma and discrimination, with individuals and institutions treating sex work as a social problem, rather than an occupation. This article focuses on financial discrimination against sex workers, whereby banks and payment service providers deny basic banking services to lawful sex industry businesses based on discriminatory policies and practices. Part III explains the societal problem of stigma and discrimination against sex workers, including financial discrimination. Part IV investigates whether financial service providers can legally refuse to serve sex workers. This part focuses on key issues emerging in anti-discrimination law and identifies the limited scope of the 'protected attributes' as the most significant barrier to accessing legal protection from discrimination. It will be argued that the law does not adequately protect sex workers, and that in many instances, financial institutions can discriminate without legal consequences. Part V summarises the findings of a qualitative study on sex industry workers' experiences with financial service providers. It will be shown that 'de-banking' can force sex workers into the cash economy, and compromise their financial security, reputation, mental health, and physical safety. Part VI draws on the problems uncovered in Parts III to V and explores options for targeted law reform to mitigate the financial exclusion of sex workers. The issues that emerge from financial discrimination are complex and do not lend themselves to easy solutions. However, if anti-discrimination protections for sex workers are strengthened, Australia could present a global best practice model for holistically advancing sex workers' rights, beyond decriminalisation.

II Method

The framing of this article acknowledges sex work is work and that sex workers are entitled to the same rights as other workers and business owners. The research question for this article therefore asked: 'what are the challenges for sex industry workers and businesses in accessing financial services, and what remedies, or law reform, is required to improve access?' Answering this question involved a qualitative study by way of interviews, document analysis, investigating remedies and identifying areas for law reform.

The catalyst for this research was the author's volunteer work with Sex Work Law Reform Victoria ('SWLRV'), a sex worker led organisation advocating for equality for sex workers. SWLRV has received numerous complaints of financial discrimination from sex industry workers and assisted some workers to pursue formal complaints. SWLRV has also undertaken extensive advocacy work to raise awareness of financial discrimination against sex workers. Assisting SWLRV with this work led the author to identify a lack of academic research on this topic, thereby informing the research question for this article.

The qualitative study involved interviewing sex industry workers about their experiences with financial service providers, to gather information on the circumstances in which discrimination was occurring and its consequences. Ethics approval was obtained through the Monash University Human Research Ethics Committee, Project ID 31402. Five in-depth semi-structured interviews were conducted, between February and May 2022. The participants were people currently working

in the sex industry, including three private sex workers, one brothel owner and one escort agency owner. One of the private sex workers had also operated a brothel and escort agency, and drew on those experiences. Two participants were female and three were male. Four were based in Victoria, and one in New South Wales.

Participants were recruited through the SWLRV network and initially approached by a sex worker member of SWLRV. This allowed participants to be assured that participation would be non-judgmental, and their perspectives and experiences would be valued. Those who indicated an interest in the study were then emailed by the author and agreed to participate on an anonymous and voluntary basis. The interviews comprised a series of open-ended questions that were designed to gather information about what financial services the participant required and their experiences with financial service providers. The questions were designed in consultation with a sex worker member of SWLRV and vetted for sensitivity. The use of semi-structured interviews allowed the author to build upon unexpected themes that emerged in the initial interviews, and modify questions for interviews that followed. Interviews were transcribed using software, then manually coded using a coding scheme that was developed according to common issues that emerged in the data. The author used inductive reasoning to analyse the data, drawing on the specific experiences reported by participants to uncover themes and patterns, and form general conclusions about how some members of the sex industry experience financial discrimination.

The chief limitation of the research was the small sample size (five participants based only in Victoria and New South Wales). The findings of the study are therefore not a reliable indication of the statistical prevalence of financial discrimination against sex industry workers. However, the in-depth qualitative interviews yielded useful information and insights into sensitive issues surrounding financial discrimination that could not have been uncovered by an industry-wide survey or other broad method of statistical analysis.[2]

III Discrimination against the Sex Industry

Sex work is a 'major source of income' for many people of all genders in Australia and around the world.[3] It is estimated that 20,000 sex workers operate in Australia in any given year,[4] the majority of whom are female.[5] Some academics and advocacy

2 André Queirós, Daniel Faria and Fernando Almeida, 'Strengths and Limitations of Qualitative and Quantitative Research Methods' (2017) 3(9) *European Journal of Education Studies* 369, 370.

3 Cecilia Benoit et al, 'Prostitution Stigma and its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers' (2018) 55 (4–5) *Journal of Sex Research* 457, 457.

4 Lauren Renshaw et al, 'Migrant Sex Workers in Australia' (Research Report No 131, Australian Institute of Criminology, 2015) 3, 9.

5 Ibid 8.

organisations (primarily radical feminists and faith groups on the Christian right), view sex work as inherently exploitative and see sex workers as victims of sexual violence rather than workers.[6] More commonly, sex work is recognised as a legitimate form of labour.[7] While sex work and its associated business activities (such as operating a brothel) have historically been suppressed or prohibited,[8] there is a clear trend towards the decriminalisation of sex work across Australian jurisdictions. Victoria, New South Wales, Queensland and the Northern Territory have now adopted the decriminalised model, while the Australian Capital Territory and Tasmania have partially decriminalised sex work.[9] Western Australia and South Australia are now the only states where sex work remains largely criminalised.[10]

Although thousands of sex workers now operate lawfully, the stigma associated with sexual services remains deeply ingrained in institutions and the general public.[11] This stigma perpetuates the idea that sex work is a social problem and that sex workers are morally deviant, untrustworthy, victims in need of rescue, or 'vectors of disease'.[12]

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6 See: Barbara Sullivan, 'Working in the Sex Industry in Australia: The Reorganisation of Sex Work in Queensland in the Wake of Law Reform' (2008) 18(3) *Labour and Industry* 73, 79; Graham Ellison, 'Criminalizing the Payment for Sex in Northern Ireland: Sketching the Contours of a Moral Panic' (2017) 57(1) *British Journal of Criminology* 194, 195.

7 Alice Orchiston, 'Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry' (2016) 21(4) *Sociological Research Online* 1, 2; Sheila Jeffreys, 'Prostitution, Trafficking and Feminism: An Update on the Debate' (2009) 32(4) *Women's Studies International Forum* 316, 316.

8 Barbara Sullivan, 'When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia' (2010) 37(1) *Journal of Law and Society* 85, 86.

9 *Sex Work Decriminalisation Act 2022* (Vic); *Disorderly Houses Amendment Act 1995* (NSW); *Sex Industry Act 2019* (NT); *Sex Work Act 1992* (ACT); *Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Act 2024* (Qld) ('*Decriminalising Sex Work Act* (Qld)'); *Sex Industry Offences Act 2005* (Tas).

10 *Prostitution Act 2000* (WA) ss 5–7, 9; *Summary Offences Act 1953* (SA) ss 25–6, pt 6; *Criminal Law Consolidation Act 1935* (SA) s 270.

11 University of New South Wales Centre for Social Research in Health, *Stigma Indicators Monitoring Project: Project Summary Phase 2* (Report, 2020) 3; Kahlia McCausland et al, '"It is Stigma that Makes My Work Dangerous": Experiences and Consequences of Disclosure, Stigma and Discrimination Among Sex Workers in Western Australia' (2022) 24(2) *Culture, Health and Sexuality* 180, 181; Zahra Stardust et al, '"I Wouldn't Call the Cops if I was Being Bashed to Death": Sex Work, Whore Stigma and the Criminal Legal System' (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 142, 143 ('Sex Work, Whore Stigma and the Criminal Legal System').

12 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections for Sex Workers in Australia* (Briefing Paper, February 2022) 1, 2 ('*Anti-Discrimination and Vilification Protections*'); Cecilia Benoit et al, '"I Dodged the Stigma Bullet": Canadian Sex Workers' Situated Responses to Occupational

These negative stereotypes lead to discrimination in areas including goods and services, healthcare, housing, employment, and policing.[13] In a recent survey monitoring stigma experienced by various groups (with a focus on healthcare), 96% of sex worker participants reported experiencing sex work related stigma or discrimination within the last 12 months, and '91% of participants reported any negative treatment by health workers'.[14] This incredibly high level of discrimination excludes sex workers from various spheres of public life and has a significant impact on mental health. A recent study on the relationship between stigma and mental health found sex workers 'anticipated stigma and negative judgements from most people if they disclosed their work'.[15] This led to 'a growing sense of "worthlessness" that their true experiences and stories could not be shared publicly'.[16]

A *Financial Discrimination*

Financial discrimination is an element of the wider discrimination against sex workers which has gained increased visibility in recent years. There has been considerable leadership and advocacy by sex worker groups, who are documenting and resisting financial discrimination.[17] This advocacy has caught the attention of the media, which is increasingly reporting on sex industry 'de-banking'.[18] De-banking refers to the refusal to provide an individual or business with basic banking services.[19] For sex workers and their businesses, this can mean being denied a basic business

Stigma' (2020) 22(1) *Culture, Health and Sexuality* 81, 82 ('Sex Workers' Responses to Stigma'); Stardust et al, 'Sex Work, Whore Stigma and the Criminal Legal System' (n 11) 143–4.

13 Linda Banach, 'Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination' (Research Report, November 1999) 6–7.

14 Centre for Social Research in Health, *Stigma Indicators Monitoring Project: Sex Workers* (Report, 2020) 1–2.

15 Carla Treloar et al, 'Rethinking the Relationship Between Sex Work, Mental Health and Stigma: A Qualitative Study of Sex Workers in Australia' (2021) 268 *Social Science and Medicine* 1, 4.

16 Ibid.

17 Zahra Stardust et al, 'High Risk Hustling: Payment Processors Sexual Proxies and Discrimination by Design' (2023) 26(1) *City University of New York Law Review* 57, 67 ('High Risk Hustling').

18 See, eg: Ayesha de Kretser, 'Sex Workers Slam Banks, Regulator Over Flawed Rules', *Australian Financial Review* (online, 16 January 2023) <https://www.afr.com/companies/financial-services/sex-industry-accuses-banks-austrac-of-discrimination-20230115-p5ccm1>; Sarah Simpkins, 'Ombudsman Slams Banks for Adult Industry Discrimination', *Investor Daily* (online, 13 September 2019) <https://www.investordaily.com.au/markets/45677-ombudsman-slams-banks-for-adult-industry-discrimination>; Sex Work Law Reform Victoria, Submission to Mike Callaghan, *Banking Code Review* (6 August 2021) 5 ('Banking Code Review Submission SWLRV').

19 *Flynn v Westpac Banking Corporation* [2022] ACAT 21, 1 [1] ('*Flynn*'); Zeynab Malakoutikhah, 'Financial Exclusion as a Consequence of Counter-Terrorism Financing' (2020) 27(2) *Journal of Financial Crime* 663, 669.

bank account and merchant facilities to take payment from clients. Some banks and specialist merchant services, such as National Australia Bank and SquarePay, have publicly stated they will not serve sex industry businesses.[20] However, Zahra Stardust et al have documented that financial service providers' policies more commonly contain vague prohibitions on sex or adult related activities and products, affording a wide discretion to refuse certain customers.[21] For example, PayPal prohibits transactions involving 'certain sexually oriented materials or services'.[22] Other similar service providers have no accessible policies prohibiting sex industry customers, although they are excluded in practice.[23] This has led individual sex workers and advocacy groups to publish online banking discrimination guides, indicating where their colleagues will be refused services.[24]

Although discrimination against sex workers is well-documented in other areas, the particular issue of financial discrimination has received scarce attention by academia, especially in the Australian context.[25] This can be partly explained by the tendency for sex work research to focus on 'issues of sexual health and violence',[26] with the practicalities of running a sex work business from a financial perspective

20 Amber Schultz, 'It's Sex Discrimination: Banks Strip Brothels and Escort Agencies of Their Rights', *Crikey* (online, 20 May 2020) <https://www.crikey.com.au/2020/05/20/discrimination-against-brothels-banks-report/>.

21 Stardust et al, 'High Risk Hustling' (n 17) 90.

22 'PayPal Acceptable Use Policy', *PayPal* (Web Page, October 2022) cl 2(i) <www.paypal.com/au/legalhub/acceptableuse-full>.

23 Three of the five sex industry workers interviewed by the author were refused services by financial service providers who did not have publicly available policies prohibiting sex industry customers: Interview with Brothel Owner (Nina Cheles-McLean, 19 April 2022) ('Interview with Brothel Owner'); Interview with Private Sex Worker (Nina Cheles-McLean, 18 February 2022) ('Interview with Private Sex Worker A'); Interview with Private Sex Worker (Nina Cheles-McLean, 29 March 2022) ('Interview with Private Sex Worker B').

24 See, eg: MissFreudianSlit, 'Sex Work Approved Payment Options' *SEXWORKER HELPFULS* (Blog Post, November 2018) <https://sexworkerhelpfuls.com/payment-options>; 'Financial Institutions: Which Ones Discriminate?', *Sex Work Law Reform Victoria* (Web Page, 31 January 2023) <https://sexworklawreformvictoria.org.au/financial-institutions-which-ones-discriminate/>.

25 Stardust et al, 'High Risk Hustling' (n 17) 63. For an examination of financial exclusion of the sex and adult industries in the American context, with a focus on payment platforms: see: Natasha Tusikov, 'Censoring Sex: Payment Platform's Regulation of Sexual Expression' in Mathieu Deflem and Derek Silva (eds), *Media and Law: Between Free Speech and Censorship* (Emerald Publishing, 2021) 63; Bianca Beebe, '"Shut up and Take My Money!": Revenue Chokepoints, Platform Governance, and Sex Workers' Financial Exclusion' (2022) 2 *International Journal of Gender, Sexuality and Law* 140; Lana Swartz, *New Money: How Payment Became Social Media* (Yale University Press, 2020) ch 4.

26 Renshaw et al (n 4) 1.

largely ignored.[27] The author is only aware of one journal article, written by Stardust et al in 2023,[28] which specifically addresses this issue in the Australian context. That article addresses the notable gap in Australian scholarship, bringing together sex worker accounts of financial discrimination, and a detailed analysis of what drives financial institutions to discriminate. Aside from the work of Stardust et al, the Eros Association has published a report documenting the high rates of financial discrimination against the adult industry in Australia, however this report focuses on adult store retailers rather than the sex industry.[29]

The issue of de-banking is a complex global problem, which is not limited to the sex industry. Financial exclusion of other populations and industries (including women,[30] African Americans,[31] refugees,[32] Muslim charities,[33] remittance service providers,[34] and low-income earners[35]) has been the subject of extensive commentary. De-banking is often attributed to low risk appetite of financial institutions (including risk of money laundering and terrorist financing), low client

27 Jo Weldon, 'Show Me the Money: A Sex Worker Reflects on Research into the Sex Industry' (2006) 9 *Research for Sex Work: Sex Work and Money* 12, 12–14; Alys Willman-Navarro 'Money and Sex: What Economics Should Be Doing for Sex Work Research' (2006) 9 *Research for Sex Work: Sex Work and Money* 18, 18–20.

28 Stardust et al, 'High Risk Hustling' (n 17). There are a small number of studies and articles which peripherally deal with financial discrimination against sex workers. See, eg, Sharon Pickering, JaneMaree Maher and Alison Gerard, *Working in Victorian Brothels: An Independent Report Commissioned by Consumer Affairs Victoria into the Victorian Brothel Sector* (Report, June 2009) 21–2, 56, which notes Victorian sex workers had difficulty securing housing loans and insurance despite earning high incomes, and recommended targeted assistance in financial planning for sex workers.

29 Stardust et al, 'High Risk Hustling' (n 17). Jarryd Bartle, *Financial Discrimination Against Adults-Only Businesses* (Report, October 2017).

30 See, eg, Stephen Tully, 'The Exclusion of Women from Financial Services and the Prospects of a Human Rights Solution Under Australian Law' (2006) 12(2) *Australian Journal of Human Rights* 53.

31 See, eg, Kristen Broady, Mac McComas and Amine Ouazad, 'An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services' (Research Report, 2 November 2021).

32 See, eg, Lene M P Hansen, *Serving Refugee Populations: The Next Financial Inclusion Frontier* (Guidelines for Financial Service Providers, November 2016).

33 See, eg, Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward* (Policy Brief No 72, August 2018) 2–3.

34 See, eg, Louis De Koker, Supriya Singh and Jonathan Capal, 'Closure of Bank Accounts of Remittance Service Providers: Global Challenges and Community Perspectives in Australia' (2017) 36(1) *University of Queensland Law Journal* 119.

35 See, eg, Therese Wilson, 'Consumer Credit Regulation and Rights-Based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians' (2012) 35(2) *University of New South Wales Law Journal* 501.

profitability and the cost of compliance,[36] reputational risk,[37] and discriminatory policies and practices.[38] Broadly speaking, the outcome of de-banking can lead to exclusion from the mainstream economy, as it forces 'people and entities into less regulated or unregulated channels',[39] ultimately contributing to the growth of the cash economy.[40] In 'highly banked' economies (where most people hold a bank account), financial exclusion has also been linked to social exclusion.[41] De-banked individuals can find themselves 'shut out of modern life', because basic banking services are 'a gateway to other products and services, like insurance, credit and mortgages'.[42] De-banking can also increase the risk of crime, as forcing a business to deal in cash encourages lower rates of tax compliance and heightens the risk of money laundering.[43] Even where a business has no links to criminal activity, the optics of dealing entirely in cash fosters misperceptions that the business is not complying with the law and entrenches stigma.[44] A cycle therefore emerges of stigma resulting in financial exclusion, which only further entrenches stigma.

IV Can Banks Legally Discriminate against Sex Workers?

The growing reports of financial discrimination against sex workers raises the question of whether banks are acting illegally when they refuse to serve sex industry businesses. There is no simple answer to this question, as it requires analysis of multiple intersecting laws which vary across the states and territories. The task

36 Tracey Durner and Liat Shetret, 'Understanding Bank De-Risking and its Effect on Financial Inclusion: An Exploratory Study' (Research Report, November 2015) 9–11.

37 De Koker, Singh and Capal (n 34) 127–8; Malakoutikhah (n 19) 669, 671.

38 Cătălin-Gabriel Stănescu and Asress Adimi Gikay, 'Introduction' in Cătălin-Gabriel Stănescu and Asress Adimi Gikay (eds), *Discrimination, Vulnerable Consumers and Financial Inclusion: Fair Access to Financial Services and the Law* (Routledge, 2021) 1, 3–6.

39 De Koker, Singh and Capal (n 34) 128, citing Financial Action Task Force, 'FATF Clarifies Risk-Based Approach: Case-By-Case, Not Wholesale De-Risking' (Statement, 23 October 2014); Malakoutikhah (n 19) 670.

40 Sharon Collard et al, 'Access to Financial Services in the UK' (Occasional Paper No 17, May 2016) 9.

41 Beatriz Fernández-Olit, Juan Diego Paredes-Gázquez and Marta de la Cuesta-González, 'Are Social and Financial Exclusion Two Sides of the Same Coin? An Analysis of the Financial Integration of Vulnerable People' (2018) 135(1) *Social Indicators Research* 245, 265.

42 Collard et al (n 40) 9.

43 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021: De-Banking' (Media Release, 29 October 2021) ('AUSTRAC Statement 2021'); see generally, Gamze Oz-Yalaman, 'Financial Inclusion and Tax Revenue' (2019) 19(3) *Central Bank Review* 107.

44 Interview with Private Sex Worker A (n 23); Penny Crofts and Jason Prior, 'The Proposed Re-Introduction of Policing and Crime into the Regulation of Brothels in New South Wales' (2016) 28(2) *Current Issues in Criminal Justice* 209, 215.

is further complicated by the fact that there is no case law on financial discrimination against sex workers, and little case law on financial discrimination against other groups which could assist in shedding light on the issue.[45] This part will therefore begin by discussing sex work laws and the relevant banking law. Key issues in the application of the various state and territory anti-discrimination laws will then be discussed. The application of anti-discrimination law is complicated by issues emerging across the legal landscape. Next, this part will examine anti-money laundering laws and counter-terrorism financing laws, including those contained in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (*'AML/CTF Act'*). Finally, these strands of law will be drawn together to consider the implications for sex workers who experience financial discrimination.

A *Sex Work and Banking Law*

The laws governing sex work are found at the state and territory level and differ across jurisdictions. In jurisdictions where sex work remains largely criminalised (South Australia and Western Australia), it is obvious that many sex workers will not receive banking services as a result of compliance concerns on the part of the bank.[46] However, the thousands of sex workers who operate lawfully should arguably be entitled to banking services.[47] Despite the necessity of banking services in contemporary life, there is surprisingly no such entitlement in law. The importance of financial inclusion has led a number of international jurisdictions, including the European Union and Canada, to recognise a right to a bank account.[48] However, no such right has been recognised in Australia,[49] and there is nothing in Australian

45 To the author's knowledge, there are only eight published cases brought against banks by customers claiming discrimination in the area of goods and services: *Evans v Lee* [1996] HREOCA 8 (*'Evans'*); *Keating v ANZ Banking Group Ltd* [1995] VADT 13; *Lomax v National Australia Bank Ltd* [2014] VCAT 348; *Cairns v ANZ Banking Group Ltd* [2016] NSWCATAD 165; *Webb v Commonwealth Bank of Australia* [2011] VCAT 1592; *Csizmadia-Estok v Bendigo Bank* [2006] VCAT 1566; *Gupta v HSBC Bank Australia Ltd* [2020] SACAT 60; *Flynn* (n 19).

46 Banks are not necessarily obligated to refuse services to business customers who engage in any unlawful conduct. For example, it can be assumed Crown Melbourne Ltd still receives banking services despite breaching Victorian gambling laws: Victorian Gambling and Casino Control Commission, *Decision and Reasons for Decision* (TRIM ID: CD/22/21465, 7 November 2022). The refusal of banking services to sex workers operating illegally perpetuates a 'two-tiered industry' and cements disadvantage: Stardust et al 'High Risk Hustling' (n 17) 134. However, anti-discrimination legislation in all jurisdictions permits discriminatory conduct that is necessary to comply with a statutory obligation. See, eg, s 75 of the *Equal Opportunity Act 2010* (Vic). Banks could potentially utilise this exception to refuse to serve sex workers operating illegally, in compliance with their obligation to make risk-based decisions under the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) ss 81–2.

47 Stardust et al, 'High Risk Hustling' (n 17) 132.

48 De Koker, Singh and Capal (n 34) 151–2.

49 Ibid.

banking law that compels a bank to provide basic services to individuals or lawful businesses. This means banks are free to pick and choose who can access their services and to terminate a customer's existing services, without giving reasons.[50] Banks must comply with their own terms and conditions, but these generally afford a wide discretion. For example, National Australia Bank's terms and conditions for its business products state that it may close a customer's accounts by notice in writing for any reason 'it deems appropriate'.[51] According to Louis De Koker, Supriya Singh and Jonathan Capal, this means that '[c]ustomers are generally powerless to prevent bank account closures'.[52] The Australian Banking Association's *Banking Code of Practice* contains some provisions dealing with inclusive banking that go beyond the requirements of the law.[53] Namely, cl 32 states that banks are 'committed to providing banking services which are inclusive of all people'.[54] However, cl 32 has very little practical effect and does not prevent banks from denying services to categories of people according to internal policies.[55]

B *Anti-Discrimination Law*

The silence on the rights of customers in banking law means that a bank's freedom to pick and choose who it will serve is only tempered by anti-discrimination law. Anti-discrimination legislation has been introduced in every state and territory, and at the federal level. These laws do not prohibit discrimination against all people in all circumstances. They only prohibit a 'person' (including a corporation) from discriminating against others because they possess certain protected attributes.[56] Further, these laws only prohibit discrimination whilst engaging in certain activities, such as providing accommodation, providing goods and services, or employing workers.[57] Protected attributes include race, religious belief, disability, age, gender identity

50 Mike Callaghan, *Independent Review of the Banking Code of Practice 2021* (Final Report, November 2021) 100–1; De Koker, Singh and Capal (n 34) 120, 135, 140; Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Financial Related Crime* (7 September 2015) 47.

51 National Bank Australia, *NAB Business Products* (Terms and Conditions, 3 March 2023) [1.14], [2.17], [3.22] <https://www.nab.com.au/content/dam/nabrwd/documents/terms-and-conditions/business/nab-business-products-tnc-oct-2021.pdf>.

52 De Koker, Singh and Capal (n 34) 135.

53 Australian Banking Association, *Banking Code of Practice* (1 March 2020); Callaghan (n 50) 92.

54 Callaghan (n 50) 92.

55 Ibid 100–1; *Australian Financial Complaints Authority Determination No 687972* (12 May 2020).

56 See, eg: *Interpretation of Legislation Act 1984* (Vic) s 38 (definition of 'person'): 'person includes a body politic or corporate as well as an individual'; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 277–8 ('*Christian Youth Camps*'); *Bell v iiNET Ltd* [2017] QCAT 114, [102] ('*Bell*').

57 See, eg: *Equal Opportunity Act 2010* (Vic) pt 4 ('*Equal Opportunity Act* (Vic)'); Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 41.

and sexuality.[58] Some, but not all, jurisdictions have protected attributes that apply to sex workers: 'lawful sexual activity' (Victoria and Tasmania); 'sex work activity' (Queensland); 'profession, trade or occupation' (Victoria); and 'employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work' (Northern Territory).[59] Formerly, 'lawful sexual activity' was the protected attribute applicable to sex workers in Queensland. Following recent legislative amendments, it has been replaced with 'sex work activity'.[60] Anti-discrimination legislation in New South Wales, Western Australia and South Australia currently contains no protections for sex workers.

Relevantly, all states and territories prohibit discrimination in the provision of goods and services,[61] and this includes financial services.[62] This means that banks and other financial services providers must comply with anti-discrimination law when they serve (or refuse to serve) customers. Further, the presence of 'attributed liability' provisions means a financial service provider can be liable when an employee refuses to serve a customer for discriminatory reasons.[63] To avoid liability, the financial service provider must show it took reasonable preventative action to avoid the discrimination.[64] Plainly, it would be very difficult for a financial service provider to invoke this defence where it has express policies or a widespread practice of denying services to particular categories of people (for example, sex workers).

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58 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 52; Rees, Rice and Allen (n 57) 46.

59 *Anti-Discrimination Act 1991* (Qld) ('*Anti-Discrimination Act* (Qld)') s 7(1); *Discrimination Act 1991* (ACT) ('*Discrimination Act* (ACT)') s 7(1)(p); *Equal Opportunity Act* (Vic) (n 57) ss 6(g), 6(la); *Anti-Discrimination Act 1998* (Tas) ('*Anti-Discrimination Act* (Tas)') s 16(d); *Anti-Discrimination Act 1992* (NT) s 19(1)(ec) ('*Anti-Discrimination Act* (NT)').

60 *Anti-Discrimination Act* (Qld) (n 59) s 7(I); *Decriminalising Sex Work Act* (Qld) (n 9) ss 4, 6.

61 *Anti-Discrimination Act 1977* (NSW) s 19 ('*Anti-Discrimination Act* (NSW)'); *Discrimination Act* (ACT) (n 59) s 53; *Equal Opportunity Act* (Vic) (n 57) s 44; *Equal Opportunity Act 1985* (WA) s 20 ('*Equal Opportunity Act* (WA)'); *Anti-Discrimination Act* (NT) (n 59) s 41; *Anti-Discrimination Act* (Qld) (n 59) s 46; *Equal Opportunity Act 1984* (SA) s 39 ('*Equal Opportunity Act* (SA)'); *Anti-Discrimination Act* (Tas) (n 59) s 22(1)(c).

62 See, eg, *Evans* (n 45).

63 *Anti-Discrimination Act* (NSW) (n 61) s 53(1); *Discrimination Act* (ACT) (n 59) s 121A(2); *Equal Opportunity Act* (Vic) (n 57) s 109; *Equal Opportunity Act* (WA) (n 61) s 161(1); *Anti-Discrimination Act* (NT) (n 59) s 105(1); *Anti-Discrimination Act* (Qld) (n 59) s 133(1); *Equal Opportunity Act* (SA) (n 61) s 91(1); *Anti-Discrimination Act* (Tas) (n 59) s 104(3). For an explanation of 'attributed liability' and how it differs from the common law principle of vicarious liability: see Rees, Rice and Allen (n 57) 826–7.

64 *Anti-Discrimination Act* (NSW) (n 61) s 53(3); *Discrimination Act* (ACT) (n 59) s 121A(3); *Equal Opportunity Act* (n 57) s 110; *Equal Opportunity Act* (WA) (n 61) s 161(2); *Anti-Discrimination Act* (NT) (n 59) s 105(2); *Anti-Discrimination Act* (Qld) (n 59) s 133(2); *Equal Opportunity Act* (SA) (n 61) s 91(2); *Anti-Discrimination Act* (Tas) (n 59) s 104(2).

C *Judicial Interpretation of Sex Worker Protected Attributes*

Although five of the seven state and territory anti-discrimination acts ostensibly protect sex workers, 'lawful sexual activity' and 'protection, trade, occupation or calling' are the only attributes that have been considered by a court or tribunal.[65] As will be argued in detail below, in these cases, the scope of the protected attributes was interpreted so narrowly that they were rendered almost inutile.[66] This reflects a wider problem regarding the application of anti-discrimination law. The High Court of Australia has acknowledged on several occasions that anti-discrimination law should be given a liberal interpretation in accordance with its beneficial purpose.[67] However, the judiciary has generally adopted a 'narrow and formalistic' approach to statutory interpretation in anti-discrimination matters.[68] As Beth Gaze and Belinda Smith explain, one aspect of this narrow approach is the judicial tendency to separate 'the named attribute from the activities or manifestations that are inherently associated with it', drawing an 'extremely narrow and artificial line around the protected scope'.[69] This reasoning was infamously applied in *General Electric Co v Gilbert*,[70] leading the United States Supreme Court to separate women and pregnancy, thereby allowing discrimination against a woman because they were pregnant. The High Court of Australia followed similar logic in the heavily criticised,[71] yet influential[72] case *Purvis v New South Wales*,[73] when it held that expelling a disabled school child due to misbehaviour inextricably linked with his disability was not discrimination — thus drawing an artificial line between the status of being disabled and its unavoidable manifestation.

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65 See: *Capocchi v West* [2020] TASADT 8 ('*Capocchi*'); *J v Federal Capital Press of Australia Ltd* [1999] ACTDT 2 ('*Federal Capital Press*'); *Dovedeen Pty Ltd v GK* [2013] QCA 116 ('*Dovedeen*').

66 See below nn 76–92 and accompanying text.

67 Gaze and Smith (n 58) 80–1, citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 362–5 (Mason CJ and Gaudron J), 378–9 (Brennan J), 383–4 (Deane J), 408–10 (McHugh J); *IW v City of Perth* (1996–7) 191 CLR 1, 12 (Brennan CJ and McHugh J), 27 (Toohey J), 35–6 (Gummow J), 52 (Kirby J) ('*IW*').

68 Gaze and Smith (n 58) 80; Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 21.

69 Gaze and Smith (n 58) 80.

70 429 US 125 (1976).

71 See, eg: K Lee Adams, 'Defining Away Discrimination' (2006) 19(3) *Australian Journal of Labour Law* 263, 264; Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Act 1992* (Cth)' (2009) 35 *Federal Law Review* 111.

72 For a discussion of the precedential value of *Purvis v New South Wales* (2003) 217 CLR 9 ('*Purvis*'), see Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3.

73 *Purvis* (n 72).

Surprisingly, there has been no substantive academic analysis of the few published discrimination cases involving sex workers. However, examination of these cases shows that the judicial tendency to narrowly interpret protected attributes — which was exemplified by *Purvis* — has also affected the interpretation of sex worker protected attributes. In the few sex worker discrimination cases that have been decided, the judge or tribunal member drew an artificial distinction between 'sex worker' and 'sex work'. The effect of this distinction is that discrimination is prohibited on the basis of a person's sex worker job descriptor, but not because a sex worker is performing sex work.[74]

This narrow interpretation is exemplified by the ruling of the Queensland Court of Appeal in *Dovedeen Pty Ltd v GK* ('*Dovedeen*').[75] The complainant in this case, referred to by the pseudonym 'GK', was a regular guest at the Drovers Rest Motel, and engaged in sex work there. On the last occasion she stayed there, she was told by the manager, Mrs Hartley, that she would not be allowed accommodation in future because she would not allow 'prostitution' in her motel. GK claimed direct discrimination on the basis of lawful sexual activity in the area of provision of accommodation.[76] Mrs Hartley claimed that she did not deny GK accommodation because she was a sex worker per se, but because GK intended to carry out sex work in the motel room.[77] Thus, the central issue in dispute was whether sex work itself came within the scope of 'lawful sexual activity'. Justice of Appeal Fraser held that 'lawful sexual activity' encompassed the status of being a sex worker, but did not include the activity of sex work. In doing so, his Honour relied heavily on the statutory definition of lawful sexual activity: 'a person's *status* as a lawfully employed sex worker, whether or not self-employed'.[78] This interpretation meant that '[d]iscrimination on the basis that [GK] was a lawfully employed sex worker was prohibited, but discrimination on the basis that she proposed to perform work as a sex worker at the motel was not prohibited'.[79]

The approach of Fraser JA is essentially mirrored in the only two other discrimination cases brought by sex workers which have proceeded to judgment in a court or tribunal. In *J v Federal Capital Press of Australia Ltd* ('*Federal Capital Press*'), a sex worker made a discrimination complaint which was heard at the Australian Capital Territory Civil and Administrative Tribunal.[80] The complainant had attempted to

74 Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, November 2021) 98.

75 *Dovedeen* (n 65).

76 *Anti-Discrimination Act* (Qld) (n 59) ss 82–3.

77 *GK v Dovedeen Pty Ltd (No 3)* [2011] QCAT 509, [8].

78 *Anti-Discrimination Act* (Qld) (n 59) sch 1 (definition of 'lawful sexual activity') (emphasis added). This reference concerns the historical version of the *Anti-Discrimination Act* (Qld) at the time of the judgement. The current version of the *Anti-Discrimination Act* (Qld) no longer contains the protected attribute 'lawful sexual activity' nor its definition in sch 1.

79 *Dovedeen* (n 65) [20].

80 *Federal Capital Press* (n 65).

advertise sexual services in two Canberra newspapers. Her advertisements generally contained the words 'Angie, pampering, passionate, and private [phone no]'.[81] The factual basis of the complaint was accepted by the Tribunal — the complainant's payment terms were different to other advertisers; she was confined to the 'adult services' column and therefore not allowed to place 'spot advertisements', and she was denied advertising services entirely by one of the newspapers. Despite these factual findings, the Tribunal decided that there was no discrimination. This was because it was the '*subject matter* of the advertisements, rather than the *occupation* of the advertiser', which led to the unfavourable treatment.[82]

The subject matter of the complainant's advertisements was sexual services, and they were necessary for her to carry out her occupation as a sex worker. The Member's decision, therefore, assumes that activities inherent to an occupation are not protected. These assumptions are revealed in the evidence that the Member used to justify this finding. Namely, that the complainant had been treated the same as any other advertiser when she placed advertisements that were not for adult services.[83] The Member appears to have inferred that because the complainant was not discriminated against when she placed an advertisement unrelated to sex work, her occupation did not cause the unfavourable treatment when she advertised her sexual services. This indicates that while it would be unlawful to discriminate against a sex worker in their personal capacity (for example a sex worker places an advertisement for a used car), it is lawful to treat them unfavourably when they carry out activities in connection with their occupation. The complainant unsuccessfully appealed the Tribunal's decision, which was ultimately upheld by the Federal Court.[84]

The most recent case dealing with this issue was brought by Zoe Capocchi and heard in the Tasmanian Civil and Administrative Tribunal: *Capocchi v West* ('*Capocchi*').[85] Ms Capocchi was evicted from rented premises for performing 'full service' (a sexual service involving sexual intercourse). Relevantly, the rental contract stipulated that '[u]se of the rooms is solely for sensual adult massage. Sex of any kind is not permitted.'[86] Ms Capocchi claimed, inter alia, that the respondents' conduct in evicting her amounted to direct and indirect discrimination on the basis of 'lawful sexual activity'.

The nature of Ms Capocchi's claim meant the Member had to decide whether the activity of providing 'full service' fell within the scope of 'lawful sexual activity'. Ultimately, the Member found that it did not. The Member decided that the reason Ms Capocchi was evicted

81 Ibid 4.

82 Ibid 23 (emphasis added).

83 Ibid.

84 *Edgley v Federal Capital Press of Australia Pty Ltd* (2001) 108 FCR 1.

85 *Capocchi* (n 65).

86 Ibid [23].

> was not because she was a lawfully employed sex worker who offered full service (the protected attribute) but because she had performed and proposed to perform in the future full service at the respondents' premises in breach of the rental agreement.[87]

The Member's reliance on a breach of the rental agreement somewhat sidesteps the fact that discriminatory clauses in rental agreements may be unenforceable.[88] This point aside, the first aspect of the Member's reasoning relied on a distinction between the status of being a sex worker and actually engaging in sexual activity at particular premises. While the former is encompassed by the protected attribute, the latter is not. This is especially apparent in the Member's comment that '[t]he evidence is that the respondents had no problem with sex workers who wanted to provide full service. They just did not want sex workers providing full service at their premises.'[89] In this regard, the reasoning in *Capocchi* mirrors *Dovedeen* and *Federal Capital Press* — anti-discrimination law does not protect sex workers who perform sex work.

D *Discrimination against Corporations*

An additional barrier to sex workers accessing anti-discrimination protections presents itself in the issue of whether corporations can be protected from discrimination. This is nested in the larger, highly contentious and under-litigated issue of whether a corporation can have human rights.[90] Brothels and escort agencies are often incorporated, and private sex workers also sometimes choose to incorporate rather than operate as sole traders.[91] In these cases, it can arguably be the corporation that has been discriminated against when services are refused. This issue is very likely to arise in financial discrimination cases because an incorporated business will inevitably apply for business banking services in its company name.

Anti-discrimination legislation generally prohibits discrimination by a person against another person. As a matter of law, 'person' generally includes artificial and natural persons.[92] While it is uncontroversial that the 'person' who discriminates can be a corporation,[93] it is less clear if a corporation can be a complainant. This is because a corporation probably cannot possess the protected attributes which form

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87 Ibid [55].

88 See, eg, Tammy Solonec, 'Racial Discrimination in the Private Rental Market: Overcoming Stereotypes and Breaking the Cycle of Housing Despair in Western Australia' (2000) 5(2) *Indigenous Law Bulletin* 4.

89 *Capocchi* (n 65) [65].

90 Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37(3) *Sydney Law Review* 329, 331.

91 Interview with Brothel Owner (n 23); Interview with Private Sex Worker A (n 23); Interview with Escort Agency Owner (Nina Cheles-McLean, 26 March 2022) ('Interview with Escort Agency Owner').

92 Rajanayagam and Evans (n 90) 341; *Acts Interpretation Act 1901* (Cth) s 2C.

93 *Christian Youth Camps* (n 56) 277–8, 333; *Bell* (n 56) [102].

the prohibited grounds of discrimination. For example, a corporation cannot have a race, or a disability, or be pregnant.[94] Of course, corporations are simply a form of organisation used by humans, and the members of a corporation can possess protected attributes.[95] However, the well-established principle of the corporate veil separates a corporation from its members.[96] Considering these difficulties, the following sub-sections discuss ways in which complaints could proceed where banking services have been refused to a sex industry corporation.

1 *Piercing the Corporate Veil*

A corporation could bring a claim if a court imputed the protected attribute of a natural person (whether that be race, disability, or occupation as a sex worker) to the corporation. This process is known as 'reverse veil piercing'.[97] However, according to Shawn Rajanayagam and Carolyn Evans, reverse veil piercing has received little judicial support in Australia.[98] This is exemplified by *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('*Christian Youth Camps*').[99] In this case, a religious corporation (Christian Youth Camps Ltd ('CYC')) attempted to rely on a statutory exemption which excused discriminatory conduct if it was necessary for a 'person' to comply with 'genuine religious beliefs'.[100] The Victorian Court of Appeal therefore had to decide whether a corporation was a person who could hold such a belief. The majority held that the exemption could not apply to corporations without an express statutory provision that attributed religious beliefs to corporations by way of legal fiction.[101] As Neave JA explained: '[b]ecause a corporation is not a natural person and has "neither soul nor body", it cannot have a conscious state of mind amounting to a religious belief or principle.'[102] This ruling means it is unlikely that other attributes, including occupation as a sex worker, could be imputed to a corporation for the purposes of making a discrimination complaint.

2 *Interpretation of 'Profession, Trade or Occupation'*

Unlike most protected attributes, 'profession, trade or occupation' could arguably characterise a corporation without piercing the corporate veil. This very issue was

94 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills Second Exposure Draft* (31 January 2020) 15 [46].

95 *Burwell v Hobby Lobby Stores Inc*, 573 US 682, 706–7 (2014).

96 See generally *Salomon v A Salomon & Co Ltd* [1897] AC 22.

97 This is different to 'forward piercing' where the company's liability is imposed on its members: see Rajanayagam and Evans (n 90) 342–3.

98 Ibid 343.

99 *Christian Youth Camps* (n 56).

100 *Equal Opportunity Act 1995* (Vic) s 77.

101 *Christian Youth Camps* (n 56) 334.

102 Ibid 261, quoting *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1963) 110 CLR 9, 14 (Kitto, Taylor and Owen JJ).

raised when the Sex Work Decriminalisation Bill 2021 (Vic), which introduced this attribute, was being debated in Parliament. Gordon Rich-Phillips, Member of the Victorian Legislative Council, referred to businesses that had been de-banked and asked the Minister whether 'profession, trade or occupation' would apply to corporations as well as natural persons, thereby allowing them to make discrimination claims.[103] This question gave rise to the following exchange:

> **Mr LEANE**: Thanks for your patience. I am unsure whether this acquits Mr Rich-Phillips's concern, but the bill does not displace any parts of the Equal Opportunity Act, including the definition of 'person'. Under the Equal Opportunity Act section 4 states:
>
> > ***person*** includes an unincorporated association and, in relation to a natural person, means a person of any age …
>
> **Mr RICH-PHILLIPS**: Thank you, Minister. I take from that the scope is as broad as we discussed, including other incorporated entities and bodies corporate, and therefore this protection would extend to those in respect of a trade, profession or occupation.
>
> **Mr LEANE**: Yes.[104]

This suggests Parliament intended that corporations be protected under Victorian anti-discrimination law based on profession, trade or occupation. However, while the Hansard can guide statutory interpretation,[105] there has been no authoritative judicial ruling on this point.

3 *Association with a Natural Person*

Although a corporation cannot be a sex worker, it can arguably be associated with one. Association with someone who has a protected attribute is itself a protected attribute in most jurisdictions, although wording and definitions vary.[106] The difficulty here is whether a corporation can be said to have an 'association' or 'personal association' with a natural person. In *Cassidy v Leader Associated Newspapers Pty Ltd*,[107] it was held that 'personal association' requires 'an association between natural persons and not between a person and a company'.[108] This

103 Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 260 (Gordon Rich-Phillips).

104 Ibid 265 (Gordon Rich-Phillips and Shaun Leane).

105 Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 335.

106 *Discrimination Act* (ACT) (n 59) s 7(c); *Anti-Discrimination Act* (NSW) (n 61) s 7; *Equal Opportunity Act* (Vic) (n 57) s 6(q); *Anti-Discrimination Act* (NT) (n 59) s 19(r); *Anti-Discrimination Act* (Qld) (n 59) s 7(p); *Equal Opportunity Act* (SA) (n 61) s 29(2)(d); *Anti-Discrimination Act* (Tas) (n 59) s 16(s).

107 [2002] VCAT 1656 ('*Cassidy*').

108 Ibid [75].

strongly suggests that a sex industry corporation could not rely on its association with sex workers in Victorian proceedings. However, the outcome could differ in jurisdictions whose definition of association is broad enough to encompass association with a corporation.[109]

4 *A Natural Person Makes the Discrimination Claim*

The most straightforward way for a sex worker who operates an incorporated business to make a discrimination complaint will likely be to make the complaint in their own name. There is conflicting case law on whether a natural person can make a complaint about discrimination that was technically directed at a corporation. The High Court considered this issue in the context of disability discrimination in *IW v City of Perth* ('*IW*').[110] In that case, an individual referred to as 'IW' complained that he was refused services by reason of his impairment when Perth City Council denied planning approval for a drop-in centre for human immunodeficiency virus ('HIV') positive persons. IW was HIV positive and therefore possessed a relevant impairment under the *Equal Opportunity Act 1984* (WA). However, it was not IW, but an incorporated association named 'Persons Living with Aids (WA) Inc' ('PLWA'), of which IW was a member, who had applied for and was refused planning approval.[111] The majority held that IW did not have standing to complain. This was because IW had not made the application, so technically he had not been refused services.[112] As Gummow J succinctly explained: '[IW] suffered impairment but did not seek the provision of services by the Council. Services were sought by PLWA, but it did not suffer impairment.'[113]

This same issue arose in the Victorian Civil and Administrative Tribunal case that preceded *Christian Youth Camps*: *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* ('*Cobaw Community Health Services Ltd* (VCAT)').[114] The claim was brought by Cobaw Community Health Services Ltd ('Cobaw'), an incorporated community health service that focused on suicide prevention among same-sex attracted rural youth. An employee of Cobaw had attempted to book accommodation owned by CYC to conduct a weekend camp for same-sex attracted youth. CYC refused to provide the accommodation on the grounds it was opposed to homosexual activity because it was contrary to the bible.

Cobaw brought the discrimination claim against CYC as a 'representative body' for the attendees of the camp, who possessed the protected attribute 'sexual orientation'.[115] In order to have standing to bring the complaint, Cobaw was required to

109 See, eg, Australian Human Rights Commission (n 94) 13.

110 *IW* (n 67).

111 Ibid 7 (Brennan CJ and McHugh J), 18–19 (Dawson and Gaudron JJ).

112 Ibid 25 (Dawson and Gaudron JJ), 45 (Gummow J).

113 Ibid 45.

114 [2010] VCAT 1613 ('*Cobaw Community Health Services Ltd* (VCAT)').

115 Ibid [61]–[68].

show that each of the attendees would have had standing to bring the claim in their own right.[116] CYC attempted to rely on *IW*, and argued it was Cobaw who had applied for and was refused accommodation and not the camp attendees.[117] Judge Hampel distinguished *IW* and found Cobaw had applied for the accommodation 'on behalf' of the attendees.[118] The discriminatory conduct was therefore directed at the camp attendees and not at the corporate entity.[119] Judge Hampel emphasised that this finding was dependent on the facts of the case. In particular, the Cobaw employee had made it clear the accommodation was to be provided for the camp attendees (same sex-attracted youth) and did not refer to Cobaw (the corporation) when attempting to book the accommodation.[120] Judge Hampel's decision indicates there may be some scope for sex workers to bring discrimination claims where they can argue a corporation applied for banking services on their behalf. However, the success of this argument will be dependent on the particular facts of the case.

E *Anti-Money Laundering and Counter Terrorism Financing Laws*

Another barrier to sex workers seeking redress for financial discrimination presents itself in s 235 of the *AML/CTF Act*, which potentially provides protection from liability to banks who discriminate against their customers. The *AML/CTF Act* imposes obligations on financial institutions to prevent serious financial crimes, including money laundering and the financing of terrorism. While these obligations are clearly appropriate, evidence has emerged that instead of assessing customer risk on a case-by-case basis, financial institutions are de-banking entire categories of persons and businesses who they deem to be high risk,[121] 'without adequate consideration and without clear reasons'.[122] Compounding this issue, the *AML/CTF Act* provides an exemption from liability to financial institutions in relation to this potentially discriminatory conduct. Section 235(1) provides:

116 *Equal Opportunity Act 1995* (Vic) ss 104(1)(a), 104(1B)(a)(i); *Cobaw Community Health Services Ltd* (VCAT) (n 114) [60].

117 *Cobaw Community Health Services Ltd* (VCAT) (n 114) [167].

118 Ibid [172], [175].

119 Ibid [171]–[172].

120 Ibid [172].

121 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43); Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report, April 2016) 99; Australian Transaction Reports and Analysis Centre, *Strategic Analysis Brief: Bank De-Risking of Remittance Businesses* (Brief, 2015) 4 ('Bank De-Risking').

122 Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Select Committee on Australia as a Technology and Financial Centre* (Final Report, October 2021) xi.

> (1) An action, suit or proceeding (whether criminal or civil) does not lie against:
>
> (a) a person (the ***first person***); or
>
> (b) an officer, employee or agent of the first person acting in the course of his or her office, employment or agency;
>
> in relation to anything done, or omitted to be done, *in good faith* by the first person, officer, employee or agent:
>
> …
>
> (e) in compliance, or *in purported compliance*, with any other requirement under:
>
> (i) this Act …[123]

This exemption is incredibly broad and can likely be utilised to avoid liability for discrimination.[124] Notably, s 235(1)(e) applies to conduct 'in *purported* compliance' with the *AML/CTF Act*. This could possibly capture discriminatory conduct that is not required or authorised by the *AML/CTF Act*. Although the conduct must be carried out in 'good faith', this is unlikely to prevent s 235(1)(e) from being used in discrimination proceedings, because discriminators do not necessarily have an intention to discriminate that amounts to bad faith.[125]

The first instance of a bank claiming a defence under s 235 in discrimination proceedings occurred in a claim brought by a bitcoin trader: *Flynn v Westpac Banking Corporation* ('*Flynn*').[126] In this case, Westpac refused to provide any personal or business banking services to a digital currency exchange operator named Allan Flynn, in perpetuity.[127] Westpac's decision was not based on an individualised assessment of risk, but on a blanket policy not to provide services to digital currency exchange providers.[128] Mr Flynn claimed he was discriminated against because of his occupation. In its defence, Westpac raised s 235(1)(e).[129]

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123 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 235(1) (emphasis added).

124 Human Rights and Equal Opportunity Commission, Submission No 32 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006* (November 2006) 4.

125 Ibid, citing *Australian Medical Council v Wilson* (1996) 68 FCR 46 (Sackville J).

126 *Flynn* (n 19).

127 Ibid [12]–[14], [22].

128 Ibid [40], [61].

129 Ibid [47].

Unfortunately, the Tribunal could not determine whether s 235(1)(e) excused Westpac's conduct, because it accepted Westpac's argument that it did not have jurisdiction to consider the *AML/CTF Act*, which is Commonwealth legislation.[130] The Tribunal held that Westpac was therefore obliged to obtain relief under s 235(1)(e) in 'a court of competent jurisdiction'.[131] Westpac subsequently applied for judicial review of the Tribunal's decision, requesting orders that Mr Flynn's discrimination claim be dismissed. Westpac's grounds included that it had raised a 'non colourable defence under a Commonwealth statute' (ie s 235(1)(e)) and that Westpac was not required to commence proceedings in a separate jurisdiction in order to rely on s 235(1)(e).[132] Essentially, Westpac argued that raising s 235(1)(e) should simply put an end to discrimination proceedings. The dispute between Westpac and Mr Flynn settled in May 2022.[133] The full implications of s 235(1)(e) are therefore still unclear, however it could present a significant barrier to sex workers pursuing financial discrimination complaints.

F *Implications for Financial Discrimination*

The total effect of the laws discussed above presents a series of hurdles for sex workers seeking redress for financial discrimination. The likely outcome is that sex workers will only be protected from financial discrimination in very limited circumstances, in certain jurisdictions. In many instances, a financial institution can likely refuse to serve a sex worker without legal consequences, even if the decision is based on prejudice. As explained above, nothing in banking law prevents services being denied to sex workers, no matter how capricious the reason. Sex workers will therefore need to rely on anti-discrimination law. This will only be possible in jurisdictions with a protected attribute applicable to sex workers (Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory). In South Australia, Western Australia and New South Wales, sex workers will have no remedy.

A sex worker's legal status will impact their ability to make a complaint. If a sex worker is not working lawfully, they may not be able to rely on *lawful* sexual activity. Furthermore, sex workers who work illegally will be reluctant to draw attention to themselves by making a legal claim.[134] If a sex worker has incorporated their business, the principle of the corporate veil will further complicate matters. This could prevent discrimination claims from succeeding based on the technicality that services were applied for under a company name. As discussed above, there are

130 Ibid [64].

131 Ibid [73].

132 Westpac Banking Corporation, 'Originating Application: Judicial Review', filed in *Westpac Banking Corporation v Allan Flynn*, 19 April 2022.

133 @Allan_W_Flynn (Twitter, 26 May 2022, 10:29 am) <https://twitter.com/Allan_W_Flynn/status/1529620583151017984>.

134 See generally Stardust et al, 'Sex Work, Whore Stigma and the Criminal Legal System' (n 11).

various ways this could be circumvented, but a sex worker will likely have to frame their claim so that the company was acting on their behalf.

The most significant barrier is the limited scope of the various protected attributes. Courts and tribunals have consistently found that protected attributes applicable to sex workers do not encompass sex work activities. This narrow interpretation would pose significant difficulties for discrimination claims where business banking services, such as a business bank account, and merchant services, have been refused. This is because a bank could claim they have no objection to sex worker customers per se, but do not offer financial services for the purpose of conducting the activity of sex work. Indeed, Westpac appeared to raise a similar argument in *Flynn*:

> Westpac's case is that it de-banked Mr Flynn because *his use* of accounts with Westpac and St George to operate a digital currency exchange business fell outside Westpac's risk appetite. It was this, rather than *his occupation* as a DCE operator or provider, that was the reason for its decision.[135]

According to the logic followed in *Dovedeen*, *Federal Capital Press* and *Capocchi*, this argument could equally apply to sex workers, and succeed.

The final hurdle for sex workers presents itself in s 235(1)(e) of the *AML/CTF Act*. There is a common misperception that the sex industry is at an increased risk of money laundering.[136] It is therefore highly likely that a bank would raise s 235(1)(e) in a discrimination claim brought by a sex worker. Raising s 235(1)(e) could provide a free pass for banks to discriminate against their customers if their conduct can be linked to 'purported compliance' with the *AML/CTF Act*. At the least, it will remove a dispute from a Tribunal's jurisdiction, necessitating costly litigation in a court with federal jurisdiction. For many, this could make addressing financial discrimination through anti-discrimination law almost impossible.

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135 *Flynn* (n 19) [38] (emphasis in original). This point was not resolved because the Tribunal ordered a stay: at [74].

136 Sex Work Law Reform Victoria, 'Banking Code Review Submission SWLRV' (n 18) 11, citing: Julie Walters et al, 'Anti-Money Laundering and Counter-Terrorism Financing Across the Globe: A Comparative Study of Regulatory Action' (Research Report No 113, Australian Institute of Criminology, 10 February 2012); Clare Sullivan and Evan Smith, 'Trade-Based Money Laundering: Risks and Regulatory Responses' (Research Report No 115, Australian Institute of Criminology, 2 February 2012); Julie Walters et al, 'The Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia: Perceptions of Regulated Businesses in Australia' (Research Report No 117, Australian Institute of Criminology, 1 August 2012); Julie Walters et al, 'Money Laundering and Financing of Terrorism Risks in Non-Financial Sector Businesses and Professions' (Research Report No 122, Australian Institute of Criminology, 1 May 2013).

V Qualitative Analysis of Sex Industry Workers' Experiences of Financial Discrimination

Building upon the apparent inadequacies in our current legal frameworks, the experiences shared by participants during the qualitative study provide a deeper understanding of the 'de-banking' problem facing the sex industry and the law reform that is therefore required to achieve financial inclusion. The data yielded indicates that accessing financial services is a significant challenge for the sex industry, because some financial service providers are refusing to serve, or otherwise disadvantaging sex industry workers because of their occupation. The interviews also revealed various strategies sex industry workers have developed to mitigate the negative consequences of discrimination and carry out their business.

A *Types of Discrimination*

Participants reported various forms of prejudicial treatment, including: (1) refusal of service; (2) termination of existing services; (3) denial of credit; (4) chargebacks being unfairly processed against their business; and (5) being charged inflated merchant fees. Participants reported being refused various services at the point of application, including business bank accounts, personal bank accounts, business loans and merchant services. Some participants reported multiple instances of being refused services throughout their careers. This conduct was not limited to certain providers but appeared to be widespread across the financial sector — participants were refused services by the big four banks, medium sized banks, specialist merchant services and payment processing apps.

Participants described being refused services immediately after disclosing their occupation. For example, a brothel owner explained:

> Every time I went to a bank, I was upfront, I said, 'listen, I'm in the adult industry, I run a brothel, do you accept this business in your bank?' And the person would run away, speak to the manager, or the manager would come out and say, 'sorry, sir, we don't do brothels or the sex industry'.[137]

The only participant who did not report being refused services had never disclosed his profession to a financial service provider.

Some participants also reported having existing services terminated, in some instances immediately after they disclosed their occupation. In other instances, services were suddenly terminated after openly dealing with the bank as a sex industry business for decades. One brothel owner reported that a Big Four bank not only terminated his existing business and personal accounts, but also closed the personal accounts of his wife and sister, although they were not involved in the operations of his brothel.

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137 Interview with Brothel Owner (n 23).

One private sex worker reported discrimination in relation to chargebacks. She said that banks had unfairly sided with her clients when chargebacks were claimed against her business. She described one such occasion when a client requested a chargeback, claiming he had not received a sexual service. The bank processed the chargeback and then terminated the sex worker's merchant services:

> We did triple verification, we had him on security cameras, we took a photo of his ID. And then his claim to [medium sized bank] merchant services when he did the chargeback was that someone impersonated him. And that just fucking blew our socks off. [The bank] didn't even believe him. They just went with him, because like my evidence was irrefutable and they're not blind. Basically, they've just gone 'fuck ya' to me … You can accurately say that that sex act would not have gone down had it not been transactionary. And now you've gone and violated that … You've got to look at who's facilitating some of these chargebacks which facilitates the sexual assault, or the rape, which is banks and merchant services. And they're not accountable.[138]

According to Stardust et al, chargebacks are often requested by clients 'because they do not wish the service to appear on their bank records, because they feel entitled to access free or discounted services/content, or simply because they know that, as a stigmatized group, sex workers have little recourse'.[139]

The private sex worker involved in the transaction described above quite understandably viewed the bank's conduct as facilitating sexual assault, because it vitiated her condition for consent. The issue of banks wrongfully processing chargebacks in this context warrants particular concern, and should be the subject of separate research, considering its complexities.

An escort agency owner reported being charged higher merchant fees because of the nature of her business, despite having a reliable customer record with the same bank for decades:

> When you told a bank you were an escort service, they would charge you 10%, 8%, 6%. Then people who think they know better would say, 'mate, do what we do and tell them you're a bookshop, because you'll only pay 2.4% on your merchant terminal'. But for about 20 years, we paid 10%. They've always charged us more than some unknown quantity that's just opened up for a year, who says they're a café.[140]

This account reflects Stardust et al's observation that '[w]here sex workers are successful in opening accounts, they may be charged higher premiums or fees than other users, effectively taxed for their sex work status.'[141]

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138 Interview with Private Sex Worker A (n 23).

139 Stardust et al, 'High Risk Hustling' (n 17) 103.

140 Interview with Escort Agency Owner (n 91).

141 Ibid 68, citing LaLa B Holston-Zannell, 'How Mastercard's New Policy Violates Sex Workers' Rights', *ACLU* (Web Page, 15 October 2021) <https://perma.cc/58E3-LWDW>.

B *Reasons for Discrimination*

The most common reasons given for refusal of service were that the provider did not serve the participant's business type, or that their business type was 'high risk'. Although 'risk' is often relied on by banks in this context, there is a lack of reliable data showing that sex industry workers are indeed 'high risk' customers, making it unclear whether banks are drawing on accurate or individualised evidence in these 'risk assessments'.[142] Some participants were not given any reason for refusal of service. A brothel owner received multiple letters stating the decision to close his accounts was based on 'commercial reasons'.[143] After pursuing internal and external complaint processes, the bank refused to provide further reasons. After a private sex worker's merchant services were terminated by a payment service provider, he wrote a letter of complaint to their CEO. Their response indicated he was refused services purely on the grounds of his occupation:

> They didn't explain why they terminated me, they just said it was because 'we don't take that industry.' There was no reference to my actual conduct, good or bad. There was no talk of my individual risk. It was 'we don't take your industry' and this was put in writing on a number of occasions. Not just from a junior sales rep, but from the CEO himself.[144]

Most participants could not think of a reason why they were refused services other than their occupation. For example, an escort agency owner whose business bank account and merchant services were terminated commented:

> We haven't had credit cards go bad that have been unresolved. Got a massive record and we can show you the records. So, it's not because you know, something's gone wrong … Someone in [big four bank] made an error. I haven't done anything wrong. This is a fundamental error. You can't throw out a customer after 28 and a half years.[145]

However, one private sex worker believed that on one occasion her merchant services were terminated due to a chargeback being processed against her business. In addition, a brothel owner believed his bank accounts may have been closed because he was contesting criminal charges. The author does not know the details of these charges, so it is unclear if they could have provided a legitimate reason for the bank's decision. However, the brothel owner believed the pending charges could not explain why he was subsequently refused services on point of application by 13 different banks that had no knowledge of the charges: 'As soon as you say that

142 Stardust et al 'High Risk Hustling' (n 17) 102, 104. See also Crofts and Prior, 'Regulation of Brothels' (n 44), which argues that perceived links between sex work and crime in New South Wales are largely unfounded or based on outdated stereotypes.

143 Interview with Brothel Owner (n 23).

144 Interview with Private Sex Worker B (n 23).

145 Interview with Escort Agency Owner (n 91).

you own a business and it's in the brothel industry, the answer is "no" straight away, you can't even apply.'[146]

The explanations given by financial service providers for refusal of service indicate that on most occasions, the primary reason was the participant's occupation. This is especially apparent where services were immediately refused on point of application, because this could not be based on an individualised risk assessment or customer conduct. This apparent disregard of an individual sex workers' positive customer record echoes the case *Sibuse Pty Ltd v Shaw*,[147] where the New South Wales Court of Appeal found that all brothels were inherently disorderly and therefore subject to closure, regardless of whether a particular brothel was 'clean, neat and tidy'.[148]

C *Consequences of Discrimination*

Participants reported numerous negative consequences of being excluded from financial services, including operating without the necessary service, physical safety concerns, inconvenience, reputational damage, vulnerability to theft, loss of income and insecurity. Participants also described experiencing negative emotional impacts and stigma.

On some of the occasions when services were terminated, participants were able to obtain services from another provider. On other occasions, they struggled to find a provider and were forced to operate without the service. A private sex worker was forced to operate without merchant services for a number of years. As a result, she primarily dealt in cash, which was not her preference. A brothel owner has still been unable to secure a business bank account or merchant services and has been forced to operate entirely in cash. He has resorted to storing the cash in on-site safe deposit boxes. However, he is concerned this may cause legal complications for his business, because storing vast quantities of cash on site could appear suspicious to the police, or the Australian Tax Office:

> What my accountant's done, he's written to the Tax Office … You need to write a formal letter, that the banks have blocked you out because of your industry, and it's a legal industry in Victoria, and you show them all the licenses … and you explain that now you can't bank, what do I do with the cash? You need an answer from them. Where do I put it? Under the bed? Because you need to put it on record. Because if they come here and see all this cash …[149]

The brothel owner's concerns reflect Penny Crofts and Jason Prior's observation that brothels are often incorrectly associated with money laundering due to their

146 Interview with Brothel Owner (n 23).

147 (1988) 13 NSWLR 98.

148 Penny Crofts, 'A Decade of Licit Sex in the City' (2006) 12(1) *Local Government Law Journal* 5, 6, quoting *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98.

149 Interview with Brothel Owner (n 23).

reputation as cash rich premises.[150] Some participants indicated that accepting cash payments compromised their safety, and they preferred clients to pay electronically. However, this was not possible when they could not obtain merchant services. A private sex worker explained:

> It's a digital signature, it basically offers me so much more security, especially for new people. [When clients cannot pay in cash] they go and find, unfortunately, an easier target … the bad proportion of the males in our society will go and find lower hanging fruit, so to speak. So, the more you are ingratiated in the system, the less risk you experience.[151]

The sex workers who are forced to rely on cash are the 'lower hanging fruit' who are made vulnerable in the scenario described by the private sex worker. According to the private sex worker, they are more likely to attract dangerous clients, because there is no electronic transaction through which the client can be traced. An escort agency owner made a similar comment: '[card payment] filters the calibre of the client out. Definitely, it's a different calibre of person. And yes, the traceability, and the reliability … If something's gonna go wrong, it's gonna be a "pay cash" person.'[152] A private sex worker also expressed safety concerns about making late night trips to the bank to deposit cash after seeing clients:

> I'm exhausted … and I had to run to the bank. I'd get there at 3 am when they started to do that thing where you could bank in the ATM. I remember being paranoid looking up and down the street, thinking 'if I'm robbed, we default on the next mortgage payment'.[153]

Some participants expressed that dealing in cash was also a source of inconvenience. For example, a private sex worker commented:

> Because I prefer to operate above board, in the sense that I do declare all my income, I do pay income tax, if I get paid in cash, I still have to deposit that anyway, which is just more work, because it's a trip to the ATM machine, usually late at night, which is inconvenient.[154]

Participants believed that being forced to deal in cash had damaged their reputation. For example, a former brothel owner believed she was diminished in the eyes of her staff when she could not provide merchant services:

150 Crofts and Prior (n 44) 215.

151 Interview with Private Sex Worker A (n 23).

152 Interview with Escort Agency Owner (n 91).

153 Interview with Private Sex Worker A (n 23).

154 Interview with Private Sex Worker B (n 23).

> I will never forget how humiliated I was in front of my whole team. I had 30 people working for me and all of a sudden, in front of their eyes, I couldn't get merchant services. I know they were laughing at me in the girl's room.[155]

Dealing in cash also affected the attitudes of clients towards sex workers. A private sex worker said some of her clients assumed she was breaking the law when she could only accept cash: 'I came across as not professional. I did, I came across as shifty. The amount of people that would ask me, "do you pay tax on this?" Or, "you obviously don't pay tax on this cash right?" And I'd be like, "oh my god yes."' The same private sex worker described significant loss of income from operating without merchant services:

> I lost easily a million. Easily. Because my rates are not cheap. So, if your cash extraction is $1,000 maximum from an ATM, my fee is $1,000. Without merchant facilities, clients can't be using their credit cards and you've got a lot of income lost there as well. A booking might blow out, you know they might want more time and be paying for more time. But if you don't have merchant facilities it just puts an end to it. You've got to get dressed and go get money and come back? No.[156]

Ongoing insecurity was a common theme among participants who had services terminated. Even after finding another provider, they felt their services could be terminated again at any moment, regardless of their good conduct as a customer. As Lana Swartz writes, 'to survive, you have to get paid … [a] system that suddenly and unexpectedly cuts you off from money can be as perilous as not having access to any system at all.'[157] In this regard, a private sex worker commented:

> I have felt a profound sense of insecurity, as I suspect most sex workers have, in all the 10 years I've been working, including right now with [payment service provider] … because all companies we know from lived experience are susceptible to just de-bank you and ban you with little to no notice. So, there's always that lack of security there.[158]

Participants expressed strong feelings of anger, injustice and stigmatisation after being refused services. A private sex worker commented: 'At the time, it made me feel shocked and extremely angry … And it really hasn't gone away, like the level of anger is still there, at what they've done and the fact that they're getting away with it.'[159] An escort agency owner described how she felt devalued by her bank's conduct:

> I've never hidden what I've done. I fought for legalisation. We're supposed to be free. I'm the boss, I'm a lady and what you see is what you get. There are no hidden agendas behind us. And there's no guys standing over ladies … I feel like everything I've done to raise us up into the daylight, like we should be proud. I felt devalued. And

155 Interview with Private Sex Worker A (n 23).

156 Ibid.

157 Swartz (n 25) 82.

158 Interview with Private Sex Worker B (n 23).

159 Ibid.

> I still feel devalued, and I'm hurt. And I should be able to move past that being hurt. But it's like they're just laughing, like everything we did means nothing and 'girls, you can go and get stuffed' basically. They've pushed us back down.[160]

D *Strategies to Mitigate Discrimination*

Participants adopted different strategies to adapt to this precarious environment, with varying levels of success. For example, some participants had utilised financial technology solutions such as the payment app 'Beem It' after being refused services by the major banks. However, access to smaller payment service providers (at least, the ones that do not discriminate) does not remedy exclusion from mainstream banks, because they require digital literacy and uptake on the part of clients.[161] One private sex worker expressed immense frustration about convincing her clients to adopt electronic payment apps:

> They [the clients] go, 'Well, I've known you for 20 years, so why the fuck should I?' And I go, 'Well, that's all totally fine and well, but if you could just like EFT it, so I'm not an angry sex worker in your face, and that would be even better.' So the migration of like, 'just fucking do it. I'm not asking you out of the kindness of my heart. I'm asking you as in an order.' So, I've had to sort of groom this like enormous group of people to traverse into this new reality — the reality is, that, sex workers want cashless. They just fucking do.[162]

Other participants did not disclose their profession at certain times to avoid anticipated discrimination. This reflects the finding made by numerous studies that sex workers commonly conceal their profession to avoid discrimination.[163] One private sex worker explained why he had never disclosed his occupation to his bank:

> It's just about the stigma around it that they have. I mean, I've heard from other workers how they were ostracised, so to speak, for their profession. They weren't allowed to have a bank account because they were considered less than worthy, I guess.[164]

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160 Interview with Escort Agency Owner (n 91).

161 Stardust et al, 'High Risk Hustling' (n 17) 84. See also Beebe (n 25) 159, who writes that cryptocurrency is often suggested as a solution for sex workers, although clients would likely be unwilling or unable to pay in that manner.

162 Interview with Private Sex Worker A (n 23).

163 See, eg: Julie Ham and Alison Gerard, 'Strategic In/visibility: Does Agency Make Sex Workers Invisible?' (2014) 14(3) *Criminology and Criminal Justice* 298, 307; McCausland et al (n 11) 2–3; Benoit et al, 'Sex Workers' Responses to Stigma' (n 12) 87; Lynzi Armstrong and Cherida Fraser, 'The Disclosure Dilemma: Stigma and Talking About Sex Work in the Decriminalised Context' in Lynzi Armstrong and Gillian Abel (eds), *Decriminalisation and Social Change* (Bristol University Press, 2020) 177, 194.

164 Interview with Private Sex Worker C (Nina Cheles-McLean, 29 March 2022).

Some participants had obtained business banking services for a second business and banked their sex work earnings through the second business. One private sex worker explained that he banked his sex work earnings as if it were income from his live music business:

> It works perfectly that way. So, the cover business is genuine, legitimate. And then if there's any questions on the other cash deposits in there, I just say 'well I did a wedding or I did a birthday for this person or that person'. It's very simple really. So, my tax returns at the end of the year are very simple. There's the cash earnings that are declared and then the actual traceable earnings, usually through booking agents.[165]

However, it was not possible for all participants to obtain services under a 'shadow occupation'. A brothel owner explained:

> How does a place like mine do that? Have a look at the size of me. I'm not this little pebble. It stands out. Everyone in Australia knows it. How can I say, 'oh, it's Mandy's Massage Shop', and there's $150,000 worth of credit cards coming through?[166]

Other participants insisted on disclosing their occupation as a matter of principle, even though they expected this would result in discrimination. An escort agency owner explained:

> If we said we were something else, which would be very easy to say, that we were seamstresses or piecework, we would hold the account. But I'm not prepared to not state the business. We're legal. We fought hard to legalise it in the state of Victoria. We've got nothing to hide.[167]

While sex workers may successfully utilise strategies such as adopting a 'shadow occupation' and reporting sex work income to the tax office under the cover of a second job, this exposes sex workers to a risk of criminal liability. For example, this conduct could arguably be in breach of taxation law which prohibits making 'false or misleading statements' to a tax officer.[168]

E *Discussion*

Overall, the findings of this study indicate that occupational discrimination on the part of financial service providers is disadvantaging sex industry workers on multiple levels. It is causing financial insecurity, reputational damage, contributing to dangerous working conditions and perpetuating stigma and its associated harm to mental health. It is also compromising the immediate physical safety of sex workers who are forced to deal in cash. More broadly, financial service providers

165 Ibid.

166 Interview with Brothel Owner (n 23).

167 Interview with Escort Agency Owner (n 91).

168 *Taxation Administration Act 1953* (Cth) s 8K.

may be stalling social progress by signalling to the general public that sex industry workers are not operating legitimate businesses deserving of financial services.[169]

Further research would be required to ascertain the underlying cause of financial service providers' unwillingness to service the sex industry in Australia. The Eros Association has suggested that financial discrimination against the adult industry can be attributed to moral objections, a misplaced perception that the industry is high risk, or the flow on effects of overseas anti-adult industry regulations.[170] Similarly, Stardust et al argue that complex factors give rise to this discrimination, including risk detection systems that do not distinguish between sex trafficking and consensual sex work, 'moral panic', and the transnational impact of the United States' restrictive sex work laws on Australian financial institutions.[171]

It is noteworthy that the interviews uncovered extensive experiences of discrimination, although participants were limited to Victoria and New South Wales, where many sex workers and sex work premises have been operating lawfully for decades. This signals two things. First, that sex workers seeking financial services in jurisdictions where sex work is largely illegal, such as Western Australia and South Australia are likely in a worse position than the participants in this study and would very likely face severe stigma and discrimination. Second, it reflects the significant 'time lag' between reform to sex work laws and the treatment of sex workers as legitimate participants in the workforce, which has been examined extensively in the work of Crofts and Prior.[172] As Bianca Beebe points out, this means that the policies of financial service providers arguably have 'a more profound effect on sex workers' material reality than state legislation, as these intermediaries control how they are able to secure business and be paid for it without having to answer to a voting demographic'.[173] This demonstrates the continued need for robust anti-discrimination protections for sex workers, despite achieving formal 'equality' with other workers before the law.

VI Options for Reform

Plainly, the law does not adequately protect sex workers from financial discrimination. This 'emboldens individuals, organisations and institutions to discriminate against sex workers with the knowledge that this behaviour is socially and culturally

169 Stardust et al, 'High Risk Hustling' (n 17) 89.

170 Bartle (n 29) 10.

171 Stardust et al, 'High Risk Hustling' (n 17) 73, 104, 136.

172 See, eg: Crofts (n 148); Penny Crofts et al, 'Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria' (2012) 23(3) *Current Issues in Criminal Justice* 393; Crofts and Prior (n 44); Penny Crofts, 'Brothels and Disorderly Acts' (2007) 1 *Public Space: Journal of Law and Social Justice* 1.

173 Beebe (n 25) 140.

accepted and legally sanctioned'.[174] This final part discusses options for targeted law reform to address this, with a focus on the protected attributes under anti-discrimination law.

A *Anti-Money Laundering and Counter Terrorism Financing Laws*

The exemption from liability found in s 235 of the *AML/CTF Act* should be amended so that it does not apply in anti-discrimination proceedings. The Australian Human Rights Commission ('AHRC') raised significant concerns about s 235 as it appeared in the Bill which became the *AML/CTF Act*. The AHRC argued there was a real risk the Bill could lead to financial institutions discriminating against customers based on race, religion and nationality. In this context, it was rightly argued they should not be exempt from liability under discrimination law.[175] As noted above, the AHRC's concerns have essentially materialised, with obligations under the *AML/CTF Act*, and s 235 presently being utilised by banks to justify policies of blanket financial exclusion.[176] This was not the intention of the *AML/CTF Act*, and could actually increase the risk of money laundering,[177] by forcing businesses to deal entirely in cash. Amending s 235 will mean these discriminatory policies will not be immune from judicial scrutiny, encouraging banks to assess customer risk on a case-by-case basis.

B *Protecting Corporations from Discrimination*

This article does not advocate for additional rights for corporations to make discrimination claims. In the context of discrimination against the sex industry (or other small businesses run by people with protected attributes), increased rights for corporations may seem desirable. However, this could have the unintended consequence of giving already powerful corporations a means to advance their commercial interests. For example, campaigns led by environmental and social activists have essentially led to the de-banking of companies in the fossil fuel[178] and

174 Scarlet Alliance and Australian Sex Workers Association, 'Anti-Discrimination and Vilification Protections' (n 12) 2.

175 Human Rights and Equal Opportunity Commission, *Comments on the Anti-Money Laundering and Terrorism Financing Bill 2006 and Draft Consolidated AML/TF Rules 2006* (Comment, 2006). Note that in 2008, the Human Rights and Equal Opportunity Commission was renamed the Australian Human Rights Commission.

176 *Flynn* (n 20) [47]; Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43).

177 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43).

178 Zoe Bush and Fleur Ramsay, 'Is it Time for Lawyers to Dump their Fossil Fuel Clients?' *Saturday Paper* (30 April 2022) 94; Alex Kotch, 'ALEC Launches Attack on Banks that Divest from Fossil Fuels', *Centre for Media and Democracy* (online, 3 December 2021) <https://www.exposedbycmd.org/2021/12/03/alec-launches-attack-on-banks-that-divest-from-fossil-fuels/>.

tobacco industries.[179] It would not align with the purpose of anti-discrimination law if these companies could make discrimination claims under the protected attribute profession, trade or occupation. While this may appear far-fetched, reports have emerged of a 'burgeoning fossil fuel discrimination movement'[180] in the United States.[181]

Judge Hampel's decision in *Cobaw Community Health Services Ltd* (VCAT)[182] struck the correct balance on this issue, and it is respectfully submitted that her decision should be followed. According to Hampel J, the law can address discrimination directed at a corporation where the corporation was acting on behalf of a natural person.[183] This means the protected attributes of natural persons remain central to the alleged discrimination, ensuring that the purpose of anti-discrimination law is not subverted.

C *Protected Attributes for Sex Workers*

Most importantly, sex workers should be protected by carefully drafted protected attributes in every state and territory. There is no best practice model for a protected attribute in any jurisdiction that merits replication. The current attributes have not withstood statutory interpretation by courts and tribunals, and as a result are too narrow in their scope to offer substantial protection. Tellingly, there has not been a single Australian case in which a sex worker has made a successful discrimination claim.[184] This distinct lack of success indicates that any protected attribute designed for sex workers must be watertight, and expressly provide what is included in its scope. As Gaze and Smith explain, 'whatever the statutory formulation, unless a feature is expressly mentioned in the Act, there will always be a question about how broadly or narrowly a court will interpret the attribute'.[185]

Crucially, any attribute designed for sex workers must expressly include sex work itself. Limiting an attribute to the sex worker job descriptor will only prevent discrimination when a sex worker is not working (for example, if a person is refused service in a grocery store because they happen to be a sex worker). Including sex work is necessary to prevent discrimination in the course of carrying out a business,

179 'The Tobacco-Free Finance Pledge', *United Nations Environment Program Finance Initiative* (Web Page) <https://www.unepfi.org/insurance/insurance/projects/the-tobacco-free-finance-pledge/>.

180 Statement of Intent, Texas Senate Bill 13, 16 March 2021 (Brian Birdwell).

181 Nitish Pahwa, 'Oil Companies are Whining About "Discrimination"', *Slate Magazine* (online 24 January 2022) <https://slate.com/technology/2022/01/climate-divestment-harvard-fossil-fuel-opposition.html>.

182 *Cobaw Community Health Services Ltd* (VCAT) (n 114).

183 Ibid [170]–[172].

184 *Dovedeen* (n 65); *Payne v APN News & Media* [2015] QCAT 514; *Millen v The Salvation Army (Queensland) Property Trust* [2004] QADT 33; *Federal Capital Press* (n 65); *Capocchi* (n 65).

185 Gaze and Smith (n 58) 83.

including purchasing advertisements, booking accommodation, and applying for financial services.[186] The existing case law indicates that these are the very situations where discrimination is most likely to occur. With a view to addressing these issues, the following sub-sections consider options for amending existing attributes and propose a new protected attribute for sex workers.

1 *Lawful Sexual Activity*

The rulings in *Dovedeen* and *Capocchi* indicate lawful sexual activity excludes sex work and related activities. This could be remedied by a statutory definition clarifying that the attribute includes sex work.[187] However, the limitation of the attribute to lawful sex workers is arguably unworkable.[188] In jurisdictions with criminalisation models, a significant proportion of the industry will at times work illegally or have an uncertain legal status. These workers cannot rely on lawful sexual activity.[189] Furthermore, some street-based sex work offences remain in decriminalised jurisdictions.[190] Street-based workers are the most visible and arguably the most vulnerable to discrimination.[191] Accordingly, it would be unacceptable to leave street-based workers out of any attribute designed to protect sex workers.

2 *Sex Work and Sex Worker*

Scarlet Alliance, the peak national body for sex workers, considers 'sex work and sex worker' to be best practice for a protected attribute.[192] This attribute is also supported by numerous sex worker advocacy groups and the Queensland Human Rights Commission ('QHRC').[193] In July 2022, the QHRC recommended

186 Scarlet Alliance and Australian Sex Workers Association, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (4 March 2022) 8 ('Submission to QHRC').

187 Sex Work Law Reform Victoria, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (1 March 2022) 2, 7 ('Submission to QHRC').

188 Stardust et al, 'High Risk Hustling' (n 17) 130.

189 Victorian Equal Opportunity and Human Rights Commission, Submission to Department of Justice and Community Safety, *Review to Make Recommendations for the Decriminalisation of Sex Work* (20 July 2020) 4.

190 *Summary Offences Act 1988* (NSW) s 19(1); *Summary Offences Act 1966* (Vic) s 38B.

191 South Australian Sex Industry Network, Submission No 30 to Select Committee on the Statutes Amendment (Decriminalisation of Sex Work) Bill 2015, *Inquiry into the Statutes Amendment (Decriminalisation of Sex Work) Bill 2015* (16 October 2015) 2.

192 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections* (n 12) 6.

193 Sex Worker Outreach Program (SWOP NT) and Sex Worker Reference Group, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (undated) 8; Sex Worker Outreach Project (SWOP NSW), Submission to Queensland Human Rights Commission, *Review of Queensland's*

Queensland's anti-discrimination act be amended to include 'sex worker', defined as 'being a sex worker or engaging in sex work'.[194] The Queensland government has given effect to this recommendation, by introducing the new protected attribute 'sex work activity'.[195] The Northern Territory recently amended its anti-discrimination act to include a similar protected attribute: 'employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work'.[196]

The primary benefit of 'sex work and sex worker' (and the similarly worded protected attributes in Queensland and the Northern Territory) is its specificity, as it ensures the activity of sex work is within scope. Including 'sex work' would also ensure that people who do not identify as a sex worker, or who cannot substantiate a sex worker 'occupation' but have engaged in sex work at certain times are protected. Importantly, this attribute recognises the unique historical and current stigma attached to sex work that is not experienced by people in other professions.[197]

However, this approach has its pitfalls. It could exclude numerous workers in the sex and adult industries, including strippers, adult web-cammers, phone sex operators, brothel managers, escort agency managers, and adult product retailers, because they may not be classified as sex workers, or as engaging in sex work in law.[198] Certain members of the sex industry, such as brothel managers, could be protected from discrimination on the basis of their 'association' with sex workers. However, this would not capture people such as adult store retailers or strippers, who do not necessarily have any association with sex workers. Furthermore, 'association' does not necessarily include contractual or business relationships,[199] and is not a protected attribute in all jurisdictions.[200]

Discrimination against other sex industry workers can also have a detrimental effect on sex workers. For example, some escort agency managers provide payment terminals to escort workers.[201] If a bank refuses merchant services to the escort

Anti-Discrimination Act 1991 (4 March 2022) 3; Magenta, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (28 February 2022) 2; South Australian Sex Industry Network, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (undated) 2.

194 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 27, 295.

195 Explanatory Notes, Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024 (Qld) 3; *Decriminalising Sex Work Act* (Qld) (n 9) s 4.

196 *Anti-Discrimination Act* (NT) (n 59) s 19(1)(ec).

197 Scarlet Alliance and Australian Sex Workers Association, 'Submission to QHRC' (n 186) 8.

198 Sex Work Law Reform Victoria, 'Submission to QHRC' (n 187) 7.

199 *Cassidy* (n 107) [82]–[83].

200 The *Equal Opportunity Act 1984* (WA) does not contain a protected attribute of association.

201 Interview with Escort Agency Owner (n 91).

agency manager, the escort workers will be forced to deal in cash. 'Sex work and sex worker' would likely be more effective than 'lawful sexual activity' and 'profession, trade or occupation'.[202] However, its exclusion of the wider sex and adult industries is problematic.

3 *Profession, Trade or Occupation*

The attribute 'profession, trade or occupation' has been advocated for by a number of sex worker advocacy groups at different times.[203] However, it is no longer considered best practice by Scarlet Alliance, who recognises it has not adequately protected sex workers.[204] It may be difficult for some complainants to prove their occupation as a sex worker, because a large proportion of sex workers work part-time or casually and move in and out of the industry.[205] However, the most significant issue with this attribute is that it may not encompass activities necessary to perform an occupation, including sex work itself.[206] The obvious benefit of this attribute is its breadth. It will encompass the numerous occupations within the sex and adult industries that face discrimination.[207] The problems with this attribute could largely be addressed by an accompanying definition clarifying that the attribute includes but is not limited to 'sex work' and 'sex worker', or at the very least includes the business activities associated with an occupation.

An alternative solution could be to introduce 'profession, trade or occupation' and 'being a sex worker or engaging in sex work' as overlapping attributes that operate together to cover the field of professions within the sex and adult industries. This could address the issue that no single attribute appears to be adequate. Although unorthodox, the concept of overlapping attributes presents as the best option

202 The similarly worded attributes in the Northern Territory ('employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work') and Queensland ('sex work activity') are yet to be judicially tested: see above nn 59–60 and accompanying text.

203 Scarlet Alliance and Australian Sex Workers Association, Submission No 146 to Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act* (9 February 2018) 11; Sex Worker Outreach Program (SWOP NT) and Sex Worker Reference Group, (SWRG) Collective, Submission No 162 to Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act* (February 2018) 6; Sex Work Law Reform Victoria, Submission to Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA) (29 October 2021) 1.

204 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections* (n 12) 6.

205 JaneMaree Maher, Sharon Pickering and Alison Gerard, 'Privileging Work not Sex: Flexibility and Employment in the Sexual Services Industry' (2012) 60(4) *Sociological Review* 654, 663–4; Basil Donovan et al, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health* (Report, 2012) 18.

206 *Federal Capital Press* (n 65).

207 Sex Work Law Reform Victoria, 'Submission to QHRC' (n 187) 7.

for addressing the full picture of discrimination against the wider sex and adult industries.

VII Conclusion

Financial discrimination is emerging as a significant issue for the sex industry and marks the next frontier in sex workers' rights. Decriminalisation cannot be fully enjoyed by sex workers who cannot open a bank account and take payment from clients. The multiple areas of intersecting law that bear upon this issue mean there can be no easy solution to the problems described in this article. The barriers sex workers will face when making a discrimination claim are many and complex. This article has identified some of the most significant barriers, and proposed options for reform by amending the *AML/CTF Act* and introducing robust protected attributes. Introducing protected attributes which unambiguously protect sex workers would represent a significant step towards equality. Clearly, it is not enough for such an attribute to protect the status of being a sex worker. This would be akin to an attribute that purports to protect gay and lesbian people but does not protect them if they engage in same-sex sexual activity. Accordingly, any attribute designed to protect sex workers must expressly include sex work itself. This will protect sex workers' right to carry out their profession, including engaging in basic activities such as banking their earnings. Case law shows that this matter cannot be left to interpretation by courts and tribunals. Unless the attribute is drafted to include sex work, it is almost certain to remain excluded from the protective blanket of Australia's anti-discrimination laws.

Murray Wesson[*]

THE *MINERALOGY ACT* AND THE RULE OF LAW

'This is crucial that this bill is introduced and passed. And the academics and the other people can write about it afterwards, can analyse it afterwards, all they like for months to come.'[1]

Abstract

On 13 August 2020, the Parliament of Western Australia ('WA') enacted the *Mineralogy Act* to address damages claims arising from proposals for mining projects submitted by Clive Palmer, Mineralogy Pty Ltd and International Minerals Pty Ltd. The constitutionality of the *Mineralogy Act* was challenged in the High Court on various grounds in *Mineralogy* and *Palmer*. This article considers one of these grounds: that the *Mineralogy Act* was invalid for its failure to comply with the rule of law, understood as an implied constraint on State legislative competence arising under the *Commonwealth Constitution*. This submission was unsuccessful, as were the other grounds of challenge. However, the High Court's consideration of this issue and the legislative process leading to the enactment of the *Mineralogy Act* provide a useful backdrop to reflect upon the concept of the rule of law, the circumstances in which departures from the rule of law are justifiable, and the status of the rule of law in Australian constitutional law. The rule of law is rightly protected primarily through parliamentary as opposed to judicial processes, although the *Mineralogy Act* also reveals clear weaknesses in Australia's political constitution.

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[*] Associate Professor, UWA Law School. I would like to thank the participants in the seminar 'The Palmer Act: The Rule of Law under State Constitutions' (15 September 2022) organised by the Australian Academy of Law and the Australian Association of Constitutional Law, as well as the participants in the WA Bar Association CPD seminar 'The Palmer Act and the Rule of Law under State Constitutions' (20 March 2023), for feedback on earlier versions of this article. I would especially like to thank Professor Sarah Murray for helpful comments.

[1] 'QUIGLEY — Palmer's $30 Billion Claim', *ABC Radio Perth — Breakfast* (ABC Radio Perth, 13 August 2020) 3–4 <https://libstream.Parliament.wa.gov.au/2020/8/Radio/222601.pdf>.

I Introduction

On 11 August 2020 at 4.55pm, standing orders were suspended in the WA Legislative Assembly to allow the Attorney-General, John Quigley, to introduce urgently and without notice the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020 ('Mineralogy Bill'), which purported to amend the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Pre-Amendment Act*'). In a radio interview on 13 August 2020, the Attorney-General explained that the Mineralogy Bill had been prepared in secret over a period of six weeks.[2] Other than the Premier and the Attorney-General, and possibly one or two other Ministers, no member of Cabinet was aware of the Mineralogy Bill's existence until a Cabinet meeting at 4.15pm on 11 August 2020, approximately 45 minutes before the Mineralogy Bill was introduced to Parliament. Backbenchers knew nothing about the Mineralogy Bill until the Attorney-General rose to speak, and the Leader of the Opposition, Liza Harvey, was briefed only minutes beforehand.[3] The Mineralogy Bill passed the Legislative Assembly the following day and was passed by the Legislative Council on 13 August 2020. The Governor, Chris Dawson, assented to the Mineralogy Bill on the same day. Usually in WA, statutes commence four weeks after receiving royal assent, unless otherwise specified.[4] The Mineralogy Bill stipulated that it would commence on the day of its assent, meaning that the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('*Mineralogy Act*') took effect on 13 August 2020.

As the Attorney-General explained in his second reading speech, the effect of the Mineralogy Bill was to address damages claims arising from proposals submitted by Clive Palmer, Mineralogy Pty Ltd and International Minerals Pty Ltd (the plaintiffs) pursuant to the terms of the *Pre-Amendment Act*. These proposals related to a project called the Balmoral South Iron Ore Project. The Attorney-General stated that the damages claim was in the order of $30 billion, an amount equivalent to the WA state budget or $12,000 per person in WA. The Mineralogy Bill was, as the Attorney-General acknowledged, 'unprecedented'.[5] The Mineralogy Bill would, *inter alia*: ensure that the Balmoral South proposals would have no further legal effect; terminate arbitration proceedings concerning those proposals; and invalidate existing arbitral awards. The clandestine preparation of the Mineralogy Bill and its urgent passage through Parliament were also extraordinary. In his radio interview on 13 August 2020, the Attorney-General explained that the Mineralogy Bill's introduction to the WA Legislative Assembly was timed to prevent Clive Palmer registering arbitral awards from 2014 and 2019: 'we kept it so tight and then brought it in at 5:00pm on Tuesday, after every court in the land was closed, and the doors were locked'. All of this was necessary, the Attorney-General said, to protect

2 Ibid 4.

3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Liza Mary Harvey).

4 *Interpretation Act 1984* (WA) s 20(2).

5 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4599 (John Quigley, Attorney-General).

the state 'from the rapacious nature of Mr Palmer, Mineralogy and International Minerals'.[6]

The constitutionality of the *Mineralogy Act* was challenged in the High Court on various grounds in *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy*')[7] and *Palmer v Western Australia* ('*Palmer*').[8] This article considers one of these grounds: that the *Mineralogy Act* was invalid for its failure to comply with the rule of law, understood to be an implied constraint on State legislative competence arising under the *Commonwealth Constitution*. This submission was unsuccessful, as were the other grounds of challenge. The constitutionality of the *Mineralogy Act* was upheld, the arbitration proceedings were terminated, and, at the time of writing, the plaintiffs were seeking damages from the Commonwealth by way of international arbitration proceedings.[9] However, the High Court's judgments in *Mineralogy* and *Palmer* and the legislative process leading to the enactment of the *Mineralogy Act* provide a useful backdrop to reflect upon the concept of the rule of law, the circumstances in which departures from the rule of law are justified, and the status of the rule of law in Australian constitutional law.

From the perspective of the High Court, as Dixon J states in *Australian Communist Party v Commonwealth* ('*Communist Party Case*'), the rule of law 'forms an assumption' of the *Constitution*.[10] To be sure, there are aspects of the rule of law that find practical expression in the *Constitution*. For example, ch III of the *Constitution* gives effect to the rule of law through s 75(v), which entrenches the federal judiciary's ability to engage in judicial review of Commonwealth executive action through constitutional writs.[11] But generally, the rule of law does not function as a standard of legal validity.[12] However, this does not mean that the rule of law is unimportant. Instead, the rule of law functions mainly as a political ideal that is upheld through Australia's political institutions. In other words, the rule of law is primarily an

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6 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4598 (John Quigley, Attorney-General).

7 (2021) 274 CLR 219 ('*Mineralogy*').

8 (2021) 274 CLR 286 ('*Palmer*').

9 Paul Karp, 'Clive Palmer sues Australia for $41.3bn over alleged free trade rule breach', *The Guardian* (online, 11 July 2023) <www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal>.

10 (1951) 83 CLR 1, 193 (Dixon J) ('*Communist Party Case*').

11 Ch III of the *Constitution* also gives effect to the rule of law by vesting in an independent judiciary the ability to hold the Commonwealth Parliament to constitutional constraints in the enactment of legislation, and by denying to non-ch III courts the ability to engage in exclusively judicial tasks such as the adjudication of criminal guilt. For discussion, see Justice AS Bell, 'The Rule of Law and the Constitution: A Short Overview' (Web Page, 23 July 2021) <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2021-Speeches/Bell_20210723.pdf>.

12 Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 2.

aspect of Australia's political constitution — the part associated with holding those who exercise political power to account through political processes — as opposed to its legal constitution — the part associated with holding those who exercise political power to account through judicial review.[13]

The rule of law is a notoriously contested idea, with a noted divide between 'thin' accounts, focused on formal attributes of the rule of law, and 'thick' accounts that seek to import various substantive rights into the concept.[14] Notwithstanding these complexities, this article contends that the *Mineralogy Act* constitutes a clear violation of the rule of law. This is because the *Mineralogy Act* undermines a fundamental value of the rule of law, which is that the law should be capable of guiding human conduct.[15] However, the rule of law is not an absolute. Prominent rule of law theorists acknowledge that the rule of law must be balanced against other values.[16] Unfortunately, there is much less guidance in the literature about the circumstances in which legislative departures from the rule of law are warranted. The article seeks to contribute to our understanding of the rule of law by developing an account of when the rule of law may be justifiably limited, drawing upon the legitimate aim and balancing stages of the structured proportionality test.[17] This article argues further that these issues are best addressed through parliamentary, as opposed to judicial, processes. In other words, there are good reasons for the rule of law to primarily form a part of Australia's political, as opposed to legal, constitution.

But for Parliament to perform its role in determining whether departures from the rule of law are justified, it is necessary for the legislative process to work effectively. This was not the case for the *Mineralogy Act*. The WA Parliament was unable to properly consider the rule of law implications of the Mineralogy Bill due to: (1) the urgency with which the Mineralogy Bill was pressed upon Parliament; (2) the limited information provided by the Government; (3) the extent to which the legislative process was distorted by the extreme unpopularity of Clive Palmer with the WA public; and (4) the overwhelming Parliamentary majority held by the WA Labor party.

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13 On the distinction between political and legal constitutionalism, see, eg: Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273; Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455.

14 Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] (Autumn) *Public Law* 467.

15 Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210; Lon Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1964) 95.

16 Raz (n 15); Fuller (n 15).

17 Structured proportionality was introduced to Australian constitutional law as a 'tool of analysis' for determining whether the implied freedom of political communication is breached in *McCloy v New South Wales* (2015) 257 CLR 178, 336 ('*McCloy*').

However, a peculiar feature of the circumstances surrounding the passage of the Mineralogy Bill was that the Government had some justification for restricting the information available to Parliament given that arbitration proceedings were extant at the time the Mineralogy Bill was before Parliament, and thus subject to the confidentiality requirements of the *Commercial Arbitration Act 2012* (Cth). The Government could also point to reasons for the urgent passage of the Mineralogy Bill relating to the need to forestall litigation that might derail the constitutionality of the *Mineralogy Act*. In these circumstances, members of Parliament felt compelled to take the Government at its word that departing from the rule of law was necessary to safeguard the fiscal position of the State, even though they were not able to conclude with complete confidence that this was the case. Indeed, it is still not possible to do so given that the *Mineralogy Act* excludes the application of the *Freedom of Information Act 1992* (WA).[18] In short, although this article develops a theory of when it is permissible for legislatures to depart from the rule of law, it is not possible to reach a clear conclusion about whether the *Mineralogy Act* constitutes a justified departure from the rule of law. The *Mineralogy Act* therefore stands as a highly bizarre, deeply unsatisfactory, and possibly singular episode that nonetheless holds broader lessons for the place of the rule of law in Australian constitutional law. The *Mineralogy Act* has also received surprisingly little scholarly attention, especially given the extent to which it reveals weaknesses in the protection for the rule of law under Australia's political constitution.[19]

The arguments in this article are developed as follows. First, the article explores the nature of State Agreements and the Balmoral South disputes, provides an overview of the key features of the *Mineralogy Act*, and explains the focus of the High Court proceedings in *Mineralogy* and *Palmer*. Second, the article discusses the concept of the rule of law and develops a theory of the circumstances in which legislative departures from the rule of law are justified. Third, the article explains how the rule of law featured in the High Court's decisions in *Mineralogy* and *Palmer*, thereby shedding light on the place of the rule of law under Australia's legal constitution. Fourth, the article turns to the political constitution, considers how parliaments should ideally operate where proposed legislation threatens to derogate from the rule of law, and against this background analyses the deliberations of the WA

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18 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ss 13(1), (3) and 21(1)–(3) ('*Mineralogy Act*').

19 For discussion, see: Nick Seddon, 'The Palmer Act' *AUSPUBLAW* (Blog Post, 31 August 2021) <https://auspublaw.org/blog/2020/08/the-palmer-act/>; Natalie Brown, 'Clive Palmer Takes a Sovereign Risk Challenging the Authority of WA Parliament' *AUSPUBLAW* (Blog Post, 9 September 2020) <www.auspublaw.org/blog/2020/09/clive-palmer-takes-a-sovereign-risk-challenging-the-authority-of-wa-Parliament/>; John Southalan, 'High Court Dismisses Challenge to Western Australia's Mineralogy Legislation' (2021) 40(1) *Australian Resources and Energy Law Journal* 5; Albert Monichino and Gianluca Rossi, 'Ex parte Enforcement of Arbitral Awards and the Rule of Law: *Mineralogy v Western Australia*' (2021) 31(1) *Australasian Dispute Resolution Journal* 31; Anthony Gray, 'The Separation of Powers and the Mineralogy/Palmer Litigation' in Keith Thompson (ed), *Current Issues in Australian Constitutional Law* (Connor Court Publishing, 2022) 63–92.

Parliament on the Mineralogy Bill. The article concludes by reflecting upon the clear weaknesses in the safeguards for the rule of law in Australia's political constitution revealed by the *Mineralogy Act*.

II State Agreements and the Balmoral South Disputes

To understand the *Mineralogy Act*, we first need to understand the nature of State Agreements. As John Southalan explains, State Agreements are used for large mining operations in WA and other states.[20] A State Agreement originates in a contract between a resources company and the Government. The Government obtains Parliament's approval of the agreement through statute which attaches the State Agreement. The legal effect of Parliament's endorsement is to enforce any aspects of the State Agreement that would otherwise be contrary to existing law. The State Agreement's main function is then to act as a mechanism to regulate future developments by the company. This occurs through the company providing the Government with proposals that are broadly described in the State Agreement. The Government considers each proposal, and, when approved, these allow the developments to proceed. The *Government Agreements Act 1979* (WA) prescribes additional protections for State Agreements.

The Mineralogy State Agreement was concluded by the WA Premier and the plaintiffs in December 2001, then approved by the WA Parliament in 2002 in the *Pre-Amendment Act*.[21] Clause 6 of the Mineralogy State Agreement required that the plaintiffs submit to the relevant Minister proposals for one or more combinations of projects. The Minister could take one of three courses of action regarding these proposals. First, the Minister could approve the proposal without qualification or reservation. Second, the Minister could defer considering, or making a decision on, the proposal pending submission of a further proposal, or a proposal in respect of matters not covered by the initial proposal. Third, the Minister could require that there be an alteration of the proposal, or require compliance with conditions on the approval of the proposal that the Minister, for stated reasons, considered reasonable. It was not open to the Minister simply to reject the proposal. Clause 46 of the Mineralogy State Agreement dealt with arbitration, providing that disputes between the parties should be resolved through arbitration under the *Commercial Arbitration Act 2012* (WA).

In 2012, the plaintiffs submitted to the Minister a proposal for a mining, processing, and export development, referred to in the *Pre-Amendment Act* as the 'first Balmoral South proposal'.[22] The Minister considered that the first Balmoral South proposal was outside the terms of the Mineralogy Agreement, and did not approve it. In response, the plaintiffs sought arbitration pursuant to clause 46 of the Mineralogy

20 Southalan (n 19).

21 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) sch 1 ('*Pre-Amendment Act*').

22 Ibid s 7(1).

State Agreement. In 2013, while the arbitration was in progress, the plaintiffs submitted to the Minister further documents, referred to in the *Pre-Amendment Act* as the 'second Balmoral South proposal'.[23] In 2014, the arbitrator determined that that the first Balmoral South proposal was a proposal within the terms of the Mineralogy State Agreement, which the Government had not properly considered. Following this decision, the Government effectively gave a 'conditional approval' to the first Balmoral South proposal, specifying 46 conditions for the plaintiffs to address before proceeding.

In 2018, the plaintiffs referred to arbitration a procedural dispute about whether the 2014 arbitral award precluded them from pursuing a claim for damages for breach of the Mineralogy State Agreement relating to the initial failure of the Minister to deal with the first Balmoral South proposal. A procedural dispute was also referred to arbitration regarding whether the plaintiffs were entitled to pursue a claim for damages for breach of the Mineralogy State Agreement on the basis that the conditions imposed by the Government for approval of the first Balmoral South proposal were so unreasonable as to give rise to a further failure to deal with the proposal. In 2019, the arbitrator ruled that the plaintiffs were not precluded from pursuing either claim for damages.

The result was that, in July 2020, the plaintiffs referred the substantive claims for damages to arbitration. The arbitrator was scheduled to hear the damages claims in November 2020 and issue a decision by February 2021. Notwithstanding these developments, the WA Premier, Mark McGowan, and the Attorney-General, John Quigley, were, in March 2020, already engaged in discussion about the prospect of legislation as a means of dealing with the plaintiffs' damages claims.[24] By the end of July 2020, they were discussing the exact timing of the introduction of the Mineralogy Bill to Parliament.[25] The enactment of the *Mineralogy Act* on 13 August 2020 terminated the arbitration proceedings.

III The Mineralogy Act

Described by the WA Solicitor-General in the *Mineralogy* High Court litigation as providing 'cascading layers of protection' for the financial position of the State,[26] the *Mineralogy Act* is an extraordinary piece of legislation. Section 9 provides that the first and second Balmoral South proposals will have no further legal effect. Section 10 terminates the arbitration proceedings that were then in progress and states that the 2014 and 2019 arbitral awards in favour of the plaintiffs should be taken never to have had legal effect. Pursuant to an elaborate definition of 'disputed matter',[27] s 11 precludes any relevant liability on the part of the State and provides

23 Ibid.

24 *Palmer v McGowan (No 5)* (2022) 404 ALR 621, 630 [27] (Lee J).

25 Ibid 630 [28] (Lee J).

26 *Mineralogy* (n 7) 257 [95] (Edelman J).

27 *Mineralogy Act* (n 18) s 7(1).

that no relevant proceedings can be brought against the State. Further to an equally elaborate definition of 'protected matter',[28] s 18 prevents the matter from giving rise to a cause of action or legal right or remedy against the State after commencement of the *Mineralogy Act*, and provides that the matter is taken never to have had the effect of giving rise to any cause of action or legal right or remedy against the State which may have existed before commencement. The *Mineralogy Act* separately requires the plaintiffs to indemnify the State against any amount that might be recovered in respect of these matters.[29] In addition, non-enforcement provisions prevent a liability of the State connected with these matters from being charged to or paid out of the Consolidated Revenue Fund or enforced against any asset of the State.[30]

Apart from these protections, the *Mineralogy Act* excludes any relevant conduct of the State from judicial review,[31] other than for jurisdictional error,[32] and from the application of the rules of natural justice. The Act states that 'no proceedings can be brought, made or begun to the extent that the proceedings are connected with seeking, by or from the State, discovery, provision, production, inspection or disclosure of any document or other thing connected with [a disputed or protected] matter'.[33] Persons are also precluded from seeking payment from the State for legal costs connected with the proceedings.[34] These provisions clearly have the potential to bear directly upon the judicial process. The Act similarly excludes the application of the *Freedom of Information Act 1992* (WA) from these matters.[35] A further noteworthy feature of the *Mineralogy Act* is the express provision made for the substantive provisions of Pt 3 to have distinct and severable operations in the event of invalidity: if 'a provision of [Pt 3], or a part of a provision of [Pt 3], is not valid for any reason, the rest of [Pt 3] is to be regarded as divisible from, and capable of operating independently of, the provision, or the part of the provision, that is not valid'.[36] A final remarkable feature of the *Mineralogy Act* is s 30, which empowers the Governor, if the Minister is of the opinion that one or more specified circumstances exist or may exist and on the Minister's recommendation, by order to amend Pt 3 to address these circumstances or to make any other provision necessary or convenient to address these circumstances. Section 31 goes on to provide that subsidiary legislation may operate retrospectively and have effect notwithstanding the State Agreement, *Mineralogy Act*, or any other Act or law. Section 30 was

28 Ibid s 7(1).

29 Ibid ss 14, 15, 22, 23.

30 Ibid ss 17, 25.

31 Ibid ss 12(1), (3), 20(1), (3).

32 Ibid s 26(6).

33 Ibid ss 12(4)–(7), 13(5)–(8), 20(4)–(7), 21(5)–(8).

34 Ibid ss 11(7), (8), 12(7), 13(8).

35 Ibid ss 13(1)–(3), 21(1)–(3).

36 Ibid s 8(5).

described by the Attorney-General in the WA Legislative Assembly as 'the Henry VIII clause of all Henry VIIIs'.[37]

IV The High Court's 'Prudential Approach' to Constitutional Adjudication

In September 2020, the plaintiffs filed writs in the High Court challenging the constitutionality of the *Mineralogy Act*, and *Mineralogy* and *Palmer* were heard in June 2021. Counsel for Mineralogy Pty Ltd made submissions in the *Mineralogy* proceedings and Clive Palmer appeared in person in the *Palmer* proceedings.

In *Mineralogy*, the High Court emphasised that it adopts a 'prudential approach' to constitutional adjudication. The prudential approach means that parties have no entitlement to expect an answer to a question of law unless 'there exists a state of facts which makes it necessary to decide [the] question in order to do justice in a given case and to determine the rights of the parties'.[38] It follows that parties will not be permitted to 'roam at large' over statutes, but will instead be 'confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party'.[39] Further, it is ordinarily inappropriate for the Court to be 'drawn into a consideration of a whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid'.[40]

The result of the prudential approach is that, notwithstanding the elaborate provisions of the *Mineralogy Act*, the High Court was able to narrow its focus to those sections having a 'practical effect' on the rights of the plaintiffs. These were identified as ss 9(1) to 9(2) (invaliding the first and second Balmoral South proposals) and ss 10(4) to 10(7) (invalidating the arbitration awards). In other words, the High Court confined its inquiry to the provisions of the *Mineralogy Act* extinguishing the rights of the plaintiffs. The plaintiffs challenged these provisions on the basis that they are were inconsistent with ch III and s 118 of the *Constitution*. Additional grounds of challenge were that the *Mineralogy Act* as a whole was incompatible with s 6 of the *Australia Act 1986* (Cth) and exceeds limitations on the scope of the legislative power of the WA Parliament relating to the rule of law. This article does

37 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4834 (John Quigley, Attorney-General). A Henry VIII clause enables delegated legislation to override legislation that has been passed by Parliament.

38 *Mineralogy* (n 7) 247–8 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon J). For discussion of the prudential approach, see Tristan Taylor, 'The High Court's Prudential Approach: When Is it Necessary to Resolve a Constitutional Question?' (2024) 47(1) *UNSW Law Journal* 211.

39 *Knight v Victoria* (2017) 261 CLR 306, 324–5 [33].

40 Ibid 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

not provide a comprehensive overview of the High Court's judgments in *Mineralogy* and *Palmer*.[41] Instead, the focus is on the interaction between the *Mineralogy Act* and the rule of law.

V The Rule of Law

Before considering *Mineralogy* and *Palmer*, it is necessary to explore the concept of the rule of law in greater depth. As Tom Bingham notes,[42] credit for coining the phrase 'the rule of law' is normally given to Professor AV Dicey who used the term in his book, *Introduction to the Study of the Law of the Constitution*.[43] However, the idea has numerous antecedents, including in the work of Aristotle.[44] The rule of law has since emerged as a key principle of liberal constitutionalism, but it does not follow that the meaning of the rule of law is settled or clear. Instead, the meaning of the rule of law is notoriously elusive, with some authors suggesting that concept is 'essentially contested'[45] or even meaningless.[46] As Jeremy Waldron notes, there is 'contestation about the content and requirements of the Rule of Law ideal, *and* there is contestation about its point'.[47]

In the literature on the rule of law, there is a well-established distinction between 'thin' and 'thick', or 'formal' and 'substantive' conceptions of the rule of law. For Paul Craig, thin or formal conceptions of the rule of law address: (1) the manner in which the law was promulgated; (2) the clarity of the ensuing norm; and (3) the temporal dimension of the enacted norm.

However, formal conceptions of the rule of law do not pass judgement upon the content of the law. They are 'not concerned with whether the law was, in that sense, a good law or a bad law, provided that the formal precepts of the rule of law were themselves met'.[48] Prominent thin accounts of the rule of law are provided by Joseph Raz[49] and Lon Fuller.[50] In contrast, thick or substantive conceptions of the rule of

41 For a general discussion of *Mineralogy* and *Palmer*, see Southalan (n 19).

42 Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3.

43 AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co, 8th ed, 1927).

44 Aristotle, *The Politics* (c 350 BC), tr Stephen Everson (Cambridge University Press, 1988).

45 Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21(2) *Law and Philosophy* 137.

46 Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987) 1.

47 Waldron (n 45) 159 (emphasis in original).

48 Craig (n 14) 467.

49 Raz (n 15).

50 Fuller (n 15).

law accept the formal attributes of the rule of law but also seek to derive substantive rights from the concept. An example is the work of TRS Allan, who argues that the rule of law embraces substantive moral principles and it is the role of the judiciary to apply these principles to restrain legislative and executive power.[51] As Lisa Burton Crawford notes, the distinction between thin and thick accounts of the rule of law is therefore not the only axis of disagreement.[52] Where Allan regards the rule of law as a criterion of legal validity, for Raz, the rule of law is a 'political ideal which a legal system may lack or may possess to a greater or lesser extent'.[53]

For the purposes of this article, it is not necessary to explore substantive conceptions of the rule of law. As argued below, the *Mineralogy Act* plainly violates a formal conception of the rule of law. This dispenses with the need to delve into more contentious, substantive accounts of the rule of law to establish the incompatibility of the *Mineralogy Act* with the rule of law. Further, it is typically formal conceptions of the rule of law that are invoked in Australian constitutional law. The focus is therefore on formal theories of the rule of law, especially those developed by Raz and Fuller.

For Raz, the basic idea of the rule of law is that 'law must be capable of guiding the behaviour of its subjects'.[54] From this idea, Raz derives a series of principles: (1) all laws should be prospective, open, and clear; (2) laws should be relatively stable; (3) the making of particular laws should be guided by open, stable, clear and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible; and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[55]

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51 TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 2001).

52 Crawford (n 12) 14.

53 Raz (n 15) 211.

54 Ibid 210. In *Thoughtfulness and the Rule of Law* (Harvard University Press, 2023), Jeremy Waldron questions the centrality of predictability values to the rule of law. In particular, Waldron discusses three aspects of legal practice that incorporate elements of 'thoughtfulness' as opposed to predictability: the use of standards as opposed to rules; the rules of legal procedure; and *stare decisis*. However, Waldron does not wish to displace predictability values altogether from the rule of law. Further, the aspects of legal practice that he discusses are not raised by the *Mineralogy Act*, which concerned the enactment of legislation that derogated from various rule of law principles, especially — it will be argued — the value of legal predictability for the plaintiffs. For these reasons, while Waldron's discussion enriches our understanding of the rule of law, there does not appear to be any inconsistency between his theory and the approach taken in this article, which maintains a focus on legal predictability as essential to the rule of law for the purposes of analysing the *Mineralogy Act*.

55 Raz (n 15) 214–18.

In developing a formal account of the rule of law, Raz emphasises that the rule of law is not a 'complete social philosophy'.[56] The rule of law is one virtue that a legal system may possess and should not be confused with democracy, justice, equality, human rights and so on. Conformity to the rule of law is also a matter of degree. Complete conformity to the rule of law is impossible, but it is broadly agreed that legal systems should generally comply with the rule of law. Importantly, Raz acknowledges that since the rule of law is just one of the virtues that the law should possess, it has no more than prima facie force. The rule of law must be balanced against the competing claims of other values. A lesser degree of conformity with the rule of law may facilitate the realisation of other goals. The evil of different violations of the rule of law is not always the same. Therefore, 'one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law'.[57]

There are some overlaps between Raz's account of the rule of law and Fuller's theory of the inner morality of law developed in *The Morality of Law*.[58] It is well-known that Fuller develops his theory through an allegory involving eight ways in which the fictional King Rex fails to make law. These eight failures to make law correspond to eight standards of legal excellence: (1) generality; (2) promulgation; (3) non-retroactivity; (4) clarity; (5) non-contradiction; (6) possibility of compliance; (7) constancy; and (8) congruence between the declared rule and official action.

Similarly to Raz's account of the rule of law, Fuller regards the purpose of law as 'subjecting human conduct to the governance of rules'.[59] The standards of legal excellence ensure that the law is capable of guiding human behaviour. Fuller likewise acknowledges that a legal utopia in which the standards of legal excellence are perfectly realised is not possible. There may also sometimes be trade-offs between the standards of legal excellence.[60] For Fuller, the 'inner' morality of law is therefore a 'morality of aspiration' that appeals to the 'pride of the craftsman'.[61]

Notwithstanding these overlaps, there are also some key differences between Raz's and Fuller's theories. Fuller regards some level of compliance with the standards of legal excellence as necessary for the existence of law and on this basis concludes that law is an innately moral concept. In contrast, Raz does not accept that every legal system necessarily has some moral value.[62] Relevantly for this article, there are also differences between Raz and Fuller about the circumstances in which departures from the rule of law are justified. Raz simply notes that general conformity to the

56 Ibid 211.

57 Ibid 229.

58 Fuller (n 15).

59 Ibid 96.

60 Ibid 41, 45.

61 Ibid 43.

62 Raz (n 15) 223.

rule of law should be 'cherished',[63] and that the rule of law should be 'balanced'[64] against competing values. Fuller similarly invokes the idea of balance: 'not too much, not too little'.[65] However, Fuller's view of the purposes that may justify departures from the rule of law is more constrained than Raz's account. Kristen Rundle argues that at the basis of Fuller's theory is a conception of the person as a responsible agent. The lawgiver and legal subject enter into a relationship of reciprocity. Derogations from the inner morality of law are permissible if they 'serve the particular quality of lawgiver-legal subject relationship that a condition of legality constitutes and maintains'.[66] Fuller argues, for example, that retroactive laws may be justified to address irregularities arising from failures to meet other desiderata of legality.[67]

For reasons explored below, Fuller's emphasis on the purpose for which the legislature seeks to depart from the rule of law is deeply illuminating. However, Fuller's account of the purposes that are legitimate in this context is arguably excessively constrained, at least if Fuller is understood as arguing that these purposes are confined to notions of reciprocity inherent in the idea of legality. Consider, for example, the challenge for the rule of law posed by the growth of administrative discretion in the modern state. It is sometimes argued that administrative discretion threatens to undermine the rule of law by introducing elements of arbitrariness into administrative decision-making and jeopardising legal certainty.[68] On the other hand, it is also possible to defend administrative discretion on the basis that it is necessary to achieve greater flexibility and better substantive outcomes.[69] These are not objectives related to the promotion of legality, or a situation where a particular desideratum is compromised in order to promote another aspect of the rule of law. Rather, the argument is that it is necessary to compromise the rule of law in pursuit of non-legal objectives.[70]

VI The Permissibility of Departures from the Rule of Law

Faced with these difficulties, some theorists conclude that it is not possible to formulate a general theory about the circumstances in which departures from the rule of law are justified. John Finnis, for example, argues that there is no 'key' or

63 Ibid 222.

64 Ibid 228.

65 Fuller (n 15) 18.

66 Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Bloomsbury Publishing, 2012) 98.

67 Fuller (n 15) 54.

68 See, eg, Robert Goodin, *Reasons for Welfare* (Princeton University Press, 1988) 184–229.

69 See, eg, Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (Oxford University Press, 2020) 274–6.

70 There may also be an argument that administrative discretion is conducive to greater overall compliance with the law. See, eg, Heath (n 69) 276.

'guide' and ultimately what is required is an exercise in 'practical reasonableness'.[71] In a similar vein, John Tasioulas suggests that the extent to which less than maximal compliance with the rule of law is permitted 'will naturally differ from one society to another, depending on their individual circumstances'.[72]

In contrast, this article argues that it is possible to stipulate some general principles to structure our reflections on the rule of law, even if these are stated at a relatively high level of abstraction. The starting point for this argument is the doctrine of structured proportionality, which has gained prominence in Australian constitutional law in recent years as a 'tool of analysis'[73] for determining whether limitations on the implied freedom of political communication[74] and the guarantee of free interstate trade, commerce and intercourse in s 92 of the *Constitution* are justified.[75] In broad terms, structured proportionality requires the court to consider: (1) whether there is a burden on the right or freedom; (2) whether the purpose of the law is legitimate; and (3) whether the law is proportionate to the legitimate objective. The third stage is understood as entailing a further three steps. In the Australian context, these are articulated by the High Court as follows: (i) the law should be suitable (rationally connected to the purpose of the provision); (ii) necessary (there should not be an obvious and compelling alternative reasonably practicable means of achieving the same purpose that has a less restrictive effect on the right or freedom); and (iii) adequate in its balance[76] (which involves a value judgement, consistent with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction that it imposes on the freedom).[77]

As it stands, it would be infeasible to transplant the structured proportionality test wholesale to analysis of whether particular departures from the rule are permitted. First, structured proportionality is not well-adapted to the internal complexity of the rule of law. Structured proportionality developed in the context of the enforcement of constitutional rights and freedoms, where the question is whether a right or

71 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 275.

72 John Tasioulas, 'The Rule of Law' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2020) 117, 128.

73 *McCloy* (n 17) 211 [58] (French CJ, Kiefel, Bell and Keane JJ).

74 Ibid 193–6 [2]-[5] (French CJ, Kiefel, Bell and Keane JJ).

75 *Palmer v Western Australia* (2021) 272 CLR 505, 43 [140] (Gageler J).

76 *McCloy* (n 17) 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

77 Ibid 195 [2] (French CJ, Kiefel, Bell and Keane JJ). There is extensive literature on structured proportionality. For a comparative perspective see, eg: Alex Stone Stewart and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012). In Australian constitutional law see, eg: Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

freedom may justifiably be limited with respect to a legislative objective external to the right or freedom. In contrast, as Tasioulas notes, the rule of law has a more complex structure given that it necessitates trade-offs 'among its … desiderata when they conflict … and also trade-offs of those desiderata against other considerations, such as democracy or justice'.[78] The internal complexity of the rule of law necessitates a more flexible mode of analysis than structured proportionality.

Second, structured proportionality assumes that rights are 'optimisation requirements' meaning that they should be 'realised to the greatest extent possible given their legal and factual possibilities'.[79] The optimising nature of rights is especially evident in the necessity limb of the structured proportionality test, which asks whether there is an alternative means of achieving the legislative objective that is less restrictive of the right or freedom. In contrast, the rule of law does not share the optimising character of constitutional rights. Both Raz and Fuller emphasise that complete conformity to the rule of law is impossible and it is not feasible for the various desiderata of the rule of law to be realised to their maximum extent.[80]

Third, the normative status of the rule of law is more variable than constitutional rights. While some departures from the rule of law are tantamount to rights violations, others may be 'violations of imperfect duties directed at fostering and preserving common goods to which no-one can claim to have an individual right'.[81] The normatively chequered character of the rule of law necessitates a more flexible mode of analysis than structured proportionality for determining whether departures from the rule of law are justified.

Notwithstanding these qualifications, there are two elements of the structured proportionality test that are helpful in evaluating the permissibility of legislative departures from the rule of law. First, as Fuller notes, there are advantages to considering the purpose for which the legislature is seeking to depart from the rule of law.[82] The insight provided by structured proportionality is that not every purpose can justify a limitation of a constitutional right or freedom.[83] The purpose must be compatible with the democratic values of the state which can be sourced, expressly and impliedly, in the *Constitution*.[84] Likewise, not every legislative purpose should justify a departure from the rule of law. In the Australian context, the purpose must be compatible with the *Constitution*'s commitment to representative and responsible

78 Tasioulas (n 72) 128.

79 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 47. For a helpful discussion of Alexy's work, see Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2(3) *International Journal of Constitutional Law* 574.

80 Raz (n 15) 229; Fuller (n 15) 122.

81 Tasioulas (n 69) 129.

82 Fuller (n 15) 87.

83 Barak (n 77) 245.

84 Ibid 251.

government. In other words, it should not be permissible for legislatures to depart from the rule of law for purposes that are destructive of Australian democracy. A bedrock commitment to representative government is integral to the legal and political dimensions of Australia's constitutional settlement.

Second, like the final balancing stage of structured proportionality, it is helpful to consider whether there is an adequate balance between the importance of the legislative purpose and the extent of the restriction or burden being placed on a particular aspect of the rule of law. This requires the decision-maker to weigh the benefits gained by the public against the proposed harm to the rule of law. There must be an 'adequate congruence' between the advantages to the public of the law and the projected damage to the rule of law.[85] The balancing stage of structured proportionality aligns with the references to balancing in Raz's theory of the rule of law.[86] Balancing receives even greater emphasis in Fuller's work who argues that it is not a 'trite' notion but rather an inevitable consequence of the pursuit by human beings of a 'plurality of ends'.[87] For Fuller, balancing is not the 'easy way', involving a minimum of commitment, but rather the 'hard way'.[88] It is a problem that we invariably encounter as we 'traverse the long road that leads from the abyss of total failure to the heights of human excellence'.[89]

Both the legitimate aim and balancing stages are value-oriented analyses that require normative weight to be ascribed to the legislative purpose and the rule of law. Both are also sufficiently flexible to accommodate the structural and normative complexities of the rule of law. Neither inquiry entails, for example, that an optimising character should be attached to the rule of law. In contrast, the necessity stage of structured proportionality presupposes the optimising character of constitutional rights and would be unhelpful in considering the permissibility of departures from the rule of law. Inclusion of the suitability stage of structured proportionality would also threaten to over-formalise the type of flexible analysis that the rule of law and legislative reasoning require. In any event, suitability is already likely implicit in consideration of whether there is an adequate balance between the importance of the legislative aim and the limitation of the rule of law.[90]

The legitimate aim and balancing stages also share a focus upon the balancing of competing imperatives. Julian Rivers observes that the legitimate aim stage of structured proportionality represents a 'crude balancing exercise between rights

85 Barak (n 77) 340.

86 Raz (n 15) 228.

87 Fuller (n 15) 18.

88 Ibid 19.

89 Ibid 45–6.

90 Suitability plays only a limited role in the enforcement of constitutional rights. Dieter Grimm describes the suitability stage as eliminating a 'small number of runaway cases'. See 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383, 389.

and public interests at the highest level of generality'.[91] This is because balancing is implicit in consideration of whether a legislative purpose has sufficient normative weight to justify the limitation of a constitutional right, or, in our analysis, the rule of law. In contrast, the balancing stage of structured proportionality involves a closer examination of whether the 'degree of attainment of the legitimate aim balances the limitation of interests necessarily caused by the act in question'.[92]

A common objection to balancing by the judiciary is that it requires incommensurable values to be weighed against one another, in the sense that there is no given scale of measurement for determining whether the benefits of achieving the legislative aim outweigh the costs to the competing norm. Critics argue that this entails a departure from the rule of law, in favour of arbitrary rule by judges.[93] There are various responses to this objection in the literature on the justiciability of balancing. Aharon Barak, for example, argues that the relevant dimension of comparison should be 'the social importance of the benefit gained by the limiting law and the social importance of preventing harm to the limited constitutional right at the point of conflict'.[94] As for how social importance is determined, it is derived 'from different political and economic ideologies, from the unique history of each country, from the structure of the political system, and from different social values'.[95]

Even assuming that it is possible to reach a judicial consensus upon social importance as the relevant standard of comparison, Barak's argument underscores that balancing is an inherently open-ended and unstructured inquiry that draws upon multiple values, sources and considerations. This is not to say that the judiciary should never engage in balancing; some forms of balancing are unavoidable.[96] Nor is this an argument against structured proportionality, which incorporates elements of balancing within an overall, staged analysis. Rather, the contention is that to the extent that departures from the rule of law should be considered primarily with reference to balancing — whether this involves consideration of legitimate aims or adequacy of balance — this is an inherently political task that is better suited to the legislature than the judiciary. In other words, the rule of law is overall better situated

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91 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174, 196.

92 Ibid 200.

93 See, eg: Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 311; Jochen von Bernstoff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 63.

94 Barak (n 77) 349.

95 Ibid.

96 For example, awarding damages in tort law: see Endicott (n 87) 323.

within the political constitution rather than the legal constitution and generally should not function as a justiciable standard.[97]

Before returning to the *Mineralogy Act*, it is necessary to consider two potential objections to the analysis developed in this section. On the one hand, it might be argued that the argument goes insufficiently far in recommending that legislatures rely upon particular elements of the structured proportionality test to determine the permissibility of proposed legislative departures from the rule of law. More specifically, it might be suggested that in addition to the legitimate aim and balancing stages legislatures should apply a necessity test, which would assist in identifying alternatives to the proposed legislation that are less burdensome of the rule of law while also promoting the legislative objective. In this regard, it might be observed that the necessity stage of the structured proportionality test is capable of being applied with varying levels of intensity.[98] The flexible nature of the necessity test would allow legislative decision-makers to accommodate the normatively chequered nature of the rule of law in their deliberations.

However, it should be emphasised the focus of this article is on legislative as opposed to judicial reasoning. In contrast to judicial reasoning, commentators stress the inherently open-ended, all-things-considered nature of legislative reasoning. Richard Ekins for example, notes that the 'legislature responds directly to the complexity of the common good in that its deliberation is open to whatever is relevant to the good of the community, including moral argument, empirical findings, and the interests of various members of the community'.[99] It follows that recommendations for how legislatures should reason should not over-formalise the process. Applying the necessity stage of structured proportionality with different levels of intensity involves finely grained and technical distinctions between whether the proposed alternative measures are, for example, equally effective, obvious and compelling, and so on.[100] While lawyers thrive upon drawing and applying these types of distinctions, it is difficult to imagine a legislature imposing these constraints upon their reasoning. There is also a risk, as Ekins also notes, that an over-formalised reliance upon proportionality in legislative reasoning may 'reduce or obscure much that is important'.[101] The stages of the structured proportionality test recommended by this article — the legitimate aim and balancing stages — are the least structured and most open-ended and apply only a very loose framework to legislative deliberations.

On the other hand, from a different perspective, it might be argued that any importation of legal concepts such as structured proportionality to the legislative process is problematic. Of course, there are instances where legislatures are required to engage

97 Crawford (n 12) 14.

98 Stone (n 77) 137.

99 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 125.

100 Stone (n 77) 137.

101 Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press, 2014) 343, 369.

in legal reasoning. Gabrielle Appleby and Adam Webster explain that the Commonwealth Parliament has a primary role in constitutional interpretation in instances where courts show deference to Parliament, and where a non-justiciable constitutional question is involved.[102] Similarly, pursuant to the 'New Commonwealth Model of Constitutionalism',[103] many jurisdictions have introduced parliamentary rights review mechanisms such as joint standing committees on human rights.[104] Even Australia, which lacks a federal bill of rights, has at a Commonwealth level established a Parliamentary Joint Committee on Human Rights which examines bills and legislation for compatibility with Australia's international human rights treaty commitments.[105] These developments would seem to require legislatures to engage in legal reasoning, including through the application of structured proportionality.

However, these observations do not reach the heart of the objection to legislatures relying upon elements of structured proportionality to determine the permissibility of departures from the rule of law. Even where legislatures are required to interpret legal materials, commentators emphasise that they should not 'mimic the legalistic processes of the courts'.[106] Mark Tushnet has cautioned against legislatures failing to develop their own constitutional norms and instead slavishly following the norms that courts articulate, thereby allowing judicial decisions to displace legislative consideration of arguably more important issues.[107] Further, the rule of law in Australia is primarily an assumption of the *Constitution* that functions as a political value as opposed to a standard of legal validity. This casts further doubt upon the appropriateness of legislatures importing elements of legal analysis to their consideration of whether departures from the rule of law are justified.

The difficulty is that even commentators such as Ekins who are sceptical of legislatures adopting elements of legal reasoning emphasise that adherence to the 'ideal of the rule of law is central to legislating well and the rule of law serves as a powerful rational constraint on legislative reasoning'.[108] While there is an extensive literature on the nature of the rule of law as a political ideal, there is much less consideration

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102 Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37(2) *Melbourne University Law Review* 255, 265.

103 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *The American Journal of Comparative Law* 707.

104 For discussion, see: Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *Modern Law Review* 7; Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023) 150–69.

105 The Parliamentary Joint Committee on Human Rights was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For discussion, see George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469.

106 Appleby and Webster (n 103) 270.

107 Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245, 247.

108 Ekins (n 101) 132.

of the circumstances in which departures from the rule of law are permissible. The result is that legislators have little guidance about how to proceed when confronted with proposed legislation that threatens to derogate from the rule of law. This article has drawn upon the concept of structured proportionality to provide a framework for legislative consideration of this issue. In doing so, it has selected those aspects of structured proportionality that are the most suited for political determination and the least likely to impose upon the legislature the 'crabbed and formalistic constitutionalism' that often characterises judicial interpretation.[109] In doing so, this article has sought to chart a middle path between criticisms that the proposed approach goes insufficiently far in incorporating structured proportionality, and objections to the adoption of any elements of structured proportionality in this context.

With this background in mind, we can now return to the *Mineralogy Act*. In terms of the theories developed by Raz and Fuller, it is difficult to see the *Mineralogy Act* as anything other than a violation of the rule of law. At one level, this is because the *Mineralogy Act* violates various desiderata of the rule of law formulated by both theorists. The *Mineralogy Act* is, for example, ad hominem and retrospective. The clandestine preparation of the *Mineralogy Act* and its urgent passage through Parliament undermined the requirements that laws should be relatively stable and constant. The provisions of the *Mineralogy Act* excluding judicial review threaten to undermine judicial independence. But even more fundamentally, the essence of both theories is that the law should be capable of guiding human conduct. Raz, for example, endorses the following statement by FA Hayek:

> [The rule of law means that] government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[110]

In contrast, the entire point of the *Mineralogy Act* was to wrong-foot the plaintiffs to ensure that they would not be able to plan their affairs with reference to the law. The Attorney-General was clear in his radio interview on 13 August 2020 that the secretive preparation of the Mineralogy Bill, and the timing of the introduction to the Mineralogy Bill to Parliament, were intended to ensure that the plaintiffs would not be able to rely upon their pre-existing legal rights.

It is therefore unsurprising that the rule of law featured prominently in debates surrounding the *Mineralogy Act*. There are multiple references to the rule of law in parliamentary debates in the Legislative Assembly on 11 and 12 August 2020[111] and

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109 Cornelia TL Pillard, 'The Unfulfilled Promise of the *Constitution* in Executive Hands' (2005) 103 *Michigan Law Review* 676, 678.

110 Raz (n 15) 210, quoting FA Hayek, *The Road to Serfdom* (London, 1944) 54.

111 See, eg, Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4800 (Peter Argyris Katsambanis).

the Legislative Council on 13 August 2020.[112] On 19 August 2020, the Law Society of Western Australia issued a statement implicitly invoking a Fullerian conception of the rule of law:

> Citizens acquiesce to be governed by the State on the basis the State will govern according to the rule of law. The rule of law comprises a series of concepts, but most fundamentally: all people, whatever their status, are subject to the ordinary law of the land. Departure from that principle has the capacity to affect the foundation of our democracy.[113]

However, as we have also seen, the rule of law is not an absolute. Departures from the rule of law are permissible where these are in furtherance of a legitimate aim and there is an adequate balance between the importance of this aim and the extent of the restriction on the particular aspect of the rule of law that is burdened. The next part of this article explores the role that the rule of law played in the legal constitutionalist proceedings in the High Court in *Mineralogy* and *Palmer* before turning to the political constitutionalist deliberations of the WA Parliament. The High Court's approach to Ch III provides important context for the WA Parliament's deliberations, especially the urgency with which the *Mineralogy Act* was enacted.

VII The Rule of Law in the Legal Constitution: The High Court's Decisions in *Mineralogy* and *Palmer*

In the *Communist Party Case*, Dixon J stated that the rule of law 'forms an assumption' of the *Constitution* as opposed to a justiciable standard.[114] It is therefore unsurprising that the rule of law was not given great prominence in the plaintiffs' submissions or the High Court's judgments in *Mineralogy* and *Palmer*. However, there are aspects of the *Constitution* that give effect to the underlying assumption of the rule of law. One of these aspects is ch III of the *Constitution*. In *APLA Ltd v Legal Services Commissioner (NSW)*, Gleeson CJ and Heydon J said:

> The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the *Constitution* depends for its efficacy. Chapter III of the *Constitution*, which confers and denies judicial power, in accordance with its express terms and necessary implications, gives practical effect to that assumption.[115]

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112 See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2020, 4881 (Rick Mazza).

113 Law Society of Western Australia, 'Media Statement on the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act' (Media Statement, 19 August 2020).

114 *Communist Party Case* (n 10) 193 (Dixon J).

115 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J).

Theorists such as Raz also identify judicial independence as a key element of the rule of law.[116]

In *Mineralogy*, the plaintiffs' argument that ss 9(1) to 9(2) (invalidating the first and second Balmoral South proposals) and ss 10(4) to 10(7) (invalidating the arbitration awards) of the *Mineralogy Act* breached ch III had two strands. First, they submitted that the provisions impaired the institutional integrity of a State court to an extent that is incompatible with its status as a repository or potential repository of federal jurisdiction. For this submission, they relied upon the doctrine in *Kable v Director of Public Prosecutions*.[117] The plaintiffs argued further — or in the alternative — that the provisions constituted an exercise of judicial power by the Parliament of Western Australia. They contended that an exercise of judicial power by the Parliament of a State is precluded by the integrated judicial system established by ch III of the *Constitution*.

The joint judgment held that the provisions went no further than to ascribe new legal consequences to past events and thereby to alter substantive legal rights. In this regard, the joint judgment relied on *Duncan v Independent Commission Against Corruption* to the effect that 'a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the *Constitution* even if those rights are in issue in pending litigation'.[118] They added that '[m]uch less does a statute which alters substantive rights involve an exercise of judicial power even if those rights have been the subject of a concluded arbitration or are the subject of a pending arbitration'.[119] Further, the institutional integrity of a court cannot be undermined by a mere alteration of substantive legal rights even if the alteration is extreme or drastic.[120] In other words, there may have been alteration of substantive rights but there was no interference with judicial independence or exercise of judicial power by the legislature. For this reason, there was no need to consider whether the integrated judicial system established by ch III of the *Constitution* precluded an exercise of judicial power by a State legislature.[121]

Writing separately on ch III, Edelman J cited *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* as authority for the proposition that legislation may alter or extinguish substantive rights, even regarding pending litigation.[122] However, Edelman J also cited *Liyanage v The Queen*[123] in which the Privy Council invalidated legislation on the basis that it

116 Raz (n 15) 216.

117 (1996) 189 CLR 51.

118 (2015) 256 CLR 83, 98 [26] (French CJ, Kiefel, Bell and Keane JJ).

119 *Mineralogy* (n 6) 255 [85] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

120 Ibid [86].

121 Ibid [87].

122 (1986) 161 CLR 88 ('*Australian Building Construction Federation*').

123 [1967] 1 AC 259 ('*Liyanage*'), cited in *Mineralogy* (n 6) 280–1 [158] (Edelman J).

usurped the judicial function. The Privy Council explained that the aim of the legislation 'was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences'.[124] For Edelman J, the crucial distinction between these precedents appeared to be that the legislation in the former case did not 'deal with any aspect of the judicial process'.[125]

Despite finding no conflict between the *Mineralogy Act* and ch III, Edelman J indicated somewhat cryptically that had there been pending or extant litigation there might have been force to the plaintiffs' submissions that the *Mineralogy Act* constituted an exercise of judicial power.[126] This observation may be due to those aspects of the *Mineralogy Act* that do not simply extinguish rights but bear more directly upon the judicial process by, for example, precluding discovery,[127] judicial review other than for jurisdictional error,[128] and payment from the State for legal costs connected with the proceedings.[129] Due to its prudential approach to constitutional adjudication, the High Court did not consider these provisions and confined its focus to those parts of the *Mineralogy Act* extinguishing legal rights. Had there been pending or extant litigation, the sections of the *Mineralogy Act* relevant to the judicial process may have been engaged and the High Court might have broadened its focus. But in the absence of pending or extant litigation, the ch III argument could not gain any traction. This point is returned to below, in the discussion of the deliberations of the WA Parliament.

Apart from the ch III submissions, the plaintiffs advanced the following, more speculative argument: the rule of law is an 'assumption' upon which the *Constitution* depends for its efficacy; the States cannot pass laws that flout that assumption; and the rule of law requires that persons have access to impartial courts to vindicate their legal rights. This submission drew upon Kirby J's obiter remarks in *Durham Holdings Pty Ltd v New South Wales* that: the states derive their 'constitutional status' from the *Constitution*; State laws must be of a kind envisaged by the *Constitution*; and certain 'extreme' laws might fall outside that 'constitutional presupposition'.[130] In other words, the *Constitution* impliedly limits the law-making powers of the states with reference to the rule of law, and the *Mineralogy Act* constituted a sufficiently flagrant violation of the rule of law to fall outside the legislative competence of the WA Parliament.

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124 *Liyanage* (n 124) 290 (Lord Pearce).

125 *Australian Building Construction Federation* (n 124), 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ), cited in *Mineralogy* (n 6) 280–1 [158]–[159] (Edelman J).

126 *Mineralogy* (n 6) 281 [159] (Edelman J).

127 *Mineralogy Act* (n 17) ss 12(4)–(7), 13(5)–(8), 20(4)–(7), 21(5)–(8).

128 Ibid s 26(6).

129 Ibid ss 11(7), (8), 12(7), 13(8).

130 (2001) 205 CLR 399, 431 (Kirby J).

The joint judgment in *Palmer* dealt with this submission in a single paragraph. They describe the rule of law as a 'useful shorthand description of a complex concept central to an appreciation of the form of government that inheres in the text and structure of the *Constitution*'.[131] Reference to the rule of law can help to elucidate constitutional conferrals of judicial, legislative and executive power. However, the rule of law does not support conceptions of judicial, legislative and executive power that extend beyond those limits inherent in the text and structure of the *Constitution*. It is not permissible to treat the rule of law as though 'it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content or attributed'.[132] This formulation reiterates the High Court's well-established emphasis upon the text and structure of the *Constitution* and its related aversion to free-standing principles in constitutional interpretation.[133]

Justice Edelman also wrote separately in *Palmer* and addressed the plaintiffs' rule of law submissions in greater depth. In the process, Edelman J provided helpful guidance about the extent to which parties can make submissions drawing upon the rule of law in constitutional litigation. For Edelman J, 'it is necessary (i) to identify precisely the aspect of the highly contested and abstract notion of the rule of law that is relied upon, and (ii) to identify why that aspect is necessary for the meaning or effective operation of the *Constitution* or its provisions'.[134] Justice Edelman noted that there are a limited number of constitutional implications that have been recognised by the High Court as associated with aspects of the rule of law. For instance, Dicey's principle that no person 'is punishable … except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'[135] is reflected in the constitutional implication that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[136]

For their part, the plaintiffs sought to establish a constitutional implication derived from the rule of law that persons should have access to impartial courts to vindicate their legal rights. Justice Edelman found that it was unnecessary to determine whether this implication is entailed by the text and structure of the *Constitution* given that such an implication would not extend to the protection of legal rights from extinguishment. Accordingly, the provisions of the *Mineralogy Act* extinguishing

131 *Palmer* (n 8) [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

132 *McGinty v Western Australia* (1996) 186 CLR 140, 169 ('*McGinty*'), quoted in *Palmer* (n 8) [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

133 See, eg, *McGinty* (n 133) 232 (McHugh J).

134 *Palmer* (n 8) [21] (Edelman J).

135 Dicey (n 43) 172.

136 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

the rights of the plaintiffs were 'not inconsistent with any constitutional implication based upon any aspect of the rule of law'.[137]

VIII The Rule of Law in the Political Constitution: The Deliberations of the WA Parliament

The extent to which the *Mineralogy Act* constitutes a justified departure from the rule of law was therefore only tangentially explored by the High Court. However, as argued, it is doubtful that the judiciary is the most appropriate forum for these deliberations. The type of open-ended and unstructured balancing exercises involved in determining whether the legislature is departing from the rule of law for a legitimate aim, and whether there is an adequate balance between the importance of the legislative aim and the extent of the restriction on the particular aspect of the rule of law that is burdened, are inquiries that are better suited to the parliamentary process. But for the legislature to properly perform this role, it is essential that there is: (1) sufficient time; and (2) sufficient information for proper scrutiny and debate regarding bills that threaten to derogate from the rule of law.

It should be clear that neither of these criteria were met in the legislative process surrounding the enactment of the *Mineralogy Act*. On the issue of whether the Parliament was provided by the Government with sufficient information, the explanation provided by the Attorney-General for the Mineralogy Bill was the 'dire financial consequences for the state of Western Australia and Western Australians'[138] if the plaintiffs were to succeed in their damages claim. It seems to have been accepted by most members of Parliament that fiscal considerations are potentially a legitimate aim warranting a departure from the rule of law, at least where the envisaged costs to the State are sufficiently far-reaching. For instance, the Leader of the Opposition, Liza Harvey, said that 'net debt in this state is $36 billion. No opposition would stand in the way of a government protecting its taxpayers from net debt increasing to $66 billion on the back of litigation by any individual. That is why we are supporting this legislation'.[139]

However, the only information provided by the Attorney-General in support of his claim that the State faced ruinous financial repercussions if the Mineralogy Bill was not passed was a one-page schedule tabled in the Legislative Assembly.[140] Members of the Legislative Assembly expressed frustration that they were not able to verify the extent of the plaintiffs' damages claim. The Leader of the Opposition stated that

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137 *Palmer* (n 8) [26] (Edelman J).

138 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4597 (John Quigley, Attorney-General).

139 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Lisa Mary Harvey).

140 Comparative Table of Approximate Damages (Including Interest) Claimed <www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4013558a2cb77093b33c6e3a482585c2004d3a22/$file/3558.pdf>.

they were forced to take 'the Premier at his word that $30 billion of taxpayers' funds are at stake'.[141] In response, the Attorney-General noted that pending the enactment of the *Mineralogy Act* the arbitration proceedings remained extant and thus subject to the confidentiality requirements of the *Commercial Arbitration Act 2012* (Cth). This meant that it was not legally possible to provide further information regarding the damages claim. To be sure, the Attorney-General conceded that he had 'in a way' utilised parliamentary privilege to breach the *Commercial Arbitration Act 2012* (Cth) by tabling the schedule of damages.[142] However, he was reluctant to countenance a more far-reaching breach of the *Commercial Arbitration Act 2012* (Cth) without the consent of the plaintiffs, observing that 'in fairness to [Mr Palmer] … he has his rights under the act'.[143]

This position seems to have been reluctantly accepted by some members of the Legislative Assembly. For example, the Deputy Leader of the Opposition, WR Marmion stated that 'I absolutely understand that we cannot have all the information'.[144] It is also understandable that the Attorney-General did not wish to divulge commercially sensitive information. But the net result was that the WA Parliament was unable to properly appraise whether the *Mineralogy Act* had a legitimate aim, or whether there was an adequate balance between the importance of this aim and the projected damage to the rule of law. A further troubling aspect of the *Mineralogy Act* is that it excludes the application of the *Freedom of Information Act 1992* (WA),[145] meaning that even though the arbitration proceedings are now terminated the circumstances surrounding the *Mineralogy Act* remain obscure. The Attorney-General argued that this was necessary to prevent Clive Palmer using 'the freedom of information process as a tool to gather information and documents to pursue the state'.[146] This explanation also appears to have been cautiously accepted by the Opposition. The Deputy Leader of the Opposition stated, 'I understand that Clive Palmer should not get anything and this adequately covers that under freedom of information'.[147]

Apart from the paucity of information provided by the Government, there was also insufficient time for Parliament to properly scrutinise the Mineralogy Bill. Even if the Parliament had been able to verify the extent of the damages claim, the urgency with which the Mineralogy Bill was passed meant that they would not have been able to properly consider whether there was an adequate balance between the purpose of the Mineralogy Bill and its ramifications for the rule of law. Speaking in the Legislative Assembly, the Leader of the Opposition proposed

141 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Lisa Mary Harvey).

142 Ibid 4833 (John Quigley, Attorney-General).

143 Ibid.

144 Ibid 4797 (William Richard Marmion).

145 *Mineralogy Act* (n 18) ss 13(1)–(3) and 21(1)–(3).

146 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4829 (John Quigley, Attorney-General).

147 Ibid 4829 (William Richard Marmion).

a 'short, sharp and bipartisan Legislative Council select committee to review the State's course of action in the best interests of accountability and oversight, without compromising the State's position'.[148] This was a compelling proposal. Indeed, the political protection for the rule of law would be greatly enhanced by bipartisan select committees that consider the permissibility of proposed legislative departures from the rule of law. However, this idea was roundly rejected by the Premier, Mark McGowan: 'absolutely not. We will not agree to any such measure whatsoever.'[149] The Attorney-General also insisted on the urgent passage of the Mineralogy Bill. He explained that subsequent to the introduction of the Mineralogy Bill to the Legislative Assembly, Clive Palmer had registered the 2014 and 2019 arbitration awards with the New South Wales Supreme Court. This made it 'all the more urgent to get this bill through and assented to, with no inquiries and no committees'.[150]

The fact that Clive Palmer succeeded in registering the 2014 and 2019 arbitration awards subsequent to the introduction of the Mineralogy Bill but prior to the enactment of the *Mineralogy Act* raised the question of whether the *Mineralogy Act* would be effective in defeating the damages claim. In response, the Attorney-General pointed to s 7 of the Mineralogy Bill which defined 'introduction time' as meaning 'the beginning of the day on which the Bill for the amending Act is introduced into the Legislative Assembly'.[151] He explained that the relevant provisions of the *Mineralogy Act* would be effective from the 'introduction time' thereby defeating the plaintiffs' damages claim even though their arbitration awards had been registered prior to the enactment of the *Mineralogy Act*. In the words of the Attorney-General: '[t]oo late, mate! Not checkmate; too late mate — by a day'.[152]

This gave rise to a further question, astutely raised by the Honourable Nick Goiran in the Legislative Council:

> 'If the introduction time is a core element of the bill, and that is why the Attorney-General is boasting that he has outfoxed Mr Palmer, why is the bill urgent, Leader of the House? If the introduction time is important to the functioning of the bill, why does it matter at what time the bill receives assent, and why does it matter at what time the Legislative Council concludes its consideration of this bill?'[153]

The Leader of the House and the Legislative Council, the Honourable Sue Ellery, answered that enactment of the *Mineralogy Act* would add an additional layer of protection for the fiscal position of the State: '[i]t is about layering protections and the thickest layer we can have, if I can describe it in that way, is to have the act in

148 Ibid 4783 (Lisa Mary Harvey).

149 Ibid 4783 (Mark McGowan).

150 Ibid 4821 (John Quigley, Attorney-General).

151 Ibid.

152 Ibid 4822.

153 Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2020, 4918 (Nick Gorian).

place.'[154] She added that they were also 'seeking to eliminate the possibility of a chapter III constitutional challenge.'[155]

The reference to a potential ch III challenge returns us to the High Court's decision in *Mineralogy*. There, in response to the plaintiffs' submissions that provisions of the *Mineralogy Act* breached ch III, the joint judgment found that the effect of the *Mineralogy Act* was simply to alter substantive legal rights. Justice Edelman agreed but added that had there been pending or extant litigation there might have been some force to the plaintiffs' submissions that the *Mineralogy Act* constituted an exercise of judicial power. In these circumstances, those aspects of the *Mineralogy Act* bearing upon the judicial process, but not considered by the High Court in *Mineralogy* and *Palmer* due to its prudential approach to constitutional adjudication, would have been engaged. In other words, the legal position of the State might have been more precarious had there been extant litigation seeking to vindicate the plaintiffs' rights when *Mineralogy* and *Palmer* reached the High Court. The result is that there is some force to the Government's view that the Mineralogy Bill needed to be urgently passed to nip any potential litigation in the bud.

Perhaps surprisingly, the Government was therefore able to provide reasons for providing the Parliament with: (1) insufficient time; and (2) insufficient information to properly scrutinise and debate the Mineralogy Bill, notwithstanding that these conditions should ideally be met where proposed legislation threatens to derogate from the rule of law. It follows that Parliament was unable to determine with confidence whether the *Mineralogy Act* constitutes a justified departure from the rule of law, and indeed it is still not possible to do so given that the *Mineralogy Act* excludes the application of the *Freedom of Information Act 1992* (WA).[156]

However, it is also clear that the Government did not come under serious pressure to utilise parliamentary privilege to provide further information regarding the plaintiffs' damages claims, or provide sufficient time to closely scrutinise the Mineralogy Bill by convening a bipartisan select committee in the Legislative Council. This is partly because the Labor Government's overwhelming majority in the Legislative Assembly — where as a result of their landslide victory in the 2021 State election Labor held 53 out of 59 seats — and Legislative Council — where Labor enjoyed a majority of 22 out of 36 seats — helped assure the frictionless progress of the Mineralogy Bill. It is also no doubt relevant that Clive Palmer is a wildly unpopular figure with the WA public, owing in part to his unsuccessful constitutional challenge to WA's 'hard' border arrangement during the COVID-19 pandemic.[157] The *West Australian* newspaper has, on its front page, variously depicted Clive Palmer as a

154 Ibid 4927 (Sue Ellery).

155 Ibid.

156 *Minerology Act* (n 17) ss 13(1)–(3), 21(1)–(3).

157 *Palmer v Western Australia* (2021) 272 CLR 505.

chicken, a cane toad and a cockroach.[158] While the opposition were clearly uncomfortable with the Mineralogy Bill, they were also anxious to distance themselves from Clive Palmer. In the Legislative Assembly, the Leader of the Opposition took care to emphasise that she 'would like to get it on the record that we do not support the actions of Clive Palmer, which is why we are not opposing this legislation.'[159]

IX Conclusion

In one sense, the *Mineralogy Act* represents a bizarre and possibly singular episode in Australian constitutional law that might not have been possible outside a highly unusual configuration of circumstances. At the time, the Government insisted that the *Mineralogy Act* is a one-off measure that does not have broader ramifications for the integrity of State Agreements or the State's adherence to the rule of law. Notwithstanding its unusual character, the *Mineralogy Act* is a useful case-study to reflect upon the concept of the rule of law, the circumstances in which legislative departures from the rule of law are justified, and the protections for the rule of law under the *Constitution*. In this regard, the article argues that there are good reasons for the rule of law to be primarily safeguarded under the political as opposed to legal constitution. However, the *Mineralogy Act* also points to clear weaknesses for the protection of the rule of law under the political constitution. While Clive Palmer is not a vulnerable or disadvantaged individual, the most disquieting long-term lesson to be drawn from the *Mineralogy Act* may be that there is ample political space for Australian governments to derogate from the rule of law where they command clear parliamentary majorities and proposed legislation is directed at sufficiently reviled groups or individuals. This issue is especially acute at state and territory level, where legislatures are subject to fewer constitutional constraints than the Commonwealth Parliament.

158 See, eg, 'The West Australian Turns Clive Palmer into a Cane Toad on Front Page', *PerthNow* (online, 13 August 2020) <www.perthnow.com.au/business/media/the-west-australian-turns-clive-palmer-into-a-cane-toad-on-front-page-ng-b881637651z>.

159 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4793 (Liza Mary Harvey).

Kathy Douglas and Lola Akin Ojelabi***

CIVIL DISPUTE RESOLUTION IN AUSTRALIA: A CONTENT ANALYSIS OF THE TEACHING OF THE TOPIC OF ADR IN THE CORE LEGAL CURRICULUM

Abstract

This article describes a research project exploring the diverse ways that Australian law schools offer alternative or appropriate dispute resolution ('ADR') as part of the core curriculum. Since an amendment to the 'Priestley 11' required areas of study for admission to practice, ADR is now a topic in the renamed area of Civil Dispute Resolution (formerly known as Civil Procedure). This article reports on a research project that uses content analysis to map and explore the provision of ADR core education in Australia. Our research shows most universities combined ADR into the teaching of Civil Procedure and gave less focus to ADR than civil procedure. A significant number of law programs used the term Civil Dispute Resolution, indicating an adoption of the Priestley 11 approach to this study area. The data shows a trend to integrate the two areas of ADR and civil procedure which resonates with a vocational view of legal education and recognises the mainstreaming of ADR in dealing with disputes.

I Introduction

The contemporary trend for legal practitioners to use alternative or appropriate dispute resolution ('ADR') to serve the needs of their clients is widespread in Australia and has impacted legal practice and legal education.[1] ADR includes

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1 'Appropriate' dispute resolution as a term may be seen to be preferable to the use of 'alternative' with ADR now routinely part of court processes: Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) ch 7. For an argument regarding the vocational basis for including ADR in the legal curriculum see: James Duffy and Rachael Field, 'Why ADR Must Be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9, 9–11; Rachael Field and Alpana Roy, 'A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum' (2017) 27(1) *Legal Education Review* 73.

a range of: facilitative practices, such as negotiation and mediation; advisory processes, such as conciliation; and determinative processes, such as arbitration.[2] In the court-connected context, the most embedded ADR process is mediation, as many courts and tribunals can direct parties to mediation.[3] Consequently, alongside this growth in the use of ADR by lawyers, particularly in the court system, there has been an impetus to teach the theory and skills of this discipline area.[4] Notably, this area of study has sometimes been combined with Civil Procedure.[5] ADR has also been referred to by some as 'dispute resolution', as many options (such as mediation and conciliation) are no longer necessarily viewed as 'alternative'.[6]

The requirements for admission to legal practice contribute to the content of legal education and reference legal practice.[7] The Law Admissions Consultative Committee ('LACC') is the body that promotes consensus among various states in Australia regarding admission requirements to practice in law.[8] Each state in Australia specifies requirements for admission to practice, which include the need for a university qualification in law.[9] This can be a Bachelor of Laws ('LLB') (an undergraduate degree) or a Juris Doctor ('JD') (a postgraduate degree). Law school degrees must include courses in the required knowledge areas, colloquially known as the 'Priestley 11', as they were first prescribed by a committee chaired by Justice Priestley in 1992.[10] Additionally, for admission to practice, graduates must also

2 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) ch 1.

3 Ibid ch 8.

4 Field and Roy (n 1).

5 Kathy Douglas, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22(1) *International Journal of the Legal Profession* 71, 79. See also John Lande and Jean Sternlight, 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' (2010) 25(1) *Ohio State Journal on Dispute Resolution* 247, 294.

6 Rachael Field, *Australian Dispute Resolution* (Lexis Nexis, 2nd ed, 2022) 70–2 [3.11]–[3.13].

7 Sally Kift and Kana Nakano, Council of Australian Law Deans, *Reimagining the Professional Regulation of Australian Legal Education* (Report, 1 December 2021) 12–25; Richard Johnstone, 'Whole-of-Curriculum-Design in Law' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 1, 3 [1.4].

8 'Law Admission Consultative Committee (LACC)', *Legal Services Council* (Web Page, 12 March 2024) <https://www.legalservicescouncil.org.au/about-us/law-admissions-consultative-committee.html>.

9 See Law Admissions Consultative Committee, *Model Admission Rules 2015* (at December 2016) r 2 ('*Model Admission Rules*') which provides the model rule that to be admitted a person must have completed an approved tertiary academic law course. See also Law Admissions Consultative Committee, *Accreditation Standards for Australian Law Courses* (at July 2018) s 4.1, which provides that for a course to be accredited it must lead to a degree or similar qualification in law.

10 *Model Admission Rules* (n 9) r 2, sch 1; Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by Australian Universities Teaching Committee* (Report, January 2003) 4–5.

undertake supplementary training completed through a practice-focused qualification referred to as practical legal training ('PLT') or a legal traineeship involving work-integrated learning at a law firm or government department.[11] Other factors that affect legal education in Australia include regulation via additional accrediting bodies, such as the Tertiary Education Quality Standards Agency and, up until 2024, the Council of Australian Law Deans ('CALD').[12] CALD is made up of representatives from the various law programs in Australia[13] and is also influential in legal education government policy.

To address the growing recognition of the prevalence of ADR, some Australian universities established specific subjects, parts of subjects, or skills programs on ADR, particularly in areas such as negotiation and mediation.[14] These included compulsory or elective subjects or part of a core subject for legal practice, such as civil procedure.[15] Importantly, in Australia, ADR is now a topic area in the revised Priestley 11 area of Civil Dispute Resolution, formerly categorised as Civil Procedure.[16] In late 2016 the LACC revised the *Model Admission Rules* to include ADR in the required areas of knowledge for admission to legal practice.[17] This led to a name change from Civil Procedure to Civil Dispute Resolution. This change was effective in 2017 and the impact is unclear, particularly regarding the way this topic area has been included in legal education.[18]

In this article we outline a research project using content analysis to map the offering of ADR in legal education several years after the inclusion of ADR as a topic in Civil Dispute Resolution in the Priestley 11. The parameters of our research concern

11 See *Model Admission Rules* (n 9) r 3.

12 CALD offered a voluntary certification system for law programs. For details of regulations and accreditation, see: Olivia Rundle and Lynden Griggs, 'Law Schools and the Burden of Bureaucracy: Release the Yoke (A Plea from the Coalface). Part 1: Over-Regulation in Australia' (2019) 93(5) *Australian Law Journal* 389, 389–90; Olivia Rundle and Lynden Griggs, 'Law Schools and the Burden of Bureaucracy: Release the Yoke (A Plea from the Coalface). Part 2: International Comparators and a Proposal' (2019) 93(6) *Australian Law Journal* 499.

13 'Deans and Law Schools', *Council of Australian Law Deans* (Web Page, 2024) <https://cald.asn.au/contact-us/deans-law-schools/>. For a discussion of CALD, see David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 147–50.

14 Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-adversarial Practice in Law' (2011) 22(1) *Australasian Dispute Resolution Journal* 49, 51–2. For arguments to include ADR in the core curriculum see Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23(3) *Australasian Dispute Resolution Journal* 148.

15 Douglas (n 14) 51. See also John Lande, 'Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice' (2013) 1(1) *Journal of Dispute Resolution* 1.

16 Field (n 6) 24 [1.53].

17 *Model Admission Rules* (n 9) sch 1.

18 Field (n 6) 25–32 [1.57]–[1.74].

the impact of the Priestley 11, rather than other regulatory factors affecting legal education. We focus on subjects relating to ADR that are core in the curriculum, rather than subjects that may be offered as electives or subjects that are core where ADR is encompassed under wider legal practice skills. Our research is significant as it maps a trend to include ADR in the law curriculum in line with the changes to the Priestley 11. The study shows that ADR is now routinely part of legal education and therefore is arguably no longer operating at the margins. This acceptance and endorsement of ADR, however, is largely achieved through the integration of this area with civil procedure. Most core subjects identified in this study combined ADR with civil procedure and therefore potentially allow learnings in relation to civil procedure and court processes to dominate. These courses predominantly include ADR theory as an aspect of a combined subject rather than an exploration of both theory and practice of ADR. In this article we first discuss trends in litigation and ADR, and second we discuss ADR in legal education. Third, we outline the research method for this project and then lastly discuss the findings and conclude with the need for further research on this topic.

II Civil Dispute Resolution

The introduction of case management in conjunction with a greater focus on ADR in courts has meant that dispute resolution is routinely a part of court processes.[19] ADR, primarily through use of mediation,[20] was adopted to encourage swifter processes and higher rates of settlement of disputes.[21] Following from United Kingdom reforms based on the Woolf report that promoted case management,[22] jurisdictions such as Victoria enacted legislation intended to shift legal practice to a culture that supported the integration of ADR.[23] In some jurisdictions internationally, ADR is used in courts to encourage settlement.[24] ADR is traditionally

19 David Bamford and Mark J Rankin, *Principles of Civil Litigation* (Law Book Company, 4th ed, 2021) ch 9.

20 The definition of mediation provided by the national body in Australia for voluntary accreditation is 'a process that promotes the self-determination of participants and in which participants, with the support of the mediator: (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other; and (f) reach and make their own decisions': Mediator Standards Board, *National Mediator Accreditation System (NMAS)* (at 1 July 2015) 2.

21 Bamford and Rankin (n 19) ch 9.

22 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Report, June 1995).

23 See generally Corey Byrne, 'Changing the Culture of Litigation in Victoria: Ten Years of the Civil Procedure Act 2010 (Vic)' (2021) 10(1) *Journal of Civil Litigation and Practice* 31.

24 For example, in the United Kingdom and Singapore: Masood Ahmed and Dorcas Quek Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice' (2019) 38(1) *Civil Justice Quarterly* 1.

associated with providing improved access to justice due to the opportunity to address a dispute without a costly, formal hearing.[25] However, concerns have been raised about the impact of settlement on the assumed right to a trial, with all its procedural protections, and the potential for second-class justice through ADR to become the norm in dispute resolution.[26] There is also the potential to impact the development of precedents in case law that can affect the evolution of jurisprudence.[27] It is argued that courts value the use of ADR in order to reduce the costs of justice, and that this approach can decrease the opportunity for the public to litigate meritorious claims.[28] Changes to dispute resolution in courts also reflect the dominant premises of the ADR movement, such as collaborative problem-solving, which provide an alternative construction of the role of the lawyer.[29] This role can be described as more holistic in its approach to legal problems, as it includes attention to issues underlying the conflict and the client's needs, as well as the impact of the conflict on their lives and emotions.[30]

Paula Baron, Lillian Corbin and Judy Gutman maintain ADR should form part of an ecosystem that adapts to the context of a dispute.[31] Lawyers should shift their strategies depending on the process they are engaging with, and with attention to the best interests of their client.[32] This kind of flexibility in legal practice requires lawyers to possess the skills and understanding to make and responsively enact such strategic decisions.[33]

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25 Lola Akin Ojelabi, 'Ethical Issues in Court-Connected Mediation' (2019) 38(1) *Civil Justice Quarterly* 61, 67–9.

26 Martin Frey, 'Does ADR Offer Second Class Justice' (2001) 36 *Tulsa Law Journal* 727, 764–6.

27 Michael Legg and Sera Mirzabegian, 'The Vitality of Litigation' in Michael Legg (ed), *Resolving Civil Disputes* (Lexis Nexis, 2016) 37, 38–41 [3.4]–[3.9]. Linda Mulcahy and Wendy Teeder, 'Are Litigants, Trials and Precedents Vanishing After All?' (2021) 85(2) *Modern Law Review* 326.

28 Hazel Genn, 'What is Civil Justice For? Reform, ADR and Access to Justice' (2012) 24 *Yale Journal of Law and Humanities* 397. In the Australian context, it has been argued that appropriate funding to courts must be maintained and ADR should not simply be a way to save on costs: see Michael Black, 'The Relationship Between the Courts and Alternative Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (Lexis Nexis, 2016) 49, 53–4 [4.19]–[4.26].

29 Julie Macfarlane, *The New Lawyer: How Clients Are Transforming the Practice of Law* (University of British Columbia Press, 2nd ed, 2017) 121–4, 154–9.

30 Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096.

31 See generally Paula Baron, Lillian Corbin and Judy Gutman, 'Throwing Babies Out with the Bathwater? — Adversarialism, ADR and the Way Forward' (2014) 40(2) *Monash University Law Review* 283.

32 Ibid 285–7.

33 See, eg, Lillian Corbin, Paula Baron and Judy Gutman, 'ADR Zealots, Adjudicative Romantics and Everything In Between: Lawyers in Mediation' (2015) 38 (2) *University of New South Wales Law Journal* 492, 512–13.

The intersection of lawyers' practice, the realisation of the benefits of ADR, and party experience is important when considering the potential benefits of ADR. For example, Carrie Menkel-Meadow famously warned that litigation paradigms could absorb and reshape processes such as mediation so that they mirror the traditional adversarial legal approach to dispute resolution.[34] In Australia rights-based discourses predominate in mediations that can sometimes look like 'mini-trials'.[35] Lawyers' practice in mediation can favour evaluative approaches, with legal representatives debating the likelihood of winning in court and commonly adopting positional bargaining strategies.[36] Although this kind of practice is not uniform, and may vary significantly due to context,[37] it can be argued that the anticipated shifts in legal practice and the benefits to parties[38] have not yet fully materialised.

Some commentators criticise the acceptance of ADR in legal and justice systems. For instance, in 1984 Owen Fiss wrote that courts and jurisprudence have a role in society to deliver precedents that provide indications of shared societal values.[39] ADR processes mean that matters are not fully litigated and, therefore, precedents are not set for society. Fiss observed that the drive for efficiency in courts, with the aim of moving cases expeditiously through lists, increased the prevalence of private ordering as part of case management.[40] Fiss' assessment of the dangers of ADR have largely proven accurate, with the driving force for many present-day court-connected initiatives, particularly in mediation, being court efficiency and cost considerations.[41] ADR is not necessarily better for parties who are unrepresented and unaware of their legal rights. However, many prospective litigants would face similar dilemmas without ADR, due to the prohibitive costs of legal advice and litigation.[42] Successive government reports have identified the potential improvement to access to justice through the widespread provision of ADR options that are

34 Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 19(1) *Florida State University Law Review* 1, 1–2.

35 Michael McHugh, 'Mediation and Negotiation in Legal Disputes' (2021) 31(2) *Australasian Dispute Resolution Journal* 104, 106.

36 Ibid 105–6.

37 For instance, tribunals may encourage more collaborative problem solving than courts: Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at the Victorian Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 779.

38 Laurence Boulle, *Mediation and Conciliation in Australia: Principles, Process, Practice* (Lexis Nexis, 2023) 302–304 [9.4]–[9.7].

39 Owen Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073, 1085.

40 Ibid 1088–9.

41 Ellen Waldman, 'What *Against Settlement* Got Right' in Art Hinshaw, Andrea Kupfer Schnieder and Sarah Rudolph Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford University Press, 2021) 355, 356.

42 Ibid 357.

less costly, time-consuming and formal than litigation.[43] Historically, critics have argued that ADR can prioritise private ordering too easily, and this denies the public the opportunity for a contested hearing.[44] This may mean that the public do not have the same access to the courts due to the widespread uptake of ADR. This uptake is only likely to increase as the combination of ADR with technology is mooted as a way to provide cheaper and easier access to the justice system. This will be achieved through online dispute resolution and legal education for the public via the internet or specific apps.[45] Therefore emerging technologies combined with ADR may mean that the public use the court system progressively less in the future. But, although there are many benefits to technology in providing cost-effective innovations to improve civil dispute resolution, not all those who might interact with the justice system will have the ability to successfully engage with technology due to challenges with the use of both hardware and software.[46]

Lawyers' skills in, and understanding of, ADR may influence the ways that they practice in the various processes.[47] As noted previously, lawyers' adversarial

43 See, eg: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000); Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Final Report No 92, September 1999); Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) ch 4; Law Reform Committee, Parliament of Victoria, *Alternative Dispute Resolution and Restorative Justice* (Final Report, May 2009) chs 1–5; Productivity Commission, Australian Government, *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Report No 72, September 2014) vol 1; Law Council of Australia, *The Justice Project Final Report — Part 2: Dispute Resolution Mechanisms* (Report, August 2018) 6–18; Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Final Report No 135, March 2019) ch 8. For a discussion of the evolution of ADR in legislation, see Lola Akin Ojelabi, 'Legislating Appropriate Dispute Resolution for the Public Good' (2023) 42(4) *Civil Justice Quarterly* 333.

44 See, eg, Genn (n 28) 397–8.

45 Law Council of Australia, 'Addressing the Legal Needs of the Missing Middle' (Research Paper, November 2021) 32–6. See also Maurits Barendrecht et al, Hague Institute for Innovation of Law, *Understanding Justice Needs: The Elephant in the Courtroom* (Report, November 2018) 44, 80–6.

46 Tania Sourdin, Bin Li and Tony Burke, 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19(1) *Macquarie Law Journal* 17. Technology is now being included in the area of ADR/civil procedure through the teaching of online dispute resolution ('ODR'): Genevieve Grant and Esther Lestrell, 'Bringing ODR to the Education Mainstream' in Catrina Denvir (ed), *Modernizing Legal Education* (Cambridge University Press, 2019) ch 5.

47 Carrie Menkel-Meadow, 'The Trouble with the Adversarial System in a Postmodern, Multicultural World' (1996) 38(1) *William and Mary Law Review* 5, 37–9. Lawyers, on occasion, will need to act for the clients in ways that promote relationship concerns, including understanding the other party's point of view, as well as monetary issues: Jonathan M Hyman, 'Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation' (2010) 34(1) *Washington University Journal of Law and Policy* 11.

orientation may influence court-connected ADR. The widespread use of mediation in courts has increased the use of evaluative mediation due to adversarial legal culture.[48] In the evaluative model, the mediator gives advice on the likely court outcomes and can exert pressure on the parties to settle.[49] Mediation thus may not enhance party self-determination due to the emphasis on achieving settlement.[50] Indeed, such practice can potentially undermine the quality of justice provided by the legal system.[51] The prevalence of evaluative mediation also risks decreasing parties' experience of procedural justice.[52] Research into procedural justice shows that being able to tell their story in full during a process, and being treated with respect by a third party, may be more important to parties than the ultimate outcome of a dispute.[53] However, the practice of lawyers in mediation can sideline the input of parties, focus on settlement and favour evaluation as a method of achieving settlement.[54] Despite the potential valuable contribution of procedural justice to parties, it can be difficult to convince some sections of the legal profession of the benefits of these types of respectful, validating experiences for their clients.[55]

Arguably, law students need to understand a variety of options in ADR, including mediation and associated skills.[56] The inclusion of ADR as a topic in the Priestley 11

48 Nancy Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6(1) *Harvard Negotiation Law Review* 1, 25–7. See also Tania Sourdin and Nikola Balvin, 'Mediation in the Supreme and County Courts of Victoria: A Summary of the Results' (2009) 11(3) *Alternative Dispute Resolution Bulletin* 41, 45.

49 Lela P Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24(4) *Florida State University Law Review* 937, 937–8. Compare this to the facilitative model, which focuses on party empowerment through collaborative problem solving and the mediator attempts to be impartial and refrain from giving advice: see Carole J Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal' (2003–2004) 4(2) *Pepperdine Dispute Resolution Journal* 279.

50 Robert A Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What It Means for the ADR Field' (2002) 3(1) *Pepperdine Dispute Resolution Law Journal* 111, 115–16.

51 Nancy A Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System' (2004) 5(2) *Cardozo Journal of Conflict Resolution* 117, 138–42; Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1, 1.

52 Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' [2002] (1) *Journal of Dispute Resolution* 179, 185–7.

53 Ibid.

54 McHugh (n 35) 105–6.

55 Nancy A Welsh, 'Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically' [2008] (1) *Journal of Dispute Resolution* 45, 53–7.

56 Field (n 6) 25–32 [1.57]–[1.74].

can be said to be part of a trend in legal education to better prepare students for the realities of contemporary practice. Research by Australian academics Tom Fisher, Judy Gutman and Erika Martens demonstrated a link between non-adversarial orientations and concepts of conflict during students' legal education.[57] Their research focused on a core first-year offering entitled Dispute Resolution at La Trobe University in Victoria, Australia, and the impact on students' learning about ADR. In this subject, students learnt about ADR processes and engaged in mediation and negotiation skills role-plays.[58] The results of the study showed that after learning ADR theory and skills students shifted to a more collaborative approach to disputes than they showed at the beginning of the subject.[59] We next discuss in more detail the content and pedagogy of ADR subjects and what this area can contribute to legal education.

III ADR and Legal Education

Legal education is a significant site for the shaping of lawyers' practice, as law schools contribute to the knowledge, skills and ethical interpretations students experience in their education in becoming a lawyer.[60] The common framework of much contemporary ADR practice is due to lawyers' legal education.[61] This is because the experience of legal education generally promotes an adversarial frame of practice, a 'standard philosophical map' that privileges a rights-based focus in dispute resolution.[62] Vocationalism is often seen to be the dominant guiding paradigm of the content and pedagogy of legal education, with its focus on what lawyers must know and be able to do in the legal profession.[63] In terms of ADR, vocationalism provides a coherent narrative to include ADR as part of core learnings in law because ADR is increasingly common in legal practice.[64] Nick James argues that a more appropriate paradigm than vocationalism is the discourse of professionalism, as it provides a broad framework for legal education that encompasses critique of the legal

57 Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part 2: An Empirical Survey' (2007) 17(1–2) *Legal Education Review* 67.

58 Ibid 70–1. For a similar study in the subject in the US, see Ronald Pipkin, 'Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri–Columbia' (1998) 50(4) *Florida Law Review* 609.

59 Fisher, Gutman and Martens (n 57) 80, 84.

60 Macfarlane (n 29) 31–5.

61 Ibid 33.

62 Leonard L Riskin, 'Mediation and Lawyers' (1982) 43(1) *Ohio State Law Journal* 29, 43–51.

63 Nickolas J James, 'More than Merely Work-Ready: Vocationalism Versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186.

64 Kathy Douglas, 'Shaping the Future: The Discourses of ADR and Legal Education' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 118, 130–2.

profession and diverse student employment outcomes.[65] However, ADR can also fit this paradigm as, depending on the way it is taught, it can include critique of theoretical issues, such as power, neutrality and impartiality.[66] The *Carnegie Report*,[67] published in 2007, recognised the importance of ADR. This report provides insights into the content and pedagogy of law programs in the United States ('US').[68] Their research critiqued the teaching in US law schools as overly driven by precedent and substantive content.[69] The report noted that the discipline area of ADR has benefits for law students as it builds theory and practice in collaborative problem-solving.[70] The report also discussed the benefits of the commonly used strategy of experiential learning through role-plays in ADR, exploring the ways that simulation pedagogies can help build professional identity.[71] Recent follow-up research on the *Carnegie Report*, including a longitudinal analysis of the data, showed continued content-driven practice at law schools in the US with some increased focus on legal writing and research (including digital research methods).[72]

In Australia, for many years there has been at least some recognition of the importance of ADR in legal education. For example, the *Pearce Report*,[73] published in 1987, highlighted the focus on doctrine in legal education and called for an increase in legal skills teaching, including ADR, in Australian law schools. Similarly, the 2000 federal report *Managing Justice: A Review of the Federal Civil Justice System*[74] recommended greater attention to legal skills in legal education, including negotiation and dispute resolution options.[75] In 2010, the Learning and Teaching Academic Standards Project in Law, in consultation with many elements of the law discipline,

65 James (n 63) 206–9.

66 See, eg: Leah Wing, 'Mediation and Inequality Reconsidered' (2009) 26(4) *Conflict Resolution Quarterly* 383; Toran Hansen, 'Critical Conflict Resolution Theory and Practice' (2008) 25(4) *Conflict Resolution Quarterly* 403.

67 William Sullivan et al, Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007).

68 Ibid 16.

69 Ibid 87–9.

70 Ibid 111–14.

71 Ibid 114, 152–61. For a recent discussion of the various reports into legal education from around the world and suggestions for Australian law curriculum, see Kift and Nakano (n 7).

72 Gregory Camilli, Judith W Wegener and Ann Gallagher, 'Faculty Perception of Tasks Relevant to Academic Success in the First Year of Law School: A Longitudinal Analysis' (2022) 32(1) *Legal Education Review* 183, 203.

73 Denis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Report, 1987).

74 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, January 2000).

75 Ibid ch 2.

articulated threshold learning outcomes ('TLOs').[76] The standards require minimum education in legal knowledge, skills and ethics, and were developed to align with the bachelor level (Level 7) of the Australian Quality Framework.[77] The TLOs have now become widely adopted in legal education and many are supported by the study of ADR.[78] The impact of this influential construct of practice assists the argument for the compulsory study of ADR.[79]

The six TLOs are:

TLO 1: Knowledge.
TLO 2: Ethics and professional responsibility.
TLO 3: Thinking skills.
TLO 4: Research skills.
TLO 5: Communication and collaboration.
TLO 6: Self-management.

TLO 1 requires demonstration of doctrinal knowledge, and knowledge of the Australian legal system and the various dispute resolution processes operating in this system. This TLO requires knowledge of lawyers' roles, including in negotiation. Similarly, TLO 3 requires demonstration of thinking skills, including creativity, which can be included in the study of ADR. TLO 5 deals with communication and collaboration, and ADR courses commonly include these areas. TLO 6 relates to self-management, requiring the ability for students to learn and work independently, and to be able to reflect on their learning. ADR learning can assist with TLO 6 by covering substantive content and also requiring reflection in assessments, such as journal writing regarding theory and practice.

The former federal advisory committee on ADR, the National Alternative Dispute Resolution Advisory Council ('NADRAC'), noted in their 2012 research paper on the teaching of ADR in Australian law schools ('NADRAC Research Paper') that there was interest in this area from students, but that the cost of the experiential pedagogy and the availability of skilled ADR teachers hampered the teaching of ADR.[80] At the time of the research, there were 32 law schools in Australia and 27 responded to the survey on ADR. Of those law schools that responded, eight

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76 Learning and Teaching Academic Standards Project, *Bachelor of Laws; Learning and Teaching Academic Standards Statement* (Report, Australian Learning and Teaching Council, December 2010) 1–2, 6–7 ('*LLB Academic Standards Statement*'); Field (n 6) 25 [1.56].

77 *LLB Academic Standards Statement* (n 76) 9–10; Field (n 6) 27–8.

78 *LLB Academic Standards Statement* (n 76) 9–10; Field (n 6) 28–32.

79 Corbin, Baron and Gutman (n 33) 510–11.

80 National Alternative Dispute Resolution Advisory Council, 'Teaching Alternative Dispute Resolution in Australian Law Schools' (Research Paper, 2012) 13–14 ('NADRAC Research Paper'). This research was supplemented by the knowledge of the committee of eminent ADR practitioners and a forum on Legal Education and Wellbeing held at RMIT University in 2012.

included ADR as a core subject in the curriculum, with 50% of the content relating to ADR.[81] The content of ADR was often combined with Civil Procedure, likely due to the incorporation of ADR as part of case management, and the report also noted the many electives in the area of ADR being offered at the time.[82]

It was NADRAC's view that the amount of ADR teaching that was occurring in most Australian law schools was insufficient, considering the increasing role that lawyers play in advising clients about, and assisting them in, ADR processes.[83] Clients, professional bodies and courts/tribunals expect that lawyers will be knowledgeable about ADR options, and will also understand interest-based negotiation.[84] This expectation is evident in rule 7.2 of the *Australian Solicitor Conduct Rules*, requiring lawyers to advise clients of alternatives to litigation.[85] Explanations proffered by NADRAC for the lack of depth of focus on ADR include 'the ability of law schools to devote sufficient resources to teaching ADR',[86] specifically, staffing issues around '[t]he shortage of ADR-specific academics associated with Australian law schools'.[87] The staffing issues are attributed to a number of elements including: 'lack of staff interest; difficulty in finding suitably qualified staff; difficulty for staff to contribute sufficient time to preparing and teaching ADR subjects; and unwillingness of staff to integrate ADR into existing subjects they teach'.[88] Notably, in other research into the teaching of ADR in legal education conducted prior to the change to Civil Dispute Resolution in the Priestley 11, it was found that where ADR was combined with Civil Procedure, generally the ADR content was constrained by the focus on the processes of litigation.[89]

More widely, Menkel-Meadow highlighted the potential of ADR to shift dispute resolution from a myopic concern with a framework of rights, through the inclusion of insights from a range of disciplines, that can include the social sciences.[90]

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81 Ibid 9.

82 Ibid.

83 Ibid 12.

84 Ibid.

85 Law Council of Australia, *Australian Solicitors Conduct Rules 2021* (at November 2023).

86 NADRAC Research Paper (n 80) 13.

87 Ibid.

88 Ibid 15.

89 See, eg, Douglas (n 5). In this study, law school staff in two Australian states, Victoria and Queensland, who taught in ADR or ADR/Civil Procedure subjects were interviewed about the content and pedagogy of their offerings. In the study, one law school subject did combine the areas of civil procedure and ADR effectively. This study also noted the high cost of experiential learning via role-plays and the need for skilled staff to teach ADR.

90 Carrie Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54(1) *Journal of Legal Education* 7, 16–17.

Howard Gadlin warned of the danger of settlement-driven ADR processes that fail to address the psychological nuances of conflict, and neglect the larger societal stories that impact upon conflict resolution processes.[91] Mediation has a history of experiential learning and reflection that assists with the development of the legal professional identity.[92] It therefore provides more than just skills and theory but also moulds professional identity for holistic problem-solving.[93]

One impetus for seeking to enhance professional identity is the concern for lawyer and law student wellbeing. Importantly, in several studies, Jill Howieson has researched ADR courses and argued from her findings that they have a positive impact on student mental wellbeing. ADR teachers routinely use role-plays, including debriefing, and Howieson notes these approaches have been found to promote belonging in student cohorts, improving their wellbeing.[94] In her latest research, Howieson and co-authors ran a study during the pandemic and found that:

> [o]verall, the results of the current study corroborate the findings of the 2007 and 2011 studies and mirrors the research in the field. An interactive learning environment can create a sense of belonging, engagement, and mental ease. Our findings confirm that the interactive nature of the DR unit and the enjoyment and nature of the exercises, role-plays and the work with fellow students are associated with a more positive sense of wellbeing.[95]

There are many areas of law that, arguably, can be core in the legal education curriculum: for instance, technology, Indigenous perspectives, clinical experiences and international law.[96] Recently, website content analysis was conducted to establish how many Australian law schools include international law as a core

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91 Howard Gadlin, 'Contributions from the Social Sciences' (2004) 54(1) *Journal of Legal Education* 34, 41.

92 Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315.

93 Ibid 335–6.

94 Jill Howieson, 'ADR Education: Creating Engagement and Increasing Mental Wellbeing Through an Interactive and Constructive Approach' (2011) 22(1) *Australasian Dispute Resolution Journal* 58.

95 Jill Howieson et al, 'Balancing Convenience and Connection Blending Law School Teaching and Learning During a Pandemic' (2022) 32(1) *Legal Education Review* 209, 224.

96 See, eg: Trevor Ryan, 'Coding for Critical Thinking: A Case Study in Embedding Complementary Skills in Legal Education' (2021) 31 *Legal Education Review* 81; Anna Cody, 'Reflection and Clinical Legal Education: How Do Students Learn about Their Ethical Duty to Contribute to Justice' (2020) 23(1–2) *Legal Ethics* 13. For a discussion of possible core areas of inclusion in legal education, see generally Kift and Nakano (n 7). In relation to the inclusion of technology, see also Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (Report, 2017) 76–80.

subject.[97] The authors of the research noted the competition between various areas of law to be core in the over-full law degree curriculum as a significant source of tension.[98] However, they note the number of universities that include international law in the compulsory law curriculum has increased, likely since practice in international law has grown in the profession.[99] The question of what to include in the core of a law program also exists in relation to the inclusion of ADR in the law curriculum. For most law schools, combining ADR with the area of civil procedure is arguably the most appealing option.[100] Textbooks in this area show an inclusion of ADR and civil procedure in ways that acknowledge dispute resolution includes a range of options, culminating in a trial.[101] Some textbooks also include ethics, showing an integrated approach to dispute resolution with the ethical obligations of practice.[102] Our research, described in the next section of this article, provides valuable insights into dispute resolution as a core component of the law curriculum and in particular, what is being taught in law schools in the Priestley 11 area of Civil Dispute Resolution.

IV Methodology

This study assesses how and to what degree ADR theory and skills are taught as core in Australian law programs. Our research explores programs in each state and the core courses required to be completed for the undergraduate law degree, excluding electives. Our approach was to conduct a content analysis of publicly available information on university websites as well as examining course and subject information in online handbooks.[103] Content analysis provides a systematic approach to gathering data according to predetermined categories in a manner that is replicable.[104] The methodology chosen was influenced by the availability of data online. The methodology of a study is important to articulate in any research project.[105]

97 Irene Baghoomians, Emily Crawford and Jacqueline Mowbray, 'The Teaching of Public International Law in Australian Law Schools: 2021 and Beyond' (2022) 43(1) *Adelaide Law Review* 7.

98 Ibid 32.

99 Ibid 15.

100 Douglas (n 5) 74–5.

101 See, eg: Sonya Willis, *Civil Dispute Resolution: Balancing Themes and Theory* (Cambridge University Press, 2022); Bamford and Rankin (n 19).

102 Margaret Castles, Anne Hewitt and Stacey Henderson, *Ethical Resolution of Civil Disputes: South Australian Theory and Practice* (Thomson Reuters, 2nd ed, 2023) ch 2.

103 A similar content analysis was conducted prior to the change to the Priestley 11: Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26 *Australasian Dispute Resolution Journal* 64, 68.

104 Tom Clark et al, *Bryman's Social Research Methods* (Oxford University Press, 6th ed, 2021) ch 13.

105 Linda Mulcahy and Rachel Cahill-O'Callaghan, 'Introduction: Socio-Legal Methodologies' (2021) 48 (Special Supplement 1) *Journal of Law and Society* S1, S1–S2.

The research question sought to explore the teaching of ADR in the core curriculum. The content analysis interprets the data through the lens of the experience of the two researchers, who are both long-time teachers of ADR with decades of engagement with this area's content and pedagogy.

Although qualitative data, in the form of interviews with academic staff, would have provided this information and, additionally, thick descriptions of practice, the research team did not have the resources for a national study of this nature. Quantitative data through surveys was also considered, but the difficulty of achieving sufficient responses from the various law schools meant that this method was not considered suitable. The benefits of a content analysis of law program websites is the opportunity to gain the information needed in an accessible manner and at a low cost. The research involved a preliminary study in October 2022, followed by an updated, refined search in September 2023, which was further updated in March 2024, of publicly available information on the websites of Australian universities offering accredited law programs. The relevant institutions were identified from the CALD website listing certified Australian law schools.[106] Australian law school websites were then accessed to identify core courses available to law students which cover relevant content on ADR skills, knowledge and understanding. The focus was on undergraduate law programs, Bachelor of Laws, rather than postgraduate law programs, JD, as nearly all universities in the study offer an undergraduate law program, but not all offer a JD. However, two law schools, the University of Melbourne and the University of Western Australia, only offer a JD and so these two offerings were included in the study.[107]

Information sourced included lists of core subjects in an undergraduate law program structure and subject information for prospective students, which may include online subject pages or links to handbook pages. This method of data gathering relied on the information available to an individual who is not already enrolled as a student or who does not have staff member access to the institution. This meant that there was information inaccessible to the researchers, for example, in some cases, information on prescribed or recommended texts and details of assessment in each subject was restricted to a learning management system. An additional limitation of this research approach is that law programs may change their offerings over time and thus the accuracy of the information analysed is limited to the period the

106 Council of Australian Law Deans, 'Australia's Law Schools', *Studying Law in Australia* (Web Page, 2023) <https://cald.asn.au/slia/australias-law-schools/>.

107 Where a university offers both a LLB and a JD the approach to the teaching of ADR may differ. For example, at RMIT University in the JD there is a core stand-alone course, Negotiation and Dispute Resolution, and there is also a separate course on Civil Procedure that includes ADR as a topic: 'Masters by Coursework: Juris Doctor', *RMIT University* (Web Page, 2024) <https://www.rmit.edu.au/study-with-us/levels-of-study/postgraduate-study/masters-by-coursework/juris-doctor-mc161/mc161auscy>. In the LLB at RMIT University there is only a core course on Civil Dispute Resolution: 'Bachelor Degrees: Bachelor of Laws', *RMIT University* (Web Page, 2024) <https://www.rmit.edu.au/study-with-us/levels-of-study/undergraduate-study/bachelor-degrees/bachelor-of-laws-bp335/bp335auscy>.

data was accessed online. In this project the last update of the information was in March 2024.

As noted, the first step in the data collection was to access the structure of the law program. The second step was to identify the name of a subject(s) that dealt with ADR. Unlike the 2012 NADRAC Research Paper,[108] discussed earlier in this article, we did not require ADR to be 50% of a subject to be included in our analysis. As we were focused on the impact of the change to the Priestley 11 prescribed areas that included ADR as a topic amongst traditional civil procedure topics, our scope of study was wider than that of the NADRAC Research Paper. The methodology also differs in that NADRAC included predominately survey data.

In our research on the subject titles, we looked for indications of ADR content. For instance, a subject might be called ADR or Dispute Resolution, which might indicate a strong focus on ADR theory and skills. We were particularly interested in subjects that used the Priestley 11 term of Civil Dispute Resolution, which would generally indicate a focus on both ADR and civil procedure. Alternatively, a subject might include a title that combined Civil Procedure with ADR or the subject might simply be called Civil Procedure, but have a topic dealing with ADR in the content. A decision was made to identify separately Civil Dispute Resolution subjects, and combined Civil Procedure and ADR subjects, due to the likelihood that the adoption of the more recent nomenclature and the use of this title showed the staff developing or updating the program had reflected on the need to integrate ADR since the change to the Priestley 11.

The next step was to analyse the subject description and learning outcomes to ascertain the level of focus on ADR. Assessment tasks were also considered but were not uniformly available. Analysis included whether the subject provided learning in both the theory and practical skills of ADR. Attention was given to whether an assessment dealing with ADR required experiential learning, such as reflection on role-plays. Alternatively, a subject might only provide an understanding of the theory of ADR without the teaching of ADR skills in an experiential approach. Different levels of focus were discerned as the courses could be divided into three general categories, with a fourth category relating to situations where there was no publicly available information regarding course learning outcomes and assessment. The categories were:

- Strongest Focus on ADR: inclusion of both ADR theory and skills evident through an analysis of the subject description and/or learning outcomes.
- Strong Focus on ADR: inclusion of ADR in Civil Dispute Resolution or combined civil procedure and ADR subjects with a theoretical focus, but also with some skills focus.
- Medium Focus on ADR: Combined courses with a learning outcome concerning ADR that is theoretical.
- These subjects had limited information available to the public.

108 NADRAC Research Paper (n 80).

Tables 1 to 4 set out institutions and core subjects offered, including information on the extent to which there is a focus on ADR theory or skills according to the four categories above.

Table 1: Category 1 — Strongest Focus on ADR

Type of course	University	Subject
Standalone	University of Notre Dame	LAWS4620 Alternative Dispute Resolution[109]
	Western Sydney University	LAWS2001 Alternative Dispute Resolution[110]
	University of Southern Queensland	LAW1122 Dispute Management
	La Trobe University	LAW1DR Dispute Resolution
	University of Canberra	1152.2 Dispute Management[111]
Combined Civil Procedure with Ethics (in title) or another area	University of Western Australia (JD)	LAWS5109 Ethical Dispute Resolution

An example of a standalone subject which demonstrates the strongest focus on dispute resolution, as evidenced by the learning outcomes, descriptions and assessment focus on ADR, is La Trobe University's 'Dispute Resolution'. This subject addresses ADR separately to civil procedure, although it references litigation, and assesses the theory and skills of facilitative mediation. In the University of Western Australia's JD course, Ethical Dispute Resolution, there is evidence of a similar approach, but with the explicit addition of ethics. Other subjects in this category demonstrate a focus on both the theory and skills of ADR and attempt to explore deeply the discipline area.

109 The subject LAWS 4001 Civil Procedure is also core in this law program.

110 The subject LAWS 4013 Civil Procedure and Arbitration is also core in this law program.

111 The subject 11783.1 Civil Procedure is also core in this law program.

Table 2: Category 2 — Strong Focus on ADR

Type of course	University	Subject
Civil Dispute Resolution	Queensland University of Technology	LLB103 Civil Dispute Resolution
	RMIT University	LAW2582 Civil Dispute Resolution
	University of Newcastle	LAWS4003 Civil Dispute Resolution
	University of Queensland	LAWS4701 Civil Dispute Resolution[112]
	Bond University	LAWS11325 Civil Dispute Resolution
	University of New South Wales	LAWS2371 Resolving Civil Disputes
Combined with Civil Procedure	None	None
Combined Civil Procedure with Ethics (in title) or another area	University of Adelaide	LAW 3501 Dispute Resolution and Ethics
	University of Wollongong	LLB2225 Advanced Legal Skills[113]
	Australian National University	LAWS2244 Litigation and Dispute Management[114]
	Monash University	LAW4303 Litigation and Dispute Resolution
	University of Melbourne (JD)	LAWS90140 Disputes and Ethics

Those subjects we have categorised as having a strong focus on ADR have a clear direction of combining ADR with civil procedure in a manner that endorses the vocational nature of these two areas, and the integration of various dispute resolution processes. They usually reference some assessment of the skills in ADR practice. An example of a close integration of ADR with civil procedure is the Civil Dispute Resolution subject at Queensland University of Technology, which discusses litigation but includes an assessment of mediation. Notably, this subject has adopted the language of the Priestley 11 in the title. Notably, five of the subjects in this category explicitly name the core area of study as Civil Dispute Resolution, again mirroring the amended language of the Priestley 11. The three other subjects in this category use a variety of language with two adopting dispute resolution or management. This may reflect the view that ADR is part of a spectrum of processes

112 Inclusion of arbitration and the critical steps in mediation.

113 This course includes drafting and advocacy, but two of the course learning outcomes refer to dispute management, and planning and conducting a mediation. As such we include it because ADR is a major part of the subject curriculum. This program also has a course 'LLB 3300 Remedies and Civil Procedure', encompassing aspects of civil procedure.

114 This subject includes ethics in the learning outcomes.

that complements litigation.[115] The Australian National University combined litigation and dispute management undergraduate course is somewhat broader than other subjects in this category, with a focus on dispute management in the course title and a learning outcome.

Table 3: Category 3 — Medium Focus

Type of course	University	Subject
Civil Dispute Resolution Civil Procedure or Combined Civil Procedure/Litigation	University of New England	LAW310 Civil Dispute Resolution
	University of South Australia	LAWS3087 Civil Dispute Resolution[116]
	Southern Cross University	LAWS2013 Civil Litigation and Procedure
	Central Queensland University	LAWS13017 Civil Procedure
	Charles Sturt University	LAW217 Civil Procedure
	Charles Darwin University	LWZ317 Civil Procedure
	James Cook University	LA4022 Civil Procedure[117]
	University of the Sunshine Coast	LAW304 Civil Procedure
	Flinders University	LLAW3321 Civil Procedure
	University of Tasmania	LAW355 Civil Procedure
	Deakin University	MLL391 Civil Procedure and Dispute Resolution[118]
	Australian Catholic University	LAWS201 Civil Procedure and Alternative Dispute Resolution[119]
	Swinburne University	LAW30029 Civil Procedure and Alternative Dispute Resolution[120]
	Victoria University	LLW4000 Civil Procedure
	Edith Cowan University	LAW4207 Civil Procedure and Practice
	Murdoch University	LLB450 Civil Procedure
	University of Sydney	LAWS1014 Civil and Criminal Procedure
	University of Technology Sydney	70104 Civil Practice

115 Field (n 6) 11 [1.21]–[1.23].

116 This subject includes discussion of the theory and practice of negotiation, and mediation and online dispute resolution, but does not seem to have any experiential practice element.

117 There is an additional subject at James Cook University that is core to the law program, 'LA117 Contemporary Practice: The New Lawyer', that includes some ADR content and refers to skills-based learning. It appears to be wider than many ADR subjects but arguably encompasses ADR.

118 Deakin university law program offers a core subject in 'Advanced Legal Problem Solving and Persuasion' that includes reference to negotiation and mediation.

119 This subject includes ADR and a discussion of the trajectory of the area in dispute resolution. It does not appear to include a skills-based approach to content.

120 This subject includes ADR in the form of arbitration, mediation, negotiation and persuasion.

An example of a university offering subjects with a medium focus on ADR and less strong evidence of ADR skills is Charles Sturt University. The core course refers to ADR theory and it is a combined civil procedure and dispute resolution course entitled Civil Procedure. There is one learning outcome focused on ADR, which is to 'demonstrate personal autonomy in the use of professional judgement relating to mediation and other alternative dispute mechanisms, including extrajudicial determination of issues arising in the course of litigation'.[121] Other offerings in this category include ADR in the title, and incorporate discussion of the trajectory of ADR, but do not have a skills focus — such as the Australian Catholic University subject Civil Procedure and Alternative Dispute Resolution. Other subjects in this category do not include ADR explicitly but might include it in dispositions before trial.

Table 4: Category 4 — Lack of evidence of focus

Type of course	University	Subject
Standalone	None	None
Combined with Civil Procedure	Griffith University	5210LAW Civil Procedure
	Curtin University	LAWS3009 Civil Procedure[122]
Combined Civil Procedure with Ethics or another area	Macquarie University	LAWS3200 Civil and Criminal Procedure

The content of the above courses is difficult to discern due to a lack of evidence of ADR focus on the website.

V Analysis

Table 1 indicates the variety of ADR-focused subjects predominately termed ADR, Dispute Resolution or Dispute Management being taught as core in various law programs. These subjects showed a commitment to teaching both the theory and practice of ADR and included experiential learning in delivery and assessment. Arguably, these subjects represent 'best practice' of the teaching of ADR and due to being core in the curriculum, provide students with both the theory and skills needed for present day legal practice. These stand-alone subjects align with the desired teaching of ADR as articulated in the 2012 NADRAC Research Paper[123] and would equip students to pursue the opportunities that ADR can present for their clients.

121 'LAW217 — Civil Procedure', *Charles Sturt University* (Web Page, 2024) <https://handbook.csu.edu.au/subject/2023/LAW217>.

122 Includes reference to ADR in course description but limited additional information available online.

123 NADRAC Research Paper (n 80) 18–19.

In Table 2 are those subjects that had a strong focus on ADR. Five of these subjects were titled Civil Dispute Resolution and five further subjects had differing titles. Each combined ADR with civil procedure except the legal skills subject.[124] They had a learning outcome with ADR as the focus and included some skills-based learning. None of these devoted most of the subject to ADR, but they do contain numerous topics and some assessment in the area of ADR. Importantly, some law programs combined ADR, civil procedure and ethics (for example, the University of Adelaide) indicating a further integration of this area with the ethical responsibilities of lawyers.

In Table 3 are those subjects that are categorised as a medium focus on ADR. These courses sometimes combined Civil Procedure and ADR explicitly in the course titles by, for example, calling them 'Civil Procedure and Alternative Dispute Resolution' at Swinburne University and the Australian Catholic University. Alternatively, such courses were simply entitled Civil Procedure as, for example, at Flinders University and James Cook University, where these Civil Procedure courses include ADR material. Their classification as courses with a medium focus on ADR is because the information did not demonstrate practical or experiential treatment of ADR skills and approaches. If learning outcomes or assessment did include explicit attention to ADR, the attention in this category was generally framed in terms of students' ability to discuss, analyse or evaluate ADR approaches rather than their ability to practice, reflect on and implement ADR skills in simulated exercises. However, it did show evidence of the widespread adoption of the topic of ADR in courses focused on civil procedure. Together with the earlier two categories, it supports the proposition that ADR is accepted in line with the revised Priestley 11 Civil Dispute Resolution requirements. Arguably, this reflects an adoption of the vocationalism discourse in the teaching of this area, with a focus on what lawyers do in practice. In total, 35 subjects had a focus on at least the theory of ADR as part of a core subject, and for 3 subjects it was difficult to discern the inclusion of ADR. This represents a considerable change to the degree of ADR inclusion in the core curriculum of law programs since the NADRAC Research Paper.

However, only six of the 38 courses are standalone ADR courses with the strongest focus on ADR practice — again, from the information provided publicly. These address ADR theory and skills in-depth and include experiential learning via role-plays. One of the most comprehensive subjects is offered at the University of Western Australia. 'Ethical Dispute Resolution', which is a standalone course, has learning outcomes including: (1) knowledge; (2) understanding; and (3) practical experience — not only of ADR, but also, for example, of conflict dynamics underpinning litigation and ADR, and the socio-legal research informing policy development in the area.[125] Notably, this course also includes ethics, which is a trend in the data and arguably complements the study of ADR.

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124 'LLB2225 Advanced Legal Skills', *University of Wollongong* (Web Page, 2024) <https://courses.uow.edu.au/subjects/2023/LLB2225?year=2024>.

125 University of Western Australia, 'Ethical Dispute Resolution [LAWS5109]', *University of Western Australia Handbook 2024* (Web Page, 2024) <https://handbooks.uwa.edu.au/unitdetails?code=LAWS5109>.

Using the title, Civil Dispute Resolution, for a course which included ADR seemed to indicate commitment to inclusion of ADR skills and, where sufficient information was available publicly, were assessed as demonstrating a strong focus. However, two subjects named Civil Dispute Resolution were categorised with a medium focus, where theory is addressed but inclusion of skills is not. In total, seven subjects adopted the name of Civil Dispute Resolution, indicating an acceptance of the approach of the Priestley 11. Notably, it is not a requirement of adherence to the Priestley 11 to adopt the naming protocols of the areas of study.

Additionally, some law programs provided extensive electives in ADR. Although not systematically captured in this research with our focus on core courses, it is evident that electives are available for those students interested in ADR.

While NADRAC's research findings may still hold true in terms of limited opportunities in learning ADR, the conclusion that '[i]t is possible for students to leave law school with no exposure to ADR'[126] is no longer applicable. This can be linked to the inclusion of ADR in the Priestley 11 areas of knowledge, through the renaming of Civil Procedure to Civil Dispute Resolution, which has meant that a law student will at least have some theoretical acquaintance with the existence of ADR.

Regardless, there remains considerable challenge in relation to the level of content (theory and skills) covered in subjects across different law schools. Some graduates may complete law school with a focus on ADR skills, while others may graduate with theoretical knowledge only. Without a strong focus on ADR, the capacity of law school graduates to serve their clients with sufficient sophistication and skills to meet the demands of the contemporary legal landscape is reduced. Even when graduates do not go on to legal practice, the understanding achieved through a deeper study of ADR would potentially serve them in non-legal practice roles and in their personal lives with implications for society. As has been noted by NADRAC:

> Conflict management and resolution knowledge and skills are critical in many professional roles. Teaching ADR knowledge and skills to law students will assist them to handle conflict and disputes in all aspects of their life, such as preventing and managing disputes that arise in the workplace and in the commercial sector.[127]

The thin coverage, particularly where the focus is theoretical, also means that the benefit of improving professional identity through the study of ADR may not be realised for some Australian law graduates.

As discussed above, however, the use of ADR both within and outside of the justice system only continues to grow, making it more important for law students to learn relevant skills that could be applied when they enter the profession. The results of this study suggest that there should be further investigation of whether a deeper focus on ADR is required in core courses at Australian law schools.

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126 NADRAC Research Paper (n 80) 8.

127 Ibid 12.

Further research may take several forms. Assessing the impact on graduates of programs where there has been a strong focus on ADR in terms of their attitude to legal practice, their confidence in skills and approach, may be one area of research. More in-depth surveys, focus groups or interviews of academic leadership and teachers, across a range of law schools with differing levels of focus on ADR, as identified in this study, would help to assess the reasons for these differing levels, enhance these initial findings, and potentially provide possible pathways for remediation. In addition, a survey of the profession to assess the general confidence and skill level in ADR would be a useful tool.

VI Conclusion

Some institutions appear to strongly address the task of including ADR as a core element of teaching law to future legal practitioners. This may be due to the academic interests of existing staff, a strategic interest in supporting the shift in the law curriculum to reflect the reality of contemporary legal practice, or a future-focused approach, which recognises the limitations of a highly adversarial mindset for their graduates. Other institutions seemed to find it difficult to include both theory and skills of ADR as a core element of study for law students. Speculatively, this may be due to a lack of expertise of existing academic staff, or the inability to recruit academic staff with skills and interest in this area. It could also be the result of a failure to recognise and prioritise the shift in legal culture, which requires practitioners who are able to analyse, assess and discuss a range of non-adversarial skills and approaches. Lawyers need to be sufficiently familiar with, and skilled in the use of, these ADR approaches to enable them to serve the complex needs of clients. Additionally, the opportunity to address law student wellbeing through the area of ADR is neglected when ADR is only addressed in theoretical terms. It appears that significant change has occurred in the legal curriculum since the advent of Civil Dispute Resolution in the Priestley 11. This change is supported by the greater integration of ADR into the courts, and the consequent strengthening of the vocationalism discourse around the full range of dispute resolution options. Arguably, the full potential of ADR in the legal curriculum may yet to be realised in most law programs. Further research is required to explore why many law schools take this approach.

Ian Murray and Natalie Silver***

USE OF CY-PRÈS AND ADMINISTRATIVE SCHEMES BY AUSTRALIAN HIGHER EDUCATION PROVIDERS TO END DEAD HAND CONTROL OF CHARITABLE ASSETS

Abstract

Australian higher education providers are recipients of large charitable gifts. Many of these gifts take the legal form of perpetual charitable trusts, creating significant endowment portfolios. However, charitable trusts often contain conditions or restrictions that the donor has placed on the use of the funds, presenting challenges for utilising these assets, particularly when the trust conditions have become impracticable or inexpedient to perform because they no longer reflect contemporary society or institutional practices. As a result, Australian higher education providers are increasingly seeking to amend or remove trust conditions using cy-près and administrative schemes. This paper undertakes a survey of Australian cy-près and administrative scheme cases involving higher education purposes and examines judicial approaches towards scheme applications, including the extent to which the promotion of both testamentary intent and the public interest in the effective use of charitable assets is considered. This survey uses philanthropy in the higher education space as an example of broader trends. In particular, the paper considers whether, in Australia's current regulatory environment that seeks to balance public trust and confidence in the charitable sector with supporting an effective charitable sector, the ancient scheme jurisdiction provides a viable means of enabling higher education providers and other charitable gift trustees to access funds controlled by donors from the grave.

I Introduction

Over the past five years, the University of Adelaide has applied to the Supreme Court of South Australia to vary the terms of a number of charitable trusts for the advancement of education where the trust terms became outdated. One concerned a bequest of $75,000 made in 1979 for research and education in botany to be used as determined by the Chairman of the Department of Botany, which had grown to almost $500,000 because botany was no longer taught as a stand-alone

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subject, and the department and position of Chairman no longer existed.[1] Similarly, an application was made in relation to a bequest from 1950 which was to be used in connection with an agricultural institute that ceased operations in 2002.[2] A further application concerned a trust to establish a Chair in Therapeutics at the Medical School that had insufficient funds to endow a Chair, while another related to a trust to award scholarships in nuclear medicine that had grown to $3.5 million, due to low numbers of applicants.[3] The issues surrounding these large charitable gifts are not unique and continue to arise in the courts with relative frequency, particularly as universities review large charitable gifts that can no longer be utilised.[4]

Many large gifts to Australian universities and other higher education providers take the legal form of charitable trusts, creating significant endowment portfolios. However, donors of large philanthropic gifts often seek to retain some degree of control from the grave over these charitable bequests by imposing restrictions on the use of the funds, which in the case of a perpetual charitable trust may allow the donor to exercise that control for eternity.[5] Trust law requires that trustees adhere to the donor's stated charitable purposes on the basis that, in making a charitable gift through a bequest, donors consider the likelihood that their donation will be governed as they intended. The rationalisation is that by promoting donor intent, donors will be more incentivised to give, resulting in more charitable assets, which will provide greater public benefit.[6]

Yet the perpetual enforcement of charitable trusts can present challenges, particularly when there are changed social or organisational circumstances unforeseen by the donor, rendering it impossible or inexpedient for a trustee to comply with

1 *The University of Adelaide* [2023] SASC 8 ('*University of Adelaide*').

2 *University of Adelaide v A-G (SA)* [2023] SASC 17 ('*University of Adelaide v A-G* (2023)').

3 *University of Adelaide v A-G (SA)* [2018] SASC 82 ('*University of Adelaide v A-G* (2018)').

4 See, eg, *Perpetual Trustee Co Ltd v University of New South Wales* [2023] NSWSC 1061.

5 This has been extensively discussed by United States scholars. See, eg: Evelyn Brody, 'From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing' (2007) 41(4) *Georgia Law Review* 1183; Susan N Gary, 'The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing' (2010) 85(3) *Chicago-Kent Law Review* 977; Iris J Goodwin, 'Ask Not What Your Charity Can Do for You: *Robertson v. Princeton* Provides Liberal-Democratic Insights onto the Dilemma of Cy Pres Reform' (2009) 51(1) *Arizona Law Review* 75; Susan A Ostrander, 'The Growth of Donor Control: Revisiting the Social Relations of Philanthropy' (2007) 36(2) *Nonprofit and Voluntary Sector Quarterly* 356.

6 See Evelyn Brody, 'Charitable Endowments and the Democratization of Dynasty' (1997) 39(3) *Arizona Law Review* 873, 942–3.

the restrictions.[7] These problems are exacerbated by the fact that most charitable giving occurs for a mix of egoistic and altruistic reasons, meaning that donors are not necessarily motivated to seek the most efficient achievement of public benefit.[8] In these situations, it is questionable whether giving vehicles that allow donors perpetual control over their wealth provide for the most expedient and efficient use of charitable assets. Further, a legal regime that locks future generations into the distributional choices of earlier generations, such as a scholarship for the 'top male student' at a co-educational government high school,[9] invites disrespect as social mores change and inefficiencies emerge.

Charity law provides a potential solution: the availability of administrative schemes to reform the means by which a (higher education) purpose is pursued and cy-près schemes to reform the (higher educational) purpose itself. In Australia, as government funding for universities and other higher education providers has materially decreased proportionally as a source of funding,[10] accessing funds held in perpetual charitable trusts has become an important institutional response. However, with the passage of time, some of these trusts have become impossible, impracticable, or inexpedient to perform. This may be due to institutional changes, including changes to individual units, courses, degrees, or departments; or societal changes, including more diverse student bodies with different needs, or advances in technology such as shifts to online learning and virtual libraries. The result has been an increase in applications concerning higher education charitable trusts to amend or remove trust conditions using cy-près and administrative schemes.[11]

This paper investigates how cy-près and administrative schemes facilitate (or hinder) the ability of Australian higher education providers to amend or remove trust conditions that no longer reflect contemporary society or institutional practice. It does so both to illuminate the difficulties faced by higher education providers, and also to use the context of educational charitable trusts as an exemplar in considering the broader effectiveness of cy-près and administrative schemes. We examine the state regulatory schemes applying to charitable trusts, which have served to lower the cy-près threshold. We then undertake a survey of Australian cy-près and administrative scheme cases involving higher education purposes to understand how the courts apply cy-près and administrative schemes and to gain a sense of how strongly donor intent is prioritised. The case survey exemplar then serves as a basis to consider whether, in Australia's current regulatory environment that seeks

7 See, eg, Ian Murray, *Charity Law and Accumulation: Maintaining an Intergenerational Balance* (Cambridge University Press, 2021), especially ch 8 ('*Charity Law and Accumulation*').

8 John Picton, 'Regulating Egoism in Perpetuity' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart, 2020) 53, 59–65.

9 See *Tasmanian Perpetual Trustees Ltd v A-G (Tas)* [2017] TASSC 32 ('*Tasmanian Perpetual Trustees*').

10 Australian Universities Accord Panel, *Australian Universities Accord: Final Report* (Report, December 2023), 276–83.

11 See Appendix.

to balance public trust and confidence in the charitable sector with supporting an effective charitable sector, the scheme jurisdiction provides an effective means of achieving that balance.

II Regulatory Schemes

In Australia, an application to clarify or modify the purposes of a charitable trust or to improve its administration can be made through the state supreme courts' inherent jurisdiction over the administration of charitable trusts or pursuant to statute. The court does so by approving a scheme to regulate the future management and administration of the trust. There are two categories of schemes available to applicants: (1) cy-près schemes, which alter the charitable purposes or ends; and (2) administrative schemes, which vary the administrative means of pursuing a purpose. These schemes are the key 'mechanism[s] by which to prescribe the means to pursue charitable objects and, crucially, to ensure that those objects remain capable of fulfilment over time'.[12]

A *Cy-Près Schemes*

The ancient cy-près doctrine is 'the vehicle by which the intentions of a donor may be given effect "as nearly as possible" in circumstances where literal compliance with the donor's stated intentions cannot be effectuated.'[13] A cy-près scheme is an approved change to the charitable purpose for which property is held.[14] Historically, at general law, a cy-près scheme may be settled by a court where a donor has directed a gift to a charitable object or purpose which has failed, meaning that it has become impossible or impracticable to carry out.[15]

In all Australian states (but not the territories), statute has enlarged or replaced[16] the cy-près doctrine to broaden the grounds on which the original purposes can be varied beyond impossibility and impracticability. The new grounds include circumstances where 'the original purposes have ceased to provide a suitable and effective method of using the trust property', having regard to the 'spirit of the

12 GE Dal Pont, *Law of Charity* (LexisNexis, 3rd ed, 2021) 339 [14.6].

13 Rachael P Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (Routledge-Cavendish, 2006) 1.

14 See generally Dal Pont (n 12) chs 15–16.

15 *A-G (NSW) v Fulham* [2002] NSWSC 629, [12] (Bryson J), quoting *A-G (England and Wales) v The Governors of the Sherborne Grammar School* (1854) 18 Beav 256; 52 ER 101, 110–11 (Romilly MR).

16 In Western Australia, Edelman J concluded in *Taylor v Princess Margaret Hospital for Children Foundation Inc* (2012) 42 WAR 259, 266 [47] ('*Taylor*') that the doctrine of cy-près had been replaced by a statutory regime under charitable trusts legislation.

trust' ('cessation grounds'),[17] or where it would be 'inexpedient' to carry out the original purposes ('inexpedience grounds').[18] The 'spirit of the trust' encompasses a more abstract conception than the original specific purposes of the trust, being 'the basic intention' or substance underlying the creation of the trust or the making of a gift.[19] It includes regard to the trust's history and the social context of the time at which it was established.[20] Changed social and economic conditions can help show that a particular purpose is inexpedient,[21] or that it no longer provides a suitable and effective method for using trust property.[22] However, it is clear that the statutorily expanded provisions do not apply merely because an amended purpose would be more expedient or would provide a more suitable or effective method.[23] Further evidence is needed, for example demonstrating that societal preferences have changed to such a degree that it can be said that it is no longer expedient or suitable to continue in the old way.

It is worth noting that universities may also have internal mechanisms through which they are able to vary the terms of a trust. For example, the University of Sydney is a statutory corporation and pursuant to its enabling legislation, the University Senate can apply for ministerial approval to vary trust terms on the basis that they are 'impossible or inexpedient to carry out'.[24]

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17 See *Charitable Trusts Act 1993* (NSW) s 9(1). See also: *Trusts Act 1973* (Qld) s 105(1)(e)(iii); *Trustee Act 1936* (SA) s 69B(1)(e)(iii); *Variation of Trusts Act 1994* (Tas) s 5(3)(e)(iii); *Charities Act 1978* (Vic) s 2(1).

18 See: *Charitable Trusts Act 2022* (WA) s 10(1); *Variation of Trusts Act 1994* (Tas) s 5(2).

19 Dal Pont (n 12) 418–19 [16.11], quoting *Varsani v Jesani* [1999] Ch 219, 234 (Morritt LJ).

20 See: *University of Adelaide v A-G* (2018) (n 3) [12] (Stanley J); *University of New South Wales v A-G (NSW)* [2019] NSWSC 178, [33] (Ward CJ in Eq) ('*University of New South Wales*'); *RSL Veterans' Retirement Villages Ltd v NSW Minister for Lands* [2006] NSWSC 1161, [57] (Palmer J); *Free Serbian Orthodox Church Diocese for Australian and New Zealand Property Trust v Dobrijvic* (2017) 94 NSWLR 340, 385 [217] (Payne JA). See also *Perpetual Trustee Co Ltd v A-G (NSW)* (2018) 17 ASTLR 126, 143–6 [56]–[70] ('*Perpetual Trustee*'), where Leeming JA undertook a review of the cases dealing with the requirement to have regard to the 'spirit of the trust'.

21 *Re Radich* [2013] NZHC 2944, [8]–[11] (Collins J) (the New Zealand provisions are worded similarly to those in Western Australia).

22 See, eg: *Re Peirson Memorial Trust* [1995] QSC 308; *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [46]–[47] (Brereton J).

23 *University of Adelaide v A-G* (2018) (n 3) 82 [8]–[9]; *Re Trusts of Kean Memorial Trust Fund; Trustees of Kean Memorial Trust Fund v A-G (SA)* (2003) 86 SASR 449, 464 [56], 466 [68] (Besanko J); *Robinson v A-G (NSW)* [2022] NSWSC 996, [37]–[54] (Kunc J) ('*Robinson*'); *McElroy Trust* [2003] 2 NZLR 289, 293 [11], 293–4 [14] (Tipping J) ('*McElroy Trust*').

24 *University of Sydney Act 1989* (NSW) s 25.

B *Administrative Schemes*

The courts and the relevant state Attorneys-General also have the ability to settle administrative schemes where 'a donor has failed to specify the details by which a gift is to be applied for charitable purposes, or the details specified are insufficient for its practical application for these purposes.'[25] The Court's power to make administrative schemes derives from its inherent jurisdiction in respect of charitable trusts, 'to clarify, supplement or alter the machinery for the carrying out of charitable objects.'[26] An administrative scheme therefore differs from a cy-près scheme in that it is an approved change to the mode of administering a charity, rather than its purpose.[27] It is usually sought where there is some uncertainty as to the internal rules of a charity relating to the means to pursue the charitable purpose.[28] However, other descriptions of the circumstances in which an administrative scheme will be settled are broader, referencing circumstances where the current mode is 'inadequate or impractical' to achieve the charitable purpose,[29] or where it appears to the Court to be 'expedient to do so.'[30] While conceptually, the focus of administrative schemes is on means rather than ends, the fundamental legal principle of charitable trusts being able to exist in perpetuity underlies both administrative and cy-près schemes as this 'perpetual dedication to charity requires a mechanism by which to prescribe the *means* to pursue charitable objects and crucially, to ensure that those objects remain capable of *fulfillment* over time.'[31] However, in practice this can sometimes be a difficult distinction for courts to make,[32] not least because many charitable purposes are expressed with a greater level of specificity than, for example, 'the advancement of education', such that the means become somewhat intermingled with the charitable objects.

25 Dal Pont (n 12) 338 [14.6]. As to the general circumstances in which administrative schemes are available: see 338–9 [14.6]–[14.7], 342–3 [14.10]–[14.12], cf 343–4 [14.13].

26 *University of Adelaide v A-G* (2018) (n 3) [45]. See also *College of Law Pty Ltd v A-G (NSW)* (2009) 4 ASTLR 66, 68 [7] (Brereton J) ('*College of Law*').

27 For discussion of the differences between (and potential overlap of) cy-près and administrative schemes: see, eg, Mulheron (n 13) 95.

28 See, eg, Dal Pont (n 12) 343 [14.10].

29 *Corish v A-G (NSW)* [2006] NSWSC 1219, [9] (Campbell J) ('*Corish*'). For other cases on broader grounds, see also: *Re University of London Charitable Trusts* [1964] Ch 282, 284–5 (Wilberforce J); *Re J W Laing Trust; Stewards' Co Ltd v A-G (UK)* [1984] Ch 143, 153, 155 (Gibson J); *A-G (England and Wales) v Dedham School* (1857) 23 Beav 350; 53 ER 138, 140 [356]–[357] (Romilly MR).

30 *University of Adelaide v A-G* (2018) (n 3), [46].

31 Dal Pont (n 12) 339 [14.6] (emphasis added).

32 See, eg, Mulheron (n 13) 28–30.

III Case Law Survey

In order to determine how the courts apply cy-près and administrative schemes in relation to universities and other higher education providers, we undertook a survey of Australian cases.

A *Search Methodology*

In August 2023, we conducted a search of cases in state supreme courts involving universities and other higher education providers and cy-près, administrative and variation schemes in three major legal databases: AustLII, CaseBase and Westlaw. The search terms we used were one of 'university' or 'tertiary education' or 'higher education', combined with one of 'cy-près', 'administrative scheme' or 'variation scheme'. The term 'variation scheme' describes the state supreme courts' power to settle cy-près schemes pursuant to statute,[33] as compared to their inherent jurisdiction over the administration of charitable trusts.

We searched cases from 1960 onwards, on the basis that the enactment of the *Charities Act 1960* (UK) in the United Kingdom created a very significant expansion in the grounds upon which cy-près schemes are available, upon which most Australian legislation was loosely modelled.[34] In particular, the cessation grounds and inexpedience grounds that are modelled on the *Charities Act 1960* materially reduce the degree of deference accorded to donor intent.[35] We obtained a total of 166 results. We then took the following steps to exclude the irrelevant results. First, we excluded judgments where the charitable purpose did not include the advancement of higher education.[36] We also excluded cases that did not involve applications for either an administrative scheme or a cy-près scheme. These narrow parameters resulted in 21 cases, which are summarised in the Appendix.

The cases in our survey were decided between 1960 and 2023. Despite its size, the case survey is representative in the sense that our search methodology likely obtained most, if not all, of the relevant cases that were accessible from the

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33 See the provisions set out at nn 17, 18; *Charitable Trusts Act 2022* (WA) s 12.

34 See above (n 17). Western Australia enacted legislation in 1962; Queensland and Victoria have similar legislation enacted in the 1970s; South Australia's relevant provision commenced operation in 1980; New South Wales enacted legislation in 1993, but previously the *Imperial Acts Application Act 1969* (NSW) had applied; and Tasmania enacted legislation in 1994. There is no statutory scheme legislation in the territories.

35 See, eg, Mulheron (n 13) 109–12.

36 For instance, one case involved a charitable trust for pure research purposes: *Annandale* [1986] 1 Qd R 353. While *University of Adelaide v A-G* (2023) (n 2) concerned a trust for research into botany to be conducted by the Department of Botany of the University of Adelaide and hence is a borderline inclusion, we included the case on the basis that such research conducted by a university would involve higher degree by research students, and so also involves the advancement of education.

primary legal databases. However, it is worth noting that the legal databases do not include decisions made by state Attorneys-General. The legislation in a number of states provides that for small charitable trusts, scheme applications go directly to the Attorney-General.[37] The following observations are therefore based only on decisions made by state supreme courts, with nine cases in the Supreme Court of New South Wales, four in the Supreme Court of South Australia, three in the Supreme Court of Victoria, three in the Supreme Court of Queensland, and one case in each of the Supreme Court of Western Australia and the Supreme Court of Tasmania.

B *General Findings*

The cases we found were dominated by cy-près applications (19 of 21), with administrative schemes requested in five cases. However, in three cases where a cy-près scheme was requested, the court determined that an administrative scheme was more appropriate or required in conjunction, and settled an administrative scheme instead of, or in addition to, a cy-près scheme, showing that although conceptually distinct, in practice it can sometimes be difficult for courts and parties to distinguish between the two types of schemes.[38] The majority of cases concerned testamentary gifts via a bequest in the form of a charitable trust. These gifts tended to be large, representing the residual or entirety of the deceased estate. In the majority of cases, a higher education provider was a party, either as plaintiff/applicant in their capacity as trustee, or as defendant/respondent as a named beneficiary. In all cases the state Attorney-General appeared as a party, and in some of the cases made written and/or oral submissions to the Court. The Attorneys-General generally adopted a neutral position in that they did not oppose the proposed variations, and in some cases, they explicitly supported the application. This is likely a result of the applicant consulting the Attorney-General prior to embarking on the court process. For example, in *Chartered Secretaries Australia Ltd v Attorney-General (NSW)* (‘*Chartered Secretaries Australia*’), Bryson AJ explicitly acknowledged that the New South Wales Attorney-General requested changes before the matter reached court, resulting in the Attorney-General supporting the scheme.[39] It is also notable that in almost all cases the parties’ costs were awarded out of the trust assets.

The reasons for bringing the applications were primarily due to: (1) institutional changes,[40] such as a subject, position and department ceasing to exist,[41] a research

37 See below n 120 and accompanying text.

38 *University of Adelaide v A-G* (2018) (n 3); *Robinson* (n 23); *Kerin v A-G (SA)* [2019] SASC 103 (‘*Kerin*’).

39 *Chartered Secretaries Australia Ltd v A-G (NSW)* [2011] NSWSC 1274, [13] (‘*Chartered Secretaries Australia*’).

40 *Robinson* (n 23) [59] can also be thought of as an example, in that a key reason for the application was that the persons who were trustees and who had a personal connection with Balliol College at Oxford University (in relation to which scholarships were funded) were reaching an age necessitating retirement.

41 *University of Adelaide* (n 1).

institute ceasing to exist,[42] or a change of control of a higher education provider;[43] (2) changes to education and training models (including for priests,[44] nurses,[45] company secretaries,[46] and engineers[47]), and to educational funding models resulting in the type of scholarships offered no longer being as effective;[48] (3) the trust having insufficient or excessive funds to carry out the charitable purpose (including a University Chair that could not be endowed,[49] funds for scholarships that could not be expended due to a lack of applicants,[50] and a research centre and library that could not be established[51]); (4) named charity recipients never, or no longer, existing;[52] and (5) to create administrative and/or governance efficiencies.[53]

The schemes were largely allowed in all but two cases, *Re Meshakov-Korjakin; State Trustees Ltd v Attorney-General (Vic)* ('*Re Meshakov-Korjakin*')[54] and *Kerin v Attorney-General (SA)* ('*Kerin*'),[55] for the reasons stated below. In one additional case, a component of a cy-près scheme requested by an Attorney-General to remove a discriminatory condition was refused.[56] In two further cases, a cy-près scheme was denied, but an administrative scheme settled on the same terms on the basis

42 *University of Adelaide v A-G* (2023) (n 2).

43 *Connery v Williams Business College Ltd* [2014] 17 ITELR 251 ('*Connery*').

44 *The Corporation of the Trustees of the Roman Catholic Queensland Regional Seminary v A-G (Qld)* [2020] QSC 67 ('*Roman Catholic Queensland Regional Seminary*'); *The Banyo Seminary Trust* [2000] QSC 215 ('*The Banyo Seminary Trust*').

45 *Levett v A-G (NSW)* [2014] NSWSC 1787 ('*Levett*').

46 *Chartered Secretaries Australia* (n 39).

47 A cy-près scheme was sought in respect of the first charitable trust considered in *University of Adelaide v A-G* (2018) (n 3) [19]–[27] to remove variation clause limits so as to permit the University of Adelaide to confirm amendments to scholarship terms to remove the need for engineering students to study overseas.

48 *Kerin* (n 38).

49 *University of Adelaide v A-G* (2018) (n 3).

50 Ibid.

51 *King v A-G (NSW)* [2020] NSWSC 629 ('*King*').

52 *Price v A-G (WA)* [2014] WASC 430 ('*Price*'); *Greer v A-G (NSW)* [2018] NSWSC 725 ('*Greer*'). Initial impossibility ended up being the ground for a cy-près scheme in *Connery* (n 43) [63].

53 *College of Law* (n 26); *Robinson* (n 23); *Rechtman v A-G (Vic)* [2005] VSC 507 ('*Rechtman*'); *Equity Trustees Ltd v A-G (Vic)* [2019] VSC 834 ('*MacKenzie*'); *Re Meshakov-Korjakin; State Trustees Ltd v A-G (Vic)* [2011] VSC 372 ('*Re Meshakov-Korjakin*'); *Bisset* [2015] 1 Qd R 211 ('*Bisset*'); *Tasmanian Perpetual Trustees* (n 9), where the Attorney-General also sought the removal of a discriminatory scholarship condition; *Corish* (n 29).

54 *Re Meshakov-Korjakin* (n 53).

55 *Kerin* (n 38).

56 *Tasmanian Perpetual Trustees* (n 9).

that there was no change of purpose.[57] Therefore, in almost all of the cases, trustees were successful in obtaining the changes that they sought.

C *Brevity of Judgments*

One striking aspect of over half of the cases is the brevity of the judgments.[58] Cy-Près and administrative scheme principles are relatively arcane and quite difficult to apply. However, while statutory provisions or prior cases were set out in detail, the actual step of application often took up far fewer paragraphs. There is a sense that the main focus in some of these judgments is arriving at a particular conclusion, rather than explaining how it is arrived at. That sense is reflected in a criticism levelled at the parties in *Robinson*:

> The Court's difficulty with the parties' submissions is twofold … Second, the process of reasoning appears to be that the parties are in agreement that there is a "more efficient and beneficial method for the fulfilment of *the self-same Trust Purpose*" … and therefore, assuming that to be the case, it must follow that the original purposes have "ceased to provide a suitable and effective method of using the trust property"… I accept that s 9 is a beneficial provision which should be interpreted generously and practically. Nevertheless, such an approach is not a licence to disengage completely from the text of the section in order to achieve what might generally be agreed to be a desirable outcome.[59]

In *King v Attorney-General (NSW)* ('*King*'), Hallen J noted:

> The Plaintiff, the Attorney-General, and the University of Sydney (the organisation that agreed to carry out the purpose stated in the Will), all accept that a cy-près scheme is justified and that s 9 of the CT Act is available to the Plaintiff in the present case. It follows that as all are agreed as to the course to be followed, the Court should not lightly stand in the way of a regime which on its face achieves the charitable purpose.[60]

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57 *University of Adelaide* (n 1) [20]; *Robinson* (n 23) [52]. Cf *University of Adelaide v A-G* (2023) (n 2) [2].

58 See, eg: *University of Adelaide* (n 1); *University of Adelaide v A-G* (2023) (n 2); *Levett* (n 45); *University of New South Wales* (n 20); *The Banyo Seminary Trust* (n 44); *Roman Catholic Queensland Regional Seminary* (n 44); *King* (n 51); *University of Adelaide v A-G* (2018) (n 3); *Rechtman* (n 53); *Price* (n 52); *Greer* (n 52); *College of Law* (n 26).

59 *Robinson* (n 23) [37]–[38].

60 *King* (n 51) [10], citing *Perpetual Trustee Company Ltd v A-G (NSW) (No 3)* [2018] NSWSC 1784, [8]. However, Leeming JA's statement related only to a notice of motion to revise court orders made previously by Leeming JA settling a cy-près scheme. The comments do not relate to the grounds for setting a cy-près scheme, but only to the similarity requirement (and other tests) applied when considering the specific scheme proposed.

It is notable that the reasoning as to whether the grounds for a scheme had been established in several cases — and these were cases involving more than the simple situation of a named beneficiary no longer in existence — was six paragraphs or less.[61] In several cases, there was also no attempt in the reasoning regarding cy-près schemes to identify the difference between varying the original purpose to be more effective from a variation required because the original purpose had ceased to be a suitable and effective method or had become inexpedient.[62] In one, the reasoning was largely as follows:

> The applicant and the first respondent have together sought to identify the best way to use the site as a seminary and university. In the light of the growing and changing demands of the two enterprises being conducted there, the trust deed, as varied by the Relationship Deed, has ceased to provide a suitable and effective method of using the trust property. The variation agreement puts into place a scheme for the effective and suitable use of the land.[63]

In addition, two cases in which a trustee was found to cease to exist after the charitable trust came into existence were treated as cy-près cases without any discussion of whether an administrative scheme to replace the trustee might be the appropriate response.[64]

It is possible that the brevity in judicial reasoning may simply reflect the non-controversial nature of the vast majority of these scheme applications, as evidenced by the state Attorneys-General generally adopting a neutral position in these cases.

D *Cost in Comparison to Quantum of Trust Funds*

In *Equity Trustees Ltd v Attorney-General (Vic)* (‘*Mackenzie*’), McMillan J noted that ‘[t]he legal costs incurred in both this application and the previous cy près application [of over $100,000] represent a significant proportion of the trust’s value’.[65] While a portion of each proceeding to which McMillan J referred concerned matters other than the cy-près application, the cy-près proceedings appear to have

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61 *University of Adelaide v A-G* (2023) (n 2) [32]–[34]; *Roman Catholic Queensland Regional Seminary* (n 44) [23]–[24]; *University of New South Wales* (n 20) [66] (in relation to the administrative scheme and even as to the cy-près scheme, the application reasoning is only contained in [36]–[38] and [46]–[47]); *The Banyo Seminary Trust* (n 44); *King* (n 51) [43]–[48]; *University of Adelaide v A-G* (2018) (n 3) [15], [25]–[27]; *Rechtman* (n 53) [15]–[17]; *MacKenzie* (n 53) [59], [61]–[62].

62 *University of Adelaide v A-G* (2023) (n 2) [32]–[34]; *Roman Catholic Queensland Regional Seminary* (n 44) [24]; *University of Adelaide v A-G* (2018) (n 3) [25].

63 *Roman Catholic Queensland Regional Seminary* (n 44) [24].

64 *Price* (n 52); *Greer* (n 52). Indeed, *Greer* referred at [21] to *Tantau v MacFarlane* [2010] NSWSC 224 as authority for settling a cy-près scheme when in fact in *Tantau*, the court indicated there would be no need for a cy-près scheme if an alternative trustee could be found.

65 *MacKenzie* (n 53) [62].

constituted about half of the costs, resulting in an estimate of around $25,000 per cy-près application. In present dollars, that is around $30,000.[66] This quantum is consistent with research conducted in Western Australia into amending restricted gifts, suggesting court costs of approximately $10,000, plus initial advice costs.[67]

McMillan J considered these costs 'significant' in relation to a trust corpus of $2.8 million in 2023 dollars.[68] Converting the relevant amounts to 2023 dollars, of the 21 surveyed cases, nine concerned trust funds of $2.8 million or less, one concerned three charitable trusts, one of which was less than $2.8 million and one case did not state the value of the trust fund or provide information (such as reference to large land holdings) suggesting that the value of the trust was above $2.8 million.

E *Balancing Donor Intent with Effective Use of Assets*

As noted earlier, cy-près and administrative schemes are mechanisms used to balance respect for donor intent against the need to more effectively use assets dedicated to charity. Regard to donor intent occurs at several stages. First, the provision of narrow grounds upon which to request a cy-près scheme, which in some instances, refer directly to the 'spirit of the trust'.[69] Second, the application of a similarity test (to the original purposes or means) when determining whether to approve the proposed scheme, applying to both cy-près[70] and administrative[71] schemes.

The cases demonstrate that the courts are mindful of donors' wishes under these two steps, with the vast majority of cases making reference to donor intent whether

66 'Inflation Calculator', *Reserve Bank of Australia* (Web Page) <https://www.rba.gov.au/calculator/annualDecimal.html> ('RBA inflation calculator').

67 Ian Murray et al, *Building Resilience: Utilising Restricted Reserves* (Research Project, 2023) 51–2, 64–5 ('*Building Resilience*').

68 Applying the RBA inflation calculator (n 66) to the $2.4 million trust corpus as at 2019.

69 See above n 17 and accompanying text.

70 This is either because the general law or the legislative provisions refer to a 'cy-près' (as near as possible) scheme: *Charitable Trusts Act 1993* (NSW) ss 9(1), 12(1)(a); *Trusts Act 1973* (Qld) s 105(1)(e)(iii); *Charities Act 1978* (Vic) ss 2(1), 4(3), or to the same concept in plain English: *Charitable Trusts Act 2022* (WA) s 10(2); or because the legislation refers to a scheme according 'as far as reasonably practicable' 'with the spirit of the [trust/original gift]': *Trustee Act 1936* (SA) s 69B(6); *Variation of Trusts Act 1994* (Tas) ss 6(3), 7(5). See also Dal Pont (n 12) 409–13 [16.1]–[16.4].

71 Courts would generally be required, in establishing an administrative scheme, to consider whether the scheme would involve application of the trust fund as nearly as possible in accordance with the intention of the settlor: *The Joyce Henderson Trustee (Inc) v A-G (WA)* [2010] WASC 60, [36] (Hasluck J); *Philpott v St George's Hospital* (1859) 27 Beav 107; 54 ER 42, 43–4 [111]–[113] (Romilly MR); Dal Pont (n 12) 338–9 [14.6], 343 [14.11].

at the stage of determining grounds for a cy-près scheme,[72] or at the similarity stage by reference to applying the gift as close as possible to the donor or testator's original intentions.[73] Indeed, the case survey provides evidence that intent is brought into account at the similarity stage once the question has moved from whether a scheme should be settled to the precise terms of that scheme. That is because, of the 19 instances in which schemes were determined to be available or partially available, five of those cases involved refusal of some components of a scheme, asked for amended wording or requested further submissions on the precise terms to be settled, so as to better accord with similarity requirements.[74] In two further cases, the Attorney-General or the trustee was requested to prepare a detailed scheme.[75] However, some judges also acknowledge that donors could not have predicted changes over time,[76] meaning that talk of donor 'intent' is not always apt when a donor may never have turned their mind to the relevant change.

The extent to which donor intent is taken into account depends on the changed circumstances that have resulted in the scheme application, including: changes to education models; institutional changes; non-existence of a named charity recipient; the trust having insufficient or excessive funds for the stated purpose; achieving administrative or governance efficiencies; or broader changes in social and economic conditions. Each of these are examined below.

F *Changes to Education Models*

Changes to educational models appear to have resulted in requested variations that are characterised as both improving the effectiveness of asset use and as squarely fitting within the original donor intent, at least when viewed at a high level of abstraction. For example, in *Levett v Attorney-General (NSW)*, changing understandings

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72 See, eg: *University of New South Wales* (n 20) [37], [47]; *Levett* (n 45) [12], [20]; *Chartered Secretaries Australia* (n 39) [18], [24]–[26]; *University of Adelaide* (n 1) [31]–[34]; *Tasmanian Perpetual Trustees* (n 9) [64]–[68]. See also *Roman Catholic Queensland Regional Seminary* (n 44) [22]–[24] (implicit consideration of intent).

73 See, eg: *University of Adelaide* (n 1) [28]; *University of Adelaide v A-G* (2023) (n 2) [31]–[34]; *University of Adelaide v A-G* (2018) (n 3) [32], [41]–[42]; *King* (n 51) [51]–[53]; *Re Meshakov-Korjakin* (n 53) [5], [54]; *Price* (n 52) [14], [27]; *Rechtman* (n 53) [18]; *Bisset* (n 53) [56]; *Tasmanian Perpetual Trustees* (n 9) [52]–[53]; *Kerin* (n 38) [38]–[39], [53]; *Roman Catholic Queensland Regional Seminary* (n 44) [23]–[24]; *Robinson* (n 23) [25], [47]; *Corish* (n 29) [29]. Intention implicitly taken into account in discussion about the desirability of a winding-up clause with greater similarity of objects: *College of Law* (n 26) [13].

74 *Bisset* (n 53), see especially at [53], [55]–[56]; *Tasmanian Perpetual Trustees* (n 9) [42], [46]; *Kerin* (n 38) [38]–[39], [53]; *College of Law* (n 25) [13]; *Corish* (n 28) [29]. In two other cases very minor changes were made to the proposed scheme wording, but for matters of practicality, not similarity with the original intent: *Chartered Secretaries Australia* (n 39) [28]; *Price* (n 52).

75 *Connery* (n 43); *Robinson* (n 23).

76 For particularly explicit examples, see: *University of Adelaide v A-G* (2023) (n 2) [32] (McDonald J); *Levett* (n 45) [20] Nicholas JA.

of nursing terminology over time meant that scholarships were being provided to a narrower class of persons than originally envisaged when 'nursing' would have incorporated aspects of midwifery.[77] Changing approaches to education also meant that part-time and distance education options had become more widely used. Acting Justice Nicholas found that the changes to expressly include midwifery students and to permit scholarships for a wider range of course delivery models, were both within the spirit of the trust *and* enabled the more effective use of trust assets.[78] His Honour reasoned:

> [T]he effect of the alterations enables the Trust to proceed with the general purpose of encouraging, assisting, and promoting nursing education as a benefit to the nursing profession with regard to the modern realities of the nature of the nursing profession and the methods of delivery of nursing education.[79]

A similar approach is either explicit[80] or implicit[81] in the reasons given in the other cases dealing with changed educational models. However, not all cases relating to changes in educational models resulted in approval of the proposed scheme. *Kerin* concerned a trust where one of the purposes was the provision of scholarships to assist students in financial difficulty residing in isolated farming areas to undertake secondary or tertiary study.[82] The trustee argued that increased government and philanthropic support for education of rural and remote students alongside increased educational costs, meant that the low value general educational scholarships offered to these students were no longer as effective. Instead, support should have been provided by informing students about educational and scholarship opportunities, rather than (or in addition to) directly providing scholarships.[83] The variation also sought to narrow the range of fields of study promoted or supported by scholarship to agriculture and related fields. Justice Nicholson refused these aspects of the scheme on the basis that the proposed changes diverged too far from the spirit of the trust and the testator's intentions,[84] highlighting that sometimes a change will stray so far from the original trust terms that it is seen as going beyond even the broad and flexible spirit of the trust. *Kerin* thus serves as a warning about the two stages at which intent is considered: the grounds stage and the similarity stage. While courts

77 *Levett* (n 45) [12]–[14].

78 Ibid [17]–[18], [20].

79 Ibid [20].

80 *Chartered Secretaries Australia* (n 39) [18], [24]–[26]. Arguably, the approved variation of the scholarship period in *Tasmanian Perpetual Trustees* (n 9) to extend beyond two years of a university degree was to reflect changes in the cost of university degrees. Justice Wood expressly found that failing to permit an extended period would 'defeat the purpose of the trust' at [42].

81 In *Roman Catholic Queensland Regional Seminary* (n 44) [23]–[24], Davis J also interpreted the reasoning of the earlier decision *The Banyo Seminary Trust* (n 44) as involving the advancement of intent as well as more effective use of assets.

82 *Kerin* (n 38).

83 Ibid [21]–[23], [34], [37].

84 Ibid [38]–[41], [53].

might be more willing to accept that changed education models provide grounds for a scheme, they will still look closely at the particular scheme proposed to consider whether it is sufficiently close to the original purpose and spirit of the gift.

G *Institutional Changes*

The approach adopted in most cases involving changes to educational models, can also be seen in cases relating to institutional changes.[85] For instance, in *University of Adelaide v Attorney-General (SA)* (2023), McDonald J notes:

> [T]he evolution of science and technology that has occurred over the last 70 years is not something that [the donor] could have predicted. Certainly concepts of climate change, urbanisation and environmental degradation were not in the contemplation of those working and studying in agricultural science in 1950.
>
> It is apparent from the initial terms of the Mortlock Bequest, and the circumstances in which it was made, that the variation sought reflects the original purposes of the trust. I accept … "that through the effluxion of time, the scheme in the Will does not now operate beneficially for the purposes of the bequest, and the interests of the charity can be better promoted by an altered scheme, consistent with more modern usage". The proposed trust variation scheme does no more than reflect the manner in which science and the operation of the [relevant research institute] evolved over time.[86]

This passage shows that where circumstances have changed in ways that are harder for the trust creator to predict, the courts are more willing to characterise terms of the gift relating to those changed matters, as not being fundamental to donor intent, or to the spirit of the trust. Similarly, in *Chartered Secretaries Australia*, Bryson AJ stated:

> It has not become impossible to administer the trust in accordance with the provisions of the will, but there would be marked disadvantages in attempting to do so. There are likely to be few graduates who wish to proceed immediately to training of the kind referred to [in the will]: there will be some, and there is a significant risk that an attempt to administer the trust would lead to decisions to grant scholarships for study purposes which moved further and further away from the training referred

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85 *University of Adelaide v A-G* (2023) (n 2) [33]; *University of Adelaide* (n 1) [28]; *Robinson* (n 23) [25], [52]–[54], [76]–[77]. Acceptance that the University would use an amended variation power to enable altered scholarships for engineering students, to enable a more beneficial use of assets suggests a focus on effectiveness, in a context where it seems to have been accepted that this would have fallen within the intent of the donor: *University of Adelaide v A-G* (2018) (n 3) [21], [25], [27]. While *Connery* (n 43) also involved institutional change, part of the reason for those changes was the ambiguity of the original gift terms, resulting in a finding of initial impossibility. A cy-près scheme was settled to validate past trustee actions, but for the future, the Attorney-General was directed to establish a scheme, hence the court did not have to consider similarity requirements.

86 *University of Adelaide v A-G* (2023) (n 2) [32]–[33].

> to in the will. To pay regard of the spirit of the trust requires adopting a method of using trust property in which it truly is used, and does not remain unused except in relatively rare instances, nor remain accessible only to very small number of post-graduate students.[87]

H *Non-Existence of a Named Charity Recipient*

In contrast to the approach above, in cases involving applications for schemes based on the non-existence of a named charity recipient, the question of balancing or aligning effective use of assets and settlor intent tends not to arise, given the focus is simply on finding replacement organisations with similar purposes.[88]

I *Trust Having Insufficient or Excessive Funds for the Stated Purpose*

In circumstances where the trust property has become too little or too much for the stated purpose, the focus on intent arises largely in relation to the similarity test.[89] In this context, the judgments readily find that there are grounds for settling a cy-près scheme without the need to inquire into intent, with the focus aimed at achieving the effective use of trust property, provided that use is broadly aligned with the spirit of the trust. In other words, settlor intent is largely subordinated to the goal of effective use of assets. For instance, in *King* Hallen J stated:

> The Plaintiff submits that the proposal to grant scholarships or fellowships in the name of the deceased to support research and study at the University of Sydney on religion, or religious experience, as related to aesthetics, creativity and the arts, is broadly consistent with the deceased's paramount intention — and the spirit of the Will more generally — for the promotion of research, education and development of an arts-based conception of modern religion. It also accounts for the reality that the estate has now been liquidated and is in cash. The proposed scheme is appropriately connected to the amount to be held on trust.
>
> The Attorney-General also submits that the Court could be satisfied that the scheme proposed satisfies this requirement, insofar as it will facilitate study and research on the subject of religion or religious experience "as related to aesthetics, creativity and the arts". While such study or research will presumably not necessarily, or not only, involve "arts-based religion" (the term used in Clause 4 of the deceased's Will), that term remains somewhat obscure, and the study and research that will be funded will evidently concern the intersection between religion and the arts.[90]
>
> I respectfully agree with the submissions made by both counsel.

87 *Chartered Secretaries Australia* (n 39) [25].

88 *Price* (n 52) [14], [27]; *Greer* (n 52) [21], [23].

89 *University of Adelaide v A-G* (2018) (n 3) [32], [41]–[42]; *King* (n 51) [51]–[53].

90 *King* (n 51) [51]–[53].

In *University of Adelaide v Attorney-General (SA)* (2018) (a case relating to three separate charitable trusts, two of which involved trust assets being too little or too large), Stanley J reflected this prioritisation of effectiveness of trust assets in relation to one trust:

> The variation of a trust intended to fund a scholarship for post-graduate students, to also fund an academic fellowship (a comparatively senior position), is a significant alteration.
>
> This is, to an extent, ameliorated by the draft variation scheme retaining as one of its purposes the option of funding post-graduate scholarships from time to time (instead of annually), in addition to the funding of "one or more academic fellowships". The Attorney-General submits that it might, however, more closely accord with the spirit of the gift if the draft scheme were to be expressed to make it clear that only one fellowship, but one or more scholarships, could be awarded. I am not attracted to that course. I am not persuaded that the imposition of such a limitation is necessary or desirable in order to accord with the spirit of the trust.[91]

J *Achieving Administrative or Governance Efficiencies*

The above approaches can be contrasted with cases where scheme applications were made due to the desirability of achieving administrative or governance efficiencies. In these circumstances, courts seemed far more conscious of balancing donor intent and the effective use of assets, acknowledging that the two could be in conflict. For instance, in *University of New South Wales v Attorney-General (NSW)*, Ward CJ in Eq noted:

> The spirit of the IH Trust is clearly to provide for the erection, establishment and administration of a place of residence for overseas and Australian students of the University. It is also clear that the stipulations as to independence from the University of the management of the College were considered to be of importance in furthering that objective.
>
> There can be no doubt that there is a tension between the requirements of independent management and control on the one hand and the responsibilities and overall supervision of the University on the other.[92]

The reference to 'independent management and control' reflects donor intent, while the capacity for and manner of overall university supervision relates to the effective use of assets.[93] The requirement for independent management and control of the international student residence, UNSW International House, had resulted in years of disputes and previous litigation due to the overlapping governance responsibilities of the residence manager and the University. Ultimately, Ward CJ found that

91 *University of Adelaide v A-G* (2018) (n 3) [40]–[41].

92 *University of New South Wales* (n 20) [37]–[38].

93 Ibid [38].

the administrative inefficiencies and governance hindrances sufficiently serious that the requirement for independent management and control had 'ceased to provide a suitable and effective means of using the trust property', providing grounds for a cy-près scheme.[94] At the similarity test stage, Ward CJ also appeared to accept that significant (but not complete) watering down of independent management was justified so as to reduce the costs of management and to enhance the student experience.[95]

In other cases where the trust terms were leading to governance impasses,[96] or material administrative inefficiencies,[97] the effective use of assets was also typically prioritised over adherence to donor intent as expressed in the trust terms. In some instances, the trustee was unable to provide evidence that a desired administrative change was material — and a scheme was refused in relation to that change. For instance, where the trustee argued that income would be insufficient in the future, requiring it to access capital, yet the financial evidence suggested that the trust fund was growing at a healthy rate, with significant reserves of retained income from previous years;[98] or where trustees sought additional specific investment powers, which were considered unnecessary because of the broad investment powers provided under trustee legislation.[99]

However, this was not always the approach adopted. *Re Meshakov-Korjakin* involved an application for an administrative scheme by the University of Melbourne, on the basis that it would be more administratively efficient for the University to manage and invest the trust funds, to provide scholarships in the same manner

94 Ibid [47].

95 Ibid [3]–[4], [62]–[64].

96 *MacKenzie* (n 53) [59]. In this case, a government body named as a member of a scholarships, prizes and grants selection committee notified the trustee that it would not continue as a member of the committee, due to perceived conflicts of interest.

97 Ibid [61]–[62] (relating to further variations to the committee membership provisions to include a clause enabling the trustee to substitute members as required, in order to avoid the costs of bringing further scheme proceedings); *Rechtman* (n 53) [16]–[17]; *Bisset* (n 53), although note at [56] that donor intent may be taken into account in applying similarity requirements to select the most appropriate cy-près scheme. In *Tasmanian Perpetual Trustees* (n 9) [44]–[46], [53], while refused in respect of some other changes, a cy-près scheme was approved, by reference to overcoming material administrative impediments in relation to changes to provide discretion to the trustees, to refuse funding for a particular university course and, in fixing a cap for scholarship payments. A number of administrative schemes were settled on the basis that the means set out in the trust had become 'inadequate or impractical': see, eg, *Robinson* (n 23) [59]. Or to significantly improve the 'practical operation of the fund' or it is 'desirable for the administration of the Trust': see *Corish* (n 29) [18]. Or to address 'difficulties in [the trust's] administration' and to help with gaining accreditation status as a higher education provider and 'facilitate commercial dealings with third parties': see *College of Law* (n 26) [8], [12].

98 *Tasmanian Perpetual Trustees* (n 9) [47]–[49].

99 *Corish* (n 29) [20]–[22].

as its other scholarship funds, rather than receive income from the trustee each year.[100] However, Mukhtar AsJ found that while it might be more efficient for the University, the University was not the trustee and it was not clear that it was inexpedient or inefficient for the trustee to pay trust income to the University.[101] To follow the University's approach would be inconsistent with the testator's intentions and would split the trust in half (implicitly leaving any claimed inefficiencies in place).[102] It would place the University in a potential position of conflict in having to determine whether it had met certain conditions in order to receive the trust income, and raise issues with respect to an individual also potentially having a contingent interest in the trust funds, if an accumulation provision failed for perpetuity reasons.[103] In essence, the administrative inefficiency here was that of a recipient of trust income, not administrative inefficiency of the trust itself.

K *Broader Changes in Social and Economic Conditions*

Tasmanian Perpetual Trustees v Attorney-General (Tas) involved a request for a cy-près scheme, not only in relation to administrative efficiencies, but also broader changes in social and economic conditions.[104] Consistent with the general approach to administrative efficiencies, the Court gave significant consideration to donor intent.[105] The Attorney-General sought a cy-près scheme variation of a scholarship trust to remove a gender condition that the recipient be male.[106] The Attorney-General argued that the gender condition was 'jarringly discordant with contemporary values' and that the condition had become 'inexpedient' because widely accepted social norms of gender equality were 'so pervasive that the inconsistency constitutes continued administration on present terms as being "unsuitable, inadvisable or inapt"'.[107] Justice Wood noted the (often stated, not always followed) distinction between a trust condition being inexpedient, as opposed to a proposed change being merely expedient.[108] While Wood J accepted that gender equality was a societal norm, her Honour downplayed its impact in three ways, two of which were linked to donor intent. First, Wood J noted that the norm was an 'aspirational standard' in a number of areas.[109] The second, linked to donor intent, was that her Honour considered that societal expectations of testamentary gifts were less demanding than expectations of government actions, such that:

100 *Re Meshakov-Korjakin* (n 53).

101 Ibid [65]–[66].

102 Ibid [5](f)–(g), [65]–[75].

103 Ibid.

104 *Tasmanian Perpetual Trustees* (n 9).

105 Ibid [55], [60].

106 Ibid [54] (in respect of the gender condition, the trustee was neutral).

107 Ibid [55], [60], quoting *McElroy Trust* (n 23).

108 Ibid [56]–[59].

109 Ibid [63].

> There is an understanding that a testator's selection of a charitable purpose is necessarily informed by his or her life experiences, perspectives and perception of need.[110]
>
> The discord with societal standards and the sense of grievance or unfairness will be muted by knowledge that the scholarship is funded by a bequest.[111]

The third factor was the importance of upholding donor intent:

> In making the necessary value judgment the Court must take into account an important value, that of 'respect for the intentions of a settlor'. The courts intervene only if it is clearly warranted. The purpose of the charitable trust to benefit male students is central to the terms of the will and the charitable object; the criterion of gender is repeated and appears in the guiding principles regarding the scholarship. It was clearly intended to be unalterable. There is a public interest in charitable gifts generally and respecting testamentary freedom and the primacy of testamentary wishes. Obviously, defeating testamentary intention too readily will discourage these gifts.[112]

Although not expressly noted in the judgment, it may have been relevant that the testator made his will in 2003 and died in 2012, such that it was harder to argue that societal norms had changed considerably in ways unexpected by the testator.

When viewed as a whole, these cases reveal that, in general, judges are adopting a permissive and pragmatic approach to trust variation by focusing on the charity's present needs. This permissive approach to trust variation by the courts has implications for charities other than higher education providers in accessing assets held in charitable trusts. At the same time, it calls into question the appropriateness of the current regulatory regime, with its heavy reliance on the courts, for varying charitable trusts. Accordingly, the next section will examine the existing regulatory regime in Australia.

IV Evaluating the Existing Regime

The provision of higher education is a highly regulated activity, with regulation significantly focussed on quality, fairness and safety.[113] It is undertaken by universities and other higher education institutions with quite different financial capacities, and with longer-term funding pressures due to decreasing government funding contributions, geopolitical risks and the impacts of COVID-19 dampening international

110 Ibid [64].

111 Ibid [66].

112 Ibid [68].

113 Ian Murray, 'How do we Regulate Activities within a Charity Law Framework Focussed on Purposes?' (2020) 26(2) *Third Sector Review* 65, 72–3 ('How do we Regulate Activities').

student income.[114] Accessible philanthropic funds are thus greatly valued. Higher education activities are also undertaken in an environment that involves a number of major social, economic and environmental changes, such as changes in digital technology and artificial intelligence, demographic growth in outer suburban and regional areas, changing combinations in needed skills and knowledge, and global and regional geopolitical structures.[115]

However, higher education providers are not unique in these respects. A range of activities, such as the provision of health, primary and secondary education, and aged care, are all highly regulated areas of activity in which philanthropy can be important.[116] Similar challenges and rapid changes are being experienced by many organisations. Thus, this section evaluates the existing cy-près and administrative scheme regimes with reference to the broader range of charitable causes supported by charitable trusts. We draw on the case survey to help illustrate that evaluation.

Under the existing regime, the state Attorneys-General have a significant role as the protectors of charities and guardians of the public interest in the administration of charitable trusts.[117] In general, it is the Attorney-General, as the representative of the public, who has standing to enforce the terms of a charitable gift.[118] This role also necessitates the involvement of the Attorney-General as a party in court scheme proceedings,[119] such that the Attorney-General plays a key role in representing the public interest. In addition, statutes in a number of states provide that if the value of the trust property is less than a certain amount — $500,000 in New South Wales; $500,000 in Victoria; $300,000 in South Australia; $300,000 (real property)/$150,000 (personal property) in Tasmania; $100,000 in Western Australia — scheme applications go directly to the Attorney-General.[120] Even for

114 Australian Universities Accord Panel, *Australian Universities Accord* (Final Report, December 2023), 63–4, 276–83.

115 Ibid 58–4.

116 See, eg, Murray, 'How do we Regulate Activities' (n 113) 72–3.

117 *Wallis v Solicitor-General for New Zealand* [1903] AC 173, 181–2 (Lord Macnaghten).

118 See: *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (Lord Simonds); *Num-Hoi, Pon-Yu, Soon-Duc Society Inc v Num Pon Soon Inc* (2001) 4 VR 527 (Harper J).

119 See, eg: Dal Pont (n 12) 340–2 [14.8]–[14.9], 352–3 [14.25]; *Davies* (1940) 58 WN (NSW) 36, 36 (Roper J). In some jurisdictions, additional functions are formally provided for the Attorney-General, such as reviewing the initial form of a proposed scheme before an application can be made to the court: *Charitable Trusts Act 2022* (WA) s 13(1); or authorising the bringing of proceedings as charitable trust proceedings: *Charitable Trusts Act 1993* (NSW) s 6(1)(a) and see also *Willoughby City Council v A-G (NSW)* [2016] NSWSC 972, [5] (Hallen J).

120 *Charitable Trusts Act 1993* (NSW) ss 12, 14; *Charitable Trusts Act 2022* (WA) s 16 (income less than $20,000 is an alternative basis); *Trustee Act 1936* (SA) s 69B(3)(b); *Variation of Trusts Act 1994* (Tas) s 7; *Charities Act 1978* (Vic) s 4. Queensland has released exposure draft legislation that would introduce a similar power for trust property up to $750,000: Draft Trusts Bill 2024 (Qld) s 207.

internal cy-près mechanisms such as that for the University of Sydney, the statute requires that the 'the [University] Senate may request the Minister [for Education] to effect a variation of the terms of the trust … *with the concurrence of the Attorney General*'.[121]

In the United States, questions have arisen as to the suitability of the Attorney-General as an adequate advocate for both charities and donors.[122] This is because the Attorney-General does not have a strong institutional interest in the enforcement of the gift restriction (in the case of the donor) or in an alternative use (in the case of the charity).[123] In Australia, in some states the Attorney-General may not be receptive to these applications, which may further add to the costly and possible lengthy nature of scheme applications. Adding to this risk in a higher education context, is the fact that the Attorney-General may not have a good sense of the nature of the regulatory environment within which higher education providers operate, nor of the socio-economic changes affecting providers. This may be due to a lack of resourcing capacity to spend time learning about the regulatory environment, much of which exists at the federal level, not at a state or territory level. Equally troubling is the potential for an Attorney-General to take a politicised view of their role, and to seek to co-opt charitable resources to support government education policy.[124] However, the case survey found that Attorneys-General are generally neutral in that they do not oppose scheme applications, indicating that these concerns may be overstated.

Under the existing regime, the courts also have a significant role. However, the case survey demonstrates that, in the vast majority of cases, schemes were granted where the applicant established there had been institutional changes, changes to education and training models, insufficient or excessive funds, charity recipients ceasing to exist, or the potential for administrative or governance efficiencies. Given many of these are matters that courts are not well-placed to know more about than higher education providers or other applicants, even with the permissive approach taken by the courts, it remains questionable whether the existing regime best promotes an efficient and effective use of charitable resources. This is also

121 *University of Sydney Act 1989* (NSW) s 25 (emphasis added).

122 See, eg: in the United States, Marion Fremont-Smith, 'Donors Rule' (2007) *Trusts and Estates* 10–12; Reid Kress Weisbord, 'Reservations about Donor Standing: Should the Law Allow Donors to Reserve the Right to Enforce a Gift Restriction?' (2007) 42(2) *Real Property, Probate and Trust Journal* 245, 245–7.

123 Ibid.

124 As to the general risk of co-optation by an Attorney-General see, Marilyn Warren, 'Celebrity Fundraising, Human Generosity and Consumer Protection', *Charity Law Association of Australia and New Zealand* (Document, 5 July 2021) <https://www.claanz.org.au/pdf/Celebrity%20Fundraising%20-%20CLAANZ%20-%205%20July,%202021.pdf>. In a United States context see, eg: Evelyn Brody, 'Whose Public? Parochialism and Paternalism in State Charity Law Enforcement' (2004) 79(4) *Indiana Law Journal* 937; Jonathan Klick and Robert H Sitkoff, 'Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off' (2008) 108(4) *Columbia Law Review* 749.

because the process of making a scheme application is lengthy,[125] and uses a significant amount of charitable dollars, as the parties' costs are typically paid out of the assets of the charitable trust itself. The plaintiff as trustee may invoke its entitlement to indemnity costs, in the exercise of its rights of exoneration of recoupment out of trusts, while the Attorney-General's presence in the proceedings is required as the protector of charities.[126] As a result, charitable dollars are wasted on the process, even if the final outcome is successful.

This was highlighted in *MacKenzie*, as discussed above. However, the case survey also demonstrates that around half the cases involved trust funds with a similar value to that in *MacKenzie*. Indeed, even when applying a more restrictive criterion, costs look large in comparison to the quantum of trust assets. Private ancillary funds, being charitable trusts that qualify for certain donation tax concessions, are required to distribute 5% of the market value of the trust fund each year.[127] To some extent, this can be seen as a reflection of industry practice for grant-making charitable trusts.[128] Arguably, if costs amount to more than half of this expected distribution to the public good (i.e. $30,000 will be more than 2.5% of a fund's value for funds with assets of less than $1.2 million), then the variation costs are material. Returning to our 21 cases, five concerned trust funds valued at less than $1.2 million in 2023 dollars.[129] One further case involved three trusts, one of which was valued at less than $1.2 million, with one of the other two unstated and one larger than $1.2 million.[130] One further case did not state the value of the trust fund or provide information suggesting that the value was above $1.2 million.[131]

Moreover, the cy-près and administrative scheme provisions are used only infrequently and are not well understood by many lawyers, giving rise to significant difficulties and costs.[132] Indeed, six of the 21 cases surveyed demonstrate potential difficulties of understanding, even once a variation application has been provided to an Attorney-General, and their feedback received before the matter is heard in court. As discussed earlier, in three cases a cy-près scheme was requested, but the court considered that an administrative scheme was actually the appropriate type of

125 See, eg, *Robinson* (n 23) [5] where Kunc J noted that 'the present application is the product of discussions between the interested parties, including the Crown Solicitor on behalf of the Attorney General, over a period of several years'.

126 See *University of New South Wales* (n 20) [69].

127 *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (Cth) r 15(1).

128 See, eg, Murray, *Charity Law and Accumulation* (n 7) 215–16.

129 *King* (n 51); *Connery* (n 43); *Kerin* (n 38); *Price* (n 52); *University of Adelaide* (n 1).

130 *University of Adelaide v A-G* (2018) (n 3).

131 *Levett* (n 45).

132 See, eg, *Taylor* (n 16) [53]. For commentary beyond Australia, see: Mulheron (n 13) 139–41; Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 46–9; Melanie B Leslie, 'Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Près Doctrine' (2012) 31(1) *Cardozo Arts and Entertainment Law Journal* 1, 10–12.

scheme instead because there was no change in purpose, or in conjunction with it.[133] In a further case, an administrative scheme was requested, but some matters were considered to constitute a change of purpose and so could not be included in the administrative scheme.[134] In the other two cases, as discussed above, the judgment itself did not clearly explain why the purpose had changed so as to justify a cy-près scheme.[135]

The result is a regime that is onerous, costly, and lacking regulatory cohesion. This seems particularly unwarranted given our survey findings that most of the higher education applications brought before the courts are non-controversial, with the schemes overwhelmingly allowed, and the courts adopting a pragmatic approach to ensure the most expedient and efficient use of charitable assets. In this process, donor intent appears to play a much larger role in shaping the form of the scheme that is ultimately approved, rather than the question of whether a scheme will be granted in the first place. On the issue of whether a scheme should be granted, the onerous regime does not seem to provide material protection for donor intent, other than screening out applicants on the basis of cost. As a consequence, some smaller charities are choosing to by-pass this regime altogether and instead are making informal arrangements with donors or donors' heirs to informally 'amend' the terms of a trust, when it is no longer expedient to carry out the charitable purposes, or to do so in the manner originally intended.[136] For universities, which are subject to public accountability and scrutiny, employing such workarounds would be risky and exposes universities as trustees to a claim for breach of trust. This raises the question of whether there are alternatives to the existing regulatory framework.

V Alternatives to the Existing Regime

Unlike Australia where the settlement of cy-près and administrative schemes remains within the jurisdiction of the courts, the Charity Commission for England and Wales is empowered through legislation to make cy-près schemes.[137] Further, the trustees of charitable trusts are permitted to amend the trust purposes by way of a 75 percent special majority vote of trustees (or, if there are members with voting powers, then a majority of trustees and 75 percent of those members).[138] The only ground required is that the trustees in good faith consider the change to be

133 *Robinson* (n 23); *University of Adelaide* (n 1); *Kerin* (n 38).

134 *Corish* (n 29).

135 *Price* (n 52); *Greer* (n 52).

136 This is the inevitable conclusion from research into the Western Australian charity sector, see Ian Murray et al 'Restricted Philanthropic Gifts: Paradigm Clash between Law and Practice or Simply a Muddle?' (2024) 47(1) *UNSW Law Journal* 139; *Building Resilience* (n 67).

137 *Charities Act 2011* (UK) s 69.

138 Ibid s 280A.

'expedient in the interests of the charity';[139] and the change must not render the trust non-charitable.[140] The change must be approved by the Charity Commission, which is required to have regard to several factors, including similarity requirements.[141] The result in England and Wales is that 'most cy-près schemes are made by the Charity Commissioners'[142] and that, it has become 'relatively easy for trustees to achieve modification.'[143]

This contrasts with the position in Australia. Western Australia has recently revised,[144] and at the time of writing Queensland is currently revising,[145] statutory provisions dealing with cy-près and administrative schemes for charitable trusts. However, these revisions do not contain any substantive broadening of the grounds on which cy-près schemes are available.[146] Yet widening the statutory cy-près grounds in Australia to enable variation, where trustees can establish that changed social and economic circumstances would result in assets being used more expediently would, based on our survey, essentially be making explicit the current judicial approach to these schemes. That is, courts are very ready to find grounds for a scheme. However, the continued application of a similarity requirement (for the proposed new scheme) under this approach also provides some protection of donor intent. That accords, to some extent, with the continued use of similarity requirements in the case survey by the courts in settling the final terms of a scheme. As noted in Part III, in five cases, the terms of a scheme were adjusted to better accord with the original intention and in a further two cases the trustee or Attorney-General was asked to prepare a detailed scheme for review by the court, once the grounds had been established.

Given that Australia also has a national charity regulator, it merits considering whether reforms to the regulatory regime involving the Australian Charities

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139 For discussion of the requirement and the purported 'technical issues' background to the reforms: see John Picton, 'The Charities Act 2022 and its Dissuasive Effects on Donors' (2023) 86(4) *Modern Law Review* 1011.

140 *Charities Act 2011* (UK) s 280A (3).

141 Charity Commission consent will require regard to factors including the desirability of securing that the new purposes are 'so far as reasonably practicable, similar to the purposes being altered'; as well as 'the purposes of the charity when it was established' and 'the need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances': *Charities Act 2011* (UK) s 280A(10).

142 Mulheron (n 13) 92.

143 Brett Crumley and John Picton,'"Still Standing?": Charitable Service-users and Cy-pres in the First-tier Tribunal (Charity)' (2018) 82(3) *Conveyancer and Property Lawyer* 262, 262. These comments were made even before the most recent round of liberalising amendments that commenced in March 2024.

144 *Charitable Trusts Act 2022* (WA).

145 Yvette D'Ath, Department of the Premier and Cabinet, 'Modernised Trusts Bill introduced to Parliament' (Media Statement, 21 May 2024).

146 See, eg, Ian Murray, 'Charitable Trusts Bill 2022 (WA) — A Critique' (2022) 33(3) *Public Law Review* 195.

and Not-for-profits Commission ('ACNC') would be possible here. The English experience suggests there is an argument for enabling the ACNC to have concurrent jurisdiction with the courts. This would reduce the role of state Attorneys-General in scheme applications. The issue in Australia is that the Commonwealth has no general head of power relating to charities or to trusts. The current ACNC regime is (somewhat controversially) largely based on powers relating to corporations, tax and the territories.[147] Indeed, a number of the ACNC regime provisions (primarily compliance sanctions) are expressly limited to 'federally regulated entities', a term that is defined by reference to entities or arrangements to which the Commonwealth corporations or territories powers apply.[148] However, the application of these provisions to trusts has been questioned.[149] Outside the territories, regulating the internal amendment processes for trusts raises a significant risk of extending beyond existing heads of power.[150] While existing referrals of power by the states in relation to corporations and to consumer law could potentially serve as models for referring power in relation to charitable trusts,[151] this issue presents a significant political hurdle that would need to be overcome.

If this hurdle proves insurmountable, a compromise could involve state Attorney-General approval of changes made by trustees. Given that state Attorneys-General are already consulted on scheme applications prior to court proceedings being initiated, and that some Attorneys-General already have the statutory authority to approve cy-près schemes when the trust assets are below a certain threshold,[152] it would not be a great leap to expand this approval process to all charitable trusts in all states.

Permitting trustees to vary charitable trust purposes by way of a 75% special majority vote of trustees, and approval by either the ACNC or the state Attorneys-General would provide a more flexible regulatory regime, reducing both the costs and the timeframe. It would also provide a more expedient use of charitable assets when circumstances change. The ACNC, and to a lesser extent dedicated staff within an Attorney-General's department, arguably have greater familiarity with the charity

147 Along with the communications and external affairs powers: Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) [2.2]–[2.14]. See, eg: Nicholas Aroney and Matthew Turnour, 'Charities are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446; Nicholas Aroney, 'Federal Charities Law and the Taxation Power: Three Constitutional Problems' (2023) 51(1) *Federal Law Review* 78.

148 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 80–5, 85–5, 95–10, 100–5, 205–15, 205–20.

149 Ian Murray, 'Regulating Charity in a Federated State: The Australian Perspective' (2018) 9(4) *Nonprofit Policy Forum* 1, 10–11.

150 Aroney (n 147), which argues that the tax power is already stretched to breaking.

151 Patrick McClure, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (Final Report, 31 May 2018) 111–14 recommended adopting a national scheme of charity regulation involving some referral of power by the states to the Commonwealth.

152 See above n 120 and accompanying text.

sector and higher education providers within this sector, along with government policy relating to the sector, than the courts. They likely would have a better sense of how charity assets could be used more expediently.[153] Further, if the focus of the ACNC or the Attorney-General is on expediency and similarity requirements of the proposed scheme, it is likely more effective for the regulator to have a specific understanding of these issues rather than a broad overview of the various regulatory settings and socio-economic changes which go to the basis for a scheme. That is, the focus in reviewing a scheme is a narrower one, rather than a broad-based exercise of considering whether a scheme is required at all. In a higher education context, this would mean trusting highly regulated education providers to determine when changed institutional settings, education models or administrative and governance settings mean that it is expedient to alter an educational charitable trust. Regulatory attention would then focus on whether the proposed change logically responds to those changed settings, and is broadly consistent with the original intent.

Concerns may be raised that such a development in Australia would open the floodgates for scheme applications. Further concerns may be raised regarding the risk of donors choosing an alternate device if they feel their charitable assets could be directed to a charitable end they did not specify. However, these concerns can be alleviated via practical solutions. In particular, by maintaining a requirement that any new scheme be as similar as possible to the current purposes, taking into account changed social and economic conditions. Further, the relevant regulators could publish guidelines setting out evidentiary and notification requirements for them to approve a change, as England and Wales have done.[154] Prudent donors could always include a clause in their trust document providing for alternative charitable purposes. Donors making large philanthropic gifts could, as another option, achieve a degree of control through gift agreements governed by contract law.[155]

VI Conclusion

The Australian government has committed to doubling philanthropic giving by 2030 and, at the time of writing, the Productivity Commission is conducting an inquiry into philanthropy to achieve this objective.[156] With significant amounts

153 As to the potential for greater expertise on the part of an administrative body: see Jonathan Garton, 'Justifying the Cy-près Doctrine' (2007) 21(3) *Tolley's Trust Law International* 134, 148–9.

154 See, eg, Charity Commission for England and Wales, 'CC36: Guidance — Changing your Charity's Governing Document' (Web Page, August 2011) <https://www.gov.uk/government/publications/changing-your-charitys-governing-document-cc36> concerning notification of changes for small charitable trusts.

155 See generally Natalie Silver, 'The Contractualisation of Philanthropy' (2022) 38 (2–3) *Journal of Contract Law* 248. To survive the donor, this would require the assignment of contractual rights.

156 See Andrew Leigh, 'Harnessing Generosity, Boosting Philanthropy' (Media Release, 11 February 2023).

of charitable assets being held in perpetual charitable trusts as a result of donor-imposed restrictions that are no longer relevant, as well as a costly judicial process that wastes precious charitable dollars to recover these assets, reform of the current system is needed. This is particularly so for educational charitable trusts, since higher education providers are facing unique funding challenges, along with a suite of major changes.

Our survey of Australian cy-près and administrative scheme cases involving universities and other higher education providers show that following statutory reforms, courts have generally adopted a permissive and pragmatic approach to trust variations, that takes into account considerations beyond adhering to donor intent. Yet, the process of applying for a trust variation remains costly and time consuming. England and Wales provide model possibilities for reform and in doing so demonstrate that in Australia, we do not need to cling to ancient doctrines and processes, but instead can adopt a new regime for trust variations that will serve to increase the resources for the charitable sector, and the wider Australian community.

Appendix: Higher Education Cy-Près and Administrative Scheme Cases and Outcomes

No.	Citation	Type of application	Outcome
1.	*King v A-G (NSW)* [2020] NSWSC 629	Cy-Près scheme relying on extension of grounds under s 9 of the *Charitable Trusts Act 1993* (NSW)	Approved.
2.	*University of Adelaide v A-G (SA)* [2018] SASC 82	Umbrella application for three separate cy-près schemes under s 69B of the *Trustee Act 1936* (SA)	All three cy-près schemes approved. Although not expressly applied for, the court's inherent jurisdiction was also used to settle complementary administrative schemes in respect of two of the charitable trusts — on the grounds of expediency [46].
3.	*Bisset* [2015] QSC 85	Application pursuant to s 105(a)(iii) s105(1)(e)(iii) of the *Trusts Act 1973* (Qld) for cy-près scheme.	Approved (with changes as to the identity of the trustee and other matters such as the precise description of the area of focus of the architecture scholarship).
4.	*The Banyo Seminary Trust* [2000] QSC 215	Application pursuant to s 105(1)(e)(iii) of the *Trusts Act 1973* (Qld) to apply part of the property of the Banyo Seminary Trust cy-près.	Approved.
5.	*Corporation of the Trustees of the Roman Catholic Qld Regional Seminary v A-G (Qld)* [2020] QSC 67	Variation of existing cy-près scheme (in 4 above) by way of application under ss 105(1)(e)(iii) and 106 of the *Trusts Act* (Qld).	Approved.
6.	*Equity Trustees Ltd v A-G (Vic)* [2019] VSC 834	One of two gifts under a will related to higher education. A cy-près scheme was applied for in relation to that gift (under s 2(1)(a)(ii) of the *Charities Act 1978* (Vic) so as to amend a previous cy-près scheme settled in relation to the gift.	Approved.
7.	*Connery v Williams Business College Ltd* [2014] 17 ITELR 251	Judicial advice under s 63 of the *Trustee Act 1925* as to whether cy-près scheme should be ordered.	While trustee had applied for advice, not a cy-près scheme, the court settled a cy-près scheme (in its inherent jurisdiction) as to past conduct and, for the future, ordered that the Attorney-General establish a scheme under s 13(2) of the *Charitable Trusts Act 1993* (NSW).

No.	Citation	Type of application	Outcome
8.	*Tasmanian Perpetual Trustees Ltd v A-G (Tas)* [2017] TASSC 32	Cy-Près variation under ss 5 and 6 of the *Variation of Trusts Act 1994* (Tas) (in particular, the ground of inexpedience in s5(2)).	Refused in part — as to a discriminatory gender condition; and as to resort to capital. Approved in part — as to the period of the scholarship, discretion to refuse funding for a particular university course, and fixing a cap for scholarship payments.
9.	*Levett v A-G (NSW)* [2014] NSWSC 1787	Cy-Près scheme relying on the extension of grounds under s 9 of the *Charitable Trusts Act 1993* (NSW).	Approved.
10.	*Rechtman v A-G (Vic)* [2005] VSC 507	Application for cy-près scheme.	Approved under s2(1)(e)(iii) of the *Charities Act 1978* (Vic)).
11.	*Kerin v A-G (SA)* [2019] SASC 103	Application under s 69B(1)(e) of the *Trustee Act 1936* (SA) for cy-près scheme, seeking four variations. While not expressly requested in this form by the trustee, A-G (SA) submitted that one of the variation requests was actually a request for an administrative scheme in court's inherent jurisdiction.	Refused in large part due to the proposed additional purpose of promoting in rural areas, education in agriculture and related fields, proposed restriction of scholarships to agricultural and related fields of study, and proposed relaxation of equal division of trust income between two purposes. Approved in part — administrative scheme settled under court's inherent jurisdiction (change of wording to avoid ambiguity).
12.	*Chartered Secretaries Australia v A-G (NSW)* [2011] NSWSC 1274	Cy-Près scheme relying on extension of grounds under s 9 of the *Charitable Trusts Act 1993* (NSW).	Approved.
13.	*College of Law Pty Ltd v A-G (NSW)* [2009] NSWSC 1474	Administrative scheme (presumably within the court's inherent jurisdiction at general law).	Approved (with minor variation to better align winding-up clause with the original objects).
14.	*Greer v A-G (NSW)* [2018] NSWSC 725	Cy-Près scheme (no explicit reference to statutory provisions in the judgment).	Approved.
15.	*Price as Executor of the Estate of Beryl Sheila Price v A-G (WA)* [2014] WASC 430	Statutory cy-près scheme under s15(c) of the *Charitable Trusts Act 1962* (WA).	Approved.
16.	*Corish v A-G (NSW)* [2006] NSWSC 1219	Administrative scheme.	Scheme largely approved.

No.	Citation	Type of application	Outcome
17.	*Re Meshakov-Korjakin; State Trustees Ltd v A-G (Vic)* [2011] VSC 372	Application for administrative scheme (by one party only, not the trustee) in court's inherent jurisdiction (and opposed by Attorney-General and trustee). Tentative application for cy-près scheme under s 2 of the *Charities Act 1978* (Vic) in respect of accumulated income (by one party only, not the trustee — and opposed by Attorney-General and trustee) on the basis of alleged breach of perpetuities rules.	Administrative scheme refused. Cy-Près scheme refused because the perpetuities rules did not, at the time of the case, invalidate the accumulation direction.
18.	*University of New South Wales v A-G (NSW)* [2019] NSWSC 178	Cy-Près scheme and administrative scheme under s 9 of the *Charitable Trusts Act 1993* (NSW) (and court's inherent jurisdiction).	Cy-Près and administrative schemes approved.
19.	*Robinson v A-G (NSW)* [2022] NSWSC 996	Cy-Près scheme relying on extension of grounds under s 9 of the *Charitable Trusts Act 1993* (NSW).	Cy-Près scheme refused (no change of purpose requested), but an administrative scheme to achieve the same effect could be approved, with the precise terms to be settled upon a further application.
20.	*Re University of Adelaide v A-G (SA)* [2023] SASC 8	Administrative scheme under court's inherent jurisdiction and cy-près scheme under s 69B of the *Trustee Act 1936* (SA).	Administrative scheme approved. Cy-Près scheme refused (no change of purpose requested).
21.	*University of Adelaide v A-G (SA)* [2023] SASC 17	Cy-Près scheme under s 69B of the *Trustee Act 1936* (SA) and court's inherent jurisdiction.	Approved.

*Joanna Jarose**

REVISITING THE LIMIT ON SMALL CLAIMS IN SOUTH AUSTRALIA'S MINOR CIVIL JURISDICTION

Abstract

Minor civil jurisdictions provide 'an effective and low cost dispute resolution mechanism' for cases where the value in dispute is relatively low.[1] The limit on small claims in South Australia ('SA') has been set at $12,000 since 2016, after an increase to $25,000 four years earlier was rolled back. This comment argues that raising this limit would have three main benefits. First, it would facilitate access to justice for individuals who may be deterred from the courts due to the disproportionate (and rising) cost of litigation in the general jurisdiction. Second, it would bring SA more in line with other states which have made similar amendments and take account of the impact of inflation since 2016. Finally, and most significantly, it would support the objectives of our courts in ensuring 'just, efficient, timely, cost-effective and proportionate resolution' of matters.[2]

I Introduction

Small claims form part of the minor civil jurisdiction under the *Magistrates Court Act 1991* (SA) ('Act').[3] When the Act first came into force, this was deemed to be 'a monetary claim for $5000 or less';[4] this increased slightly to $6,000 in 2002.[5] However, a decade later the limit vacillated considerably in a relatively short time, raised to $25,000 in 2013[6] before being more than halved to $12,000 in 2016,[7] at which level it has remained.[8] Setting the 'correct' limit for the

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1 Department of the Attorney-General and Justice (NT), *Review of the Jurisdictional Limit and Legal Representation in the Small Claims Act: Consultation Outcomes* (Report, June 2014) 13.

2 *Uniform Civil Rules 2020* (SA) r 1.5 ('*UCRs*').

3 *Magistrates Court Act 1991* (SA) s 3(2)(a) ('*MCA*').

4 Ibid s 3(1) (definition of 'small claim'), as enacted.

5 *Statutes Amendment (Courts and Judicial Administration) Act 2001* (SA) s 16(b).

6 *Statutes Amendment (Courts Efficiency Reforms) Act 2012* (SA) s 23: the amendment came into force on 1 July 2013.

7 *Magistrates Court (Monetary Limits) Amendment Act 2016* (SA) s 4(2).

8 *MCA* (n 3) s 3(1) (definition of 'small claim').

small claims jurisdiction is a complicated question. In essence, it involves balancing two main commonsense factors. The first is that parties to litigation should have the opportunity to be fairly and fully heard, maximising the chance of a just outcome in accordance with our adversarial court system.[9] The second is that legal costs, procedural requirements and demands on court time and resources associated with litigation should be, as far as possible, proportionate to the matter's complexity and the amount in dispute.[10] This comment will examine the appropriateness of the current limit, with these factors in mind. In doing so, it will consider: the procedural differences between the minor civil and general jurisdictions in SA; the impact of legal costs and inflation; the concern of reduced access to justice, on both sides of the debate; the potential issues associated with ensuring unrepresented applicants are adequately heard; and other arguments raised in support of the 2016 reduction to the SA small claims jurisdiction.

This comment will conclude that, on balance, the current limit is inappropriately low. While it acknowledges that there are downsides to a matter being heard in the minor civil jurisdiction (such as reduced capacity to have legal representation and limited options for appeal), these cannot outweigh the significant access to justice issue created by forcing applicants seeking to dispute relatively small sums into the general jurisdiction. The risk of potentially disproportionate legal expenses creates an obvious deterrent effect. The comment will propose that a raised limit for small claims to approximately $20,000, which could be subject to indexation[11] or change by regulation,[12] would strike a more appropriate balance.

II What is the Difference?

There are significant procedural differences between the minor civil and general jurisdictions of the SA Magistrates Court. While the general jurisdiction retains the formal, adversarial approach typical of common law courts, the minor civil jurisdiction operates in a manner reminiscent, at least superficially, of the inquisitorial system preferred in many civil law jurisdictions (and in some Australian tribunals).[13] In a minor civil matter the magistrate leads the inquiry on behalf of the Court, rather than it being 'an adversarial contest'.[14] Parties can only be represented

9 See, eg, *UCRs* (n 2) rr 1.5, 21.1(4), 67.2(2)(c), 263.2(2)(a)(ii).

10 See, eg, ibid rr 1.5, 3.1(h), 12.2(2), 61.1(d).

11 As was suggested in the Legislative Council in 2012: South Australia, *Parliamentary Debates*, Legislative Council, 20 July 2012, 1899 (Dennis Hood).

12 As in Tasmania: *Magistrates Court (Civil Division) Act 1992* (Tas) s 3 (definition of 'minor civil claim'); *Magistrates Court (Civil Division) (Minor Civil Claims) Regulations 2023* (Tas) reg 3.

13 Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 4–5; Margaret Castles, David Caruso and Anne Hewitt, 'Why Representation and Resources are Critical to Access to Justice in Minor Civil Jurisdictions: The Experience of Advisory Services in Minor Civil Claims' (2014) 8 *Court of Conscience* 25, 26.

14 *MCA* (n 3) s 38(1)(a).

by lawyers where they unanimously agree, or fairness requires one party be allowed such a concession.[15] Costs are generally not awarded.[16] The Court is not bound by the rules of evidence or formal procedure,[17] and determines the facts for itself based on examination of the evidence and witnesses presented.[18] This creates a meaningful distinction in how extensively an individual's case may be presented and by whom, as well as the financial outlay required to engage in the process.

III The Case For the $12,000 Limit

In 2012, the limit for small claims remained $6,000 as it had been since 1991.[19] In July 2011, Steven Marshall MP (then member for Norwood) had formally introduced a private member's bill which proposed an increase to $25,000.[20] Mr Marshall raised his concerns as follows:

> By having the limit set so low, we are forcing businesses and individuals to take disputes over relatively minor claims to the General Division of the Magistrates Court. … Quite often the costs far outweigh the work of the original dispute, meaning that it is not worth the time, effort and money needed to effect justice for this important sector in South Australia. Moreover, this disadvantages the business community in South Australia and deprives them of cost-effective justice that they would be able to achieve in other jurisdictions around the country. This is particularly a problem for small businesses that do not bother taking disputes to court because it is simply not worth it.[21]

Mr Marshall's bill received significant support from other Liberal MPs[22] but was ultimately not passed. When the Labor Government of the time later put forward the Statutes Amendment (Courts Efficiency Reforms) Bill 2011 in the House of Assembly, which incorporated reform in this area, it proposed the limit should be increased to only $12,000.[23] The opposition at the time strongly supported adhering

15 Ibid s 38(4).

16 Ibid s 38(5).

17 Ibid s 38(1).

18 Ibid s 38(1)(b).

19 South Australia, *Parliamentary Debates*, House of Assembly, 14 March 2012, 673 (Vickie Chapman).

20 South Australia, *Parliamentary Debates*, House of Assembly, 28 July 2011, 4717–18; ibid, 675–6 (Steven Marshall).

21 South Australia, *Parliamentary Debates*, House of Assembly, 28 July 2011, 4717.

22 South Australia, *Parliamentary Debates*, House of Assembly, 15 September 2011, 4984–8.

23 South Australia, *Parliamentary Debates*, House of Assembly, 23 November 2011, 6115 (John Rau, Deputy Premier); South Australia, *Parliamentary Debates*, House of Assembly, 1 March 2012, 494 (John Rau, Deputy Premier).

to the original proposal,[24] and an amendment proposed by Labor's Stephen Wade in the Legislative Council to this affect received majority support from that body.[25] This was largely based around the high cost of legal services and the perception that the $12,000 limit would perpetuate an access to justice issue.[26] The amendment was accepted by the House of Assembly[27] and by the Government,[28] and the bill was passed, lifting the limit to $25,000 in 2012.[29]

In April 2016, a bill proposing to lower the limit was introduced by John Rau MP, then Deputy Premier and Attorney-General.[30] An inquiry by the Office of Crime and Statistics Research (unfortunately not publicly available) had reportedly found that although the increase in jurisdictional limit had resulted in increased 'accessibility to the civil justice system' and 'a possible reduction in the median number of days to finalise a defended claim', there was a corresponding increase in demand on the small claims jurisdiction.[31] Further, 'the number of complex claims where the parties were unrepresented had also increased which was requiring additional time for the Registrar or Magistrate to determine the relevant issues'.[32] It was also noted in the second reading speech that other states had retained a lower limit on small claims (generally, at that time, $10,000).[33] Therefore, the amendment aimed to 'reduce court delays by decreasing the number and complexity of small claim lodgements'.[34] There was some criticism by the opposition, in particular that the report had not considered all the available data and that the Government had not looked at less absolute pathways for amendment suggested by the Joint Rules Advisory Committee (such as excluding certain claims, or giving Magistrates a discretion to refer matters to the general jurisdiction).[35]

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24 South Australia, *Parliamentary Debates*, House of Assembly, 14 March 2012, 673–4 (Vickie Chapman). Although early discussion in the Legislative Council was more restrained, Stephen Wade did note that 'the opposition … have concerns, and some of those will be reflected in amendments we will move at the committee stage': South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2012, 1130 (Stephen Wade).

25 South Australia, *Parliamentary Debates*, Legislative Council, 20 July 2012, 1897–1900.

26 Ibid.

27 South Australia, *Parliamentary Debates*, House of Assembly, 30 October 2012, 3461–2 (John Rau, Deputy Premier).

28 South Australia, *Parliamentary Debates*, Legislative Council, 13 November 2012, 2662 (Stephen Wade).

29 *Statutes Amendment (Courts Efficiency Reforms) Act 2012* (SA) s 23(2).

30 South Australia, *Parliamentary Debates*, House of Assembly, 13 April 2016, 5134–1 (John Rau, Deputy Premier).

31 Ibid 5135.

32 Ibid.

33 Ibid 5136.

34 Ibid.

35 South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2016, 5468 (Vickie Chapman).

In May 2016, the Law Society of SA wrote a letter to Mr Rau, strongly in support of lowering the small claims limit to $12,000.[36] Their primary justifications were that: (1) 'very few claimants … would consider $25,000 to be a "minor" amount of money, and that disputes involving sums of this kind are often complex';[37] (2) it was 'unfair' that a successful claimant in such a matter could receive only nominal costs;[38] and (3) claims against 'corporate or insurance defendants' would often be under $25,000, creating a heightened risk of a power imbalance between parties under the larger statutory limit.[39] The Law Society's recommendations, among others, were noted in support of the bill by both Labor and Liberal members of the Legislative Council.[40] Despite some misgivings from the Liberal members about the absolute terms of the bill, they ultimately accepted the amendment.[41] As a result, the small claims limit was changed to $12,000.[42]

Although the small claims limit has not been reviewed in the intervening years, there are numerous counterarguments that can now be made for raising the limit once more.

IV A 'Minor' Amount of Money?

The Law Society was clearly correct in stating that most people, in their everyday life, do not consider $25,000 a minor amount of money — but this proposition must be considered in context. The essential practical question for litigants is not whether the amount in dispute is significant. Rather, it is ultimately whether they can go to court without their legal costs exceeding the amount in dispute. The answer at present, for a claim between $12,000 and $25,000, is likely no.

A monetary claim over $12,000 will be heard in the fully adversarial general division; to achieve any modicum of fairness, this requires a party to pay for appropriate legal advice and representation. Of course, the *Uniform Civil Rules* ('*UCRs*') strongly promote 'cost-effective and proportionate resolution' of matters.[43] They further allow a court to limit the party/party costs which may be awarded in a proceeding,[44] which should theoretically encourage parties to keep costs down to a range proportionate to the amount in dispute.

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36 Letter from David RA Caruso at the Law Society of South Australia to John Rau, 2 May 2016, [3] ('LSSA Letter').

37 Ibid [6].

38 Ibid [7].

39 Ibid [8].

40 South Australia, *Parliamentary Debates*, Legislative Council, 7 June 2016, 4148–9 (Andrew McLachlan), 4151 (Peter Malinauskas).

41 Ibid 4148–9 (Andrew McLachlan).

42 *Magistrates Court (Monetary Limits) Amendment Act 2016* (SA) s 4(2).

43 *UCRs* (n 2) r 1.5. See also rr 3.1(h), 61.1(b), 61.1(d).

44 Ibid r 194.2(1).

However, preparation for litigation under these same rules is complex and time-consuming. The power of a court to limit a costs award at the conclusion of a matter does not actually remove any of the mandatory steps parties must perform to get to trial.[45] These steps may possibly be more straightforward when the amount in dispute is $15,000 instead of $150,000 (although by no means guaranteed) but in any event, they are generally no fewer. Even the most costs-conscious lawyer may accrue thousands of dollars in solicitor/client costs just taking fully informed instructions, complying with pre-action steps and properly preparing pleadings — only the preliminary stages of a disputed matter. If a lawyer does not represent their client properly, they not only risk losing the case but may be subject to adverse costs orders against them personally[46] and even potential accusations of unsatisfactory professional conduct or professional misconduct.[47]

The reality is therefore that going to trial in the general jurisdiction — no matter the amount in dispute — is very costly for all parties. There is no way to ensure that solicitor/client costs are proportionate to the disputed sum while also ensuring the case is adequately argued.

In the seven years since the most recent adjustment of the small claims limit in SA, legal costs have only risen further. Scale costs have always increased incrementally each year; even since the *UCRs* were enacted in 2020, every given value on the Magistrates Court costs scale has increased.[48] Of course, most law firms charge more than scale.[49] It is not unknown for an applicant to obtain a judgment in their favour, but at the cost of an outlay over ten times that amount in legal fees.[50]

Ultimately, the small claims limit should be such that an individual can pursue their claim in court without their out-of-pocket legal costs necessarily outweighing the disputed sum.

Another clear consideration, especially in the context of the high current rate of inflation, is that $12,000 is simply not worth as much as it was in 2016. On average, $12,000 spent in SA during March 2016 is equivalent to $15,487.85 as at March

45 Ibid chs 7–9, 13–14.

46 Ibid r 194.8.

47 Law Society of South Australia, *South Australian Legal Practitioners' Conduct Rules* (at 1 January 2022) rr 2.3, 4.1.1, 4.1.3.

48 *UCRs* (n 2) sch 6, pt 3, r 5(3) cf sch 6, pt 3, as enacted. For example, item 7 (first day '[a]ttendance as counsel at trial') has increased from $1,333 to $1,480.

49 See, eg, *Sullivan v Krepp* [2023] SASC 4, [26].

50 See, eg: *Be Financial Pty Ltd v Das* [2012] NSWCA 164, in which the applicant had obtained an order for $24,124.64 but apparently accrued costs of $231,224 for costs up to and including a seven day trial: at [16], [30]; *Mathieson Nominees Pty Ltd v AJH Lawyers Pty Ltd* [2017] VSC 377, where the applicant allegedly accrued $421,109.43 in costs during a dispute over $35,000: at [1], [120].

2024.[51] A contract for goods or services costing $11,000 in 2016, and therefore well within the range which could be disputed in the minor civil claims jurisdiction, now costs on average $14,197 and is not considered a small claim. Therefore, a significant number of potential disputes which would have been small claims in 2016, now cannot be heard as a minor civil action purely due to inflation and the higher relative costs of goods and services as at 2024.

In the specific context of a litigated court matter, with inflation pushing more and more disputes out of the minor civil jurisdiction, $25,000 should now be more appropriately considered a 'minor' sum.

V Imbalance of Power Between Parties?

Parties to small claims are generally not permitted to be represented, unless: (1) one of them is a legal practitioner; (2) all parties agree; or (3) the Court 'is of the opinion that the party would be unfairly disadvantaged' without representation.[52] One concern raised by the Law Society in 2016 was that the inability for an individual to obtain representation would cause a serious power imbalance if facing a corporate opponent.[53] This is a valid concern. Just because a party cannot be represented in court does not stop them from engaging significant legal expertise behind the scenes. Litigants proceeding without advice and having to represent themselves in a hearing may be less able to obtain a just result due to their lack of legal expertise.[54]

However, it is unclear how this issue is helped by reducing the small claims jurisdiction. Such a power imbalance is only magnified in a traditional, adversarial trial. An individual with legal representation will still be unlikely to equal the resources of a powerful corporate opponent. Further, an individual who cannot reasonably afford legal costs at all will be far more disadvantaged than they might have been in the minor civil jurisdiction — especially if they fall within the broad cohort of individuals 'too poor to afford a lawyer but not sufficiently poor to qualify for legal aid',[55] a demographic sometimes referred to as the 'missing middle'.[56] A self-represented

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51 Calculations based on 'Time Series Spreadsheets: Tables 3 and 4, CPI: All Groups, Weighted Average of Eight Capital Cities', available at 'Consumer Price Index, Australia', *Australian Bureau of Statistics* (Web Page, 24 April 2024) <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release>.

52 *MCA* (n 3) s 38(4)(a).

53 LSSA Letter (n 36) [8].

54 Castles, Caruso and Hewitt (n 13) 26.

55 Gabrielle Canny, 'Grim Prediction Comes to Pass', *Legal Services Commission South Australia* (online, 16 February 2022) <https://lsc.sa.gov.au/cb_pages/news/Grimpredictioncomestopass.php>.

56 Law Council of Australia, 'Closing the Justice Gap for the Missing Middle' (Media Release, 9 December 2021) <https://lawcouncil.au/media/media-releases/closing-the-justice-gap-for-the-missing-middle>.

litigant in the general jurisdiction — having to manage formal rules of pleadings, evidence and court procedure, and likely opposed by professional counsel — is far less likely to succeed than if they were represented.[57] Further, self-represented litigants are often detrimental to the efficient administration of justice: inexperience and ignorance may lead to longer, more difficult and more numerous hearings and increased pressure on the court to manage inadequate pleadings.[58]

In the minor civil jurisdiction, the playing field is at least somewhat levelled as the magistrate themselves provides legal expertise and guides the proceedings. This reduces the potential disadvantage to unrepresented parties. Additionally, even those with inadequate resources to pay a lawyer and no access to legal aid have some options: for example, they can seek assistance in understanding their case from services such as the Adelaide Law School Magistrates Court Legal Advice Service,[59] prior to lodging a claim. While such services cannot represent a client in a trial, they can certainly help a litigant prepare to bring a small claim effectively.

VI Unfairness of Costs Awards?

The Law Society was also concerned about the limited costs awards available in the minor civil jurisdiction.[60] It is true that even where legal representation is permitted, the costs which can be awarded are much more limited than in the general jurisdiction — for example, costs for filing an action are capped at $500,[61] while in the general jurisdiction they can be as much as $5,000.[62] Further, costs can be awarded for fewer tasks performed by a lawyer during the trial process.[63]

But this can equally be considered a positive rather than a negative, particularly for applicants of reduced means. Indeed, as Barrett J has observed: '[t]he purpose of the legislation in restricting the right to legal representation is to enable people involved in litigation concerning small amounts of money to conduct their litigation without incurring relatively high fees for legal representation'.[64] The limitation on costs awards is a disincentive for affluent parties to expend significant amounts

57 RW White, 'Advocacy and Ethics: The Self-Represented Litigant' (Speech, 18 October 2014) 8 [17] <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/White/white_20141018.pdf>.

58 Ibid 2 [4]; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 498.

59 'Magistrates Court Legal Advice Service', *University of Adelaide* (Web Page) <https://law.adelaide.edu.au/free-legal-clinics/magistrates-court-legal-advice-service>.

60 LSSA Letter (n 36) [7].

61 *UCRs* (n 2) sch 6, pt 4, r 7(3) item 1.

62 Ibid sch 6, pt 3, r 5(3) item 2.

63 Ibid sch 6, pt 3, r 5(3) (13 categories for costs) cf sch 6, pt 4, r 7(3) (9 categories for costs).

64 *People's Choice Credit Union v Robey* [2013] SADC 34, [26].

on solicitor fees in preparing for a small claim: after all, the reality is most parties will not spend more defending a minor matter than it would cost to simply settle, especially when there is no prospect of recovering their costs. The risk of an adverse costs award has been recognised as a deterrent for potential litigants.[65] In the general jurisdiction, an unsuccessful party is often out of pocket for damages or loss, required to pay their own lawyers, and finally required to at least partially fund the successful party's legal fees. The normalisation of unrepresented parties and assistance from the Court also reduces the need for parties to engage extensive legal assistance in order to navigate the process.

Overall, minor civil actions should be comparatively low cost for parties, and the limit on available costs awards should not be a major motivation for keeping the current threshold on small claims.

VII Other Arguments Against a Raised Limit

A *Flexibility to be Heard in the Minor Civil Jurisdiction*

It must be acknowledged that there is flexibility built into the Act to allow a civil matter, falling within the general jurisdiction, to be heard in the minor jurisdiction. A party involved in a dispute over a larger claim (up to the Magistrates Court maximum quantum of $100,000[66]) may apply to the Court to have it heard as a minor civil action.[67] This could be an option where parties are concerned about potential costs, wish to be self-represented, or believe the matter is simpler than would warrant a full formal trial. However, a transfer of this kind can only occur at the discretion of the Court and requires the other side to agree,[68] so this option cannot adequately compensate for a low small claims limit.

B *Limited Right to Appeal*

One area in which minor civil actions are at a clear disadvantage is potential avenues of appeal. Parties to a minor civil action have only a right of review by the District Court of SA[69] (although the District Court has its own discretion to rehear evidence).[70] Legal representation is limited much as the first instance proceed-

65 See, eg: Nicola Pain and Rachel Pepper, 'Legal Costs Considerations in Public Interest Climate Change Litigation' (2019) 30(2) *King's Law Journal* 211, 211; Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) 39 [2.115].

66 *MCA* (n 3) s 8(1); note however there is an exception to this maximum, if the parties agree, in s 8(2).

67 Ibid s 10AB(a); *UCRs* (n 2) r 113.4.

68 *MCA* (n 3) s 10AB(a).

69 Ibid ss 38(6), (7).

70 Ibid s 38(7)(c).

ings are, and the decision of the District Court is not open to further appeal.[71] Therefore available appeal is quite limited compared to a decision under the general jurisdiction, which gives a right of appeal to a single judge of the Supreme Court of SA (and a further discretion for that judge to refer the matter on to the Court of Appeal).[72]

But limits on possible appeal seem reasonable. Small claims being heard in an abridged, efficient manner proportionate to the amount in dispute is strongly in accordance with the overarching objects of the *UCRs*.[73] It is therefore appropriate that a smaller claim is more limited in its potential use of court resources. A statutory review by right in the District Court seems like an ample concession in this context. In reality, appeals are often refused anyway where the likely costs are disproportionate to the sum in dispute.[74]

VIII Reform by Other States

As noted above, one justification for the 2016 reduction of the small claims jurisdiction was that SA's $25,000 limit compared with other states and territories made it an outlier.[75] However, this would no longer be the case. It should be unsurprising, in the context canvassed above, that many other Australian states and territories have since increased the limit of their small claims jurisdiction. Although the Tasmanian *Magistrates Court (Civil Division) Act 1992* sets a default limit of $5,000, this is subject to regulation and is currently in practice $15,000 for most matters.[76] Victoria changed the limit from $10,000 to $15,000 in 2018.[77] However these are relatively modest increases compared to several other jurisdictions. Queensland instituted a far earlier change than even SA, in 2010, when the 'prescribed amount' under the jurisdiction of their Civil and Administrative Tribunal was changed from $7,500 to $25,000.[78] In New South Wales, the small claims limit was doubled to $20,000 in 2018.[79] Finally, both the Northern Territory and Australian Capital Territory each

71 Ibid s 38(8).

72 See ibid s 40.

73 *UCRs* (n 2) r 1.5.

74 See, eg, *South Australian Superannuation Board (Super SA) v McIntyre* [2015] SASCFC 57; *Kedem v Johnson Lawyers Legal Practice Pty Ltd* (2014) 121 SASR 118.

75 South Australia, *Parliamentary Debates*, House of Assembly, 13 April 2016, 5136.

76 *Magistrates Court (Civil Division) Act 1992* (Tas) s 3 (definition of 'minor civil claim'); *Magistrates Court (Civil Division) (Minor Civil Claims) Regulations 2023* (Tas) reg 3.

77 *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 3; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 183(a).

78 *Justice and Other Legislation Amendment Act 2010* (Qld) cl 177; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 (definition of 'prescribed amount').

79 *Justice Legislation Amendment Act (No 3) 2018* (NSW) sch 1, s 1.20[1]; *Local Court Act 2007* (NSW) s 29(1)(b).

set a new higher limit of $25,000 in 2016 (only shortly after the SA reduction), associated with the transfer of jurisdiction to their respective civil tribunals.[80] Western Australia has not reformed its small claims jurisdiction in many years, with the limit remaining $10,000.[81] Among all of these states, SA is the only one that has increased and then decreased its statutory small claims limit. SA's current limit of $12,000 sits below every jurisdiction except Western Australia.

IX Recommendation and Conclusion

Whether the reduction of the small claims jurisdiction in 2016 was warranted or not, there are many reasons that the limit should now be reconsidered.

An increase in the statutory limit of small claims from $12,000 to $20,000 would seem a proportionate response to the issues raised above. Setting such a limit would bring SA's minor civil jurisdiction in line with other states which have made similar amendments. While $20,000 is admittedly not a small amount of money in many circumstances, in the context of litigation the advantages and concessions offered by the minor civil jurisdiction processes strike the right balance for hearing a dispute of this magnitude or below. The $20,000 limit could further be made subject to regular indexation, or change by regulation, to increase potential flexibility in response to changing economic conditions and inflation.

This change would significantly reduce the number of claimants who may be practically denied access to justice due to the ever-rising costs of litigating a matter in the general jurisdiction. As a result, it would better uphold the objectives of our courts in ensuring 'just, efficient, timely, cost-effective and proportionate resolution' of matters.[82]

The manner in which the minor civil jurisdiction operates, so different from usual common law process, may be considered by some a lesser form of justice. It could be argued that without a full adversarial court process being available, it is less likely that a fair outcome will be reached. Being unrepresented may also disadvantage parties who are inexperienced in dealing with courts or otherwise unable to argue their own case effectively, especially where dealing with more sophisticated opponents.

On the other hand, the availability of small claims may provide an avenue to court adjudication which would otherwise simply be unavailable to many who are 'priced out' of traditional court proceedings. 'Poor man's justice' may seem perfectly acceptable to those for whom the alternative is no justice at all, and a low small claims limit alone serves only to further reduce access to justice for many potential litigants.

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80 *Small Claims Act 2016* (NT) s 5(1); *Civil and Administrative Tribunal Act 2008* (ACT) s 18(2).

81 *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 3(1) (definition of 'minor cases jurisdictional limit').

82 *UCRs* (n 2) r 1.5.

Nora Peat and Ashwini Ravindran***

THE JURY IS OUT: *VUNILAGI V THE QUEEN* (2023) 411 ALR 224

'Then you may trust the Parliament
not to wipe out the right to a jury?'[1]

I Introduction

Trial by jury is a fundamental common law right. It ensures that 12 peers stand between the judiciary and the exercise of its power to remove an individual's liberty at the request of the executive. This right is reflected in s 80 of the *Constitution*. Section 80 requires that all Commonwealth indictable offences be tried by jury. *Vunilagi v The Queen* ('*Vunilagi*') has confirmed that s 80 does not apply to criminal offences enacted by territory legislatures, despite their power being derived from laws of the Commonwealth Parliament.[2] This decision follows a long line of High Court jurisprudence which has limited the application of s 80, and in doing so, undermined the protection of the common law right to trial by jury in Australia.[3]

Vunilagi concerned the prosecution and conviction of Simon Vunilagi for offences under the *Crimes Act 1900* (ACT) by trial by judge alone. In the midst of the COVID-19 emergency, the government of the Australian Capital Territory ('ACT') gave the ACT Supreme Court the power to order a trial by judge alone without the consent of the accused.[4] Vunilagi was denied a trial by jury on this basis. He appealed his conviction, arguing that the enabling law contravened the *Kable*[5]

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1 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 353 (Sir Isaac Isaacs) ('*Australasian Federal Convention Debates* 1898').

2 (2023) 411 ALR 224, 236–7 [54]–[57] (Kiefel CJ, Gleeson and Jagot JJ), 239 [65] (Gageler J), 247 [90] (Gordon and Steward JJ) ('*Vunilagi*').

3 See, eg: *R v Bernasconi* (1915) 19 CLR 629 ('*Bernasconi*'); *R v Archdall* (1928) 41 CLR 128 ('*Archdall*'); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 ('*Federal Court of Bankruptcy*'); *Cheng v The Queen* (2000) 203 CLR 248 ('*Cheng*').

4 *Supreme Court Act 1933* (ACT) s 68BA, as at 8 April 2020.

5 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). See Part III(A) below.

principle and s 80 of the *Constitution*. The High Court unanimously dismissed both of these grounds.[6]

This article will focus on the Court's application of s 80 in *Vunilagi*. Parts II and III will outline the factual and legal background to the decision and Part IV will summarise the Court's reasoning. Part V will argue that the Court in *Vunilagi* endorsed a narrow interpretation of s 80, rather than interpreting the provision as a broad, substantive guarantee of the common law right to trial by jury. This interpretation is inconsistent with the typical approach to ch III of the *Constitution*. It is also inconsistent with the framers' intention to maintain the jury system across the Commonwealth, a system which was considered to be a fundamental 'safeguard of liberty'.[7]

II Facts

A *Legislative Background*

The COVID-19 pandemic posed significant problems for the ongoing administration of jury trials in courts throughout Australia. Not only did public health orders restricting activity and imposing social distancing requirements result in the likely delay of many jury trials, but there were also concerns about unnecessarily imperilling the safety of jurors.[8] The response of the ACT Legislative Assembly to these and other pandemic-related issues was to pass the *COVID-19 Emergency Response Act 2020* (ACT), which, inter alia, inserted provisions regarding jury trials into the *Supreme Court Act 1933* (ACT) ('*Supreme Court Act*').

Prior to the passage of these amendments, the *Supreme Court Act* generally required that accused persons in the ACT be tried by jury, unless the accused made a contrary election.[9] Relevantly, the new s 68BA invested the Supreme Court with the power to order that a criminal trial conducted during the COVID-19 emergency period proceed by way of trial by judge alone, rather than trial by jury.

The impugned provision read as follows:

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6 *Vunilagi* (n 2) 231 [22]–[24] (Kiefel CJ, Gleeson and Jagot JJ), 237–8 [60]–[62] (Gageler J), 245 [90]–[92] (Gordon and Steward JJ), 278 [224] (Edelman J).

7 *Australasian Federal Convention Debates* 1898 (n 1) 351 (Bernhard Wise).

8 Explanatory Memorandum, COVID-19 Emergency Response Bill 2020 (ACT) 19.

9 *Supreme Court Act 1933* (ACT) ss 68A–68B, as at 7 April 2020 ('*Supreme Court Act*'). Certain serious offences, listed in sch 2, pt 2.2 of the *Supreme Court Act*, were exempted from the election, such that the accused could not elect to be tried by judge alone.

68BA Trial by judge alone in criminal proceedings — COVID-19 emergency period

(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

(2) To remove any doubt, this section applies —

(a) to a criminal proceeding —

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B(4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The court may order that the proceeding will be tried by judge alone if satisfied the order —

(a) will ensure the orderly and expeditious discharge of the business of the court; and

(b) is otherwise in the interests of justice.

(4) Before making an order under subsection (3), the court must —

(a) give the parties to the proceeding written notice of the proposed order; and

(b) in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice

(5) In this section:

commencement day means the day the *COVID-19 Emergency Response Act 2020*, section 4 commences.

COVID-19 emergency period means the period beginning on 16 March 2020 and ending on —

(a) 31 December 2020; or

(b) if another day is prescribed by regulation — the prescribed day.

(6) This section expires 12 months after the commencement day.

B *Vunilagi*

Simon Vunilagi, alongside three co-accused, was charged with committing multiple counts of sexual intercourse without consent and an act of indecency without consent, which were offences against ss 54 and 60 of the *Crimes Act 1900* (ACT) respectively. On 13 August 2020, Murrell CJ made an order under s 68BA that the trial proceed before a judge alone.[10] Vunilagi had opposed the making of the order; however, her Honour nonetheless found it to be in the interests of justice to order a trial by judge alone.[11]

The trial proceeded before Murrell CJ. On 9 October 2020, Vunilagi was found guilty of multiple counts of sexual intercourse without consent and one act of indecency without consent.[12] He was sentenced to 6 years, 3 months and 14 days' imprisonment.[13] Vunilagi unsuccessfully appealed to the ACT Court of Appeal, arguing, inter alia, that s 68BA was constitutionally invalid.[14] After this appeal was dismissed, he took the matter to the High Court.

III Relevant Law

Vunilagi concerned the validity of s 68BA under the *Kable* principle and s 80 of the *Constitution*. In determining the application of s 80 to the impugned provision, the legislative history of the *Crimes Act 1900* (ACT) was also highly relevant. This legal background is outlined below.

A Kable *Principle*

The *Kable* principle establishes that State legislation will be constitutionally invalid if it confers upon a state Supreme Court a power or function which substantially impairs the institutional integrity of the Court.[15] Such a law is constitutionally invalid as it is incompatible with the role of state Supreme Courts as repositories of federal jurisdiction under ch III of the Constitution.[16] The *Kable* principle applies to the ACT Supreme Court because it is capable of exercising Commonwealth judicial power.[17]

10 *R v Vunilagi* [2020] ACTSC 225, [42].

11 Ibid [39]–[40].

12 *R v Vunilagi* [2020] ACTSC 274, [526].

13 *R v Vunilagi* [2020] ACTSC 303, [84].

14 *Vunilagi v The Queen* (2021) 17 ACTLR 72, 123 [223], 131 [254].

15 *Kable* (n 5).

16 *Vunilagi* (n 2) 242 [82] (Gordon and Steward JJ).

17 Ibid 229 [12] (Kiefel CJ, Gleeson and Jagot JJ), 242 [82] (Gordon and Steward JJ), citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [28].

B *Section 80 of the* Constitution

Section 80 of the *Constitution* is the final provision of ch III. It relevantly states that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'.

Although s 80 might appear to constitutionally enshrine a right to trial by jury, its substantive guarantee has been severely limited by the prevailing interpretation of the provision. Most notably, s 80 requires a trial by jury only for a 'trial on indictment'. The High Court has repeatedly affirmed that whether an offence is triable on indictment is a matter for Parliament to decide.[18] This effectively means that s 80 only requires a trial by jury where Parliament prescribes that the offence is to be tried by jury. That interpretation has been criticised as leaving s 80 without substantive meaning.[19]

Section 80 also only applies to offences against a 'law of the Commonwealth'. In dispute in *Vunilagi* was whether ss 54 and 60 of the *Crimes Act 1900* (ACT) are laws of the Commonwealth to which s 80 applies.

R v Bernasconi ('*Bernasconi*')[20] is a High Court case which was the subject of much discussion in *Vunilagi*.[21] This case was decided in 1915, on appeal from the Central Court of Papua, and concerned the application of s 80 to laws of a territory. The Commonwealth is able to 'make laws for the government of any territory' under s 122 of the *Constitution*, including laws which establish an independent system of government.[22] In *Bernasconi*, Griffith CJ, with whom Duffy and Rich JJ agreed, considered that ch III of the *Constitution* — and therefore, s 80 — did not apply to laws made under s 122 of the *Constitution*, whether or not those laws are made by the Commonwealth Parliament 'directly or through a subordinate legislature' of a territory.[23] As will be discussed below, the Court in *Vunilagi* refused to overturn *Bernasconi* but made clear that it is largely no longer good law.[24]

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18 See, eg: *Archdall* (n 3) 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139–40 (Higgins J); *Kingswell v The Queen* (1985) 159 CLR 264, 276–7 (Gibbs CJ, Wilson and Dawson JJ, Mason J agreeing at 282) ('*Kingswell*'); *Cheng* (n 3) 295 [141]–[143] (McHugh J).

19 See, eg: *Federal Court of Bankruptcy* (n 3) 584 (Dixon and Evatt JJ); *Kingswell* (n 18) 310 (Deane J); *Cheng* (n 5) 307 (Kirby J). See generally Anthony Gray, 'Mockery and the Right to Trial by Jury' (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 66.

20 *Bernasconi* (n 3).

21 See below Part IV.

22 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 265–6 (Mason CJ, Dawson and McHugh JJ), 272 (Brennan, Deane and Toohey JJ), 284 (Gaudron J) ('*Capital Duplicators*'). See also *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J).

23 *Vunilagi* (n 2) 236 [54], citing *Bernasconi* (n 3) 635.

24 Ibid 236 [54] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 264–7 [170]–[178] (Edelman J).

C *Legislative History of the* Crimes Act 1900 *(ACT)*

The legislative history of the *Crimes Act 1900* (ACT) is relevant to whether ss 54 and 60 are 'laws of the Commonwealth' under s 80 of the *Constitution*. This history was discussed at great length by the Court in *Vunilagi*.[25]

In 1909, the ACT was surrendered by New South Wales and accepted as a territory of the Commonwealth under s 111 of the *Constitution*. Between 1909 and 1989, the *Crimes Act 1900* (NSW) applied in the ACT pursuant to Commonwealth law.[26]

In 1989, under s 122 of the *Constitution*, the Commonwealth passed the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('*Self-Government Act*'), which created the ACT Legislative Assembly and granted this body the power to 'make laws for the peace, order and good government' of the ACT.[27] Under s 34(4) of the *Self-Government Act*, a law which was in force in the ACT before the commencement of that Act and was 'an Act of the Parliament of New South Wales' was taken to be an enactment of the ACT Legislative Assembly and could be amended or repealed accordingly.[28] Initially, s 34(4) did not apply to the *Crimes Act 1900* (NSW);[29] however, this was later altered and from 1 July 1990, the *Crimes Act 1900* (NSW) was taken to be an enactment of the ACT Legislative Assembly.[30]

In 1992, the Legislative Assembly also enacted the *Crimes Legislation (Status and Citation) Act 1992* (ACT) ('*Status and Citation Act*') which specifically provided that the *Crimes Act 1900* (NSW) 'shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of the [Act] had been re-enacted in an Act passed by the Assembly and taking effect on the commencement of [the *Status and Citation Act*]'.[31] The *Status and Citation Act* was repealed in 1999[32] but it has continued in its effect.[33]

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25 See ibid 231–3 [26]–[36] (Kiefel CJ, Gleeson and Jagot JJ), 239–40 [66]–[73] (Gageler J), 248–52 [105]–[123] (Gordon and Steward JJ), 275–7 [209]–[219] (Edelman J).

26 Ibid 231–2 [28] (Kiefel CJ, Gleeson J, Jagot J), citing *Seat of Government Acceptance Act 1909* (Cth) s 6(1); *Seat of Government (Administration) Act 1910* (Cth) s 4.

27 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22(1).

28 Ibid s 34(4).

29 Ibid s 34(5), sch 3 pt 2 (as made).

30 *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) s 12(2).

31 *Crimes Legislation (Status and Citation) Act 1992* (Cth) s 3(1).

32 *Vunilagi* (n 2) 233 [35] (Kiefel CJ, Gleeson and Jagot JJ), citing *Law Reform (Miscellaneous Provisions) Act 1999* (ACT) s 5(1), sch 2.

33 *Vunilagi* (n 2) 233 [35], citing *Law Reform (Miscellaneous Provisions) Act 1999* (ACT) s 5(2); *Interpretation Act 1967* (ACT) s 42; *Legislation Act 2001* (ACT) ss 88, 301(2).

IV Decision

On appeal to the High Court, Vunilagi contended that s 68BA was invalid by reason of being contrary to: (1) the implied limitation on legislative power recognised in *Kable*;[34] and (2) s 80 of the *Constitution*. In respect of the second ground, Vunilagi argued that the *Crimes Act 1900* (ACT) is a 'law of the Commonwealth' because it is given force by the Commonwealth's *Self-Government Act*, or alternatively that s 80 applies to all laws made pursuant to s 122 of the *Constitution*, including laws made by a territory legislature.[35] The High Court unanimously rejected both grounds and dismissed the appeal. Their Honours' reasoning is set out below.

A *Chief Justice Kiefel, Gleeson and Jagot JJ*

Chief Justice Kiefel, Gleeson and Jagot JJ rejected the appellant's contention that s 68BA was constitutionally invalid under the *Kable* principle. The appellant had argued that s 68BA(4) operated as a 'gatekeeping function' whereby the ACT Supreme Court could arbitrarily provide an accused person with a notice under s 68BA(4)(a), without any 'criteria' or 'discernible test' for whether the notice should be provided.[36] However, the plurality found that the appellant's argument rested on an incorrect construction of s 68BA.

Their Honours considered that, on the proper construction of s 68BA, the provision granted the trial judge a discretionary power which involved 'the usual incidents of the judicial process, including an open and public enquiry, procedural fairness and the giving of reasons'.[37] As such, in their Honours' view, s 68BA did not impair the institutional integrity of the Court and was not in breach of the *Kable* principle.

In relation to the appellant's second ground of appeal, Kiefel CJ, Gleeson and Jagot JJ did not consider ss 54 and 60 of the *Crimes Act 1900* (ACT) to be laws of the Commonwealth to which s 80 of the *Constitution* applies. Therefore, there was no constitutional requirement for Vunilagi to be tried by jury.

Their Honours considered the *Crimes Act 1900* (NSW) to have been a law of the Commonwealth until 1 July 1990, when s 34(4) of the *Self-Government Act* applied to the *Crimes Act 1900* (NSW) and it became a law of the ACT.[38] Their Honours considered the ACT Legislative Assembly to be an independent body politic which enacted laws which were 'distinct from the laws of the Commonwealth Parliament'.[39] As such, at the time of the appellant's trial, ss 54 and 60 of the *Crimes*

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34 See above Part III(A).

35 See above Part III(B). See also Simon Vunilagi, 'Appellant's Submissions', Submission in *Vunilagi v The Queen & Anor*, C13/2022, 5 August 2022, 7 [17], 14 [32], 16 [37].

36 *Vunilagi* (n 2) 229–30 [15]–[16] (Kiefel CJ, Gleeson and Jagot JJ).

37 Ibid 229 [14].

38 See *ACT Self–Government (Consequential Provisions) Act 1988* (Cth) s 12(2).

39 *Vunilagi* (n 2) 236–7 [55].

Act 1900 (ACT) were not laws of the Commonwealth to which s 80 applies and therefore, Vunilagi was not required to be tried by jury for these offences.

Their Honours also rejected the appellant's secondary and broader contention that s 80 applies both to laws made by the Commonwealth under s 122, and laws made by the Legislative Assembly, which derives its power from laws made under s 122. This finding would be contrary to the decision in *Bernasconi*.[40] Their Honours made clear that the contention in *Bernasconi* that ch III does not apply to territories is now 'considered to be incorrect'.[41] However, in relation to s 80, their Honours considered it unnecessary to revisit *Bernasconi* as they had already determined the narrower question of whether ss 54 and 60 were 'laws of the Commonwealth' under s 80.[42]

B *Justice Gageler*

Justice Gageler concurred with the plurality's reasoning on the *Kable* ground.[43] His Honour also agreed with the plurality's conclusion in respect of the s 80 ground, but expressed his own reasons on this point.

Justice Gageler found that the reasoning in *Bernasconi*, that the legislative power in s 122 of the *Constitution* is not subject to the requirements of ch III, 'no longer accords with the doctrine of the Court'.[44] However, his Honour considered it unnecessary to decide whether the conclusion in *Bernasconi* was nevertheless correct on the basis that laws made under s 122 are not subject to s 80.[45] This was because, in his Honour's view, the appeal could be resolved by deciding whether legislation made by a territory parliament that is constituted under the authority of Commonwealth legislation is a 'law of the Commonwealth' — a question left unanswered by the majority in *Bernasconi*.[46]

According to Gageler J, the answer to that question was no. The reference in s 80 to a 'law of the Commonwealth', his Honour wrote, was a reference to legislation enacted by the Commonwealth Parliament and delegated legislation enacted pursuant to such legislation, but was not a reference 'to the ultimate source of power to enact that legislation'.[47] The legislative power vested in the ACT Legislative Assembly was considered 'distinct' from the legislative power of the Commonwealth

40 *Bernasconi* (n 3).

41 *Vunilagi* (n 2) 236 [54].

42 Ibid 236–7 [55].

43 Ibid 237–8 [60].

44 Ibid 238 [62].

45 Ibid.

46 Ibid 238 [63], quoting *Bernasconi* (n 3) 634 (Griffith CJ, Gavan Duffy and Rich JJ agreeing at 640).

47 *Vunilagi* (n 2) 239 [65].

Parliament itself,[48] and thus, laws enacted by the Legislative Assembly were not laws of the Commonwealth.[49]

On the facts of *Vunilagi*, Gageler J found that the *Status and Citation Act* had the substantive legal effect of re-enacting the text of the *Crimes Act 1900* (NSW), giving that legislation 'the status of a law enacted by the Legislative Assembly'.[50] The thereby-created *Crimes Act 1900* (ACT) was therefore not deemed a law of the Commonwealth to which s 80 applies.[51]

C *Justices Gordon and Steward*

Justices Gordon and Steward dismissed the *Kable* argument through similar reasoning as that of the plurality. Their Honours took the view that 'once s 68BA … is properly construed, the appellant's argument falls away'.[52]

Further, Gordon and Steward JJ found that ss 54 and 60 of the *Crimes Act 1900* (ACT) were not laws of the Commonwealth under s 80 of the *Constitution*.[53]

Their reasoning differed from the other Justices in some respects. Their Honours stated that s 34(4) of the *Self-Government Act* could not conclusively deem laws to not be laws of the Commonwealth.[54] In their view, this would amount to the 'stream ris[ing] higher than its source', contrary to the decision in *Australian Communist Party v Commonwealth*.[55]

However, their Honours considered s 34(4) to reflect an intention on the part of the Commonwealth to 'hand over the lawful authority' of the existing laws in the ACT to the ACT Legislative Assembly.[56] Therefore, such existing laws could validly become laws of the ACT if the Legislative Assembly 'sufficiently adopted the laws' through an 'amendment or a repeal and re-enactment of the law'.[57] By enacting the *Status and Citation Act*, the Legislative Assembly had sufficiently adopted the *Crimes Act 1900* (NSW) as a law of the ACT.[58] Therefore, in their Honours' view, ss 54 and 60 were not laws of the Commonwealth to which s 80 applies.

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48 See *Capital Duplicators* (n 22).

49 *Vunilagi* (n 2) 239 [66].

50 Ibid 240 [71].

51 Ibid 238 [61], 240 [73].

52 Ibid 243 [85].

53 Ibid 253 [126].

54 Ibid 250 [113].

55 (1951) 83 CLR 1, 258 (Fullagar J).

56 *Vunilagi* (n 2) 250 [115].

57 Ibid.

58 Ibid 251 [118].

Justices Gordon and Steward also rejected Vunilagi's alternative contention that laws made by the ACT Legislative Assembly were nevertheless 'laws of the Commonwealth' under s 80. Their Honours considered the ACT Legislative Assembly to exercise its own 'separate and distinct legislative power … not a power under delegation or agency from the Commonwealth Parliament'.[59] Therefore, ss 54 and 60 were 'laws of the Territory' not 'laws of the Commonwealth' to which s 80 applies.

D *Justice Edelman*

Justice Edelman dismissed Vunilagi's *Kable* argument, holding that the approach required by s 68BA(4) was 'wholly compatible with the institutional integrity of the Supreme Court'.[60]

With regard to the s 80 argument, Edelman J argued that the question of whether ch III of the *Constitution*, or specifically s 80, did not apply to territory laws made under s 122 of the *Constitution* had to be answered before the Court could decide whether a law made by a territory parliament could be a law of the Commonwealth.[61] In contrast, the rest of the bench had found it unnecessary to consider this first issue.[62]

Justice Edelman found that the reasoning in *Bernasconi*, that s 122 was unconstrained by the requirements of ch III of the *Constitution*, was 'manifestly wrong'.[63] His Honour would therefore have granted leave to re-open *Bernasconi*.[64] Furthermore, his Honour considered that *Bernasconi* could neither be re-explained on the basis that s 122 is immunised against s 80 specifically, nor on the basis that the decision was limited to a particular type of territory.[65] However, in his Honour's view, the reference in s 80 to a 'law of the Commonwealth' could be interpreted as excluding the laws of a self-governing territory. Since *Vunilagi* could be resolved on that basis, there was no need to consider whether *Bernasconi* could be re-explained as such.[66]

In particular, Edelman J noted the 'formal approach' that had been taken by the High Court to the interpretation of the phrase 'trial on indictment' in s 80. Justice Edelman argued that in the interests of consistency, a formal interpretative approach

59 Ibid 253 [126], citing *Capital Duplicators* (n 22) 265, 281–4.

60 *Vunilagi* (n 2) 257 [142], 257–8 [145].

61 Ibid 259 [150]–[151].

62 See ibid 236–7 [55] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 247 [98] (Gordon and Steward JJ).

63 Ibid 254 [132], 267 [178].

64 Ibid.

65 Ibid 267 [179], 268 [183], 271 [193].

66 Ibid 267 [179].

should similarly be adopted for construing the phrase 'law of the Commonwealth'.[67] His Honour accepted that, had the purpose of s 80 been 'to provide a strong guarantee of trial by jury', s 80 might constrain both laws passed by the Commonwealth Parliament and laws passed by self-governing territories that derive their authority from Commonwealth law.[68] However, the formal approach previously applied to the interpretation of s 80 'instead reflect[ed] a more flexible approach to trial by jury'.[69] In light of this formal approach, his Honour considered that 'law of the Commonwealth' means an enactment of the Commonwealth Parliament or delegated legislation created pursuant to such an enactment, but does not extend to legislation passed by self-governing territories with their own legislative power.[70]

In his Honour's view, the ACT Legislative Assembly had adopted the *Crimes Act 1900* (NSW) through the *Status and Citation Act*.[71] The relevant offences for which Vunilagi was convicted were therefore not offences against a law of the Commonwealth, and thus s 80 did not apply.[72]

E *Conclusion*

Overall, the Court in *Vunilagi* found that a law of a self-governing territory such as the ACT is not a 'law of the Commonwealth', and is therefore not constrained by s 80. Thus, *Vunilagi* establishes that the *Constitution* does not require offences against criminal laws enacted by the ACT Legislative Assembly to be tried by way of jury. The Court also agreed that the broad reasoning in *Bernasconi*, to the effect that laws made under s 122 of the *Constitution* are not constrained by ch III, is no longer persuasive.[73] However, only Edelman J rejected the narrower reasoning in *Bernasconi*, that s 80 does not apply to laws made under s 122.[74] The majority considered it unnecessary to address this question.

V Comment

This comment proceeds in two parts. First, we discuss the balancing act performed by the framers when drafting s 80 of the *Constitution*. The framers sought to maintain the common law right to trial by jury, while ensuring that the Commonwealth could formulate a flexible and effective system of criminal procedure. This

67 Ibid 273–4 [202].

68 Ibid 273 [201].

69 Ibid 273–4 [202].

70 Ibid 275–6 [204]–[205].

71 Ibid 277 [217]–[218].

72 Ibid 277 [219].

73 Ibid 236 [54] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 264–7 [170]–[178] (Edelman J).

74 Ibid 270 [189] (Edelman J).

has left s 80 vulnerable to judicial attack, and has seen its protection of the right to trial by jury continually undermined.

Second, we argue that the Court in *Vunilagi* implicitly rejected the view that s 80 provides a substantive guarantee of this common law right, and instead opted for a restrictive and formal interpretation of the constitutional provision. We argue that although this interpretive approach might be consistent with case law on s 80, it stands at odds with ch III jurisprudence more generally.

A *Section 80: A Balancing Act*

Trial by jury remains the cornerstone of Australia's criminal justice system at common law. This system was inherited from Britain[75] where it is 'ingrained … in the British idea of justice'.[76] It is a fundamental check on government power and a safeguard for criminal defendants, whose liberty is threatened by two arms of government — the executive prosecutor and the judiciary. In this context, Deane J in *Kingswell v The Queen*[77] described the jury trial as a 'bulwark against the tyranny of arbitrary punishment'.[78]

At the time of the 1890s Federal Conventions, trial by jury was 'firmly established in each of the federating colonies as the universal method of trial of serious crime'.[79] This system was considered an important aspect of the transition in Australia from 'military control to civilian self-government'.[80]

Section 80 was drafted into the *Constitution* in order to maintain the jury system across the Commonwealth.[81] Bernhard Wise considered it 'a necessary safeguard to the individual liberty of the subject in every state'.[82] However, the framers also appreciated the need for pragmatism in this area. There was concern amongst a number of the framers that 'making trial by jury a fixture'[83] under s 80 would limit the Federal Parliament's autonomy and prevent the formulation of a flexible and effective criminal justice system. There was also concern that it would render the

75 Herbert Vere Evatt, 'The Jury System in Australia' (1936) 10 (Supplement) *The Australian Law Journal* 49, 52–3.

76 United Kingdom, *Parliamentary Debates*, House of Lords, 25 May 1933, vol 87, col 1054 (Lord Atkin). In 1215, the Magna Carta declared that 'no Freeman shall be taken or imprisoned … but by lawful judgment of his Peers, or by the Law of the Land': *Magna Carta 1297*, 25 Edw 1, c 9, s 29.

77 *Kingswell* (n 18).

78 Ibid 298.

79 *Brownlee v The Queen* (2001) 207 CLR 278, 297 [52].

80 *Kingswell* (n 18) 299 (Deane J).

81 *Australasian Federal Convention Debates* 1898 (n 1) 351 (Henry Higgins).

82 Ibid 350 (Bernhard Wise).

83 Ibid 350 (Patrick Glynn).

Commonwealth's 'power less great than the power … possessed by the states' which maintain an unfettered ability to alter or remove the right to trial by jury.[84]

Ultimately, a balance was sought between protecting the right to trial by jury, and ensuring the Federal Parliament was able to effectively prosecute offences against Commonwealth laws. Section 80 was drafted to only apply to indictable offences, a category of offences created by the Federal Parliament itself.[85] This ensured that the flexibility and convenience of the summary jurisdiction was maintained. However, the framers recognised that this significantly weakened the application of s 80, which could be limited by the Federal Parliament by simply expanding the summary jurisdiction.[86]

This weakness has been evident in the High Court's construction of s 80 since federation. The High Court has interpreted s 80 narrowly and significantly limited its protection of the common law right to trial by jury.[87] By finding that offences against laws of territory legislatures do not have to be tried by jury, *Vunilagi* represents another narrow reading of s 80 — this time in relation to the scope of its application. This construction appears to be contrary to the intentions of the framers in seeking to enshrine the right to trial by jury across the Commonwealth. As will be discussed below, the Court's approach in *Vunilagi* is also inconsistent with the substantive approach generally adopted by the High Court in relation to ch III of the *Constitution*.

B *Section 80: A Toothless Tiger*

The interpretation of s 80 adopted by the Court in *Vunilagi* endorses a formal interpretive approach to s 80, instead of reading the provision as a guarantee of the common law right to trial by jury. We argue that this is inconsistent with the substantive interpretive approach generally applied to ch III of the *Constitution* (which contains s 80).

1 *A Formal Interpretive Approach to s 80*

The Court's conclusion in *Vunilagi* — that s 80 does not apply to the laws of self-governing territories — implicitly rejects the view that s 80 provides a substantive constitutional guarantee of the common law right to a trial by jury. Justice Edelman was most clear: his Honour expressly observed that had the purpose of s 80 been to provide this guarantee, then 'there might be a strong argument' that s 80 *would* extend to the laws of self-governing territories.[88]

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84 Ibid.

85 See *Kingswell* (n 18) 276–7 (Gibbs CJ, Wilson and Dawson JJ, Mason J agreeing at 282).

86 *Australasian Federal Convention Debates* 1898 (n 1) 352–3 (Richard O'Connor): 'You may trust the Parliament not to increase the list of offences to be dealt with by summary jurisdiction'.

87 See above Part III(B).

88 *Vunilagi* (n 2) 273 [201].

This hypothetical outcome seems logical. If a substantive view of s 80 was adopted, then the more formal question of whether the law was enacted by the Commonwealth Parliament or the legislature of a self-governing territory would seem less relevant. Instead, the focus would be on construing s 80 as a constitutional guarantee of the common law right to trial by jury. To that end, the phrase 'law of the Commonwealth' could be interpreted liberally, such that it would encompass the laws of self-governing territories on the basis that the power to pass such laws was granted by legislation enacted by the Commonwealth Parliament. This would extend the protection in s 80 to a wider array of offences throughout Australia, better enshrining the fundamental common law right.

Instead, the Court in *Vunilagi* decided the constitutional question on the basis that the offences in question were against laws enacted by the ACT Legislative Assembly. This represents a far more 'formal' and restrictive approach to the operation of s 80.[89]

2 *A Substantive Interpretive Approach to Ch III*

This 'formal' approach to interpretation might be consistent with much of the jurisprudence on s 80, as Edelman J argued. As explained in Part III(B), the interpretation of the phrase 'trial on indictment' has received a reading that has significantly narrowed the substantive meaning of the provision. And in *Alqudsi v The Queen*, the High Court found that when s 80 applies to a criminal trial, an accused cannot elect to be tried by judge alone, rejecting the view that s 80 confers a personal right that can be waived.[90]

However, although this formal and restrictive view may be consistent with the approach that the Court has previously taken to the construction of s 80, it sits uncomfortably with the Court's avowed approach to the interpretation of ch III of the *Constitution* — the chapter in which s 80 appears. In particular, the Court has repeatedly endorsed and applied the view that 'the concern of the Court in construing ch III of the *Constitution* is with substance, not merely form'.[91] As McHugh J said in *Re Woolley; Ex parte M276/2003*, 'Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks'.[92]

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89 See ibid 273–4 [202] (Edelman J).

90 (2016) 258 CLR 203, 250–1 [115] (Kiefel CJ, Bell and Keane JJ), 259 [141] (Gageler J), 277 [213] (Nettle and Gordon JJ). See also *Brown v The Queen* (1986) 160 CLR 171.

91 *Nicholas v The Queen* (1998) 193 CLR 173, 233 [148] (Gummow J). See also judgments of Kirby J: at 257 [201]; Hayne J: at 278 [250]. See also: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*'); *SDCV v Director-General of Security* (2022) 405 ALR 209, 253 [175] (Gordon J).

92 (2004) 225 CLR 1, 35 [82].

Thus, in both *Alexander v Minister for Home Affairs* ('*Alexander*')[93] and *Benbrika v Minister for Home Affairs* ('*Benbrika*'),[94] the High Court invalidated Commonwealth laws purporting to invest the Minister with power to involuntarily deprive a citizen of their citizenship. In doing so, the Court in *Alexander* concluded that the impugned laws were punitive in their 'substantive effect' and so breached the *Lim* principle, which stipulates a separation of powers implied by ch III.[95] Further, the *Lim* principle had previously only been raised in the context of executive detention, but the Court in *Alexander* applied a substantive approach in finding that the principle could be extended to restricting involuntary citizenship deprivation.[96]

And the majority in the later decision of *Benbrika*, finding that the *Lim* principle prohibits laws authorising the Commonwealth Executive to punish criminal guilt, even where such guilt has been found by a ch III court, reaffirmed that 'the concern of the Constitution in "exclusively entrusting to the courts designated by ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth … is with substance and not mere form"'.[97]

3 *A Conflict of Interpretation*

Clearly, the Court has consistently applied and endorsed a substantive rather than formalistic approach to the interpretation of ch III of the *Constitution*. With respect, it is contradictory to apply a formal and restrictive approach to the interpretation of s 80 in the interests of consistency, when such an approach is, itself, inconsistent with the approach to ch III interpretation more generally.

Further, it is not clear why a substantive approach should be taken to the interpretation of principles that have been found to be implied in the *Constitution*, but a formal and restrictive approach should be taken to an express provision such as s 80 that the framers chose to write into the *Constitution* in keeping with centuries of common law thinking. This inconsistency was neither recognised nor explained in *Vunilagi*, and, with respect, appears to lack a principled basis.

Ultimately, by applying a formal and narrow interpretive approach to s 80, *Vunilagi* forsakes an interpretation that would render s 80 a substantive constitutional guarantee of the common law right to trial by jury. This is not justified by the High Court's general approach to the interpretation of ch III, and it is certainly not justified by the framers' intentions in drafting s 80 against the background of a strong common law right to trial by jury.

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93 (2022) 401 ALR 438 ('*Alexander*').

94 (2023) 97 ALJR 899 ('*Benbrika*').

95 *Alexander* (n 93) 456 [79] (Kiefel, Keane and Gleeson JJ). See also *Lim* (n 91) 27 (Brennan, Deane and Dawson JJ).

96 *Alexander* (n 93) 456 [79] (Kiefel, Keane and Gleeson JJ), 476 [158] (Gordon J).

97 *Benbrika* (n 94) [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), quoting *Lim* (n 91) 27 (Brennan, Deane and Dawson JJ).

VI Conclusion

The ratio of *Vunilagi* is straightforward. A law of a self-governing territory is not a 'law of the Commonwealth', and so an offence against such a law is not subject to the jury requirement in s 80 of the *Constitution*.

However, the implications of that conclusion are significant. It means that there is no constitutionally enshrined guarantee of a right to trial by jury for offences committed against the laws of self-governing territories. *Vunilagi* thus adds its name to the list of High Court decisions that, by adopting a formal interpretive approach, narrows the application of s 80 and thereby weakens the protection of the right to trial by jury throughout the Australian federation.

That is no trifling matter. The jury trial has been described as 'an essential feature of real democracy',[98] and is a historical and constituent aspect of criminal trials under the common law. And although the right to trial by jury remains relatively untrammelled in Australia in practice, national emergencies such as the COVID-19 pandemic reveal the ease with which legislatures can remove it, in the absence of a guarantee of the right. Without a substantive interpretation of s 80, the right to trial by jury in Australia is frail and feeble. Whether that would have surprised many of our *Constitution*'s framers is one question.[99] Perhaps the more significant question is whether it should worry us.

98 Evatt (n 75) 67.

99 See Gray (n 19) 77.

Annalise Delic and Monique Blight***

SANTOS' PIPE(LINE) DREAM: *SANTOS NA BAROSSA PTY LTD V TIPAKALIPPA* (2022) 296 FCR 124

I Introduction

Consultation with affected First Nations people is often viewed as a mere procedural speed bump on the path towards project approval. However, a landmark ruling by the Full Court of the Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* ('*Santos*')[1] unanimously demonstrated that this perception is far from accurate — as stated by Kenny and Mortimer JJ, 'conduct that is superficial or token will not be enough'.[2] To fulfil the criteria outlined in reg 11A(1)(d) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) ('*Offshore Environment Regulations*'), and ultimately obtain project approval, consultation must be 'genuine' and allow affected individuals to communicate how the project impacts their interests.[3] Justices Kenny and Mortimer effectively warned against superficial consultation practices that have likely become the industry norm, by asserting that '[a]n email may be inappropriate, but properly notified and conducted meetings may well suffice'.[4]

The decision carries profound implications for future projects, serving as a stark warning to developers that their consultation efforts will undergo close scrutiny. Failure to genuinely engage in consultation requirements will not only result in legal consequences, but could also lead to project delays, reputational damage, and a loss

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1 (2022) 296 FCR 124 ('*Santos*').

2 Ibid 157 [104].

3 Ibid 147 [56]. On 10 January 2024, the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) ('*2023 Regulations*') commenced, replacing the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) ('*Offshore Environment Regulations*'). The *2023 Regulations* 'retain the same substance and form' as the *Offshore Environment Regulations*, and therefore this case note's commentary concerning the *Offshore Environment Regulations* is equally applicable to the *2023 Regulations*: see 'Remade Offshore Petroleum and Greenhouse Gas Storage Regulations Are in Force', *Australian Government Department of Industry, Science and Resources* (Web Page, 8 March 2024) <https://www.industry.gov.au/news/remade-offshore-petroleum-and-greenhouse-gas-storage-regulations-are-force>.

4 *Santos* (n 1) 157 [104].

in investor confidence. This case note delves into the inherent tension between the industry's prevailing consultation practices and what was intended by the *Offshore Environment Regulations*. Ultimately, it concludes that a project's ability to fulfill its consultation requirements is intrinsically tied to its overall success and should not be reduced to a mere checkbox exercise.

II Background

A *Facts*

Santos involved a legal challenge to the decision of the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA') to approve a drilling environment plan ('EP') submitted by Santos NA Barossa Pty Ltd ('Santos'), in relation to an area of the Timor Sea, north of the Tiwi Islands.[5] The purpose of the drilling EP was to allow Santos to produce eight production wells as part of its offshore drilling project known as the Barossa Gas Project.[6] The traditional owners of the Tiwi Islands comprise various clans, one of which is the Munupi clan.[7] The applicant, Dennis Murphy Tipakalippa, is 'an elder, senior law man and traditional owner of the Munupi clan' who sought judicial review of NOPSEMA's decision on the basis that his clan, and other traditional owners, were not sufficiently consulted.[8] Under the *Offshore Environment Regulations*, NOPSEMA could only accept an EP if it was satisfied that the plan meets certain criteria, including the requirement to consult with 'a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environmental plan'.[9] The fundamental issue for the Court was whether NOPSEMA could have been 'reasonably satisfied' that Santos had 'carried out the consultations' required to approve the drilling EP.[10]

B *Regulatory Framework*

The provisions in issue were regs 10(1), 10A(g)(i) and 11A of the *Offshore Environment Regulations*, as made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Regulation 10A(g)(i) provided that for an EP to be accepted by NOPSEMA under reg 10(1), it must demonstrate that the proponent has undertaken consultation in accordance with reg 11A. Regulations 10(1), 10A(g)(i) and 11A are reproduced below:[11]

5 Ibid 127–8 [5].

6 Ibid 128–9 [8].

7 Ibid 127–8 [5].

8 Ibid.

9 *Offshore Environment Regulations* (n 3) regs 10A(g), 11A(1)(d).

10 *Santos* (n 1) 128 [6].

11 For the provisions as currently in force, see regs 25(1)(d), 33 and 34 of the *2023 Regulations* (n 3).

10 Making decision on submitted environment plan

(1) Within 30 days after the day described in subregulation (1A) for an environment plan submitted by a titleholder:

(a) if the Regulator is reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must accept the plan; or

(b) if the Regulator is not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must give the titleholder notice in writing under subregulation (2); or

(c) if the Regulator is unable to make a decision on the environment plan within the 30 day period, the Regulator must give the titleholder notice in writing and set out a proposed timetable for consideration of the plan.

10A Criteria for acceptance of environment plan

For regulation 10, the criteria for acceptance of an environment plan are that the plan:

…

(g) demonstrates that:

(i) the titleholder has carried out the consultations required by Division 2.2A; and

(ii) the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate; and

…

11A Consultation with relevant authorities, persons and organisations, etc

(1) In the course of preparing an environment plan, or a revision of an environment plan, a titleholder must consult each of the following (a *relevant person*):

…

(d) a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan;

…

C *Issues*

Mr Tipakalippa first sought judicial review of NOPSEMA's acceptance of the EP before Bromberg J at the Federal Court of Australia in August 2022.[12] Mr Tipakalippa sought review under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on the grounds that: (1) NOPSEMA did not have jurisdiction to accept the EP 'because it could not have been reasonably satisfied that the [d]rilling EP demonstrated that the consultation required' by regs 10A and 11A of the *Offshore Environment Regulations* was carried out ('Ground One');[13] and (2) Santos submitted the drilling EP without conducting the consultation required by regs 10A and 11A ('Ground Two').[14]

Justice Bromberg rejected Ground Two on the basis that Santos' 'non-compliance [did] not have the consequence of invalidating the decision made by NOPSEMA' under the *Offshore Environment Regulations*.[15] Accordingly, provided NOPSEMA was 'reasonably satisfied' that the consultation required by regs 10A and 11A had occurred, any actual non-compliance by Santos did not invalidate NOPSEMA's decision.[16] However, by adopting a tailored approach guided by the circumstances of the parties to the proceedings, Ground One was upheld by Bromberg J. His Honour considered that the EP did not reflect Santos' methodology of identifying all 'relevant persons' who required consultation in accordance with reg 11A,[17] such that NOPSEMA was not in a position to be '"reasonably satisfied" that the required consultation had occurred' (labelled the 'methodological flaw').[18] Given this legal error,[19] Bromberg J dismissed NOPSEMA's decision to accept the drilling EP and required Santos to shut down drilling operations and remove the rig within two weeks.[20]

Following the shut-down of Santos' drilling operations in the Timor Sea, Santos sought an appeal of Bromberg J's decision before the Full Court of the Federal Court.

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12 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* (2022) 406 ALR 41 ('*Primary Decision*').

13 Ibid 45–6 [11]. Ground One was said to enliven ss 5(1)(c), (d) and (f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*'): at 48 [26].

14 *Primary Decision* (n 12) 46 [16]. Ground Two was said to enliven s 5(1)(b) of the *AD(JR) Act* (n 13): at 48 [26].

15 *Primary Decision* (n 12) 104 [268].

16 Ibid.

17 Ibid 77 [144]–[145].

18 Ibid 74 [126], 84 [183].

19 Note that Bromberg J also considered, in the alternative to the methodological flaw, that NOPSEMA's failure to be on notice that relevant persons had not been consulted was an error (labelled a 'failure to consider flaw'): ibid 74 [126]. This was given that the EP identified that environment containing 'significant sea country for traditional owners' would be affected, despite those traditional owners not being consulted: at 84 [183].

20 Ibid 108 [290]–[292].

The 'real issues' of the appeal were: (1) whether Mr Tipakalippa and the Munupi clan, as traditional owners of the Tiwi Islands, were 'relevant persons' requiring consultation under reg 11A(1)(d), such that they had 'functions, interests or activities' that may be affected by the drilling EP;[21] and (2) if so, whether NOPSEMA was 'reasonably satisfied' under reg 10 that the drilling EP demonstrated Santos had consulted all 'relevant persons' as required by reg 11A.[22]

A central issue for the Full Court was the 'proper construction' of 'functions, interests or activities' for the purposes of reg 11A(1)(d) — a matter not expressly considered by Bromberg J in the primary decision.[23] The Full Court did not adopt Bromberg J's tailored approach of analysing any 'methodological flaw' or 'failure to consider flaw', instead agreeing with Santos' submissions that the validity of Bromberg J's approach and consequent findings depended on the proper construction of reg 11A.[24]

III Decision

Justices Kenny and Mortimer, with Lee J concurring, held that Santos wrongly proceeded on the basis that Mr Tipakalippa and the Munupi clan did not have 'functions, interests or activities'[25] that could be affected by Santos' activities under the EP, and therefore, were not consulted. For this reason, their Honours held that NOPSEMA should not have approved the EP as Santos did not carry out the necessary consultation required by the *Offshore Environment Regulations*.[26]

A *Definitional Issues*

The judgments of Kenny, Mortimer and Lee JJ resolved critical definitional disputes embedded throughout the *Offshore Environment Regulations*, to determine whether the primary judge had erred in his initial decision. Their Honours agreed that for NOPSEMA to be 'reasonably satisfied' that the EP had complied with reg 10A, it must possess 'evident and intelligible justification' on an objective basis.[27] Similarly, it was also agreed that the Munupi clan had sufficient cultural or spiritual interests in the Tiwi Islands as traditional owners, as evident in the material before NOPSEMA.[28] However, the Court grappled with the fundamental issue of interpreting reg 11A and the requirement to consult with 'relevant persons' whose 'functions,

21 *Santos* (n 1) 139 [23]–[25] (Kenny and Mortimer JJ), 159 [115] (Lee J).

22 Ibid (Kenny and Mortimer JJ).

23 Ibid 139 [24].

24 Ibid.

25 *Offshore Environment Regulations* (n 3) reg 11A(1)(d).

26 *Santos* (n 1) 158 [111] (Kenny and Mortimer JJ), 168 [163] (Lee J).

27 Ibid 140 [31].

28 Ibid 141 [38] (Kenny and Mortimer JJ), 167 [158] (Lee J).

interests or activities may be affected'.[29] Justices Kenny and Mortimer held that 'relevant persons' not only accommodates natural persons, but also bodies, groups and organisations.[30] This interpretation requires titleholders to exercise 'some decisional choice' in determining which natural person to approach in that group and how to sufficiently distribute information to the relevant person.[31] Importing this element of discretion countered Santos' criticism in their outline of submissions[32] that consulting with all persons with a spiritual connection would render it practically impossible to undertake sufficient consultation within a reasonable timeframe.[33] Understanding the meaning of 'relevant persons' provides the crucial foundation to interpret 'functions, interests or activities' under reg 11A.

B *Functions, Interests or Activities*

Justices Kenny and Mortimer, and Lee J agreed that 'functions, interests or activities' should be construed broadly, with slightly differing reasons. For Kenny and Mortimer JJ, the phrase must uphold the objects of the *Offshore Environment Regulations* to ensure that any 'offshore petroleum or greenhouse gas storage activity' is consistent with the 'principles of ecologically sustainable development', 'environmental, social and equitable considerations', and 'the potential effect … on people and communities'.[34] For this reason, their Honours rejected Santos' notion that 'activities' should be interpreted by reference to reg 4, which states that an 'activity means a petroleum activity or greenhouse gas activity'.[35] This interpretation would incorrectly suggest that only operators who engaged in activities like Santos would need to be consulted.[36] Justices Kenny and Mortimer were 'of the clear view that to construe "activities" … in this way would defeat the evident object of reg 11A and, more broadly, the objects of the Regulations'.[37] Justice Lee similarly adopted a broad interpretation of 'activity' as 'a thing that a person or group does'.[38] It was also unanimously agreed that the concept of 'functions' should be construed broadly.[39] This meant that Mr Tipakalippa and the Munupi clan could have relevant 'functions', although this aspect was addressed as an aside to the issue of 'interests'.[40]

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29 *Offshore Environment Regulations* (n 3) reg 11A.

30 *Santos* (n 1) 145 [46]–[48].

31 Ibid 145 [47].

32 Santos NA Barossa Pty Ltd, 'Outline of Submissions of the Appellant', Submission in *Santos NA Barossa Pty Ltd v Tipakalippa*, VID555/2022, 9 November 2022, [63].

33 *Santos* (n 1) 162 [136] (Lee J).

34 Ibid 145–6 [51]–[52] (Kenny and Mortimer JJ); *Offshore Environment Regulations* (n 3) reg 3(a).

35 *Santos* (n 1) 147 [58]; *Offshore Environment Regulations* (n 3) reg 4.

36 *Santos* (n 1) 147 [58].

37 Ibid 147–8 [59].

38 Ibid 164 [146].

39 Ibid 148 [60] (Kenny and Mortimer JJ), 164 [143]–[144] (Lee J).

40 Ibid.

Justices Kenny and Mortimer, and Lee J, differed in opinion when interpreting 'interests'. For Kenny and Mortimer JJ, Mr Tipakalippa and the Tiwi Islanders were able to seek judicial review because their cultural and spiritual interests were impacted by the proposed EP.[41] This was particularly relevant given that cultural and spiritual interests, despite not being recognised native title interests, are 'well known to contemporary Australian law' and acknowledged in federal legislation, and therefore have a legal basis.[42] For Lee J, 'interests' referred to 'an existing interest over and above a member of the public at large'.[43] Whilst there may be administrative law reasoning supporting this approach, Lee J did not refer to such and, rather, emphasised that a legal or proprietary basis is not necessary to form an interest.[44] It appears that Kenny and Mortimer JJ held a slightly narrower interpretation of 'interests' by relating it to judicial review; however, this had no operative effect on the outcome of the case. It was unanimously held that for the purpose of reg 11A of the *Offshore Environment Regulations*, Mr Tipakalippa and the Munupi clan held — at minimum[45] — interests that may have been affected by the EP which warranted consultation.

C *Duty to Consult*

Santos sought to rely on two arguments to establish that it did not have a duty to consult with Mr Tipakalippa and the Munupi clan, being: (1) the analogous context of procedural fairness did not support a duty to consult with 'the public at large';[46] and (2) a requirement to consult with persons such as Mr Tipakalippa and the Munupi clan would be 'unworkable'.[47]

1 *Procedural Fairness*

In relation to the former argument, Santos contended that, consistent with the duty of procedural fairness, a requirement to consult with 'the public at large' whose interests are only 'indiscriminately' affected under the EP could not attract a consultation obligation.[48] This argument was promptly dismissed by Kenny and Mortimer JJ who stated that, 'it cannot seriously be suggested that the interests of Mr Tipakalippa and the Munupi clan are analogous to those of the public at large'.[49]

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41 See ibid 148–9 [61]–[68].

42 Ibid 149 [68].

43 Ibid 166 [154].

44 See ibid 165 [149]–[151].

45 Justices Kenny and Mortimer stated that it was 'unnecessary' to determine whether Mr Tipakalippa and the Munupi clan had 'functions' within the meaning of reg 11A(1)(d), because their Honours were 'of the view that they have "interests"': ibid 148 [60].

46 See ibid 152 [82] (Kenny and Mortimer JJ).

47 Ibid 153 [86].

48 Ibid 152 [83].

49 Ibid 152–3 [84].

Further, their Honours highlighted the distinction between an 'express statutory obligation' to consult persons whose 'interests may be affected' under reg 11A,[50] and an 'unexpressed implication arising from common law' to accord procedural fairness when exercising a statutory power.[51] Justices Kenny and Mortimer concluded that, in the context of an obligation that is 'express and irrefutable', attempting to interpret by analogy to procedural fairness was unconvincing.[52]

2 *Workability*

Regarding the workability argument, Santos asserted that interpreting 'interests' in a way that required consultation with relevant First Nations peoples would render reg 11A(1) unworkable.[53] According to Santos, this unworkability stemmed from the 'complex, difficult, and indeterminate' nature of identifying, and then consulting, 'each and every' First Nations person who may have a traditional connection to the environment under the EP.[54]

In this respect, Lee J agreed that the requirement to identify and consult with all First Nations peoples would only be workable if each person 'holding an interest … could be identified, and there [was] a practical means or mode by which they might be "given" information and told things'.[55] However, his Honour also emphasised 'the important qualifier' that it is only persons with 'readily ascertainable' interests that must be consulted, and thus the argument that reg 11A was unworkable was 'unpersuasive' to the Court.[56] As noted by Kenny and Mortimer JJ, Santos 'was well aware' of the presence of the Tiwi Islanders and their traditional connection to their islands, waters and marine resources — Santos had simply formed a view that the Tiwi Islanders did not require consultation.[57] Additionally, their Honours noted that even if Santos was unable to determine whether any First Nations clans had connections to the environment the subject of the EP, '[i]n contemporary Australia, there are a myriad of ways of contacting groups of First Nations peoples'.[58] This suggests that even in the face of difficulty in discerning relevant interests, Santos was under a positive duty to proactively seek out and identify those interests that were 'readily ascertainable'.[59]

Regarding the practicalities of consulting with 'each and every' First Nations person, Kenny and Mortimer JJ acknowledged that where interests are communally,

50 Ibid.

51 Ibid.

52 Ibid (emphasis omitted).

53 Ibid 153 [86].

54 Ibid 153 [86]–[87].

55 Ibid 165–6 [152].

56 Ibid 166 [153].

57 Ibid 154 [93].

58 Ibid 154 [92].

59 Ibid 166 [153] (Lee J).

as opposed to individually, held, a different approach to consultation would be required.[60] Drawing on the approach under the *Native Title Act 1993* (Cth) ('*NTA*'), their Honours considered that consulting with a 'sufficiently representative section' of the relevant native title claim group would suffice.[61] Their Honours considered that this approach was applicable, notwithstanding that reg 11A was not qualified by a term such as 'reasonable efforts' as apparent in the *NTA*.[62] Further, the Court acknowledged the long-standing need for 'practical and pragmatic approaches to provisions dealing with group decision-making', driven by considerations of reasonableness and workability.[63] As for what 'consultation' with a communal group would entail, Kenny and Mortimer JJ, and Lee J, reiterated that it must be 'appropriate and adapted to the nature of the interests of the relevant persons'.[64]

D *Decision and Consequences*

For the reasons outlined above, Kenny, Mortimer and Lee JJ held that Santos 'proceeded on an incorrect understanding' of reg 11A(1)(d) and could not have demonstrated to NOPSEMA that it properly undertook the consultations required by reg 11A.[65] On this basis, the orders of the primary judge were upheld and the appeal dismissed.

Following the decision, Santos engaged in extensive and protracted consultation with the Tiwi Islanders in accordance with the Court's findings.[66] On 15 December 2023, NOPSEMA approved Santos' revised EP,[67] paving the way for the commencement of the relevant drilling activities. Although the revised EP implemented measures such as mandated cultural training for Santos' employees and contractors,[68] it did not fundamentally alter the contents of the original EP. This underscores a crucial point: despite the importance of the decision in *Santos*, the obligations under reg 11A(1)(d) of the *Offshore Environment Regulations* do not confer First Nations' people with a substantive right to refuse consent to a given project. Rather, reg 11A(1)(d) provides a procedural right for First Nations' people to be consulted. This is evident as although the revised EP addressed the concerns of the Tiwi Islanders raised during consultation, the project largely proceeded as planned.

60 Ibid 154 [95].

61 Ibid 156 [102], citing *Anderson v Western Australia* [2007] FCA 1733, [36] (French J).

62 Ibid 156 [103].

63 Ibid.

64 Ibid 157 [104] (Kenny and Mortimer JJ), 166 [153] (Lee J).

65 Ibid 158 [111] (Kenny and Mortimer JJ), 168 [163] (Lee J).

66 NOPSEMA, *Acceptance of Barossa Development Drilling and Completions Environment Plan* (Doc No: A1036721, 4 January 2024) 33 [103].

67 Ibid 1 [1].

68 Ibid 39–40 [111(d)(ii)(A)].

IV Comment

A *Social Licence to Operate*

Santos has not only faced significant legal consequences for failing to properly consult with the Tiwi Islanders, but the decision also brings into question Santos' social licence to operate ('SLO'). A SLO refers to companies who conduct their business practices in accordance with 'stakeholder expectations and social norms', distinct from the grant of any legal or regulatory licence.[69] Achieving this standard often operates in parallel with meeting a company's broader international obligations, such as those outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[70] This Part IV explores: (1) the requisite standard for project proponents to adhere to *UNDRIP*; and (2) the reputational consequences of companies who fail to meet their SLO.

1 *Free, Prior and Informed Consent*

UNDRIP sets out, most crucially, the requirement to obtain free, prior and informed consent ('FPIC') before the development of any project which may impact upon the lands or territories of Indigenous Peoples.[71] Whilst Santos' failure to uphold the principles of *UNDRIP* has no direct legal ramifications,[72] *Santos* demonstrates that domestic courts are increasingly willing to engage with FPIC principles. Such principles are founded on the fundamental and collective rights of Indigenous Peoples to participate in 'a qualitative process of dialogue and negotiation, with consent as the objective'.[73]

For example, Kenny and Mortimer JJ emphasised that consultation is a 'real world activity' which requires gathering information and using this information to actively assist in minimising environmental impacts and risk.[74] Sending an email with information, and even a follow up, does not mean that proper consultation has occurred, or that reg 11A is satisfied.[75] Further, Kenny and Mortimer JJ state that consultation must be 'genuine', by ensuring affected communities are given a reasonable period to understand the effect of any proposed activity on their interests and provide

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69 Basak Baglayan et al, *Good Business: The Economic Case for Protecting Human Rights* (Report, December 2018) 26. See also Anne Matthew, 'Trust, Social Licence and Regulation: Lessons from the Hayne Royal Commission' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 103, 104.

70 *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) ('*UNDRIP*').

71 Ibid art 32(2). See also arts 10, 11(2) and 29(2).

72 *UNDRIP* has not been incorporated into domestic law to be legally binding.

73 Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach — Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62 (10 August 2018) 5 [15].

74 *Santos* (n 1) 153 [89].

75 Ibid 154 [94] (Kenny and Mortimer JJ).

a response with their concerns.[76] This is largely consistent with the principles of 'prior and informed consent', which implies that consent is achieved prior to the commencement of any operation works, on the basis of sufficient information, consultation and participation.[77] Under FPIC, and as recognised by their Honours in *Santos*, participation requires that individuals are consulted in a way which is accessible and appropriate.[78] Specifically, Lee J acknowledged that the 'appropriate discharge of the prescriptive consultation step' should be tailored to the nature of the interest and the relevant person holding that interest.[79] The Justices' emphasis on ensuring the proper discharge of the consultative process underscores how 'consultation' entails a rigorous standard, consistent with FPIC principles.

Despite a growing body of case law concerning consultation with affected First Nations people,[80] ambiguity persists regarding how to effectively meet the standards of FPIC. Such uncertainty was explored during the Australian Senate's 'Inquiry into the Application of UNDRIP in Australia' ('Senate Inquiry'), which aimed to improve adherence to *UNDRIP* in Australian legislation.[81] Submissions from mining companies and other stakeholders were notably critical about the exercise of FPIC obligations, citing instances of 'non-observance in practice and undue qualification or limitation'.[82] Further concerns were raised in the 'additional comments' section of the final report by Senator Lidia Thorpe.[83] Senator Thorpe emphasised that FPIC is 'one of UNDRIP's most disregarded principles. [Australia] has a shocking record of decision-making for and often to the detriment of First Peoples,

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76 Ibid 147 [56].

77 United Nations Office of the High Commissioner for Human Rights, *Free Prior and Informed Consent of Indigenous Peoples* (Issues Paper, September 2013) 2.

78 *Santos* (n 1) 147 [56]–[57].

79 Ibid 166 [153].

80 See, eg: *Barngarla Determination Aboriginal Corporation RNTBC v Minister for Resources* (2023) 299 FCR 50; *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.

81 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Terms of Reference, 2 August 2022). Note that the inquiry initially commenced in the Senate and was then referred to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs ('JSCATSIA'). All public submissions accepted by the Senate were also accepted by JSCATSIA.

82 Environmental Justice Australia, Submission No 46 to Senate Legal and Consultation Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (16 June 2022) 16 [78]. See also Woodside Energy Group Ltd, Submission No 24 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (25 October 2022) 2.

83 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Final Report, November 2023) 103–70 ('*Inquiry into the Application of UNDRIP*').

completely ignoring the principle of FPIC.'[84] Senator Thorpe recommended that the Government enshrine *UNDRIP* into domestic law 'to clarify and establish a framework for contested areas such as FPIC, in particular with regard to resource extraction'.[85] Despite such appeals, the recommendations of the Senate Inquiry notably fell short in addressing the procedural necessities for achieving FPIC. Rather, recommendations included developing a National Action Plan to outline the approach to implementing *UNDRIP*.[86] This recommendation has been made to the Government numerous times by multiple international bodies including the Committee on the Elimination of Racial Discrimination,[87] the World Conference on Indigenous Peoples,[88] and by member States during the United Nations Human Rights Council's Periodic Review of Australia,[89] to no avail. Whilst the Government is yet to respond to the Senate Inquiry, precedent suggests that there is unlikely to be legislative enshrinement of *UNDRIP* in the near future.

Clarity regarding compliance with FPIC principles, however, does not solely depend on the enshrinement of *UNDRIP*. For example, in response to *Santos*, NOPSEMA issued guidelines titled *Consultation in the Course of Preparing an Environment Plan*, which discuss FPIC principles.[90] The Guidelines assist proponents in understanding how to meet consultation obligations under the *Offshore Environment Regulations* based on transparency, inclusiveness and collaboration.[91] However, if stakeholder views are any indication, merely issuing broad guidelines is fundamentally inadequate.[92] Legislative amendments are therefore necessary to not only explicitly mandate consultation, but also to provide project proponents with a framework which reconciles societal expectations with the realities of business

84 Ibid 109 [1.35].

85 Ibid 147 [1.265].

86 Ibid 81–4.

87 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18–20 (26 December 2017) 5 [22].

88 *Inquiry into the Application of UNDRIP* (n 83) 81 [4.38]; *Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, UN Doc A/RES/69/2 (25 September 2014, adopted 22 September 2014) 2 [8].

89 *Inquiry into the Application of UNDRIP* (n 83) 42–3 [2.81]–[2.82]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (24 March 2021) 23 [146.272], 23 [146.285] and Add.1 (2 June 2021) 3 [19].

90 NOPSEMA, *Consultation in the Course of Preparing an Environment Plan* (Guidelines, 12 May 2023).

91 Ibid 7.

92 The *Independent Review* of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') was critical of non-binding consultation guidelines which lacked sufficient resources to be properly implemented and did not necessarily have practical implications: Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) ch 2.2. See also above nn 82, 84, 85.

needs. In this respect, the Department of Industry, Science and Resources' ('DISR') consultation paper titled '*Clarifying Consultation Requirements for Offshore Oil and Gas Storage Regulatory Approvals*' suggests a potential shift towards legislative enforcement of FPIC principles.[93] The consultation paper acknowledges that irrespective of *Santos*, 'uncertainty remains' regarding how to ensure that 'targeted, effective, meaningful and genuine consultation occurs'.[94] Following public consultation, the DISR will consider implementing new policies, or more significantly, amending the *Offshore Environment Regulations* to establish precise consultation requirements.[95] This should alert project proponents that the incorporation of FPIC principles into the *Offshore Environment Regulations* is likely forthcoming.

2 *Reputational Damage*

The failure to undertake proper consultation and obtain a SLO carries significant implications for Santos, affecting both its reputation and financial standing. This failure serves as a sign of challenges looming over offshore petroleum and gas projects more generally. For example, on the day their Honours delivered their judgment, the *Australian Financial Review* published an article titled 'Santos Bungles Oil Approvals', stating '[i]t is hard to have sympathy for the gas and oil giant after its second successive court loss over its failure to consult Indigenous people'.[96] Further, Lee J was particularly critical in his analysis, emphasising that Santos' approach to identifying the Tiwi Islanders interests and carrying out its consultation obligations was 'misconceived', with 'an immediate flaw' and 'unpersuasive'.[97] It is well recognised that a poor reputation is a distinct source of financial risk, often arising from highly publicised litigious battles.[98] Santos itself acknowledge that the decision had negative implications for investor confidence in Australia,[99] signalling broader implications for similar projects facing approval delays.

The case of *Munkara v Santos NA Barossa Pty Ltd (No 3)* ('*Munkara*')[100] further highlights the impact of legal proceedings on the industry at large. *Munkara* concerned a permanent injunction application initiated by Aboriginal people from the Tiwi Islands regarding the Barossa Gas Project.[101] The applicants argued that Santos was obligated to submit a revised environmental plan due to the risk of the

93 DISR, *Clarifying Consultation Requirements for Offshore Oil and Gas Storage Regulatory Approvals* (Consultation Paper, January 2024).

94 Ibid 3, 6.

95 Ibid 11.

96 Tony Boyd, 'Santos Bungles Oil Approvals', *Australian Financial Review* (online, 2 December 2022) <https://www.afr.com/chanticleer/santos-bungles-oil-approvals-20221202-p5c38g>.

97 *Santos* (n 1) 162 [138], 163 [140], 165 [149].

98 See generally Baglayan et al (n 69).

99 Santos, 'Federal Court Decision' (Announcement, 21 September 2022).

100 [2024] FCA 9 ('*Munkara*').

101 Ibid 6 [1]. *Munkara* explicitly did not consider, or weaken, the consultation requirements outlined in *Santos*: at 293 [1318].

pipeline on their cultural heritage.[102] Justice Charlesworth's ruling in favour of Santos was heavily critical of the Environmental Defenders Office for confecting evidence and engaging in a 'form of subtle coaching' of consultees to establish their interest in the pipeline site.[103] The ruling may have 'cleared this particular obstacle'[104] for Santos. However, *Munkara* does not necessarily restore confidence in the viability of similar projects. Investors industry wide are likely to continue approaching offshore petroleum and gas projects with caution given the growing uncertainty that approved EPs equate to project success.[105] For example, Santos estimates that the ramifications of *Munkara* alone will require an additional $200–$300 million in capital expenditure to complete the project.[106] Furthermore, the Australasian Centre for Corporate Responsibility noted that the effects of *Munkara* leave a 'colossal haemorrhage of shareholder money in its wake'.[107] Santos' legal challenges serve as a stark reminder that the ramifications of court proceedings, whether adverse or otherwise, extend far beyond the confines of the legal domain.

B *Future Implications*

Whilst the Full Court's findings regarding the requirement for considered and genuine stakeholder consultation are limited to offshore petroleum and gas projects under the *Offshore Environment Regulations*, the implications of *Santos* could be wide-reaching. The decision not only aligns consultation expectations for offshore petroleum and gas project proponents with those imposed on many onshore developers,[108] but serves as a broader alert to project proponents in other offshore sectors. Stakeholder consultation should no longer be regarded as a perfunctory checkbox exercise. Instead, there is a heightened expectation for genuine, targeted dialogue to be actively demonstrated.

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102 Ibid 7 [4].

103 Ibid 220–1 [994].

104 Hannah Wootton and Ben Potter, '"Made Up": Judge Slams Green Activists in Santos Gas Case', *Australian Financial Review* (online, 15 January 2024) <https://www.afr.com/companies/energy/santos-finally-gets-green-light-for-barossa-oil-field-pipeline-20240115-p5ex90>.

105 Samantha Dick, 'Gas Sector Demands Regulatory Reform Following Santos Court Battle with Elders from Tiwi Islands', *ABC News* (online, 17 January 2024) <https://www.abc.net.au/news/2024-01-17/santos-nt-barossa-project-court-decision-industry-react/103323524>.

106 Santos, *Fourth Quarter Report for the Period Ending 31 December 2023* (Report, 25 January 2024) 5.

107 Australasian Centre for Corporate Responsibility, 'Federal Court Ruling on Barossa Pipeline Gets Santos out of Hot Water: For Now' (Media Release, 15 January 2024).

108 For example, the *Electricity Infrastructure Investment Act 2020* (NSW) s 4(1) requires the Minister to 'issue guidelines about consultation and negotiation with the local Aboriginal community in relation to relevant projects'. Consequently, the Minister issued the *First Nations Guidelines* which place an expectation on project proponents to engage in 'best practice engagement': Office of Energy and Climate Change, *First Nations Guidelines* (Guidelines, August 2022).

There are further implications for *Santos* in the context of offshore wind and non-petroleum projects, under the *Offshore Electricity Infrastructure Act 2021* (Cth) ('*OEI Act*'). Similar to the *Offshore Environment Regulations*, the *OEI Act* requires that proponents seeking a licence for the construction and operation of an offshore renewable energy or electricity infrastructure project submit a management plan.[109] This plan is assessed by the Offshore Infrastructure Regulator within NOPSEMA.[110]

Section 115(2) of the *OEI Act* states that the licensing scheme under the *Offshore Electricity Infrastructure Regulations 2022* (Cth) ('*OEI Regulations*') may require submitted management plans to demonstrate consultation with 'any person that may be affected by the activities' has been carried out. *Santos* has provided clarity on who may fall under the scope of 'affected' persons for this purpose. In contrast to the *OEI Act*, reg 11A of the *Offshore Environment Regulations* qualifies a person's right to consultation by requiring that such person must have an established 'function, interest or activity' that would be affected by the activities outlined in the EP.[111] Accordingly, following *Santos*, if First Nations groups are recognised to have an established 'interest', by virtue of their 'traditional connection to the sea, and to the marine resources [they] hold',[112] they would also fall under the broader category of persons 'that may be affected', thus requiring consultation under the *OEI Act*. As such, the *OEI Act* authorises the *OEI Regulations* to impose consultation requirements on licensing activities that affect First Nations people.

Currently, however, the *OEI Regulations* do not mandate such consultation. This may be subject to change, following statements from the Department of Climate Change, Energy and the Environment and Water ('DCCEEW') that it is developing the *OEI Regulations* through a phased approach.[113] Notably, the DCCEEW's exposure draft of the Offshore Electricity Infrastructure Amendment Regulations 2024 (Cth) proposes additional requirements that are currently subject to consultation.[114] The proposed s 57(1)(b) states that licence holders must make 'reasonable efforts' to identify and consult with First Nations groups that may have native title rights and interests, or sea country, in the licence area. Further, the proposed s 58(1)(b) mandates that licence holders provide affected First Nations groups with sufficient information regarding any 'foreseeable effects' of the licenced activities. These developments align with broader industry trends towards increased consultation for project proponents, such as legislative reforms to the *Environment Protection*

109 *Offshore Electricity Infrastructure Act 2021* (Cth) s 114(1).

110 Ibid s 175(1).

111 *Offshore Environment Regulations* (n 3) reg 11A(1)(d).

112 *Santos* (n 1) 153 [90] (Kenny and Mortimer JJ).

113 'Legislation and Regulations', *Department of Climate Change, Energy, the Environment and Water* (Web Page, 9 February 2024) <https://www.dcceew.gov.au/energy/renewable/offshore-wind/legislation-regulations>.

114 See DCCEEW, *Regulations under the Offshore Electricity Infrastructure Act 2021* (Consultation Paper, 2024) 8–11.

and Biodiversity Conservation Act 1999 (Cth).[115] *Santos* will undoubtedly play a significant role in shaping these requirements by setting a precedent for genuine engagement with First Nations people.

The impact of *Santos* on development of the *OEI Act* is therefore two-fold: (1) it removes any ambiguity on whether a traditional connection to land is sufficient to meet the threshold of 'affected' persons; and (2) it increases the normative demand for legislative enshrinement of consultation requirements.

V Conclusion

Santos has set a new industry standard for the level of consultation expected of offshore petroleum and gas project proponents. While the decision itself does not create a substantive right for First Nations' people to refuse consent, the far-reaching policy implications will likely influence the success of similar projects. The Full Court's pointed critique of Santos' actions suggest that proponents operating under the *Offshore Regulations* will find it increasingly difficult to plead ignorance when it comes to identifying who to consult and understanding the necessary steps in the consultative process. Overtime, this heightened threshold will likely extend to offshore wind and non-petroleum projects, reflecting an industry-wide shift in support of First Nations' participation. For now, *Santos* serves as a cautionary tale — in the face of multi-million-dollar delays, reputational damage and continuing legal battles, not only is proper consultation with First Nations people the right thing to do, but the success of future projects may depend on it.

115 In response to the *Independent Review of the EPBC Act* (see above n 92), the DCCEEW announced it is developing National Environmental Standards which will prioritise the protection of First Nations cultural heritage: at DCCEEW, *Nature Positive Plan: Better for the Environment, Better for Business* (Report, December 2022) 2.

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TABLE OF CONTENTS

VALE ASSOCIATE PROFESSOR TONY MOORE

P T Babie, Andrew Parkinson and Richard Sletvold
***In Memoriam*: Anthony Peter (Tony) Moore, 1945–2023** **191**

ARTICLES

Gabrielle Wolf
Sentencing Criminal Offenders with Autism: A Comparative Analysis of Three Jurisdictions **207**

Juan Diaz-Granados
Exclusive Possession, 'Contractualisation' and the Lease-Licence Dichotomy: A Reconsideration of Legal Categorisation in the Airbnb Era **250**

Nina Cheles-McLean
Sex, Money and the Law: Financial Discrimination Against Sex Workers **273**

Murray Wesson
The *Mineralogy Act* and the Rule of Law **310**

Kathy Douglas and Lola Akin Ojelabi
Civil Dispute Resolution in Australia: A Content Analysis of the Teaching of the Topic of ADR in the Core Legal Curriculum **339**

Ian Murray and Natalie Silver
Use of Cy-près and Administrative Schemes by Australian Higher Education Providers to End Dead Hand Control of Charitable Assets **362**

COMMENTS

Joanna Jarose
Revisiting the Limit on Small Claims in South Australia's Minor Civil Jurisdiction **393**

CASE NOTES

Nora Peat and Ashwini Ravindran
The Jury is Out: *Vunilagi v The Queen* (2023) 411 ALR 224 **404**

Annalise Delic and Monique Blight
Santos' Pipe(Line) Dream: *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124 **420**