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RETRYING *DELIVEROO* WITH THE IMPLIED DUTY TO COOPERATE: UNSETTLING THE INDEPENDENT CONTRACTOR STATUS OF ON-DEMAND PLATFORM WORKERS

Abstract

Following the High Court cases of *Personnel Contracting* and *Jamsek*, the Full Bench of the Fair Work Commission 'regrettably' found a Deliveroo food delivery rider to be an independent contractor, having confined their analysis to only the written terms of the agreement. As the High Court left open the possibility that implied terms may also be considered in characterising an employment contract, this article undertakes the hypothetical exercise of retrying the case emphasising the implied duty of cooperation, an accepted implied term by law in all contracts. In the context of on-demand platform workers, the authors contend that this duty requires workers to cooperate with their platforms in the supply of their labour, as such a duty is 'necessary' for the efficacy of these contracts. Consideration of this duty would highlight the legal right Deliveroo has to control its workers, pointing towards an employment relationship. The article thus offers a novel argument to unsettle the status of on-demand platform workers as independent contractors by exploring the under-researched practical implications of implied terms in classifying employees under both the common law and the legislative test for determining employment status under the *Fair Work Act 2009* (Cth).

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I Introduction

In Australia, in the absence of statutory intervention, the terms 'employee', 'employer' or 'employment' are given their ordinary meaning under the common law.[1] There is no determinative test for ascertaining the ordinary meaning of an employee. Generally speaking, whether a worker is an employee rests upon two key considerations — the extent of the putative employer's rights to control the worker's activities (including how, where, and when the work is done),[2] and 'the extent to which the putative employee can be seen to work in [their] own business, as distinct from the business of the putative employer' with neither element being determinative and both being a question of degree.[3] Decision-makers ask a series of questions to determine whether the answers point away or towards these elements, and consequently determine if an employment relationship does or does not exist (a multifactor test).[4]

Prior to 2022, it was thought that this inquiry could include the parties' conduct in executing the contract.[5] However, in 2022, High Court ('HC') plurality judgments clarified in the cases of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* ('*Personnel Contracting*')[6] and *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek*')[7] that, 'in the case of a wholly written employment contract, the "totality of the relationship" which must be considered is the totality of the legal rights and obligations provided for in the contract'.[8] Post-contractual

1 See, eg: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 388–9 [173]; *C v Commonwealth* (2015) 234 FCR 81, 87 [34], cited in Andrew Stewart, Mark Irving and Pauline Bomball, 'Shifting and Ignoring the Balance of Power: The High Court's New Rules for Determining Employment Status' (2023) 46(4) *University of New South Wales Law Journal* 1214, 1217.

2 *JMC Pty Ltd v Federal Commissioner of Taxation* (2022) 114 ATR 795, 801 [23] ('*JMC*'), citing *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 197 [73]–[74] (Kiefel CJ, Keane and Edelman JJ), 208–9 [113] (Gageler and Gleeson JJ) ('*Personnel Contracting*'); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24 (Mason J), 36–7 (Wilson and Dawson JJ) ('*Stevens*').

3 *JMC* (n 2) 801 [23], citing *Personnel Contracting* (n 2) 184–5 [36]–[39] (Kiefel CJ, Keane and Edelman JJ), 208–9 [113] (Gageler and Gleeson JJ).

4 The authors' references to 'decision-makers' are intended to capture courts, commissions and/or tribunals.

5 Stewart, Irving and Bomball (n 1) 1217–18. This approach had been endorsed in High Court decisions such as *Stevens* (n 2) 24 (Mason J) and *Hollis v Vabu Pty Ltd (Bicycle Couriers Case)* (2001) 207 CLR 21, 41 [44] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

6 *Personnel Contracting* (n 2).

7 (2022) 275 CLR 254 ('*Jamsek*').

8 *Personnel Contracting* (n 2) 229 [173] (Gordon J). Justice Gordon's agreement with Kiefel CJ, Keane and Edelman JJ provided a plurality finding in *Personnel Contracting* that in a wholly written contract it is necessary to consider only the terms of the

conduct is not to be considered. The inquiry must be confined to contractual rights and obligations.

This clarification prompted concerns from labour law scholars that focussing solely on parties' contractual terms to determine employee status could lead to decisions that were out of step with reality.[9] The Full Bench of the Fair Work Commission ('FWC') similarly critiqued the HC,[10] when they overturned an initial finding that a driver for the food delivery company Deliveroo, which operates as a digital on-demand platform where drivers and clients are algorithmically assigned to each other, was an employee.[11] Having delayed the appeal of this case until after the *Jamsek* and *Personnel Contracting* decisions and having then applied these precedents, the Full Bench '[r]egrettably' found the worker to be an independent contractor.[12] In coming to their conclusion, the Full Bench explained that they were 'obliged … to ignore' various factual circumstances that would have otherwise been relevant to finding the driver to be an employee, had it not been for the HC's findings.[13]

The current federal Labor government also appeared to agree with critiques of *Jamsek* and *Personnel Contracting*, introducing s 15AA to the *Fair Work Act 2009* (Cth) ('*FW Act*'), which took effect on 26 August 2024. The section requires decision-makers to have regard to the 'real substance, practical reality and true nature of the relationship between the individual and the person' having regard to 'the totality of the relationship between the [putative employee] and the [putative employer] … not only to the terms of the contract governing the relationship' when determining the 'ordinary meanings of employee and employer' for the purposes of the *FW Act*.[14] The note to s 15AA states that the section was enacted in response to the HC decisions in *Personnel Contracting* and *Jamsek*.[15]

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contract. See also *Jamsek* (n 7), 273–4 [53] (Kiefel CJ, Keane and Edelman JJ), 285–6 [95] (Gordon and Steward JJ), referring to their reasoning in *Personnel Contracting.* Subsequent references to the *Personnel Contracting* and *Jamsek* decisions refer to the plurality judgements unless otherwise stated. See also Joellen Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35 *Australian Journal of Labour Law* 79, 85.

9 See, eg: Stewart, Irving and Bomball (n 1); Eugene Schofield-Georgeson, 'Contract, Labour Law and Reality in the High Court of Australia' (2022) 48(3) *Monash University Law Review* 232; Eugene Schofield-Georgeson and Joellen Riley Munton, 'Precarious Work in the High Court' (2023) 45(2) *Sydney Law Review* 219; Joellen Riley Munton, 'Employment Contracts in the Australian High Court' (2022) 15(2) *Italian Labour Law e-Journal* 173.

10 *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253, 280 [56] ('*Deliveroo*').

11 *Franco v Deliveroo Australia Pty Ltd* (2021) 305 IR 255 ('*Franco*').

12 *Deliveroo* (n 10) 280 [57].

13 Ibid 278–9 [53]–[54].

14 *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) sch 1 item 237 ('*Closing Loopholes Act*'), inserting *Fair Work Act 2009* (Cth) s 15AA ('*FW Act*'). This provision commenced on 26 August 2024.

15 Ibid.

Moving forward, there will therefore be two approaches to determining a worker's employment status under Australian law. The statutory test that will affect the employment status of workers under the *FW Act* and their consequent eligibility for the employee entitlements contained therein, and the common law test which will remain significant in relation to other obligations and entitlements affected by a worker's common law employment status, such as findings of vicarious liability in tort law,[16] or superannuation,[17] taxation,[18] occupational health and safety,[19] and workers' compensation obligations.[20] While the key considerations for determining a worker's employment status will presumably remain the same under both the common law and the statutory test (that is, the extent of the putative employer's control and the extent the putative employee could be said to be working in their own business), the evidence that may be considered under each test will differ, with the statutory test permitting a broader scope of inquiry beyond the parties' contractual terms.

Along with the new statutory test for determining employment status, a new category of 'employee-like' workers has also been introduced into the *FW Act*, defined to include individuals who: (1) are party to a services contract; (2) perform 'all, or a significant majority of the work' under the contract; (3) perform work that is 'digital platform work'; (4) are not performing their work as employees; and (5) satisfy at least two prescribed characteristics, including having 'low bargaining power' in negotiating the contract or having 'a low degree of authority over the performance of their work'.[21] The FWC will be able to set minimum standards of work for these

16 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 [12]–[13].

17 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3): common law employees are entitled to the superannuation guarantee but so are persons that work 'under a contract that is wholly or principally for the labour of the person'.

18 *Taxation Administration Act 1953* (Cth) sch 1 requires employers to deduct taxes from wages paid to their employees and remit that amount to the Australian Tax Office in a system known as PAYG. Section 12-35 states: '[a]n entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity).' Contractors must generally meet their own tax obligations. There are, however, exceptions. For example, an independent contractor may enter into a voluntary agreement to withhold tax from their remuneration payments, tax has to be withheld where a contractor does not provide an Australian Business Number, and labour hire firms need to withhold tax on the payments to labour hire workers: 'Payments You Need to Withhold From', *Australian Tax Office* (Web Page, 17 October 2022) <https://www.ato.gov.au/Business/PAYG-withholding/Payments-you-need-to-withhold-from/>.

19 Occupational health and safety obligations apply to common law employees, however, some legislations have extended employers' duties to include certain independent contractors. See, eg: *Work Health and Safety Act 2011* (Cth) ss 7, 19; *Occupational Health and Safety Act 2004* (Vic) ss 21, 23.

20 See *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11, which defines 'worker' as any person who performs work under a contract.

21 *Closing Loopholes Act* (n 14) sch 1 item 248, inserting *FW Act* (n 14) s 15P. This provision also commenced on 26 August 2024.

workers.[22] Any worker subject to these minimum standards 'is not an employee of any person in relation to that work'[23] and any steps taken to comply with these orders cannot be considered in determining whether an employment relationship exists between the parties.[24]

As seen above, an employee-like worker excludes any worker that is found to be an employee, under the statutory test for determining an employee under the *FW Act*. However, the very existence of this category of employee-like workers to capture digital platform workers assumes that these workers will not be found to be employees, even under the new legislated test under s 15AA that is intended to capture the true nature of the relationship between parties.

This assumption is perhaps justified given the repeated failures by digital platform workers to successfully argue for employee status, even preceding *Jamsek* and *Personnel Contracting* where parties' post-contractual conduct was taken into account.[25] This suggests that contrary to the Full Bench of the FWC's statements in *Deliveroo Australia Pty Ltd v Franco* ('*Deliveroo*')[26] and the initial finding in this case, it is not necessarily a given that the ability to look beyond contractual rights and obligations will lead digital platform workers to be categorised as employees. Indeed, the inherent uncertainty of the multifactor test has led to extensive academic debate about the appropriate classification of digital platform workers in Australia. Some scholars have argued that many platform workers should be treated as employees.[27] Others have considered but argued against establishing a distinct worker category with a broader definition than employee,[28] while some have

22 Ibid; Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [35].

23 *Closing Loopholes Act* (n 14) sch 1 item 248, inserting *FW Act* (n 14) s 15KA.

24 These clarifications were introduced by Workplace Relations Minister Tony Burke to clarify that the FWC's setting of minimum standards for gig workers must 'reflect their engagement as independent contractors': 'Burke Negotiates Changes to Loopholes Gig Provisions', *Workplace Express* (online, 9 November 2023) <workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=62881>. See also Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, [17]–[18].

25 See, eg: *Kaseris v Rasier Pacific VOF* (2017) 272 IR 289; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 ('*Gupta*'). Cf *Klooger v Foodora Australia Pty Ltd* (2018) 283 IR 168 ('*Klooger*'). See also Anthony Forsyth, 'Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia' 31(2) *King's Law Journal* 287.

26 *Deliveroo* (n 10).

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

28 Ibid; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420. In the United Kingdom, in the case of *Uber BV v Aslam* [2019] IRLR 257, the Supreme Court

proposed industry-specific regulatory responses to cover common sectors of digital platform work such as road transport.[29]

However, the authors contend that there is still scope for some digital platform workers, specifically on-demand platform workers, to be considered employees under both the common law and the statutory test for determining employment if implied terms are considered. In digital platforms such as Airtasker, the platform acts as a passive marketing tool and the worker and client determine the 'work's nature, timing, quality and price' between themselves, referred to as crowd-work systems.[30] In contrast, on-demand platforms: (1) allocate tasks directly to registered, available workers; (2) provide tasks that are often homogenous and without the need for distinct skillsets or qualifications; and (3) set pre-determined parameters for work (such as delivery times, or ride fares).[31] The platform will generally set conditions of work including rates of pay and estimated delivery times, which are offered to the client without any opportunity for input or negotiation from the worker, and expected minimum standards of service are reinforced by the platforms' algorithms.[32] Key examples of such platforms still operating in Australia include Uber, Ola and Menulog.[33]

To date, no case has attempted to introduce an argument that considers implied terms when determining a worker's appropriate employment status. Existing academic literature on this point has also been under-explored.[34] However, under both the

found an Uber driver to be a 'worker' under s 230(3)(b) of the *Employment Rights Act 1996* (UK), a category of employment in the United Kingdom which entitles workers to some but not all employee entitlements such as minimum wage rates and holiday pay. However, more recently, the Supreme Court decided a Deliveroo rider was neither a worker nor an employee for the purposes of art 11 of the *European Convention on Human Rights* and was therefore not eligible for collective bargaining rights: *Independent Workers Union of Great Britain v Central Arbitration Committee* [2024] IRLR 148.

29 Michael Rawling and Joellen Riley Munton, 'Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work' (2022) 45(1) *University of New South Wales Law Journal* 7.

30 Department of Premier and Cabinet, Government of Victoria, *Inquiry into the Victorian On-Demand Workforce* (Report, 12 June 2020) 72 [480].

31 Ibid 15 [77].

32 Ibid 14 [69].

33 Ibid 15 [77].

34 There has, however, been some exploration of the potential of implied terms in governing work more broadly. See, eg: David Cabrelli and Jessica D'alton, 'Furlough and Common Law Rights and Remedies', *UK Labour Law* (Blog Post, 8 June 2020) <https://uklabourlawblog.com/2020/06/08/furlough-and-common-law-rights-and-remedies-by-david-cabrelli-and-jessica-dalton/>; Philippa Collins and Gabrielle Golding, 'An Implied Term of Procedural Fairness During Disciplinary Processes: Into Contracts of Employment and Beyond?' (2024) 53(2) *Industrial Law Journal* 125; Gabrielle Golding, *Shaping Contracts for Work: The Normative Influence of Terms Implied by Law* (Oxford University Press, 2023) ('*Shaping Contracts for Work*').

common law and the statutory test for determining employment, the contract and its corresponding rights and obligations remain a relevant point of consideration.

The terms of any contract include both express and implied terms.[35] The authors therefore submit that the implied duty to cooperate, a term implied by law into all contracts,[36] could tip the scales in characterising service agreements of on-demand platforms as employment contracts. The authors' focus on the implied duty to cooperate is inspired by the duty of cooperation that had incidentally been contained in the express terms of the Administrative Services Agreement that was at the heart of *Personnel Contracting*.[37] The case of *Personnel Contracting* involved Mr McCourt who sought to be classified as an employee of a labour hire agency. In the agreement, there was an express term that workers 'cooperate in all respects' with the agency 'in the supply of labour' to the end client.[38] This clause was central to the plurality's finding that the worker in *Personnel Contracting* was in fact an employee of the agency, as the clause suggested that the agency had a right of control over him.[39] The authors contend that the implied duty to cooperate could be similarly interpreted to include a duty for workers to cooperate in all respects with their on-demand platforms in the supply of labour to the end client, given the necessity for such a duty to give effect to these agreements.

This article revisits the *Deliveroo* decision with explicit attention on the mutual duty of cooperation and its potential impact on classifying on-demand platform workers as employees. It is acknowledged that Deliveroo is no longer operational in Australia and any future retrying of similar cases will necessarily turn on their facts.[40] However, in *Deliveroo,* the Full Bench highlights the matters it would have considered were it not for the HC's recent precedent and how this would have affected

35 *Personnel Contracting* (n 2) 187 [45] (Kiefel CJ, Keane and Edelman JJ), 213–14 [126] (Gageler and Gleeson JJ), quoting *Narich Pty Ltd v Commissioner of Pay-roll Tax* (1983) 50 ALR 417, 420–1 ('*Narich*').

36 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 ('*Secured Income Real Estate*'). See also: Vanitha Sundra-Karean, 'The Erosion of the Implied Term of Mutual Trust and Confidence in Australian Employment Law: Are Common Law and Statute Necessarily Uncomfortable Bedfellows?' (2016) 45(4) *Common Law World Review* 275, 285–6, 290; Gabrielle Golding, 'Rethinking the Rationale for Implying Terms by Law into Australian Employment Contracts' (2020) 39(1) *University of Tasmania Law Review* 1, 8.

37 *Personnel Contracting* (n 2) 177 [14], 197 [75].

38 Ibid.

39 Ibid 197–8 [76]–[77].

40 See, eg: Josh Taylor, 'Deliveroo Quits Australia Citing "Challenging Economic Conditions"', *The Guardian* (online, 16 November 2022) <https://www.theguardian.com/business/2022/nov/16/deliveroo-quits-australia-citing-challenging-economic-conditions>; Josh Taylor, 'Deliveroo's Sudden Collapse in Australia Leaves Delivery Riders Scrambling to Find New Jobs', *The Guardian* (online, 17 November 2022) <https://www.theguardian.com/australia-news/2022/nov/17/deliveroos-sudden-collapse-leaves-delivery-riders-scrambling-to-find-new-jobs>.

their decision.[41] This offers insight into how decision-makers may approach similar cases under the statutory test in the *FW Act*. *Deliveroo* therefore offers a valuable illustrative case against which to engage in the hypothetical exercise of exploring the potential influence of an implied duty of cooperation in unsettling the classification of on-demand platform workers under Australian law.

While the discussion in this article is focussed on the implications of an emphasised duty of cooperation in the context of on-demand platform workers under Australian law, it is hoped that this will form a foundation for further research. The potential for implied terms to govern work more broadly should be further explored. The article's arguments could also be explored in the context of other types of workers that share a similar duty of cooperation with their putative employers. The applicability of this article's arguments in other common law jurisdictions could also be an area of further research.

The article is set out as follows. Part II outlines the *Deliveroo* decision and its application of relevant precedent from *Personnel Contracting* and *Jamsek*. Part III sets out the article's arguments for emphasising the implied duty of cooperation in determining a worker's employment status and defining the scope of this duty in the context of service agreements for on-demand platforms. This is done by drawing upon existing literature on the inherent features of these platforms, justifying the applicability of this article's arguments as they relate to Deliveroo and to other on-demand platforms that share these characteristics. This is used to support the authors' contention that in the context of service agreements for on-demand platform workers, the implied mutual duty of cooperation should be interpreted to include a duty of cooperation between workers and their platforms in the supply of their labour. Part IV retries *Deliveroo* under the common law test, considering this implied term alongside the express terms in this case to demonstrate how the contract may now be found to be an employment contract. Part V discusses how this argument would be similarly useful in the context of determining a worker's employment status under the legislated test for determining employment in the *FW Act*. Part V also addresses the potential hesitancy decision-makers may have in appropriately classifying these workers and explores the alternative argument of emphasising the implied duty of mutual trust and confidence to address challenges faced by these workers. Part VI concludes the article and reiterates how its arguments can and should be pursued.

41 Although all cases post *Personnel Contracting* and *Jamsek* on the employment status of on-demand platform workers, at the time of writing, have similarly found these workers to not be employees. See, eg: *Nawaz v Rasier Pacific Pty Ltd (t/as Uber BV)* (2022) 317 IR 134 ('*Nawaz*'); *Gondal v Uber Australia Pty Ltd* [2024] FWC 300; *Muhammad v Rasier Pacific Pty Ltd* [2024] FWC 153; *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683.

II The Case of *Deliveroo*

The initial decision of *Franco v Deliveroo Australia Pty Ltd* was decided by Commissioner Cambridge on 18 May 2021, pre-dating the cases of *Personnel Contracting* and *Jamsek*.[42] The case involved a driver, Mr Franco, who was working for Deliveroo, a company providing 'food and drink delivery services to customers via an online platform'.[43] Mr Franco and Deliveroo were parties to a 'supplier agreement'.[44] In April 2020, Deliveroo terminated their agreement with Mr Franco due to delayed delivery times.[45] Mr Franco sought to bring an unfair dismissal claim, a right available only to employees.[46] As such, Mr Franco's employment status was a key issue in the dispute.

Commissioner Cambridge, examining the totality of the circumstances involved in the parties' relationship, including their conduct in practice, concluded that Mr Franco was an employee of Deliveroo. This case was one of several other cases in Australia involving on-demand platform workers and their appropriate employment classification, all in the context of unfair dismissal claims.[47] Prior to this decision, in only one case involving a food delivery cyclist for the company Foodora was the worker found to be an employee.[48] However, Foodora subsequently became insolvent and exited the Australian market, making it a 'pyrrhic victory'.[49] Commissioner Cambridge's finding in this case thus marked an important shift in the classification of these workers. He acknowledged that while there was a 'purported absence of control' — one of the key factors that had pointed away from an employment relationship in a prior decision involving an Uber driver — 'a more detailed examination beyond the mere appearance of the apparent freedoms that were provided to Mr Franco, reveals a very different picture'.[50]

Mr Franco had performed most of his work for Deliveroo under a self-service booking ('SSB') system,[51] which allowed riders who had a higher priority ranking (based on their attendance rates, number of late cancellations and preparedness for participation during peak periods) to book sessions in advance of lower ranked riders.[52] Deliveroo discontinued the SSB system in Sydney in January 2020.[53]

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42 *Franco* (n 11).

43 *Deliveroo* (n 10) [4].

44 Ibid [5].

45 Ibid.

46 *FW Act* (n 14) s 382.

47 See n 25 above.

48 *Klooger* (n 25).

49 Rawling and Munton (n 29) 17.

50 *Franco* (n 11) 277 [106]–[107], distinguishing from *Gupta* (n 25).

51 Ibid 277–8 [108].

52 Ibid 261 [22].

53 Ibid 261 [23].

However, Commissioner Cambridge was sufficiently persuaded by 'the capacity that Deliveroo possesses to exercise a significant level of control' by, for example, reintroducing the SSB system, noting:

> Work that is undertaken via computerised platform based engagements provides the operators of those digital platforms, such as companies like Deliveroo, with an extraordinarily vast repository of data relating to the performance and activities of those individuals who perform the work. It takes little imagination to envisage that the data or metrics in the possession of a company such as Deliveroo, can be used as a means to control those who perform the work.[54]

Commissioner Cambridge proceeded to examine other relevant factors but was mostly persuaded by 'the level of control that Deliveroo possessed, and which it could choose to implement or withdraw' which although 'not immediately apparent, when properly comprehended, represented an indicum that strongly supported the existence of employment rather than independent contracting'.[55]

The decision was appealed and the Full Bench of the FWC deferred the determination of this appeal until after *Personnel Contracting* and *Jamsek* were decided.[56] Consequently, the Full Bench applied their interpretation of the foregoing authorities, considering only 'the rights and obligations under that contract'.[57] First, the Full Bench disregarded any labelling terms that sought to characterise the relationship as well as clauses that were merely consequential upon this labelling such as clauses relating to tax and insurance obligations.[58]

The clause that stated that Deliveroo was not required to provide work to drivers and that Mr Franco could work for other entities was also considered not determinative in finding Mr Franco to be a contractor, in line with the plurality in *Personnel Contracting* that had found that this clause also existed in casual employment relationships.[59] The Full Bench did, however, note that Mr Franco could choose not only when but also where he worked and could unassign himself from orders even after accepting them, allowing him a greater level of control over his work, in their view, than in typical casual employment relationships.[60] The Full Bench maintained, however, that although this went against finding Mr Franco to be an employee, it was not determinative.[61]

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54 Ibid 278 [111].

55 Ibid 283 [139].

56 *Deliveroo* (n 10) 257–8 [10].

57 Ibid 272 [34].

58 Ibid 275 [41]–[42], quoting *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 153 [37] ('*ACE Insurance*').

59 *Deliveroo* (n 10) 273 [35], citing *Personnel Contracting* (n 2) 200 [84].

60 *Deliveroo* (n 10) 275–6 [44]–[45].

61 Ibid. See also *Nawaz* (n 41) 153–4 [51].

A range of factors were, however, considered to 'weigh decisively in favour' of finding Mr Franco to be a contractor.[62] First, in confining their analysis to the express terms of the agreement, the Full Bench found that the contract reflected a lack of control over Mr Franco's manner of performance over the delivery, aside from that it 'be delivered within a reasonable time period', which was seen as being 'typical for independent contracting arrangements in the road transport industry'.[63] Similarly, the requirement that Mr Franco provide his services with due care and skill was seen to be typical in independent contracting relationships.[64] Adding to this finding was the right for Mr Franco to choose his own vehicle, provided safety, reliability and legislative requirements were met.[65] This, combined with Deliveroo's inability to compel Mr Franco to perform deliveries, were all seen as factors that pointed towards a minimal right of control between Deliveroo and Mr Franco.[66] In this way, the Full Bench dispensed with the most persuasive indicum that Commissioner Cambridge had relied on in the first instance to find an employment relationship.

The second relevant point was Mr Franco's obligation to provide the delivery vehicle, with the Full Bench saying:

> Because the 2019 Agreement allows for this to be something more than just a bicycle, then it is possible (to borrow the language used by Gageler and Gleeson JJ in *Jamsek*) that Mr Franco may provide a 'substantial item of mechanical equipment' such that 'the personal is overshadowed by the mechanical'.[67]

Third, the Full Bench noted that Mr Franco was not asked to perform personal services as he could delegate his duties to someone else without the approval of Deliveroo while retaining the obligation to ensure the delegate had the requisite skills and training and was paid, which again pointed towards non-contractual employment.[68]

Fourth, despite the fact that being paid by result (that is, upon delivery) was not necessarily inconsistent with employment, the Full Bench found that Mr Franco's administrative fee payment of 4% to access Deliveroo's invoice providing software was 'inconsistent with the existence of an employment relationship'.[69]

In coming to this conclusion, the Full Bench clarified that they felt they had to 'close [their] eyes' to matters that would have tipped the balance in favour of finding

62 *Deliveroo* (n 10) 276–7 [46].

63 Ibid.

64 Ibid 277 [47].

65 Ibid 276–7 [46].

66 Ibid.

67 Ibid 277 [48], quoting *Jamsek* (n 7) 283–4 [88].

68 *Deliveroo* (n 10) 277 [49].

69 Ibid 277 [50].

Mr Franco to be an employee, discussed further below.[70] The Full Bench acknowledged Mr Franco's submission that the contract was a sham but noted that the relevant test requires that both parties intend for the contract to not have any legal consequences, which was not applicable in this case.[71] Aside from a claim of sham, Mr Franco made no other submissions that would allow an examination beyond the express terms of the contract. However, the authors argue that in a future similar case, emphasising the significance of implied terms may lead to a different outcome.

III Arguing for an Implied Term by Law

A *Implied Terms*

Lord Brandon's statement, endorsed in *Personnel Contracting*, regarding the appropriate points of consideration when interpreting a contract makes clear reference to implied terms:

> where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express *or implied*, of that contract in the light of the circumstances surrounding the making of it …[72]

Typically, a contracting party will argue for a term that provides itself a benefit or imposes an obligation on the other party, and then argue a breach of that term and receive appropriate remedies. Here, we propose a slightly unusual situation in which a worker would be arguing for an implied term, not to establish any breach in contract law, but rather to appropriately characterise the contract as an employment agreement to receive consequent employee entitlements. Although atypical, the option is theoretically available to litigants given the precedent of *Personnel Contracting* and its repeated references to considering both express and implied terms of a contract when establishing a worker's employment status.[73]

Terms may be implied in fact, by custom or usage, or by law in particular classes of contract or in all contracts.[74] Terms implied in fact rely on the presumed intention of the parties,[75] and only apply when there is a 'deficiency in the expression of the

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70 Ibid 279 [54].

71 Ibid 279 [55].

72 *Personnel Contracting* (n 2) 187 [45] (Kiefel CJ, Keane and Edelman JJ), 213 [126] (Gageler and Gleeson JJ), quoting *Narich* (n 35) 32 (emphasis added).

73 *Personnel Contracting* (n 2) 187 [45], 213 [126], 220 [143], 232–3 [178], 238–9 [190].

74 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 185–6 [21] ('*Barker*').

75 See, eg: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, 285; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 ('*Codelfa Construction*'); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 440 ('*Byrne*'); *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115, 136.

consensual agreement … caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision of it'.[76] The HC has found, for example, that in establishing implied terms in fact, it 'is necessary to show that the term in question would have been accepted by the contracting parties as a matter so obvious that it would go without saying'.[77] Such an argument is unlikely to succeed in the context of on-demand platform agreements, given the persistent tension between parties relating to the degree of control exercised by platforms over their workers. In this context, the duty of cooperation is in no way 'obvious'.

Where terms are implied by custom and usage in a particular industry, the custom must be so 'well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract'.[78] Courts have tended to strictly apply this test and the introduction of such terms has been exceedingly rare, especially in the context of employment law.[79] It may, therefore, be difficult to introduce implied terms by custom or usage in contracts relating to on-demand platforms, given the relative novelty of the industry. Instead, the focus of this article's analysis lies in the duty of cooperation, an implied term by law.

B *The Duty of Cooperation*

The duty of cooperation is an accepted implied term by law under the common law in all contracts.[80] As with all implied terms effected by the common law, this term may only be displaced by statute or express terms of the contract.[81] There is a question as to whether the term exists as an implied term in its own right or if the duty is applied in the construction of the contract.[82] However, this debate largely highlights 'taxonomical distinctions which do not necessarily yield practical differences'.[83] For the purposes of this analysis, what is more important is to determine what the duty entails.

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76 *Codelfa Construction* (n 75) 346.

77 *Byrne* (n 75) 446.

78 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 241, quoted in *Byrne* (n 75) 423.

79 Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Rethinking their Rationale' (PhD Thesis, University of Adelaide, 2017) 32–3 ('Terms Implied by Law'); Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 281; Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) 422.

80 See, eg: *Butt v M'Donald* (1896) 7 QLJ 68, 70–1 where Griffith CJ stated that the principle is 'applicable to every contract' and arises by implication; *Barker* (n 74) 189–90 [30]; *Secured Income Real Estate* (n 36) 607.

81 *Barker* (n 74) 185–6 [21].

82 Ibid 186–7 [24]–[25], 189 [29]. See also: Golding, 'Terms Implied by Law' (n 79) 36–8; Wayne Courtney and JW Carter, 'Implied Terms: What is the Role of Construction?' (2014) 31(2) *Journal of Contract Law* 151.

83 *Barker* (n 74) 187 [24].

The duty of cooperation has been expressed in different ways.[84] However, 'the scope of each co-operative duty or standard is ultimately defined through a normative assessment, namely, an assessment of what is necessary and appropriate in terms of protecting the bargain'[85] — '[t]he degree of co-operation warranted is established on a case-by-case basis'.[86] This element of 'necessity' was described by the HC as essential in limiting the courts' judicial law-making powers when implying terms.[87] This concept of 'necessity' has been viewed as encompassing 'more general considerations', having regard to the 'inherent nature of the contract and of the relationship thereby established',[88] particularly in the context of implied terms by law.[89] In fact, for terms implied by law, the test of necessity has been described as 'no more than the imposition of legal duties in cases where the law thinks that policy requires it'.[90]

However, the test of 'necessity' has also been defined narrowly to mean a term where 'absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps be seriously undermined" or the contract would be "deprived of its substance, seriously undermined or drastically devalued"'.[91] Even if the element of 'necessity' is viewed narrowly, interpreting the general duty of cooperation to encompass a duty for workers to cooperate with their platforms in the 'supply of their labour' is natural and logical. If the duty was not interpreted in this way, the inherent value and purpose of the contract would be seriously undermined, as evidenced by the inherent mechanics of these platforms.

C *Interpreting the Duty to Cooperate in On-Demand Platform Agreements*

As mentioned above, the duty to 'cooperate' mirrors a clause in the Administrative Services Agreement that was at the heart of the *Personnel Contracting* decision, that is, an express term to 'cooperate in all respects' with the labour hire agency 'in the supply of labour' to the end client.[92] In *Personnel Contracting*, the plurality

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84 Golding, 'Terms Implied by Law' (n 79) 79; Ryan Catterwell, 'Co-Operation and Prevention in Contract Law' (2023) 47(1) *Melbourne University Law Review* 114, 121–35: the article identified four recognised duties of cooperation in Australia: the 'performance duty' (performing acts reasonably necessary to achieve the contract's objectives); the 'prevention principle' (not preventing or delaying the performance of the contract; the 'benefit duty' (doing all that is reasonably necessary to enjoy the contract's benefits; and the 'negative covenant' (not hindering or preventing fulfilment of the purpose of any express terms).

85 Catterwell (n 84) 116.

86 Ibid 120.

87 *Barker* (n 74) 189 [29].

88 *University of Western Australia v Gray* (2009) 179 FCR 346, 377 [142] ('*Gray*').

89 Jane Knowler and Charles Rickett, 'Implied Terms in Australian Contract Law: A Reappraisal after *University of Western Australia v Gray*' (2011) 37(2) *Monash University Law Review* 145, 149–50.

90 *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322, 348.

91 *Barker* (n 74) 189 [29], quoting *Byrne* (n 75) 450, 453.

92 *Personnel Contracting* (n 2) 175–8 [14], 197 [75].

described Mr McCourt's obligation to cooperate with the labour hire agency, Construct, in the supply of his labour as 'unambiguously central to Construct's business of supplying labour to builders' and that this right to control was advertised to Construct's end clients.[93] To quote the decision:

> The marketability of Construct's services as a labour-hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients. That right of control was therefore the key asset of Construct's business … Indeed, the right of control held by Construct over Mr McCourt explains why there was no need for any contractual relationship between Mr McCourt and [the end client].[94]

The plurality's statements can just as easily be applied to the business structure of Deliveroo and other on-demand platforms. Clients of these on-demand platforms rely entirely on the assumption that the platforms' promises will be kept by 'compliant labour' and it is this ready and ever available workforce that Deliveroo, and other on-demand platforms, advertise.

While Deliveroo is no longer operational in Australia, Deliveroo United Kingdom boasts on the homepage of its website that your favourite food will be 'delivered in a flash' and that '[y]ou'll see when your rider's picked up your order, and be able to follow them along the way. You'll get a notification when they're nearby, too.'[95] Uber Australia advertises their rideshare services with the slogan, 'Request a ride, hop in, and go.'[96] Without an expectation on the part of clients that food will be delivered within stated delivery windows or rides will arrive almost immediately and for the price set by platforms such as Deliveroo and Uber, the business model of such platforms necessarily fails. It is the convenience, reliability, and transparency of these businesses that contribute to its success and this can only be guaranteed where there is close cooperation between platforms and its riders in the supply of their labour.

This view is supported by further findings of the plurality in *Personnel Contracting*, when deciding whether Mr McCourt was running his own business. The plurality drew upon *Lehigh Valley Coal Co v Yensavage* ('*Lehigh Valley Coal*'),[97] a case concerning a coal miner working on a mine site where the mine owner contended that the miner was not his employee. The plurality noted how this contention was mocked by Coxe and Learned Hand JJ in *Lehigh Valley Coal* who said that, if this contention was accepted, the mine owner would not be

> in the business of coal mining at all … It is absurd to class such a miner as an independent contractor … He has no capital, no financial responsibility. He is himself as

93 Ibid 197–8 [76].

94 Ibid.

95 'Deliveroo', *Deliveroo* (Web Page) <https://deliveroo.co.uk/>.

96 'Ride', *Uber* (Web Page) <https://www.uber.com/au/en/ride/>.

97 218 Fed 547 (1914) ('*Lehigh Valley Coal*').

> dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their 'hand', if any one is.[98]

The plurality in *Personnel Contracting* agreed that the judges had highlighted 'the absurdity of the notion that the mine owner was no more than an introduction agency' for their miners.[99] The 'absurd notion' that Deliveroo is a mere introducer of labour, however, is exactly what on-demand platforms like Deliveroo often contend, arguing that they merely match willing contractors to available work.[100] Although Deliveroo required riders to provide their own vehicles, suggesting some capital investment, it is still the riders that provide the work central to the operation of Deliveroo's business and the riders who act at their 'hands'.

To borrow the plurality's reasoning, if the contention of platforms such as Deliveroo is that they are mere matchers of labour, then this would mean that companies such as Deliveroo are not food delivery service companies at all. In short, although the above findings in *Personnel Contracting* were directed toward a different purpose, they demonstrate the centrality of compliant workers, and by extension a duty of cooperation in the supply of workers' labour, to the inherent nature of these platforms' businesses. Without these workers' cooperation in the performance of their duties, the value proposition of these organisations is wholly undermined, and the business is deprived of the compliant labour necessary to perform its main business activities.

The centrality of this duty of cooperation to on-demand service agreements is evidenced by the extensive use of algorithmic management tools as a staple feature of on-demand platforms to facilitate and enforce workers' cooperation.[101] On-demand platforms like Deliveroo employ algorithmic management digital tools to monitor drivers' activities, including any drops in efficiency in delivery times that Deliveroo

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98 *Personnel Contracting* (n 2) 196–7 [69] (Kiefel CJ, Keane and Edelman JJ), quoting *Lehigh Valley Coal* (n 97) 552–3.

99 *Personnel Contracting* (n 2) 196 [70].

100 See, eg: 'How Does Uber Match Riders with Drivers', *Uber* (Web Page) <https://www.uber.com/us/en/marketplace/matching/>; Ipshita Sen, 'How Deliveroo Uses Machine Learning to Power Food Delivery', *Outside Insight* (Web Page) <https://outsideinsight.com/insights/how-deliveroo-uses-machine-learning-to-power-food-delivery/>; Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 13–14.

101 See: Prassl (n 100) 55–8; Mareike Möhlmann et al, 'Algorithmic Management of Work on Online Labor Platforms: When Matching Meets Control' (2021) 45(4) *Management Information Systems Quarterly* 1999, 2006–8; James Duggan et al, 'Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM' (2020) 30(1) *Human Resource Management Journal* 114, 120.

(and Deliveroo alone) considers reasonable.[102] Beyond the mere knowledge of available drivers on the platform, 'effective algorithmic matching also relies on market-level performance or outcome data' that often includes delivery drivers' ratings and the speed with which deliveries are made.[103] This real-time monitoring exerts the pressure necessary to impose discipline and efficiency standards on workers and has been described as an essential component in the success of on-demand platforms.[104]

Drivers may choose when to accept requests and may unassign themselves from a delivery. The express terms of these agreements may even permit drivers to choose their vehicles and routes. However, the algorithm will penalise workers for low acceptance rates, delayed delivery times or frequent cancellations, making it less likely that they will receive work in the future.[105] Customer ratings are also used to monitor drivers' compliance with the platforms' expectations, with workers reporting acute awareness of the importance of maintaining high average ratings to ensure work is filtered towards them when on the app.[106] In essence, 'for most platforms, rather than simply "matching" workers and customers, they instead act as digital work intermediaries [or in other words labour-hire agencies] that use algorithms to tightly manage a large, invisible workforce'.[107] These platforms' algorithms have been described as a 'panopticon' or 'invisible' bosses that discipline and control workers.[108]

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102 See generally: Prassl (n 100) 55–8; Martin Wiener, W Alec Cram and Alexander Benlian, 'Algorithmic Control and Gig Workers: A Legitimacy Perspective of Uber Drivers' (2023) 32(3) *European Journal of Information Systems* 485, 488.

103 Möhlmann et al (n 101) 2005. See also Alessandro Gandini, 'Labour Process Theory and the Gig Economy' (2019) 72(6) *Human Relations* 1039, 1051.

104 Nura Jabagi et al, 'Gig-Workers' Motivation: Thinking Beyond Carrots and Sticks' (2019) 34(4) *Journal of Managerial Psychology* 192, 197; Alex Rosenblat and Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 *International Journal of Communication* 3758; Duggan et al (n 101) 120.

105 Alex J Wood et al, 'Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy' (2019) 33(1) *Work, Employment and Society* 56, 64; Keith Cunningham-Parmeter, 'From Amazon to Uber: Defining Employment in the Modern Economy' (2016) 96(5) *Boston University Law Review* 1673, 1720; Kristine M Kuhn and Amir Maleki, 'Micro-Entrepreneurs, Dependent Contractors, and Instaserfs: Understanding Online Labor Platform Workforces' (2017) 31(3) *Academy of Management Perspectives* 183, 195; Ben Z Steinberger, 'Redefining "Employee" in the Gig Economy: Shielding Workers from the Uber Model' (2018) 23(2) *Fordham Journal of Corporate and Financial Law* 577, 585.

106 Ibid.

107 Duggan et al (n 101) 125. See also Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Hart Publishing, 2022) 104.

108 See, eg: Duggan et al (n 101) 126; Aloisi and De Stefano (n 107) 58; Jamie Woodcock, 'The Algorithmic Panopticon at Deliveroo: Measurement, Precarity, and the Illusion of Control' (2020) 20(3) *Ephemera* 67; Sophia Galière, 'When Food-Delivery Platform

The implications of the algorithm are widely understood by the drivers themselves, with workers of these platforms expressing concerns relating to the constant surveillance, minimal transparency and dehumanisation that comes from knowing their work is subject to the purview of the algorithm.[109] On-demand platforms are increasingly obfuscating their algorithm's decision-making powers and factors for consideration from view, potentially to limit their appearance of control. However, to imply a duty for workers of these platforms to cooperate in the supply of their labour, decision-makers need only be satisfied that such a term is 'necessary', such that, without the term, the contract would 'be rendered nugatory, worthless' or 'deprived of its substance, seriously undermined or drastically devalued'.[110] If successfully argued, this interpretation of the implied duty of cooperation would necessarily fall within the factors of consideration when determining employment status. The parts below discuss how the inclusion of such a duty would be central in finding workers of these platforms to be employees under the common law and statutory test.

IV Retrying *Deliveroo*: The Common Law Test

The duty for workers to cooperate in the supply of their labour was highly influential in characterising the agreement as an employment contract in *Personnel Contracting*. However, the plurality also noted that in *Personnel Contracting* '[t]here was no suggestion that the work Mr McCourt agreed to do would involve the exercise of any discretion on his part, either as to what he would do or as to how he would do it.'[111] This was not the case in *Deliveroo,* as the Full Bench found several express clauses of the agreement pointed towards Mr Franco having more discretion in the conduct of his work.

These terms may give rise to the argument that interpreting the duty of cooperation to extend to the supply of workers' labour would be displaced by the express terms that suggest a level of independence between Deliveroo and its workers. Since terms implied by law are usually presumed to exist, the onus of proof will rest with the party that contests the implication (that is, the obligation to argue a purported

Workers Consent to Algorithmic Management: A Foucauldian Perspective' (2020) 35(3) *New Technology, Work, and Employment* 357, 359; Alex Veen, Tom Barratt and Caleb Goods, 'Platform-Capital's "App-Etite" for Control: A Labour Process Analysis of Food-Delivery Work in Australia' (2020) 34(3) *Work, Employment and Society* 388, 400–1.

109 Mareike Möhlmann and Ola Henfridsson, 'What People Hate about Being Managed by Algorithms, According to a Study of Uber Drivers', *Harvard Business Review* (Web Page, 30 August 2019) <https://hbr.org/2019/08/what-people-hate-about-being-managed-by-algorithms-according-to-a-study-of-uber-drivers>; Rosenblat and Stark (n 104) 3775.

110 *Barker* (n 74) 189 [29], quoting *Byrne* (n 75) 450, 453.

111 *Personnel Contracting* (n 2) 197 [75].

inconsistency would presumably fall to Deliveroo).[112] However, the authors take the view that the express terms can be read alongside the duty for workers to cooperate with their platforms in the supply of their labour, which reveals the true control these platforms exercise over their workers, pointing towards an employment relationship.

Clause 2.3 of Deliveroo's agreement, for example, was found by the Full Bench of the FWC to go beyond typical casual employment relationships, as Deliveroo's workers could also elect where they worked and unassign themselves from deliveries.[113] However, the control, or lack thereof, over workers outside of the supply of their labour is not as relevant. It is the control exercised during the 'supply of [their] labour', and the ability for Deliveroo to allocate who their workers will work for, that point towards Mr Franco being an employee of Deliveroo, factors that were similarly persuasive in *Personnel Contracting*.[114]

The Full Bench also highlighted clauses such as cl 2.5.1, which permitted riders to use 'any route [they] determine to be safe and efficient', and clauses that alluded to riders using their choice of vehicle,[115] as suggesting Mr Franco had a degree of 'control over the mode of performance of [his] work'.[116] However, this discretion can easily be read as being subject to the worker's duty to cooperate with Deliveroo in the supply of their labour, curtailing the discretion that would be afforded to a contractor. For example, while a rider may choose their route and vehicle, if the proposed interpretation of the implied term was accepted, this discretion would be subject to the worker's ability to meet the promised delivery times that the platform unilaterally sets.

Clauses stating that Mr Franco was required to supply his own vehicle, could delegate his tasks, and was required to pay an administrative fee to access Deliveroo's software and invoicing services were also seen as inconsistent with an employment relationship by the Full Bench of the FWC.[117] However, the degree of investment and 'questions of scale can be important and even decisive' when considering the criterion of capital.[118] The equipment at the heart of *Deliveroo*, and most on-demand platforms, is not specialised and likely to be equipment already owned by everyday Australians for their personal use, suggesting limited capital investment.

The required payment of an administrative fee is also perhaps more appropriately characterised as a matter that reflects the 'view by one party (or both) that the

112 JW Carter and Wayne Courtney, 'Implied Terms in Contracts: Australian Law' (2015) 43(3) *Australian Business Law Review* 246, 248; Courtney and Carter, 'Implied Terms: What is the Role of Construction?' (n 82) 153; *Gray* (n 88) 392–3 [205].

113 *Franco* (n 11) 277 [107].

114 *Personnel Contracting* (n 2) 197 [75].

115 See *Deliveroo* (n 10) 281–3.

116 Ibid 276–7 [46].

117 Ibid 277–8 [48]–[51].

118 *Jamsek* (n 7) 283–4 [88]–[89].

relationship is, or is not, one of employment', such as insurance cover or superannuation, or the lack thereof, which 'may be taken into account but are not conclusive'.[119] It was for this reason that the Full Bench disregarded the labelling of Deliveroo's agreement, and the requirement for Mr Franco to pay for tax and insurance and maintain an Australian Business Number, as discussed above.

The Full Bench of the FWC did not apply this same treatment to the 4% administration fee. However, it is difficult to see why it should be treated any differently as it appears to be another formality intended to reflect the platform's view that this was not an employment relationship. Arguably, on the issue of payment, it is more important to consider that Deliveroo had the absolute right in its express terms to set the relevant rates of pay for each task and act as its workers' paymaster. These were among the rights found by the plurality in *Personnel Contracting* to be persuasive in establishing an employment relationship.[120]

Finally, perhaps the most persuasive clause for the Full Bench of the FWC in establishing the agreement as a contractual relationship was the ability for Deliveroo's workers to delegate.[121] It should also be noted that since *Deliveroo*, a recent Full Federal Court decision took a similarly strict stance against the argument that a right to subcontract (ie delegate) was 'hollow' in practice as it was subject to the putative employer's approval.[122] The Court found that 'it is the existence of the rights which is important, not the question of whether they are likely to be or have in fact been exercised'.[123] This finding would suggest that courts may similarly allow for a right of delegation in future agreements to weigh heavily in favour of finding an on-demand platform worker to not be an employee.

However, the coal miner case, *Lehigh Valley Coal*, cited by the plurality in *Personnel Contracting*, involved establishing whether a coal mine owner was the employer of both a miner and their 'helper' — both were ultimately found to be the mine owner's employees.[124] This further supports the possibility that the use of delegates, or 'helpers', does not necessarily preclude a finding in favour of employment. The HC's endorsement of this case is significant, as it was one of the early cases that adopted a purposive approach to characterising workers for the purposes of a protective labour statute.[125] The authors posit that even if a Deliveroo worker acts on the contractual right to delegate their work, an occurrence that is neither

119 *ACE Insurance* (n 58) 153 [37].

120 *Personnel Contracting* (n 2) 196 [71].

121 *Deliveroo* (n 10) 277 [49].

122 *JMC Pty Ltd v Federal Commissioner of Taxation* (2023) 297 FCR 600, 624–5 [80]–[83].

123 Ibid 625 [83], citing *Stevens* (n 2) 24.

124 *Personnel Contracting* (n 2) 195–6 [69].

125 Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 375.

commercially practical nor likely to occur in practice,[126] their delegates can and should be considered employees of these platforms too. Thus, this right to delegate should not in itself negate an employment relationship where the central duty of cooperation in the supply of labour can be made out between the parties.

In short, although Deliveroo's agreement, and likely other service agreements for on-demand platforms, include more express terms pointing towards a contractual relationship than in *Personnel Contracting*, these terms are not necessarily determinative of an independent contractor relationship. If the duty of cooperation encompasses the supply of workers' labour and read alongside the express terms, there are several key factors that would favour finding an employment relationship under the present common law test. Namely, the platform's unilateral right to allocate work, set the relevant rates of pay, act as workers' paymaster, and, crucially, if successfully argued, the obligation for workers to cooperate in all respects with the platform in the supply of their labour (that is, to be subject to the platform's 'control').

V Retrying *Deliveroo*: The Statutory Employment Test

The introduction of the 'employee-like' category for 'digital platform workers' may suggest that their employment status under the *FW Act* is settled. This is significant as the courts have found policy considerations to be relevant

> in negativing the making of an implication, or else in demonstrating that the issues raised by the proposed implication are of such a character or complexity as to make it inappropriate for a court, as distinct from a legislature, to impose the obligation in question.[127]

Therefore, courts may be especially reluctant to consider the duty of cooperation in the context of determining the employee status of these workers under the *FW Act*. However, the statutory test for determining employment requires decision-makers to identify the 'true relationship' between parties. As set out below, the authors contend that the duty of cooperation remains critical to unearthing the true relationship between on-demand platform workers (as opposed to other digital platform workers).

In *Deliveroo*, the Full Bench stated that the following factors would have contributed to Mr Franco being found to be an employee: the operation of the SSB (eventually discontinued); the actual minimal capital investment by Mr Franco; the fact that Mr Franco used branded Deliveroo items that were provided to him and that he was encouraged to use; the reality that Mr Franco never delegated his work and it was never commercially practical to do so (noting the general rule that

126 *Deliveroo* (n 10) 278–9 [53].

127 *Gray* (n 88) 379 [146], citing *Reid v Rush and Tompkins Group Plc* [1990] 1 WLR 212, 220.

Mr Franco was to provide his services personally was eventually removed from later agreements); and the prevalence of unilateral iterations of the contract that 'might be inferred … was done with an eye to maintaining Deliveroo's position that the delivery workers were contractors and not employees'.[128]

Factors such as these would presumably be permitted for consideration by decision-makers when determining employment under the *FW Act* in future cases. It is questionable, however, the extent to which these factors would be persuasive, applicable, or easily proven. The SSB system, for example, had been discontinued by Deliveroo. In any future case, establishing the level of control enacted by these platforms would require evidence of the intricacies of their algorithms, which may be difficult to establish.

Also, while the minimal required capital investment eliminates a factor in favour of finding Mr Franco to be a contractor, it does not necessarily indicate that he was in fact an employee. As for the use of branded items, while this appears to be a similar practice with other on-demand platforms in the food delivery space, all platforms maintain that the use of these items is voluntary.[129] A worker may therefore not necessarily use these items regularly; platforms may eventually stop offering these items to workers, start requiring that workers purchase these items themselves, or even disallow workers from wearing any branded merchandise, as Uber has required of its drivers.[130]

A similar problem arises in relation to the right of delegation.[131] If a worker were to occasionally delegate their work, as they are often entitled to do, they would presumably lose the benefit of this factor in determining their employment status. Finally, while the unilateral revisions to the contract were highlighted by the Full Bench as being rightfully problematic, it is difficult to see how these changes point towards an employment relationship per se.

Ultimately, workers' and platforms' behaviour may vary with each case, and it is likely that platforms will continue to artfully adjust their (and their workers') behaviour, alongside their express contractual terms, to dodge the classification of their workers as employees. Establishing an implied duty for workers to cooperate in the supply of their labour, however, relies only on whether such a right of control

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128 *Deliveroo* (n 10) 278–9 [53].

129 See, eg: 'New Delivery Bags Launching!', *Uber Blog* (Blog Post, 20 August 2023) <https://www.uber.com/en-AU/blog/new-delivery-bags-launching/>; *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246, 252 [11]; 'The New Dasher Roadmap', *DoorDash Dasher Support* (Web Page) <https://help.doordash.com/dashers/s/article/New-Dasher-Roadmap?language=en_AU&ctry=AU&divcode=VIC>.

130 *Nawaz* (n 41) 145 [33].

131 See, eg: 'Nominating Someone to Deliver for You', *Uber Blog* (Blog Post, 3 February 2023) <https://www.uber.com/en-AU/blog/nominating-someone-else-to-deliver-for-you/>; 'Independent Contractor Agreement', *DoorDash* (Web Page) [10.1] <https://help.doordash.com/legal/document?type=dx-ica&region=AU&locale=en-AU>.

is 'necessary' for the efficacy of the parties' contractual relationship. This question is not affected by factors such as the presence, or lack thereof, of uniforms, the occasional delegation of work, or the intricacies of each platform's algorithms. Therefore, while the statutory test for determining employment states that the terms of the contract will not be the only factor that is considered, its terms, both express and implied, can and should continue to play an important part in the classification of workers.

VI Conclusion

Deliveroo has ceased operations in Australia and the argument to consider the scope of the implied duty of cooperation in the context of on-demand platform agreements has yet to be tested. However, this legal argument needs to be presented and explored. The amendments to the *FW Act* may suggest that any matter that would affect the employment status of digital platform workers is best left to the legislature. However, the consideration of an implied term that would reflect a more accurate representation of the parties' relationship aligns with the broader intentions of the amendments to the *FW Act* to legislate a statutory test for determining employment based on the true nature of the parties' relationships. Moreover, establishing a worker's employment status under the common law remains an open and important point of consideration in various other legal contexts such as tort, taxation, superannuation, and workers' compensation — all of which have yet to be considered by Parliament.

A clear statement that all digital platform workers are contractors across all legal domains may reduce the potential for ambiguity. However, this must be weighed against the fairness and accuracy of such an approach. If the proposed implied duty of cooperation is 'necessary' to give effect to service agreements for on-demand platforms and the inclusion of this term gives rise to a finding that such workers are employees, then this is a decision that is open to decision-makers. This would be in keeping with the approach adopted by Gageler and Gleeson JJ (now, Gageler CJ) in *Personnel Contracting* that, unlike the majority, defended the examination of the totality of the relationship when applying the multi-factorial test, stating that through this approach, 'the common law has shown itself to be "sufficiently flexible to adapt to changing social conditions"'.[132]

If examining only the express terms of these contracts, companies like Deliveroo could maintain that drivers have extensive autonomy by continuing to leave the existence of these algorithms and its functions out of the terms of the contract. Where post-contractual conduct is considered, as will be permitted under the statutory test in the *FW Act,* such an examination will also require an analysis of each worker's circumstances. This analysis may turn on the facts of each case,

132 *Personnel Contracting* (n 2) 211–12 [120] (Gageler and Gleeson JJ), quoting *Stevens* (n 2) 29. Justice Gageler was appointed Chief Justice with effect from 6 November 2023.

and will require overcoming evidentiary challenges such as obtaining access to platforms' algorithmic decision-making tools. It is therefore critical that the duty for workers to cooperate with their platforms in the supply of their labour is deemed within the scope of the implied duty of cooperation for all service agreements of on-demand platforms. If successful, this duty would clearly illuminate the reality of the parties' relationship as one that is subject to extensive control, warranting the workers of these platforms to be considered employees.

Deliveroo demonstrates how examining only the express terms of a contract and post-contractual conduct can create the illusion of an independent contractor relationship. This needs to be challenged. The potential for implied terms to influence classifications under the common law and the *FW Act* must also be explored, so that on-demand platform workers' classification as independent contractors or 'employee-like' is not a given. It will not necessarily be the case, however, that all digital platform workers would be considered employees. The gig economy is diverse and varied, and includes platforms that genuinely support independent contractors who will benefit from the standard setting measures under the *FW Act*. The arguments put forward in this article accommodate and respect this distinction in the employee versus contractor debate by limiting focus to on-demand platform workers.

In conclusion, the authors argue that it is possible to unsettle the classification of on-demand platform workers as independent contractors through the examination of implied terms. The obligation for workers to cooperate with their respective platforms in the supply of their labour should be emphasised as an implied term by law across all services agreements for on-demand platforms. This obligation is essential to these platforms' viability, as evidenced by the algorithmic management tools used to enforce and oversee the performance of this obligation. The consideration of this implied duty would demonstrate the substantial right of control that these platforms have over their workers and tilt the scales towards finding the agreement representative of an employment relationship. It is hoped that the article has highlighted the legitimacy and fairness of classifying these workers as employees and the important potential for implied terms in securing workers' entitlements and protections in Australia and that this is given due consideration by the legislature and decision-makers.

*Joel Lisk**

REGULATION OF SPACE ACTIVITIES: THE AUSTRALIAN APPROACH

Abstract

The regulation of space is a complex topic, given the several competing regulatory frameworks, approaches and interests that operate across different States. In this regard, international law primarily governs the rights, obligations and behaviours of States, whereas domestic law governs public bodies and regulates the activities of non-government entities subject to a State's jurisdiction. The international and domestic legal frameworks do not always align, and nor do they need to. Each level of regulation has also been created with different interests in mind. Over the past decade the Australian space sector has blossomed, with private startups having been able to firmly establish themselves and carve out a place in the international space economy. However, the activities of non-government entities need to be regulated. This article first describes the current characteristics of the international space sector and then considers two of the regulatory pressure points for space businesses in Australia: the breadth of the laws that apply to space activities, and the positioning of the relevant regulatory bodies. This article concludes that there is a significant lacuna in specific Australian regulatory frameworks for space activities and that the position of the relevant regulatory agency is clouded with uncertainty.

I Introduction

Outer space might be described as an unending void — but it is not devoid of regulation. Norms of behaviour began to develop the instant humanity ventured beyond the atmosphere via rockets and artificial satellites. International laws followed quickly thereafter. The first binding treaty governing

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outer space, the *Outer Space Treaty*,[1] was concluded in 1967, a decade after the former Union of Soviet Socialist Republics ('USSR') placed Sputnik-1 into low earth orbit ('LEO'). While the focus at the time was on State activities — that is, government-funded activities undertaken in the national interest — the private sector understood the opportunities that outer space provided. Over the decades that followed, space activities moved from mere science fiction and aspirational dreams to commercial reality, with outer space activities in the 2010s and 2020s (especially in the United States ('US')) now dominated by the private sector. As with other high-technology sectors, regulation plays an important role in the behaviour of non-government entities. The regulation of private activities in outer space is complicated by the international obligations of States, including the obligation to authorise and supervise non-government entities operating in outer space.[2] It is not uncommon for States to now have regulations that contemplate the activities of private entities in outer space. The format used is typically a licensing framework that places a prohibition on certain conduct accompanied by the ability to seek a licence permitting an entity to engage in the otherwise prohibited conduct. The content and precise obligations within these frameworks can vary significantly across States.[3] These domestic legal frameworks directly affect the private entities that need to comply with them.

In recent years, Australia has seen a rapid build-up in the size and capabilities of its private space sector. This led to amendments to Australia's regulatory framework for private space activities and the creation of an Australian Space Agency. This article will critically engage with the characteristics of the private space sector in Australia, the legislative frameworks that apply to its activities and the positioning of the relevant regulatory authorities. Ultimately, this article will conclude by highlighting risks associated with operational certainty for space-focused businesses in Australia now and into the future. While the Australian law was inspired by efforts in other jurisdictions, the primary legislative instrument, the *Space (Launches and Returns) Act 2018* (Cth) ('*S(L&R)A*'), is narrow and creates a substantive regulatory lacuna not seen in other jurisdictions. Further, this article will also highlight uncertainty associated with the regulatory agency and its deviation from emerging international practices.

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1 *Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*').

2 Ibid art VI.

3 For example, the *Laki Avaruustoiminnasta* [tr Finlex, Act on Space Activities] (Finland), No 63 of 2018 and *Regulation of the Space Sector* (United Arab Emirates), Federal Law No 12 of 2019 regulate many of the same activities and use a broadly similar approach, but the details differ.

II Space and Satellites

LEO, a region of outer space, has been heavily utilised by humans (either in person or remotely) since the 1957 launch of Sputnik-1 by the USSR. Moreover, humans have had a continuous physical presence in LEO since 2000 through the occupation of the International Space Station. Broadly, LEO is considered to be the region between the lowest sustainable orbit,[4] and an altitude of approximately 2,000 km above mean sea level.[5] The use of LEO for commercial purposes has rapidly expanded in recent times, aligning with the efforts of participants in the 'New Space' economy.[6] Weinzierl described the mode of New Space as seeing high-net-wealth individuals using 'their wealth to overcome high fixed-cost barriers to entry' in order to develop new approaches to technology,[7] which effectively opened LEO (and space more generally) to a larger number of businesses and entrepreneurs. These activities have led to a rapid reduction in the costs of reaching space. For example, Weinzierl reported that the estimated cost per kilogram to launch a payload to the International Space Station on the NASA-operated Space Shuttle was USD272,000, but comparative private sector costs were, in 2017, in the range of USD89,000 to USD139,000 per kilogram for services provided by SpaceX and Orbital Sciences Corporation (now a part of Northrop Grumman Space Systems), respectively.[8] A 2017 US Government Accountability Office report cited substantially lower costs for reaching LEO, with SpaceX levying USD2,864 per kilogram for launches on its Falcon 9 launch vehicle compared with USD9,514–USD16,866 per kilogram levied by the established private launch corporation United Launch Alliance for launches on its Atlas V launch vehicle.[9] Thus, the actions of entrepreneurs have revolutionised the ability of entities to venture into LEO. As reported by Scoles with some scepticism, SpaceX CEO and founder Elon Musk touts that the cost to launch payloads on some next generation launch vehicles under development could be as low as USD10 per kilogram.[10]

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4 The altitude of the lowest sustainable orbit varies according to the speed and nature of the satellite and the atmospheric conditions at a specific point in time. On the basis of these factors, the lowest sustainable orbit has a perigee (lowest point) of ~80 km above mean sea level: Jonathan C McDowell, 'The Edge of Space: Revisiting the Karman Line' (2018) 151 *Acta Astronautica* 668, 676.

5 Inter-Agency Space Debris Coordination Committee, '*IADC Space Debris Mitigation Guidelines*', Doc No IADC-02-01 Rev 3, June 2021, 8.

6 Matthew Weinzierl, 'Space, the Final Economic Frontier' (2018) 32(2) *Journal of Economic Perspectives* 173, 177.

7 Ibid.

8 Ibid 181, citing Edgar Zapata, 'An Assessment of Cost Improvements in the NASA COTS — CRS Program and Implications of Future NASA Missions' (Conference Paper, AIA Space 2017 Conference, 12 September 2017) 8.

9 United States Government Accountability Office, *Surplus Missile Motors: Sale Price Drives Potential Effects on DOD and Commercial Launch Providers* (Report No GAO-17-609, August 2017) 30.

10 Sarah Scoles, 'Prime Mover' (2022) 377(6607) *Science* 702, 703.

The reduction in launch costs has been matched by a shift towards smaller and more cost-conscious satellites.[11] Small satellites, unlike their larger counterparts in more distant orbits, are generally designed and manufactured to serve a single specific, and clearly defined purpose. Larger satellites are designed and equipped with the latest technologies to ensure that they have a high capacity and are capable of operating for one or more decades in more distant orbits. The size of these satellites allows the inclusion of large communications arrays, sensors and cameras, and other equipment that simply would not fit on small satellite platforms.[12] Although these large platforms allow the placement of the best and latest technology into orbit, significant costs are associated with these activities (including increased launch, manufacturing, ground technology, transport and insurance costs). Nevertheless, their lifespan and capacity to provide services to up to 43% of the globe from geostationary orbit provides a justification for the initial input costs for their manufacture and deployment.[13] Comparatively, highly advanced sensors and capabilities are still used in small satellites, with the increased reliance on commercial off-the-shelf componentry and technologies resulting in a lower cost profile.

The past decade has seen the emergence of constellations of satellites (multiple satellites working together to deliver a single service) on a new scale. Commonly referred to as 'mega-constellations', there are currently constellations being launched that require hundreds to tens of thousands of individual satellites to be deployed before a service can be offered — the most prominent being SpaceX's Starlink network.[14] Several other mega-constellations are planned by companies including Amazon and Boeing.[15]

In addition to the development of satellite constellations in LEO, other activities are being proposed for space. These include: the promise of in-orbit servicing — where one satellite will provide services such as repair and refuelling to another; active debris removal — where debris and derelict satellites are physically removed from orbit instead of being left to return naturally; space tourism; and in-orbit assembly

11 See National Aeronautics and Space Administration, *CubeSat 101: Basic Concepts and Processes for First Time Cube Sat Developers* (Guide, October 2017) 4.

12 See also Jason Rainbow, 'Falcon Heavy Sends Jupiter-3 Broadband Giant towards Geostationary Orbit', *SpaceNews* (online, 29 July 2023) <spacenews.com/falcon-heavy-sends-jupiter-3-broadband-giant-toward-geostationary-orbit/>.

13 Davis Wright, Laura Grego and Lisbeth Gronlund, *The Physics of Space Security* (American Academy of Arts and Sciences, 2005) 43.

14 Andreas Witte, 'A Tragedy of the Night Sky? International Law as a Regulator for Satellite Megaconstellations' (2020) 45 *Annals of Air and Space Law* 307, 312–13; Ruth Pritchard-Kelly, 'WRC-23 on the Horizon: Large Satellite Constellations, ITU Issues and Industry Perspective' (2023) 48 (Special Issue) *Air and Space Law* 179.

15 H Austin Simpson, 'Regulating Science Fiction: The Regulatory Deficiencies in a Rapidly Growing Commercial Space Industry' (2022) 87(4) *Journal of Air Law and Commerce* 759, 770–1.

and manufacturing activities.[16] These changing and emerging activities have the potential to stress the regulatory frameworks that currently apply to space activities.

III Australia in Space

In recent years, Australia has taken an ambitious approach to increasing its role in the international space economy and enhancing how it can exploit space for civil and military purposes.[17] Australia has not traditionally been considered a 'space power' in the international context.[18] Despite this, Australia has a long history of involvement in other States' space activities.[19] Given Australia's geography and the volume of unoccupied land mass, it has played host to large receiver and broadcasting ground stations that are essential for conducting space activities, such as the famous use of the Parkes Observatory to assist in receiving and broadcasting television signals from the 1969 Moon landing.[20] More recently, Australia was announced (along with South Africa) as the host of the Square Kilometre Array.[21] Australia also hosts one of the three nodes of the NASA Deep Space Network.[22]

Beyond providing ground services, Australia did play a role in the early space launch sector, with a military testing range near Woomera, South Australia, being a primary hub of activity.[23] In 1967, using technology provided by the US and the United Kingdom ('UK'), Australia launched its own satellite, WRESAT, into orbit.[24] This accomplishment made Australia the third nation to build and launch a

16 See also National Science and Technology Council (US), *In-Space Servicing, Assembly, and Manufacturing National Strategy* (April 2022) <www.whitehouse.gov/wp-content/uploads/2022/04/04-2022-ISAM-National-Strategy-Final.pdf>.

17 See: Namrata Goswami, 'Setting Australia's Space Priorities', *Australian Strategic Policy Institute: The Strategist* (Web Page, 9 February 2023) <www.aspistrategist.org.au/setting-australias-space-priorities/>; Malcolm Davis, 'Australia Needs to Aim High with Space Strategic Update', *Australian Strategic Policy Institute: The Strategist* (Web Page, 11 March 2022) <www.aspistrategist.org.au/australia-needs-to-aim-high-with-space-strategic-update/>.

18 Cassandra Steer, 'Australia as a Space Power: Combining Civil, Defence and Diplomatic Efforts' (National Security College Policy Options Paper No 19, May 2021) 3.

19 See ML James, 'Into Space from Australia: The Early Days' (Conference Paper, National Conference on Engineering Heritage, 3–5 December 1990) 53–5.

20 See ibid 57.

21 See 'Construction Begins on SKA Telescope in Australia and South Africa', *Department of Industry, Science and Resources* (Web Page, 6 December 2022) <www.industry.gov.au/news/construction-begins-ska-telescopes-australia-and-south-africa>.

22 Heather Monaghan, 'What is the Deep Space Network?' *National Aeronautics and Space Administration* (Web Page, 30 March 2020) <www.nasa.gov/directorates/heo/scan/services/networks/deep_space_network/about>.

23 See generally James (n 19).

24 Ibid 58.

satellite from its own territory (after the USSR and the US).[25] Woomera also hosted 10 launches undertaken by the European Launcher Development Organisation in 1964–70. All of these activities led to the Woomera range being described at the time as the 'world's second most heavily used launch site, after Cape Canaveral'.[26] Despite being a centre of space activity during the 1960s and 1970s, Australia quickly fell out of relevance for the space industry. The late 1990s saw a potential resurgence in the form of interest from launch service providers to use Australia as a base for launching, but the interest never eventuated.[27]

Fast forward to the early 2010s, Australian businesses dived back into the space sector buoyed in part by the significant increase in activity and investment in private space ventures in other Western nations (principally the US). A report commissioned by the Australian Government, which was delivered in 2017 as part of a review of Australia's space capability, purported to identify 388 companies, 56 education and research organisations and 24 government agencies that had some sort of space capability.[28] On this basis, it was estimated that at the time of the report there were approximately 10,000 full-time equivalent positions in the Australian space industry sector with an associated revenue of between AUD3 billion and AUD4 billion.[29] The *2018 Review of Australia's Space Industry Capability*, prepared by an Expert Reference Group, set a goal of having an Australian space industry with revenues between AUD10 billion and AUD12 billion by 2030 and to add an additional 10,000 to 20,000 full-time positions to this sector.[30]

Following the establishment of the Australian Space Agency in June 2018, it prepared and released an Australian Civil Space Strategy for 2019–28 in April 2018.[31] While

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25 Steven Freeland, 'Sensing a Change? The Re-Launch of Australia's Space Policy and Some Possible Legal Implications' (2010) 36(2) *Journal of Space Law* 381, 383–4.

26 Senate Standing Committee on Economics, Parliament of Australia, *Lost in Space? Setting a New Direction for Australia's Space Science and Industry Sector* (Report, November 2008) 25 [4.1].

27 See Joel Lisk and Melissa de Zwart, 'Watch This Space: The Development of Commercial Space Law in Australia and New Zealand' (2019) 47(3) *Federal Law Review* 444, 446.

28 ACIL Allen Consulting, *Australian Space Capability: A Review* (Report to Department of Industry, Innovation and Science, October 2017) 1 <https://www.space.gov.au/sites/default/files/2023-11/australian_space_industry_capability_-_a_review_0.pdf>.

29 Ibid 2.

30 Expert Reference Group, *Review of Australia's Space Industry Capability* (Report, Commonwealth of Australia, March 2018) 5 <https://www.space.gov.au/sites/default/files/media-documents/2023-11/review_of_australias_space_industry_capability_-_report_from_the_expert_reference_group.pdf> ('*Review of Australia's Space Industry Capability*').

31 Australian Space Agency, *Advancing Space: Australian Civil Space Strategy 2019–2028* (April 2019) <https://www.space.gov.au/sites/default/files/media-documents/2023-11/Advancing%20Space%20Australian%20Civil%20Space%20Strategy.pdf>.

this strategy was not reconfirmed following a change of federal government in 2022,[32] it worked to reaffirm Australia's commitment to grow its space sector and set out the Australian Space Agency's mission to focus its work across four themes: international; national; responsible; and inspire.[33] In recent years, the Australian Space Agency has prepared additional policy documents called 'roadmaps' in areas including communications technology, robotics and Earth observation.[34] The purpose of these roadmaps is to publicly plot future actions by this Agency to support the activities of the Australian space sector.

IV The Space-Specific Laws We Have

The rapid growth of the space sector in Australia (and internationally) poses several questions about the levers that can be used to ensure private entities operate in a responsible and sustainable manner. LEO and beyond is far from a lawless domain. Laws specifically applying to outer space have existed in a clearly binding form since at least 1967, following the entry into force of the *Outer Space Treaty*, and arguably under custom from the moment humanity reached orbit in the 1950s.[35] The introduction of written international law was quickly followed by domestic laws that operate within States, overcoming the limitations inherent in the constitutional arrangements in many States that prevent the direct imposition of international law on non-government entities.[36] Regardless, not all laws apply to space activities, nor are all laws for space relevant to every activity that could possibly take place in LEO and beyond.

A *International Law*

International law applicable to space activities is often the most prominent of the laws that expressly consider outer space. International treaties focused on space activities were developed in the 1960s and the 1970s following humanity's race to

32 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 26 October 2023, 100 (Meghan Quinn).

33 Australian Space Agency, *Advancing Space: Australian Civil Space Strategy 2019–2028* (n 31) 2.

34 See, eg: Australian Space Agency, *Communications Technologies and Services Roadmap 2021–2030* (1 December 2020) <https://www.industry.gov.au/sites/default/files/2024-02/communications-technologies-and-services-roadmap-2021-2030.pdf>; Australian Space Agency, *Robotics and Automation on Earth and in Space Roadmap 2021–2030* (24 January 2022) <https://www.industry.gov.au/sites/default/files/2024-02/robotics-and-automation-on-earth-and-in-space-roadmap-2021-2030.pdf>.

35 *Outer Space Treaty* (n 1); Francis Lyall and Paul B Larsen, *Space Law: A Treatise* (Routledge, 2nd ed, 2018) 38–9, 63–73.

36 See, eg: *Victoria v Commonwealth* (1996) 187 CLR 416; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224–5 (Mason J); *United States v Belmont*, 301 US 324, 331 (1937); *United States v Postal*, 589 F 2d 862, 876–7 (5th Cir, 1979); *Medellin v Texas*, 552 US 491, 508 (2008).

LEO and the Moon. These laws are principally contained within five multilateral treaties that are binding upon their signatories. The first of these treaties, the *Outer Space Treaty* of 1967, followed a declaration of principles issued by the United Nations General Assembly in 1963, and substantially replicates the content of that declaration.[37] The three treaties that followed the *Outer Space Treaty*, that is, the 1968 *Rescue Agreement*,[38] the 1972 *Liability Convention*,[39] and the 1975 *Registration Convention*,[40] primarily stand as elaborations of the provisions of the *Outer Space Treaty* and the 1963 declaration that preceded it. As at 1 January 2022, there were 112 full parties and 23 signatories to the *Outer Space Treaty*.[41] The rates of adoption for the remaining treaties trend downwards — there are 73 full parties and three signatories to the 1975 *Registration Convention*.[42] The final 'space treaty', the 1979 *Moon Agreement*, does not enjoy the same level of acceptance as its counterparts — it has only 17 full parties and a further four signatories, following Saudi Arabia's withdrawal from this instrument in early 2023.[43] The *Moon Agreement* departs from its predecessors by attempting to introduce new provisions and laws for space activities on the Moon and other (non-Earth) celestial bodies. Some States, although involved in drafting the *Moon Agreement*, have rejected it entirely, with US President Donald Trump signing an executive order in 2020 describing the *Moon Agreement* as not being 'an effective or necessary instrument to guide nation states regarding the promotion or commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies.'[44]

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37 *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962 (XVIII), UN Doc A/RES/1962(XVIII) (13 December 1963).

38 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968) ('*Rescue Agreement*').

39 *Convention on International Liability for Damage Caused by Space Objects*, opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972) ('*Liability Convention*').

40 *Convention on Registration of Objects Launched into Outer Space*, opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976) ('*Registration Convention*').

41 Legal Subcommittee, Committee on the Peaceful Uses of Outer Space, *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2022*, UN Doc A/AC.105/1260 (19 April 2022), 10 ('*Status of International Agreements*').

42 Ibid; Lisk and de Zwart (n 27) 445.

43 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 21 (entered into force 11 July 1984) ('*Moon Agreement*'); *Status of International Agreements* (n 41); Secretary-General of the United Nations, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies: Saudi Arabia: Withdrawal*, UN Doc C.N.3.2023.TREATIES-XXIV.2 (Depositary Notification) (5 January 2023).

44 Exec Order No 13914 'Encouraging International Support for the Recovery and Use of Space Resources' 85 Fed Reg 20381 (6 April 2020).

Recent decades have seen a departure from the creation of traditional-form multilateral treaty instruments for materials agreed upon by consensus and adopted by the United Nations General Assembly. These materials are non-binding in nature but provide important contributions to the body of law applicable to space activities overall.[45] The most recent of these, the *Guidelines for the Long-term Sustainability of Outer Space Activities*, clearly sets out a range of concepts inspired by the established space treaty framework and the activities of States. These guidelines, if used into the future, can become subsequent State practice and influence the substantive interpretation and application of the space treaty framework.[46]

Sitting separately from 'space-focused' material are the laws and mechanisms associated with the international regulation of spectrum. The International Telecommunications Union ('ITU') was originally established to regulate and create standards around the use of emerging (in the late 1800s) communications technologies.[47] Its role has grown and evolved as technology has. As a specialist agency of the United Nations, the ITU enjoys one of the highest levels of State participation. At present, the ITU is constituted under an international convention, and it administers a range of subsidiary instruments.[48] The *Constitution of the International Telecommunications Commission* states, among other matters, that the ITU is tasked with 'maintain[ing] and extend[ing] international cooperation … for the improvement and rational use of telecommunications of all kinds' and in the course of doing this, it shall 'effect allocation of bands of the radio-frequency' for 'space services' in a way that 'avoid[s] harmful interference between radio stations of different countries'.[49] Further, the ITU is tasked with coordinating efforts to 'eliminate harmful interference between radio stations of different countries' while also improving the use of radiofrequency spectrum.[50] As at the time of writing, with one exception, every member State of the United Nations is a member of the ITU.[51]

45 Steven Freeland, 'The Role of "Soft Law" in Public International Law and Its Relevance to the International Legal Regulation of Outer Space' in Irmgard Marboe (ed), *Soft Law in Outer Space: The Function of Non-Binding Norms in International Space Law* (Bohlau Verlag Gmbh and Cie, 2012) 9.

46 Ibid.

47 Lyall and Larsen (n 35) 189–93.

48 Ibid 194–5.

49 *Constitution and Convention of the International Telecommunications Union*, opened for signature 22 December 1992, 1825 UNTS 330 (entered into force 1 July 1994) art 1(1)–(2).

50 Ibid art 1(2)(b).

51 The United Nations and ITU both have 193 members. The Republic of Palau is not a member of the ITU, and the Vatican is a member of the ITU but only an observer State within the United Nations. See 'List of ITU Member States', *International Telecommunications Union* (Web Page, 2023) <www.itu.int/en/ITU-R/terrestrial/fmd/Pages/administrations_members.aspx>.

B *Domestic Law for Space — Two Pillars*

Domestic law is generally more specific, targeted and narrow than international law. Australia has a range of laws that can be applied to operators of LEO assets. This Part summarises the two 'pillars' of space-related laws in Australia: space and spectrum. Both pillars contain a set of laws that regulate a key component of space activities. The pillar on 'space' focuses on launch and return activities — the acts of putting and bringing back something from space — while 'spectrum' is a broader area of law that regulates the use of radiofrequency — or in simpler terms, regulates the way things communicate with each other wirelessly.

A State may need or elect to introduce legislation for numerous reasons, such as to achieve public policy objectives, address 'harms' (however characterised) or mitigate risks.[52] In the context of outer space, there is the additional need to address international law. For Australia, while international law might not be immediately binding on entities other than the Commonwealth itself,[53] constitutional arrangements and domestic laws are not a reason for the State itself to not be in compliance with international obligations.[54] This gives rise to an additional need for domestic laws.

1 *Space-Specific Laws*

There is very little in the way of laws dedicated to the topic of space activities in Australia. The primary instrument on space activities is the *S(L&R)A*. The *S(L&R)A* is narrow in its focus, only applying to launch and return activities, and establishing the mechanisms for the payment of compensation in case of damage by a space object.[55] While described as a 2018 law, the *S(L&R)A* is not a recent instrument, it was earlier known as the *Space Activities Act* between its introduction in 1998 and amendment in 2018.[56]

The *S(L&R)A* has remained largely unchanged in its substance since its introduction in 1998, with amendments in 2001, 2002 and 2018 merely tinkering with the

52 Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 61–2.

53 See above n 36.

54 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 48, quoting *Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (Judgment)* (1932) PCIJ (ser A/B) No 46, 167, and *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* (1932) PCIJ (ser A/B) No 44, 24.

55 *Space (Launches and Returns) Act 2018* (Cth) s 4 ('*S(L&R)A*').

56 *Space Activities Amendment (Launches and Returns) Act 2018* (Cth) sch 1 cl 3.

operation of certain provisions.[57] At its core, the *S(L&R)A* can be characterised as a traditional licensing regime. The law specifies a range of prohibited activities — including launching a space object from Australia or operating a launch facility.[58] This is supplemented by a permit system that allows individuals, corporations and foreign persons to obtain authorisations to conduct the otherwise unlawful activities.[59] The six classes of authorisation are as follows:

- Australian launch permit: authorising launches from Australia's geographic jurisdiction.
- Launch facility licence: authorising the operation of a launch facility within Australia.
- High-power rocket permit: authorising the launch of high-power rockets from Australia's geographic jurisdiction.
- Overseas payload permit: authorising the launch of Australian owned/controlled payloads on launches being conducted outside of Australia.
- Return authorisation: authorising the return of space objects from space to a place within Australia's geographic jurisdiction.
- Authorisation certificate: authorising an activity to occur without the need for another authorisation category.

It may be apparent from the above, but is necessary to note, that payloads being placed into outer space on vehicles launching from Australia do not require specific authorisation provided the launch itself is licensed.[60]

The *S(L&R)A* is administered by the Minster responsible for the Department of Industry, Science and Resources ('DISR').[61] At the time of writing, this is the Minister for Industry and Science (noting that multiple Ministers have responsibility for the DISR).[62] In practice, the *S(L&R)A* is administered by the Australian Space Agency, a non-statutory agency within the DISR that is led by a 'Head of Agency'.[63]

The use of the *S(L&R)A* has increased in recent years, driven by the emergence of new and innovative Australian businesses attempting to enter the space sector.

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57 House of Representatives Standing Committee on Industry, Innovation, Science and Resources, Parliament of Australia, *The Now Frontier: Developing Australia's Space Industry* (Report, November 2021) 95–7 [4.27]–[4.32] ('*Now Frontier Report*').

58 *S(L&R)A* (n 55) ss 10–15A.

59 Ibid.

60 See *Space (Launches and Returns) (General) Rules 2019* (Cth) s 50 ('*Space (General) Rules*').

61 See Governor-General of the Commonwealth of Australia, *Administrative Arrangements Order* (3 August 2023) pt 11.

62 Ibid.

63 Australian Space Agency, 'Regulating Australian Space Activities', *Department of Industry, Science and Resources* (Web Page) <www.industry.gov.au/australian-space-agency/regulating-australian-space-activities>.

This increase is reflected in the progressively increasing numbers of licenses being issued by the Minister through the Australian Space Agency.[64]

There are no other Australian laws dedicated specifically to space activities.

2 *Spectrum*

Australia has several statutory instruments relevant to the use of radiofrequency spectrum, the primary being the *Radiocommunications Act 1992* (Cth). While this law has always been focused on the use of radiofrequency spectrum in Australia, recent amendments to it have also seen its objects amended to reflect the country's changing technological landscape and have thus been more focused on promoting the 'long-term public interest derived from the use of spectrum' and facilitating the 'efficient planning, allocation and use of the spectrum' for commercial, defence, national security and non-commercial purposes.[65]

The *Radiocommunications Act 1992* (Cth) creates a range of licences that allow non-government entities to utilise radiofrequency spectrum.[66] Each type of licence grants a different bundle of rights to the licence holder. Spectrum licences entitle holders to the exclusive use of the radiofrequency spectrum or a portion of it.[67] These classes of licence have an almost proprietary nature, but can be prohibitively expensive and are normally reserved for terrestrial communications networks (ie mobile phone networks) and broadcasting services (ie television services). This type of licence has not been used by orbital infrastructure operators to provide services. The more relevant licence type, apparatus licences, allows the use of specific transmitters and receivers.[68] This type of licence is more restrictive than a spectrum licence, but is more suited to operations involving satellite infrastructure. This type has several sub-categories, including space licences, space-receive licences, Earth licences and Earth-receive licences, each of which has some relevance to satellite communications activities.[69] Most apparatus licences are issued on a 'no interference' basis,[70] meaning they are more restrictive than spectrum licences, but

64 See Australian Space Agency, 'Minister Decisions about Space Activities', *Department of Industry, Science and Resources* (Web Page) <www.industry.gov.au/australian-space-agency/regulating-australian-space-activities/minister-decisions-about-space-activities>.

65 *Radiocommunications Act 1992* (Cth) s 3 ('*Radiocommunications Act*'), as amended by *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020* (Cth).

66 *Radiocommunications Act* (n 65) s 45.

67 See ibid pt 3.2.

68 Ibid pt 3.3.

69 See *Radiocommunications (Interpretation) Determination 2015* (Cth) sch 1.

70 'No interference basis' means that holder of the apparatus licence undertakes to share the use of the radio frequency and take steps to avoid interfering with the activities of others using the same radio frequency: see: *Radiocommunications (Communication with a Space Object) Class Licence 2015* (Cth) s 8(1); Australian Media and Communications Authority, *Apparatus licence fee schedule* (April 2024) 53.

they do not involve the same level of financial investment.[71] Last, class licences are a broad licence type issued by the regulator that allow anyone to use radiofrequency devices that comply with the standards specified in the class licence instrument.[72] As communications with spacecrafts are essential to their operations and usability, businesses in Australia that intend to communicate with their satellites or businesses overseas that wish to deliver orbital services from orbit must obtain a licence (ie an apparatus licence) or comply with the relevant class licence, prior to commencing operations.

The *Radiocommunications Act 1992* (Cth) is administered by the Australian Communications and Media Authority ('ACMA'), a statutory agency established under its own legislative instrument, the *Australian Communications and Media Authority Act 2005* (Cth). The ACMA is also responsible for other legislation, such as the *Telecommunications Act 1997* (Cth), the *Broadcasting Act 1992* (Cth) and the *Spam Act 2001* (Cth).[73]

C *Other Laws*

Although outer space may be physically distant from Australia, Australian laws still apply to a broad range of activities irrespective of their location. Australian businesses, if using a corporate structure, are subject to the *Corporations Act 2001* (Cth) that governs their operations and regulates their fundraising activities. The *Income Tax Assessment Acts* of 1936 and 1997 separately specify (in addition to other laws) the taxes applicable to businesses in Australia. The *Patents Act 1990* (Cth), the *Copyright Act 1968* (Cth) and the *Trade Marks Act 1995* (Cth) all play a role in regulating how businesses use and protect intellectual property while engaged in business activities. The *Competition and Consumer Act 2010* (Cth) regulates the manner in which businesses operate within a market with respect to their competitors and customers. The *Defence Trade Controls Act 2012* (Cth) has some effect on the equipment and componentry that can be used as part of a space activity, with restrictions on some space technologies leading to increased regulations.

Some Australian laws do specifically mention space, with an example being the *Personal Property Securities Act 2009* (Cth) that makes an inclusive reference to satellites and other space objects being a form of goods that can have security interests registered against them.[74]

The purpose of setting out these different legal frameworks is to acknowledge that whereas there are laws that clearly relate to space activities (ie launch regulations), there are other laws that affect the conduct of space activities in more discrete

71 *Radiocommunications Act* (n 65) ss 107–8.

72 Ibid pt 3.4.

73 'Our Role in Compliance and Enforcement', *Australian Communications and Media Authority* (Web Page, 25 March 2021) <www.acma.gov.au/our-role-compliance-and-enforcement>.

74 *Personal Property Securities Act 2009* (Cth) s 10 (definition of 'goods').

ways, whether through limitations on equity fundraising imposed through corporation laws or restrictions on access to technology that can be considered dual use or valuable in military settings. These are not the laws that will immediately come to mind when a person thinks of 'space', but they play an essential role in how commercial space activities are undertaken.

D *Foreign Domestic Laws*

In addition to Australian laws that may apply to Australian businesses operating in outer space, the laws of other nations play a significant role in how Australian-led space activities are conducted. Australian businesses that seek to operate in other States need to ensure that they are compliant with the full range of laws that might apply to them. Owing to the nature of space activities and the international framework that governs them, it is common to see multiple States exercise some level of jurisdiction and control over these activities.[75] Accordingly, an Australian business wanting to launch a small satellite from New Zealand may be required to comply with Australian laws applicable to launch and radiocommunications, as well as the New Zealand laws on these same matters.[76] This would be in addition to other areas of compliance, such as import and export clearances and other finance or technology-related laws.

Thus, because of the rapid globalisation of space activities, space businesses need to look beyond Australia and into other jurisdictions to fully appreciate the breadth of laws that apply to them.

V Activities Challenging Regulatory Approaches

Regulation plays an important part in the activities undertaken in LEO and beyond. Having appropriate regulatory structures in place is not typically a key priority of entrepreneurs in a technology-driven sector, but requests for the introduction and maintenance of regulatory frameworks have been a consistent theme for the space sector, starting in the US in the early 1980s.[77] The ongoing view has been that without a clear and certain regulatory framework, it is difficult for private sector operators to seek out the investments required to undertake innovative or non-traditional activities using outer space.[78] It is these future planned activities that are now stressing the limits of existing regulatory frameworks. Part V will now consider several of these challenges for the future of the Australian space sector

75 This arises as a consequence of the *Outer Space Treaty* (n 1) art VIII.

76 *S(L&R)A* (n 55) s 14; *Outer Space and High-altitude Activities Act 2017* (NZ) s 15.

77 See *Future Space Programs*, Hearing before the Subcommittee on Space Science and Applications of the Committee on Science and Technology, 97th US Congress 104–5 (September 1981) (Testimony by David Hannah Jr, President, Space Services).

78 See: ibid; *The Expendable Launch Vehicle Commercialization Act*, Hearing before the Subcommittee on Space Science and Applications of the Committee on Science and Technology, 98th US Congress (18 November 1983, 29 March 1984).

and discuss several of the legal and policy issues that will need to be resolved in the future to fully support the Australian space industry.

A *Scope of Laws Specifically for Space*

As a consequence of the content of the international treaty framework, Australia is obliged to authorise and continually supervise the activities of non-government entities that take place in outer space.[79] This treaty-level obligation created a requirement to which the Australian Parliament had to respond. The particular performance standard for this obligation is unclear, but minimum standards may require a State to place itself in a position whereby it is aware of the activities undertaken by non-government entities and is capable of enforcing standards of behaviour.[80]

In this context, there is a need to examine the scope of the regulatory frameworks in place in Australia that apply directly to space activities and to confirm their role in authorising and supervising the space activities of non-government entities. As explained in Part IV.B.1, the principal space-specific law currently in force in Australia is the *S(L&R)A*. This instrument captures a narrow range of activities associated with getting 'space objects' to and from outer space.

Launch and return activities form an important but minor segment of the larger space industry.[81] The majority of the space industry is focused on developing high-technology capabilities, and the downstream utilisation of space-based assets or space-derived data. This makes the operation of instruments such as the *Radiocommunications Act 1992* (Cth) essential from the communications perspective, despite it not speaking to conduct in orbit more generally.

The *S(L&R)A* was originally developed (as the *Space Activities Act 1998*) in direct response to interest from corporations outside of Australia that sought to undertake launch operations from Australian territory.[82] This limitation was acknowledged by the Australian Parliament in 2018 when it changed the name of the *Space Activities Act 1998* to the *S(L&R)A*, noting that the previous name 'convey[ed] the impression that the legislation address[ed] all space activities undertaken within Australian

79 *Outer Space Treaty* (n 1) art VI.

80 See John Goehring, 'Properly Speaking, the United States Does Have an International Obligation to Authorize and Supervise Commercial Space Activity' (2018) 78(1) *Air Force Law Review* 101 ('Properly Speaking').

81 BryceTech, *2019 Global Space Economy at a Glance* (Report, 5 October 2020); World Economic Forum and McKinsey & Company, *Space: The $1.8 Trillion Opportunity for Global Economic Growth* (Insight Report, April 2024) 44.

82 Lisk and de Zwart (n 27) 446–47.

territory' which was causing 'unnecessary misunderstandings'.[83] The name change for the law occurred to 'more accurately reflect [the law's] scope'.[84]

The predecessor to what is now the *S(L&R)A* was not developed in isolation. The US, the UK, South Africa, Sweden and Norway had all introduced laws that regulated the activities of their nationals prior to Australia's actions.[85] When the proposed *Space Activities Act* was first introduced to the Australian Parliament in 1998, it closely aligned with the scope of the US *Commercial Space Launch Act* (as amended).[86] This was not a coincidence, considering that Australian politicians in the late 1990s stated that US laws acted as inspiration for much of what is now the *S(L&R)A*.[87] While the *Commercial Space Launch Act* was significant for private enterprise in the US, it was narrow and far from the only instrument that affected non-government space activities.[88] The instrument only regulated launch activities and the operation of launch sites within the US or by US citizens irrespective of their location.[89] This was expanded to include re-entry activities in 1998 in response to what appeared to be legitimate developing commercial capabilities to return spacecraft from orbit.[90] While the US *Commercial Space Launch Act* was not the first domestic law regulating commercial space activities on its introduction in 1984 — that honour goes to Norway with its 1969 *Act on Launching Objects from Norwegian Territory etc. into Outer Space*[91] — it certainly had a profound

83 Department of Industry, Innovation and Science, *Reform of the Space Activities Act 1998 and Associated Framework* (Legislative Proposals Paper, 24 March 2017) 10 ('*Reform of the Space Activities Act 1998*'); Steven Freeland, *Public Submissions into the Australian Government's Review of the Space Activities Act* (Analysis Report, August 2016) 108.

84 *Reform of the Space Activities Act 1998* (n 83).

85 *Lov om oppskyting av gjenstander fra norsk territorium m.m. ut l verdensrommet* [tr Frans von der Dunk and Atle Nikolaisen, Act on Launching Objects from Norwegian Territory etc. into Outer Space] (Norway), No 38 of 1969 ('*1969 Norway Act*'); *Lag (1982:963) om rymdverksamhet* [tr UNOOSA, Law (1982:963) on Space Activities] (Sweden); *Commercial Space Launch Act of 1984*, Public L No 98-575, 98 Stat 3055 (1984); *Outer Space Act 1986* (UK); *Law About Space Activity* (Decree No 5663-1, 1993) (Russia); *Space Affairs Act 1993* (South Africa).

86 *Commercial Space Launch Act of 1984*, Pub L No 98-575, 98 Stat 3055 (1984).

87 Commonwealth, *Parliamentary Debates*, Senate, 12 Nosvember 1998, 216 (Rod Kemp).

88 See 'Properly Speaking' (n 80).

89 *Commercial Space Launch Act of 1984*, Pub L No 98-575, §§6(a)(1)–(2), 98 Stat 3055, 3057 (1984).

90 *Commercial Space Launch Act of 1998*, Pub L No 105-303, §102, 112 Stat 2843, 2846–53 (1998).

91 *1969 Norway Act* (n 85); Frans von der Dunk, 'Vikings First in National Space Law: Other Europeans to Follow: The Continuing Story of National Implementation of International Responsibility and Liability' (2001) 44 *Proceedings on the Law of Outer Space* 111.

impact on the commercial space launch sector with its comprehensive consideration of liability, safety and licensing process.

What this background fails to recognise is the wider content of US law relevant to space activities. Before the *Commercial Space Launch Act* passed the US Congress (but in the same year), the *Land Remote-Sensing Commercialization Act of 1984* entered into law.[92] This instrument not only began the process of commercialising the Landsat Earth observation program of the US, but also granted the Secretary of Commerce the authority to license privately operated Earth observation systems. This law was substantially amended in 1992, and responsibility for Earth observation licensing now rests with the National Oceanic and Atmospheric Administration.[93] Even before the regulation of Earth observation satellites, the US had passed the *Communications Satellite Act of 1962*. This instrument, introduced at the dawn of the space age, granted the US Federal Communications Commission ('FCC') the authority to regulate communications with satellites 'as will best service the public interest, convenience and necessity'.[94] Since that initial regulatory authority was granted, the FCC has expanded the body of rules that apply to satellites utilising spectrum to include the consideration of orbital debris, although this principally emerged in the early 2000s.[95] More recently, the FCC has extended the body of regulations it controls relevant to space activities to cover debris mitigation and the design specifications of NGSO satellite systems, and is considering moving into other areas in the future.[96]

These situations depict the manner in which the US — at least by the time the *Space Activities Act* was introduced in 1998 — was regulating launch, return, communications with satellites, and the use of Earth observation systems by private organisations, representing a substantial volume of law for the sector. Considering the FCC's developments in the early 2000s, the US had a body of law in place that considered the majority of viable non-government in-orbit behaviours. It should be noted that the FCC's regulations on orbital debris and its proposed extensions into

92 *Land Remote-Sensing Commercialization Act of 1984*, Pub L No 98-365, 98 Stat 451 (1984).

93 See: Steve Mirmina and Caryn Schenewerk, *International Space Law and Space Laws of the United States* (Edward Elgar, 2022) 154–7; *Land Remote Sensing Policy Act of 1992*, Pub L No 102-555, 106 Stat 4163 (1992).

94 *Communications Satellite Act of 1962*, Pub L No 87-624, §201(c)(7), 76 Stat 419, 422 (1962).

95 In the Matter of Mitigation of Orbital Debris, Second Report and Order [2004] FCC 04–130.

96 See 47 CFR pt 25 (2024); In the Matter of Space Innovation; Facilitating Capabilities for In-space Servicing, Assembly, and Manufacturing: Notice of Inquiry [2022] FCC 22–66.

other areas have not been universally accepted, with Congress recently expressing some reservations.[97]

Of course, the US was not the only State that had regulated space. The *Outer Space Act 1986* (UK) sought to regulate three types of activity carried on from the UK or elsewhere: launching or producing the launch of a space object, operating a space object and 'any activity in outer space'.[98] This was in addition to the body of law applicable to radiocommunications. The law was amended in 2018 to only apply to overseas activities carried out by UK nationals and supplemented with a new, more detailed law — namely, the *Space Industry Act 2018* (UK). These are laws that unambiguously apply to activities because of where they are occurring, not a description of the activity.

A lacuna becomes evident in Australian law when compared to that of the UK: the lack of regulation of in-orbit activities. This gap is common, in part, to the US. Its failure to regulate in-space activities beyond Earth observation and spectrum use is a matter that continues to vex the US Congress. Recent proposals have included concepts associated with 'mission authorisations'.[99] The 'mission authorisation' concept suggests that the US Congress introduce legislation that is not necessarily activity-specific, but will be sufficient to enable the US Government to assess any proposed activity's compatibility with international obligations and national interests.[100] This would be regulation of the operation of space objects in outer space beyond the current activity-specific regulations. Despite several attempts to introduce laws to address this gap, the US does not have a legislated 'mission authorisation' framework.[101]

With the *S(L&R)A* only applying to launch and return activities and the operation of launch facilities in Australia, a large number of space activities performed by Australian nationals are left unregulated, potentially failing to meet the required authorisation and supervision requirements under international law. Despite this, aspects of the law do lend themselves to the regulation of activities conducted in

97 See Letter from Eddie Bernice Johnson, Frank Lucas, Donald S Beyer Jr, and Brian Babin to Jessica Rosenworcel, 27 September 2022, <https://democrats-science.house.gov/imo/media/doc/2022%2009%2027%20SST%20Bipartisan%20Letter%20to%20FCC%20on%20Orbital%20Debris%20Mitigation.pdf>.

98 *Outer Space Act 1986* (UK) s 1 (as at 18 July 1986).

99 Executive Office of the President, Office of Science and Technology Policy, 'Letter Submitted in Fulfillment of a Reporting Requirement Contained in the US Commercial Space Launch Competitiveness Act' (4 April 2016); Goehring, 'Properly Speaking' (n 80) 107.

100 John Goehring, 'U.S. Commercial Space Regulation: The Rule of Three' (2023) 13 *Journal of National Security Law & Policy* 337, 339–41.

101 Examples of legislative proposals include the following: *American Space Renaissance Act*, HR 4945, 114th Congress (2016); *American Space Commerce Free Enterprise Act*, HR 2809, 115th Congress (2018); *Space Frontier Act of 2019*, S 919, 116th Congress (2019).

space. First, applicants for all licences issued under the *S(L&R)A* are required to satisfy the Minister (the ultimate decision-maker under that law) that there is no reason 'relevant to the security, defence or international relations of Australia' that the authorisation should not be granted.[102] There is no temporal aspect to this provision, meaning that the Minister could consider the nature of a payload to be launched and in-orbit activities that will be performed when determining whether to grant a licence. However, given the scope of the law, and legislation's focus on launch and return, this is an assessment that should only attach to an authorisation application, not the payload's operation. Further, it is arguable that given the focus of the legislation on launch and return, assessing matters peripheral to this would be beyond the powers of the decision maker under the legislation.[103] Second, the holder of an Australian launch permit is subject to the comprehensive liability provisions of the *S(L&R)A* for any damage by a space object that occurs during the period between launch and 30 days after launch.[104] Liability for an authorised return commences when re-entry manoeuvres begin.[105] This liability period subjects an authorisation holder to a degree of regulation for activities occurring in space in the form of an insurance requirement. This is not a comprehensive form of regulation, merely a regulatory measure that covers the beginning and end of a payload's 'life' in orbit. Third, entities that seek an overseas payload permit must provide the Minister with an undertaking that they will not operate the payload in a manner that will cause Australia to be liable for any damage under the *Liability Convention* or negatively affect the country's national security.[106] The force of this undertaking is unclear and is not expressly supported by any overt legislative provision.[107] Fourthly, the changes to the *S(L&R)A* in 2018 did create obligations for certain authorisation holders to develop orbital debris mitigation plans as part of the licensing process.[108] Finally, s 60 of the *S(L&R)A* does allow the Minister to request 'any information' they may require 'for the purposes of performing functions or exercising powers' under the law, potentially allowing for requests for information regarding the whole life cycle of a satellite that could impact on the security, defence or international relations threshold discussed above.[109]

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102 *S(L&R)A* (n 55) s 28(3)(e).

103 See: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J); *New England Biolabs Inc v Commissioner of Patents* (2001) 110 FCR 357; *Knight v Wise* [2014] VSC 639, [33] (Emerton J); LexisNexis, Halsbury's Laws of Australia (online at 12 July 2024) 10 Administrative Law, '5 Judicial Review' [10–13180].

104 LexisNexis, Halsbury's Laws of Australia (online at 12 July 2024) 10 Administrative Law, '5 Judicial Review' [10–13180].

105 *S(L&R)A* (n 55) s 8 (definition of 'liability period' para (b)).

106 *Space (General) Rules* (n 60) s 77(2)(b)).

107 Melissa de Zwart and Joel Lisk, Submission No 16.1 to the Standing Committee on Industry, Innovation, Science and Resources, *Inquiry into Developing Australia's Space Industry* (9 April 2021) 18–19 [4.4.2].

108 *S(L&R)A* (n 55) ss 34(2)–(4), 46G(2)–(4).

109 Ibid s 60.

Acknowledging the first point above, it has been suggested that that assessment criteria in the *S(L&R)A* and subsidiary rules are being or may be utilised to assess aspects of proposed space activities beyond launch and return. For example, in the context of in-orbit operations, the Australian Space Agency has acknowledged that the *S(L&R)A* 'does not specifically deal with' these activities, but aspects of the existing law could be used to capture them.[110] Australian Space Agency materials have previously suggested that the ongoing information provision requirements, the debris mitigation plan requirements and insurance considerations all allow the regulator to consider proposed activities beyond the mere launch.[111] Further, the obligations for applicants to provide certain contracts associated with a proposed activity to the regulator has been suggested to include contracts that could relate to 'in-orbit operations'.[112] This is despite the *Space (General) Rules* only being focused on contracts for 'the purpose of the [proposed] launch or launches' (ie contracts for the use or lease of launch facilities and contracts for launch services providers to carry a payload).[113] The inclusion of the contract disclosure requirement in the *Space (General) Rules* was not warmly welcomed by all segments of the Australian industry, with some industry participants raising concerns that an application could be rejected on the basis that a vendor or supplier was 'unacceptable to the Commonwealth', or a contract's terms were not 'adequate' in the view of the regulator.[114] In some respects, these concerns (in the context of materials released by the regulator) are valid. While information collection provisions do not give a regulator the right to reject an application on the face of the documents received, the collection of vast volumes of information can enable a rejection on grounds 'relevant to the security, defence or international relations of Australia' as this information will be suggestive of operational activities beyond the scope of a mere launch or return and as noted above. The 'security, defence or international relations of Australia' threshold does not appear to be temporally limited.[115] Unlike the FCC in the US, the ACMA does not regulate debris or in-space activities through the *Radiocommunications Act 1992* (Cth), and its regulatory authority is restricted to the use of radio frequency.

Placing these matters into a practical example, if an Australian business seeks to launch a satellite from Australia using an Australian-based launch services provider (rocket company), the launch itself will be regulated through an Australian launch permit.[116] The first 30 days in which that satellite is in orbit will be subject to the

110 Australian Space Agency, Pre-forum Reading: Space Regulation Advisory Collective (SRAC) forum — 11 October 2023 (2023) 1.

111 Ibid 2.

112 Ibid.

113 *Space (General) Rules* (n 60) ss 58, 80.

114 See: Myriota, Submission No 166902247 to Australian Space Agency, *Space (Launches and Returns) Act 2018: Consultation on Draft Rules 2019* (2019) 3; Optus, Submission No 1022401485 to Australian Space Agency, *Space (Launches and Returns) Act 2018: Consultation on Draft Rules 2019* (June 2019) 6–7.

115 *S(L&R)A* (n 55) s 28(3)(e).

116 Ibid s 12.

damage and liability provisions in the *S(L&R)A*.[117] As part of the application process for the launch permit, an undertaking regarding the operation of the satellite will have to be provided to the regulator by the satellite's operator (who is not the holder of the launch permit) through the launch permit applicant.[118] There will also be a requirement to mitigate any debris generated because of the launch and placement of the satellite into orbit.[119] It is also likely that the Minister will impose conditions on the launch permit related to the ongoing provision of information regarding the launch.[120] Although this collection of regulatory requirements appears comprehensive on the face of the content, it is actually highly fragmented.[121] If, for example, a satellite is launched to conduct in-orbit servicing (which means it will dock with another satellite to provide repairs, refuel or perform station-keeping manoeuvres), the launch of the satellite and its eventual removal from orbit will be regulated, but not the operational phase and servicing activities.

The limitations in the *S(L&R)A* regime were noted as part of the final report of the *Inquiry into Developing Australia's Space Industry* ('*2020/21 Inquiry*'). The report, titled *The Now Frontier: Developing Australia's Space Industry* ('*Now Frontier Report*'), recommended that the laws be 'further reform[ed]' to 'support the growth and competitiveness of the Australian domestic industry, ensure the safe and responsible management of the space environment, [and] are in line with the regulations used by similar space countries.'[122] Responding to the *Now Frontier Report*, the Australian Government agreed to these recommendations but has not made any announcement regarding its implementation.[123]

The most significant disadvantage to this approach is the uncertainty it creates. Where legislation has been clearly established to regulate a particular activity (in this case, launch and return), the use of broad information collection provisions coupled with vague assessment thresholds extend the operation of those laws, which creates regulatory uncertainty. Thus, potential applicants are unable to derive the full scope of a particular licence assessment procedure from the primary law itself. Further uncertainty occurs as a consequence of moving from a highly regulated activity (launch and return) to an area that lacks clear regulation. Although some traditional laws can be used to control conduct (ie a person must not operate a space

117 Ibid ss 8 (definition of 'liability period'), 63.

118 *Space (General) Rules* (n 60) s 50(1)(j).

119 *S(L&R)A* (n 55) ss 34(2)–(4).

120 Ibid s 30; *Space (General) Rules* (n 60) pt 3 div 2.

121 As a communications satellite's principal purpose is to act as a relay for communications, its primary operation would be intimately tied to the content of the *Radiocommunications Act 1992* (Cth).

122 *Now Frontier Report* (n 57) 109–110 [4.78].

123 Australian Government, *Australian Government Response to the House of Representatives Standing Committee on Industry, Innovation, Science and Resources Report: The Now Frontier: Developing Australia's Space Industry* (December 2022) 14 ('*Australian Government Response: The Now Frontier*').

object in contravention of the *Criminal Code 1995* (Cth)), this does not necessarily provide operation-specific regulatory clarity.

At present, and for the time that Australia does not have a stable launch capability, the laws of foreign jurisdictions will step in to undertake the role of orbital conduct regulation. For example, Australian businesses seeking to launch their satellites using a Rocket Lab Electron vehicle from New Zealand will be required to seek a 'payload permit' under New Zealand law.[124] Unlike Australian law, the *Outer Space and High-altitude Activities Act* does expressly set out conditions related to how a payload is to be operated once in orbit.[125]

Further to the above is the need for clarity on the scope of activities that will be approved. For example, there continue to be moves for commercial and research entities within Australia to manufacture technologies capable of utilising the resources of celestial bodies. These in situ resource exploitation activities sit at the forefront of technological development in the space industry. Australia is in the unique position of being a signatory to the 1979 *Moon Agreement* that arguably prohibits in situ resource exploitation and the US Artemis Accords that expressly provide for the exploitation of these resources.[126] While the issue is currently academic, as technology and proposals for in situ resource exploitation develop, the applicable regulatory environment will need to become certain in its treatment of such activities.[127] The same can be said for activities conducted in LEO, such as human spaceflight, sub-orbital activities, in-orbit proximity and rendezvous activities, and in-space assembly and manufacture. These are all activities that could occur in space, during and after the 30-day liability window, before re-entry and using more than just radiocommunications.

B *Regulators and Their Oversight*

The ACMA and Australian Space Agency are the most significant regulators when considering the preceding discussion on space-specific regulation. The ACMA was established in 2005 as a successor to the Australian Communications Authority and independently administers the *Radiocommunications Act 1992*.[128] Comparatively, responsibility for the *S(L&R)A* sits with the Minister for Industry and Science

124 *Outer Space and High-Altitude Activities Act 2017* (NZ) s 15.

125 Ibid s 18(1)(d).

126 Melissa de Zwart, 'To the Moon and Beyond: The Artemis Accords and the Evolution of Space Law' in Melissa de Zwart and Stacey Henderson (eds), *Commercial and Military Uses of Outer Space* (Springer, 2021) 65; Alexander Stirn, 'Do NASA's Lunar Exploration Rules Violate Space Law?' *Scientific America* (online, 12 November 2020) <www.scientificamerican.com/article/do-nasas-lunar-exploration-rules-violate-space-law/>.

127 While still mostly academic, businesses in Australia are actively considering space resource exploitation activities: see *Now Frontier Report* (n 57) 74–6 [3.99]–[3.105].

128 Explanatory Memorandum, Australian Communications and Media Authority Bill 2004 (Cth) 1.

and the DISR.[129] While the portfolio responsibilities of Ministers and the departments have changed over time,[130] responsibility for Australia's launch and return laws have remained with Ministers and departments with some responsibility for industry and science. Within the Department, the Space Licensing and Safety Office was established following the passage of the *Space Activities Act 1998*. This Office was responsible for administering the law until the Australian Space Agency was established.

The Australian Government announced in September 2017 that it intended to establish an Australian Space Agency.[131] The Australian Space Agency commenced operations in July 2018, partially taking the place of the Space Licensing and Safety Office. Its work was originally shaped according to recommendations provided by the Expert Reference Group that undertook the *Review of Australia's Space Industry Capability*. The March 2018 report from the *Review of Australia's Space Industry Capability* recommended the establishment of a 'dedicated, ongoing, and whole-of-government statutory agency … to realise Australia's civil ambitions in space' and that arrangements be made to establish it 'immediately'.[132] The Report recommended that the soon-to-be established agency 'be responsible for civil strategic policy direction setting, international representation, coordination of national civilian activities, and strategies to facilitate the growth of the Australian space industry sector'.[133] Further, the recommendations of the Expert Reference Group included the delegation of management for regulatory approval processes as well as government funding to enable the agency's 'establishment and effective operation'.[134] There had been consistent calls for the establishment of an Australian space agency. The *Review of Australia's Space Industry Capability*'s report stated that '[a]lmost all of the submissions to the Review … emphasised the importance of an Australian space agency'.[135] Similarly, the review of the *Space Activities Act 1998* that accepted public submissions in 2016 also revealed strong support among respondents for an Australian space agency.[136]

The Australian Space Agency has been established with a dual mission — it has been tasked with promoting and encouraging the growth of the Australian space sector and with performing a regulatory role under the *S(L&R)A*.[137] Its founding Charter describes this Agency's regulatory competency as administering the regulation

129 All powers in the *S(L&R)A* are exercisable by 'the Minister'.

130 The Minister originally responsible for the *Space Activities Act 1998* was the Minister for Industry, Science and Tourism.

131 *Review of Australia's Space Industry Capability* (n 30) 60.

132 Ibid 12.

133 Ibid.

134 Ibid 12–13.

135 Ibid 37.

136 Freeland (n 83) 127–8.

137 *Now Frontier Report* (n 57) 15–17 [2.25]–[2.32], 105–6 [4.61]–[4.64].

of space activities and delivering on international obligations.[138] Other 'roles and responsibilities' for the Australian Space Agency, as set out in its Charter, include providing national policy and strategic advice on the civil space sector, coordinating the domestic civil space sector activities, supporting the growth of Australia's space industry and the use of space across the broader economy, leading international civil space engagement, and inspiring the Australian community and next generation.[139] The dual mandate and these responsibilities were reaffirmed in a Statement of Expectations from the Minster for Industry, Science and Technology in 2019.[140]

Despite the recommendations from the Expert Reference Group, structurally (and much like the Space Licensing and Safety Office), the Australian Space Agency is a non-statutory agency within the DISR. The first Head of Agency was Dr Megan Clark, the chair of the Expert Reference Group for the *Review of Australia's Space Industry Capability* that was, in part, responsible for designing the focus of this Agency. The current Head of Agency, Enrico Palermo, was appointed to the role in January 2021.[141] Following the announcement of the Australian Space Agency and in response to the recommendations from the *Review of Australia's Space Industry Capability,* the Australian Government stated:

> The establishment of a statutory basis for the Australian Space Agency will be considered after a review of its operations that will commence within four years of the establishment of the Australian Space Agency.[142]

The *2020/21 Inquiry* received written submissions and heard testimony that touched on the role of the Australian Space Agency and how successful it had been since its inception.[143] Many witnesses and submissions to the *2020/21 Inquiry* highlighted the Australian Space Agency's dual mandate as both a regulator and promoter of the Australian space industry, and the Government's long-term plans for the Agency's structure and underlying basis.[144] There were concerns that the current structure

138 Australian Space Agency, *Australian Space Agency Charter* (Australian Government, October 2018) 1.

139 Ibid.

140 Letter from Karen Andrews, Minister for Industry, Science and Technology to Megan Clark, Australian Space Agency, 2 September 2019.

141 Karen Andrews and Scott Morrison, 'New Head of Australian Space Agency Announced' (Media Release, 13 November 2020) <www.minister.industry.gov.au/ministers/karenandrews/media-releases/new-head-australian-space-agency-announced>.

142 Australian Government, *Response to the Review of Australia's Space Industry Capability* (14 May 2018) 5 <www.industry.gov.au/sites/default/files/June%202018/document/extra/australian_government_response_to_the_review_of_australias_space_industry_capability.pdf>.

143 *Now Frontier Report* (n 57) 15–17, 105–8.

144 Ibid 105–6 [4.63].

remained vulnerable to the whims of government and administrative changes that could simply cause the Agency to no longer exist.[145]

In the global context, the Australian Space Agency is not the only regulatory agency to hold a dual role. In the US, the Federal Aviation Administration's Office of Space Transportation is tasked with many of the same responsibilities as the Australian Space Agency, most notably to regulate the commercial space transportation industry in the US and 'encourage, facilitate, and promote commercial space launches and reentries by the private sector'.[146] Similarly, the New Zealand Space Agency (established in 2016) describes itself as the 'lead government agency for space policy, regulation and sector development'.[147] Selected submissions to the *2020/21 Inquiry* made reference to recent actions in the UK to shift space regulatory responsibility from its space agency to the Civil Aviation Authority.[148] The rationale for the relocation of regulatory authority, as expressed in consultation documents released by the UK Government in 2020, was that the separation of regulatory and industry sector promotion was to 'ensure regulation is impartial',[149] given the risk that a regulator holding both roles may have a greater tolerance for risk when they are also involved in facilitating the development and eventual deployment of technology. In many respects, this rationale aligns with the replacement in 1995 of the Australian Civil Aviation Authority with the Civil Aviation Safety Authority and Airservices Australia. The explanatory statement to the legislation giving effect to this change stated that '[s]eparation of the regulatory and service provider functions will ensure that aviation safety regulation is not compromised'.[150] Although the Australian Space Agency does not perform a 'service provider' function akin to the current Airservices Australia, the underlying inference is that regulatory functions should be separated from sector-enabling functions.

145 Ibid 105–6 [4.61]–[4.64]. See generally: Space Law Council of Australia and New Zealand, Submission No 14 to House Standing Committee on Industry, Innovation, Science and Resources, *Inquiry into Developing Australia's Space Industry* (January 2021) 7 ('Space Law Council Submission'); Adelaide Law School, The University of Adelaide, Submission No 16 to House Standing Committee on Industry, Innovation, Science and Resources, *Inquiry into Developing Australia's Space Industry* (29 January 2021) 7 (Adelaide Law School Submission); Evidence to House Standing Committee on Industry, Innovation, Science and Resources, Parliament of Australia, Canberra, 20 September 2021, 24 (Chris Deeble, Chief Executive, Northrop Grumman Australia).

146 Federal Aviation Administration, 'About the Office of Commercial Space Transportation', <www.faa.gov/about/office_org/headquarters_offices/ast>.

147 New Zealand Space Agency, Ministry of Business, Innovation and Employment, 'New Zealand Space Agency' <www.mbie.govt.nz/science-and-technology/space/>.

148 Space Law Council Submission (n 145); Adelaide Law School Submission (n 145).

149 Department for Transport, *Unlocking Commercial Spaceflight for the UK: Consultation on Draft Regulations to Implement the Space Industry Act 2018* (2020) 19.

150 Explanatory Memorandum, Civil Aviation Legislation Amendment Bill 1995 (Cth) 1.

The current Head of Agency for the Australian Space Agency, Enrico Palermo, acknowledged the content of the submissions to the *2020/21 Inquiry*, recognising that there was interest in the Agency becoming a statutory agency and that there were concerns about the dual regulatory role.[151] Palermo's view was that significant work needed to be done to assess the ongoing operational structure of the Agency and its future, but recognised that codifying the Agency in statute would provide 'a sense of permanency to investors in the sector'.[152] The *2020/21 Inquiry's* report included recommendations that the federal government consider:

- Establishing the Australian Space Agency as a statutory authority;
- Separating the Australian Space Agency's industry engagement and regulatory functions;
- The Australian Space Agency's future workforce requirements, including the appointment of more staff with industry and technical experience; and
- Appropriate budgeting and resourcing to ensure that the Australian Space Agency can meet its goals and objectives.[153]

Despite the strong views of industry on the role of the industry regulator and promoter, and bipartisan recommendations from the Parliamentary Committee at the conclusion of the *2020/21 Inquiry*, in the response to the *2020/21 Inquiry*, the Australian Government only 'agree[d] to give consideration' to the recommendations regarding agency structure.[154]

Budget papers released in March 2022 confirmed the Australian Space Agency's funding into the foreseeable future.[155] Subsequent 2022 budget papers released following a change in the federal government in May 2022 did not refer to the Australian Space Agency or the space industry more generally. In the 2023 Budget, the Australian Space Agency's funding was reduced and several grant programs were cancelled.[156] In June 2023, the major 'National Space Mission for Earth Observation' was cancelled, with the Minister for Industry and Science suggesting that the reduction in funding 'placed the Australian Space Agency on a sustainable financial footing'.[157]

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151 *Now Frontier Report* (n 57) xxi [2.115].

152 Evidence to House Standing Committee on Industry, Innovation, Science and Resources, Parliament of Australia, Canberra, 20 September 2021, 27 (Enrico Palermo).

153 *Now Frontier Report* (n 57) 8 [2.115].

154 *Australian Government Response: The Now Frontier* (n 123) 7.

155 See: Treasury, *Budget 2022–23: Budget Measures* (29 March 2022) vol 2 127–8; Treasury, *Mid-Year Economic and Fiscal Outlook 2021–22* (2021) 262.

156 Treasury, *Budget 2023–24: Budget Measures* (9 May 2023) vol 2, 166.

157 Andrew Greene, 'Labor Axes Morrison Government's Billion Dollar Australian Satellite Program', *ABC News* (online, 29 June 2023) <www.abc.net.au/news/2023-06-29/labor-axes-morrison-government-satellite-program/102538686>; Nadia Daly,

The lack of ongoing clarity regarding the role and future of the Australian Space Agency (especially in light of recent budget reductions) creates a degree of uncertainty for the regulated population and the space industry within Australia more broadly. The Agency has acted as the 'front of house' for the Australian space sector since its foundation in 2018, but with the industry transitioning from what could be described as a start-up phase through to a growth and maintenance phase, it is crucial to ensure enduring stability for the Australian Space Agency. Significantly, the Agency's dual mandate will remain an area of concern into the foreseeable future, especially as many of the grants issued in its early years begin to produce technologies that will need regulatory approval.

VI Conclusion

Australia's approach to regulating space activities, on its face, appears to be comprehensive and complete. There is a specialist space-specific law that governs how a private entity's assets will get into LEO and beyond, coupled with a range of laws that apply to radiocommunications and private activities more generally, and a regulator that seeks to ensure compliance with laws as well as to promote the sector. Nevertheless, when engaging with the content of these frameworks, practices in other jurisdictions and the practical application of the space-specific law more critically, gaps begin to emerge. Australia appears to have introduced laws for launch and return that were inspired by the US, but did not seek to replicate the full regulatory environment within which space businesses operate in the US. As private entities in Australia start to engage in more 'in-space' activities, the gaps in the *S(L&R)A* will start to come to the fore, with the only saviour being the potential use of general information collection provisions coupled with wide-ranging licensing thresholds within the *S(L&R)A* to prevent the launch of space objects that could stretch the boundaries of what are currently seen as 'acceptable' by regulators. This situation presents risks associated with regulatory certainty, an essential requirement for businesses when they seek out investment and commence work on projects that require significant expenditure. This regulatory uncertainty is paired with the uncertain position of the space sector's regulator, with its lack of statutory basis leaving it vulnerable to machinery of government changes and the potential for conflicts of interest to emerge between its regulatory duties and the extensive industry facilitation work. While at present there continue to be investments made into space businesses, these businesses broadly reflect 'traditional' space-focused activities (ie launch services and ground services).[158] It is those activities, which

'Experts Warn Australia's Space Industry "In Limbo" after Axing of Key Programs', *ABC News* (online, 3 August 2023) <www.abc.net.au/news/2023-08-03/australia-space-industry-cuts-730/102683954>.

158 Tess Bennet, 'The Gold Coast's Answer to SpaceX is Now Worth $605m', *Australian Financial Review* (online, 19 February 2024) <www.afr.com/technology/the-gold-coast-s-answer-to-spacex-is-now-worth-605m-20240214-p5f4xu>; Adam Thorn, 'LeoLabs Secures US$29m in Funding', *Space Connect* (online, 14 February 2024) <www.spaceconnectonline.com.au/situational-awareness/6124-leolabs-secures-us-29m-in-funding>.

do not cleanly fit within the four corners of the existing legal framework, that are most likely to be negatively impacted by the regulatory lacuna. Together, the gaps in the regulatory framework and the position of the regulator present barriers to the future of the industry — barriers that could be rectified through strong government action coupled with the import of best practices from other States with flourishing space economies.

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MODERN SLAVERY RESEARCH: A COMMENTARY ON METHODS AND THEMES

Abstract

This article explores the methods used in the rapidly growing field of modern slavery research. Research on this topic has gained momentum since the introduction of modern slavery legislation in the UK and Australia. Defined as a broad umbrella term encompassing human trafficking, forced labour, and other exploitative practices, modern slavery research spans multiple academic disciplines, including law. This article aims to amplify discussion on the methods used in modern slavery research globally. It analyses 165 relevant articles from the Scopus database and finds a scholarly field with some disciplinary segregation, particularly between business and supply chain literature on the one hand, and legal and criminology scholarship on the other. It also finds distinct methodological preferences in different disciplines. We suggest there is scope to broaden modern slavery research to increase interdisciplinary dialogue, diversify methodologies, support scholars from the Global South, and give voice to victim-survivors.

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I Introduction

Research on modern slavery is a rapidly growing field, spurred — at least in part — by the introduction of modern slavery legislation in the United Kingdom[1] ('UK') and Australia[2] with other similar business reporting, or more robust human rights due diligence regimes, emerging internationally. Modern slavery is a global challenge, defined as 'a broad umbrella term used to describe a number of crimes including, but not limited to, human trafficking, forced labour, sexual slavery, child labour and trafficking, domestic servitude, forced marriage, bonded labour including debt bondage, slavery and other slavery-like practices'.[3] As such, although described by some as a 'novel phenomenon',[4] modern slavery covers slavery and other crimes and exploitative practices that have existed historically, as well as contemporary forms of slavery.

Prior scholarship has focused on investigating modern slavery from specific disciplinary perspectives, including: social sciences; business, management and accounting; and, arts and humanities. This scholarship has also spanned many fields of research, including: behavioural;[5] human and labour rights;[6] supply chains;[7] and policy and history,[8] to name a few. While each discipline is valuable in advancing our understanding of modern slavery, and more importantly in discovering mechanisms to tackle it, this is still a somewhat embryotic area of research which has gained greater traction recently due to the aforementioned modern slavery legislation. Best practices for investigating this arguably 'wicked problem' are still open to debate.[9] Therefore, we are interested in better understanding the research methodologies employed by various fields, to see which methodological tools are being used by which disciplines, and where there is potential for cross-fertilization across scholarly domains to address research gaps.

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1 *Modern Slavery Act 2015* (UK) ('*UK MSA*').

2 *Australian Modern Slavery Act 2018* (Cth) ('*Australian MSA*').

3 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Modern Slavery and Global Supply Chains* (Interim Report, August 2017) 2.

4 Robert Caruana et al, 'Modern Slavery in Business: The Sad and Sorry State of a Non-Field' (2021) 60(2) *Business and Society* 251, 251.

5 See, eg, Andrew Crane, 'Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation' (2013) 38(1) *Academy of Management Review* 49.

6 See, eg, Bill Cooke, 'The Denial of Slavery in Management Studies' (2003) 40(8) *Journal of Management Studies* 1895.

7 See, eg, Stefan Gold, Alexander Trautrims and Zoe Trodd, 'Modern Slavery Challenges to Supply Chain Management' (2015) 20(5) *Supply Chain Management: An International Journal* 485.

8 See, eg, Julia O'Connell Davidson, *Modern Slavery: The Margins of Freedom* (Palgrave Macmillan, 2015).

9 Caruana et al (n 4).

Academic scholarship requires a robust, rigorous, and defensible method,[10] irrespective of the field of research,[11] and scholars take great pains to articulate and justify their selected method(s).[12] Many scholars return time and again to tried and tested methods unique to their discipline or sub-discipline. Academic books, journals, and conferences are dedicated to presenting and critiquing methods. Yet, regarding modern slavery related research, while a wide range of research methods are employed, they are generally under examined. We propose two main possible reasons for this gap: (1) temporal — the relatively recent turn to modern slavery research; and (2) disciplinary — the interdisciplinary nature of the field, which encompasses different types of studies that are often siloed, thus defying methodological consistency, with each academic discipline gravitating towards well-established, discipline-specific methods. What constitutes 'good' research and research methods, particularly in an interdisciplinary or multidisciplinary context, has long been debated.[13] Todd Landman argues that human rights related research and advocacy — including on slavery — requires what he refers to as 'trans-disciplinary' methods.[14] He outlines a problem based and action oriented approach that identifies the problem, undertakes rigorous and systematic research to determine the nature and extent of the problem and its main drivers, and proposes solutions and ways of assessing outcomes from these solutions. It is clear that this approach is not doctrinal in nature but rather requires a multidisciplinary approach both to understand the substantive issues and suitable research methods. Landman's article is a useful insight into the work of the Rights Lab at the University of Nottingham, but does not present a global study of methods used in modern slavery research, which is what we offer here.

The overarching goal of this article is to amplify discussion on methods in modern slavery research and encourage acknowledgement of the complexity of the field and of methodological solutions. It also aims to incite further reflection on and critique of methods; begin to develop a shared language across disciplines researching modern slavery; and contribute to the development of innovative and robust research methods to address research gaps.

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10 See, eg: Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Bloomsbury, 2005); Stacy M Carter and Miles Little, 'Justifying Knowledge, Justifying Method, Taking Action: Epistemologies, Methodologies, and Methods in Qualitative Research' (2007) 17(10) *Qualitative Health Research* 1316.

11 See, eg, Till Grüne-Yanoff, 'Justifying Method Choice: A Heuristic-Instrumentalist Account of Scientific Methodology' *Synthese* (11 December 2020) 3903.

12 Nikolaos Basias and Yannis Pollalis, 'Quantitative and Qualitative Research in Business & Technology: Justifying a Suitable Research Methodology' (2018) 7(1) *Review of Integrative Business and Economics Research* 91.

13 Pär Mårtensson et al, 'Evaluating Research: A Multidisciplinary Approach to Assessing Research Practice and Quality' (2016) 45(3) *Research Policy* 593.

14 Todd Landman, 'Out of the Shadows: Trans-Disciplinary Research on Modern Slavery' (2018) 2(2) *Peace Human Rights Governance* 143.

As a group of scholars from diverse disciplines and sub-disciplines but broadly within law and business, we use an interdisciplinary research theoretical framework. A.S. CohenMiller and Elizabeth Pate acknowledge that an interdisciplinary research theoretical framework can be elusive, but they note that as a framework it provides: an orientation for guiding perspectives for research and practice; allows solutions beyond one discipline; and is based on an assumption that intentionally examining problems and issues from multiple disciplines is critical.[15] This aligns well with our approach to this research and to our understanding of modern slavery research in general. Although more science focused, the United States ('US') National Academy of Sciences provides a useful definition of interdisciplinary research:

> a mode of research by teams or individuals that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or area of research practice.[16]

It also identifies four drivers of interdisciplinary research that resonate with us: (1) the inherent complexity of nature and society; (2) the drive to explore basic research problems at the interfaces of disciplines; (3) the need to solve societal problems; and (4) the stimulus of generative technologies.

Our theoretical framework was also informed by postcolonial approaches to research on modern slavery,[17] which led us to ask: from which countries does modern slavery research emanate and which stakeholders are participants in modern slavery research?

The article is structured as follows: Part II provides an overview of the emergence of modern slavery research and its diverse disciplines and briefly notes some of the challenges that result. Part III outlines the methods we employed in conducting this survey of the field. As a cross-disciplinary team of scholars, we noted the diverse range of methods now used to research modern slavery but also the limited scholarly scrutiny of the methods used. There have been systematic literature reviews, but

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15 A.S. CohenMiller and Elizabeth Pate, 'A Model for Developing Interdisciplinary Research Theoretical Frameworks' (2019) 24(6) *The Qualitative Report* 1211, 1215–16.

16 National Academy of Sciences, National Academy of Engineering, and Institute of Medicine, *Facilitating Interdisciplinary Research* (National Academies Press, 2005) 26.

17 See, eg: Swati Nagar, 'Modern Slavery in Contemporary India: Addressing the Elephant in the Room — Contributions From Stringer and Samonova' in Vijayta Doshi (ed), *Postcolonial Feminism in Management and Organization Studies* (Routledge, 2023) 72; Nádia Campos Pereira Bruhn et al, 'Contributions of International Business from a Postcolonial Perspective: A Critical Review' (2023) 63(4) *Revista De Administração De Empresas* 1.

these tend to be specific to one discipline rather than across disciplines.[18] So far there has been no comprehensive global analysis of the *methods* used in modern slavery research. By methods we mean the way in which modern slavery research is carried out — the tools of data collection and analysis.

Part IV reports on our findings; followed by a discussion in Part V of the key trends and gaps in research methods used and proposals for future research directions. Here we also reflect on the implications of interdisciplinary research and research methods for lawyers and legal researchers. We conclude that there is scope for further dialogue across disciplinary silos, and scope to critique and expand existing methods in modern slavery research.

II Taking Stock of The Emergence and Diversity of Modern Slavery Research

Although nascent as a research field, modern slavery research is diverse, spanning disciplines and countries and bringing new and varied analyses of modern slavery drivers, manifestations, responses, and legislation. As Figure 1 indicates, scholarly works that expressly focus on 'modern slavery' — and use that specific terminology — were largely non-existent until 2002, and became more common around 2014/2015. Our analysis of these publications indicates that this was at least partly related to the introduction of the UK *Modern Slavery Act 2015* ('*UK MSA*').[19] Modern slavery works became more prolific in 2018 (78 publications compared to 28 in 2017) as scholarship that engaged with the implementation of the *UK MSA* reached the publication stage, and preliminary commentary on the introduction of an Australian Modern Slavery Act began to feature in the literature before the introduction of the *Australian Modern Slavery Act 2018* (Cth) ('*Australian MSA*').[20]

In our study, we refer to modern slavery as a 'field' of research. The Organization for Economic Cooperation and Development ('OECD') uses 'fields of research and development' as a way of classifying research and development ('R&D') by 'fields of enquiry, namely, broad knowledge domains based primarily on the content of the R&D subject matter'.[21] These are high level categories and national data collection

18 See, eg: Chen Han et al, 'Modern Slavery in Supply Chains: A Systematic Literature Review' (2022) 27(7) *International Journal of Logistics: Research And Applications* 1206; Barnabas Jossy Ishaya et al, 'A Systematic Literature Review of Modern Slavery Through Benchmarking Global Supply Chain' (2023) 31(2) *Benchmarking: An International Journal* 558. But with the exception of Waqas Mehmood et al, 'Modern Slavery: A Literature Review using Bibliometric Analysis and the Nexus of Governance' (2022) 23(1) *Journal of Public Affairs* 1.

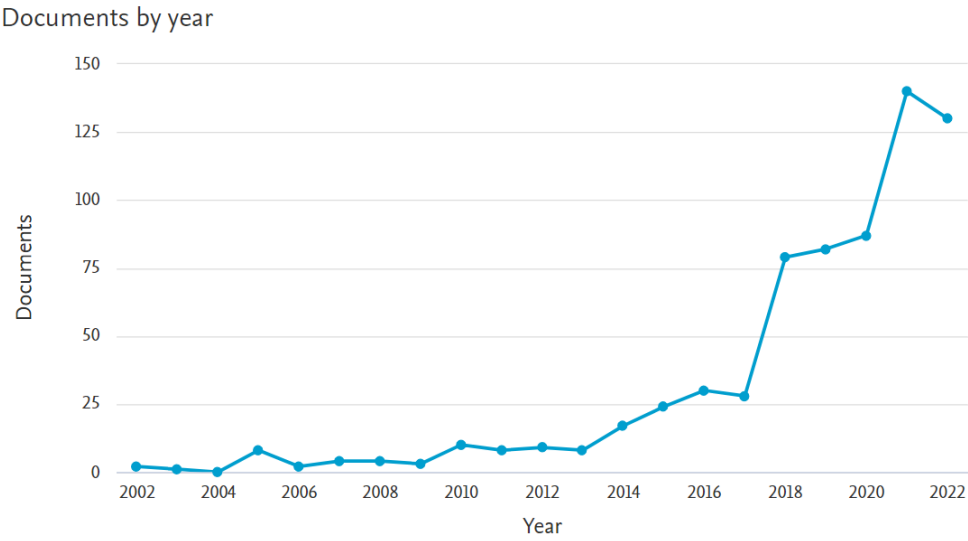
19 *UK MSA* (n 1).

20 *Australian MSA* (n 2).

21 OECD, *Frascati Manual 2015: Guidelines for Collecting and Reporting Data on Research and Experimental Development* (The Measurement of Scientific, Technological and Innovation Activities, 2015) 370.

is often aligned with these classifications. For example, although our study is global, the lead scholars are based in Australia where the Australian and New Zealand Standard Research Classification ('ANZSRC') is used for the measurement and analysis of R&D in Australia and New Zealand. This uses Fields of Research ('FoR') to describe 'common knowledge domains and/or methodologies used' in research and experimental development;[22] which are broadly aligned with the OECD classifications. ANZSRC FoR codes of relevance to modern slavery research within '48. Law and Legal Studies', could include diverse fields such '480103 Corporations and associations law' and '480704 Migration, asylum and refugee law'.[23] Such R&D classification systems are slow to change and so it is not surprising that there is no distinct code for the field of modern slavery research. As a field, it has roots in well-established disciplines such as law, social sciences, and business, and in subject areas such as slavery, human trafficking, child labour, and labour exploitation, but research on the specific topic of modern slavery is relatively recent.

Figure 1: Scopus Documents by Year — Search Term 'modern slavery'[24]



22 'Australian and New Zealand Standard Research Classification (ANZSRC): A Statistical Classification Used for the Measurement and Analysis of R&D in Australia and New Zealand', *Australian Bureau of Statistics* (Web Page, 30 June 2020) <https://www.abs.gov.au/statistics/classifications/australian-and-new-zealand-standard-research-classification-anzsrc/latest-release>.

23 Ibid, see 'Data downloads > ANZSRC 2020 FoR — structure, definitions and explanatory notes'.

24 Search of Scopus database using search term 'modern slavery'.

We identify this immaturity of the field as a challenge for methodology. Elizabeth Fisher et al grappled with a similar challenge in the area of environmental law in 2009.[25] They argued that 'the subject can only mature when we face its methodological challenges head on'.[26] Like us, they identified the interdisciplinary nature of the subject as a challenge, in addition to some further challenges that are more specific to law, but resonate with the legal and regulatory aspects of modern slavery research, namely: the speed and scale of legal and regulatory change; the heavy reliance on a diverse range of governance arrangements; and the multi-jurisdictional nature of the subject.[27]

Given the multifaceted character of modern slavery, there are a wide range of relevant disciplines including law, business, management, accounting, social sciences, economics, human geography, criminology, industrial relations, political science, and so forth. Robert Caruana et al have bemoaned the 'sad and sorry state of a non-field' when examining the underdeveloped nature of modern slavery research in business and management.[28] As a cross-disciplinary team of scholars, we noted the diverse range of methods now used to research modern slavery but also the lack of scholarly scrutiny of the methods used. There have been systematic literature reviews, but these tend to be specific to one discipline rather than across disciplines.[29] An exception to this was the recent literature review by Waqas Mehmood et al.[30] They carried out a qualitative and quantitative meta-literature review of 280 publications and found three research streams on modern slavery, these were: overview and growth; theories; and country behaviour. Here, we add to this by examining a subset of the literature with a focus on methods and we specifically examine the methods used in modern slavery research. Those who have engaged specifically with overarching questions of methods in modern slavery research (rather than simply discussing methods applied in their particular project) have tended to focus on methods for estimating prevalence,[31] critiquing systems and methods for estimating prevalence,[32] or discussing technology-based solutions

25 Elizabeth Fisher et al, 'Maturity and Methodology: Starting a Debate about Environment Law Scholarship' (2009) 21(2) *Journal of Environmental Law* 213, 213.

26 Ibid.

27 Ibid.

28 Caruana et al (n 4).

29 See, eg, Han et al (n 18).

30 Mehmood et al (n 18).

31 David P Durgana and Paul L Zador, 'Fighting Slavery through Statistics: A Discussion of Five Promising Methods to Estimate Prevalence in the United States' (2017) 30(3) *CHANCE* 50.

32 Anne T Gallagher, 'What's Wrong with the Global Slavery Index?' (2017) 8(1) *Anti-Trafficking Review* 90; John Whitehead et al, 'On the Unreliability of Multiple Systems Estimation for Estimating the Number of Potential Victims of Modern Slavery in the UK' (2021) 7(1) *Journal of Human Trafficking* 1.

for modern slavery research.[33] There have also been studies on business and human rights methods more broadly (not confined to modern slavery).[34]

Methods are generally situated within a methodology and informed by a theoretical framework of the research, the research question(s) and the object(s) of inquiry.[35] A challenge, beyond the scope of this study, is that scholars — even within the same discipline — often mean different things when discussing 'methodology' or 'methods'[36] and in some cases the terms are used interchangeably.[37] Further, many struggle to articulate a theoretical framework.[38] This is a well-established problem for doctrinal legal scholars:

> The researchers' philosophical stance frequently determines the research questions, progress and possible outcomes of academic research. However, the 'perspective' or theoretical stance often lies unstated.[39]

In any case, in this study, we are focused on methods and not broader questions of methodology or theoretical frameworks. By method, we mean the way in which the research in the literature we examine has been carried out. As Bal Sokhi-Bulley posits:

> A method has empirical and sociological connotations — so, is the method a qualitative or quantitative analysis? What methods of data collection are used — documentary analysis, case studies, observation, interviews, for example? It is essentially about *what you do* in a project, as opposed to *how you think it*.[40]

As in many scholarly areas, the field of modern slavery research remains largely dominated by scholars from the Global North, with a need to amplify voices and scholarship from developing countries and Indigenous peoples — among the groups

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33 Rosa Lavelle-Hill et al, 'Machine Learning Methods for "Wicked" Problems: Exploring the Complex Drivers of Modern Slavery' (2021) 8(247) *Humanities and Social Sciences Communications* 1.

34 Karin Buhmann, Björn Fasterling and Aurora Voiculescu, 'Business & Human Rights Research Methods' (2018) 36(4) *Nordic Journal of Human Rights* 323.

35 Sundhya Pahuja, 'Methodology: Writing about How We Do Research' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law* (Edward Elgar, 2021) 60.

36 Ibid.

37 Bal Sokhi-Bulley, 'Alternative Methodologies: Learning Critique as a Skill' (2013) 3(2) *Law and Method* 6, 12.

38 Norman G Lederman and Judith S Lederman, 'What Is a Theoretical Framework? A Practical Answer' (2015) 26(7) *Journal of Science Teacher Education* 593, 593.

39 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 107.

40 Sokhi-Bulley (n 37) 11 (emphasis in original).

most impacted by modern slavery.[41] Simply put, different researchers may be trying to answer different questions, have a different theoretical starting point, may be bound by different disciplinary or cultural constraints, and personal skillsets.[42] Here we aim to respect disciplinary differences and innovative approaches while advocating for more dialogue on methods in modern slavery research. At best, disparate approaches illuminate new findings or ways of understanding the issue; at worst, they cause confusion and apparent inconsistency in research findings.[43]

We acknowledge that a limitation of this study is that much of the groundwork in modern slavery research has been outside the academy and indeed non-academic publications remain prolific and influential in the field. These include non-governmental organisation ('NGO') reports, government reports and policy documents, and reports by international organisations — 'grey literature'.[44] Whereas academics are concerned with developing and defending a robust method for their research, this is not always high on the agenda of those producing grey literature. In addition, the university sector has strict and onerous ethics application processes for the collection of primary data from people (eg through a survey or interview) to avoid risks to participants, but the same hurdles do not always present themselves for grey literature researchers. In short, there are epistemological differences in method between academic literature and grey literature. Riley Klassen-Molyneaux cautions that NGO research might be useful for some specific purposes, but that the research and methods used warrant scrutiny.[45] Grey literature on the topic of modern slavery, while prolific, is not typically contained in the scholarly databases we have used for this study, and so does not form part of our dataset of journal articles that we analyse here, but its impact has been significant in some areas. A key example is the Global Slavery Index ('GSI'), which

41 See, eg: Kamala Kempadoo, 'Revitalizing Imperialism: Contemporary Campaigns Against Sex Trafficking and Modern Slavery' (2016) 47(1) *Cadernos Pagu* 1; Caroline Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' (2021) 81(2) *ZaöRV Heidelberg Journal of International Law* 497.

42 Bryan S Schaffer and Christine M Riordan, 'A Review of Cross-Cultural Methodologies for Organizational Research: A Best-Practices Approach' (2003) 6(2) *Organizational Research Methods* 169, 169.

43 See for example reports analysing modern slavery statements under the UK and Australian Modern Slavery Acts, which may choose a different sample of statements with some overlap of companies but reach slightly different conclusions. Nga Pham, Bei Cui and Ummul Ruthbah, *Modern Slavery Statement Disclosure Quality: ASX100 Companies* (Research Brief, Monash Centre for Financial Studies, October 2021); Amy Sinclair and Freya Dinshaw, *Paper Promises: Evaluating the Early Impact of Australia's Modern Slavery Act* (Report, Human Rights Law Centre, 6 February 2022); Freya Dinshaw et al, *Broken Promises: Two Years of Corporate Reporting under Australia's Modern Slavery Act* (Report, Human Rights Law Centre, 1 November 2022).

44 Quenby Mahood, Dwayne Van Eerd and Emma Irvin, 'Searching for Grey Literature for Systematic Reviews: Challenges and Benefits' (2014) 5(3) *Research Synthesis Methods* 221, 221.

45 Riley Klassen-Molyneaux, 'Doing Good and Feeling Good: A Critical Analysis of Human Rights Research' (2022) 14(2) *Journal of Human Rights Practice* 513, 525, 528.

seeks to establish what no previous report or study has done with any certainty or authority, namely publish global estimates of the prevalence of modern slavery,[46] and its citations within journal articles in our dataset is analysed here.

III Method Of Analysis

For our dataset of journal articles, we used Scopus, a curated abstract and citation database of scholarly literature across a wide variety of disciplines. A Scopus search for 'modern slavery' but without 'method*' (the asterisk allows for inclusion of similar terms such as 'methods' and 'methodology') in 'Article title, abstract, keywords' returns 667 results across 24 subject areas. Table 1 indicates the top 14 subject areas (the number of items fell to seven after number 14) with social sciences accounting for 452 publications, followed by business, management and accounting with 147. Social sciences in the Scopus classification includes law, although a limitation is that it indexes a 'miniscule numbers of law journals', a criticism it shares with Web of Science.[47]

Table 1: Scopus Subject Areas, January 2023

	Scopus Subject	**Number of items**
1	Social Sciences	452
2	Business, Management and Accounting	147
3	Arts and Humanities	115
4	Economics, Econometrics and Finance	78
5	Medicine	48
6	Engineering	46
7	Environmental Science	42
8	Computer Science	23
9	Decision Sciences	23
10	Agricultural and Biological Sciences	20
11	Psychology	19
12	Earth and Planetary Sciences	14
13	Energy	12
14	Mathematics	11

46 Walk Free produce two types of reports: *The Global Estimates of Modern Slavery* produced in partnership with the International Labour Organization and International Organization for Migration, see, Walk Free, International Labor Organization, and International Organization for Migration, *Global Estimates Of Modern Slavery: Forced Labour And Forced Marriage* (Report, September 2022); and the widely used Global Slavery Index which includes a country-by-country analysis of the estimates, see, 'Global Slavery Index', *Walk Free* (Web Page, 2024) <https://www.walkfree.org/global-slavery-index/>.

47 Kathy Bowrey, *A Report into Methodologies Underpinning Australian Law Journal Rankings* (Report, Council of Australian Law Deans, 8 February 2016) 5.

To identify articles of relevance to our focus on methods, we used a Scopus search for 'modern slavery' and 'method*', producing 165 search results. We then codified the data using Microsoft Excel, carried out co-citation analysis (Biblioshiny), and thematic analysis using text mining (Leximancer), as discussed next.

There are limitations of this approach and scope for further research. First, 'modern slavery' as a term omits several more well-established terms which sit within the modern slavery umbrella term — for example, forced labour, debt bondage, slavery, human trafficking, and so forth. Future research could include additional search terms. Second, including the word 'method' may have produced some results where the word 'method' was used in the article but it did not relate specifically to the academic research method for the article. Our coding of methods was aimed at minimising this risk (see Part III(A)).

A *Coding*

Using Microsoft Excel, each journal article was coded for: (a) primary method used; (b) country of lead author institution; (c) research participants (if applicable); (d) primary academic discipline; and (e) whether one of our identified reports or data sources was used (Global Slavery Index; US Trafficking in Persons Report; and United Nations or International Labour Organization reports). Each entry was coded once by a research assistant and coding was verified by the discipline experts within the research team.

B *Co-citation Analysis*

Co-citation analysis has recently gained traction throughout supply chain management literature,[48] and other fields.[49] It is particularly recommended in specialised and emerging fields of research to build consilience about ideas and constructs that are relevant across a range of disciplines.[50] When using co-citation analysis, the frequency of pairs of articles cited in tandem (ie by another article) is examined; thereby, the more often articles are co-cited alongside other articles, the

48 See, eg: Mehrdokht Pournader, Andrew Kach and Srinivas (Sri) Talluri, 'A Review of the Existing and Emerging Topics in the Supply Chain Risk Management Literature' (2020) 51(4) *Decision Sciences* 867; Xinhan Xu et al, 'Supply Chain Finance: A Systematic Literature Review and Bibliometric Analysis' (2018) 204(c) *International Journal of Production Economics* 160.

49 Kevin W Boyack and Richard Klavans, 'Co-citation Analysis, Bibliographic Coupling, and Direct Citation: Which Citation Approach Represents the Research Front Most Accurately?' (2010) 61(12) *Journal of the American Society for Information Science and Technology* 2389, 2389. See also, Daniel Holman, Rebecca Lynch and Aaron Reeves, 'How Do Health Behaviour Interventions Take Account of Social Context? A Literature Trend and Co-citation Analysis' (2018) 22(4) *Health* 389.

50 Caleb M Trujillo and Tammy M Long, 'Document Co-citation Analysis to Enhance Transdisciplinary Research' (2018) 4(1) *Science Advances* 1, 1.

greater the influence that particular article gains.[51] Likewise, the more frequently a pair of articles is co-cited,[52] the greater the chance they will share similar cluster categorization. The clusters extracted using co-citation analysis can help to identify common categories or thematic groups from a pool of articles.

Co-citation analysis begins by performing a network analysis across a pool of articles. To perform this analysis, we used Biblioshiny within RStudio (version 2022.12.0). To prepare the package, the Scopus csv file output was imported into RStudio, maintaining all the major information categories (eg article title, authors, keywords, citations, etc). The 165 articles were then mapped using Biblioshiny's co-citation analysis process. The network degree range was then adjusted contingent upon the number of observed emerging clusters. If this value is set too high then the cluster may lack consistency across themes (ie muddling effects). Thereby, we set the cluster threshold maximum to 500.

C *Leximancer Analysis*

Following the co-citation analysis, we then used Leximancer, a text mining software tool, to identify themes and relationships within the pool of articles. Text mining is a method of discovering concepts and themes within unstructured data by analysing the words used in documents.[53] Identifying patterns can help researchers find potential avenues for future research and contribute to a more comprehensive understanding of the way the issue is discussed in the literature. Leximancer is useful for deciphering textual data in burgeoning fields, such as modern slavery research, where there may be a lack of consensus about the domain boundaries and the methods being used. It can complement citation-based analysis by providing a systematic, unbiased, and content-driven review of the literature.[54]

Leximancer is a valuable tool for this type of research, as it identifies related terms that signify key concepts and themes in text data. The software applies a Bayesian learning algorithm to identify frequently used concepts and relationships between

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51 Erjia Yan and Ying Ding, 'Scholarly Network Similarities: How Bibliographic Coupling Networks, Citation Networks, Cocitation Networks, Topical Networks, Coauthorship Networks, and Coword Networks Relate to Each Other' (2012) 63(7) *Journal of the American Society for Information Science and Technology* 1313, 1313; Jinhyuk Yun, 'Generalization of Bibliographic Coupling and Co-citation Using the Node Split Network' (2022) 16(2) *Journal of Informetrics* 1, 2.

52 Aaron Clauset, MEJ Newman and Cristopher Moore, 'Finding Community Structure in Very Large Networks' (2004) 70(6) *Physical Review* E 70, 066111.

53 Sarah Kaine and Martijn Boersma, 'Women, Work and Industrial Relations in Australia in 2017' (2018) 60(3) *Journal of Industrial Relations* 317, 320–1; Krithika Randhawa, Ralf Wilden and Jan Hohberger, 'A Bibliometric Review of Open Innovation: Setting a Research Agenda' (2016) 33(6) *Journal of Product Innovation Management* 750, 751

54 Ibid.

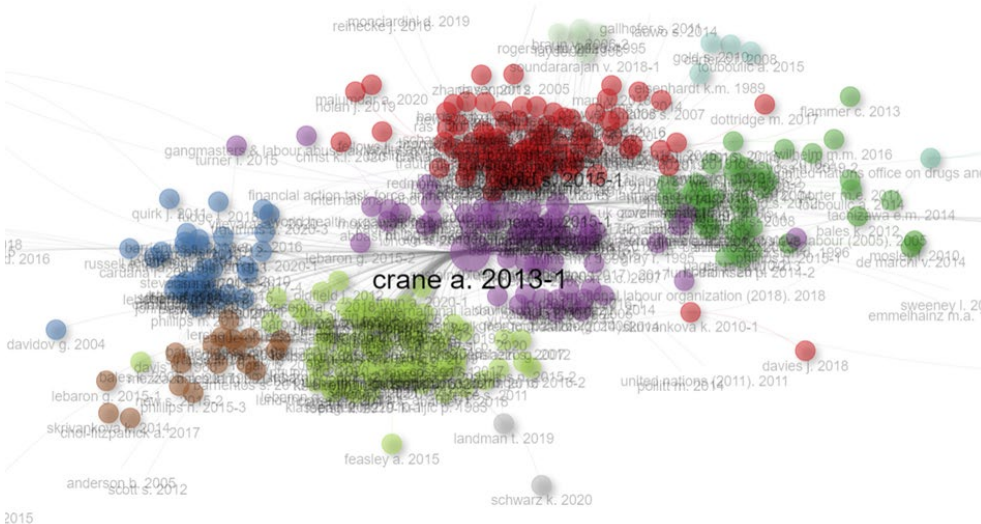
them, allowing for the examination of both individual concepts and groups of related concepts that form themes.[55]

IV Findings

A *Networks and Themes in Modern Slavery Research*

The co-citation analysis produced six major clusters, with the minimum cluster containing 23 nodes, and the maximum containing 84 (see Figure 2 and Table 2). Node colour represents the cluster to which the articles belong, and node size portrays the frequency with which the node is connected via co-citation to other nodes. The modularity of our co-citation network (which ranges from –1 to +1) was .734, indicating strong ties between the nodes within each cluster.[56]

Figure 2: Co-citation Network



55 Christine Mathies and Marion Burford, 'Customer Service Understanding: Gender Differences of Frontline Employees' (2011) 21(6) *Managing Service Quality* 636, 640.

56 Vincent D Blondel et al, 'Fast Unfolding of Communities in Large Networks' (2008) 1(10) *Journal of Statistical Mechanics: Theory and Experiment* P10008 2.

Table 2: Cluster Analysis

Cluster	Top Connector(s)	Theme	Nodes
Purple	Crane 2013	Foundational Modern Slavery	66
Red	Gold 2015	Modern Slavery in Supply Chains	84
Blue	Allain 2012	Human Trafficking	35
Dark Green	Pagell 2014, Croom 2018	Supply Chain Sustainability	39
Brown	Davidson 2015; Bales 1999	International Labour & Migration	23
Light Green	Cooke 2003	Human and Labour Rights	78

Note: The clusters are listed in order based on extraction.

Purple: This is the most central cluster, representing literature which commonly cites Andrew Crane's 2013 article on modern slavery as a management practice,[57] alongside other seminal modern slavery literature such as Stephen John New (2015),[58] and Kevin Bales, Zoe Trodd and Alex Kent Williamson (2009).[59] Given Crane's centrality in the model, other clusters also cite this work (as depicted by the lines in the network model flowing from that node). However, different themes emerged from those clusters. This cluster is the least consolidated of the six in terms of any emergent theme, containing more general work targeted at organisations in terms of how they (mis)manage modern slavery related challenges. For example, work here ranges from International Labor Organization ('ILO') and Walk Free Reports, to accounting-oriented scholarship such as Katherine Leanne Christ, Kathyayini Kathy Rao, and Roger Leonard Burritt (2019).[60]

Red: This is the largest cluster, containing work heavily focused around modern slavery issues across supply chains, with Stefan Gold et al (2015) the top connector.[61] The more influential articles in this cluster have been published in supply chain themed journals (eg Mark Stevenson and Rosanna Cole 2018; Anthony Flynn 2020)[62] as well as more general business journals (eg Christina Stringer and Snejina

57 Crane (n 5).

58 Stephen John New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?' (2015) 20(6) *Supply Chain Management: An International Journal* 697.

59 Kevin Bales, Zoe Trodd and Alex Kent Williamson, *Modern Slavery: The Secret World of 27 Million People* (Oneworld, 2009).

60 See, eg, Katherine Leanne Christ, Kathyayini Kathy Rao and Roger Leonard Burritt, 'Accounting for Modern Slavery: An Analysis of Australian Listed Company Disclosures' (2019) 32(3) *Accounting, Auditing and Accountability Journal* 836.

61 Gold, Trautrims and Trodd, (n 7).

62 See, eg: Mark Stevenson and Rosanna Cole, 'Modern Slavery in Supply Chains: A Secondary Data Analysis of Detection, Remediation and Disclosure' (2018) 23(2) *Supply Chain Management: An International Journal* 81; Anthony Flynn, 'Determinants of Corporate Compliance with Modern Slavery Reporting' (2020) 25(1) *Supply Chain Management: An International Journal* 1.

Michailova 2018; Alexander Trautrims et al 2020).[63] The main difference between this cluster and the *dark green* cluster is that the articles here focus specifically on modern slavery; whereas, the *dark green* cluster references modern slavery when discussing the broader work of social sustainability risks. This cluster shares high proximity to the *purple* cluster, indicating a higher level of citations between the two. Lastly, this cluster contains some of the youngest influential work in modern slavery, compared to other clusters.

Blue: This is a smaller cluster which is heavily focused and consolidated around two human trafficking books (Jean Allain 2012 and Joel Quirk 2011).[64] Many of the articles in this cluster are oriented more towards human rights violations and law (eg Landman 2020: Ashley Russell 2018).[65] This is one of the most focused yet isolated clusters, sharing the least ties with other clusters and linked primarily through Crane's 2013 article.[66]

Dark Green: This cluster is primarily formed of supply chain sustainability work centred around more general sustainability-related issues (eg Mark Pagell and Anton Chevchenko 2014; Stefan Seuring and Martin Muller 2008)[67] and social issues (Simon Croom et al 2018; Robert D Klassen and Ann Vereecke 2012).[68] While less focused directly on modern slavery issues than its *red* cousin, this cluster shares heavy ties with both the *purple* and *red* clusters, making it one of the most interconnected clusters.

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63 See, eg: Christina Stringer and Snejina Michailova, 'Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains' (2018) 26(3) *Multinational Business Review* 194; Alexander Trautrims et al, 'Survival at the Expense of the Weakest? Managing Modern Slavery Risks in Supply Chains During COVID-19' (2020) 23 (7–8) *Journal of Risk Research* 1067.

64 Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff, 2012); Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (University of Pennsylvania Press, 2011).

65 See, eg: Todd Landman, 'Measuring Modern Slavery: Law, Human Rights, and New Forms of Data' (2020) 42(2) *Human Rights Quarterly* 303; Ashley Russell, 'Human Trafficking: A Research Synthesis on Human-Trafficking Literature in Academic Journals from 2000–2014' (2018) 4(2) *Journal of Human Trafficking* 114.

66 Crane (n 5).

67 See, eg: Mark Pagell and Anton Shevchenko, 'Why Research in Sustainable Supply Chain Management Should Have No Future' (2014) 50(1) *Journal of Supply Chain Management* 44; Stefan Seuring and Martin Müller, 'From a Literature Review to a Conceptual Framework for Sustainable Supply Chain Management' (2008) 16(15) *Journal of Cleaner Production* 1699.

68 Simon Croom et al, 'Impact of Social Sustainability Orientation and Supply Chain Practices on Operational Performance' (2018) 38(12) *International Journal of Operations and Production Management* 2344; Robert D Klassen and Ann Vereecke, 'Social Issues in Supply Chains: Capabilities Link Responsibility, Risk (Opportunity), and Performance' (2012) 140(1) *International Journal of Production Economics* 103.

Brown: This cluster shares similar themes with the *blue* and *light green* clusters (hence the proximity) in terms of human trafficking and labour force abuses. However, the focus is more on the people (victim/survivors) and the abusers (eg Kevin Bales 1999; O'Connell Davidson 2015).[69] Migrant labour is a major theme in this cluster (eg Siobhán McGrath 2013; Ben Rogaly 2008).[70] Interestingly, this is a more dispersed cluster (ie weaker ties) considering the level of similarity between much of the work.

Light Green: This was the second largest cluster focusing heavily on forced labour and human rights (Bill Cooke 2003).[71] Many of the papers in this cluster explore human rights in general (eg Olga Martin-Ortega 2018; Genevieve Lebaron 2021),[72] alongside modern slavery pertaining to forced labour (eg Justine Nolan and Gregory Bott 2018; Miriam Wilhelm et al 2020).[73] The proximity of this work to the blue and brown clusters is not surprising given the legal and socio-criminology ties amongst these articles. Moreover, this cluster is less tightly coupled compared to the similarly sized purple and red clusters, indicating less strength of ties between co-citation pairs (ie pairs were discovered less frequently).

One of the most significant emergent developments from this analysis is the segmentation between legal (brown, blue, and light green clusters) and supply chain (red and dark green clusters) scholarship. The common thread connecting these two fields is the purple cluster (more targeted at organisational (mis)management of modern slavery related challenges). The following contextual analysis will shed some light on how verbiage in the articles across different fields may, in part, be playing a role in this segregation.

Turning then to the Leximancer analysis, we find 12 themes (Figure 3). The colour of the themes denotes their importance, ranging from cooler colours that signify lesser relative importance, while warmer colours signify greater relative importance (Figure 4).

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69 O'Connell Davidson (n 8); Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press, 1999).

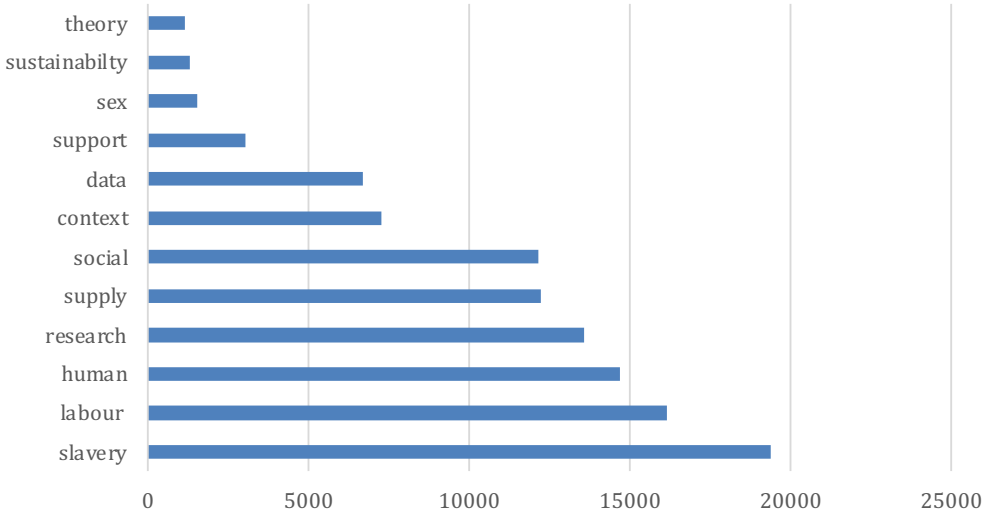
70 Siobhán McGrath, 'Fuelling Global Production Networks with Slave Labour?: Migrant Sugar Cane Workers in the Brazilian Ethanol GPN' (2013) 44(1) *Geoforum* 32; Ben Rogaly, 'Migrant Workers in the ILO's Global Alliance Against Forced Labour Report: A Critical Appraisal' (2008) 29(7) *Third World Quarterly* 1431.

71 Cooke (n 6).

72 See, eg: Olga Martin-Ortega, 'Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry' (2018) 3(1) *Business and Human Rights Journal* 75; Genevieve LeBaron, 'The Role of Supply Chains in the Global Business of Forced Labour' (2021) 57(2) *Journal of Supply Chain Management* 29.

73 Justine Nolan and Gregory Bott, 'Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices' (2018) 24(1) *Australian Journal of Human Rights* 44; Miriam Wilhelm et al, 'Private Governance of Human and Labor Rights in Seafood Supply Chains: The Case of the Modern Slavery Crisis in Thailand' (2020) 115 *Marine Policy* 103833.

Figure 3: Leximancer Themes



In the concept map (Figure 4) Leximancer groups themes based on their co-occurrence patterns in text data, which offer insights into major themes and sub-themes, their interconnections, and importance. Leximancer maps closely related concepts together, denoting semantic relationships and facilitating a map of meaning. The distance between concepts illustrates their relational proximity.[74] Concepts that are close together in the concept map are more strongly related, meaning that they frequently co-occur in the text or share similar contexts. On the other hand, concepts that are farther apart are less related, indicating that they are less likely to co-occur or share contexts.[75]

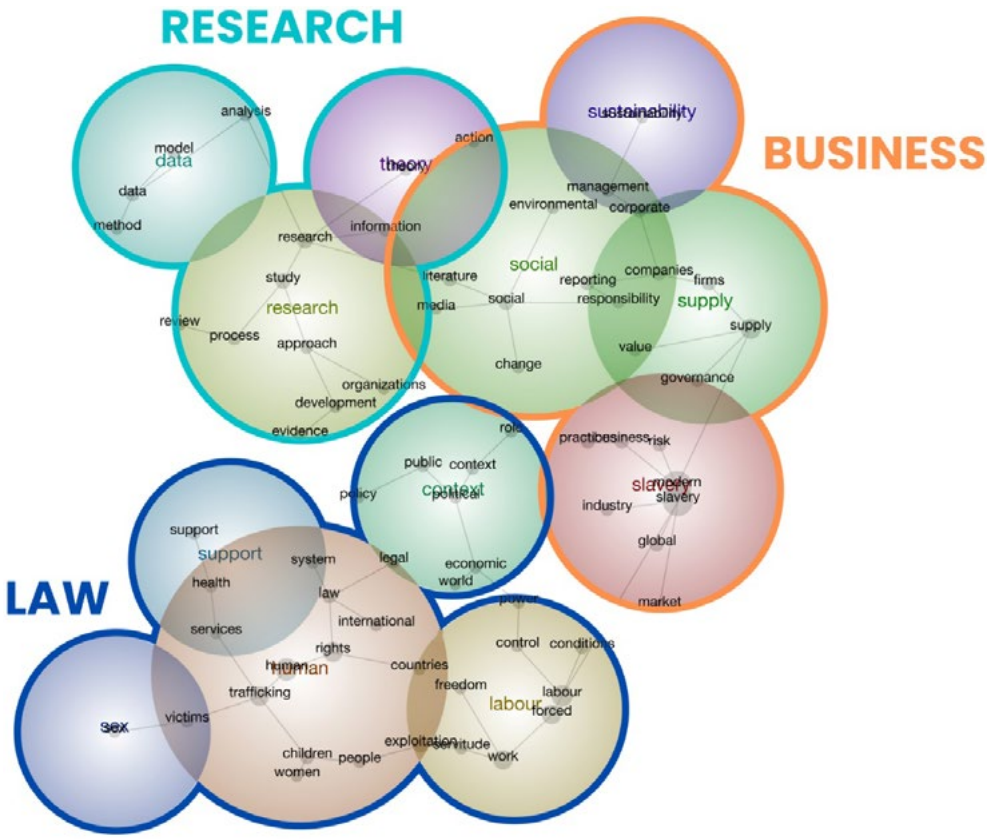
Concept maps visually represent concept relationships, while Leximancer generated lists of 'related word-like concepts' (see Figures 5–14) detail the associations between a target concept and others, ranking them by relevance. This dual approach provides a comprehensive overview and specific insights into text data, enhancing understanding of concept relationships and patterns.[76] Figures 5 to 14 show 'related word-like concepts' with count being the number of occurrences, and likelihood being the probability of the occurrence compared to other word-like concepts.

74 Andrew E Smith and Michael S Humphreys, 'Evaluation of Unsupervised Semantic Mapping of Natural Language with Leximancer Concept Mapping' (2006) 38(2) *Behavior Research Methods* 262, 264.

75 Kaine and Boersma (n 53) 322.

76 Leximancer, *User Guide Release 4.5* (10 March 2021).

Figure 4: Leximancer Clusters

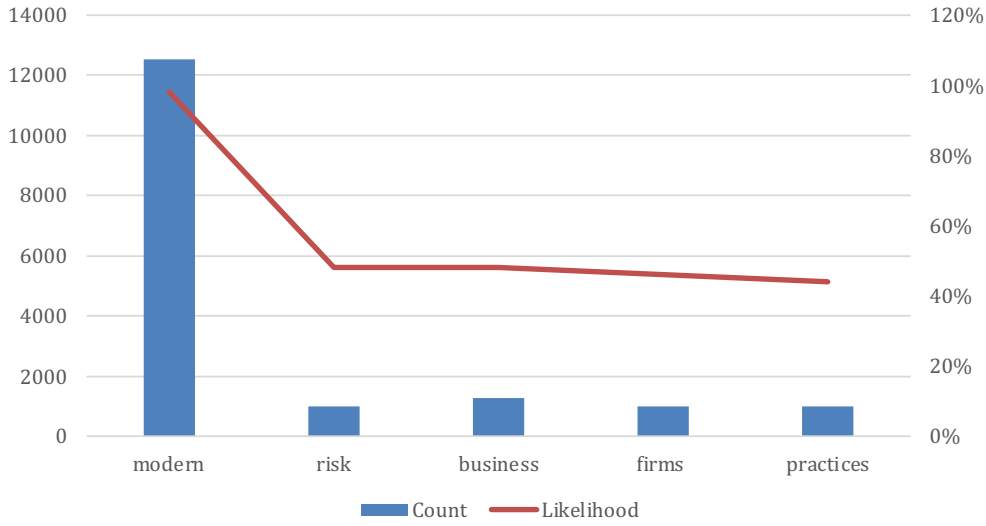


Overall, in the concept map we find three thematic clusters: modern slavery in connection to business as a discipline; forced labour and human trafficking in connection to legal studies and criminology; and research, data, and theory as discussed below.

1 *'Business' Thematic Cluster*

The first thematic cluster contains the themes 'slavery', 'supply', 'social' and 'sustainability', with 'slavery' being the most prominent of the twelve identified themes. Within the slavery thematic bubble, the concepts 'modern' and 'slavery' are — unsurprisingly given the search terms and dataset — closely connected. It is interesting to see the close connection to the concepts 'business', 'practices' and 'risk', in addition to references to concepts such as 'industry', 'global' and 'market'. This suggests a strong connection of this part of the dataset to business as a scholarly discipline. A closer look at the top five word-like concepts (Figure 5) related to 'slavery' suggest that, in the dataset under analysis, modern slavery research is

Figure 5: Slavery — Related Word-Like Concepts



strongly related to the *risk* of modern slavery,[77] and the practices of businesses and firms that may contribute to,[78] or alleviate,[79] these risks.

The assertion that part of the dataset makes a connection to business as a scholarly discipline gains credibility when looking at the 'supply' thematic, which overlaps with the 'slavery' theme. This theme relates to suppliers and supply chains:[80] on the concept map we see terms that are synonymous with 'business', eg 'firms',

77 Katherine L Christ and Roger L Burritt, 'Exploring Effectiveness of Entity Actions to Eliminate Modern Slavery Risk–Early Australian Evidence' (2023) 55(1) *The British Accounting Review* 101065; Gabriela Gutierrez-Huerter O, Stefan Gold, and Alexander Trautrims, 'Change in Rhetoric but Not in Action? Framing of the Ethical Issue of Modern Slavery in a UK Sector at High Risk of Labor Exploitation' (2023) 182(1) *Journal of Business Ethics* 35.

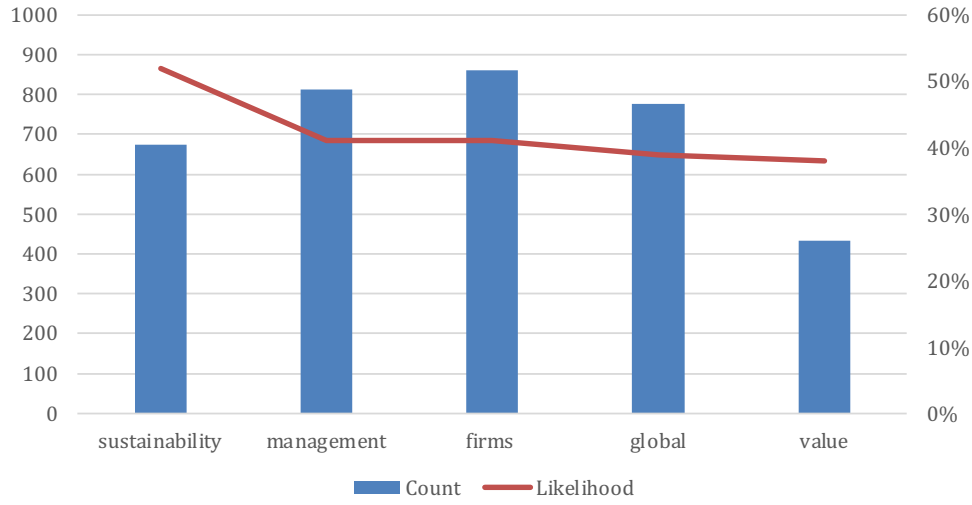
78 Udeni Salmon, 'Modern Slavery in the Criminal Family Firm: Misrecognition and Symbolic Violence in Recruitment and Retention Practices' (2022) 12(2) *Journal of Family Business Management* 280.

79 Ehi Eric Esoimeme, 'Using the Risk-Based Approach to Curb Modern Slavery in the Supply Chain: The Anglo American and Marks and Spencer Example' (2020) 27(2) *Journal of Financial Crime* 313; Anthony Flynn and Helen Walker, 'Corporate Responses to Modern Slavery Risks: An Institutional Theory Perspective' (2021) 33(2) *European Business Review* 295.

80 See, eg: Mark Stevenson and Rosanna Cole, 'Modern Slavery in Supply Chains: A Secondary Data Analysis of Detection, Remediation and Disclosure' (2018) 23(2) *Supply Chain Management: An International Journal* 81; Amy V Benstead, Linda C Hendry and Mark Stevenson, 'Detecting and Remediating Modern Slavery in Supply Chains: A Targeted Audit Approach' (2021) 32(13) *Production Planning and Control* 1136.

'companies' and 'corporate'. There is also a 'governance' concept, which suggests emphasis on supply chain governance.[81] The top five word-like concepts related to 'supply' (Figure 6) suggest the importance of sustainable supply/value chain management.[82]

Figure 6: Supply — Related Word-Like Concepts



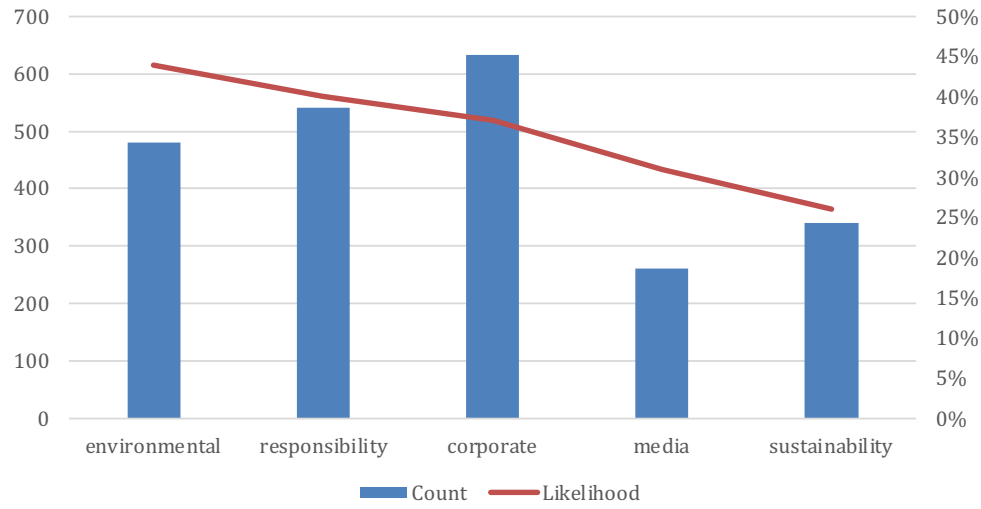
In the concept map (Figure 4), the 'supply' thematic bubble overlaps with the 'social' bubble, and key concepts in the overlapping area are 'reporting' and 'responsibility'. These two concepts are indicative of the modern slavery reporting responsibilities of commercial entities.[83] In the 'social' thematic bubble, the concept 'environmental' features near the 'sustainability' thematic bubble. The top five word-like concepts related to 'social' (Figure 7) suggest frequent refences to the social and environmental

81 See, eg: Stephen J Frenkel, Shahidur Rahman and Kazi Mahmudur Rahman, 'After Rana Plaza: Governing Exploitative Workplace Labour Regimes in Bangladeshi Garment Export Factories' (2022) 64(2) *Journal of Industrial Relations* 272; Michael Rogerson et al, 'Organisational Responses to Mandatory Modern Slavery Disclosure Legislation: A Failure of Experimentalist Governance?' (2020) 33(7) *Accounting, Auditing and Accountability Journal* 1505.

82 Camila Lee Park, Mauro Fracarolli Nunes and Alessio Ishizaka, 'End-to-End Sustainability: Trade-offs, Consumers' Perceptions and Decisions Beyond B2C Interfaces' (2023) 28(2) *Supply Chain Management: An International Journal* 225, 225; Camila Lee Park, Mauro Fracarolli Nunes and Jose AD Machuca, 'Social Sustainability in Supply Chains: The Role of Local Practices and Informal Networks' (2023) 53(1) *International Journal of Physical Distribution and Logistics Management* 35.

83 Christ, Rao and Burritt (n 60), 842.

Figure 7: Social — Related Word-Like Concepts



responsibility of corporations,[84] as well as corporate sustainability.[85] A closer inspection of the pool of articles shows that the 'media' concept is indicative of the rise in media attention to modern slavery.[86]

The 'sustainability' thematic bubble is the 'coldest' in the cluster, and therefore — relatively speaking — of less importance compared to the other themes. In the 'sustainability' theme, apart from the homonymous concept, 'management' is the only other concept to be found. The top five word-like concepts related to 'sustainability' (Figure 8) suggest links to corporate environmental and social sustainability (discussed in the previous paragraph), as well as management.[87] 'Literature' in the

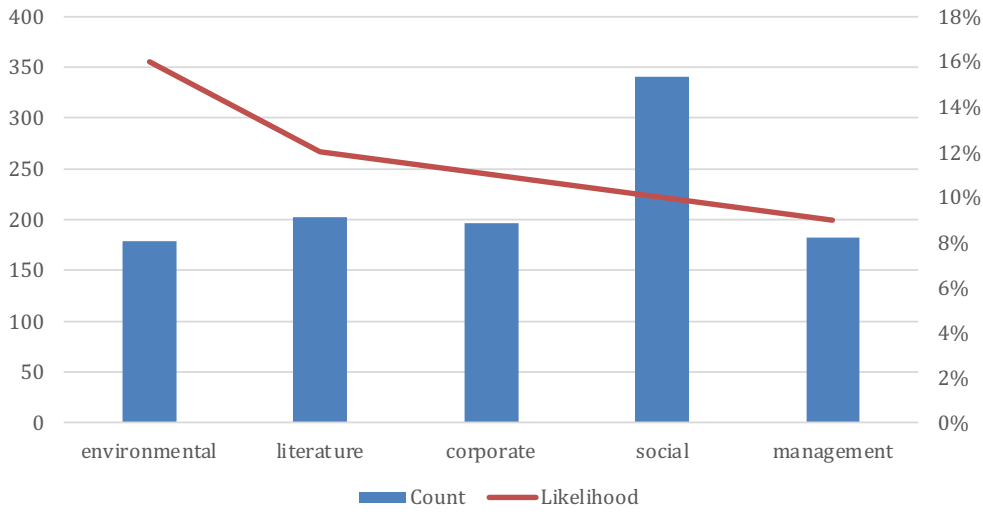
84 New (n 58); Mauro Fracarolli Nunes, Camila Lee Park and Hyunju Shin, 'Corporate Social and Environmental Irresponsibilities in Supply Chains, Contamination, and Damage of Intangible Resources: A Behavioural Approach' (2021) 241 (November) *International Journal of Production Economics* 108275, 2.

85 Irene Pollach and Stefan Schaper, 'Social Visibility and Substance in Corporate Social Sustainability Disclosures' (2023) 28(3) *Corporate Communications: An International Journal* 400; Sumit Kishore Lalwani et al, 'Benchmarking Self-declared Social Sustainability Initiatives in Cocoa Sourcing' (2018) 25(9) *Benchmarking: An International Journal* 3986.

86 Katherine Leanne Christ and Roger Leonard Burritt, 'Current Perceptions on the Problem of Modern Slavery in Business' (2018) 1(2) *Business Strategy and Development* 103, 103; Amy V Benstead, Linda C Hendry and Mark Stevenson, 'Horizontal Collaboration in Response to Modern Slavery Legislation: An Action Research Project' (2018) 38(12) *International Journal of Operations and Production Management* 2286, 2286.

87 Crane (n 5); Miguel Pina e Cunha et al, 'The Paradox of the Peasantry in Management and Organization Studies' (2021) 31(5) *International Journal of Organizational Analysis* 1802.

Figure 8: Sustainability — Related Word-Like Concepts



top five word-like concepts list is closely related to the 'research', 'data' and 'action' thematic cluster, according to the concept map. This is indicative of references to sustainability in business studies on modern slavery.[88]

2 *Legal Studies and Criminology Thematic Cluster*

The 'hottest' thematic bubble in the second cluster is 'labour', with the other themes being 'human', 'context', 'support' and 'sex'. The 'labour' thematic bubble seems to refer to the term forced labour, servitude, and exploitative working conditions.[89] While the concept map shows a direct conceptual link between 'labour' and 'slavery', the proximity of this thematic bubble to the 'human' thematic bubble is possibly explained by forced labour being defined in (inter)national law — as distinct from modern slavery. Other interesting concepts in this thematic bubble are 'freedom', 'power' and 'control', likely referring to means by which people's freedom is curtailed.[90] The top five word-like concepts related to the 'labour' theme underline attention to forced labour, labour exploitation, and servitude, while also

88 Caruana et al (n 4); Yazan Alzoubi, Giorgio Locatelli, and Tristano Sainati, 'Modern Slavery in Projects: A Systematic Literature Review and Research Agenda' (2023) 54(3) *Project Management Journal* 235.

89 Nolan and Bott (n 73); Jessie Hohmann, 'Conceptualising Domestic Servitude as a Violation of the Human Right to Housing and Reframing Australian Policy Responses' (2022) 31(1) *Griffith Law Review* 98.

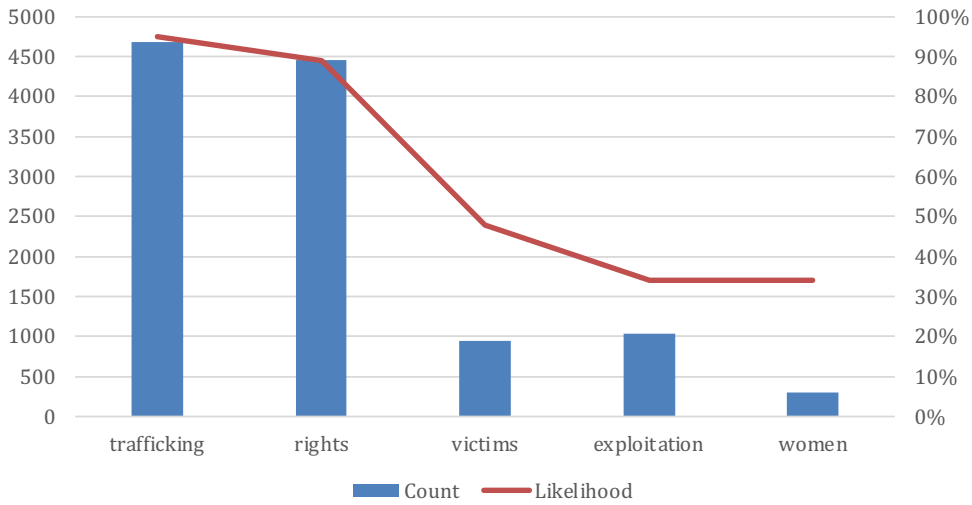
90 Amy Chisholm et al, 'Rituals as a Control Mechanism in Human Trafficking: Systematic Review and Thematic Synthesis of Qualitative Literature' (2022) *Journal of Human Trafficking* 1; Joseph Whittle, 'Snakehead: The Extent to Which Chinese Organised Crime Groups are Involved in Human Smuggling from China to the UK' (2022) *Trends in Organized Crime* 1.

referring to children as an affected group.[91] The concept map shows that 'market', as a related word-like concept, is found in the 'slavery', 'supply', 'social' and 'sustainability' thematic cluster.

The 'human' thematic bubble shows a close connection of this similarly named concept with 'trafficking' and 'rights', indicative of the terms human trafficking and human rights. The proximity of 'international', 'law' and 'legal' suggest a strong connection to legal studies and criminology, an assertion that gains credibility given that human trafficking, like forced labour (but unlike modern slavery), is defined in international law and many domestic laws, and so this term is more likely to be used in these disciplines. In the concept map, at the bottom end of the thematic bubble, we see 'children', 'women' and 'people', referring to those being subjected to human trafficking.[92] The top five word-like concepts list seems to confirm the focus on the human dimension of trafficking (Figure 9).

The next theme to be discussed is 'context', which, judging by the concept map (Figure 4), contains several concepts that link human trafficking to macro-factors. Examples are 'world', 'political', 'economic', 'policy', 'public' but also 'legal', a concept which can be found in the area overlapping with the 'human' thematic

Figure 9: Human — Related Word-Like Concepts

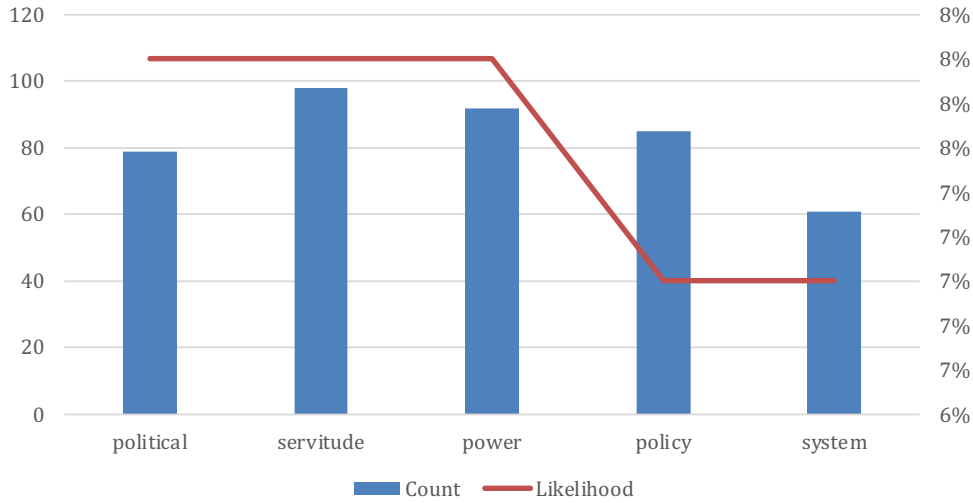


91 Sheldon X Zhang et al, 'Victims Without a Voice: Measuring Worst Forms of Child Labor in the Indian State of Bihar' (2019) 14(7) *Victims and Offenders* 832; Craig Barlow et al, 'Circles of Analysis: A Systemic Model of Child Criminal Exploitation' (2022) 17(3) *Journal of Children's Services* 158.

92 Carly Lightowlers, Rose Broad and David Gadd, 'Victims and Suspects of Modern Slavery: Identifying Subgroups Using Latent Class Analysis' (2021) 15(2) *Policing: A Journal of Policy and Practice* 1384; David M Doyle et al, '"I Felt Like She Owns Me": Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland' (2019) 59(1) *The British Journal of Criminology* 231.

bubble. The fact that 'context' as a theme is conceptually linked to themes in the 'human', 'labour', 'context', 'support' and 'sex' cluster, could be indicative of research in this cluster taking a holistic approach, looking at the broader context in which human trafficking occurs. This becomes apparent in the publications that examine causes and indicators of human trafficking and publications that set out to measure prevalence.[93] The top five word-like concepts related to the 'context' theme confirm the emphasis on contextual factors surrounding human trafficking.

Figure 10: Context — Related Word-Like Concepts

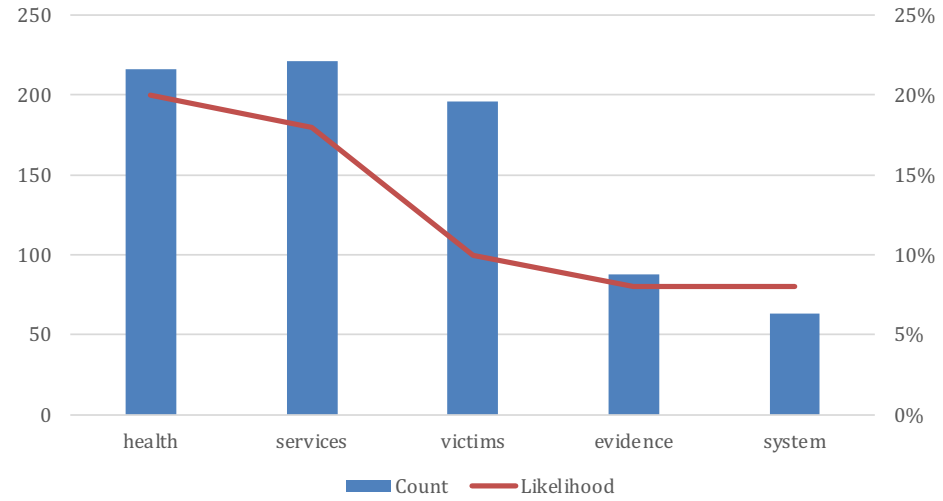


The final two thematic bubbles in this cluster are 'support' and 'sex'. The support theme contains the concepts 'health', 'services' and 'system', which suggests discussions pertaining to access to support services for human trafficking victim-survivors.[94] This assertion is given credence by the significant overlap of the 'support' and 'human' thematic bubbles. The top five word-like concepts related to the 'support' theme also seem to underline the emphasis on support systems for trafficking victims.

93 Serveh Sharifi Far et al, 'Multiple Systems Estimation for Modern Slavery: Robustness of List Omission and Combination' (2021) 67(13–14) *Crime and Delinquency* 2213; John Whitehead et al, 'On the Unreliability of Multiple Systems Estimation for Estimating the Number of Potential Victims of Modern Slavery in the UK' (2021) 7(1) *Journal of Human Trafficking* 1.

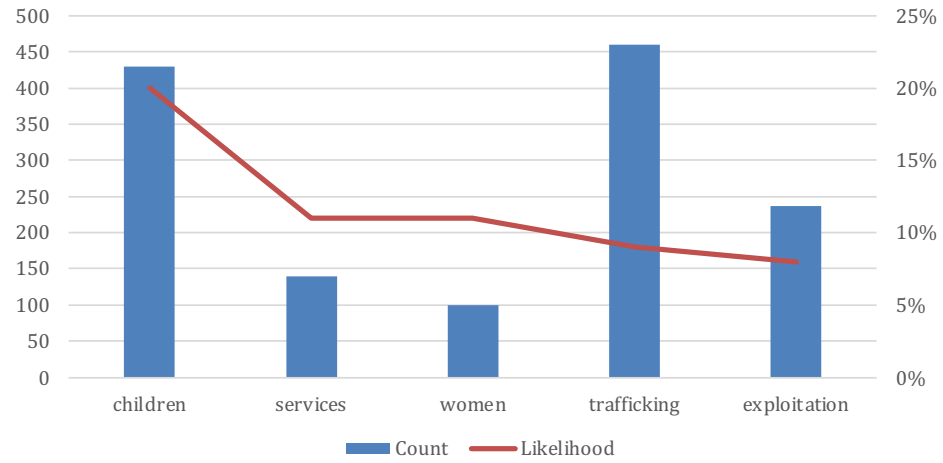
94 Sheila Bird, 'Public Health Perspective on UK-Identified Victims of Modern Slavery' (2021) 67(13–14) *Crime and Delinquency* 2295; Runa Lazzarino, Nicola Wright and Melanie Jordan, 'Mental Healthcare for Survivors of Modern Slavery and Human Trafficking: A Single Point-in-Time, Internet-Based Scoping Study of Third Sector Provision' (2022) 10(3) *Journal of Human Trafficking* 479; Carly Lightowlers, Rose Broad and David Gadd, 'Temporal Measures of Modern Slavery Victimisation' (2022) 24(1) *Criminology and Criminal Justice* 79.

Figure 11: Support — Related Word-Like Concepts



In the 'sex' thematic bubble we find the concept 'victims', which is positioned in the area that overlaps with the 'human' thematic bubble. This connection refers to victim-survivors of sex trafficking.[95] It is not surprising to see the 'sex' thematic bubble in this cluster, as this form of trafficking is arguably less relevant for business as a scholarly discipline. The top five word-like concepts related to the 'sex' thematic bubble confirms the link to sexual exploitation, particularly concerning children and women.

Figure 12: Sex — Related Word-Like Concepts

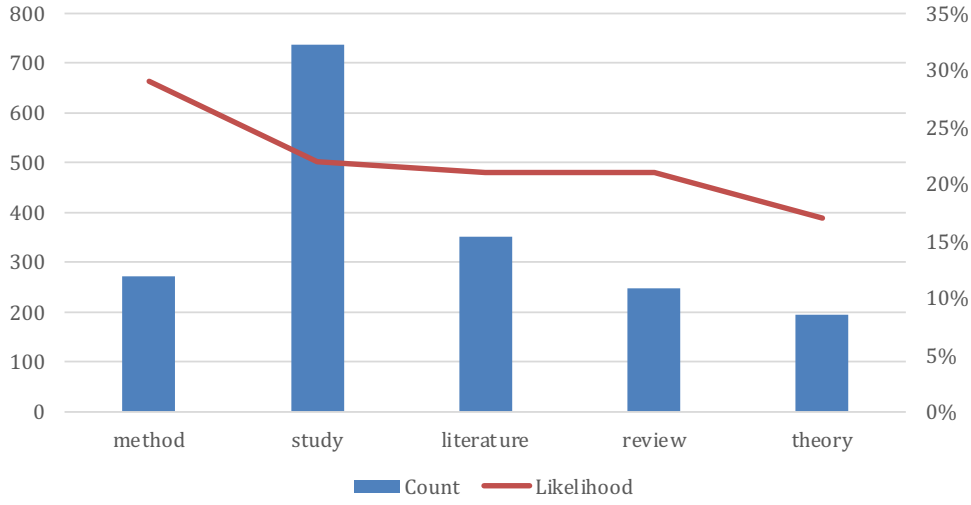


95 Beulah Shekhar, 'The Debt Trap, a Shadow Pandemic for Commercial Sex Workers: Vulnerability, Impact, and Action' (2023) 29(1) *International Review of Victimology* 106; Karin Wachter et al, 'Responding to Domestic Minors Sex Trafficking (DMST): Developing Principle-Based Practices' (2016) 2(4) *Journal of Human Trafficking* 259.

3 *'Research' Thematic Cluster*

The third thematic cluster is formed by the themes 'research', 'data' and 'theory'. Given that the dataset consists of academic publications, it is not surprising to see this thematic cluster emerge. This is also considering the search terms used in Scopus, which looked for a reference to methods. The concepts mentioned in the 'research' thematic bubble reveal relatively limited information about specific research approaches, as the concepts are generic. The top five word-like concepts seem to confirm this assertion (Figure 13).

Figure 13: Research — Related Word-Like Concepts

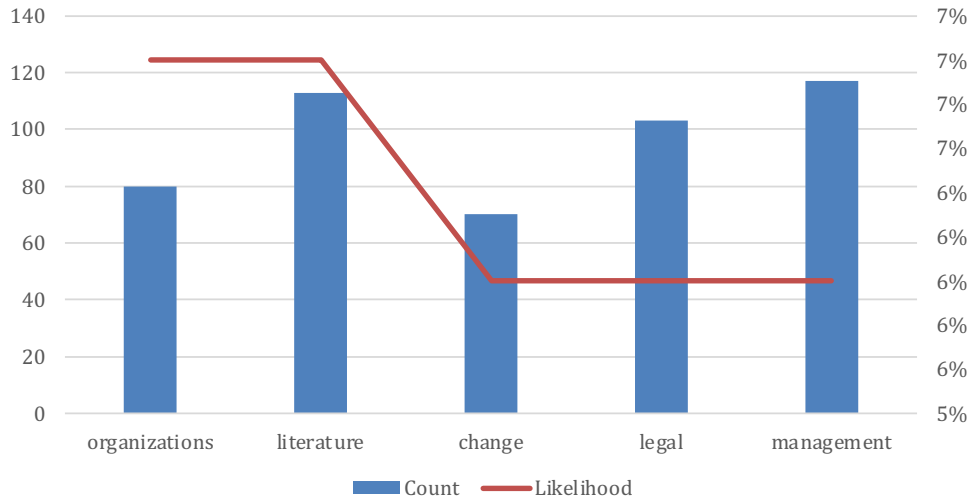


What is interesting to see is that the research thematic bubble is in closer proximity — indeed overlaps with — the cluster related to the business discipline. This suggests that, in the case of this pool of articles, descriptions of research approaches feature more prominently in the business discipline than they do in legal studies and criminology. The same can be said for the 'data' and 'theory' thematic bubbles, which are further removed from the legal studies and criminology thematic cluster. The distance from this cluster, and the proximity to the business cluster, suggest that data and theory are of higher relative importance.[96]

The top five word-like concepts for 'data' does not provide much additional insight but the top five word-like concepts for 'theory' highlight reference to organisations, literature (which was highlighted in the related word-like concepts for 'sustainability'), and management. This confirms the comparative importance of theory in the business discipline cluster compared to the legal studies and criminology cluster.

96 Flynn and Walker (n 79); Cynthia Hardy, Vikram Bhakoo and Steve Maguire, 'A New Methodology for Supply Chain Management: Discourse Analysis and its Potential for Theoretical Advancement' (2020) 56(2) *Journal of Supply Chain Management* 19.

Figure 14: Theory — Related Word-Like Concepts



Overall, in this pool of articles, references to research approaches, data, and theory feature more prominently in the business discipline than they do in the legal studies and criminology discipline. Furthermore, regarding the business literature, it is interesting to see the emphasis on the risks to businesses when it comes to modern slavery and less attention on the risk to individuals and groups. After all, business research is mainly focused on companies (and their organisation, teams and employees). This contrasts with legal and criminology research, which in general pay more attention to the human dimension, for instance by discussing vulnerable groups and support for victim-survivors (which include victims of sex trafficking and the ways in which people's freedom is curtailed). Apart from the human dimension, legal and criminology scholarship also takes a more holistic approach by looking at contextual factors that contribute to the problem, whereas the view in business studies is narrower and focuses on business practices such as the governance and sustainable management of supply/value chains, and reporting on these actions. Finally, in legal studies and criminology literature there seems to be a preference for the use of legally defined terms such as forced labour and human trafficking, rather than the broad umbrella term modern slavery.

We can draw a few conclusions from this Leximancer analysis for future research. For instance, business studies could broaden their scope to consider root causes of modern slavery — to help inform business responses — and the human cost of modern slavery, for example by tackling solutions for remediation. Legal scholarship in turn could be more explicit in articulating methods, theories, and data. Terry Hutchinson has previously acknowledged this limitation whereby legal scholars have not reflected on process, drawing on doctrinal research methodology developed intuitively — a research method at the core of practice.[97] However, it

97 Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3(1) *Erasmus Law Review* 130, 130.

is acknowledged that this no longer suffices in the contemporary academy, where identifying and justifying methods in an increasingly interdisciplinary context, is simply required.[98] There is also scope to draw on these distinct disciplinary strengths through interdisciplinary research.

B *Analysis of Research Methods*

Following analysis of the networks and themes, we then examined the specific methods used in the dataset. As indicated in Table 3, the most commonly used primary method was qualitative interviews (19% of articles). Within the dataset, a range of approaches were used in conducting interviews. For example, Coretta Phillips' 2020 study Utilising 'Modern Slave' Narratives in Social Policy Research,[99] published in *Critical Social Policy*, is based on one narrative interview with a victim-survivor of forced labour. It finds that the form and structure of the survivor's narrative of forced labour resemble those used in the abolitionist cause against antebellum slavery.[100] Another, Beulah Shekhar's 2023 study The Debt Trap, a Shadow Pandemic for Commercial Sex Workers: Vulnerability, Impact, and Action, uses a 'rapid assessment' method to carry out interviews of 15 minutes or less with commercial sex workers in India.[101] More commonly though, as discussed further below, the interviews were carried out with professionals in businesses or government, or with civil society representatives.

Other methods used that were likely to involve human participants included mixed methods (7%); action research (4%); case studies (2%); quantitative survey (2%); ethnographic studies (1%) and qualitative focus groups (1%). Table 4 indicates that where research involved human participants, these were most commonly: 'businesses / other professionals' (26 studies); followed by civil society (11 studies); victim-survivors (9 studies); at-risk populations (8 studies) and consumers (3 studies).

98 Ibid.

99 Coretta Phillips, 'Utilising "Modern Slave" Narratives in Social Policy Research' (2020) 40(1) *Critical Social Policy* 30.

100 Ibid, 30.

101 Shekhar (n 95).

Table 3: Primary Method Used in Scopus Dataset

Primary Method	No.	%
Qualitative interview	32	19%
Content analysis	19	12%
Quantitative secondary data analysis	19	12%
Conceptual	17	10%
Systematic literature review	13	8%
Mixed methods	11	7%
Doctrinal	10	6%
Other	7	4%
Action Research	6	4%
Discourse analysis	6	4%
Historical methods	6	4%
Case studies	4	2%
Experimental design	4	2%
Quantitative survey	4	2%
Ethnographic	2	1%
Policy Analysis	2	1%
Regression analysis	2	1%
Qualitative focus group	1	1%

Table 4: Research Participants in Scopus Dataset

Research participants	No.
Businesses / other professionals	26
Civil Society	11
Victim-survivors	9
At-risk populations	8
Consumers	3
Other	3

After qualitative interviews, the most commonly used methods employed secondary data sources — quantitative secondary data analysis, and content analysis, discussed further below. This was followed by 'conceptual' (10%), and this method's category included the most highly cited papers in our database — Hannah Lewis et al with 268 citations and Crane with 237 citations.[102] After this, all other methods were less frequently used (less than 10%).

102 Hannah Lewis et al, 'Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North' (2015) 39(5) *Progress in Human Geography* 580; Crane (n 5).

Of these methods, the use of secondary datasets, and content analysis, warrant further discussion. Much of the content analysis involved analysing modern slavery statements. This is unsurprising given the introduction of two accessible data sources in the UK and Australia whereby the mandatory modern slavery statements required by large businesses under the UK and Australian MSAs are available via public repositories. In the UK, this was originally hosted by the Business and Human Rights Resource Centre,[103] but later became a government repository.[104] In Australia, this repository was public from the outset.[105] Indeed, in the absence of penalties for non-compliance, or other enforcement mechanisms, public scrutiny of modern slavery statements was anticipated as an informal means of regulation.[106] In these publications, we see a concentration of authors working collaboratively (predominantly from Australia and the UK) such as Christ, Burritt, Bruce Pinnington, Rao (K.K.), Nadia Bernaz and Joanne Meehan.

In terms of the quantitative secondary data analysis, these papers were often accessing large data sets such as police or national databases (eg Carly Lightowlers, Rose Broad and David Gadd 2021, 2022; Cockbain, Bowers and Hutt 2022);[107] or using internet or social media data (eg Luca Giommoni and Ruth Ikwu 2021; Anne Vestergaard and Julie Uldam 2022; Runa Lazzarino, Nicola Wright and Melanie Jordan 2022).[108] Some of these also relied on data from the Global Slavery Index ('GSI') or other international or national publications. In our coding, we captured whether articles referenced these commonly used data sets and found that 30% of the articles referenced the GSI, with the US Trafficking in Persons and United Nations or ILO reports less commonly used at 4% in both cases (see Table 5).

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103 'Modern Slavery Statements', *Business and Human Rights Resource Centre* (Web Page) <https://www.business-humanrights.org/en/from-us/modern-slavery-statements/>.

104 'Modern Slavery Statement Registry', *UK Government* (Web Page) <https://modern-slavery-statement-registry.service.gov.uk/>.

105 'Online Register for Modern Slavery Statements', *Australian Government Attorney General's Department* (Web Page) <https://modernslaveryregister.gov.au/>.

106 See, eg: Paul Redmond, 'Regulating Through Reporting: An Anticipatory Assessment of The Australian Modern Slavery Acts' (2020) 26(1) *Australian Journal of Human Rights* 5, 5; Fiona McGaughey, 'Behind the Scenes: Reporting Under Australia's Modern Slavery Act' (2021) 27(1) *Australian Journal of Human Rights* 20.

107 Lightowlers, Broad and Gadd (n 92); Ella Cockbain, Kate Bowers, Oli Hutt, 'Examining the Geographies of Human Trafficking: Methodological Challenges in Mapping Trafficking's Complexities and Connectivities' (2022) 139 *Applied Geography* 102643.

108 Luca Giommoni and Ruth Ikwu, 'Identifying Human Trafficking Indicators in the UK Online Sex Market' (2021) 27 *Trends in Organized Crime* 10, 11; Anne Vestergaard and Julie Uldam, 'Legitimacy and Cosmopolitanism: Online Public Debates on (Corporate) Responsibility' (2022) 176(2) *Journal of Business Ethics* 227; Runa Lazzarino, Nicola Wright and Melanie Jordan, 'Mental Healthcare for Survivors of Modern Slavery and Human Trafficking: A Single Point-in-Time, Internet-Based Scoping Study of Third Sector Provision' (2022) 10(3) *Journal of Human Trafficking* 479.

Table 5: Data Sources / Reports Used in Scopus Dataset

Data Sources Used	No.	%
Global Slavery Index	49	30%
US Trafficking in Persons Report	6	4%
United Nations / International Labour Organization Reports	6	4%
Other	2	1%

The GSI is produced by Australian headquartered, international NGO Walk Free. It is partly based on data collated for the Global Estimates of Modern Slavery, published in collaboration with the ILO and the International Organization for Migration ('IOM') since 2017 and is the primary international dataset in the field of modern slavery published periodically.[109] Critique of the GSI and its methods is explored in the Discussion section.

Turning then to coding by discipline, the most common were business, criminology, law, and social sciences, and when coded by subdiscipline, 56 separate subdisciplines were recorded. When subdisciplines were analysed by method, generally there were strong similarities in the main methods used within a sub-discipline. For example, commonly used methods in the subdiscipline of business, management and accounting were 'conceptual' and 'content analysis'. This subdiscipline includes Crane,[110] which, as per our co-citation analysis, is highly influential in the field and uses a conceptual method. This means it is likely that given the disciplinary segregation noted in our co-citation and Leximancer analyses, leading authors influence the methods in their discipline. The profile of criminological research is quite distinct — favouring quantitative secondary data analysis and qualitative interviews. Legal research is strongly dominated by the doctrinal method, and qualitative interviews and systematic literature reviews are prevalent in the social sciences. Some subdisciplines (albeit with a small sample size in the dataset) such as 'Economics, Econometrics and Finance (miscellaneous)' and 'Management Science and Operations' had a wide variety of methods (eg action research, content analysis, qualitative interviews, systematic literature reviews etc).

Finally, we coded the 165 journal articles based on the country of the institution with which the lead author was affiliated. Here we sought to examine whether authors and scholarship from countries where modern slavery is more prevalent were adequately reflected in the dataset, amid concerns of imperialism in the literature.[111] As Figure 15 indicates, this analysis confirms the Western dominance in modern slavery literature. For 149 of the 165 articles, the lead author's institution

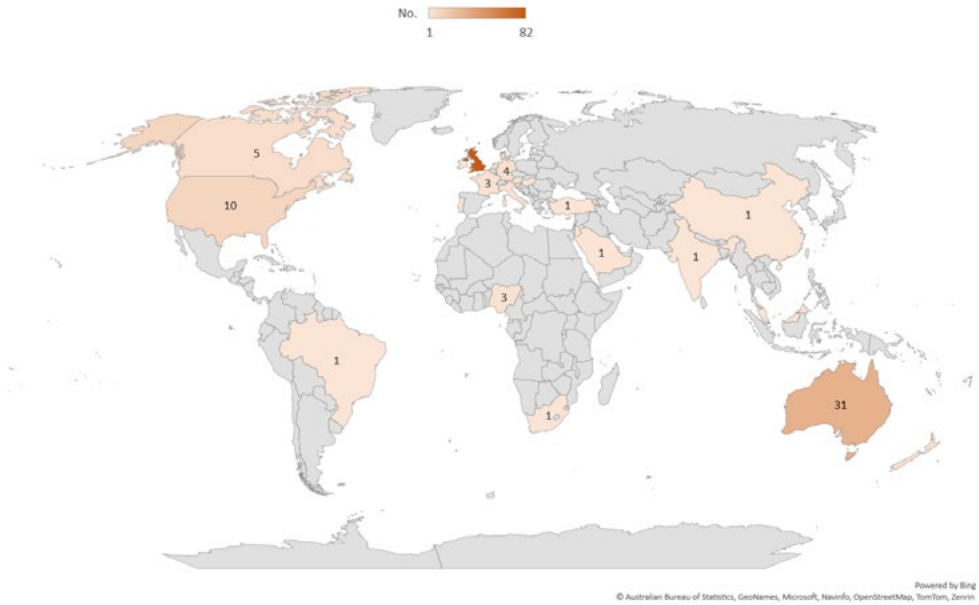
109 Editions of the Global Slavery Index have been published in 2013, 2014, 2016, 2018 and 2023.

110 Crane (n 5).

111 Although more focused on campaigns, see, eg, Kamala Kempadoo, 'Revitalizing Imperialism: Contemporary Campaigns against Sex Trafficking and Modern Slavery' (2016) 47(1) *Cadernos Pagu* 1.

was in a 'Western European or Other' country using the United Nations regional groupings.[112] There were scant articles in the dataset from the other regional groupings: Latin American and Caribbean States, Eastern European States, Asia-Pacific States, and African States. As noted in the Introduction, there was also evidence of the country's domestic legislation driving research in this area — with most articles coming out of the UK (82), followed by Australia (31) — the only two jurisdictions with laws specifically using the term 'modern slavery'.

Figure 15: Map of Scopus Articles by Country of Lead Author's Institution



V Discussion

As a complex, multi-faceted issue, modern slavery requires breadth of analysis through interdisciplinary research, as well as depth of analysis within disciplinary boundaries. As researchers, we need to consider to what extent we engage across disciplinary boundaries — a gap identified in our co-citation and Leximancer analysis. As an illustration of why interdisciplinary (or multidisciplinary) approaches may be useful, scholarship in the business discipline tends to focus on risks to business (rather than risks to people)[113] whereas legal and criminology research engages more with the context and human aspects of modern slavery. In practice, we know that a key element in effectively tackling modern slavery within businesses and

112 'Regional Groups of Member States', *United Nations Department for General Assembly and Conference Management* (Web Page) <https://www.un.org/dgacm/en/content/regional-groups>.

113 Hardy, Bhakoo and Maguire (n 96).

their supply chains is engagement with a range of stakeholders including workers, unions, suppliers, and others,[114] and yet the business literature is predominantly focused on the risk to businesses and how to mitigate these risks.

We note some developments in interdisciplinary approaches to modern slavery research such as Andrew Smith and Jennifer Johns' 2020 study on consumer knowledge in modern slavery at the interface of history, business ethics, and policy making;[115] and Nithya Natarajan, Katherine Brickell and Laurie Parsons' 2020 investigation of the structural drivers of modern slavery through the lens of global economics, political science, and international business.[116] The scholarly disciplines also complement each other, allowing us to develop a more comprehensive understanding of modern slavery. For example, in addition to examining legal duties, legal scholarship generally takes a more holistic approach than business scholarship by looking at contextual factors that contribute to the problem, whereas the business discipline offers an analysis of supply/value chains that legal scholars may lack. There is also some segregation in the methods used in different disciplines and some adherence to tried and tested methods, particularly in subdisciplines. We discuss below the scope to broaden methods used in modern slavery research in general, but similarly, disciplines can learn from each other in adopting new approaches within their fields.

We posit that lawyers and legal scholars can benefit from an interdisciplinary approach to tackling modern slavery, and to modern slavery research, in a number of ways. For example, for business-related modern slavery such as forced labour, an understanding of supply chain management and the associated terminology is essential for the drafting, application, and interpretation of relevant primary legislation and associated secondary legislation and guidelines. Assessing the *effectiveness* of legislation — such as the Modern Slavery Acts — also requires at least socio-legal, if not more rigorous empirical methods, more commonly used in other disciplines in the social sciences. Further, in most democracies, proposals for new laws and statutory reviews of existing laws involve social sciences type data collection in consultation processes with experts and the public.[117] In the Australian context for example, this method was used in: trafficking and slavery related revisions to the *Criminal*

114 See, eg, Shelley Marshall et al, *Australia's Modern Slavery Act: Is it Fit for Purpose?* (Report, 2023).

115 Andrew Smith and Jennifer Johns, 'Historicizing Modern Slavery: Free-Grown Sugar as an Ethics-Driven Market Category in Nineteenth-Century Britain' (2020) 166(2) *Journal of Business Ethics* 271.

116 Nithya Natarajan, Katherine Brickell and Laurie Parsons, 'Diffuse Drivers of Modern Slavery: From Microfinance to Unfree Labour in Cambodia' (2021) 52(2) *Development and Change* 241.

117 Maria Jesus Garcia, 'Smart Regulation Law-Making and Participatory Democracy: Consultation in the European Union' (2019) 59(1) *Catalan Journal of Public Law* 85.

Code 1995 (Cth);[118] the inquiry into whether a MSA in Australia was required;[119] the statutory review of the *Australian MSA*;[120]and, most recently, the inquiry into establishing an Anti-Slavery Commissioner.[121] This engagement through consultation aligns with a smart regulation approach which Neil Gunningham and Darren Sinclair define as encompassing:

> self-regulation and co-regulation, using commercial interests and non-governmental organisations … as regulatory surrogates, together with improving the effectiveness and efficiency of more conventional forms of direct government regulation. The underlying rationale is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation.[122]

As such, this involves processes and methods that are clearly not purely doctrinal in nature. In fact though, as IJ Kroeze argues, multidisciplinarity is actually something legal researchers regularly do because law is a social artefact and the consideration of legal issues 'require looking at socio-political and economic factors'.[123] Kroeze concludes that this 'is one of the reasons why regarding law as an axiomatic or logical discipline only is impossible'.[124] The benefits of interdisciplinary work goes both ways, legal researchers can contribute legal expertise and share our doctrinal training with others. In terms of methods employed, our analysis found that the combined 'content analysis' and 'qualitative secondary data analysis' equate to 24% of the publications we examined, meaning that researchers are making use of existing datasets such as repositories of modern slavery statements and police and criminology data. Further, the GSI was cited in 30% of the articles. We question whether the availability of such datasets has reduced the perceived need for quantitative research — 'quantitative survey' as a method was used in only 2% of the articles and mixed methods were used in only 7%. In using these existing datasets, researchers must question the robustness of these datasets and acknowledge their limitations. Modern slavery statements provide an important source of information

118 Attorney General's Office, 'Targeted Review of Divisions 270 and 271 of the *Criminal Code 1995* (Cth)' (Discussion Paper, Commonwealth of Australia, 2022).

119 Joint Standing Committee on Foreign Affairs (n 3).

120 See, eg, John McMillan, *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth) The First Three Years* (Report, Australian Government, 2023).

121 Australian Human Rights Commission Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023*, 29 January 2024. See submissions for this bill at: 'Submissions', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Anti-Slavery23/Submissions>.

122 Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133, 133.

123 IJ Kroeze, 'Legal Research Methodology and the Dream of Interdisciplinarity' (2013) 16(3) *Potchefstroom Electronic Law Journal* 36, 53.

124 Ibid.

about corporate performance — but it remains self-reported performance, not data collected by an independent researcher. Similarly, there are limitations to the reliance on the GSI as a dataset, including the fact that it does not include all forms of modern slavery, only forced labour and forced marriage. In terms of methods, the GSI relies on data from the Global Estimates of Modern Slavery which draws on three sources of data: (1) nationally representative surveys; (2) the IOM's Counter Trafficking Data Collaborative dataset; and (3) comments from the ILO Committee of Experts on the Application of Conventions and Recommendations relating to state-imposed forced labour and other secondary sources.[125]

Anne Gallagher has questioned the GSI and its methods, but also the lack of critical engagement with the dataset by others, questioning the allure of philanthropic funding as a motivating factor.[126] With regard to estimates, she points out that the complexities of estimating the numbers of people in modern slavery were well known to those working in the field.[127] The primary source of such estimates prior to the GSI, and still widely used for actual cases, is the authoritative US Trafficking in Persons Report ('TIP').[128] The TIP report no longer provides estimates due to concerns over the accuracy of the data due to 'methodological weaknesses, gaps in data, and numerical discrepancies'.[129] Now, the TIP Report cites only published, hard data including numbers of 'victims' identified and traffickers prosecuted and convicted.[130] In addition, Gallagher notes that the ILO has previously estimated forced labour and that changes to the methodology used caused a jump in estimates from 12.3 million to more than 20 million in seven years.[131] Similarly, we note that changes in the GSI methodology led to significant changes in global slavery estimates from 2016 to 2018 and again in 2023, casting doubt over the reliability and consistency of the method and the data.[132] Gallagher acknowledges that the ILO has tried to be open about the difficulties of measuring the number of those in forced labour, the fragility of the resulting data and the highly provisional nature of any conclusions based on that information.[133] Andrew Guth et al also cast doubt on the methodology used for the GSI, arguing that the use of improper methods is

125 Walk Free, 'Methodology: Prevalence', *Global Slavery Index* (Web Page 2023) <https://www.walkfree.org/global-slavery-index/methodology/methodology-content/#prevalence>.

126 Gallagher (n 32) 92.

127 Ibid 93.

128 The reports are available at: 'Trafficking in Persons Report', *US Department of State* (Web Page, 2024) <https://www.state.gov/trafficking-in-persons-report/>.

129 Gallagher (n 32) 94.

130 Ibid.

131 Ibid.

132 See, eg, Walk Free Foundation, *Global Slavery Index 2018*, (Report, 2018) 32: Due to substantial differences in scope, methodologies, and expanded data sources, prevalence estimates in the 2018 Global Slavery Index are not directly comparable to the previous edition.'

133 Gallagher (n 32) 92.

damaging as it advances data and policy that is not based on sound methodology.[134] They recommend a committee of experienced methods experts to develop measurement tools and constantly analyse and refine the methods used in the GSI.[135] We suggest that the GSI is an important dataset but should be subject to scrutiny by researchers, particularly given its widespread usage in the dataset we examined.

Our analysis of this dataset also shows that there is scope overall to broaden the range of methods used. Examples include use of photographs and videos in field studies to capture the reality of workers' experiences. Photovoice and other photo and video tools have been used effectively as a tool of empowerment for workers in participatory action research projects,[136] leading to improved working conditions.[137] More broadly, use of photography and videography in research by those at risk of human rights exploitation has been found to have a panopticon effect.[138] Further, there is a gap in terms of employing scenario-based experiments which would be very useful to test ethical dilemmas encountered by purchasing or sustainability managers when facing decisions about how to tackle an incident of modern slavery.[139] Case studies to include both buyers and suppliers (particularly high risk) could be used to examine policy versus its implementation by a supplier; and to look further upstream in the supply chain, specifically at raw material suppliers.

The limitations of secondary data sets described above make a strong case for employing primary data sources such as interviews. Indeed researchers have gravitated towards qualitative methods such as interviews, which was the most commonly used single method at 19%. 'Business / other professionals' are the most common participants (26 studies) but with less engagement with victim-survivors (nine studies) and at-risk populations (eight studies). We believe this is a serious omission in modern slavery scholarship as we need a more comprehensive understanding of the experiences of victim-survivors, including the conditions that

134 Andrew Guth et al, 'Proper Methodology and Methods of Collecting and Analyzing Slavery Data: An Examination of the Global Slavery Index' (2014) 2(4) *Social Inclusion* 14, 14.

135 Ibid 20.

136 See, eg, Saskia Duijs et al, 'Navigating Voice, Vocabulary and Silence: Developing Critical Consciousness in a Photovoice Project with (Un)Paid Care Workers in Long-Term Care' (2022) 19(9) *International Journal of Environmental Research and Public Health* 5570.

137 Mariam Flum et al, 'Photovoice in the Workplace: A Participatory Method to Give Voice to Workers to Identify Health and Safety Hazards and Promote Workplace Change — A Study of University Custodians' (2010) 53(1) *American Journal of Industrial Medicine* 1150, 1150.

138 Pini Miretski and Sascha-Dominik Bachmann, 'The Panopticon of International Law: B'Tselem's Camera Project and the Enforcement of International Law in a Transnational Society' (2014) 52(1) *Osgoode Hall Law Journal* 235, 235.

139 See, eg, David T Welsh et al, 'The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions' (2015) 100(1) *Journal of Applied Psychology* 114.

incubate modern slavery, the approaches that have resulted in positive outcomes, the support systems required to overcome the trauma, and the impact of the experience on survivors' lives.

It is worth acknowledging that university human research ethics processes are complex — a necessary protection for vulnerable communities that have experienced trauma. However, the very risk-averse approach to granting ethics approval inadvertently leaves researchers restricted in their ability to give voice to the concerns of affected populations, despite calls for survivor informed responses to modern slavery, including through research.[140] In this regard, the research of the Modern Slavery Policy and Evidence Centre in the UK is of interest and adopts an approach that could be replicated elsewhere. Their research is underpinned by the three principles of: effectiveness; equity; and survivor involvement — which aims to involve those affected by modern slavery at all stages of the research process in selection, design, production and implementation.[141]

Other areas for development include scope for marketing scholars to engage further with research to tackle the modern slavery problem, particularly consumer perceptions of modern slavery. Since consumers are a vital stakeholder in influencing and potentially championing change, we see merit in marketing scholars pursuing this fertile and impactful line of research. Use of ethnographic studies also warrants consideration — with only two such studies reported in our analysis.[142] Ethnographic studies that require prolonged engagement in the field are warranted to understand the lived experience of survivors and are critical in designing effective remediation measures and developing strategies for victim-survivors in specific contexts.

Finally, we highlight that 90% of the research in our dataset was led by an author based at a university in the Global North. To advance this field, we need more participation from the Global South, and an ambitious research agenda across different countries, industries, and migrant groups. This can be supported through grants, partnerships, bilateral assistance, and other means. In-country research has been shown to be more sustainable and improve research uptake in policy frameworks.[143]

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140 Frances Simmons and Jennifer Burn, *Beyond Storytelling: Towards Survivor-Informed Responses to Modern Slavery* (Report, University of Technology Sydney, September 2022).

141 'How we fund research', *Modern Slavery and Human Rights Policy and Evidence Centre* (Web Page) <https://modernslaverypec.org/how-we-fund-research>.

142 Cristiana Giordano, 'Practices of Translation and the Making of Migrant Subjectivities in Contemporary Italy' (2008) 35(4) *American Ethnologist* 588; Foluké Abigail Badejo, Ross Gordon, and Robyn Mayes, 'Transforming Human Trafficking Rescue Services in Nigeria: Towards Context-specific Intersectionality and Trauma-informed Perspectives' (2021) 35(7) *Journal of Services Marketing* 878.

143 See, eg, OECD, *Development Co-operation Tips, Tools, Insights, Practices: Investing in Research and Innovation in Developing Countries* (Report, 2021).

VI Conclusion

Research on modern slavery is burgeoning, and yet critical analysis of its scholarly methods, disciplinary contours, and key themes remain under explored in the literature. As an interdisciplinary team of scholars, we embarked on this study with a view to initiating dialogue on these topics to advance research on this egregious, global human rights issue. Modern slavery as a complex social issue cannot be tackled without an understanding of its various components and as such, interdisciplinary research is critical. We provide examples of reciprocal benefits for law and non-law scholars and argue that the theory of smart regulation shows that law is not always the singular discipline we might assume.

Analysing 165 relevant articles from the Scopus database provided some preliminary findings to begin this conversation. Using co-citation and Leximancer analysis we find a scholarly field with some disciplinary segregation, particularly in the gap between business and supply chain literature on the one hand, and legal and criminology scholarship on the other. By codifying the methods used, we also find quite distinct methodological preferences in different disciplines and adherence to tried and tested methods, particularly in subdisciplines. We find that researchers rely heavily on existing datasets such as repositories of modern slavery statements, and around one third cite Walk Free's Global Slavery Index. These are useful datasets, but their limitations must be acknowledged. To counter-balance this use of secondary datasets, qualitative interviews are quite prevalent and where human participants are involved, business or professional staff are more likely to be involved than victim-survivors or consumers. In terms of authors, the literature remains dominated by scholars from the Global North, despite the prevalence of modern slavery being higher in the Global South. We suggest there is scope to broaden modern slavery research to increase inter-disciplinary dialogue, diversify methodologies, support scholars from the Global South, and give voice to victim-survivors.

*Madeleine Hale**

AMPLIFYING DISCORD OR FOSTERING FREEDOM? CONTRASTING IMPLICATIONS OF SOCIAL MEDIA ECHO CHAMBERS FOR DELIBERATIVE AND LIBERTARIAN CONCEPTIONS OF DEMOCRATIC FREE SPEECH

Abstract

In the wake of social media driven insurrections in democratic states around the world, there has been widespread concern about the corrosive effects of online echo chambers on democracy and free speech. This article argues that the relationship between echo chambers, democracy and free speech is more complex than it appears. Whilst echo chambers may be problematic for a deliberative conception of democratic free speech, they are not necessarily problematic for a libertarian conception of democratic free speech. In fact, echo chambers may promote opinion formation, opinion expression and interest group formation in a libertarian conception of democratic free speech by enabling like-minded social media users to connect and express their views. This has important ramifications for the currently simplistic public debate about the effects of social media echo chambers on democracy and free speech. These findings suggest that the dominant discourse on social media echo chambers is driven by deliberative, rather than libertarian concerns, and reinforces the need to be aware of the democratic assumptions underpinning calls for reform on social media.

I Introduction

Social media echo chambers are commonly assumed to be corrosive of free speech and democracy and have been implicated in attacks on democratic institutions around the world.[1] However, this assumption is overly simplistic.

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1 For commentary in the wake of attacks on democratic institutions in the United States and Brazil, see, eg: Jonathan Haidt, 'Yes, Social Media Really is Undermining Democracy', *The Atlantic Monthly* (online, 28 July 2022) <https://www.theatlantic.com/ideas/archive/2022/07/social-media-harm-facebook-meta-response/670975/>; Laura Romero, 'Experts Say Echo Chambers From Apps like Parler and Gab Contributed to Attack on Capitol', *American Broadcasting Company*

This article demonstrates that social media echo chambers are much more normatively complex than is commonly thought.[2] It will show that whilst concerns about echo chambers might be warranted under a deliberative conception of democracy, it is not necessarily the case for a libertarian conception. This indicates that these concerns are primarily driven by a deliberative, rather than a libertarian understanding of democracy and free speech.[3] This finding highlights the importance of an awareness of the democratic assumptions that underpin views on free speech and new phenomena like social media echo chambers.[4] Such awareness may change how new phenomena on social media are discussed, assessed and potentially regulated.

Some commentators claim that there is little substantive difference between the two conceptions in practice.[5] However, the following analysis will show that there *are*

(online, 12 January 2021) <https://abcnews.go.com/US/experts-echo-chambers-apps-parler-gab-contributed-attack/story?id=75141014>; Michael Fox, 'Brazil's Shocking — but Not Surprising — Attempted Coup', *The Nation* (online, 12 January 2023) <https://www.thenation.com/article/world/brazil-bolsonaro-brasilia-capital-attack/>; Robert Braga 'The Insurrection in Brazil is Part of a Broader Crisis of Trust', *Time Magazine* (online, 11 January 2023) <https://time.com/6246475/brazil-insurrection-bolsonaro-disinformation/>.

2 I employ the term 'echo chamber' to describe 'echo chamber-like phenomena' that have been examined in empirical studies and are related to the echo chamber effect, for example: 'filter bubbles'; 'recommender systems'; 'clusters' and 'deliberative enclaves'; experiencing 'polarisation'; 'selective exposure'; 'homophily'; and a 'lack of interaction' between users. Whilst I use the term in this article for the sake of simplicity, the metaphor has been heavily criticised as problematic and lacking definitional clarity and consensus, see, eg: Axel Bruns, 'Echo Chambers? Filter Bubbles? The Misleading Metaphors That Obscure the Real Problem' in Marta Pérez-Escolar and José Manuel Noguera-Vivo (eds), *Hate Speech and Polarization in Participatory Society* (Routledge, 2021) 33; Axel Bruns, 'It's not the Technology, Stupid: How the 'Echo Chamber' and 'Filter Bubble' Metaphors Have Failed Us' (Conference Paper, International Association for Media and Communication Research, 2019); Axel Bruns, *Are Filter Bubbles Real?* (Polity Press, 2019); Amy Ross Arguedas et al, 'Echo Chambers, Filter Bubbles, and Polarisation' (Literature Review, Reuters Institute January, 2022) 7; Stefan Geiß et al, 'Loopholes in the Echo Chambers: How the Echo Chamber Metaphor Oversimplifies the Effects of Information Gateways on Opinion Expression' (2021) 9(5) *Digital Journalism* 660, 662.

3 See, for example, deliberative–driven concerns about echo chambers and social media: Geoffrey Baym, 'How Media Stifles Deliberative Democracy', *JSTOR Daily* (online, 17 January 2023) <https://daily.jstor.org/how-media-stifles-deliberative-democracy/>.

4 For a discussion of the importance of sound free speech methodology enabling a deeper theoretical understanding of free speech in debates see especially, Seana Valentine Shiffrin, 'Methodology in Free Speech Theory' (2011) 97(3) *Virginia Law Review* 549, 550.

5 See generally, for an argument that the political responses in practice of the deliberative-aligned 'left' and libertarian-aligned 'right' at the extremes are substantially similar: Edward A Shils, 'Authoritarianism: "Right" and "Left"' in Richard Christie and Marie Jahoda (eds), *Studies in the Scope and Method of the Authoritarian Personality* (Free Press, 1954) 24–9.

differences in the free speech implications of these two conceptions, and that these differences are drawn out by the phenomenon of echo chambers on social media. It will show that — contrary to common assumptions — whilst social media echo chambers *do* undermine the commitments of a deliberative conception of democratic free speech, they are *not* entirely inconsistent with the commitments of a libertarian conception of democratic free speech.

Part II of this article will problematise this analysis by outlining the existing concerns about the impact of social media echo chambers on democracy and free speech. Part III will outline a framework of two alternative conceptions of democratic free speech: a deliberative conception and a libertarian conception of democratic free speech. Part IV applies this framework to social media echo chambers to demonstrate the different implications of each conception in practice. Part V concludes by drawing out the consequences of each conception for government intervention and regulation of social media.

II Existing Concerns About the Impact of Social Media Echo Chambers on Free Speech and Democracy

Commentators have expressed various concerns about the destructive effects of social media echo chambers on free speech and democracy.[6] In so doing, they start from a premise, which is also adopted in the following, that echo chambers exist and are widespread on social media.[7]

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6 See, for example, Bill Gates describing filter bubbles as "more of a problem than I, or many others, would have expected": Kevin Delaney, 'Filter Bubbles are a Serious Problem with News, says Bill Gates', *Quartz Advisor* (online, 21 February 2017) <https://qz.com/913114/bill-gates-says-filter-bubbles-are-a-serious-problem-with-news>.

7 It is important to note that the empirical research is far from conclusive as to the existence and prevalence of echo chambers. Many empirical studies suggest that echo chambers *are* present on social media, particularly studies that examine a particular issue (eg, vaccines), ideological divide (eg, conservative and liberal) or time period (eg, the lead up to an election). Other studies suggest that echo chambers exist but are not as widespread as commonly assumed by the general public. For the purposes of this article's analysis of democratic free speech, it is sufficient and reasonable to assume that, while there is evidence on both sides of the debate, echo chambers — and related echo chamber–like phenomena — arise on social media at certain times, even though the research casts some doubt on how widespread they are. For studies that demonstrate evidence of the existence of echo chambers, see eg: Ana Lucía Schmidt et al, 'Polarization of the Vaccination Debate on Facebook' (2018) 36 *Vaccine* 3606; Matteo Cinelli et al, 'The Echo Chamber Effect on Social Media' (2021) 118(9) *Proceedings of the National Academy of Sciences* 1; Michela Del Vicario et al, 'The Spreading of Misinformation Online' (2016) 113(3) *Proceedings of the National Academy of Sciences* 554; Pablo Barberá et al, 'Tweeting from Left to Right: Is Online Political Communication More than an Echo Chamber?' (2015) 26(10) *Psychological Science* 1531; Michael D Conover et al, 'Partisan Asymmetries in Online Political Activity' (2012) 1(6) *European Physical Journal of Data Science* 3. For studies finding that echo chambers exist but are not as widespread as commonly assumed by the

First, commentators are concerned that echo chambers are problematic for democracy because they increase polarisation,[8] shielding constituents from alternative views which would normally moderate extreme or radical views.[9] The increase in extreme views results in greater polarisation amongst social media users. Polarisation is often considered problematic for democracy because it erodes the common ground and understanding that is required for healthy deliberation and decision-making.[10]

Secondly, commentators also argue that echo chambers decrease civic courage and tolerance of alternative views by insulating users from criticism and diverse discussion.[11] This is viewed as problematic for democracy and free speech for several reasons. If constituents are intolerant of other views, their own opinion formation and decision-making will be poorer because it is not informed by diverse information. Without exposure to diverse information, constituents will become increasingly hostile to views that challenge their opinions. In these hostile echo chamber environments, constituents with alternative views cannot speak freely

general public, see eg: Jesse Shore, Jiye Baek and Chrysanthos Dellarocas, 'Network Structure and Patterns of Information Diversity on Twitter' (2018) 42(3) *Management Information Systems Quarterly* 849; Geiß et al (n 2).

8 Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press, 2017) 68, 74, 88 ('*#Republic*'); Kalev Leetaru, 'The Social Media Filter Bubble's Corrosive Impact on Democracy and the Press', *Forbes Media* (online, 20 July 2019) <https://www.forbes.com/sites/kalevleetaru/2019/07/20/the-social-media-filter-bubbles-corrosive-impact-on-democracy-and-the-press/?sh=600ccf81ad42>; Nyshka Chandran, 'Obama to David Letterman: Media is Dividing Americans', *Consumer News and Business Channel* (online, 12 January 2018) <https://www.cnbc.com/2018/01/12/former-president-barack-obama-warns-on-polarizing-media-us-electoral-system.html> citing 'Barack Obama', *My Next Guest Needs No Introduction with David Letterman* (Netflix, 2018); Haidt (n 1).

9 Sunstein, *#Republic* (n 8); Chandran (n 8). Professor Kai Riemer and Dr Sandra Peter claim that social media echo chambers increase 'fragmentation and segmentation resulting in political polarisation': at Kai Riemer and Sandra Peter, 'Algorithmic Audiencing: Why We Need to Rethink Free Speech on Social Media' (2021) 36(4) *Journal of Information Technology* 409, 417.

10 Sunstein, *#Republic* (n 8) 66–7; Leetaru (n 8); Kathleen Hall Jamieson and Joseph Cappella, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment* (Oxford University Press, 2008) 246.

11 Echo chambers 'also reinforces your sense of belonging to this group, and it reinforces your negativity and hostility toward other groups': Thor Benson, 'The Small but Mighty Danger of Echo Chamber Extremism', *Wired* (online, 20 January 2023) <https://www.wired.com/story/media-echo-chamber-extremism/>. See Mostafa M El-Bermawy, 'Your Filter Bubble is Destroying Democracy', *Wired* (online, 18 November 2016) <https://www.wired.com/2016/11/filter-bubble-destroying-democracy/>; Christopher Hooton, 'Social Media Echo Chambers Gifted Donald Trump the Presidency', *The Independent* (online, 10 November 2016) <https://www.independent.co.uk/voices/donald-trump-president-social-media-echo-chamber-hypernormalisation-adam-curtis-protests-blame-a7409481.html>.

and openly.[12] It is feared that this will result in a chilling effect on free speech as users with unwelcomed opinions may self-censor for fear of community backlash.

Another concern relates to the role that echo chambers play in generating, legitimising and amplifying harmful speech such as hate speech.[13] The concern is that social media users who are exposed to large amounts of harmful speech — that often thrives in echo chambers — will become more radical and confident in expressing and spreading such harmful speech online.[14] This speech undermines and silences people who have alternative views, or those that belong to minority groups, who are exposed to, or become the target of this harmful speech, such as hate speech.[15] Additionally, it is claimed that the prevalence of harmful speech online damages democratic discourse by encouraging division and increasing ideological and affective polarisation.[16] Some commentators also argue that this harmful speech

12 El-Bermawy (n 11); Hooton (n 11).

13 Amanda Taub states that 'over time, the online echo chamber can legitimize radical ideas, including calls for violence': 'On Social Media's Fringes, Growing Extremism Targets Women', *The New York Times* (online, 9 May 2018) <https://www.nytimes.com/2018/05/09/world/americas/incels-toronto-attack.html>. See also: Reimer and Peter (n 9) 419; Vasu Goel et al, 'Hatemongers Ride on Echo Chambers to Escalate Hate Speech Diffusion' (2023) 2(3) *Proceedings of the National Academy of Sciences Nexus* 1, 1.

14 Karsten Müller and Carlo Schwarz, 'Fanning the Flames of Hate: Social Media and Hate Crime' (2021) 19(4) *Journal of the European Economic Association* 2131; Derek O'Callaghan et al, 'The Extreme Right Filter Bubble' (Working Paper No VI, Connell University, 28 August 2013).

15 For the literature on the silencing effect of harmful speech such as hate speech, see, eg: Caroline West, 'Words That Silence? Freedom of Expression and Racist Hate Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford Academic, 2012) 222; Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22(3) *Social Identities* 324; Katharine Gelber, 'Hate Speech: Definitions and Empirical Evidence' (2017) 32 *Constitutional Commentary* 619; Elisabeth Noelle-Neumann and Thomas Petersen, 'The Spiral of Silence and the Social Nature of Man' in Lynda Lee Kaid (ed), *Handbook of Political Communication Research* (Taylor and Francis, 2008) 339. Much of this literature, however, explores the silencing effect on women of hate speech in the context of pornography: Ishani Maitra, 'Silencing Speech' (2009) 39(2) *Canadian Journal of Philosophy* 309; Jennifer Hornsby, 'Speech Acts and Pornography' [1993] (10) *Women's Philosophy Review* 38; Rae Langton, 'Speech Acts and Unspeakable Acts' (1993) 22 (4) *Philosophy and Public Affairs* 293; Caroline West 'The Free Speech Argument against Pornography' (2003) 33(3) *Canadian Journal of Philosophy* 391.

16 Riemer and Peter (n 9) discuss 'large-scale algorithmic manipulation of citizens that drive polarisation and create political echo chambers with detrimental effects for democratic structures': at 422.

marginalises and dehumanises members of these target groups, such that they participate less in democratic deliberation.[17]

There is also a concern that the insulating effect of echo chambers reduces the epistemic quality of constituents' arguments and views, which degrades the quality of public discourse and decision-making. It is argued that in an echo chamber, constituents' views are not challenged or criticised and do not go through a process of refinement.[18] Constituents' views are less informed because they have not been exposed to a diverse range of information. Less informed and justified arguments decrease quality public discourse and democratic decision-making.[19]

The role of echo chambers in spreading and amplifying distorting speech, such as misinformation (false or inaccurate information spread without an intention to deceive), disinformation (deliberately false information spread with an intent to deceive), conspiracy theories and fake news, is also seen as undermining the epistemic quality of the public discourse.[20] This is viewed as having a negative effect on democracy and free speech because it distorts the public discourse,[21] erodes trust in democratic institutions (for example, through fake news about voting fraud)[22] and undermines truth-seeking in political decision-making, through the spread of

17 Katharine Gelber, 'A Better Way to Regulate Online Hate Speech: Require Social Media Companies to Bear a Duty of Care to Users', *The Conversation* (online, 14 July 2021) <https://theconversation.com/a-better-way-to-regulate-online-hate-speech-require-social-media-companies-to-bear-a-duty-of-care-to-users-163808>; Taub (n 13); Tal Orian Harel, Jessica Katz Jameson and Ifat Maoz, 'The Normalization of Hatred: Identity, Affective Polarization, and Dehumanization on Facebook in the Context of Intractable Political Conflict' [2020] (April–June) *Social Media + Society* 1, 7.

18 Samhi Boppana, 'TikTok is Bad for Political Discourse and Furthers Polarization', *John Hopkins News-Letter* (online, 21 August 2023) <https://www.jhunewsletter.com/article/2022/10/tiktok-is-bad-for-political-discourse-and-furthers-polarization>.

19 Philip M Napoli, 'What if More Speech is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble' (2018) 70(1) *Federal Communications Law Journal* 55, 57.

20 C Thi Nguyen, 'The Problem of Living Inside Echo Chambers', *The Conversation* (online, 11 September 2019) <https://theconversation.com/the-problem-of-living-inside-echo-chambers-110486>; Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 280; Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Future of Public Interest Journalism* (Final Report, 5 February 2018) 40–1; Caitlin Grant, 'Right-Wing Extremism in Australia' (Research Article, Parliamentary Library, Parliament of Australia, 21 June 2022); Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press, 2018) 5.

21 Rafał Klepka, 'Information and Disinformation and the Transformation of Modern Democracy: From Media Bias through the 'Echo Chamber' and the 'Filter Bubble' to Fake News' in Georgios Terzis et al (eds), *Disinformation and Digital Media as a Challenge for Democracy* (Intersentia, 2020) 31–46.

22 Nguyen (n 20).

false content.[23] It is also argued that distorting speech undermines the rationality and reasoning capabilities of constituents in their opinion formation and democratic decision-making.[24] Amidst these concerns, some commentators have offered advice on how to escape one's own social media echo chamber.[25]

Overall, concerns about the impacts of echo chambers on free speech and democracy are widespread in the commentary of journalists, academics, political figures and policy makers. However, much of this commentary tends to assume a deliberative understanding of democracy and free speech. The implications of social media echo chambers are rarely examined in the context of a libertarian conception of democratic free speech. Whilst concerns about social media echo chambers may be warranted under a deliberative conception of democratic free speech, this article demonstrates that, according to a libertarian conception, echo chambers do not necessarily undermine free speech and democracy. In fact, echo chambers may promote some of the core commitments of a libertarian conception of democracy and free speech. In this way, echo chambers are much more normatively complex than they appear.

To demonstrate this, Part III of this article will outline two key conceptions of democratic free speech, before applying each conception to the phenomenon of social media echo chambers in Part IV.

III Two Conceptions of Democratic Free Speech and Their Implications for Democratic Speech Moments

Free speech as it promotes democracy may be conceptualised in various ways.[26] This article focuses on two rival conceptions of democratic free speech that are prevalent in the literature. Whilst various additional and valid conceptions exist, this article focuses on two dominant conceptions that emerge, either implicitly

23 David Robert Grimes, 'Echo Chambers are Dangerous: We Must Try to Break Free of our Online Bubbles', *The Guardian* (online, 4 December 2017) <https://www.theguardian.com/science/blog/2017/dec/04/echo-chambers-are-dangerous-we-must-try-to-break-free-of-our-online-bubbles>.

24 Benson (n 11); Grimes (n 23).

25 Christopher Seneca, 'How to Break Out of Your Social Media Echo Chamber', *Wired* (online, 17 September 2020) <https://www.wired.com/story/facebook-twitter-echo-chamber-confirmation-bias/>; Steven Corby, 'How Social Media Algorithms are Manipulating What You Read', *The CEO Magazine* (online, 26 May 2022) <https://www.theceomagazine.com/opinion/social-media-algorithms/>; Wendy Rose Gould, 'Are You in a Social Media Bubble? Here's How to Tell', *National Broadcasting Company* (online, 22 October 2019) <https://www.nbcnews.com/better/lifestyle/problem-social-media-reinforcement-bubbles-what-you-can-do-about-ncna1063896>; Grimes (n 23).

26 Whilst alternative justifications for free speech exist, such as the truth and autonomy justifications, this article focusses solely on the democratic justification for free speech.

or explicitly, from the democratic commitments of various established models of democracy. They will be described as the 'deliberative conception' and the 'libertarian conception' of democratic free speech. To fully develop these conceptions in their entirety is beyond the scope of this article. However, the following section provides a brief outline and expands on their normative implications in key moments of democratic speech. Key aspects of the case law on free speech, reflecting each of these conceptions at work in Australian jurisprudence, will also be discussed.[27]

The libertarian conception of democratic free speech emerges from certain free speech implications shared amongst representative, pluralist, procedural and libertarian models of democracy.[28] These democratic models typically share similar values which give rise to shared implications for free speech. For example, these models tend to be grounded in the core values of freedom from governmental intervention; freedom of choice; personal liberty; autonomy; self-determination; formal equality; and the rule of law.[29] As a result, this conception entails a suspicion of governmental intervention and the use of arbitrary power,[30] and a general scepticism of the ability of the state to know what is true or substantively 'good'.[31] Political decisions in this conception tend to be viewed as a compromise of competing interests amidst a vibrant and unfettered encounter of opposing ideas.[32] As will be explored below, the values of this libertarian conception suggest a robust commitment towards content neutrality and a resistance of speech curation, with the exception of speech that incites imminent violence or unlawfulness.

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27 In Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1, 17, the possibility of doctrinal variation within Australian free speech jurisprudence is recognised by the Hon Geoffrey Nettle when discussing *Monis v The Queen* (2013) 249 CLR 92:

> the phenomenon of doctrinal variations is hardly novel … It is generally accepted to be an essential and valued aspect of the common law that its doctrines can and do develop and vary over time as they are applied on a case-by-case basis in new and different circumstances.

28 This article draws this conception from democracy and free speech theorists and commentators across these models, see, eg; Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2003); FA Hayek, *The Road to Serfdom* (Taylor and Francis Group, 2nd ed, 2001); Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, 1974); John Stuart Mill, 'Of the Liberty of Thought and Discussion' in David Bromwich et al (eds), *On Liberty* (Yale University Press, 2003) 86; James Madison, 'The Same Subject Continued: The Union as a Safeguard against Domestic Faction and Insurrection' (Federalist Paper No 10, 23 November 1787) 53; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996); Robert A Dahl, *On Democracy* (Yale University Press, 1998).

29 See, eg, Hayek (n 28) 81.

30 See, eg, James Weinstein, 'Free Speech and Domain Allocation: A Suggested Framework for Analysing the Constitutionality of Prohibition of Lies in Political Campaigns' (2018) 71(1) *Oklahoma Law Review* 167, 208; *Thomas v Collins* 323 US 516 (1945) 545 (Jackson J concurring).

31 Mill (n 28) 88.

32 *Abrams v United States,* 250 US 616 (1919) ('*Abrams*').

Whilst Australia is not typically associated with the libertarian tradition, the case of *Coleman v Power* ('*Coleman*')[33] is an exception in that it reflects, in part, libertarian free speech concerns.[34] In *Coleman*, the High Court read down a Queensland law criminalising the use of insulting words in a public place, due to the law's potential to infringe upon the implied freedom of political communication.[35] The implied freedom was found to protect insulting words said by the appellant to officers as part of a political protest about police corruption.[36] This judgment adopted a broad interpretation of the kinds of speech that ought to be protected, extending protection to insulting speech — unless it is likely to result in violence.[37] This decision reflects an inclination toward libertarian commitments to content neutrality and a resistance to speech curation, up to the point of imminent violence. In arriving at this conclusion, the Court in *Coleman* appeared to expressly import libertarian concerns — more traditionally aligned with United States — into Australian case law.[38] Justices Gummow and Hayne invoked the 'fighting words' doctrine from the United States Supreme Court case of *Chaplinsky v New Hampshire*,[39] to stress the importance that 'kinds of speech which fall outside concepts of freedom of speech' are 'narrowly limited'.[40] Thus, the case of *Coleman* represents a move towards more libertarian violence-based exclusions of speech, and a move away from the more deliberative justifications for speech protection — such as 'individual dignity [and] equality' and democratic participation — that tend to be more aligned with a deliberative, and indeed typically Australian, conception of free speech.[41]

The implications of this libertarian-aligned approach for social media echo chambers will be taken up in Part IV. However, it is already apparent that this approach, if applied in the context of social media echo chambers, might favour broad protections for speech and minimal content moderation; with limits only

33 (2004) 220 CLR I ('*Coleman*').

34 Ibid 2.

35 Ibid 77–9 [193]–[199] (Gummow and Hayne JJ), 87–8 [227], 91 [237] (Kirby J).

36 Ibid 30–1 [28] (Gleeson CJ).

37 Adrienne Stone and Simon Evans, 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677, 679.

38 Dan Meagher criticises the invocation of the United States' 'fighting words' concept into Australian case law in Dan Meagher, 'The 'Fighting Words' Doctrine: Off the First Amendment Canvas and into the Implied Freedom Ring?' (2005) 28(3) *University of New South Wales Law Journal* 852. See also Stone and Evans (n 37) 686.

39 (1942) 315 US 568.

40 *Coleman* (n 33) 76 [188] (Gleeson CJ).

41 Meagher (n 38) states that the Court's findings in *Coleman* 'faithfully reflects the original 'fighting words' doctrine and not how it is now understood and applied by the Supreme Court' rather than values of 'individual dignity, equality and non-violence … and the silencing capacity of such words': at 858. For a discussion of the deliberative tendencies of Australian free speech law, see Gerald N Rosenberg and John M Williams, 'Do Not Go Gently into that Good Right: The First Amendment in the High Court of Australia' (1997) *Supreme Court Review* 439.

on echo chambers containing content that provokes violence, rather than content which may undermine more deliberative-aligned values of equality and democratic participation.

The deliberative conception of democratic free speech emerges from certain commitments shared by direct, deliberative, substantive and militant models of democracy.[42] Free speech in these models is necessary to promote high-quality, informed and diverse deliberation.[43] To enable such deliberation, constituents should be highly participatory, engaged, informed and open-minded.[44] They should consume diverse, high-quality information and be aware of the existence of alternative points of view.[45] Constituents are viewed as capable of making rational decisions that are informed by lively debate and a process of self-reflection.[46] Deliberation should be collective, equal and reasonable and should cross ideological divides. Some rational agreement — if not consensus[47] — on political decisions should ultimately emerge from this process.[48] As a result of this deliberation, political decision-making under this conception should ultimately be oriented towards promoting substantive equality; the common good; the search for collective truths; and the protection of democracy itself.[49] As such, the core values of this conception include: deliberation; diversity; participation; formal and substantive equality; reason; the search for truth; and an orientation towards the common good. As will be explored below, unlike the libertarian conception, content curation and

42 This article draws this conception from democracy and free speech theorists and commentators across these models see, eg: Cass R Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1995) ch 8; Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press, 2009) ch 7; Karl Lowenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) *The American Political Science Review* 417; James S Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press, 1991); Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2002); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity, 2015); Robert Post, 'Participatory Democracy and Free Speech' (2011) 97(3) *Virginia Law Review* 477; Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 1999); Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers Publishers, 2014).

43 *Whitney v California* 274 US 357 (1927) 372–80 (Brandeis and Holmes JJ).

44 See, eg: Waldron (n 42) 15; Rawls (n 42) 197–8.

45 David Estlund and Hélène Landemore, 'The Epistemic Value of Democratic Deliberation' in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford Academic, 2019) 120–1.

46 Rawls (n 42) 197–8; Habermas (n 42).

47 Jürgen Habermas, *The Theory of Communicative Action*: *Lifeworld and System*, tr Thomas McCarthy (Beacon Press, 1981) 183.

48 See, eg: Cohen (n 42) 230; Sunstein, *Democracy and the Problem of Free Speech* (n 42).

49 See, eg, Lowenstein (n 42).

content sensitivity are not necessarily inconsistent with the commitments of the deliberative conception. Rather, the conception demonstrates more permissive tendencies with regard to the curation of speech.

In Australian free speech jurisprudence, this deliberative conception is reflected in a strand of case law that includes *McCloy v New South Wales* ('*McCloy*')[50] and *Comcare v Banerji* ('*Comcare*').[51] These cases reflect deliberative concerns as they permit limitations on speech in an effort to balance various deliberative-aligned interests that include, the promotion of the common good, and the preservation of representative democracy. In the case of *McCloy*, it was argued that certain restrictions on political donations found in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) impermissibly burdened the implied freedom of political communication.[52] The High Court found that, whilst the prohibitions *did* burden the implied freedom,[53] they served a legitimate and proportionate purpose of increasing political funding transparency and reducing corruption in politics.[54] Similarly, in the case of *Comcare*, it was argued that certain provisions of the Australian Public Service Code of Conduct[55] — under which the employment contract of a public servant who had posted anonymous criticisms on social media of various aspects of the Australian government and its departments was terminated — impermissibly burdened the implied freedom of political communication.[56] Whilst the High Court found that these provisions *did* burden the implied freedom,[57] their purpose was found to be both legitimate and proportionate.[58] Specifically, the provisions were proportionately adapted to the legitimate purpose of 'the maintenance and protection of an apolitical and professional public service … consistent with the system of representative and responsible government'.[59] In determining whether a public servant's conduct undermined this legitimate purpose, the majority stated that the nature of the content of the public servant's speech was also to be taken into account.[60]

The cases of *McCloy* and *Comcare* broadly align with the deliberative conception of democratic free speech. Both cases demonstrate a permissiveness towards the curation of speech where it is deemed necessary for the common good and the

50 (2015) 257 CLR 178 ('*McCloy*').

51 (2019) 267 CLR 373 ('*Comcare*'). It is not unusual to describe Australian free speech case law as having deliberative concerns or aims: see, eg, Rosenberg and Williams (n 41).

52 *McCloy* (n 50) 193 [1] (French CJ, Kiefel, Bell and Keane JJ).

53 Ibid 201 [24].

54 Ibid 196 [5], 208 [47].

55 Established under the *Public Service Act 1999* (Cth) s 13.

56 *Comcare* (n 51) 389 [1] (Kiefel CJ, Bell, Keane and Nettle JJ).

57 Ibid 399 [29].

58 Ibid 399–405 [31]–[42].

59 Ibid 399–400 [31].

60 Ibid 449 [183].

preservation of representative democracy, albeit in slightly different ways. In *McCloy*, the High Court permitted the curation of speech, in the form of political donations, in order to uphold the legitimate purposes of encouraging transparency, reducing corruption and preserving of the independence of government.[61] These purposes reflect deliberative concerns about the common good and the preservation of representative democracy. In *Comcare*, the High Court also permitted curation of speech and regard to the content of speech where necessary to ensure the impartiality and independence of the public service, as an important component of representative democracy.[62] As such, this decision also reflects deliberative concerns about the preservation of representative democracy. The Court also stressed the limits of the implied freedom and the need to strike a balance between free speech and 'other values', reflecting a deliberative willingness to curate speech where it comes into conflict with other concerns.[63]

The more deliberative-aligned permissive approach adopted in both cases can be contrasted to the libertarian approach and its resistance of speech curation and strong commitment to content neutrality. As will be explored further in Part IV, in the context of social media, such a deliberative-aligned approach may be used to justify the regulation of echo chambers that destabilise representative government and promote anti-democratic content, such as conspiracy theories and extremism.

These contrasting conceptions of libertarian and deliberative democratic free speech briefly identified have different implications for what democratic decision-making should look like and the role free speech should play at each stage of that process. Specifically, free speech assumes a different role in key democratic speech moments of opinion formation, opinion expression and interest group formation under each conception.

A *Opinion Formation*

The democratic speech moment of opinion formation is taken to refer to the stage in which constituents consume information and engage in dialogue and reflection in order to form an opinion on matters of political decision-making. The way in which opinion formation should occur — and the role free speech will play during this stage — will vary between the libertarian and deliberative conceptions.

Given the deliberative conception's value of informed deliberation, ideal opinion formation in this conception should be based on high-quality information that is diverse and fosters an awareness of disagreement and alternative arguments. Speech, as a result, should foster high-quality, reason-based enquiry. Speech should be based on information that is oriented towards, and does not obscure, the truth. Such high-quality information enables constituents to be better informed and make

61 *McCloy* (n 50) 196 [5], 204 [36], 208 [46]–[47], 221 [93] (French CJ, Kiefel, Bell and Keane JJ).

62 Ibid.

63 Ibid 442 [165].

decisions that are rational and in the best interests of society.[64] A diverse range of voices, opinions and information should be available for consumption and constituents should be aware of the existence of disagreement on political issues. In particular, constituents should be exposed to information that is opposing, critical or challenging so that their own ideas may be refined and gain legitimacy through a process of self-reflection.[65] This is because in this conception, a constituent is viewed as capable of rationality and personal reflection and growth, reflecting the conception's broader optimism about constituents' abilities.[66] Speech is also important at this stage for the formation of the whole individual, the development of their reasoning skills, open-mindedness and civic virtue. This kind of opinion formation increases the chance that political decision-making will be equal, respectful and inclusive; more accurate and justified; and more likely in the 'best interests' of society.[67] Speech that is anti-deliberative, on the other hand, in that it erodes common ground, understanding and equal deliberation (for example, hateful, extreme or abusive speech) will be of low value in this conception's opinion formation stage.

By contrast, the libertarian conception does not require the cultivation of a particular speech environment at the opinion formation stage. Rather, opinion formation should be wholly unconstrained. Constituents should be free to choose what information and ideas they consume, if any.[68] All information and ideas, therefore, should be available to constituents. This reflects the conception's values of autonomy and freedom of choice. Similarly, information and ideas should not be censored, curated nor mediated by some other authority before they have had a chance to compete in an open marketplace of ideas. Thus, the ideal speech environment that we see in the deliberative conception — such as a particularly diverse, high-quality or equal speech environment — would not be required, and in fact would be inconsistent with, the libertarian conception. There should be no judgments made about the truth, accuracy or value of ideas by authorities before this competition of ideas has been able to occur.[69] As a result, all kinds of speech should be free from censorship and curation; including speech that might be regarded as false, inaccurate, anti-deliberative or anti-democratic, with the exception of speech inciting imminent violence.

64 Cohen (n 42) 249.

65 Ibid; Sunstein, *Democracy and the Problem of Free Speech* (n 42).

66 Meiklejohn (n 42) 16–17:

> The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding.

67 Cohen (n 42) 190.

68 Hayek (n 28) 26.

69 Schumpeter (n 28) 251; Dworkin (n 28) 200.

B *Opinion Expression*

In the deliberative conception, opinion expression, too, should be as unrestrained and unfettered as possible. Free opinion expression is important for a constituent's personal formation (as engaged, open-minded and civic-minded constituents) as well as their opinion formation process (because, through speaking, we refine our ideas). In addition, the unfettered exchange of diverse ideas enables better deliberation and decision-making that is more likely to be representative and in the best interests of society as a whole. Finally, constituents must develop better epistemic justifications for their views when faced with rebuttal or challenge in an environment with free opinion expression. Constituents' opinions are then better justified and gain legitimacy as a result.[70]

However, as with opinion formation, opinion expression, which detracts from the deliberative values of this conception, should not be tolerated. For example, in this conception, the expression of hateful, extreme or abusive speech may be devalued, if not prohibited, because it silences the speech of others,[71] and thus undermines the conception's commitment to civic equality and diversity of representation.[72] Such speech is also inconsistent with the deliberative conception because it erodes the mutual respect, collegiality and common ground necessary for rational debate. Ideally, in this 'safer' speech environment, the opinion expression of minority voices (which might normally be silenced in or intimidated by a less welcoming environment) is preserved and encouraged.[73] Similarly, the expression of speech that deliberately obscures the truth or undermines efforts to promote the common good will not be valued in this conception and may be restricted. In addition, the expression of extreme anti-democratic speech will be prohibited or devalued because it undermines this conception's commitment to the preservation of democracy.

Under the libertarian conception, by contrast, opinion expression should be entirely free from censorship, curation or mediation, with the exception of speech that incites imminent violence.[74] Such freedom is necessary to respect the personal autonomy of constituents. It also allows the airing of ideas, which might otherwise be kept private, to calcify and intensify. Free speech at this opinion formation stage allows these ideas to be uncovered and tested through open debate and conflict.

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70 Engin Bozdag and Jeroen van den Hoven, 'Breaking the Filter Bubble: Democracy and Design' (2015) 17 *Ethics Information Technology* 249, 255.

71 See, eg, Gelber and McNamara (n 15).

72 Carl Fox and Joe Saunders, 'Introduction' in Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements from Democracy* (Routledge, 2019) 1, 8.

73 Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press, 2020) 26.

74 See, eg; *Virginia v Black* 538 US 343 (2003) 363 (O'Connor J); *Brandenburg v Ohio* 395 US 444 (1969) 448 ('*Brandenburg*'); See also Ashutosh Bhagwat and James Weinstein, 'Freedom of Expression and Democracy' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford Academic, 2021) 82, 104.

This process may also have the effect that these views become moderated or less extreme. Again, this reflects the libertarian view that ideas can only be tested in the marketplace, not by authorities before they have had a chance to freely and openly compete. Unlike in the deliberative conception, prejudgments cannot be made about the ideal kind of speech environment. As a result, all speech is permissible (except speech inciting imminent violence), regardless of whether it might be false, anti-deliberative, hateful or anti-democratic.

C *Interest Group Formation*

Unlike in the libertarian conception, the formation of interest groups may be curated where necessary in the deliberative conception. The ideal speech environment here encourages the formation of interest groups which promote the values of the deliberative conception, but discourages, if not restricts, the formation of interest groups which undermine the conception's commitments. Interest groups consistent with the deliberative conception include those that represent the interests of minority groups that have traditionally faced discrimination and underrepresentation (for example, Black Lives Matter and related interest groups). By contrast, interest groups that are inconsistent with the deliberative conception may be discouraged, devalued or restricted. They include groups propagating inequality; hate speech; extreme speech; anti-democratic speech; or abusive and violent speech (for example, White Supremacy interest groups). Deliberation should also be equal and representative in this conception. Interest groups that silence a portion of the community, or are disproportionately vocal, are also problematic for this conception's commitment to civic equality. By comparison, this would simply reflect the libertarian conception's affinity for pluralism and market-driven pragmatism.

No interest group, however extreme or anti-democratic, is inconsistent with the libertarian conception's commitments to content neutrality, freedom of choice and autonomy, unless it incites imminent violence. Given this conception's commitments to autonomy and freedom from state intervention, interest groups should occur freely, without governmental interference or curation. Constituents should be free to join any interest group they so desire, and all interest groups should be available to them. In addition, interest groups are not just anticipated, but are a vital mechanism of preference aggregation, allowing like-minded users to congregate online. By enabling the formation of diverse groups, echo chambers also play a key role in fostering pluralism in society which is another important value of the libertarian conception.

IV Implications of the Deliberative and Libertarian Conceptions of Democratic Free Speech for Social Media Echo Chambers

Now that the two conceptions of democratic free speech have been broadly drawn, Part IV will explore whether social media echo chambers further or detract from core commitments of the deliberative and libertarian conceptions of democratic free speech. This will be done by, again, tracking the key democratic speech moments of opinion formation, opinion expression, and interest group formation.

A *Opinion Formation*

The impact of social media echo chambers on the democratic speech moment of opinion formation varies according to whether a deliberative or libertarian conception is relied upon. The following section examines the implications of social media echo chambers for opinion formation according to each conception.

1 *Diversity of Information Consumed by Users*

Echo chambers may decrease the diversity of ideas and views that social media users are exposed to. In particular, users may be shielded from critical or opposing views. This is due to the clustering; biased information diffusion; enclave deliberation; and a lack of interactions across ideological divides often associated with echo chambers.[75] The presence of echo chambers has also been found to exacerbate inherent challenge avoidance, homophily and selective exposure experienced by users.[76]

A lack of interaction with diverse, alternative and opposing views limits a user's ability to form opinions in a manner consistent with the type of opinion formation constituents should experience in deliberative conception of free speech. Before forming an opinion, constituents in this conception should be well-informed and open minded, and their opinions should be exposed to rebuttal and criticism so as to enable refinement.[77] This is because the deliberative conception values diversity of perspectives, open mindedness, and engagement with alternative (particularly critical) views. Insulating social media users from alternative views, criticism, and diverse information, is contrary to the deliberative conception's commitment to diversity and engagement with criticism at the opinion formation stage.

In addition, echo chambers may also decrease a constituent's awareness of the very existence of disagreement on certain issues by shielding them from opposing views or from the debate itself.[78] This is inconsistent with the deliberative conception's

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75 See, eg: Schmidt et al (n 7) 3606; Fabiana Zollo et al, 'Debunking in a World of Tribes' (2017) 12(7) *PLoS ONE* 1, 8; Del Vicario et al (n 7) 554; Hywel TP Williams et al, 'Network Analysis Reveals Open Forums and Echo Chambers in Social Media Discussions of Climate Change' (2015) (32) (March) *Global Environmental Change* 126, 135; Wei-Chu Chen and Staša Milojević, 'Interaction or Segregation: Vaccination and Information Sharing on Twitter' (Conference Paper, Association for Computing Machinery Conference on Computer Supported Cooperative Work and Social Computing, 3-7 November 2018) 304; Barberá et al (n 7).

76 See, eg: Cinelli et al (n 7) 1, 6; Barberá et al (n 7) 1537; Williams et al (n 75); Chen and Milojević (n 75); Alessandro Bessi et al, 'Users Polarization on Facebook and YouTube' (2016) 11(8) *PLoS ONE* 1; Schmidt et al (n 7); Max Grömping, '"Echo Chambers": Partisan Facebook Groups during the 2014 Thai Election' (2014) 24(1) *Asia Pacific Media Educator* 39, 40.

77 Sunstein, *Democracy and the Problem of Free Speech* (n 42); Cohen (n 42) 249.

78 Chen and Milojević (n 75); Schmidt et al (n 7); Bessi et al (n 76); Cinelli et al (n 7); Williams et al (n 75); Del Vicario et al (n 7); Zollo et al (n 75).

valuing of different perspectives and awareness of disagreement during the opinion formation stage. This conception values awareness of disagreement at this stage because it is consistent with the conception's desired formulation of well-informed constituents who can then go on to engage in informed deliberation, armed with the knowledge of the existence of disagreement and differing perspectives.

In addition, a lack of diversity is similarly problematic for the deliberative conception because it will result in inequality of opinion formation among social media users. That is, users who experience echo chambers and are not exposed to diversity and disagreement will have poor opinion formation,[79] whilst users who do not experience echo chambers, and are exposed to higher quality, more diverse information, will have superior opinion formation. The resultant inequality of opinion formation between users caused by echo chambers is at odds with the deliberative conception's commitment to civic equality in democratic speech at the opinion formation stage.[80]

The libertarian conception, by comparison, is not as prescriptive about the importance of diversity, awareness of disagreement, and exposure to criticism. Rather, in a libertarian conception, users should be free to choose the kinds of information they consume online, and free to inhabit echo chambers if they desire. Indeed, echo chambers can be viewed as enabling user choice and autonomy by allowing users to consume only the kinds of information that they want to consume and allowing users to find outlets for their niche choices and preferences. As a result, a lack of diversity of information caused by social media echo chambers does not necessarily detract from the commitments of the libertarian conception.

There is, however, an argument that, in decreasing constituents' awareness of the existence of other information or views, echo chambers undermine several commitments of the libertarian conception.[81] First, echo chambers reduce users' liberty of choice by diminishing their awareness of disagreement and subsequent ability to choose to disagree, or at least engage with alternative opinions. Secondly, echo chambers prevent the free, open, and vibrant clash of opposing ideas valued in the libertarian conception as influenced by the work of John Milton[82] and John Stuart Mill.[83] This is because echo chambers divide social media into siloed communities and may subsequently prevent the clash of ideas from occurring in their fullness. Lastly, echo chambers may sequester some ideas into enclosed environments where they are unable to come into conflict and air in the marketplace of ideas, first envisaged in dissent by Oliver Wendell Holmes J sitting on the Supreme Court of the United States, and valued in the libertarian conception.[84] Thus, the

79 Barberá et al (n 7) 1532.

80 Fox and Saunders (n 72); Cohen (n 42) 249.

81 Bozdag and van den Hoven (n 70) 254.

82 John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Floating Press, 2009) 15, 17, 35.

83 Mill (n 28).

84 *Abrams* (n 32) 624.

impact of echo chambers in user choice and the clash of ideas can be construed as being inconsistent with opinion formation as it furthers the ideals of a libertarian conception of democratic free speech.

2 *Quality of Information Consumed by Users*

Echo chambers on social media may also decrease the quality of information available to constituents in the opinion formation stage.[85] This is because echo chambers reduce the diversity and breadth of information available to users experiencing the phenomena. This, in turn, increases the dissemination of conspiracy views, misinformation and disinformation which remain unchallenged and grow in popularity due to the insulating effect of echo chambers.[86]

This reduction in the quality of information available to constituents is contrary to the deliberative conception's commitment to high quality information, being information that is robustly challenged and justified, at the opinion formation stage. Such high quality information lays the foundation for well-informed and enlightened constituents who are then able to make rational decisions that are in the best interests of society according to the highest quality information available at the time.[87]

By contrast, the spread of conspiracy theories, misinformation and disinformation that is associated with, and perhaps exacerbated by, echo chambers is not inconsistent with the requirements of the libertarian conception. Rather, following the libertarian conception's values of autonomy and liberty, social media users should be free to make their own decisions about what information they consume and believe, regardless of whether the information is of high quality. Any government intervention to combat echo chambers would undermine the libertarian conception's core values of freedom and autonomy by violating a users' autonomy and freedom to choose what information to consume and believe. Instead, in a libertarian conception of democratic free speech, social media users should be free to choose to inhabit echo chambers and consume low quality information. In addition, any regulation restricting conspiracy theories, misinformation or disinformation would require a government to act as an arbiter of truth and decide what ideas are true or false. This would be inconsistent with the libertarian conception's general distrust of a government's ability to discern whether ideas are true or false.

In fact, the role echo chambers play in proliferating conspiracy theories, misinformation and disinformation is, to an extent, compatible with the libertarian commitment to the airing of diverse ideas. This is because echo chambers may help draw out ideas that might normally be kept hidden, for example, in the case of

85 Bozdag and van den Hoven (n 70) 252.

86 Chen and Milojević (n 75); Schmidt et al (n 7); Bessi et al (n 76); Cinelli et al (n 7); Williams et al (n 75); Del Vicario et al (n 7); Zollo et al (n 75).

87 Cohen (n 42) 249.

conspiracy theories and alternative facts.[88] If echo chambers draw out and amplify these ideas and views, they can be aired and moderated through healthy conflict and debate which is compatible with the values of the libertarian conception. In this way, the role echo chambers play in drawing out controversial ideas helps foster the kind of open opinion formation environment envisaged in a libertarian conception of free speech.

3 *User Choice and Autonomy in Consuming Information*

However, the commitments of the libertarian conception may be undermined by a specific kind of echo chamber called a filter bubble. The term 'filter bubble' describes echo chambers that are produced by social media algorithms, rather than by human choice.[89] This is to be contrasted to echo chambers that have been created by a user's own autonomous selection of attitude-consistent information online (which is consistent with the libertarian commitment to autonomy and freedom of choice). Unlike echo chambers, filter bubbles undermine the libertarian values of autonomy and self-determination by removing a user's ability to choose the content that they consume on social media.[90] This is one of the few moments in which the implications of the two conceptions overlap in relation to echo chambers, albeit as a result of different motivations. Algorithmically induced filter bubbles undermine the values of both conceptions: the libertarian conception's values of autonomy and freedom, and the deliberative conception's values of diversity and deliberation.

B *Opinion Expression*

The following section will examine the implications of social media echo chambers for opinion expression under the libertarian and deliberative conceptions, respectively.

1 *Expression of Anti-Deliberative Speech*

Echo chambers may also result in an increase in the expression of anti-deliberative speech on social media. Anti-deliberative speech is that which 'hinders people's ability to participate in political discussions that affect them',[91] which is taken to include hate speech; violent or abusive speech; extremely anti-democratic speech; and the communication of conspiracy theories; disinformation; harassment and trolling. These forms of speech may be viewed as anti-deliberative because, by

88 Zollo et al (n 75) 1, 8; Del Vicario et al (n 7) 558; Jonas Kaiser and Adrian Rauchfleisch, 'Birds of a Feather Get Recommended Together: Algorithmic Homophily in YouTube's Channel Recommendations in the United States and Germany' (2020) 6(4) *Social Media and Society* 1, 2.

89 Arguedas et al (n 2) 11.

90 Bozdag and Hoven (n 70) 254.

91 Spencer McKay and Chris Tenove, 'Disinformation as a Threat to Deliberative Democracy' (2021) 74(3) *Political Research Quarterly* 703, 709.

creating division, polarisation, and inequality,[92] they erode the common ground; mutual respect; open dialogue; good will; rationality; equality; and democratic processes that are valued in the deliberative conception.[93] Many studies suggest that echo chambers provide a safe-haven for these kinds of speech to flourish and spread, unchallenged by alternative views and uncorrected.[94]

Anti-deliberative speech significantly detracts from the deliberative conception's commitments to rational deliberation and debate. It undermines the deliberative conception's core values of civic equality, common ground, open-mindedness, and collegiality by increasing division, polarisation and inequality. For example, hate speech, harassment, and trolling promote inequality, increase polarisation and erode the common ground necessary to further the goal of open deliberation in a deliberative conception.[95] In addition, the increased expression of extreme anti-democratic speech and disinformation also undermines the deliberative conception's commitment to the preservation of democracy.

If echo chambers result in a significant increase in anti-deliberative speech (particularly hate speech, harassment, and trolling) on social media, this may reduce the opinion expression of groups that are the targets of these kinds of speech. There are arguments that such speech may silence certain, often minority, target group voices.[96] This may result in unequal opinion expression, as some users feel less free to express their opinions than others. For example, users who are the target of hate speech may be unwilling to speak up in a comment section that is already filled with hate speech. Users proliferating hate speech may then be encouraged by the presence of similar views in the comment section and post further hate speech on social media. The target group may, as a result, become even more unwilling to post in this comment section and their voices are not represented in the discussion. This goes against the values of a deliberative conception of democratic free speech, in which a diversity of views and perspectives is valued and sought after, and a civic equality of expression should be maintained.[97]

Echo chambers further exacerbate inequality of opinion expression by amplifying the voices of certain groups over others. Studies show that some users immersed in

92 Grömping (n 76) 40; Bozdag and Hoven (n 70) 251–2; Sunstein, *#Republic* (n 8) 9; Arguedas et al (n 2) 11; Ludovic Terren and Rosa Borge, 'Echo Chambers on Social Media: A Systematic Review of the Literature' [2021] (9) *Review of Communication Research* 99, 99–118.

93 Sunstein, *#Republic* (n 8) 9; Meiklejohn (n 42) 16.

94 Regarding hate speech and abuse see, eg, Müller and Schwarz (n 14) 34. Regarding extreme speech see, eg: Barberá et al (n 7) 1537; Benson (n 11); Geiß et al (n 2) 674. Regarding conspiracy theories, misinformation and disinformation see, eg: Zollo et al (n 75) 1, 8; Del Vicario et al (n 7) 558; Kaiser and Rauchfleisch (n 88) 2.

95 Grömping (n 76) 40; Bozdag and Hoven (n 70) 252; Sunstein, *#Republic* (n 8) 9; Arguedas et al (n 2) 11; Terren and Borge (n 92) 99–118.

96 Regarding the impact of hate speech see, eg, Gelber and McNamara (n 15).

97 Cohen (n 42) 249.

echo chambers are particularly vocal and effective at disseminating their opinions, even if they are parts of smaller sized groups on social media.[98] For example, the smaller right-wing echo chamber has been observed to be particularly, and disproportionately, vocal on social media, when compared to other social media echo chambers.[99] This is contrary to the values of the deliberative conception in which representative, equal opinion expression is the ideal.[100] In addition, if the speech disseminated by these disproportionately vocal groups is anti-deliberative, this also undermines the deliberative conception's commitments to equality, common ground and the preservation of democracy.

Echo chambers may also decrease the quality of opinion expression by reducing the need for better epistemic justifications for those opinions. This is because echo chambers may insulate a user's opinion expression from rebuttal or challenge, resulting in more polarised, less justified and unrefined opinions.[101] This, in turn, may subsequently decrease the quality of deliberation and the legitimacy of democratic decision-making.[102] These effects are at odds with the deliberative conception's ideals of well justified, considered and legitimate speech, and high-quality deliberation and decision-making.

By contrast, anti-deliberative, low quality or unequal opinion expression is not inherently incompatible with the libertarian conception. As described in regard to opinion formation above, the libertarian conception of democratic free speech is not prescriptive about the kind of speech environment that should be cultivated and the kinds of expression which occur in a democracy. Unlike in the deliberative conception, truthfulness, accuracy and diversity of information are not required under the libertarian conception. Thus, opinion expression need not be particularly diverse, accurate or deliberative. As a result, any expression of conspiracy theories, misinformation or disinformation that may be amplified by operation of echo chambers is not inconsistent with a libertarian democratic free speech.

In addition, a libertarian conception does not require the cultivation of a particularly deliberative, equal, or ideal speech environment.[103] As such, anti-deliberative speech such as hate speech, trolling and harassment possibly proliferated by echo chambers is not inconsistent with libertarian conception, although an argument

98 Conover et al (n 7) 3, 9; Shore et al (n 7) 863, 849.

99 Conover et al (n 7) 5; Wesley Cota et al, 'Quantifying Echo Chamber Effects in Information Spreading over Political Communication Networks' (2019) 8(35) *European Physical Journal of Data Science* 1, 5.

100 Fox and Saunders (n 72) 8.

101 Sunstein, *#Republic* (n 8) 69–71, 89; Cohen (n 42) 249.

102 Bozdag and Hoven (n 70) 255; Sunstein, *#Republic* (n 8) 9–10.

103 Pnina Lahav, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 (Winter) *Journal of Law and Politics* 451, 455; O'Connell (n 73) 6; Bhagwat and Weinstein (n 74) 101.

against such speech may be made on the grounds that it infringes on the personal autonomy of constituents.[104]

In a libertarian conception, rather, social media users should be free to express any view or idea openly and without mediation, suppression or censorship.[105] Any government intervention to minimise the effect of echo chambers because of their impact on diversity, accuracy, deliberation or equality would likely represent an overreach and an infringement of personal liberty and autonomy. Such regulation would undermine the conception's core commitment to freedom and would be inconsistent with the conception's general scepticism of truth and government power.

2 *Increased Opinion Expression*

Echo chambers also increase opinion expression in a way that is compatible with the libertarian conception of democratic speech. Echo chambers may embolden social media users to express their views by providing a 'safer', more enclosed environment for that expression. This is particularly the case for niche or controversial views which might normally be suppressed amongst larger audiences.[106] Echo chambers help users to solidify and gain confidence in their views away from the criticisms they might normally face outside of the echo chambers. This is consistent with and furthers the unrestrained marketplace of ideas envisaged in the libertarian conception of free speech.

Similarly, it is possible that echo chambers may have some effects on opinion expression that support a deliberative conception of free speech. This, at least in part, counteracts some of the undermining effects of echo chambers described above. Echo chambers may increase the expression of minority groups who might otherwise feel hesitant to express their opinion freely on social media. This is because echo chambers may assist minority groups to freely express shared views together, without fear of harassment and criticism.[107] Echo chambers also allow these groups to express their views in a more equal environment, without fear of being drowned out by louder voices. This may occur, for example, in a closed Facebook group of users with similar views, insulated from large volumes of highly critical (if not abusive) voices which may exist outside of the group on social media.

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104 Post (n 42) 484. Post argues that the First Amendment refuses 'to distinguish between good and bad ideas, true or false ideas, or harmful or beneficial ideas … within public discourse'. See, for example, in the more libertarian United States, hate speech is a protected form of speech under the First Amendment per *Brandenburg* (n 74) and *National Socialist Party of America v Village of Skokie* 432 US 43 (1977).

105 *Abrams* (n 32) 630.

106 Bolane Olaniran and Indi Williams, 'Social Media Effects: Hijacking Democracy and Civility in Civic Engagement' in John Jones and Michael Trice (eds), *Platforms, Protests, and the Challenge of Networked Democracy* (Palgrave Macmillan, 2020) 77, 79.

107 Sunstein, *#Republic* (n 8) 86–7.

As with minority groups, users may fear expressing particularly challenging, novel or unusual views on social media for fear of backlash. The presence of echo chambers may create safe environments composed of like-minded users where these ideas may be expressed and developed freely, without fear of reprisal. The increased opinion expression of minority groups or users with minority views who might normally be reluctant to speak out supports and furthers the values of increased equality and diversity of views and perspectives prioritised in a deliberative conception of free speech.[108]

C *Interest Group Formation*

The following section will examine the implications of social media echo chambers for the democratic speech moment of interest group formation as envisaged in each of the libertarian and deliberative conceptions.

1 *Facilitating Interest Group Formation*

Echo chambers support the formation of interest groups by gathering users with shared interests and preferences together online, more quickly and efficiently than would normally be possible offline. This is particularly the case for users with less common interests who might not ordinarily be able to gather in numbers in the offline world due to geographical and logistical barriers.[109] Echo chambers promote interest group formation due to their high concentration of users with common interests and insulation from rebuttal, which prevents dilution and dissipation of these groups. This effect is further compounded in echo chambers that are particularly vocal and effective at spreading their views and gaining new members.[110] Furthermore, echo chambers may themselves be viewed as interest groups. For example, some social media echo chambers may reflect large, influential social movements with real political effect, such as the Black Lives Matter movement.

The role echo chambers play in assisting the formation of minority interest groups is compatible with the deliberative conception when these groups accord with the conception's broader values. For example, the formation of minority interest groups online that form part of positive social movements is consistent with the conception's commitment to diversity, equality and the common good. Echo chambers may assist members of these groups to congregate in minority interest groups on social media and express their opinions, free from fear of criticism or dilution from majority groups or critical groups. For example, echo chambers can assist in developing and refining social movements; minority voices; diminishing epistemic injustice; and equalising voices.[111] These effects all further the deliberative values of equality,

108 O'Connell (n 73) 26.

109 Olaniran and Williams (n 106) 79.

110 Arguedas et al (n 2) 13; Chen and Milojević (n 75); Schmidt et al (n 7); Bessi et al (n 76); Cinelli et al (n 7); Williams et al (n 75); Del Vicario et al (n 7); Zollo et al (n 75).

111 Arguedas et al (n 2) 21; Sunstein, *#Republic* (n 8) 86.

diversity of representation, and justice, and so promote a deliberative conception of democratic free speech.

However, just as echo chambers assist in the formation of interest groups that are consistent with a deliberative conception, they also assist in the formation of interest groups that are not consistent with a deliberative conception of democracy. For example, echo chambers may facilitate the formation of interest groups that engage in radicalisation and promote extremism amongst social media users.[112]

As a flow-on effect of echo chambers, these groups may have very few interactions with opposing views or ideas which, in turn, may become hyper-polarised or hyper-partisan.[113] These kinds of interest groups promote values contrary to those of a deliberative democracy. Where a deliberative democracy is concerned with: the preservation of democracy; the furtherance of substantively 'good' outcomes; and the encouragement of equality, rationality, and collegiality, these groups encourage division and polarisation, and erode the common ground needed for rational debate.[114] Whilst, in some cases, polarisation may be viewed as playing a positive role in a deliberative conception of free speech,[115] extreme polarisation (even if only psychological rather than ideological) erodes the common ground and good will necessary to engage in the rational, open debate and deliberation called for by a deliberative conception.[116] In facilitating the formation of these normatively undesirable groups, echo chambers destabilise the foundation upon which the deliberative conception's core value of deliberation may occur. In this respect, social media echo chambers are not compatible with the deliberative conception of interest group formation.

Whilst the deliberative conception is selective about the kinds of interest groups that should be tolerated in a democracy, the libertarian conception is not. Rather, the libertarian conception values the clash of a pluralism of ideas in the free marketplace, regardless of ideology or extremity (at least, up until the point of threatening imminent violence).[117] This conception, therefore, is not prescriptive about the kinds of echo chambers that form on social media. Indeed, these echo chambers represent the different kinds of interest groups anticipated by and valued in the libertarian conception, helping foster the vibrant clashing of ideas.

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112 Müller and Schwarz (n 14) observed an increase in anti-refugee sentiment amongst users after exposure to far-right content on Facebook. The radicalising effect of YouTube's extreme right filter bubble on users was observed by O'Callaghan et al (n 14); Von Behr et al discussed the online radicalisation process in 'Radicalisation in the Digital Era: The Use of the Internet in 15 Cases of Terrorism and Extremism' (Research Report, Research and Development Corporation Europe, 2013).

113 See, eg: Conover et al (n 7) 1; Barberá et al (n 7) 1537.

114 Sunstein, *#Republic* (n 8) 6–7, 9, 57, 67–8, 76–8, 88; Barberá et al (n 7) 37.

115 Arguedas et al (n 2) 21; Sunstein, *#Republic* (n 8) 86.

116 Sunstein, *#Republic* (n 8) 68, 74, 76–7, 88.

117 *Brandenburg* (n 74); See, also: O'Connell (n 73) 6; Bhagwat and Weinstein (n 74) 101.

By increasing polarisation and fragmentation of ideas and interest groups online, echo chambers promote a diverse and free marketplace of ideas. Unlike in the deliberative conception, any heated disagreement that may occur as a result of this division and polarisation is not inconsistent with the libertarian conception. Indeed, the libertarian conception anticipates disagreement because it views democratic decision-making as a contest between competing, and often irreconcilable, interests.[118] Any polarisation and subsequent interest group formation caused by echo chambers online is not inconsistent with the libertarian conception of democratic free speech. In fact, under the libertarian conception, any government intervention to minimise these online interest groups through minimising echo chambers, would represent an impermissible interference by government into the formation of interest groups and the autonomy and freedom of its members under a libertarian conception of free speech, due to the conception's concern with autonomy and freedom from suppression.[119]

Echo chambers may also create inequality between interest groups by enabling the amplification of some voices on social media over others. Echo chambers may assist some groups of users, for example, those inhabiting particular clusters or echo chambers organised according to interest, to express their interests and recruit members in a disproportionately vocal and efficient way.[120] Some studies suggest that this is particularly the case for right wing echo chambers.[121] This may ultimately result in these groups having a disproportionately large effect on policy decisions. That is, groups in disproportionately vocal echo chambers on social media may create a false impression of strong support or opposition for certain policy proposals or decisions, which may influence political decision-makers to adopt or abandon these proposals or decisions.[122] For example, the literature implicates particularly active echo chambers in the outcome of the 2016 United Kingdom European Union membership referendum.[123] This inequality of bargaining power between interest groups, whilst not inconsistent with the market-driven libertarian conception, goes against the values of a deliberative conception of democratic free speech where equality between interest groups is paramount.

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118 David Held, *Models of Democracy* (Polity Press, 3rd ed, 2006) 87; O'Connell (n 73) 13; Bhagwat and Weinstein (n 74) 98.

119 Fox and Saunders (n 72) 7; Lahav (n 103) 461.

120 See, for example, the right-wing echo chambers described in Conover et al (n 7) 3; Cota et al (n 99) 1, 6.

121 Conover et al (n 7) 13; Cota et al (n 99) 5.

122 Sunstein, *#Republic* (n 8) 9–10.

123 Max Hänska and Stefan Bauchowitz, 'Tweeting for Brexit: How Social Media Influenced the Referendum' in John Mair et al (eds), *Brexit, Trump and the Media* (Abramis Academic Publishing, 2017) 31, 31–5; Samuel R Yates, 'The Rise of New Media and its Impact on the EU Referendum Vote' (2023) 33(1) *Journal of Sydney Society of Literature & Aesthetics* 138, 149.

V Conclusion

This analysis reveals that, at each key democratic speech moment, the different commitments of the deliberative and libertarian conceptions of democratic free speech have distinctly different implications for echo chambers. Echo chambers and their effects on key democratic speech moments threaten the deliberative conception's aims significantly more than they further them, and significantly undermine the values of a deliberative conception of free speech. As a result, government intervention may be justified under a deliberative conception where it is necessary to preserve or foster the kind of ideal speech environment called for by the conception; an environment in which anti-deliberative speech and polarisation is minimised, and diverse, high-quality ideas are preserved. Such government intervention may range from light-touch mechanisms (for example, education programs for social media users that increase awareness about echo chambers) to more prescriptive mechanisms (for example, laws or policies aimed at eradicating the presence of echo chambers on social media). Despite this, whilst light-touch mechanisms have been widely adopted in some liberal, Western democracies,[124] few have been willing to implement more prescriptive mechanisms to combat anti-deliberative phenomena on social media.[125] This suggests that libertarian, rather than deliberative, concerns drive the reluctance of liberal democratic governments to regulate social media. A notable exception to this, however, is the implementation of the *Online Safety Act 2021* (Cth) in Australia which, although not aimed at social media echo chambers per se, aims to 'improve online safety' by minimising harmful online content.[126] This suggests that liberal, Western democracies may see a move towards more deliberative-aligned regulation of social media in future.

The picture is not as clear-cut when we examine the libertarian conception of democratic free speech, however. For some key democratic speech moments, echo chambers further the values of the libertarian conception, through, for example, enabling the clash of ideas or the formation of interest groups. In other key speech moments, echo chambers have little to no effect on values of the conception, for

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124 For example, various media literacy mechanisms have been implemented democratic countries around the world, including the 2023 'Stop and Consider' campaign in Australia in relation to the accuracy of information circulating regarding a federal election and the United Kingdom 'News Literacy Network' established in 2022, offering critical literacy teaching resources.

125 For example, Australia, the United States, and the United Kingdom are yet to implement regulation explicitly aimed at regulating disinformation on social media. This is despite evidence of interference in the democratic mechanisms of each country through disinformation campaigns on social media: see, eg, Samantha Bradshaw and Philip N Howard, 'The Global Disinformation Disorder: 2019 Global Inventory of Organised Social Media Manipulation' (Research Project Report, Oxford Internet Institute, 4 September 2019).

126 *Online Safety Act 2021* (Cth) s 3. In the case of *eSafety Commissioner v X Corp* (2024) 303 FCR 354, the eSafety Commissioner sought various orders against X Corp for contraventions of the *Online Safety Act 2021* (Cth). This would have been a test case for the strength of this legislation, but the case has since been discontinued.

example, regarding a decrease in diversity of ideas or an increase in low-quality information. Occasionally, echo chambers offend key values of the conception where user autonomy is undermined by algorithms and corporate control.[127] Given these mixed results, combined with the libertarian conception's general suspicion of government intervention, any formal regulation of echo chambers would be inconsistent with this conception. Such intervention would not only be unnecessary in a libertarian conception, but would also undermine the conception's core values of freedom from government intervention and arbitrary power, autonomy, self-determination and freedom of choice.

This analysis of the implications of both the deliberative and libertarian conceptions of free speech for social media echo chambers draws out the contrasting commitments and constraints of each conception. This case study illustrates how the different commitments of each conception dictate the ways in they respond to new changes in speech environments caused by social media. This is not something which has been done in any significant detail by the literature (particularly in regard to the libertarian position), nor is this a nuance recognised in the commentary on the effects of echo chambers on social media. The distinct differences in implications of these two conceptions for social media echo chambers demonstrate the need for commentators to be aware of the democratic assumptions underpinning policy discussions and proposals for reform on social media in the future. Policy discussions about the effect of social media on democracy and free speech must entail a deeper awareness of the kind of democratic free speech we are trying to protect.

127 Bozdag and Hoven (n 70) 251.

*Alysia Blackham**

COLLECTIVE ACTION, VOICE AND EQUALITY: EQUALITY BARGAINING TO ACHIEVE MORE EQUAL FUTURES?

Abstract

Collective action could play a pivotal role in proactively addressing discrimination at work and creating equality-enhancing workplace structures. This article critically considers the extent to which trade unions and collective bargaining are advancing equality in Australia. Drawing on an innovative empirical study of equality provisions included in enterprise agreements recorded on the Australian Fair Work Commission website, this article considers the extent to which trade unions and other collective structures are enforcing equality norms in the workplace, particularly through bargaining. It argues that there are clear signs of equality bargaining emerging in Australia, though it is still underdeveloped, and often prompted by legislative reform. The article therefore argues for training and support within unions, legislative prompts, and legislative mandates to strengthen equality bargaining in Australia.

I Introduction

Equality law largely relies on individual claims to advance equality at work. However, this emphasis on individual action, and individual remedies, has been shown repeatedly to be ineffectual at achieving systemic change: individual action and individual claims alone cannot achieve equality at work.[1] There are significant barriers that may inhibit individual enforcement of workplace rights, including the perceived 'cost' of bringing a complaint, lack of knowledge

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1 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990); Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006) 105; Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83.

of rights, and limited access to legal mechanisms.[2] As a result, few discrimination complaints are filed with statutory equality bodies, and significantly fewer complaints progress to the courts to be heard and decided in the public arena.[3] Individual complaints mechanisms are also criticised for being reactive — rather than proactive — in identifying and addressing equality issues, limiting their ability to achieve meaningful structural change.[4]

Instead, then, there is increasing recognition that collective action — through trade unions, groups of workers, and non-governmental organisations — can play a pivotal role in proactively addressing discrimination and creating equality-enhancing work structures.[5] Unions may be increasingly using strategic equality litigation to escalate broader collective goals.[6] There is also significant potential to advance equality through 'equality bargaining', that is, the advancement of equality issues in and through collective bargaining. However, previous scholarship has expressed concern that trade unions are only reluctantly embracing the equality agenda, and that 'equality bargaining' in particular remains underdeveloped (see Part II below). Indeed, empirical work on age equality law has shown that collective enforcement mechanisms remain largely underutilised, in countries such as the United Kingdom, Australia and Sweden.[7]

This article, then, critically considers the extent to which collective action — and collective bargaining in particular — are advancing equality in Australia. 'Equality', in this context, is used in the sense of Professor Sandra Fredman's multidimensional principle of substantive equality, which encompasses: redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; facilitating participation, inclusion, and voice; and accommodating difference and structural change.[8]

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2 See the detailed discussion in Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) 73–85 ('*Reforming Age Discrimination Law*').

3 Ibid; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778; Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1.

4 Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60(1) *American Journal of Comparative Law* 265, 266, 271.

5 Blackham, *Reforming Age Discrimination Law* (n 2) ch 9.

6 Manoj Dias-Abey, 'Mobilizing for Recognition: Indie Unions, Migrant Workers, and Strategic Equality Act Litigation' (2022) 38(2) *International Journal of Comparative Labour Law and Industrial Relations* 137.

7 Blackham, *Reforming Age Discrimination Law* (n 2) ch 9; Alysia Blackham, 'Abandoning Individual Enforcement? Interrogating the Enforcement of Age Discrimination Law' (2023) 43(1) *Legal Studies* 3 ('Abandoning Individual Enforcement?').

8 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022) 29–44.

Equality, then, goes beyond simply prohibiting discrimination, which might be understood as adverse treatment on the basis of a protected characteristic such as age or gender ('direct discrimination'), or differential impact on certain groups resulting from apparently neutral conditions or terms ('indirect discrimination').[9] 'Equality bargaining' involves the integration and advancement of ideas of equality in the bargaining process. This could occur, for example, via recognition of status-based inequality, enabling voice or participation for under-represented groups in the bargaining process, or through the transformation of existing structures to redress disadvantage.[10]

This analysis draws synergies and links between two of the International Labour Organization's ('ILO') Fundamental Principles and Rights at Work: 'the effective recognition of the right to collective bargaining' and 'the elimination of discrimination in respect of employment and occupation'.[11] Drawing on legal doctrinal analysis of labour laws in Australia, and an innovative empirical study of equality provisions included in enterprise agreements recorded on the Australian Fair Work Commission ('FWC') website, this article considers the extent to which trade unions and other collective structures are enforcing equality norms in the workplace, particularly through bargaining. It argues that there are clear signs of equality bargaining emerging in Australia, though it is still underdeveloped, and often prompted by legislative reform. The article therefore considers how equality bargaining could be strengthened in Australia.

In Part II, I consider how collective action, unions and bargaining might advance equality, and the potential structural barriers in Australia to taking equality-focused collective action. In Part III, I map the legal framework for collective bargaining in Australia, with a particular focus on the federal system, and consider the legal doctrinal limits on equality bargaining. Part IV draws on literature from Australia and overseas to offer a more detailed consideration of 'equality bargaining', what it might entail, and when it might be pursued. Part V, then, presents the method for the empirical study of equality provisions included in enterprise agreements recorded on the FWC website. The findings of this study are presented in Part VI. Given these findings, Part VII considers how equality bargaining might be strengthened in Australia; and Part VIII concludes.

9 That said, preventing and addressing discrimination might be a key means of advancing some dimensions of equality.

10 These ideas are further developed in Part IV.

11 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (10 June 2022, adopted 18 June 1998) 9. See further Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142(4) *International Labour Review* 419, 419–20.

II Collective Action to Advance Equality: Structural Possibilities and Limits in Australia

Collective action and bargaining could be critical complements to the individual enforcement models embedded in equality law.[12] Bargaining, like other collective enforcement mechanisms, distributes the costs of advancing equality across a broad group of people, taking the burden of enforcement off those who are directly impacted by discrimination and inequality. This redistribution is essential, given those who are directly impacted by discrimination are often the most vulnerable workers who are the least able to make use of legal mechanisms.[13] Approaching issues of inequality collectively also helps to reframe individual experiences of discrimination as systemic issues. Conversely, casting discrimination as an individualised issue is unlikely to identify and address many systemic workplace problems.[14] Bargaining also offers a potential means of proactively addressing discrimination and equality, to identify and change structures and systems that perpetuate inequality and disadvantage before harm occurs.[15]

That said, unions — and collective bargaining conducted by unions — have not always advanced equality (at least, as that idea is articulated in Part I). Collective bargaining might be seen as inherently aiming to address power and material disparities between employers and employees.[16] Bargaining, then, is key to advancing socio-economic equality. 'Equality' bargaining, though, goes beyond the traditional material focus of collective bargaining, to focus on other (non-socio-economic) inequalities, particularly those related to the characteristics protected by discrimination laws (gender, age, ethnicity and so on). Fredman describes these as 'status-based' inequalities.[17] There is likely to be significant overlap between socio-economic disadvantage and other grounds of disadvantage,[18] yet discrimination and equality law

12 As I argue, though, this should be in addition to, not instead of, individual complaints mechanisms: Blackham, 'Abandoning Individual Enforcement?' (n 7).

13 Belinda Smith, 'It's About Time — For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 132.

14 Ibid 134–5; Bob Hepple, 'Agency Enforcement of Workplace Equality' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 49, 58.

15 In this sense, the potential benefit of bargaining is similar to the potential benefit of positive equality duties, and could complement those duties: see, eg, Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98.

16 Beth Gaze and Anna Chapman, 'The Human Right to Non-Discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia?' (2013) 29(4) *International Journal of Comparative Labour Law and Industrial Relations* 355, 356–7, 362.

17 Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23(2) *South African Journal on Human Rights* 214, 214 ('Redistribution and Recognition').

18 Ibid 214–15.

rarely engage deeply with issues of socio-economic status in Australia.[19] Drawing synergies and links between the material focus of collective bargaining, and the discrimination and status focus of equality laws therefore has potential to strengthen both areas.[20]

The limited focus on status-based equality in collective bargaining may, in part, reflect perceived tensions between individual rights (as, for example, are embedded in equality law) and collective rights in the workplace;[21] individual rights might be seen as undermining collective rights. However, as Professor Alan Bogg argues, individual rights and collective bargaining should not be seen as discrete and separate; what is 'individual' and what is 'collective' can be understood in many different ways, challenging any dichotomy between the two.[22] For example, rights can have individual elements without being individualistic, as is the case where trade unions enforce rights on behalf of members.[23] Professor Edmund Heery's 'recombination thesis' therefore argues that unions can use and incorporate individual legal rights to support and strengthen collective action and bargaining, with individual rights acting 'as a precedent, sanction and standard'.[24] Thus, strong legal regimes tend to have complementary individual and collective rights;[25] they go hand-in-hand, and are mutually supportive.[26] The individual and the collective are therefore deeply intertwined.[27]

And yet, tensions between the individual and the collective can emerge in collective agreements. For example, collective agreements might adopt a 'last-in, first-out'

19 See, eg, Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' [2018] 1 *Anti-Discrimination Law Review* 5.

20 Indeed, Fredman argues it is not tenable to keep them separate: Fredman, 'Redistribution and Recognition' (n 17) 215.

21 Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Modern Law Review* 733, 745.

22 Alan Bogg, '"Individualism" and "Collectivism" in Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 72.

23 Ibid 77.

24 Edmund Heery, 'Debating Employment Law: Responses to Juridification' in Paul Blyton, Edmund Heery and Peter Turnbull (eds), *Reassessing the Employment Relationship* (Palgrave Macmillan, 2011) 71, 89–90. That said, this complementarity can be undermined by the legal framework: Linda Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45(3) *British Journal of Industrial Relations* 463, 483.

25 Bogg (n 22) 100–101.

26 This view is also consistent with the view of union officials: as Michelle O'Sullivan et al conclude, 'while unions view the law as an inadequate substitute for collective bargaining and recognise its individualising effect, they believe, in general, that the law is "complementary to trade union organization as distinct from being a threat"': Michelle O'Sullivan et al, 'Is Individual Employment Law Displacing the Role of Trade Unions?' (2015) 44(2) *Industrial Law Journal* 222, 241.

27 Bogg (n 22) 77.

rule, which gives preferential treatment to long-serving workers in redundancy processes.[28] While these rules are potentially discriminatory on the basis of age (and, in some industries, gender), and may infringe individual rights to age equality, they might be preferred by unions and bargaining teams to other redundancy criteria, as they protect the rights of long-standing union members.

This flags the risk, then, that bargaining might *undermine* equality, rather than being equality enhancing, particularly where collective groups (like unions) favour majoritarian solutions, at the expense of minority groups. There remains a normative question, then, of whether equality rights *should* be subject to bargaining. If collective solutions can actively undermine equality, or perpetuate discrimination, there may need to be absolute or minimum standards imposed on the bargaining process, to protect equality rights. In some cases, individual discrimination rights should prevail over collective rights; collective solutions are not always morally superior.[29] This prioritisation is reflected, for example, in the *Fair Work Act 2009* (Cth) ('*FWA*'), where discriminatory terms cannot be included in enterprise agreements. In approving an enterprise agreement, the FWC must be satisfied that there are no unlawful (including discriminatory) terms.[30] Discriminatory terms in enterprise agreements have no effect[31] (see Part III below).

The extent to which collective bargaining is able to advance equality fundamentally depends on union membership, union density and, potentially, the demographics of union members. Trade union density continues to decline in Australia (dropping to 13.7% of employees by 2018),[32] though the number of employees covered by collective agreements as a proportion of the number of employees with the right to bargain has remained fairly stable, at 61.2% in 2018.[33]

The demographics of union members could also limit unions' capacity or inclination to advance equality. For example, if unions are dominated by those who have traditionally benefitted from the standard employment relationship and structural inequality — including, but not limited to, white men — then unions may be less willing to challenge or disrupt the status quo. However, union membership data from the Australian Bureau of Statistics ('ABS') shows that women are *more* likely to be a member of a union in Australia than men.[34] This may reflect women's overrepresentation in industries with high union density, such as education and the

28 See, eg, *Rolls-Royce Plc v Unite the Union* (2010) 1 WLR 318.

29 Bogg (n 22) 77.

30 *Fair Work Act 2009* (Cth) ss 186(4), 194(a), 195 ('*FWA*').

31 Ibid ss 253(1)(b), 194(a), 195.

32 'How Do Collective Bargaining Systems and Workers' Voice Arrangements Compare Across OECD and EU Countries?', *OECD* (Database, 3 October 2023) <https://web-archive.oecd.org/temp/2023-10-03/577157-ictwss-database.htm>.

33 Ibid.

34 Australian Bureau of Statistics, *Trade Union Membership* (Catalogue No 6335.0, 14 December 2022) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/aug-2022>.

public sector. Overall, too, it simply shows that trade union density among women has declined less than among men.[35]

Union membership remains highly exceptional for younger workers: according to the ABS, in August 2022, only 2% of employees aged 15–19 and 5% of those aged 20–24 were trade union members.[36] By contrast, among those aged 55–59, 19% of employees were trade union members; for those aged 60–64, this rose to 21% of employees.[37] Thus, older workers (aged 60–64) are four times more likely to be union members than those aged 20–24. As Professor Adelle Blackett and Professor Colleen Sheppard argue, unequal access to collective bargaining — and unequal access to union membership — poses a fundamental challenge to equality.[38] Equally, though, growing equality in union membership potentially positions unions as key actors in advancing equality at work.

III The Collective Bargaining Framework

In Australia, collective bargaining can be effected through a range of different instruments, which become progressively more organisation-specific. At the federal level, this system has been in place since the commencement of the *FWA*.[39] At the broadest level of abstraction, federal awards provide minimum standards for a particular industry or occupation.[40] Awards are made by the FWC, following submissions by interested stakeholders (including unions and employer groups). Modern awards (made under the new workplace relations system) contain standard terms, including terms relating to award flexibility, termination of employment, redundancy and allowances. As modern awards are specifically limited to these standard terms,[41] there is perhaps less scope to include additional provisions relating to equality.[42]

35 This gendered shift is not a new trend; Barbara Pocock observed the same in 1997: Barbara Pocock, 'Gender, Strife and Unions' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 9, 16.

36 Australian Bureau of Statistics (n 34).

37 Ibid.

38 Blackett and Sheppard (n 11) 421–2.

39 Though many of these collective mechanisms existed in some form before the *FWA* (n 30). Note, too, the changes effected by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), which expanded options for multi-employer bargaining.

40 See *FWA* (n 30) ch 2, pt 2-3.

41 See ibid s 136.

42 Note, though, that a model anti-discrimination clause was historically included in awards: Australian Industrial Relations Commission (1997) *Award Simplification Decision* H0008 Dec 1533/97 M Print P7500. Further, new standard terms might be added, including following legislative edict: see, eg, *Variation of Modern Awards to Include a Delegates' Rights Term* (AM2024/6) [2024] FWC 1699.

Collective bargaining can also be effected through single-enterprise or multi-enterprise agreements ('EAs'). These operate instead of the award,[43] however employees must generally be 'better off overall' under the EA than under the award for the agreement to be approved.[44] Draft EAs are submitted to a vote of employees who will be covered by the terms of the agreement, and are then lodged with the FWC for approval. EAs may only cover 'permitted matters', which include:

- 'matters pertaining to the relationship between an employer' and their employees;
- 'matters pertaining to the relationship between the employer' and the employee organisation(s); and
- 'how the agreement will operate'.[45]

Terms relating to equality are not required to be contained within an EA; equally, however, they are not prohibited. Thus, if equality was to be included in a collective instrument, EAs would be the likely forum. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Amendment Act*') pt 9 has clarified that 'special measures' necessary to achieve substantive equality are 'matters pertaining to the relationship between an employer' and their employees.[46] The *Secure Jobs, Better Pay Amendment Act* has also introduced changes focused on gender equality and to create a supported bargaining stream of multi-employer bargaining, which may address some of the barriers to effective collective bargaining in feminised industries.[47]

Equality is also embedded in the process of approving an EA: as noted above, in approving an EA, the FWC must be satisfied that an EA does not include any unlawful terms.[48] An unlawful term includes a discriminatory term,[49] being a term that:

> discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.[50]

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43 See *FWA* (n 30) ch 2, pt 2-4.

44 See ibid ss 186, 189, 193, 193A. For further discussion of the bargaining process, see Andreas Pekarek et al, 'Old Game, New Rules? The Dynamics of Enterprise Bargaining under the *Fair Work Act*' (2017) 59(1) *Journal of Industrial Relations* 44.

45 *FWA* (n 30) s 172(1).

46 Now contained in ibid ss 172A, 195(4).

47 Sara Charlesworth and Fiona Macdonald, 'Collective Bargaining and Low-Paid Women Workers: The Promise of Supported Bargaining' (2023) 65(4) *Journal of Industrial Relations* 403.

48 *FWA* (n 30) s 186(4).

49 Ibid s 194(a).

50 Ibid s 195(1).

A term is not discriminatory if:

- the reason for the discrimination is the inherent requirements of the position; or
- it discriminates in relation to employment in a religious institution, and is done in good faith to avoid injury to the religious susceptibilities of adherents of that religion;[51] or
- it provides for wages for junior employees, employees with a disability, or employees to whom training arrangements apply.[52]

These exceptions are potentially wide-ranging, and may serve to undermine protections afforded under state and territory discrimination laws. Amendments effected by the *Secure Jobs, Better Pay Amendment Act* have further clarified that special measures to achieve equality are not discriminatory terms to the extent they are not unlawful under any relevant anti-discrimination law.[53]

In *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd*,[54] Flick J noted, in relation to other sections of the *FWA*, that 'the term "discriminate" should be given its normal and ordinary meaning. … the term "discriminate" simply means to treat employees differently'.[55] It is unclear whether the prohibition of discriminatory terms extends to indirectly discriminatory provisions. Overall, though, it appears that indirectly discriminatory provisions are not unlawful,[56] reflecting a focus on achieving formal rather than substantive equality in EA terms. A focus on formal equality is less likely to disrupt measures that benefit the 'paradigmatic' employee.[57]

Commission and court decisions relating to discriminatory EA terms have largely focused on three areas: more generous parental leave provisions for women, which have generally been found to be non-discriminatory; terms that disadvantage part-time workers; and age-based redundancy pay, where the decisions are more mixed. First, in relation to parental leave, in *Sunrise Christian School*[58] an EA term

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51 See, eg, *Catholic Commission for Employment Relations through its Executive Director Anthony Farley* [2012] FWAA 2536.

52 *FWA* (n 30) s 195(2)–(3).

53 Now contained in ibid s 195(2)(c).

54 (2014) 232 FCR 560.

55 Ibid 575 [58].

56 *The University of Melbourne* [2014] FWCA 1133, 10 [54]; *Re Application by Metropolitan Fire and Emergency Services Board* (2019) 284 IR 239, 279–80 [119]–[120], citing binding precedent in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227, 239 [52]–[56] (Tracey J); *Construction, Forestry, Maritime, Mining and Energy Union v Svitzer Australia Pty Ltd* [2023] FWC 55, 22 [134]; *Minister for Industrial Relations (Cth) v Metropolitan Fire and Emergency Services Board* (2019) 291 IR 1, 24–6 [67]–[73].

57 Gaze and Chapman (n 16) 361–2, 364.

58 [2019] FWCA 7429. See also *Sunrise Christian School Whyalla* [2019] FWCA 7423; *Adelaide Christian Schools Early Learning Centres Inc* [2019] FWCA 7432.

providing for parental leave for women only was held to not be discriminatory, as it fell within an exception to the *Sex Discrimination Act 1984* (Cth).[59] In *The University of Melbourne*, provision of a return-to-work bonus after maternity or adoption leave was held to not be discriminatory, even if a partner returning from partner leave was not entitled to the same bonus.[60] In *Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd*,[61] a reduction in additional paid parental leave for any period of paid 'no safe job' leave was held to not be discriminatory on the basis of sex or pregnancy, as the overall effect of the clause was to limit total paid parental leave to eight weeks.

Second, in relation to provisions affecting part-time workers, in *Re Application by Metropolitan Fire and Emergency Services Board* the FWC was asked to consider whether agreement terms that disadvantaged part-time employees were 'unlawful terms' as they were indirectly discriminatory on the basis of sex and family and parental responsibilities.[62] Being bound by Federal Court precedent, the FWC held that s 195 of the *FWA* did not extend to indirectly discriminatory provisions; but the FWC indicated that, had it not been bound by precedent, it would have found otherwise.[63] In the earlier case of *Qantas Airways Ltd*,[64] a clause which prioritised full-time employees for overtime was held to not be discriminatory; however, Fair Work Australia considered whether the clause was indirectly discriminatory. On the facts presented, though, it was found that the clause did not disadvantage women.[65]

Third, in relation to age-based redundancy payments, in *Virgin Australia Regional Airlines Pty Ltd*[66] a provision of the EA provided that severance payments were not to exceed the amount an employee would have earned if their employment had proceeded to the employee's normal retirement date. The parties did not seek to challenge the term. The FWC did not see the clause — which likely discriminates on the basis of age — as a barrier to approving the agreement.[67] Rather, the FWC flagged that the term was likely not enforceable.[68]

The clear problems with this approach — approving the agreement, with a (likely) discriminatory clause retained — are revealed in other decisions: a similar clause was challenged as discriminatory in *Australian Municipal, Administrative, Clerical*

59 *Sex Discrimination Act 1984* (Cth) s 31: it is not unlawful to 'discriminate against a man on the ground of his sex by reason only of' granting a woman 'rights or privileges in connection with pregnancy, childbirth or breastfeeding'.

60 *The University of Melbourne* (n 56).

61 [2019] FWCFB 1716.

62 *Re Application by Metropolitan Fire and Emergency Services Board* (n 56).

63 Ibid 279–81 [119]–[122], 281 [125]–[126].

64 [2011] FWA 3632.

65 Ibid [41]–[48].

66 [2021] FWCA 204.

67 Ibid [5].

68 Ibid.

and Services Union v John Sands Australia.[69] Ms King was made redundant at age 67. Clause 29.7.3 of the relevant EA read: 'No employee will receive more in redundancy pay than they would have received had they remained in employment up to normal retirement date i.e. 65 years of age.' If this clause was unlawful, Ms King would have been entitled to 105 weeks' redundancy pay; if the clause was valid, she would be entitled to 12 weeks' redundancy pay under the National Employment Standards.[70] The FWC held that, given the agreement had been approved previously, it was not able to review the validity of the term, as it was not a court. Rather, the FWC could only consider the term's application to Ms King.[71] The clause was held to apply to Ms King, even if she had passed the 'normal retirement age'.[72]

A court had the chance to consider a similar term in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)*.[73] The *Centennial Northern Mining Services Enterprise Agreement 2011* cl 30.8 provided that: 'The amount of retrenchment payment due to an employee is not to be more than the employee would have received had the employee remained in employment with the Company until the age of sixty (60) years.' The mandatory retirement age for coal workers in NSW — 60 — was abolished in 2006.[74] The Federal Court of Australia ('FCA') held that cl 30.8 was clearly discriminatory:

> the effect of cl 30.8 is stark from age 60 on: no retrenchment payment is available no matter what the length of service. The reason for that difference in outcome is the employee's age. In my view, the conclusion is inescapable that the term of the Agreement having that effect (cl 30.8) is a discriminatory term (s 195 of the FW Act) and therefore an unlawful term (s 194(a) of the FW Act).[75]

The FCA noted that, when concerned with the 'proper meaning and effect of a term of an enterprise agreement … That meaning and effect is to be discerned primarily from the text of the provision, not neglecting the illumination available from context and history'.[76] Here, that context and history included previous attempts to amend such a provision in the award system. In March 2004, the Australian Industrial Relations Commission ('AIRC') declined to change a standard clause in the Commonwealth's safety net awards which limited severance payments for those nearing

69 [2013] FWC 9033.

70 John Sands made a payment of 52 weeks' pay, based on the scale for non-award employees: ibid 2 [4].

71 Ibid 8 [34].

72 Ibid 9 [41].

73 (2015) 247 IR 350.

74 *Coal and Oil Shale Mine Workers (Superannuation) Amendment Act 2006* (NSW) s 3, sch 1 cl 4.

75 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 358 [42]–[43].

76 Ibid 358–9 [45].

retirement age.[77] The standard clause read: 'Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.'[78] The AIRC held that, 'despite the passage of age discrimination legislation, the concept of a normal retirement date will continue to be relevant where a particular occupation or industry continues to have a fixed retirement date'.[79] In the AIRC's view, the standard clause would continue to be relevant to ensure that (older) employees did not receive a 'windfall' when being retrenched.[80] As the FCA later rightly noted, though, this reasoning no longer holds where fixed retirement ages have been abolished, as is now the case for most jobs and professions.[81] Indeed, the *Age Discrimination Act 2004* (Cth), which commenced on 1 July 2004, provides that '[i]t is unlawful for an employer … to discriminate against an employee on the ground of the employee's age … by dismissing the employee'.[82] In the FCA case, then,

> [s]o far as employees of the applicant are concerned, from the time they were permitted to continue working after 60 years of age a provision which subjected them to disadvantage by reference to attaining that age was directly discriminatory against them on the ground of their age within the meaning of s 195 of the FW Act.[83]

The clause was therefore an unlawful term.

Other EA clauses have also been considered as potentially discriminatory: in *Eastern Australia Airlines Pty Ltd*,[84] a clause referring to pilots as 'he' was found to be a typographical error, and not discriminatory.[85] In *ALDI Foods Pty Ltd*,[86] a clause requiring staff to submit to a medical examination where there were concerns they could not fulfill the inherent requirements of their role was held to not be discriminatory.[87] However, in *Mulgoa Quarries Pty Ltd*,[88] a clause requiring staff to submit for medical assessments at different frequencies based on age was held to be discriminatory and an unlawful term.[89] The employer was invited to provide an

77 *Redundancy Case* (2004) 129 IR 155.

78 Ibid 199 [159].

79 Ibid 200 [164].

80 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 360 [51].

81 Ibid 360 [51]. On an exception to this, see Alysia Blackham, 'Judges and Retirement Ages' (2016) 39(3) *Melbourne University Law Review* 738.

82 *Age Discrimination Act 2004* (Cth) s 18(2)(c).

83 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 360 [52].

84 [2011] FWA 4261.

85 Ibid [63]–[64].

86 *ALDI Foods Pty Ltd* [2013] FWC 3495.

87 Ibid 22 [91].

88 [2020] FWC 1063.

89 Ibid 16 [41].

undertaking that the discriminatory term would be removed.[90] In *Commissioner for Public Employment (NT)*,[91] it was argued that pay scales were indirectly discriminatory against those with family or carer responsibilities, particularly in single-income families, who found it harder to make ends meet. Fair Work Australia assumed, without deciding, that s 195 encompassed indirect discrimination,[92] but found the clause to not be discriminatory.[93]

Once approved by the FWC, all EAs are published on the Commission's website. This public database has the potential to offer critical insights into the agreements that are being made, and their contents and gaps. This article builds on that potential, as discussed in Part V.

Awards and enterprise agreements may also be made at state level for employees who are not covered by the federal workplace system (such as state and local government employees in many states).[94] State awards are not limited to standard terms, meaning there is more scope to accommodate equality within their provisions than at the federal level.[95]

IV Equality Bargaining: Potential and Challenges

A *Defining 'Equality Bargaining'*

Within this statutory framework, how do unions go about bargaining? And, in particular, are unions engaging in 'equality bargaining'? First, though, it is critical to consider what we mean by 'equality bargaining', and to evaluate its potential and limits. Trevor Colling and Professor Linda Dickens define 'equality bargaining' as that which:

> encompasses the collective negotiation of provisions that are of particular interest or benefit to women and/or are likely to facilitate gender equality ('special measures'); equality awareness on the part of negotiators in handling commonplace bargaining agenda items such as pay and pay opportunities ('gender-proofing'), and the injection of an equality dimension (specifically, addressing gender disadvantage) to the negotiation of change, for example reforming a grading structure.[96]

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90 Ibid 16 [42].

91 [2010] FWAA 9372.

92 Ibid [8].

93 Ibid [9].

94 See the summary at 'Fair Work System', *Fair Work Ombudsman* (Web Page) <https://www.fairwork.gov.au/about-us/workplace-laws/fair-work-system>.

95 See, eg, *Industrial Relations Act 1979* (WA) pt II div 2A; *Fair Work Act 1994* (SA) ch 3 pt 3.

96 Trevor Colling and Linda Dickens, 'Selling the Case for Gender Equality: Deregulation and Equality Bargaining' (1998) 36(3) *British Journal of Industrial Relations* 389, 390.

This definition could usefully be extended to encompass protected characteristics beyond gender, though most research to date has focused on gender equality bargaining specifically.[97] Linda Briskin distinguishes 'equity bargaining' — that is, the process of bargaining and bargaining strategy — from 'bargaining equity' — that is, 'issues on an equity agenda'.[98] Briskin sees 'equity bargaining' as involving three initiatives or stages:

> first, the introduction of increasingly complex 'no-discrimination' clauses in collective agreements; second, the identification of specific platforms of concerns which address the needs of each equity-seeking group; and third, the recognition of the equity implications in the entire range of traditional collective agreement provisions, what could be called equity mainstreaming.[99]

General 'non-discrimination clauses' are potentially important additions to collective agreements, as they enable those who experience discrimination to raise a dispute in relation to the agreement.[100] Workers may be more likely to raise a dispute than to approach an independent statutory agency and file a complaint under discrimination law, for example.[101] That said, these broad clauses are insufficient to meaningfully address inequality, as they essentially replicate an individual complaints model: 'more is needed' to address problems proactively and systematically.[102]

'Equity mainstreaming', then, arguably requires a 'transformation' of existing structures and practices that disadvantage people with certain protected characteristics. Mainstreaming is critical to avoid the 'compartmentalisation of equality within bargaining' to consider only specific 'women's measures' or equality measures.[103] As Dickens argues,

> developing a positive link between equal opportunities and collective bargaining calls for an equality dimension in all bargaining; a gender perspective on all issues. In this sense there is not necessarily an 'equality agenda' separate from the bargaining agenda. 'Core' negotiating issues such as working time, wage adjustment, flexibility,

97 Sue Williamson and Marian Baird, 'Gender Equality Bargaining: Developing Theory and Practice' (2014) 56(2) *Journal of Industrial Relations* 155, 161.

98 Linda Briskin, 'Equity Bargaining/Bargaining Equity' (Working Paper No 2006-01, York University Centre for Research on Work and Society, July 2006) 12 <https://www.yorku.ca/lbriskin/pdf/bargainingpaperFINAL3secure.pdf>.

99 Ibid 32.

100 Blackett and Sheppard (n 11) 439. See *FWA* (n 30) s 186(6).

101 Blackett and Sheppard (n 11) 439.

102 Ibid 440.

103 Linda Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work: Opportunities and Challenges for Trade Unions' (2000) 6(2) *Transfer: European Review of Labour and Research* 193, 200 ('Collective Bargaining and the Promotion of Gender Equality at Work').

restructuring, etc, which do not come brandishing an equality label, are of central importance to the promotion of equality.[104]

B *The Unrealised Potential of Equality Bargaining*

Scholars are generally optimistic about the potential for bargaining to advance equality.[105] As discussed in Part II, equality bargaining could be an important complement to individualised statutory equality regulation. Dickens sees distinct advantages in equality bargaining over legal regulation, as bargaining offers increased flexibility to develop targeted and tailored approaches suited to local circumstances, which are more likely to be seen as acceptable and legitimate to those involved, and enforceable via existing collective mechanisms.[106] Collective bargaining — built upon representative structures — also enables employee voice; it 'provides a way of giving women a voice; an ability to define their own needs and concerns and to set their own priorities for action'.[107] Indeed, if we define 'equality bargaining' as relating to protected characteristics beyond gender, bargaining can give voice to a broader range of workers, who would otherwise often remain marginalised in the workplace. Blackett and Sheppard similarly see collective bargaining as having 'great potential to enhance equality'[108] if there is a strong commitment on the part of the social partners to advance equality.[109]

However, despite writing more than 20 years apart, both Professor Linda Dickens (in the European context)[110] and Professor Gill Kirton (in the UK) see equality bargaining as remaining 'underdeveloped'.[111] The extent to which equality bargaining is 'underdeveloped' may reflect perceived tensions between equality rights and collective rights, and the view that equality is divisive not solidaristic (discussed in Part II).[112] It also reflects the historical exclusion from collective bargaining of those who are also over-exposed to discrimination,[113] and a history of bargaining

104 Ibid 201.

105 See, eg, ibid 196; Blackett and Sheppard (n 11) 421.

106 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 196.

107 Ibid 197.

108 Blackett and Sheppard (n 11) 421.

109 Ibid.

110 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 194.

111 Gill Kirton, 'Union Framing of Gender Equality and the Elusive Potential of Equality Bargaining in a Difficult Climate' (2021) 63(4) *Journal of Industrial Relations* 591, 592.

112 Ibid 594.

113 Blackett and Sheppard (n 11) 422. As those authors argue, '[i]n the design and application of machinery to give effect to the right to collective bargaining, certain categories of worker were forgotten, overlooked or quite simply excluded because they were not part of the dominant paradigm': at 422.

in which collectively negotiated solutions have sometimes been equality *detracting*, not equality enhancing.[114] This includes where collective solutions privileged the 'male breadwinner' model,[115] and excluded those who did not meet the normative standards of the (white, male) 'universal worker'.[116] As Barbara Pocock has argued, 'Australian unions have been no friends to women on many occasions in their history', including through fierce defence of the 'family wage' that privileged the interests of men.[117] For Professor David Peetz, then, '[d]iscrimination against women was as much a result of union pressure as it was of employer decisions'.[118] As Blackett and Sheppard argue, collective bargaining is '[p]aradoxically … part of the problem and part of the solution to the elimination of inequality and discrimination at work'.[119]

Equality bargaining therefore has the potential to fundamentally challenge and disrupt the status quo, which may be indirectly or directly discriminatory and privilege certain groups of workers.[120] Indeed, enterprise-level bargaining in Australia was originally sold to women as a way to improve their workplace conditions.[121] However, mapping the shift towards enterprise-level bargaining in Australia since 1991, Claire Thomson and Barbara Pocock note that wages remained a dominant focus of unions' industrial agendas at the enterprise level; despite a shift from reliance on awards to enterprise bargaining, the agenda remained 'in men's hands'.[122] Women's interests actually appeared to be *disadvantaged* in this shift towards workplace bargaining; indeed, bargaining in the workplace served to widen the disparity between women's and men's wages,[123] in part because women-dominated industries were more likely to be reliant on an award, and to not have access to enterprise bargaining.[124] Women were unlikely to be included on bargaining committees; in 1994, there were no women on bargaining committees in 56% of workplaces with some women employees.[125] As a result, perhaps, clauses addressing equality

114 Ibid 433.

115 David Peetz, 'Regulation Distance, Labor Segmentation, and Gender Gaps' in David Peetz and Georgina Murray (eds), *Women, Labor Segmentation and Regulation: Varieties of Gender Gaps* (Palgrave Macmillan, 2017) 3, 10.

116 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 199. See also Blackett and Sheppard (n 11) 426.

117 Pocock (n 35) 9.

118 Peetz (n 115) 10.

119 Blackett and Sheppard (n 11) 433.

120 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 202.

121 Claire Thomson and Barbara Pocock, 'Moving on from Masculinity? Australian Unions' Industrial Agenda' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 67, 83.

122 Ibid 68.

123 Ibid 70, 83.

124 Ibid 83–84.

125 Ibid 84.

issues remained exceptional in enterprise agreements.[126] In 1994, for example, 9% of 1360 enterprise agreements included an equal employment opportunity (EEO) or affirmative action provision; 5% included an anti-discrimination or harassment provision; 2% contained individual grievance procedures; and 1% included a representative consultative provision, to ensure employee representation with gender and ethnicity balance.[127]

For bargaining to become part of the solution to inequality requires both unions and employers to commit to the idea of equality.[128] This involves extending the conceptual frame of bargaining — which has traditionally emphasised economic and industrial issues — to also see equality as a critical aspect of the union bargaining agenda.[129] This conceptual shift has arguably started to occur, at least to some extent, in the UK union movement, where union officers have been appointed with national responsibility for equality, and unions have adopted national equality strategies (see Part VII(A)).[130] Despite this, equality officers — and their concerns — might be siloed and sidelined, limiting their ability to set and influence the bargaining agenda.[131] Further, union equality training is sometimes criticised for its de-emphasis on bargaining, and strong emphasis on individual complaints; and failure to reach those most in need of up-skilling.[132]

A lack of equality bargaining may also reflect an ongoing lack of diversity in the union movement itself. As discussed in Part II, union membership is increasingly diverse in Australia, at least in relation to gender. However, Kirton maps how, in the UK, while union members are more diverse, union leadership is not.[133] This limited diversity is reflected in the Trades Union Congress's ('TUC') *Equality Audit 2022*: data on official union roles (where available) show that membership diversity is still not trickling up to official union positions.[134]

Briskin also raises concerns that women might be excluded from union bargaining teams; that said, having women present in bargaining does not necessarily mean that

126 Ibid.

127 Department of Industrial Relations (Cth), *Annual Report 1994: Enterprise Bargaining in Australia* (Parliamentary Paper No 162, 1995) 145.

128 Blackett and Sheppard (n 11) 437.

129 Kirton (n 111) 595. As Dickens argues, an equality lens is also likely to broaden the issues that are seen as being 'legitimate' member interests: Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 201.

130 Kirton (n 111) 597–8.

131 Ibid 601.

132 Ibid 605.

133 Ibid 594. Dickens notes the same, writing 20 years earlier: Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 202–3. Pocock notes the same in Australia: Pocock (n 35) 13, 17.

134 Trades Union Congress, *TUC Equality Audit 2022* (Report, 2022) 22 <https://www.tuc.org.uk/sites/default/files/2022-09/TUCEqualityAudit2022.pdf>.

equality issues will be raised or advanced.[135] Drawing on a survey of 538 paid union officials involved in collective bargaining in the UK, Heery argues that equality bargaining — and, more specifically, equal pay bargaining — reflects women's voice in unions, the characteristics and preferences of bargainers and the public policy environment, and is more likely to occur in centralised, multi-employer bargaining.[136] Most respondents in Heery's survey reported some degree of bargaining around equal pay: only 26.6% of respondents reported no equality bargaining.[137] Heery also found that equality bargaining was more common for respondent members in public administration, including central and local government.[138] That said, when Dr Sian Moore, Dr Sonia McKay and Helen Bewley analysed a sample of 213 voluntary trade union recognition agreements reached in the UK between 1998 and 2002, equal opportunities were stated as being an issue for bargaining in only 8% of agreements, and specifically excluded in 31% of agreements.[139] Overall, then, Kirton still sees equality bargaining in the UK as being 'underdeveloped'.[140]

In the Australian context, Professor Marian Baird, Ludo McFerran and Ingrid Wright seem more optimistic about the scope for equality bargaining.[141] Mapping the spread of paid leave and other entitlements for those subjected to domestic violence, Baird, McFerran and Wright emphasise the importance of a 'model clause' for enabling the spread of equality bargaining across employers and agreements. In that specific instance, the model clause was developed by advocates from the Australian Domestic & Family Violence Clearinghouse ('ADFVC'), who initiated discussions with the trade union movement, and built on existing work by the UK union UNISON.[142] ADFVC continued to advise and train the union throughout bargaining.[143] As Baird, McFerran and Wright conclude, this case study 'demonstrates the importance of external activists for initiating and including domestic violence claims in bargaining',[144] as well as the bargaining relationship between the parties, organisational and negotiator characteristics. Indeed, since that research,

135 Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 43–8. See also Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 203.

136 Edmund Heery, 'Equality Bargaining: Where, Who, Why?' (2006) 13(6) *Gender, Work & Organization* 522 ('Equality Bargaining').

137 Ibid 528.

138 Ibid 529.

139 Sian Moore, Sonia McKay and Helen Bewley, 'The Content of New Voluntary Trade Union Recognition Agreements 1998-2002: Volume One — An Analysis of New Agreements and Case Studies' (Employment Relations Research Series No 26, Department of Trade and Industry (UK), August 2004) 53, 55.

140 Kirton (n 111) 592.

141 Marian Baird, Ludo McFerran and Ingrid Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56(2) *Journal of Industrial Relations* 190.

142 Ibid 198.

143 Ibid 199.

144 Ibid 200.

paid leave for family domestic violence has been added to the National Employment Standards.[145]

C *The Role of Law and Regulation*

Equality bargaining is not necessarily an easy or straightforward process. It could be prompted or limited by many factors, including government policy. For Colling and Dickens, deregulation and reduced state intervention means that equality — and the advancement of equality — can become privatised, and 'recaptured within managerial prerogative', rather than being seen as a matter for joint regulation.[146] It is important, then, to recognise the role of law and regulation in supporting, prompting and acting as a regulatory backstop for equality bargaining. Colling and Dickens argue for 're-regulation', both in equality law, and in relation to state support for collective bargaining.[147] This might include, for example, measures to enable multi-employer bargaining.[148] Further, this flags the need for a shift in how equality is conceived: as being a common concern for all parties, rather than a matter for management. This can be achieved, in part, through equality bargaining itself. As Colling and Dickens argue,

> [e]quality bargaining offers the potential to amplify, extend and underpin the business case for equality. Working within the business case logic, unions may affect an employer's cost–benefit analysis of taking equality action (by increasing the cost of not doing so). Because the process of interest definition is a political one, not simply an economic one, unions can help shape the definition of what is in the employer's business interest. Further, through collective bargaining, a different logic for equality may be imported from that of the 'business case' concern with the bottom line, which does not guarantee equality action.[149]

As Colling and Dickens argue, unions 'play a role in translating formal legal rights into substantive outcomes, both through facilitating employees' use of legal procedures and through collective bargaining'.[150]

There is a need, too, to ensure that equality bargaining is intersectional,[151] not just targeted at specific, siloed equality grounds like gender or race.[152] Intersectional

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145 *FWA* (n 30) s 106A.

146 Colling and Dickens (n 96) 403.

147 Ibid 406.

148 Ibid.

149 Ibid 405 (emphasis omitted).

150 Ibid 394.

151 Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 34–5.

152 On intersectionality generally, see Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] (1) *University of Chicago Legal Forum* 139; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

equality bargaining is perhaps an ambitious ask, particularly in jurisdictions like Australia where the idea of 'intersectionality' is often misunderstood,[153] and where the legal framework does not generally make provision for intersectional discrimination.[154]

Finally, in the Australian context, the largely decentralised nature of bargaining — with bargaining predominantly happening at the single-enterprise level — may reduce the power and impact of bargaining. That said, in the 1940s and 1950s, scholars wrote about concerns of 'pattern bargaining', where unions imposed uniform bargaining terms across different employers, regardless of their individual circumstances or needs.[155] This was seen as monopolistic behaviour on the part of unions. However, considering the case of steel workers in the USA, George Seltzer argues that collective bargaining serves to supplement market forces and government action.[156] For Thomas A Kochan, pattern bargaining acts as an 'informal substitute' for centralised, multi-employer bargaining, enabling the spread of terms and conditions from one formal bargaining structure to another.[157] Scholarship on pattern bargaining has typically focused on wages and pay,[158] perhaps because it is a measurable and quantifiable indicator of divergence and similarity between and across agreements. In this study, though, I consider the extent to which more qualitative indicators of pattern bargaining — like equality terms — might disperse and diffuse across negotiated agreements in different enterprises. We can do this by considering the actual EAs being negotiated, as illustrated in the sections that follow.

V Method

Drawing on this rich literature on equality bargaining, in this article I seek to start to map the field of equality bargaining in Australia, and to consider whether it remains 'underdeveloped' in Australia (as in the UK). I start, though, by recognising the sheer scale and practical limits of this task: as described in Part IV(A), equality bargaining can take many forms, not all of which will be evident in the terms of written collective agreements. For example, equality mainstreaming might lead to

153 Alysia Blackham, Lauren Ryan and Leah Ruppanner, 'Enacting Intersectionality: A Case Study of Gender Equality Law and Positive Equality Duties in Victoria' (2024) 49(3) *Monash University Law Review* 40.

154 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.

155 George Seltzer, 'Pattern Bargaining and the United Steelworkers' (1951) 59(4) *Journal of Political Economy* 319, 319.

156 Ibid 325.

157 Thomas A Kochan, *Collective Bargaining and Industrial Relations: From Theory to Policy and Practice* (RD Irwin, 1980) 113.

158 See, eg: Kathryn J Ready, 'Is Pattern Bargaining Dead?' (1990) 43(2) *Industrial and Labour Relations Review* 272; Franz Traxler, Bernd Brandl and Vera Glassner, 'Pattern Bargaining: An Investigation into Its Agency, Context and Evidence' (2008) 46(1) *British Journal of Industrial Relations* 33.

specific measures or terms (including those around flexible work, additional leave, work-life balance measures, and so on), which might be described differently across different agreements. This study, then, is simply a preliminary attempt to map the field of equality bargaining in Australia. It offers an illustration of new methods and data sources that could be used to frame future, broader research projects. Equally, though, it offers a critical picture of current progress, and the current limits and potential of equality bargaining.

To enable this study, a search was conducted of the FWC document search[159] of EAs mentioning 'equality' on 3 June 2023. The FWC's record of current and past EAs represents a critical source of data to consider how, if at all, bargaining is being used to advance equality and address discrimination. This database and its research utility has been significantly strengthened following the FWC's digital library and document search project in 2022–23,[160] including to allow searching within the text of agreements via optical character recognition ('OCR'). The document search therefore represents a critical new source of data for facilitating academic research on bargaining.

The document search includes current, terminated and expired agreements, and includes some agreements from prior to the *FWA*. Of the 137,510 EAs recorded on the FWC website as at 3 June 2023, 'equality' was mentioned in 2,209 agreements (1.6% of all agreements). To expedite the collection of the agreement sample, I used the Python programming language to pull data relating to 'equality' agreements from the FWC website and insert it into a spreadsheet.[161] The FWC website includes key information for each relevant agreement, including the employer, the date, the industry or sector, and the nature of the agreement (single enterprise agreement, greenfields agreement, and so on). This information was added to the spreadsheet, along with the identified 'equality' terms. The data extraction revealed 45 duplicates in the FWC database; the duplicates were removed for analysis. Two pairs of agreements were listed with the same agreement number, but reflected different agreements; this appeared to be a numbering error, and each agreement was retained in the sample. With these refinements, the sample included 2,164 agreements referring to 'equality'.

Conducting a search of this nature — for 'equality' in an agreement — is more likely to identify broad equality or non-discrimination clauses, rather than cases where equality considerations have been mainstreamed into other areas (including,

159 'Document Search', *Fair Work Commission* (Web Page) <https://www.fwc.gov.au/document-search>.

160 Fair Work Commission, *Access to Justice: Annual Report 2022–23* (Report, 2023) 40 <https://www.fwc.gov.au/documents/reporting/fwc-annual-report-2022-23.pdf>; Fair Work Commission, *FWC Bulletin* (Bulletin Vol 20/22, 4 August 2022) 3 <https://www.fwc.gov.au/documents/assets/pdf/fwcb040822.pdf>.

161 The code is available from the author upon request.

for example, working time, flexibility, pay, promotion or restructuring).[162] Further, 'equality' is not the only term that might indicate reference to ideas of non-discrimination; other terms might include discrimination (73,039 agreements); equal opportunity (26,552 agreements); or equal employment opportunity (14,696 agreements). A narrow focus on 'equality' as a search term therefore limits the findings of this study. Equally, though, as the smallest group of agreements, a targeted study of agreements referencing 'equality' allows the methods of this study and analysis to be tested and refined on a smaller subset of agreements, before considering the broader pool of published EAs.

Within this sample of equality agreements, this study deployed qualitative and quantitative content analysis to analyse the equality terms appearing in EAs.[163] Content analysis focuses on themes in texts.[164] The equality terms in agreements were coded manually using themes derived from the literature and the documents themselves,[165] and analysed using qualitative and quantitative methods.[166] Drawing on the literature above, it was hypothesised that the term 'equality' might be used in six key ways in EAs, relating to:

1. The name of the entity itself;
2. Broad general equality statements, affirming the parties' commitment to equality and, in some cases, delegating more detailed provisions to policy;
3. Establishing an equality working group or consultative committee;
4. Requiring consultation or engagement in relation to equality issues;
5. Recognising specific barriers or limits to equality in the organisation or sector; or
6. Putting forward positive measures or strategies for advancing equality.

A further category that emerged during coding involved references to legislation, particularly the *Gender Equality Act 2020* (Vic), but also the *Workplace Gender Equality Act 2012* (Cth). Reference to legislation was added as a seventh category in coding. Some agreements referenced equality in other ways, as in talking about equality of shift allocation among staff, or in including a Minister's cover letter (with a header referring to the portfolio of Minister for Equality). These were coded

162 On the differences between these clauses, see Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 32–43.

163 Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 941.

164 See Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart, 2011) 1, 11–17.

165 Gery W Ryan and H Russell Bernard, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (Sage, 2nd ed, 2003) 259, 275–6.

166 Further details of these methods and results are on file with the author and available on request.

as 'n/a', as the reference to equality did not involve an equality 'term'. It was also hypothesised that some equality terms would be replicated across similar enterprises or within industries, reflecting the presence of similar union actors in bargaining, associated employers, or the emergence of model terms. This might be seen as a form of 'pattern bargaining' across enterprises (see Part IV(C)).

VI Findings

A *'Equality' Agreement Demographics*

In this study, equality agreements were more common in specific industries. Table 1 shows the industries (as coded by the FWC) with over 100 agreements containing equality terms in the sample. That said, nearly half of the 'equality' agreements in the sample were pre-*FWA* agreements (873 of 2,164 agreements); for these early agreements, the industry was often listed as 'other', indicating some data processing difficulties for early agreements. Where industry was recorded, equality agreements were common in building and construction, storage, manufacturing, local government, and education.

Table 1: Industries with over 100 equality term agreements, agreement sample

Industry	Number of agreements with equality term
Building metal and civil construction industries	126
Educational services	103
Local government administration	124
Manufacturing and associated industries	145
Other or miscellaneous	786
Storage services	157

Other industries are also notable in aggregate, such as road transport (39), vehicle (51), passenger vehicle transport (9), and rail (22) industries, where there were 121 equality term agreements in total. Other industries with high numbers of equality agreements included food beverages and tobacco manufacturing (48), health and welfare (54), and social community home care and disability services (22). Government and the public sector were also strongly represented; in addition to local government administration (124), equality terms were included in agreements for state government administration (32), Commonwealth employment (12), Northern Territory (12), Tasmania (16) and Australian Capital Territory (6). These sector-specific trends likely reflect the presence of specific unions in these industries; and high levels of unionisation generally in these sectors (see Table 2).

Table 2: Trade union membership (% of employees), by industry, Australia, 2016 and 2022[167]

Industry	Trade union membership (% employees)	
	2016	2022
Education and training	33.1	30.1
Public administration and safety	30.8	22.5
Electricity, gas, water and waste services	26.0	21.6
Health care and social assistance	23.5	20.2
Transport, postal and warehousing	23.5	19.8
Mining	16.5	10.2
Manufacturing	14.1	9.9
Construction	13.6	9.7
Arts and recreation services	9.2	9.5
Retail trade	11.9	8.1
Information Media and telecommunications	8.2	7.2
Financial and insurance services	11.0	6.0
Other services	6.1	3.7
Administrative and support services	5.7	3.4
Wholesale trade	5.7	2.4
Rental, hiring and real estate services	2.6	2.4
Professional, scientific and technical services	2.7	2.1
Accommodation and food services	2.3	1.6
Agriculture, forestry and fishing	3.7	1.3

In the sample, there was a general increase in 'equality' agreements since 2014 (see Table 3). There was a substantial increase (nearly 30%) from 2020 (88 agreements) to 2021 (114 agreements). This growth over time may reflect a growing awareness of equality among employers and unions, or a growing presence of equality bargaining. It may also reflect a linguistic shift from the terms 'discrimination' and 'equal opportunity' towards 'equality' in agreement terms. More likely, though, as discussed further below, the substantial increase from 2020 to 2021 reflects the legislative prompt of the *Gender Equality Act 2020* (Vic) for the public sector in the state of Victoria. In total, 78 agreements made reference to the 'Gender Equality Act'.[168]

167 Australian Bureau of Statistics (n 34).

168 This search specifically excluded references to the 'Workplace Gender Equality Act' to identify the Victorian statute specifically. The federal *Workplace Gender Equality Act 2012* (Cth) was referenced in 44 agreements.

Table 3: Number of agreements referencing 'equality', by year, agreement sample, 2014–23

Year	Number of agreements
2023 (part year)	50
2022	140
2021	114
2020	88
2019	92
2018	85
2017	53
2016	77
2015	78
2014	85

Agreements approved by the FWC during 2022 and 2023 (n = 190) were manually coded using qualitative and quantitative content analysis and the coding scheme above. In this subset of agreements, the most common form of 'equality' term was a broad equality statement, affirming the parties' commitment to equality (84 agreements), followed by references to legislation (68 agreements). A small group (12) of agreements established or referred matters to an equality working group or consultative committee; more agreements (38) required consultation or engagement around equality. Thirty-three agreements referred to specific equality issues or barriers affecting the particular organisation or sector; and only 10 put forward positive measures or strategies for advancing equality.

Using this detailed analysis of a subset of agreements, key terms were identified that were likely to be replicated across different equality terms in the sample. Searches were then conducted for these key terms across the whole sample to analyse the broader group of agreements and identify trends. Those whole sample findings are detailed in the sections that follow.

B *Broad Equality Clauses*

It was originally hypothesised that most references to 'equality' in enterprise agreements would be included in broad, general equality statements, affirming the parties' commitment to equality. As noted above, this was borne out in practice: general equality clauses were the most common term in the agreements approved in 2022 and 2023, being present in 44% of those agreements.

Across the whole sample, numerous agreements (100) referred to the objective of achieving 'high standards' of equality. Depending on the agreement, this objective

could include reference to occupational health and safety, equality of employment and/or exclusion of discrimination, harassment and/or vilification.

There was also a recurring general clause that referred to equal opportunities and preventing discrimination (117 agreements). This was frequently included in DHL agreements (102 agreements), but also appeared in other transport sector agreements (the Transport Workers' Union was referenced in 93 equality agreements across the whole sample). For example, the *DHL Supply Chain Workplace Logistics Services — VIC Enterprise Agreement 2021* says:[169]

> **13 Equal Employment Opportunity**
>
> The Company is an equal opportunity employer. All people have a right to fair and equal treatment in all aspects of their employment. It is unlawful to treat people differently or to harass them on the basis of, for example:
>
> (a) sex or gender
> (b) pregnancy or potential pregnancy
> (c) breast feeding
> (d) race, colour, descent, national or ethnic origin, immigration status
> (e) marital status, relationship status
> (f) family responsibilities, status as a parent or carer
> (g) homosexuality, sexual orientation, lawful sexual activity
> (h) transgender status, gender identity, gender history, transsexuality
> (i) religious belief, affiliation, or activity, ethno religious status
> (j) union membership, participation in union activities
> (k) political belief, affiliation or activity
> (l) disability, impairment (physical or mental)
> (m) age
>
> Equality of opportunity particularly applies to, for example:
>
> (a) recruitment and promotion
> (b) terms and conditions of employment
> (c) allocation of tasks
> (d) dismissal or redundancy
> (e) retirement
> (f) enterprise agreements
>
> Employees who feel that they have suffered discrimination or harassment on one of the above grounds should report the matter to their supervisor. The matter will be dealt with in accordance with the relevant Company procedures.

There were 101 agreements that replicated key parts of this clause.[170]

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169 *DHL Supply Chain Workplace Logistics Services — VIC Enterprise Agreement 2021* [2021] FWCA 7094, cl 13.

170 Specifically: '[the organisation] is an equal opportunity employer … Equality of opportunity particularly applies to, for example …'.

As noted in Part IV, these broad equality statements are not meaningless; general 'non-discrimination clauses' can enable those who experience discrimination to access a dispute resolution procedure, and therefore potentially represent an important addition to collective agreements.[171] That said, these broad clauses alone are not enough to meaningfully address inequality.[172]

C *Specific Barriers to Equality*

Going further, then, 62 agreements included a broadly similar term recognising the lack of gender diversity in construction. This term often read like:

> The Parties to this Agreement recognise that the current level of women's employment in the construction industry is not consistent with our commitment to equality of opportunity or the promotion of inclusive workplaces which are free from discrimination.[173]

This specific clause was replicated across 48 agreements; all of those 48 agreements were negotiated by the Construction, Forestry, Mining and Energy Union ('CFMEU'). Indeed, 241 of the equality agreements overall mentioned the CFMEU, demonstrating the strategic importance of specific unions (and their negotiators) in equality bargaining.

D *Consulting Regarding Equality*

As noted above, a substantial number of agreements (78) included reference to the Victorian *Gender Equality Act 2020* (Vic), particularly its provisions relating to systemic gender equality issues.[174] These agreements were also far more likely than other agreements to include a requirement to consult or engage around matters of gender equality (50 agreements overall; 45 of those explicitly also mentioned the 'Gender Equality Act').[175] This was repeatedly expressed as, for example, '[t]he Employer will work collaboratively with Employees to identify, support and implement strategies designed to eradicate the gender pay gap, gender inequality and discrimination'.[176]

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171 Blackett and Sheppard (n 11) 439. See *FWA* (n 30) s 186(6).

172 Blackett and Sheppard (n 11) 440.

173 *Hindmarsh Construction Australia Pty Ltd and CFMEU ACT Enterprise Agreement 2022* [2023] FWCA 1464, cl 10.1.

174 *Gender Equality Act 2020* (Vic) ss 38(1), 39(1)(a).

175 Overall, 153 equality agreements referred to 'working collaboratively', but only 49 used this phrase in the context of equality or equity.

176 *Barwon Coast Committee of Management Enterprise Agreement 2022* [2022] FWC 1155, cl 10.1.1.

These clauses only referred to collaborating in relation to gender equality, reflecting the limited scope of the *Gender Equality Act 2020* (Vic).[177] However, the clauses typically went beyond the requirement to consult imposed by the Act, which is limited to consultation in the preparation of a gender equality action plan.[178] Often, the consultation clause was framed as involving collaboration with 'Employees and the Union'.[179] Thirty-one of the agreements that mentioned 'working collaboratively' around equality also mentioned the CPSU (Community and Public Sector Union). While clauses requiring parties to 'work collaboratively' to advance equality existed prior to the *Gender Equality Act 2020* (Vic), they became far more developed and widespread following the Act's implementation.

E *Consultative Committees*

Overall, 1103 agreements in the sample referred to a 'consultative committee', but only 136 referred to a consultative committee in the context of equality or equity or equal opportunities.[180] On closer review, however, many of these agreements referred to a consultative committee and equality in the table of contents, not within a substantive agreement term. In total, 86 agreements meaningfully referred to a consultative committee that addressed or considered equality issues.[181] Few agreements established a dedicated equality or equal opportunities committee;[182] more often, equality issues were referred or added to the agenda of an existing consultative committee. Further, while 91 agreements referred to a 'working group', only two referred to a working group in the context of equality or equity or equal opportunity. Of those two agreements, one also referred to the *Gender Equality Act 2020* (Vic). Thus, it is exceptional for agreements to refer equality matters to a consultative committee or working group.

F *Positive Measures*

Some agreements — exceptionally — included reference to positive action measures to redress inequality, particularly gender inequality. For example, the *Engage*

177 Noting, however, that the Victorian statute does make some provision for intersectionality. See: *Gender Equality Act 2020* (Vic) ss 4(c), 6(8), 9(2)(c), 11(2)(c), 11(3)(b); Commission for Gender Equality in the Public Sector, *Intersectionality at Work: Building a Baseline on Compounded Gender Inequality in the Victorian Public Sector* (2023) <https://content.vic.gov.au/sites/default/files/2023-10/Intersectionality-At-Work-Report-24-Oct.pdf>.

178 *Gender Equality Act 2020* (Vic) s 10(2)(b).

179 See, eg, *Melbourne Custody Centre Enterprise Agreement 2021* [2022] FWCA 1501, 38 cl 52.3.

180 This search picked up a reference to equality or equity or equal opportunity or EO within 100 characters of the term 'consultative committee' or 'workplace committee'.

181 Other results captured, for example, a table of contents, where equality clauses came before consultative committee clauses.

182 Though see *Maroondah City Council Enterprise Agreement No 11 2022* [2023] FWCA 258, cl 37.1.2.

Marine Pty Ltd Abbot Point Towage Services Union Collective Agreement 2021[183] cl 16.4.1 provides that

> when there are two candidates of equal skills and qualification, the gender diverse person or woman will be given preference over the cis-male until equality is reached in that classification. … These special measures are in accordance with s 7D of the *Sex Discrimination Act 1984* (Cth).

The *Loy Yang B Enterprise Agreement 2022*[184] cl 36 makes provision for creating an affirmative action policy, providing:

> The Company shall maintain an effective policy of affirmative action to ensure equal employment opportunity. Such policy shall be implemented through consultation between the Parties. The effect of the policy shall be to make inroads towards achieving gender equality targets as far as reasonably practicable.

The *Teachers Mutual Bank Limited Enterprise Agreement 2021* commits to undertaking a pay audit, acting on that audit and/or providing a gender pay gap analysis to the union (in that case, the Finance Sector Union ('FSU')).[185]

G *Other Matters*

Some agreements referencing the *Gender Equality Act 2020* (Vic) also included provision that the agreements should be read consistently with that Act. For example, the *Country Fire Authority Professional Technical and Administrative Agreement 2021*[186] cl 16.1 provides that: 'The provisions of this Agreement are to be interpreted consistently with the gender equality principles defined in section 6 of the *Gender Equality Act 2020* (Vic)'. In total, 45 agreements contained an interpretation provision of this nature; 43 of those agreements also mentioned the *Gender Equality Act 2020* (Vic) (though not necessarily in the context of this provision).[187]

Most equality clauses focused on the responsibilities of the employer or the parties mutually to advance equality. Some agreements, though, focused on the responsibilities of staff or teachers to advance equality. For example, in the *Seventh-Day Adventist Schools (North New South Wales) Ltd Teachers Enterprise Agreement 2022–2024*,[188] cl 10.2(v) provides: 'Teachers have a responsibility to recognise the right of equality

183 [2022] FWCA 841.

184 [2022] FWCA 3174.

185 *Teachers Mutual Bank Limited Enterprise Agreement 2021* [2022] FWCA 867, cl 57.

186 [2023] FWCA 124.

187 The two that did not mention the *Gender Equality Act 2020* (Vic) were the *Harness Racing Victoria Stewards Enterprise Agreement 2022–2023* [2022] FWCA 4054; and the *Melbourne Custody Centre Enterprise Agreement 2021* [2022] FWCA 1501. Both of these organisations are potentially captured by the *Gender Equality Act 2020* (Vic), even if they did not explicitly mention the Act in their agreement.

188 [2022] FWCA 674.

of opportunity of all according to their ability, without discrimination, within the context of the ethics, values and beliefs of the Seventh-day Adventist Church'.[189]

Some agreements specifically linked equality with secure work. For example, the *Carers Victoria Agreement 2021*[190] cl 19.5.2 provides that: 'The Employer will prioritise secure forms of employment over fixed term and casual employment, acknowledging the impact of insecure work on workers' health, work-life balance and gender equality within the workplace'. This clause was repeated across three equality agreements.

The agreement sample also featured some employers — or some divisions of employers — repeatedly. For example, 55 of the equality agreements related to O'Brien, the glass and vehicle repair company, covering different time periods and different divisions of the company.

VII Advancing Equality Bargaining

The results of this study are optimistic in parts: some agreements, and some unions, appear to be actively pursuing equality bargaining. The vast majority of EAs, however, omit any reference to equality. Further, equality terms are more likely to be broad equality statements or references to legislation than a substantive commitment to action. While this study's method and approach might not detect equality mainstreaming, or clauses using terms other than 'equality', it flags the need for further analysis and investigation, to better establish the prevalence of equality bargaining.

While treating these results with caution, and acknowledging the limits of this study, overall, it appears that equality bargaining likely remains 'underdeveloped' in Australia, as in the UK. While collective bargaining could be a critical means for advancing equality, the results of this study seem to indicate that equality bargaining has been de-prioritised in existing legal structures. Given the significant limits of individualised enforcement mechanisms for advancing equality, there is a need to reframe collective institutions and collective action, to better advance equality at work. This could be achieved through: better support and training for unions, to build capacity and re-prioritise equality; legislative prompts and external factors; or, perhaps, legislative mandates or requirements for equality bargaining.

A *Training and Support for Unions*

First, we need to build the capacity of unions, officers and delegates, to enable them to re-prioritise equality, and to engage with equality as a core aspect of the bargaining agenda. In his survey of union officers, for example, Heery found a strong

189 See also *Seventh-Day Adventist Schools (Greater Sydney) Ltd Teachers Enterprise Agreement 2023–2025* [2023] FWCA 294, cl 10.2(v).

190 [2022] FWCA 4252.

association between involvement in equal pay bargaining and receiving training on equal pay.[191] Heery also argues that union policy can influence and strengthen negotiators' commitment to equality bargaining.[192] Finally, there was a strong association between exposure to specialist equality officers and committees, and involvement in equality bargaining.[193] This implies, then, that unions can introduce supportive measures and structures, such as training, policies, committees and equality specialists, to strengthen equality bargaining.

A comparative example of how unions might re-prioritise equality emerges from the UK. UK trade unions have appointed thousands of equality representatives to give advice and support on equality issues in the workplace.[194] The *TUC Equality Audit 2022*, which drew on surveys of 41 (out of 48) affiliated trade unions, found that 18 of 41 unions (44%) had at least one national officer with sole responsibility for equality or a single strand of equality (such as gender, disability, ethnicity, sexuality or age).[195] An additional 15 unions (37%) had officers at national level with equality as part of their explicit responsibility, if not their sole responsibility.[196]

Equality representatives are also present at branch level. These 'reps' are tasked with raising local awareness of equality issues, helping to ensure that equality is properly integrated as part of workplace consultation and bargaining, and supporting members who experience discrimination.[197] In the *TUC Equality Audit 2022*, 85% of members of respondent unions were in unions with a rule or practice on equality reps.[198] Some TUC affiliated trade unions also have formal or informal equality committees and networks.[199]

While equality representatives are present in many UK unions, they lack any statutory backing, and have no right to time off to facilitate their role.[200] This limited provision is likely to significantly constrain their ability to effect meaningful change on a day-to-day basis.[201] That said, equality representatives can still have a positive impact: in a 2009 survey of UK equality representatives (n = 209), over half (56%) of respondents reported having impacted positively on employer age practices,

191 Heery, 'Equality Bargaining' (n 137) 533.

192 Ibid 533–4.

193 Ibid 538.

194 Hepple (n 14) 60.

195 Trades Union Congress (n 134) 26.

196 Ibid.

197 Ibid 27.

198 Ibid.

199 Ibid 4, 28.

200 Nicolas Bacon and Kim Hoque, 'The Role and Impact of Trade Union Equality Representatives in Britain' (2012) 50(2) *British Journal of Industrial Relations* 239, 245.

201 Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2015) 242–3, 259.

though only 6% felt they had had 'a lot' of impact.[202] Similar results were reported for impact on employer gender practices (55% had some impact; 8% reported 'a lot' of impact).[203] A substantial group of respondents, though, felt they had no impact on employer equality practices, ranging from 54% (in relation to religion) to 37% of respondents (in relation to disability).[204] Overall, 25% of respondents reported having no impact on employer practices in relation to any protected characteristic.[205]

In that study, positive impact was more likely to be reported where respondents had contact with management at least once a month, where respondents attended equality committees or forums,[206] and in workplaces with negotiation over equality policies and practices (but not necessarily in workplaces with consultation).[207] However, less than half (46.9%) of equality representatives were located in workplaces with equality forums, and only 28.2% of equality representatives regularly attended a forum; 25.8% reported that negotiation over equality occurred in their workplace; and 37.3% had contact with management in their role at least once a month.[208] Overall, then, in the absence of a legal duty to consult in relation to equality, employer willingness and support is key to the success of equality representatives; despite this, only 29.7% of respondents agreed that managers valued their equality representative activities.[209]

In Australia, the Australian Council of Trade Unions has produced a *Women in Unions Report*. In 2011, the Report found that, like in the UK, women were underrepresented in union leadership positions compared to their overall union membership.[210] Around a third of unions in the Report had a standard bargaining clause that related to equal remuneration, sexual harassment or equal employment opportunity; where a standard clause was in place, though, it had been successfully adopted in 75% of negotiated agreements.[211] The Australian Council of Trade Unions has since committed to achieving gender parity in elected union positions,[212] building on

202 Bacon and Hoque (n 200) 248.

203 Ibid.

204 Ibid.

205 Ibid.

206 Ibid 248–53.

207 Ibid 253–4.

208 Ibid 261.

209 Ibid.

210 Australian Council of Trade Unions, *Women in Unions Report 2011* (Report, May 2012) 5 [1.2.3] <https://issuu.com/australiancounciloftradeunions/docs/women_in_australian_unions_2011>.

211 Ibid 6 [1.2.8].

212 Australian Council of Trade Unions, *Gender Equity and Unions* (ACTU Congress Resolution, 2021) <https://www.actu.org.au/wp-content/uploads/2023/07/gender-equity-and-unions-2021.pdf>. While the Australian Council of Trade Unions Congress has committed to conducting a Women in Unions survey every three years, the 2021 resolution still refers to the 2015 Report.

the *Women in Unions Report 2015* which found that women occupied only 40% of national union leadership positions, despite representing 49% of union members at the time.[213] Australian unions — and the Australian Council of Trade Unions — would benefit from considering and learning from the TUC's Equality Audits, to evaluate progress towards equality in Australian trade unions, and how it compares to overseas developments. This mutual learning is key to building capacity among trade unions to advance equality.

B *Legislative Prompts and External Factors*

Second, equality bargaining can be encouraged or stimulated by external factors, including public policy, law, and policy networks.[214] Indeed, public policy is a key external factor that can prompt equality bargaining.[215] As Heery argues, 'innovation within unions often emerges from prior innovation in the policies of the state',[216] partly due to declining union density and fragmented bargaining at the workplace level: 'In this context of declining bargaining power, unions have become more dependent on opportunities afforded by changes in employment law and wider public policy to open up collective bargaining on new issues.'[217]

However, this also reflects the dynamic interplay between legislative standards and collective bargaining; as Blackett and Sheppard posit: 'Providing basic labour standards and equality rights in law buttresses the bargaining power of workers; in other words, if the law already recognizes equality principles in the workplace, then negotiations can focus on how to achieve equality at work.'[218]

This interplay is reflected, for example, in the clear stimulus provided by the *Gender Equality Act 2020* (Vic) in encouraging and extending equality bargaining in public entities (see Part VI). Where legislation is in place, collective bargaining can translate legal rights 'into real rights and substantive outcomes in the workplace'.[219] Thus, bargaining can play a critical role in implementing and embedding legal rights at the local level.[220] This reflects Dickens's argument that '[i]n providing for minimum standards, legislation provides not only a safety-net but also a resource or lever to be used in bargaining'.[221]

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213 'ACTU Congress: Women in Unions — Room for Improvement', *Australian Manufacturing Workers' Union* (Web Page) <https://www.amwu.org.au/actu_congress_women_in_unions_room_for_improvement>.

214 Heery, 'Equality Bargaining' (n 137) 536.

215 Ibid 538.

216 Ibid 539.

217 Ibid 540.

218 Blackett and Sheppard (n 11) 451.

219 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 197.

220 Ibid.

221 Ibid.

As Heery notes, unions can also drive and influence public policy;[222] what Professor KD Ewing describes as the governmental and public administration functions of trade unions.[223] This was also the case with the *Gender Equality Act 2020* (Vic), which was supported and driven by the union movement, among others.[224] As Sue Williamson and Professor Marian Baird argue, '[c]ollective bargaining is at the heart of union activity, but associated campaigning and lobbying activities for gender equality shows that the impacts of equality bargaining extend beyond collective bargaining itself'.[225]

Unions can also influence the work of governments and public policy through bargaining. Collectively bargained solutions can come to set the standard for broader labour law reforms: 'Just as labour law can act as a lever for unions to negotiate gender equality items, collective bargaining can also set the benchmark for other forms of regulation and foster wider regulatory activity.'[226]

Again, this reflects the dynamic interplay between law, regulation and bargaining. This was the case, for example, in relation to paid leave for domestic family violence in Australia, which was later embedded in statutory workplace entitlements.[227] In that case, too, the union's advocacy was spurred by advocates, including the Australian Domestic & Family Violence Clearinghouse, which helped develop a model clause.[228] This illustrates the potential importance of advocates and equality experts assisting unions to advance equality bargaining. Collating model equality clauses (as, for example, in this article), or developing a database of equality bargaining in Australia, might also help to spur and extend equality bargaining.[229]

C *Legislative Mandates*

Third, there is an open question as to whether legislation should mandate consultation around equality, or equality bargaining specifically. I have previously argued, for example, that there should be a legal duty on employers to consult and engage on equality issues.[230] This has been embedded, to some extent, in the *Gender Equality*

222 Heery, 'Equality Bargaining' (n 137) 539.

223 KD Ewing, 'The Function of Trade Unions' (2005) 34(1) *Industrial Law Journal* 1, 4–5.

224 Lauren Ryan et al, *Laying the Foundation for Gender Equality in the Public Sector in Victoria: Final Project Report* (Report, University of Melbourne, February 2022) 9 <https://doi.org/10.26188/19254539>.

225 Williamson and Baird (n 97) 164.

226 Ibid.

227 Baird, McFerran and Wright (n 141) 198.

228 Ibid.

229 See, eg, Susan Milner, Hélène Demilly and Sophie Pochic, 'Bargained Equality: The Strengths and Weaknesses of Workplace Gender Equality Agreements and Plans in France' (2019) 57(2) *British Journal of Industrial Relations* 275, 297 .

230 Blackham, *Reforming Age Discrimination Law* (n 2) 329.

Act 2020 (Vic), which requires that defined entities '[i]n preparing a Gender Equality Action Plan … consult with … employees, employee representatives and any other relevant person'.[231] Sue Williamson and Linda Colley go further, and suggest mandating equality bargaining in the public sector, as is the case in France.[232] The authors do not explore how this might occur in the Australian context.[233]

Mandating equality bargaining specifically is likely to be difficult to implement in Australia: the role of the social partners in France is quite different to that in Australia, and the French system imposes complex duties on employers, backed by financial penalties for non-compliance.[234] Even then, Susan Milner, Hélène Demilly and Sophie Pochic's evaluation of 186 French equality agreements and plans flags that, even where equality bargaining occurs to be 'formally compliant', this might result in 'weak agreements which provide little in the way of concrete actions or additional protections beyond legal minima' but simply enable 'box-ticking'.[235] There is a need, then, to focus on how unions are resourced and up-skilled to build capacity to ensure meaningful bargaining. Overall, imposing a positive duty on employers to engage and consult on equality issues, if not to undertake equality bargaining specifically, is likely to encourage and facilitate equality bargaining going forward. It is a critical step forward for equality law, which should be advocated for by unions and equality advocates.

VIII Conclusion

This article has articulated a clear case for advancing equality bargaining in Australia, and empirically mapped existing progress towards equality bargaining in EAs. Given equality bargaining appears underdeveloped, this article offers concrete suggestions for strengthening equality bargaining in Australia. Unions have a clear self-interest in advancing equality bargaining. Advancing equality via bargaining could prove to be a key recruitment tool for engaging non-traditional union members;[236] these non-traditional members are critical to the future of the union movement.[237] As the demographics of union membership change, it is critical to the union movement's legitimacy as a representative institution that it engages more

231 *Gender Equality Act 2020* (Vic) s 10(2)(b).

232 Sue Williamson and Linda Colley, 'Regulating for Gender Equality in the Australian Public Service: Extending Dickens' Tripod of Regulation' (2023) 65(3) *Journal of Industrial Relations* 274, 287.

233 Ibid.

234 Milner, Demilly and Pochic (n 229).

235 Ibid 277, 296.

236 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 198. In Australia, see similarly Barbara Pocock, 'Introduction' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 1, 2.

237 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 198.

deeply with the equality agenda.[238] Further, as Blackett and Sheppard argue, for collective bargaining to be 'effective', it must include those who have traditionally experienced exclusion and inequality.[239] Briskin cautions, though, that a focus on representational democracy — that is, the demographics of bargaining teams — is a 'limited proxy' for achieving voice or advancing equality, though it can have some benefits in strengthening voice and union democracy.[240] As well, then, she argues for representational justice, which focuses less on individuals (and 'individual equality champions')[241] and more on creating structural and constitutional linkages between equality structures within unions — like constituency committees — and bargaining.[242] Thus, not only do unions need to adopt and embed equality structures, but these structures need to be embedded and linked with bargaining.[243]

There is much to be done, but advancing equality through bargaining is as critical for the union movement as it is for individual workers. This article, then, frames the task facing Australian unions: to use collective mechanisms to prioritise and advance equality; to strengthen institutional arrangements for advancing equality in unions themselves; and to collect data and analyse progress towards equality in unions and bargaining. By mapping existing progress towards equality bargaining, this article offers important models and templates of what can and should be achieved through bargaining.

Finally, this article also puts forward a call for law reform, to ensure employers have a duty to engage and consult on equality issues. As governments and statutory agencies become increasingly attuned to the limits of the individual enforcement of equality law,[244] strengthening collective mechanisms represents a critical priority for enhancing regulation and enforcement of equality law.

238 Ibid.

239 Blackett and Sheppard (n 11) 427–8.

240 Linda Briskin, 'Strategies to Support Equality Bargaining inside Unions: Representational Democracy and Representational Justice' (2014) 56(2) *Journal of Industrial Relations* 208, 216.

241 Ibid 217.

242 Ibid 217–21.

243 Ibid 223.

244 See: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Report, 2021).

Dominique Allen*

A COMPLEX TERRAIN: NAVIGATING WORKPLACE DISCRIMINATION LAWS

Abstract

Discrimination in the workplace is prohibited by laws operating at both the state and territory, and federal levels. A shortcoming of anti-discrimination law is that it is complex, both in terms of substance and procedure. This is due, in part, to our federal structure and because the law developed organically in each jurisdiction, so it now lacks consistency. What was already a complex terrain increased with the introduction of the *Fair Work Act 2009* (Cth), which gives employees the option of using industrial relations law to pursue a discrimination claim.

Potentially, an employee has three options available for resolving a workplace discrimination claim and there are many factors to consider when choosing the most appropriate forum. This article examines the complexities that result from having multiple forums before exploring the impact this is having on how lawyers run cases. The goal of the article is to consider what factors influence the decisions lawyers make about how to pursue a discrimination claim. It draws on interviews conducted with barristers and solicitors specialising in discrimination matters in Victoria, New South Wales and Queensland at both the state and federal levels.

I Introduction

Australia's anti-discrimination laws have evolved organically over the last 40 years in response to changing social norms and expectations. A suite of laws prohibit discrimination in the workplace across a range of attributes at the federal level and in each state and territory. Federal industrial relations law has long prohibited termination because of a defined attribute and this prohibition was extended in 2009 by the *Fair Work Act 2009* (Cth) ('*FWA*') to other forms of behaviour.[1]

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1 *Fair Work Act 2009* (Cth) s 351 ('*FWA*').

While these laws are similar in form and substance, they are not consistent. The complexity of anti-discrimination laws is compounded by the fact that a workplace discrimination claim will often include a claim for worker's compensation, a contractual claim, and a claim for another workplace entitlement, each with their own jurisdictional, temporal, and procedural requirements. Obtaining expert legal advice has become increasingly important, including for respondents.

The type of protection an employee has from workplace discrimination can vary depending upon their postcode, work arrangements, and the way that they were treated. Footballer Israel Folau discovered this when he had to rely on a rarely used provision of the *FWA* because neither his local anti-discrimination law, nor any of the federal anti-discrimination laws, protected him from religious discrimination in the workplace. The Folau matter is explained in more detail in Part II to contextualise the problem of having a multitude of overlapping workplace discrimination laws. There are potentially three avenues open to an employee to pursue a discrimination claim, which creates its own complexity as identified in Part II. Yet what is difficult to ascertain is the impact this complexity in the legal framework is having on how lawyers run discrimination claims and the advice they provide to their clients.

Drawing on interviews conducted with barristers and solicitors who specialise in discrimination matters and practice in Victoria, New South Wales ('NSW') and Queensland, Part II considers what aspects of anti-discrimination law are influencing the decisions lawyers make about how to pursue a discrimination claim. As Part III explores, the unanticipated finding of this study is that the law is not having a great impact on the way cases are pursued because this decision has often been made before lawyers are involved. When lawyers play a role, financial considerations are the most influential factors, and their influence is significant.

II Complex Legal Intersections

A *The Israel Folau Matter*

In late 2019, rugby union player Israel Folau settled a discrimination claim against the NSW Waratahs and Rugby Australia for an undisclosed sum. Both parties issued an apology.[2] Folau's $4 million contract was terminated by the NSW Waratahs after he posted on social media that Hell awaits '[d]runks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolaters'.[3] This was not the first time Folau, a devout

2 Remy Varga, 'Rugby Australia Boss Raelene Castle Defends Her Role in Israel Folau Saga', *The Australian* (online, 5 December 2019) <https://www.theaustralian.com.au/sport/rugby-union/israel-folau-rugby-australia-reach-settlement/news-story/2935ab2395fcbd35c9b1a9c527f34c82>.

3 izzyfolau, (Instagram, 10 April 2019 ACDT) <https://www.instagram.com/izzyfolau/p/BwEWt2uHcLI/>.

Christian, had used social media in such a way.[4] Fearing a backlash from fans and sponsors, Rugby Australia terminated his contract.[5] Following a three day hearing before an internal *Code of Conduct* Committee constituted by Rugby Australia, Folau was found to have committed a high-level breach of Rugby Australia's *Code of Conduct* which requires players to '[t]reat everyone equally, fairly and with dignity regardless of … sexual orientation' and to '[u]se social media appropriately'.[6] Folau ultimately lodged a claim under s 772 of the *FWA*, which prohibits an employer from terminating employment because of, inter alia, the employee's religion. He was required to act quickly because *FWA* claims relating to termination must be lodged at the Fair Work Commission ('FWC') within 21 days of the dismissal taking effect.[7] This is quite different to anti-discrimination laws, which have much longer timeframes.[8]

Regardless of what one thinks of the nature and content of Folau's post, the matter is a concise illustration of some of the problems with how workplace discrimination is regulated, particularly the complexity of having overlapping schemes. Before outlining them, it is necessary to work through the statutory options which were open to Folau for addressing his termination.[9]

Folau claimed that, in terminating him for his social media post, Rugby Australia discriminated against him on the basis of his religion, specifically the expression of his religion. Religious discrimination is not prohibited by federal law.[10] The only recourse an employee has under federal law is to lodge a complaint at the Australian Human Rights Commission ('AHRC'). The President of the AHRC can conduct an

4 Australian Associated Press, 'Israel Folau Conduct Hearing Set For May', *Canberra Times* (online, 22 April 2019) <https://www.canberratimes.com.au/story/6084111/israel-folaus-code-of-conduct-hearing-date-set/>.

5 Aaron Patrick, 'Inside Story: How Israel Folau's Legal Team Played Rugby Australia', *Australian Financial Review* (online, 21 December 2019) <https://www.afr.com/companies/sport/inside-story-how-israel-folau-s-legal-team-played-rugby-australia-20191216-p53kcr>.

6 Rugby Australia, *Code of Conduct* (2019) pt 2, cls 1.3, 1.7.

7 *FWA* (n 1) s 366.

8 See, eg: *Equal Opportunity Act 2010* (Vic) s 116(a) ('*EOAV*'); *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b) ('*AHRC Act*').

9 As a high-income earner, Folau did not meet the jurisdictional requirements for lodging an unfair dismissal claim: *FWA* (n 1) s 382(b)(iii).

10 Over the last five years, various federal governments have entertained the idea of introducing a Religious Discrimination Act. This has included exposure draft Bills in 2019 and 2022 which were not passed, and an Australian Law Reform Commission inquiry focusing on education: Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Final Report No 142, December 2023). However, progress appears to have stalled with the Government announcing recently that it will not proceed with religious discrimination legislation without bipartisan support: Rosie Lewis, 'Mark Dreyfus Wants "Line-By-Line" Response from Michaelia Cash on Draft Religious Discrimination Laws', *The Australian* (online, 9 July 2024)

inquiry into the matter and attempt to resolve it through conciliation[11] but, if that fails, the employee cannot take the claim to court. If the President of the AHRC finds that a breach has occurred, they can prepare a report for the Attorney-General.[12] Reports are also published on the Commission's website.[13]

All states and territories prohibit religious discrimination, except NSW, where Folau was employed, and South Australia. The *Anti-Discrimination Act 1977* (NSW) ('*ADANSW*') prohibits race discrimination, which includes 'ethno-religious origin'.[14] As discussed below, the NSW Administrative Decisions Tribunal has held that this is not broad enough to cover 'religion'.[15] Moreover, the essence of Folau's claim was that he was discriminated against on the basis of his *expression* of his religious beliefs, rather than on the basis of his religion. In his claim, Folau said that he was compelled to communicate the word of God and doing so was a manifestation of his religion.[16] Discrimination of this kind is clearly not covered by the law in NSW, so neither federal nor state anti-discrimination laws protected him.

The fact that Folau did not have a claim under an anti-discrimination law affected his *FWA* claim. Section 351 of the *FWA* prohibits an employer from taking adverse action (including dismissal) against an employee on the basis of their religion. However, s 351 does not apply if the adverse action was not unlawful in the jurisdiction where the employee works.[17] As religious discrimination is not unlawful in NSW, Folau did not have a claim under s 351, leaving him with s 772, which is what he ultimately pursued. Section 772 is not as broad as s 351, in that it only applies to termination, so if Rugby Australia had demoted Folau or denied him a benefit, he would not have had any cause of action under statute.

The Folau matter illustrates many problems with the substance of workplace discrimination laws in terms of their definitions, coverage and application. They are considered in more depth in the remainder of Part II. Before doing so, it is necessary to note how discrimination laws are enforced. In each jurisdiction, claims are enforced in much the same way, in that the employee can lodge a claim at a statutory equality agency or at the FWC if it is a *FWA* claim. Claims are initially

<https://www.theaustralian.com.au/nation/politics/mark-dreyfus-wants-linebyline-response-from-michaelia-cash-on-draft-religious-discrimination-laws/news-story/b2f5932a0ac620bf09b7b44cec6d36ee>.

11 *AHRC Act* (n 8) ss 11(1)(f), 31(b).

12 Ibid s 32A.

13 See 'Reports to the Minister under the *AHRC Act*', *Australian Human Rights Commission* (Web Page, 30 May 2022) <https://humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

14 *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'race') ('*ADANSW*').

15 *Jones and Harbour Radio Pty Ltd v Trad (No 2) (EOD)* [2011] NSWADTAP 62 ('*Jones v Trad (No 2)*').

16 Patrick (n 5).

17 *FWA* (n 1) s 351(2)(a).

subject to compulsory conciliation facilitated by the agency — except in Victoria, where this is not compulsory — before the employee can proceed to the federal courts for adjudication or to a civil tribunal if it is a state and territory claim. The significant difference between the schemes is that civil tribunals are generally cost-free, as are *FWA* claims,[18] but federal discrimination claims may be subject to an adverse costs order.[19]

B *Complex Concepts and Definitions*

Workplace discrimination laws are complex, both in terms of the concepts they deal with and their failure to define key terms. They are statute-based without a rich, common law footing or body of jurisprudence. In fact, the body of case law is small. Laws require judicial interpretation to give them meaning but, as Alysia Blackham and Dominique Allen have documented, most cases — strong and weak — settle, so the opportunity for courts to apply the law does not arise.[20]

Alice Taylor has described the resulting body of case law as lacking both consistency and coherency.[21] Many years ago, Beth Gaze lamented the small body of case law, particularly the absence of superior court decisions, and highlighted that most decisions favour employers.[22] A small and unfavourable body of case law means

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18 Costs will only be awarded if a party acted vexatiously or caused the other party to incur costs: *FWA* (n 1) s 570.

19 *AHRC Act* (n 8) s 46PO. See also: *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214. For an overview of how the provisions operate, see Phillipa Alexander, 'Costs Update: Costs in Unlawful Discrimination Proceedings' (2015) 128 *Precedent* 55, 55–7.

20 Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ch 6; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 786–9.

21 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 188.

22 Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25(3) *Alternative Law Journal* 125, 126. This concern has been raised by others. For example, Alysia Blackham noted in 2020 that there had not been a successful case brought under the *Age Discrimination Act 2004* (Cth): 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1. Blackham notes that this changed in 2023: 'Federal Age Discrimination Law Finally Coming of Age: *Gutierrez v MUR Shipping Australia Pty Ltd*' (2023) 36(3) *Australian Journal of Labour Law* 289. As Neil Rees, Simon Rice and Dominique Allen point out, the High Court has only considered an individual's discrimination claim seven times: *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 26.

claims are settled because no one wants to be the 'test case'. Even Israel Folau chose this path.[23]

Anti-discrimination laws often contain terms that are not defined. For example, the definition of 'race' in the *ADANSW* includes 'ethno-religious origin' but this is not defined. When the term was added to the Act in 1994, the NSW government intended it to cover ethno-religious groups such as Jews, Muslims, and Sikhs.[24] The NSW Administrative Decisions Tribunal has since said that, to be covered, a group must have a common religious origin and it proposed a long list of relevant factors to consider when determining whether a group is protected by the Act or not.[25] This is an example of where the law is unnecessarily complex. For an employee in NSW, it is not clear from the wording of the statute whether or not they are protected, while the statutory equality commission, Anti-Discrimination NSW, cannot provide either party with legal advice. A lawyer who is familiar with the *ADANSW* will be able to advise the employee but, ultimately, as the Tribunal noted, it is for the Tribunal to decide whether or not a person is a member of an ethno-religious group and it may require sociological evidence and expert knowledge to make a decision.[26] This will potentially make it a difficult and costly exercise for the employee and, perhaps, make them more inclined to settle. The combination of complex legal concepts and undefined terms means that it can be important for employees to obtain legal advice, as considered separately below.

C *Inconsistencies and Gaps*

State, territory, and federal anti-discrimination laws are similar to one another in the sense that they each prohibit direct and indirect discrimination across a range of attributes, as well as prohibiting sexual harassment and victimisation. Although the laws are similar, they are not consistent. There are many instances of inconsistencies, as the earlier discussion of religious discrimination showed. It is not necessary to document them all, only to provide some examples. One is family and carer's responsibilities. The *Sex Discrimination Act 1984* (Cth) ('*SDA*') prohibits discrimination on the basis of family responsibilities, but only if it is direct discrimination,[27] whereas all of the states and territories except the Northern Territory prohibit direct *and* indirect discrimination on this basis.[28] Further, the statutes do not use the same

23 Folau ultimately settled his claim on confidential terms, which was unfortunate for the development of the law because there are so few cases about religious discrimination and religious expression. Folau's legal team had canvassed the idea of taking the case to the High Court and attempting to define the law on religious freedom: Patrick (n 5).

24 New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1827 (John Planta Hannaford, Attorney-General).

25 *Jones v Trad (No 2*) (n 15) [36].

26 Ibid [34].

27 *Sex Discrimination Act 1984* (Cth) s 7A ('*SDA*').

28 See, eg: *EOAV* (n 8) s 6(i); *ADANSW* (n 14) s 49T; *Anti-Discrimination Act 1991* (Qld) s 7(d) ('*ADAQ*').

wording to define these attributes,[29] nor are they consistent in how far the responsibilities or status extend. For example, in South Australia, 'family responsibilities' include Aboriginal and Torres Strait Islander peoples who have responsibilities to care according to kinship rules.[30] By contrast, the *SDA* contains a much narrower definition.[31]

The statutes are also inconsistent in how they define discrimination. Victoria and the Australian Capital Territory use a different test for direct discrimination from the rest of the states and the Northern Territory.[32] The definition of direct discrimination in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') is different from the three other federal laws and not replicated in any other piece of legislation.[33]

The statutes contain different tests for indirect discrimination. Indirect discrimination occurs when a seemingly neutral requirement, condition, or practice has a disadvantageous impact on an employee because of a protected attribute they possess. In NSW, South Australia, and Western Australia,[34] the employee must show that a substantially higher proportion of people without the attribute could have complied. In Queensland, the proportion does not have to be 'substantially' higher.[35] The other jurisdictions removed this requirement because of its complexity resulting from the High Court's decision in *AIS v Banovic*.[36] In Victoria, the Australian Capital Territory, and Queensland, and federally in the *SDA*, *Disability Discrimination Act 1992* (Cth) ('*DDA*') and *Age Discrimination Act 2004* (Cth) ('*ADA*'),[37] the employer is required to prove that the requirement, condition, or practice was reasonable. Elsewhere, the employee is required to prove this element.

There are many other examples which show the differences between the jurisdictions and the resulting complexities this leads to.[38] These differences are a consequence

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29 Some, like the *SDA* at s 7A, and the *Equal Opportunity Act 1984* (WA) at s 35A ('*EOAWA*'), refer to 'family responsibilities'. Others use 'caring responsibilities': *Equal Opportunity Act 1984* (SA) s 85T(6) ('*EOASA*') or refer to the person's status as a 'parent' or 'carer': *Discrimination Act 1991* (ACT) s 7(1)(e) ('*DAACT*').

30 *EOASA* (n 29) s 5(3)(b).

31 *SDA* (n 27) s 4A.

32 They refer to 'unfavourable' rather than 'less favourable' treatment which, arguably, does not require a comparator to be established: *EOAV* (n 8) s 8; *DAACT* (n 29) s 8(2).

33 *Racial Discrimination Act 1975* (Cth) s 9(1) ('*RDA*'). Cf *SDA* (n 27) s 5(1).

34 See, eg: *ADANSW* (n 14) s 7(1)(c); *EOASA* (n 29) s 29(2)(b); *EOAWA* (n 29) s 8(2).

35 *ADAQ* (n 28) s 11(1)(b).

36 *Australian Iron & Steel v Banovic* (1989) 168 CLR 165.

37 *EOAV* (n 8) s 9(2); *DAACT* (n 29) s 8(2); *ADAQ* (n 28) s 205; *SDA* (n 27) ss 7B, 7C; *Disability Discrimination Act 1992* (Cth) ss 6(3), (4) ('*DDA*'); *Age Discrimination Act 2004* (Cth) s 15(2) ('*ADA*').

38 For a useful overview of the coverage in each jurisdiction of the protected attributes and areas, definitions of direct and indirect discrimination and the exceptions, see Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 295–322 (Tables 1–4).

of the federal system and of legislatures enacting laws at different points in time, which has, of course, occurred throughout our history in most areas of law. But they make compliance difficult and add to the 'red tape' imposed on business, particularly for those operating across state/territory borders.

D *Complexity Embedded in the* Fair Work Act

The *FWA* is quite different conceptually from traditional anti-discrimination laws. Initially, it was thought that this would make the *FWA* a more attractive jurisdiction for employees,[39] but the legislature's failure to define some concepts and its eagerness to embark on a different course from traditional anti-discrimination laws has added unnecessary complexity.[40]

Section 351 of the *FWA* prohibits adverse action because of an employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, or social origin. Unlike most anti-discrimination laws, none of the attributes are defined. Thus, in the absence of judicial interpretation, not only could the meaning of an attribute be unclear,[41] it may also be difficult to predict whether an attribute has the same meaning as it has under anti-discrimination law. The federal courts have said consistently that s 351 is not to be interpreted in reference to anti-discrimination laws[42] and that makes the task of predicting the meaning of an attribute even more difficult.

The *FWA* does not define discrimination in the same way as anti-discrimination law. It prohibits adverse action on the basis of an attribute. 'Adverse action' is defined as dismissal, injuring an employee in their employment or altering an employee's position to their detriment, or discriminating against an employee.[43] 'Discrimination' is not defined. The federal courts have held that it means anything from its ordinary dictionary meaning, to different treatment, to less favourable treatment.[44] It is unclear whether it includes indirect discrimination and, given that uncertainty, an employee with an indirect discrimination claim may be well advised to pursue their claim under an anti-discrimination law.

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39 Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23(3) *Australian Journal of Labour Law* 199, 210.

40 Dominique Allen, 'Adverse Effects: Can the *Fair Work Act* Address Workplace Discrimination for Employees with a Disability?' (2018) 41(3) *University of New South Wales Law Journal* 846 ('Adverse Effects').

41 This has been a problem for 'physical or mental disability'. See also Allen, 'Adverse Effects' (n 40).

42 *Hodkinson v Commonwealth* (2011) 248 FLR 409, 442–3; *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056, [49].

43 *FWA* (n 1) s 342.

44 Allen (n 40).

There is a great deal of overlap with the protected attributes in s 351 of the *FWA* and anti-discrimination laws but the *FWA* does not use the same terminology as anti-discrimination laws.[45] For example, the *FWA* uses 'family or carer's responsibilities' which may well be different from 'family or carer's status' which is the term in some anti-discrimination laws.[46]

Another example is political opinion. The states and territories that protect this attribute use political 'conviction',[47] 'belief',[48] and 'opinion'.[49] Neil Rees, Simon Rice and Dominique Allen write that no jurisdiction defines these terms with precision and there are differences in their coverage.[50]

While there is some overlap in the protected attributes between the *FWA* and anti-discrimination laws, there are also gaps. One is religion, as the discussion of the Folau matter showed.[51] Another example is political opinion, which is not listed as a protected attribute in NSW or South Australia, and 'national extraction'. The *RDA* prohibits discrimination on the basis of an employee's 'national origin'[52] but is that the same?

Differences in terminology would not ordinarily contribute to the law's complexity, but for the exception to s 351 in sub-s (2)(a). The exception states that s 351 does not apply if the adverse action was not unlawful under an anti-discrimination law where the adverse action occurred. This encompasses the four federal anti-discrimination laws, and applicable state and territory laws.[53] The exception means that, if the conduct is lawful because it is permitted by an exception contained in an anti-discrimination law or because the attribute is not a protected attribute in that state

45 As discussed above, anti-discrimination laws are not consistent in what relationships this attribute covers either. Simon Rice and Cameron Roles, '"It's a Discrimination Law Julia, But Not as We Know It": Part 3–1 of the *Fair Work Act*' (2010) 21(1) *Economic and Labour Relations Review* 13, 13–14.

46 See above n 29.

47 *DAACT* (n 29) s 7(o); *EOAWA* (n 29) pt IV.

48 *ADAQ* (n 28) s 7(j); *Anti-Discrimination Act 1998* (Tas) s 16(m); *EOAV* (n 8) s 6(k).

49 *Anti-Discrimination Act 1992* (NT) s 19(1)(n) ('*ADANT*').

50 Rees, Rice and Allen (n 22), 539–40.

51 The South Australian legislation only protects 'religious appearance or dress': *EOASA* (n 29) s 85T(5).

52 State and territory anti-discrimination laws include 'national origin' in their definition of race. See, eg: *EOAV* (n 8) s 4; *ADAQ* (n 28) sch 1; *EOAWA* (n 29) s 4.

53 *FWA* (n 1) s 351(3).

or territory, it will not be unlawful under the *FWA*.[54] This was the reason Folau could not use s 351.[55]

In such circumstances, the employee must show that they are unable to make a claim under s 351 before they can use s 772.[56] They are likely to need legal advice to identify that they cannot make a s 351 claim,[57] ideally from a lawyer who is familiar with their local anti-discrimination law.[58] This will further add to the employee's cost and may cause delay. Moreover, s 772 will not be useful in every situation because it only applies to unlawful termination, thus if the employee was demoted or denied a benefit, they will not have a claim.

Anti-discrimination laws are not consistent across the country, as outlined above, so it is not unusual for there to be variations in laws that deal with the same subject matter. What is unusual is to have a national statute that contains a provision guaranteeing rights that vary depending upon the location of the breach. As this discussion shows, the *FWA* has added another layer of complexity to what was already a difficult field.

54 *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460, 492 [161]. Since no jurisdiction prohibits social origin discrimination, no employee can lodge a claim under the *RDA* (n 33) s 351.

55 An academic at the University of Sydney had to rely on the *RDA* (n 33) s 772 when he pursued a claim for discrimination on the basis of political opinion: Workplace Express, 'Swastika Use Protected Political Opinion, Argues Sacked Academic' (online, 16 May 2019) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=57821>. Ultimately, he did not pursue the s 772 claim: *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 272. In 2015, SBS sports reporter Scott McIntyre also found himself in the same position when he claimed he was terminated for posting politically inappropriate tweets about ANZAC Day, however he mistakenly lodged his claim under the *RDA* (n 33) s 351. When it failed to settle and the error was identified, he lodged a claim under s 772: *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768 ('*McIntyre*'). The claim was ultimately settled: Workplace Express, 'SBS and Tweeting Journalist Resolve Unlawful Dismissal Case' (online, 11 April 2016) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=54400>. More recently, a casual journalist was relying on s 772 in her claim that the ABC discriminated against her on the basis of her political opinion, race and national extraction or social origin: Workplace Express, 'Lattouf Opens Up Second Front in ABC Stoush' (online, 28 February 2024) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=63144>.

56 *FWA* (n 1) s 723.

57 See Rice and Roles (n 45) on the challenges in doing this: at 29.

58 In *McIntyre* (n 55), Commissioner Cambridge said that it was unfortunate but not unsurprising that whoever advised the employee was not aware that political opinion discrimination was not unlawful in NSW because it meant that he had erroneously pursued a claim under s 351 initially: at [29].

E *Legal Advice is Necessary*

For most, workplace discrimination laws are a difficult terrain to navigate without a guide, which suggests that it is important to obtain legal advice in order to determine the best way to proceed. Without advice, an employee will potentially file their claim in the wrong jurisdiction or in one that is not ideal for their claim. Having filed the claim in one forum, they may be prevented from subsequently filing a claim in another.[59] An employee who does not obtain timely legal advice could miss the opportunity to file at all. This is particularly important for *FWA* claims involving a dismissal because they must be lodged within 21 days of the dismissal.[60]

III Navigating a Complex Terrain

The picture that emerges in Part II is one of a complex system which requires legal advice to navigate. There is uncertainty about the law's application — both for employees and employers — and the law's development is stymied because most claims do not reach a hearing. Since the laws are complex, and it is costly to obtain legal advice and to litigate a discrimination claim, settling is understandable and often the most prudent decision to make

Part III considers the impact these factors are having on the decisions lawyers make regarding how to pursue a claim, based on interviews conducted with lawyers in Victoria, Queensland, and NSW, all of whom had experience in advising on matters and running cases in both the state and federal jurisdictions.

A *Research Method*

There is a growing body of empirical scholarship about discrimination law. Examples of earlier empirical research include studies which examined the impact of significant changes to the law and the effectiveness of legislation,[61] and those

59 *FWA* (n 1) s 725. See, eg, the discussion of the jurisdictional issues Scott McIntyre faced after lodging his claim incorrectly under s 351 of the *FWA*: *McIntyre* (n 55).

60 *FWA* (n 1) s 366.

61 See, eg: Sara Charlesworth and Fiona MacDonald, *Hard Labour? Pregnancy, Discrimination and Workplace Rights: A Report to the Office of the Workplace Rights Advocate* (Report, October 2007); Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *University of New South Wales Law Journal* 699 ('Access to Justice for Discrimination Complaints'); Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459 ('An Evaluation of the Mechanisms').

focused on particular types of discrimination such as age,[62] pregnancy,[63] sex[64] and sexuality.[65] Empirical data is commonly collected by examining complaint files and data collected by the statutory equality agencies, and by interviewing staff at the agencies and/or lawyers practicing in the area.[66] Previous studies have not considered the impact that the complexity of the system (particularly since the introduction of the *FWA*) is having on the choices lawyers make about pursuing a claim and whether this varies depending upon the employee's location.

Part III attempts to identify the factors lawyers take into account when they are determining the most appropriate way to pursue a discrimination claim and to determine what aspects of this increasingly complex area of law are influencing their decisions. To examine this, semi-structured interviews were conducted with a small group of solicitors and barristers who practice in Victoria, Queensland, and NSW.[67] These jurisdictions were chosen because they are the largest and have the highest number of claims, and because they vary in terms of how claims are enforced[68] and the remedies available. Victoria has the newest legislation,[69] whereas the NSW legislation has not been substantially modified since it was enacted. Other notable variations are that the state tribunal systems are generally cost free, as is the FWC, whereas an unsuccessful complainant in a federal discrimination claim may be ordered to pay costs.[70] A time limit of 21 days applies to *FWA* claims involving

62 Blackham (n 20).

63 Charlesworth and McDonald (n 61); Adriana Orifici and Dominique Allen, 'Expecting More: Rethinking the Rights and Protections Available to Pregnant Workers under the *Fair Work Act 2009* (Cth)' (2022) 50(4) *Federal Law Review* 504.

64 Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No 8, Centre for Employment and Labour Relations Law, University of Melbourne, 1995) 13–14.

65 Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21(4) *Sydney Law Review* 525.

66 See, eg: Gaze and Hunter, 'Access to Justice for Discrimination Complaints' (n 61); Allen, 'An Evaluation of the Mechanisms' (n 61); Blackham (n 20). Due to the confidentiality agreements the parties sign if they settle and agency's own privacy restrictions, researchers have found it difficult to interview complainants and respondents.

67 The project received ethical clearance from the Monash University Human Research Ethics Committee (Project ID: 17309). Interviews were conducted in 2019, prior to the release of the AHRC's *Respect@Work* report and subsequent legislative reforms, the inquiry into the *ADAQ* and the announcement of an inquiry into the *ADANSW*.

68 Victoria is the only jurisdiction to permit direct access to the tribunal: *EOAV* (n 8) s 122.

69 At the time of writing, a Bill was before the Queensland Parliament to modernise the state's anti-discrimination law but this was not contemplated at the time the interviews were conducted.

70 See above nn 18–19 and accompanying text.

a termination[71] and, at the time the interviews were conducted, a time limit of six months applied to federal discrimination claims.[72]

The interviews were conducted by the author in person during 2019. They were audio-recorded and transcribed and the transcripts were coded using NVivo software. Codes were derived from predefined areas of study from that research project and inductively identified from the transcripts. The interviews were conducted as part of a broader study about the dispute resolution processes used to resolve discrimination complaints in each jurisdiction and so the interview questions covered more issues than what is reported on herein. As this article is concerned with identifying the factors lawyers consider when making decisions about how to pursue a discrimination claim, it only reports on responses to questions about which of the three schemes the lawyers prefer to use and why, any that they avoid and why, and in what way court decisions (or lack thereof) influence their advice.

Discrimination matters often comprise only part of a lawyer's overall practice, which may be focused on employment law more broadly or human rights and public law.[73] Since most discrimination claims settle,[74] many solicitors may not have much litigation experience. For this reason, purposive sampling was used. Potential interview participants were approached because they had experience in running claims in the federal courts and/or their local civil tribunal (in both employment and non-employment), including the FWC. The AHRC's office is located in the Sydney CBD. Whether the AHRC's location is a factor in deciding to use the federal system and whether this varies depending on the lawyer's location was of interest, making it important to interview lawyers located in Sydney.

The solicitors worked at a mix of mid-tier law firms and community legal centres and all represented complainants. The barristers represented both parties. The participants are referred to by their role. Their jurisdiction is only noted if it is relevant to understanding the context of their comment.

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71 *FWA* (n 1) s 366.

72 *AHRC Act* (n 8) s 46PH(1)(b) but note that it was extended to 24 months in 2021 in relation to *SDA* claims by sch 1 of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) and to *RDA*, *DDA* and *ADA* claims by sch 8 of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth). In the states and the Northern Territory the time limit is 12 months (see eg *EOAV* (n 8) s 116(a), whereas in the Australian Capital Territory it is two years: *Human Rights Commissions Act 2005* (ACT) s 78(1)(a).

73 Blackham has also raised this point in her study of age discrimination claims in Australia and the United Kingdom and noted that the lack of specialists leads to less claims being run which in turns means there are too few cases for lawyers to build their expertise: (n 20), 159–60.

74 Allen (n 20); Blackham (n 20) 210–1; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253.

Table 1: Interview Participants

Location	Solicitor	Barrister	Total
Melbourne	2	3	5
Brisbane	3	0	3
Sydney	2	4	6
Total	7	7	14

B *Interview Study Findings*

Participants identified several factors which impact upon how they choose to pursue a claim but this is, of course, dependent upon their advice being sought before the complainant lodges their claim. It became clear from the initial questions the lawyers were asked that, for the most part, which jurisdiction to use is not a decision they are involved in. Typically, their advice is sought once the claim is in progress. This aspect is discussed first and then the factors the lawyers consider when they are called upon to advise on a matter are presented.

1 *Typically Lawyers are not Involved in Choosing a Jurisdiction*

Lawyers were asked about the point at which they become involved in the claim and provide legal advice. Community legal centres are regularly involved in providing information about workplace discrimination and giving general advice through their helplines and drop-in services. One of those lawyers said that they advise clients at all stages of the process and that their local equality commission refers people to their community legal centre when they lodge a complaint and are without representation. Another lawyer said they provide advice to clients before they lodge the claim about the various avenues available and 'nine times out of ten',[75] the client uses this information and proceeds with the claim themselves, rather than engaging a lawyer to complete the application. However, they noted that many of their clients are union members and the union will assist them to prepare the claim.

Overall, the lawyers said that by the time most clients seek advice, they have already made a choice about which jurisdiction to use. One barrister said that not obtaining legal advice can have significant consequences: 'the mistakes are terminal … if you make the wrong choice, you can't change it'. They offered an example: 'if you lodge a complaint and you're a state public servant at the [AHRC], they'll boot you out which is a real problem'.[76]

Very few barristers are briefed for conciliation. One said, 'they don't need me for a conciliation … There's no point in paying me for going through that'.[77] Barristers

75 Interview with Q1 (Dominique Allen, 2019).

76 Interview with N1 (Dominique Allen, 2019).

77 Interview with N2 (Dominique Allen, 2019).

become involved once a court application has been filed and this is more common in the federal courts than in the state system. The barrister will prepare the pleadings and represent the complainant at the next stage, which is mediation.

Lawyers said that clients seek their advice because they have received a settlement offer at a conciliation conference or they have commenced litigation. There is, then, no ability for the lawyer to advise on jurisdiction; rather their role is about procuring the best outcome for their client in whichever system they have entered.

2 *Time Limits can Exclude a Jurisdiction*

As noted above, each Act contains a time limit for lodging a claim. Time limits in the state anti-discrimination systems are longer than in the federal system.[78] Lawyers said that the time limit often removes the federal system as an option. The same applies to the Fair Work system. Some of the lawyers said that they prefer to use the *FWA* but sometimes they cannot, because claims involving a dismissal must be lodged within 21 days of the dismissal.[79] They said that often clients do not seek legal advice within this timeframe because they are not in a position to do so because they are dealing with the immediate impact of losing their job.

3 *Lawyers Consider the Practicalities of Running the Claim*

In an instance where a lawyer does have the opportunity to advise on which jurisdiction to use, the practicalities of running the claim are at the forefront. A community centre lawyer described the AHRC's processes as 'not as friendly to complainants' compared to their local system, especially to those 'who are not sophisticated and often unrepresented'.[80] The lawyer said they have to tell their clients that they might not be able to represent them if their claim proceeds and so in providing advice, they have to take into account which system the client would be better off using if they are self-represented.

Another community centre lawyer said that they would not choose to use the AHRC because they had found that its processes were 'ripe for exploitation by employers seeking to delay the process'.[81] A Victorian lawyer said that the Victorian Equal Opportunity and Human Rights Commission's ('VEOHRC') processes are easier to navigate than the federal system, including if the claim proceeds to the Victorian tribunal, and this is particularly so for complainants who proceed without a lawyer.

The lawyers said that the time they will have to wait to participate in conciliation is a very important factor. A lawyer said that 'nine times out of ten, complainants

78 See above n 72. When the interviews were conducted, the *AHRC Act* required claims to be lodged within six months of the contravention.

79 *FWA* (n 1) s 366.

80 Interview with Q2 (Dominique Allen, 2019).

81 Q1 (n 75).

in discrimination … want [the] quickest, cheapest way to get to early resolution'.[82] A lawyer in NSW reported that, even in Sydney, where both they and the AHRC are located, it can take 'months and months and months' to get a conciliation organised because the AHRC requires both parties to consent to the conciliation.[83] The lawyer said that the state process was quicker than the federal one and that they will use the state system if their client wants a 'speedy resolution'.[84] They said the downside of using the local system in NSW was that damages are lower and it is a no-cost jurisdiction.

A Victorian lawyer said the timeframes at both the AHRC and the VEOHRC are 'ridiculously' long and had found that a conciliation at the AHRC could take a couple of months.[85] Another lawyer said that if there were delays in the federal system, they would tell the AHRC that they do not think conciliation will be useful and ask it to issue a certificate so that they could commence proceedings in the federal courts.

However, another lawyer had experienced delays in each jurisdiction in terms of how long it takes to obtain a conciliation but, in their opinion, the likelihood of delay was 'not a proper basis on which to advise a client'.[86] They said that they do not wait until a conciliation to talk to the other side and will start the conversation prior to the complaint being filed.

Not all of the lawyers had used the Fair Work system but those who had reported that the FWC is much quicker than the equality commissions in scheduling a conciliation. One lawyer said conciliation was generally scheduled within six weeks of lodging the application, and that is one 'huge benefit' of the Fair Work system.[87] The downside, though, is what one lawyer described as the FWC having a 'get them in, get them out' approach in that it deals with matters very quickly.[88] But the lawyer acknowledged that it has to work this way due to the quantity of matters the Commission processes.

4 *The Cost and Costs Orders are Significant Factors*

One of the factors considered in the context of the practicalities of pursing a claim is what follows if the claim does not settle. Ultimately, that is litigation and all the formalities and evidentiary requirements that it entails. There is a cost to litigating

82 Interview with N3 (Dominique Allen, 2019).

83 N1 (n 76).

84 Ibid.

85 Interview with V2 (Dominique Allen, 2019).

86 Interview with N4 (Dominque Allen, 2019).

87 V2 (n 85).

88 Q1 (n 75).

and the cost is significant. As one participant said, the cost means any settlement offers are considered 'very seriously'.[89]

There are two aspects to the cost. The first is litigation expenses. A barrister said it was not always clear how well the other side's solicitors had prepared their client for the costs that will be involved in running litigation. The barrister said it 'sometimes helps to hear that in a mediation, that this is really going to be a very expensive process for you if you choose to go ahead'.[90]

The expenses can include obtaining medical reports, such as from a psychiatrist or psychologist, to substantiate a claim for psychological damage. One lawyer said:

> [The client will] say I've read *Richardson v Oracle*. I can get $100,000 in my general damages. Because community standards say that that's what happens when you're sexually harassed. But they haven't read *Richardson v Oracle*. They haven't looked at the evidence that was required to be mounted in order to substantiate a claim like that.[91]

Lawyers also take these costs into account if they are considering representing a client on a conditional basis because they will have to cover the costs of expert reports and travel upfront.

The second aspect is the risk that the employee may have to pay the other side's costs if they lose. As discussed above, state and territory claims are heard in civil tribunals, which are generally cost free, while federal discrimination claims are heard in the federal courts and may be subject to an adverse costs order.[92]

Most of the lawyers said that they advise clients not to use the federal system because of the risk of an adverse costs order. As many pointed out, it will still cost clients to run their claim in the tribunal (particularly if they need to brief a barrister) but there is not the risk of an adverse costs order. One lawyer said that 'all things being equal… in terms of the context of the law', they would prefer to use the state system because if the claim does not settle, there is not a cost risk for the employee.[93] Another lawyer said that they will only use the federal system if it was a case that had 'good prospects' because they could recover their costs.[94] By contrast, a lawyer said that if the claim had 'a bit of clout', it can be advantageous to lodge it in the Federal Court because of the respondent's fear that the claim could end up in court and/or in the media. They said that this provides 'more leverage for it to resolve'.[95]

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89 V2 (n 85).

90 Interview with V3 (Dominique Allen, 2019).

91 Interview with V1 (Dominique Allen, 2019).

92 See above nn 18–19 and accompanying text.

93 N4 (n 86).

94 N1 (n 76).

95 Interview with N5 (Dominique Allen, 2019).

The final aspect to the issue of the cost of litigation is the likely compensation award. Lawyers weigh the cost of litigating against what the employee is likely to recover if their claim is successful. One barrister said that the award the complainant will get is 'disproportionate to the cost that [they will] incur in the litigation'.[96]

One of the lawyers in NSW preferred using the federal system because they said 'the money is not as big' in the state system.[97] Another NSW lawyer said that they avoid the state system because of the cap on damages awards which means that it is not possible to have a proper assessment of what the damages should be. Until the cap on damages is removed, they said 'I won't be going there [to Anti-Discrimination NSW]'.[98]

5 *The Law's Role is Limited*

The interpretation of the law appears to play a limited role in determining how to pursue a claim. A lawyer said that in the instances where there are differences in the definitions of what constitutes discrimination, if one is more favourable for the employee, they will use that system. Similarly, another lawyer said they take the law into account for each client but what deters them from the federal system, even when the law is better for their client, is the cost and they have to explain that risk to the client. Another lawyer said that they 'tend to steer people away from the Commonwealth and towards the *Fair Work Act* or the state'. They acknowledged that the federal legislation was 'more cutting edge' in some areas than their own state's (citing the *DDA*'s reasonable accommodation provision as one example) and said that 'all things being equal I would send every disability discrimination client that way [but] I don't because of costs'.[99]

Two other NSW lawyers noted the significance of the provision in the *DDA* that the failure to make reasonable adjustments may amount to discrimination.[100] One of them said it was a 'powerful part' of the *DDA* and a reason to use it as opposed to the state Act which does not contain an equivalent provision.[101] The other said, 'you would be nuts to go state because you don't have the RA [reasonable adjustments] advantage'.[102]

There are instances in which the law will not bear much weight because one system might not apply to the employee or to the form of the discrimination. A lawyer from NSW said that is the only time they use the state system — if the protected attribute is only covered by the state legislation or if they are representing a public servant

96 V1 (n 91).

97 N2 (n 77).

98 Interview with N6 (Dominique Allen, 2019).

99 Q2 (n 80).

100 *DDA* (n 37) ss 5(2), 6(2).

101 N5 (n 95).

102 N2 (n 77).

who cannot access the federal jurisdiction. Two other NSW lawyers noted that state government employees have to use the local Act. One said that, in the past, the state government did not take issue if the public servant used a federal Act but now the state government does take issue.

Generally, the law itself does not play a great role until the claim reaches litigation. One of the lawyers said that they will refer to a case in conciliation if it will strengthen their claim. They said, 'if there's a lawyer there who I know knows the law, and I also think it's worth their client hearing it, in case their client thinks, we're sitting pretty here, I'll put that out there as a way to say, well, no'.[103] However, another lawyer said it was very difficult to convince the other side of their own legal position in a conciliation because they can simply disagree with their interpretation of the law and there is no opportunity to test their positions. A barrister said that when they are acting for the respondent, the law plays more of a role and it is debated during a conciliation. They said that then the law becomes more important than the facts and they will raise jurisdictional issues and defences in that situation. However, another barrister said they found it difficult to refer to cases in conciliation because they turn on their own facts.

IV Cost and Complexity

Given the academic critique that anti-discrimination law has become overly complex, this interview study attempted to shed light on what aspects of those laws are influencing how lawyers run discrimination claims and the choices they make in pursuing matters.

It is pleasing to note that, since the interviews were conducted, the federal government has addressed one of the problems participants identified with the federal system, namely the time limit for lodging a claim. Now, complaints can be lodged up to 24 months after the alleged discrimination occurred.[104]

Perhaps the most significant insight one can draw from the interviews is that, in many instances, the decision about which jurisdiction to use is not made by lawyers. Typically, employees are unrepresented at the early stages.[105] They do not seek

103 N5 (n 95).

104 *AHRC Act* (n 8) s 46PH(1)(b).

105 Although the equality agencies publish information about the attributes and areas upon which they receive inquiries and complaints in their annual reports, they do not include data about whether or not the parties have representation. Empirical research in the field has, however, considered legal representation. For example, in their study of federal discrimination claims, Gaze and Hunter found that over 55% of complainants had representation at some stage, but for most this was once conciliation had failed and they were nearing litigation: Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010) 297 [Table 4.17].

legal advice until they have received a settlement offer, or the claim has failed to settle and they are contemplating litigation by which time they have already selected a jurisdiction. This suggests that the advantages and disadvantages of the three systems of law and the interplay between them is academic at best; it does not appear to be factored into the decision-making process of employees.

In saying that, multiple systems are attractive because they allow different jurisdictions to experiment and learn from one another. For example, a positive duty to promote equality was first introduced in Victoria in 2010.[106] Having watched Victoria and learned from its experience, three jurisdictions introduced their own individually crafted positive duty.[107] The drawback of multiple systems, as has been highlighted, is the complexity arising from overlap and variation, which is a problem for both employees and employers. One might then be tempted to recommend introducing a national system, as occurred with federal industrial relations law, as a way of streamlining and simplifying the jurisdiction. It is beyond the scope of this article to outline the benefits and risks of doing so, but it is worth reiterating one of the reoccurring themes from the interview data — there is value in having an alternative system if one is deficient. For example, if one system does not cover the employee or the unlawful conduct, if the definitions of discrimination are clearer in one compared to the other, or if one system is more accessible. This benefit would be lost if a national system was introduced.

The findings also highlight that further research is needed to explore the degree of awareness potential complainants have of the law and their rights and what factors they consider when deciding where to lodge a discrimination claim. Empirical studies of this type have proven to be difficult to conduct because most claims settle confidentially and include terms restricting the complainant's ability to discuss the circumstances of the claim, which means it is difficult to identify research participants.[108]

When lawyers do have the opportunity to advise, the factors they take into account are not surprising. The time lapse between lodging the claim and participating in a conciliation conference and the cost of litigation are the most important considerations. This study shows that the possibility of having to pay the other side's costs is the factor that carries the most weight in deciding which jurisdiction to use. In fact, the likelihood of paying costs is high in the federal system. Recently, Margaret Thornton, Kieran Pender and Madeleine Castles found that unsuccessful

106 *EOAV* (n 8) s 15.

107 *SDA* (n 27) s 47C; *ADANT* (n 49) s 18B; *DAACT* (n 29) s 75.

108 In one of the earliest empirical studies, confidentiality clauses prevented Margaret Thornton from undertaking a full-scale study of conciliation processes in three jurisdictions: 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Modern Law Review* 733, 733; see also above n 32. Parties who have been interviewed for research either did not settle or litigated and are not bound by confidentiality. See, eg: Gaze and Hunter (n 105); Orifici and Allen (n 63).

complainants in federal sex discrimination and sexual harassment claims have been ordered to pay costs 34% of the time.[109]

The risk of having to pay a costs order is no doubt a factor in deciding how to pursue many other of types of civil litigation, not just a workplace discrimination claim, but because the amount of compensation sought in a discrimination claim is usually small and claims are pursued by individuals, the risk of paying costs is significant.[110] Indeed, when they asked lawyers what they expected the effect of what was then a new costs provision in the federal system to be, Beth Gaze and Rosemary Hunter reported that their interview participants thought it would encourage settlement.[111]

Since the interviews were conducted, the detrimental impact that the risk of an adverse costs order is having in pursuing sex discrimination and sexual harassment claims has been highlighted in the AHRC's landmark *Respect@Work* report.[112] The report recommended consistency between the *SDA* and the *FWA*.[113] In late 2024, Parliament changed the costs provision in federal discrimination claims and introduced an 'equal access' cost protection provision.[114] Now, the complainant cannot be ordered to pay the respondent's costs. However, an exception applies if (a) the court is satisfied that the complainant instituted the proceedings vexatiously or without reasonable cause; or (b) the court is satisfied that the complainant's unreasonable act or omission caused the respondent to incur costs, or (c) if all of the following apply: (1) the respondent was successful in the claim; (2) they do not have a significant power advantage over the complainant; and (3) they do not have significant financial or other resources relative to the complainant.[115]

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109 Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study' (Paper, Australian National University, 2022) 37.

110 Despite having the backing of the Public Interest Advocacy Centre when he pursued a claim for disability discrimination against RailCorp NSW, Graham Innes was at risk of losing his home if he lost. It was later revealed that RailCorp NSW, a statutory authority, spent $420,000 defending the claim: Jacob Saulwick, 'Disability Case Costs RailCorp $420,000', *Sydney Morning Herald* (online, 29 March 2013) <https://www.smh.com.au/national/nsw/disability-case-costs-railcorp-420-000-20130328-2gxn5.html>.

111 Gaze and Hunter, 'Access to Justice for Discrimination Complaints' (n 61) 710.

112 Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>. The AHRC received submissions which claimed that the existing costs provision was a disincentive to pursuing a federal discrimination claim: at 507.

113 Ibid 45 [Recommendation 25].

114 *AHRC Act* (n 8) s 46PSA.

115 Ibid s 46PSA(6). Initially the government responded with a proposal for a costs neutrality provision for all federal discrimination claims. Under that proposal the default position would be that each party bear its own costs: item 3 in sch 5 of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 as introduced into the House of Representatives, 27 September 2022. However,

The final reflection that can be drawn from the interviews is that the substantive law itself seems to be having less of an impact than what would be expected in those instances where lawyers are involved — the practicalities of running the case are more important factors. The exception is NSW, where lawyers reported that they avoid using the state legislation unless they have no option, such as if they are representing a state government employee. The NSW Law Reform Commission is currently reviewing the state Act.[116] That inquiry may well result in the streamlining of protections between the NSW and federal systems. It is hoped that at the very least, the antiquated cap on damages in the Act is removed.

V Conclusion

The story of Israel Folau's termination illustrates how the layers of anti-discrimination law intersect. It also reveals that this is an area of law that is unnecessarily complex and which can be confusing in terms of both procedure and substance. Navigating anti-discrimination laws requires specific legal knowledge but even with that expertise, the law can be unclear due to the lack of jurisprudence. Lawyers do not typically act as a guide across this complex terrain; employees are navigating it on their own and seeking advice once they have already embarked on their journey.

Consequently, the law's complexity does not appear to weigh heavily on the decisions employees make about how to pursue a claim. Practicalities are far more important. Employees are seeking quick, inexpensive resolutions to their claims and this is facilitated by the statutory equality commissions which provide conciliation. This study highlights the importance of the commissions' role in providing education and training about the law. Armed with information about their rights, employees will be better equipped to make a decision about their claim. This is even more so when novel and new concepts are introduced into the terrain, such as positive duties to promote equality, which need to be accompanied by information and guidance materials.[117]

the proposal did not receive support and the Attorney-General's Department was tasked with consulting further on the issue in 2023. Subsequently, the 'equal access' model was proposed and ultimately passed by the Parliament.

116 See also 'Anti-Discrimination Act Review', *NSW Law Reform Commission* (Web Page) <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review.html>.

117 See, eg, the extensive guidance materials the AHRC produced when the positive duty in pt IIA of the *SDA* was introduced: 'The Positive Duty in the Sex Discrimination Act', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/sex-discrimination/projects/positive-duty-under-sex-discrimination-act>.

Mirko Bagaric,* *John Anderson*** *and Brendon Murphy****

A PRINCIPLED APPROACH TO DEAD TIME IN THE SENTENCING CALCULUS

Abstract

Prison is the harshest sanction in our system of law. People sometimes serve prison terms for alleged offences of which they are ultimately acquitted, or their conviction is quashed on appeal. This has been described as 'dead time'. In some Australian jurisdictions, a quantified credit for the period served as dead time is applied if that person is subsequently imprisoned for another offence. This approach is, however, nationally inconsistent as offenders in some jurisdictions receive no such credit although discretion may be exercised to treat this 'dead time' as a subjective mitigatory consideration. In particular, there is a divergence between how sentencing courts treat dead time in Australia's largest jurisdictions — New South Wales and Victoria. It is untenable that the common law should remain unclear when dealing with issues that affect the liberty of citizens. We argue that sentencing courts should adopt the principle of always granting specified credit for dead time, in the absence of exceptional circumstances.

I Introduction

The western legal tradition places a strong emphasis on respecting the right to individual liberty.[1] This is reflected, in part, by the heavy burden of proof (beyond reasonable doubt) that must be satisfied before people can be found guilty of a crime and hence be subjected to the harshest sanction in our system of

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1 Perhaps the strongest expression of the importance of this principle is by John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism* (Fontana Press, 1985) 126. See also John Locke, *Two Treatises of Government*, ed Peter Laslett (Cambridge University Press, rev ed, 1988); Sir John Fortescue, *On the Laws and Governance of England*, ed Shelley Lockwood (Cambridge University Press, 1997); Charles Montesquieu, *The Spirit of the Laws*, eds Anne Cohler, Basia Miller and Harold Stone (Cambridge University Press, 1989).

law — imprisonment. Criminal justice is an imperfect system, however. Sometimes, people are remanded in prison after having bail refused for crimes for which they are ultimately not convicted. Also, people may be wrongly convicted and are ultimately acquitted through the court appeal processes or following an inquiry. Given backlogs in many courts and the time required to exhaust all avenues of appeal, this may result in a person being imprisoned for years. The time that accused persons spend in prison for offences for which they are ultimately acquitted or have convictions overturned on appeal has been described as 'dead time'.[2] It is difficult to prevent this injustice because of the desirability of imprisoning people accused of very serious crimes at the moment they are charged — to prevent them reoffending, fleeing the jurisdiction, or because there are other unacceptable risks that must be addressed to protect certain people or the community generally.[3] This dynamic raises the crucial problem of what to do when a person has served dead time.

This imperfection in our criminal justice system is arguably exacerbated by the fact that accused persons who have served dead time often receive no quantified credit in recompense, if later they are sentenced to prison for an unrelated offence. Thus, for example, if a person is remanded in prison for two years for aggravated burglary and is ultimately acquitted of that offence, and several years later is sentenced to three years prison for an unrelated subsequent armed robbery offence, the two years dead time which have already been served will not necessarily be deducted from the latter prison term.[4]

This situation is complicated by the fact that dead time is not dealt with uniformly throughout Australia in legislation or at common law. In New South Wales ('NSW'), the courts do not grant quantified credit for dead time. To this end, it has been contended that dead time does not equate to 'credit in the bank' and 'reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters'.[5] Whereas in Victoria, for example, the courts, as a matter of discretion, often grant quantified credit for dead time, recognising the ostensible 'grave injustice' of wrongly imprisoning an accused.[6]

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2 See further the definition of 'dead time' in Part II(B) below.

3 As noted below, serving time on remand is itself a punishment. It has a utilitarian justification but can only form part of a proportionate sanction after a conviction has been secured.

4 See further the definition of 'dead time' in Part II(B) below.

5 *Hampton v The Queen* (2014) 243 A Crim R 193, [26], [30] ('*Hampton*'). See also *R v Niass* (New South Wales Court of Criminal Appeal, Gleeson and Lee CJJ, Allen J, 16 November 1988) ('*Niass*'); *SY v The Queen* [2020] NSWCCA 320 ('*SY*'); *Dib v The King* [2023] NSWCCA 243, [33]–[52] (Simpson AJA, Garling and Ierace JJ agreeing) ('*Dib*').

6 *Karpinski v The Queen* (2011) 32 VR 85 ('*Karpinski*'); *R v Kotzmann* [1999] 2 VR 123 ('*Kotzmann*').

Given the fundamental importance of personal liberty and the imperative for a uniform common law throughout Australia,[7] it is not satisfactory that there are inconsistent approaches to dead time in Australia, and that the issue has not been subjected to detailed jurisprudential consideration.

In this article, we contend that a consistent approach to dead time should be taken throughout Australia. It is acknowledged that sentencing laws differ across the Australian jurisdictions. However, to the extent that differences exist, this is by reason of diverse statutory provisions in each jurisdiction. In circumstances where sentencing law stems from the common law, there is no basis for jurisdictional disparity. The High Court has unequivocally underlined the need for a uniform common law.[8] This is especially so regarding matters which impact on fundamental rights, such as individual liberty. The manner in which dead time is dealt with in each Australian jurisdiction stems from the common law. This provides a compelling basis for making the principle coherent and consistent throughout Australia. If this is not achieved by a decision of the High Court, each Australian legislature should pass uniform legislation on the matter. In terms of the substantive principle which should be adopted, we argue that dead time should always be credited for offenders, unless exceptional circumstances exist. Central to our reasoning is the jurisprudential principle that punishment should only be imposed on wrongdoers, hence not crediting dead time in full is morally equivalent to condoning punishment of the innocent.[9] The availability of credit, we contend, should only be discounted in exceptional circumstances, such as where there is evidence to prove that an offender deliberately committed a subsequent crime intending to use prison credit time as a 'get out of jail free' card.[10]

The focus of this article is to evaluate the current manner in which dead time is treated by the courts, with a view to recommendations for reform. There are obviously other ways in which dead time could be avoided, reduced or remediated. For example, bail laws could be relaxed; courts could be better resourced to reduce the time between arrest and trial; or wrongly convicted people could be financially

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7 The High Court has consistently maintained that the common law must be the same throughout Australia. See eg: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

8 As noted below in Part II(C), this has been expressly underlined by appeal courts regarding the need for uniformity in the approach to dead time.

9 This is discussed further in Part III(C) below.

10 An example of this situation is provided in *Dib* (n 5) where the applicant had served over 3 years 8 months imprisonment for a murder conviction which was quashed on appeal and a verdict of acquittal entered in 2016. The applicant then became involved in a conspiracy to import a commercial quantity of a border-controlled drug (MDMA) in 2017, motivated by his wrongful incarceration for murder and to pay his family back for the financial support amounting 'to a little under $800,000' that they had provided to him in relation to that matter: see at [15]–[18] (Simpson AJA).

compensated for their time in prison.[11] These possible solutions are more ambitious and involve more extensive reform (often requiring considerable additional financial resourcing by governments) in comparison to change through the courts. Moreover, there does not seem to be any momentum towards more extensive solutions. Over the past five years Australian remand numbers have increased considerably,[12] and there has been no attempt to change the discretionary and obscure manner in which ex gratia payments are made to people who have been wrongly imprisoned.[13] In our view, there are sound principled arguments for financially compensating people who have been wrongly imprisoned, but political and economic considerations seem to provide compelling obstacles and largely insurmountable barriers to this approach.[14] Accordingly, this article focuses on remediating dead time served by people who face punishment for a subsequent and unrelated serious offence. This reform is inexpensive, and hence in our view is pragmatically achievable through the weight of a persuasive doctrinal argument.

In the next part of the article, we provide a brief overview of the sentencing system and discuss the manner in which dead time for a subsequent and unrelated conviction is dealt with throughout Australia. This is followed in Part III by an evaluation of the respective and differing approaches to dead time. In Part IV, we set out the principles which should be applied to govern how dead time for a subsequent and unrelated conviction is dealt with in the sentencing calculus. These principles are summarised in the concluding remarks.

II Overview of Australian Sentencing Law and the Approach to Dead Time

A *Overview of Sentencing Law and Decision-Making*

Before turning to how dead time is considered by Australian sentencing courts, we provide a brief overview of the sentencing system and sentencing decision-making methodology to provide a general context.

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11 We thank the anonymous reviewer for this observation.

12 The number of prisoners on remand has increased from 14,635 in June 2019 to 17,625 in June 2024: Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2024* (Catalogue No 4512.0, 19 September 2024).

13 For discussion regarding the obscure and discretionary nature of ex gratia payments for wrongful conviction and imprisonment, see: Adrian Hoel, 'Compensation for Wrongful Conviction' (Paper No 356, Australian Institute of Criminology, May 2008); Rachel Dioso-Villa, 'Without Legal Obligation: Compensating the Wrongfully Convicted in Australia' (2012) 75(3) *Albany Law Review* 1329; Rachel Dioso-Villa, 'Out of Grace: Inequity in Post-Exoneration Remedies for Wrongful Conviction' (2014) 37(1) *UNSW Law Journal* 349.

14 To clarify, there would be no need to credit dead time if compensation was provided to those who were wrongly imprisoned, as the dead time credit approach presupposes a subsequent unrelated conviction and sentence to a term of imprisonment.

Australian sentencing law is a collection of rules and principles derived from legislation and the common law.[15] The various states have their own sentencing legislation dealing with many aspects of sentencing, including the purposes, relevant factors and processes.[16] There are numerous commonalities and, although different penal cultures and approaches to punishment can be identified, all Australian jurisdictions have similar objectives[17] in seeking to achieve proportionality in sentencing as the primary sentencing principle.[18] Typically, the nature and extent of any sentencing option determined to be imposed in a particular case will be arrived at through judicial synthesis of various relevant factors, principles and guideposts.[19] These will include: construction and determination of the objective seriousness of the offence;[20] consideration of applicable mitigating and aggravating factors;[21] application of relevant sentencing purposes, such as protection of the community, deterrence and rehabilitation of the offender,[22] and sentencing principles, notably proportionality, totality for multiple offences, parity for multiple co-offenders and parsimony;[23] and consideration of relevant guideposts, including the maximum penalty and any minimum or standard sentencing requirements.[24]

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15 See, eg: Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010); Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 10th ed, 2022).

16 Mackenzie, Stobbs and O'Leary (n 15) 16–21; Bagaric, Alexander and Edney (n 15) 2–13.

17 *Crimes (Sentencing) Act 2005* (ACT) s 7(1) ('*Sentencing Act* (ACT)'); *Crimes Act 1914* (Cth) ss 16A(1)–(2) ('*Crimes Act* (Cth)'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*Sentencing Procedure Act* (NSW)'); *Sentencing Act* 1995 (NT) s 5(1) ('*Sentencing Act* (NT)'); *Penalties and Sentences Act 1992* (Qld) s 9 ('*Penalties and Sentences Act* (Qld)'); *Sentencing Act 2017* (SA) ss 9–10 ('*Sentencing Act* (SA)'); *Sentencing Act 1997* (Tas) s 3 ('*Sentencing Act* (Tas)'); *Sentencing Act 1991* (Vic) s 5(1) ('*Sentencing Act* (Vic)'); *Sentencing Act 1995* (WA) s 6 ('*Sentencing Act* (WA)').

18 *Veen v The Queen* (1979) 143 CLR 458 ('*Veen*'); *Veen v The Queen [No 2]* (1988) 164 CLR 465 ('*Veen [No 2]*'); *Hoare v The Queen* (1989) 167 CLR 348, 354 ('*Hoare*'); *R v Scott* [2005] NSWCCA 152, [15]; *Boulton v The Queen* (2014) 46 VR 308, [64]–[72]. Cf *Sentencing Act* (SA) (n 17) s 3, where the primary sentencing purpose is stated as being 'to protect the safety of the community' and 'proportionality' is stated as a general principle of sentencing among others that must be applied in determining a sentence for an offence: at s 10.

19 Bagaric, Alexander and Edney (n 15) 5–11.

20 Ibid 102–9, 203–5.

21 Ibid ch 9.

22 Ibid ch 7.

23 Ibid ch 6, 540–8, 664–8, 710–35.

24 Mackenzie, Stobbs and O'Leary (n 15) 26–66; Bagaric, Alexander and Edney (n 15) chs 4, 7. In relation to legislative guideposts, see: *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*'); *Muldrock v The Queen* (2011) 244 CLR 120; standard non-parole periods in *Sentencing Procedure Act* (NSW) (n 17) ss 54A–54D (Table); and the standard sentencing scheme in *Sentencing Act* (Vic) (n 17) ss 5A–5B.

Hundreds of mitigating and aggravating circumstances can be found in national jurisprudence, and the judicial task is to sift through and identify all those relevant to a particular case and attribute weight to them in reaching a final sentencing outcome.[25] In undertaking this complex and important task, judicial officers use an approach known as 'instinctive synthesis', which originated from the decision of the Full Court of the Supreme Court of Victoria in *R v Williscroft*, where the majority stated:

> ultimately, every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.[26]

Fundamentally, this entails sentencing judges identifying and weighing, in a single step, all relevant objective and subjective factors in the case before the court, the relevant purposes and principles of sentencing, applicable legislative guideposts, and any sentencing tariffs or ranges established in previous cases for the offence(s) under consideration before reaching a determination as to the nature and duration of punishment to be imposed. This intuitive process will usually be undertaken without judicial officers expressly stating the definitive weight they assign to any relevant factor or consideration in the particular case.[27]

The High Court has emphasised that there is no objectively correct sentence in this process.[28] The 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.[29] The result of implementing such a methodology is that the sentencing judges will turn their consideration to an 'available range' of sentences relative to a specific offence category committed by a particular offender. In this way, sentencing courts are seeking to promote 'individualised justice'.[30]

In circumstances where an offender has spent time in prison prior to the sentencing, courts ordinarily factor this into the sentencing calculus. The manner in which

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25 Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identified 229 factors while Roger Douglas, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (Latrobe University, 1980) identified 292 relevant sentencing factors. For an overview of the operation of mitigating and aggravating factors, see: Mackenzie, Stobbs and O'Leary (n 15) 76–103; John Anderson et al, *Criminal Law Perspectives: From Principles to Practice* (Cambridge University Press, 2021) 113–15.

26 [1975] VR 292, 300 (Adams and Crockett JJ). See also Mackenzie, Stobbs and O'Leary (n 15), 28–30; Bagaric, Alexander and Edney (n 15) 39–57; Anderson et al (n 25) 107–10.

27 The only two exceptions are pleading guilty and cooperating with authorities: see Mackenzie, Stobbs and O'Leary (n 15) 89–94; Bagaric, Alexander and Edney (n 15) 370–91.

28 *Markarian* (n 24).

29 *Hudson v The Queen* (2010) 30 VR 610, 616.

30 Ibid.

courts factor this into the ultimate sentence is influenced significantly by whether this prison time was spent in relation to the offence for which the offender is being sentenced, or for an unrelated offence. This is a pivotal distinction, which we will now discuss in more detail.

B *The Definition of Dead Time and the Contrast with Pre-Sentence Detention*

Many offenders sentenced to imprisonment are held in custody prior to being found guilty and sentenced for the offence they have allegedly committed.[31] This usually occurs when offenders are apprehended on suspicion of committing a crime, charged, and then denied bail.[32] When accused are denied bail, they are placed in prison on remand, pending the outcome of the charges. If they are ultimately found guilty of the crime for which they had been on remand and sentenced to imprisonment, the period of time spent in prison awaiting sentencing is termed 'pre-sentence detention'. This is typically deducted from the prison term imposed.[33] Alternatively, it may be taken into account by the court, which may backdate the commencement date of the sentence to the time when the offender first entered into custody for the relevant offence or offences.[34] Thus, offenders are generally given credit for pre-sentence detention. This outcome follows common law principles and statutory provisions in some Australian jurisdictions, although there are differences in how this outcome is achieved.

In Victoria, for example, the *Sentencing Act 1991* (Vic) s 18(1) provides that the time an offender spends in custody after being charged for an offence and before being sentenced for that offence 'must' be taken into account and ordered as time already served under the sentence of imprisonment. Courts have a discretion to order otherwise and not credit the pre-sentence detention, but this cannot be done without good reason. The extreme nature of an event which would result in this outcome was discussed in *R v Foster*:

> In my opinion, a court might, other things being equal, properly 'otherwise order' within s18(1) of the *Sentencing Act 1991* as to a certain period where an offender had, through his or her own deliberate and obstructive action, caused himself or herself to

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31 In fact, well over one-third (15,937 of 41,929) of all prisoners in Australia have not been sentenced: see Australian Bureau of Statistics, *Prisoners in Australia, 2023* (Catalogue No 4517.0, 25 January 2024). See also NSW Bureau of Crimes Statistics and Research, *New South Wales Custody Statistics: Quarterly Update December 2023* (Report, 8 February 2024), where it was revealed that the number of adult prisoners on remand in NSW is now the highest on record with 5,055 people (or 42% of the prison population) in unsentenced detention in December 2023.

32 Indeed, depending on the type of charge, it is common for bail legislation to require bail to be refused, unless the accused can show cause why their detention is not justified: see, eg, *Bail Act 2013* (NSW) ss 16A–16B.

33 See, eg, *Sentencing Procedure Act* (NSW) s 24(a). See also Bagaric, Alexander and Edney (n 15) 767–8.

34 See, eg, *Sentencing Procedure Act* (NSW) s 47(2). See also Bagaric, Alexander and Edney (n 15) 767–8.

> be detained in custody longer by the length of that period than he or she need have been. The extra detention would be, as it were, self-inflicted.[35]

In a similar vein, s 159A of the *Penalties and Sentences Act 1992* (Qld) provides that

> [i]f an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.[36]

Similarly, in Tasmania, the relevant provision requires sentencing courts take into account pre-sentence custody 'in relation to proceedings for, or arising from, that offence',[37] while in the Australian Capital Territory ('ACT'), it is 'any period during which the offender has already been held in custody in relation to the offence'.[38]

In NSW, the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a sentencing court with the discretion to determine 'when' a sentence is to commence.[39] A sentencing court has the option of ordering a sentence to commence before or after the date on which the sentence of imprisonment is imposed.[40] If a sentencing court orders a sentence to commence before that date, it 'must take into account any time for which the offender has been held in custody in relation to the offence or, in the case of an aggregate sentence of imprisonment any of the offences to which the sentence relates'.[41] The position in South Australia is similar to NSW, although it is expressed in terms of allowing a court to take time in custody prior to sentence into account — the word used is 'may' rather than 'must'.[42] The relevant provision permits that time in custody be taken into account by a sentencing court by making an 'appropriate reduction in the term of the sentence'[43] or directing when a sentence is determined to have commenced.[44]

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35 [2000] VSCA 187, [38].

36 See also *R v Wilson* (2022) 10 QR 88.

37 *Sentencing Act* (Tas) (n 17) s 16(1).

38 *Sentencing Act* (ACT) (n 17) s 63(2).

39 *Sentencing Procedure Act* (NSW) (n 17) ss 24(a), 47.

40 *Sentencing Procedure Act* (NSW) (n 17) ss 47(2)(a) or (b).

41 *Sentencing Procedure Act* (NSW) (n 17) s 47(3). See also *Taha v The Queen* [2022] NSWCCA 46.

42 *Sentencing Act 2017* (SA) s 44(2).

43 Ibid s 44(2)(a).

44 Ibid s 44(2)(b)(i)–(ii). See also *R v Tsonis* (2018) 131 SASR 416; *GG v Police* [2023] SASCA 38. The position in Western Australia and the Northern Territory is somewhat similar in providing a sentencing court with the discretion to take into account time served by an offender on remand: *Sentencing Act* (WA) (n 17) s 87(1)(a)–(b); *Sentencing Act* (NT) (n 17) ss 5(2)(k), 63(4), (5). In relation to federal offences, *Crimes Act* (Cth) (n 17) s 16E(2) does not expressly give credit for pre-sentence detention, and instead applies relevant state and territory law to federal sentences.

An anomaly exists in relation to dead time. While pre-sentence detention always attracts credit for time served in relation to sentencing for the particular offence or offences to which that detention relates, the same approach is not followed for unrelated offences, resulting in dead time. Dead time differs from pre-sentence detention in that the time served in prison prior to sentencing does not relate to the offence for which an offender is actually sentenced. The archetypal example of dead time is when an offender is acquitted of an offence for which they have been on remand and served time in prison, is released, but later sentenced to a term of imprisonment for another unrelated crime. In *Karpinski v The Queen* ('*Karpinski*'), Tate JA stated:

> The notion of 'dead time' is not susceptible to any exact definition. The expression was used by Maxwell P and Weinberg JA in *Warwick v R*:
>
> > 'dead time' — that is, the time spent in custody in respect of matters of which the appellant was later acquitted or in relation to which his sentence was reduced…
>
> The expression 'dead time' is perhaps particularly justified when, as here, it relates to time spent in custody on remand for an offence where a nolle prosequi is entered, or a charge is withdrawn, and during which the appellant is neither serving another sentence, nor on remand for another offence for which he or she is ultimately tried.[45]

The *Victorian Sentencing Manual* defines dead time as time spent on remand:

- for charges that are discontinued or withdrawn; or
- during which the accused was not serving another sentence or was not on remand for another offence for which they were ultimately tried; or
- on charges of which the accused was later acquitted.[46]

Unlike pre-sentence detention, there is no rule that offenders will ordinarily receive a sentencing credit for dead time. In fact, as we discuss more fully below,[47] in some jurisdictions the default position is the opposite to pre-sentence detention — credit is usually not accorded for dead time.

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45 *Karpinski* (n 6) [28]–[29] (Tate JA, Mandie JA agreeing at [9]) (emphasis added) (citations omitted).

46 Judicial College of Victoria, *Victorian Sentencing Manual* (6 November 2024) [8.6.2]. In NSW, there is no specific definition or reference to 'dead time' in the Judicial Commission of NSW, *Sentencing Bench Book* (August 2024), however there is reference to 'time spent in custody in relation to another matter for which the offender is acquitted or discharged' along with the decisions in the cases of *Niass* (n 5) and *Hampton* (n 5) as time which is usually regarded as 'extraneous to the exercise of sentencing discretion' and 'there is nothing requiring a judge to take custody for an unrelated offence into account': at [12-510].

47 See Part II(C) below.

C *The Approach to Dead Time in the Sentencing Calculus*

There is no clear principle relating to how a sentencing court should deal with dead time.[48] In fact, there are clear jurisdictional differences. In Victoria, the prevailing approach stems from the decision in *R v Renzella* ('*Renzella*'),[49] where Winneke P, Charles and Callaway JJA (in a joint judgment) followed Brooking JA in *R v Heaney*[50] in stating that there is a common law discretion to credit dead time. Their Honours stated that pre-sentence detention unrelated to the offence for which an offender is being sentenced 'is to be taken into account in the exercise of the court's discretion. It should ordinarily be taken into account at the first opportunity … and not left to the court imposing a later sentence'.[51]

Renzella is a well-established authority on this principle in Victoria and has been consistently applied and approved in that state, without reservation.[52] The only caveat was obiter comments by Weinberg JA in *Karpinski*, who stated:

> Since *Renzella*, there has been a steady growth in reliance upon so-called 'dead time' as a mitigating factor. In my view, however, *Renzella* 'dead time' is often now invoked in circumstances where its application is difficult to justify, either as a matter of logic, or in principle. … Any accused who has been wrongly imprisoned is, of course, the victim of a grave injustice. It does not follow, however, that it is society's duty to ameliorate that injustice by giving the accused credit for the time spent in custody when he is sentenced at a later time for entirely unrelated offending.[53]

However, his Honour did not press the point:

> Despite my misgivings as to the current state of the law on this subject, I agree that the weight of authority requires that the appellant receive some credit for at least part of the time that he spent in custody on the charge of attempted murder. I agree with the order proposed by Tate JA.[54]

To the extent that a common thread can be drawn from the Victorian authorities regarding the approach to dead time; the decision is a matter of discretion with a weak starting assumption that dead time should generally be credited in full.[55] It is

48 *Karpinski* (n 6); *R v Renzella* [1997] 2 VR 88 ('*Renzella*'); *DPP (Vic) v Moustafa* [2018] VSCA 331; *Warwick v The Queen* [2010] VSCA 166, [17].

49 *Renzella* (n 48).

50 (Victorian Court of Appeal, Brooking JA, Hampel AJA and Winneke P, 27 March 1996).

51 *Renzella* (n 48) 95.

52 See, eg: *Kotzmann* (n 6); *R v Ciantar* (2006) 16 VR 26; *Akoka v R* [2017] VSCA 214; *DPP (Vic) v Hudgson* [2016] VSCA 254.

53 *Karpinski* (n 6) [5]–[7].

54 Ibid [5]–[7], [8].

55 *Kheir v The Queen* [2012] VSCA 13, [16]–[18].

important to emphasise that this assumption is weak. In the comparatively recent case of *Mokbel v The King*, the defendant was initially not granted any credit for over five years of dead time he had previously served when he was sentenced to 30 years imprisonment with a non-parole period of 22 years for drug offences.[56] This is despite the fact that most of that dead time was served in super-maximum detention. On appeal, the sentence was reduced to 26 years with a minimum of 20 years. The appeal court reduced the sentence on a number of grounds, including the expungement of a serious conviction, the appellant being assaulted in prison, and recognition that some dead time should have been credited.[57] The appeal court did not state a specific quantity of dead time which was credited, but logically it was somewhat less than the five years previously served by the offender.

While the '*Renzella* discretion' is well-established in Victoria, it has had only limited consideration in other jurisdictions, and not all with approval.[58] Courts in other Australian jurisdictions have taken a different approach to dead time.[59] In NSW, it has been held that 'bare reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters'.[60] This was most recently confirmed in the leading and lengthy judgment of Simpson AJA in the Court of Criminal Appeal in the case of *Dib v The King* ('*Dib*') where her Honour, after a consideration of various relevant authorities, concluded:

> It is thus well — and consistently — established that, in this State, offenders will not be given quantified reductions in sentence to take account of periods spent in custody other than those referable to the offence or offences for which sentence is to be imposed and neither will sentences be backdated to achieve the same result.[61]

Simpson AJA went on to examine whether there was a common law principle of sentencing, the '*Renzella* discretion', established in the series of cases decided in the Victorian Court of Appeal in this regard. Ultimately, her Honour found that such a principle had not been established, with the most that can be shown being 'in some cases (*Kotzmann* being an example) some recognition has been given to periods of custody entirely unrelated to the offence or offences for which sentence is to be passed.'[62] Further, all appellate court decisions considered from other jurisdictions,

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56 *Mokbel v The King* (2023) 375 FLR 290.

57 Ibid [72].

58 See, eg: for the ACT, *McIver v The King* (2023) 20 ACTLR 303 ('*McIver*'); *R v Crawford No 1* [2020] ACTSC 245; *Singh v Wilson* [2019] ACTSC 199; for NSW, *Dib* (n 5); for the NT *R v Lovegrove* [2018] NTSC 2; *MWL v The Queen* [2016] NTCCA 6; for SA *Police v Elmes* [2016] SASC 188; for WA *Evans v WA* (2020) 55 WAR 310.

59 See *Niass* (n 5); *Hampton* (n 5) [25]–[36], where the New South Wales Court of Criminal Appeal expressly declined to follow the approach taken in Victoria.

60 *Hampton* (n 5) [30].

61 *Dib* (n 5) [52] (Simpson AJA, Garling J agreeing at [150] and Ierace J agreeing at [151]).

62 Ibid [80]–[81] (Simpson AJA, Garling agreeing at [150] and Ierace JJ agreeing at [151]).

including Queensland, South Australia, Tasmania and Western Australia demonstrated that there was no common law principle. Such cases nearly all concerned 'doubly warranted' custody, that is, 'partly attributable to the offence for which the offender was to be sentenced, and partly attributable to other offences or charges' in a continuous timeframe.[63] Overall, her Honour observed:

> At most it may be seen that, in some circumstances, appellate courts in some jurisdictions (notably Tasmania) have exercised a discretion to make some allowance for pre-sentence custody unrelated to the offence for which the sentence is to be passed …[64]

Careful consideration was given by her Honour to the federal context given that the appellant in this case had been convicted of a serious federal drug offence. In particular, her Honour observed that the High Court in *Hili v The Queen*[65] and later in *The Queen v Pham*[66] emphasised the need for sentencing consistency throughout Australia in relation to sentencing federal offenders. This required state courts

> to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong … in the case of federal offences it is implicit in Pt 1B of the *Crimes Act* that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth.[67]

Ultimately, this led her Honour to scrutinise whether the approach to dead time taken by the Victorian Court of Appeal constituted a 'sentencing practice', such that consideration should be given to following this approach in the interests of consistency and fairness in the sentencing process for offenders across the country. On balance, her Honour found that a 'relevant practice' had not been established and concluded:

> The decisions in *Kotzmann* and *Karpinski* show that the Victorian Court is prepared to consider making an allowance in a subsequent sentence to take account of a period of unrelated custody. In NSW that simply cannot happen.[68]

In *Dib,* the original sentencing judge expressly took into account what she described as 'the significant period of uncredited custody' (served in relation to a murder for which the offender was ultimately acquitted on appeal) as part of the offender's subjective circumstances for conspiracy to import a commercial quantity of a

63 Ibid [69] (Simpson AJA, Garling agreeing at [150] and Ierace JJ agreeing at [151]).

64 Ibid [82], citing *Carr v R* [1993] TASSC 20; *Geale v Tasmania* (2009) 18 Tas R 338.

65 (2010) 242 CLR 520.

66 (2015) 256 CLR 550 ('*Pham*').

67 *Dib* (n 5) [101] (Simpson AJA), quoting *Pham* (n 66) [18]–[23].

68 *Dib* (n 5) [102].

border-controlled drug.[69] A specific quantified reduction in the sentence was not applied, although the dead time had been calculated at over 3 years and 8 months.[70] This approach was confirmed as 'in accordance with established authority in this State'[71] and shows that there is some discretion available to take account of dead time as a subjective matter in the overall instinctive synthesis approach to sentencing an offender, but it is not to be taken into account as a form of quantified credit.[72] Accordingly, while some weight might be accorded to dead time in the sentencing calculus, it is never to be regarded as specific credit 'in the bank' that can be utilised as of right to reduce any future sentence of imprisonment imposed for a subsequent and unrelated offence.

A similar approach has been taken by the South Australian courts. Chief Justice Kourakis in the Full Court of the Supreme Court decision, *R v Sprecher*, stated:

> It is well accepted that a sentencing court may, and generally should, take into account periods of remand in custody related to the offending for which he or she is being sentenced. Moreover, the period spent on remand may be taken into account even if it is referrable to both the offence for which the defendant falls to be sentenced and other offending. However, there must be some connection between the period spent on remand and the offences and the sentence under consideration. In *R v Arts and Briggs* Callaway JA identified a limitation on the extent to which a sentencing court will take into account a period of remand in custody when he remarked:
>
> > There are, of course, many cases where a person cannot be given credit for pre-sentence detention. He or she may be on remand for several months and then acquitted. The time spent on remand cannot be regarded as a bank balance on which to draw in relation to offences unconnected with the reason for custody, but that is not the case here.
>
> Callaway JA went on refer to the judgment of Lord Bingham of Cornhill CJ in *R v Governor of Brockhill Prison; ex parte Evans* where Lord Bingham referred to a practice of English courts 'to assume that all periods of custody before sentence, other than custody wholly unrelated to the offences for which sentence is passed, will count against the period of the sentence to be served'.
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> In *R v Hughey* this Court endorsed the approach that time spent on remand is not to be regarded as a bank balance on which a defendant could draw.[73]

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69 Ibid [23].

70 Ibid [15].

71 Ibid [23].

72 See also *R v Evans* (New South Wales Court of Criminal Appeal, Gleeson CJ, Allen and Mathews JJ, 21 May 1992); *R v Karageorge* [1999] NSWCCA 213; *Rafaieh v R* [2018] NSWCCA 72, [74].

73 (2015) 123 SASR 15, 21–2 [30]–[31] (Kourakis CJ, Gray J agreeing at [39] and Stanley J agreeing at [40]) (emphasis omitted) (citations omitted). See also *R v Galgey* [2010] SASC 134; *R v Hughey* [2007] SASC 452, [6]–[7].

Most recently, the *Renzella* discretion was considered by the ACT Court of Appeal in *McIver v The King*.[74] In this case, the Court,[75] interpreting and applying section 63 of the *Crimes (Sentencing) Act 2005* (ACT), unanimously held that a period of pre-sentence custody is to be taken into account and the sentence backdated when it is referable only to the offence for which the offender is being sentenced.[76] Furthermore, where it is not referable, it can only be taken into account 'provided that the period of custody for the unrelated offending is continuous with the period of custody for which the offender is being sentenced'.[77] This is what has been described in other jurisdictions as 'doubly warranted' custody. It was accepted that section 63 did not provide an exclusive statement in this regard, so the ACT Court of Appeal then turned to consider the alternative approach raised by the *Renzella* discretion and later decision of the Victorian Court of Appeal in *Karpinski*. In doing so, it was also noted that the NSW courts had declined to follow that line of authority and rather drew a sharp distinction between time on remand for the current offence and time served solely for unrelated offending.[78] The core of the NSW approach was observed to be related to 'public policy concerns that weigh against consideration of unrelated offending for which an offender is ultimately acquitted as "credit in the bank", which may then be deducted from the sentence imposed in respect of any future offending'.[79] These concerns were considered to be 'well-founded' with the Court ultimately deciding that

> although pre-sentence custody for unrelated offending may be taken into account when considering the offender's subjective case and issues of totality, we do not consider that time spent by an offender in custody for wholly unrelated offending should be taken into account in and of itself as 'time served'.[80]

Accordingly, there are some similarities to the NSW approach, in that the ACT Court of Appeal has confirmed a prohibition on quantified 'credit in the bank' for time served in relation to unrelated offending; however, at the same time they have specified a more detailed discretionary approach to the use of dead time in the sentencing synthesis concluding that

> time spent in custody for unrelated offending may be relevant to other aspects of the sentencing exercise. In particular, such custody may be relevant to an assessment of the offender's subjective case, to the application of principles of totality, or may

74 *McIver* (n 58).

75 Comprising Loukas-Karlsson, Baker and Bromwich JJ.

76 *McIver* (n 58).

77 Ibid [90].

78 Ibid [96]–[100] with reference particularly to *SY* (n 5) and *Dib* (n 5).

79 *McIver* (n 58) [101].

80 Ibid [105]. The persuasiveness of these public policy concerns is discussed in greater detail in Part III(E) below.

> otherwise be relevant to an assessment of the weight to be given to the different purposes of sentencing.[81]

In the final analysis, discretion in the ACT has broadened by incorporating the principle of totality and the weighing of the related sentencing purposes into the offender's subjective case, allowing full account of dead time to be taken in the sentencing calculus.

Overall, it is apparent that the differences in the way appellate courts treat dead time throughout Australia are significant, resulting in an inconsistent and confusing situation for the national sentencing landscape. We now turn to evaluate the respective competing approaches.

III Evaluation of the Competing Approaches to Dead Time

A *The Link Between the Offence and the Sentence is Not Cardinal*

As we have seen, there are legislative provisions and a principle that offenders should get credit for time spent in prison for the offence for which they are being sentenced. There is, however, no established principle that offenders should get credit for time spent in prison for any other offence for which they are not being sentenced.

The only difference between the approach to pre-sentence detention for prison time served for the offence for which the offender is being sentenced, and for time served for another offence is the presence of a direct nexus between the incarceration and the crime. There is no doubt that in the case of dead time, there is no direct nexus between the crime for which the offender is sentenced and the one which underpinned the detention. However, it is not clear that this distinction is anything more than a descriptive acknowledgement of the background in which the sentencing calculus is to be undertaken. It is arguable that where there has been punishment in the form of imprisonment — whether due to remand for a particular alleged offence, or for other alleged offences for which prosecution was ultimately discontinued or led to an acquittal through trial or appeal — there is still a specific and quantifiable punishment suffered by the person, which should be credited in any subsequent sentencing process, regardless of an unequivocal connection to the offence.

B *Punishment by its Nature to be Legitimate Must be for a Crime*

The concept which underpins crediting of pre-sentence detention is the reality that the offender has been subjected to harsh punishment by the state and that for punishment to be justified it must be for a crime proven to the requisite standard of proof. The need for a link between punishment and guilt for a crime is an indisputable aspect of (legitimate) punishment. This is evident from the definition of

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81 Ibid [106].

legitimate punishment that has been advanced by many leading penal scholars and philosophers throughout the ages.

Thomas Hobbes provides that punishment is an

> Evill inflicted by publique Authority, on him that hath done, or omitted that which is *Judged by the same Authority to be a Transgression of the Law*; to the end that the will of men may thereby the better be disposed to obedience… [T]he aym of Punishment is not a revenge, but terrour.[82]

Ted Honderich defines punishment as 'an authority's infliction of a penalty, something involving deprivation or distress, on an offender, *someone found to have broken a rule, for an offence*, an act of the kind prohibited by the rule'.[83]

According to the English legal philosopher Herbert Hart, the features of punishment are that:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for *an offence against legal rules*.
(iii) It must be of an *actual or supposed offender for his offence*.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[84]

Herbert Morris defines punishment as 'the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behaviour'.[85] Antony Duff defines punishment as 'the infliction of suffering on a member of the community *who has broken its laws*';[86] and similarly John McTaggart defines punishment as 'the infliction of pain on a person *because he has done wrong*'.[87]

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82 Thomas Hobbes, *Leviathan* (Penguin Books, rev ed, 1968) 353, 355 (emphasis altered).

83 Ted Honderich, *Punishment: The Supposed Justifications* (Penguin Books, 1984) 15, 19 (emphasis added).

84 HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 4–5 (emphasis added). See also Antony Flew, 'The Justification of Punishment' (1954) 29(3) *Journal of the Royal Institute of Philosophy* 291, 293–4.

85 Herbert Morris, 'Persons and Punishment' in S E Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 76, 83.

86 RA Duff, *Trials and Punishments* (Cambridge University Press, 1986) 267 (emphasis added). Duff also states that punishment is suffering imposed on an offender for an offence by a duly constituted authority: at 151.

87 John McTaggart Ellis McTaggart, *Studies in Hegelian Cosmology* (Cambridge University Press, 1901) 129 (emphasis added).

Thus, an indispensable aspect of *legitimate* state-imposed punishment is that it is imposed because a person has committed an offence, determined by due process, and in accordance with lawful authority. If the nexus between punishment and a wrong is broken, then clearly the individual has been subjected to an injustice, in the form of a state-imposed sanction without lawful conviction. It is this reality that underpins the need to credit pre-sentence detention. On a closer examination, it is strongly arguable that the same principle justifies credit for dead time.

C *To Not Credit Unjustified Punishment is the Moral Equivalent of Condoning Punishment of the Innocent*

It is important to emphasise that the proscription against punishing the innocent is a fundamental bulwark of justice and a central distinction between the rule of law and tyranny. The principle is so forceful, that arguably it is absolute — subject to no exceptions. It is so powerful that it forms one of the reasons that, at the philosophical level, utilitarianism is no longer the most influential theory of punishment.[88] Retributivists forcefully argued that utilitarianism justifies punishing the innocent where this would maximise net happiness (for example, by framing people whom the community wanted punished), and hence any theory that justifies such repugnant outcomes must be flawed.[89]

Logically, the principle against punishing the innocent applies no less in circumstances where the prison time served relates to an offence for which the accused was not convicted instead of an offence for which the accused is sentenced. If it is accepted that it is an injustice to not accord pre-sentence detention credit, then it is equally an injustice to refuse to remedy the injustice if the opportunity arises. This is especially important given that the legal system typically accords no form of compensation (monetary or otherwise) for people who have been wrongly imprisoned.[90] In fact, failing to remedy the injustice of punishing the innocent is arguably even a graver injustice than improperly imprisoning a person in the first place. In cases where dead time arises, the wrongful imprisonment was not by design — it was an institutional error, a misjudgement regarding the legal guilt of the accused to the standard of proof beyond reasonable doubt. By contrast, the decision to not grant

88 Mirko Bagaric and Kumar Amarasekara, 'The Errors of Retributivism' (2000) 24(1) *Melbourne University Law Review* 124.

89 HJ McCloskey, *Meta-ethics and Normative Ethics* (Martinus Nijhoff, 1969) 180.

90 The main exception to this is when the defendant can establish the tort of malicious prosecution in relation to the imprisonment, which is a very difficult threshold to reach. See, eg: *Wood v New South Wales* [2018] NSWSC 1247 (Fullerton J); *Spedding v New South Wales* [2022] NSWSC 1627 (Harrison J); *New South Wales v Spedding* [2023] NSWCA 180. As noted in the introduction to this article, other rare exceptions are where a wrongfully convicted person reaches a settlement with the state for an ex gratia payment of compensation (eg Lindy Chamberlain, Andrew Mallard). For an example of relevant legislation see *Government Sector Finance Act 2018* (NSW) s 5.7, which provides statutory power to Ministers to make 'act of grace' payments in certain and special circumstances.

credit for dead time is a calculated institutional choice not to act in a normatively correct and appropriate manner.

Thus, to not credit unjustified punishment in full is to morally condone punishing the innocent.

D *The Principle of Proportionality also Commands Credit for Dead Time*

Failure to grant credit for dead time also involves the violation of another cardinal legal and sentencing principle, namely the principle of proportionality. This is the established view that wrongdoers should receive punishment commensurate with the seriousness of their offending. In short, it is a principle that 'the punishment must fit the crime'. The High Court in *Hoare v The Queen* stated:

> a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.[91]

In fact, in *Veen v The Queen*[92] and *Veen v The Queen [No 2]*,[93] the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection (absent a clear legislative intention to the contrary), which, at various times, has also been declared as the most important objective of sentencing.[94] Proportionality has also been given statutory recognition in all Australian jurisdictions.[95]

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91 *Hoare* (n 18) 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis altered) (citations omitted).

92 *Veen* (n 18) 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

93 *Veen [No 2]* (n 18) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

94 See, eg, *Channon v The Queen* (1978) 20 ALR 1. See also above n 18, in relation to *Sentencing Act* (SA) s 3.

95 The *Sentencing Act* (Vic) (n 17) s 5(1)(a) provides that one of the purposes of sentencing is to impose just punishment. It further provides that in sentencing an offender, the court must have regard to the gravity of the offence and the offender's culpability and degree of responsibility: at ss 5(2)(c)–(d). The *Sentencing Act* (WA) (n 17) s 6(1) states that the sentence must be 'commensurate with the seriousness of the offence', and the *Sentencing Act* (ACT) (n 17) s 7(1)(a) provides that the punishment must be 'just and appropriate'. In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be 'just in all the circumstances': *Sentencing Act* (NT) (n 17) s 5(1)(a); *Penalties and Sentences Act* (Qld) (n 17) s 9(1)(a). In South Australia, 'proportionality' is specifically recognised in s 10 of the *Sentencing Act* (SA) (n 17) as a general principle of sentencing which a court must apply in determining a sentence for an offence. The need for a sentencing court to ensure that the offender is 'adequately punished' is also fundamental to the sentencing of offenders for Commonwealth crimes: see *Crimes Act* (Cth) (n 17) s 16A(2)(k). The same phrase is used in the New South Wales legislation: *Crimes (Sentencing Procedure) Act* (NSW) (n 17) s 3A(a).

More fully, proportionality has two limbs. The first is the seriousness of the crime, and the second is the harshness of the sanction.[96] Further, the principle has a quantitative component — the two limbs must be matched.[97] In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.[98]

The proportionality principle is a universal principle of justice. As Richard Fox notes, the notion that the response must be commensurate to the harm caused, or sought to be prevented, is at the core of the criminal defences of self-defence and provocation.[99] It is also at the foundation of civil law damages for injury or death, which aim to compensate for the actual loss suffered; and equitable remedies, which are proportional to the detriment sought to be avoided.[100]

While in criminal law proportionality normally operates to require punishment, the principle is not a one-way directive. The requirement that the response be commensurate with the harm caused also operates to command redress for those who have been unjustly punished. The other side of the 'punishment must fit the crime' coin is the requirement that some form of redress or compensation must be accorded for punishment inflicted in the absence of a crime.

Thus, the need to credit dead time stems from the operation of two important principles: the proscription against punishing the innocent; and the proportionality principle.

E *Dead Time as a Prison Bank Balance: No Pure Causal Link Between Offence and Punishment Even for Offences Attracting Pre-Sentence Detention*

In order to make out the argument more fully that dead time should be credited, it is necessary to debunk the reasons that have been advanced for not crediting this time. To this end, it emerges that there is a notable absence of considered arguments; rather, there are a number of cursory observations that have been advanced to justify not permitting the adjustment of sentences for dead time. That may be so because, ultimately, the question of crediting dead time is a question of public policy, which is perhaps best addressed by parliament rather than the courts.

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96 Richard G Fox, 'The Meaning of Proportion in Sentencing' (1994) 19(1) *Melbourne University Law Review* 489, 491.

97 Ibid.

98 Ibid.

99 Although it is appropriate to acknowledge that since Fox made this observation, provocation has been abolished as a defence to murder in most Australian jurisdictions: Paul Fairall and Malcolm Barrett, *Criminal Defences in Australia* (5th ed, 2016). In NSW note that the partial defence of 'extreme provocation' is available to a charge of murder: see *Crimes Act 1900* (NSW) s 23.

100 Fox (n 96) 491. This article also provides a good historical overview of the proportionality principle: see R G Fox, 'The Killings of Bobby Veen: The High Court on Proportionality in Sentencing' (1988) 12(1) *Criminal Law Journal* 339, 350–2.

The view that dead time cannot be used as a 'bank balance on which to draw in relation to offences unconnected with the reason for custody'[101] is not a legitimate basis for not crediting dead time. This is because this view is not an argument; it is simply a comment which lacks an underlying justification. There is no logical or normative framework within which this comment is couched to give it coherency and persuasion. It is simply a superficial statement which has a veneer of plausibility because of its link to the broader principle that the punishment should fit the crime, but which does not withstand closer intellectual scrutiny.

The strongest basis for arguing that dead time should not be treated as a bank balance is to highlight the absence of a causal nexus between the events: the crime for which the person was imprisoned and the crime for which the person was sentenced. However, the distinction between the approaches for crediting pre-sentence detention and dead time couched in terms of a causal nexus between the relevant crimes is not as sharp as has been asserted in the jurisprudence.

It is not accurate to assert that pre-sentence detention is appropriate for crimes which are directly connected to the sentence *because* of this connection. There are often reasons unrelated to the immediate crime that resulted in the pre-sentence detention of the offender. The offending is simply part of the broader backdrop to the detention in many instances. The most common situation when pre-sentence detention arises is when an offender has been remanded in custody for a crime of which the offender is ultimately convicted. The reason for being placed on remand is the refusal of bail. The nature of the offence is only one consideration that informs the bail determination.[102] It is not correct to assert that the offence committed is the sole, or sometimes even the main, reason for a denial of bail and hence that any sentence should begin at that point in time.

While suspicion of the commission of a crime is a necessary element of a bail determination, there are other considerations that are relevant. Other important considerations include whether the offender is at meaningful risk of reoffending, or not appearing at court. Thus, in circumstances where an offender has served pre-sentence detention, important causal reasons for this include not only the offence, but also an assessment that the offender is likely to reoffend or not appear in court in relation to the offence. Hence, it could be argued that pre-sentence detention should not always be credited because the cause of the detention was the offender's own character and (negative) attitude towards possible bail conditions. This argument ultimately breaks down because the key reason for crediting pre-sentence detention is the need to acknowledge the fact that punishment can only be justified if it stems from the commission of a crime. If punishment commenced before a finding of guilt for a particular crime, this should be remedied by means of granting pre-sentence detention credit for that crime or — if a finding of guilty never occurred for that crime — other crimes. Ultimately, every episode of involuntary deprivation

101 See above Part II(C) citing *R v Sprecher* (2015) 123 SASR 15 [30].

102 See, eg: *Bail Act 2013* (NSW) ss 17–20; *Bail Act 1977* (Vic) pt 2; *Bail Act 1985* (SA) s 10(1).

of liberty imposed through the coercive power of the state should be viewed in the same manner when an actual sentence is being formulated by a sentencing court.

F *Application of the Dead Time Principle for Sanctions other than Prison*

By way of clarity, it is worthwhile noting that the principle of dead time could be extended beyond imprisonment, to also apply to other forms of punishment, such as community corrections orders or home detention. All forms of punishment involve hardship, hence, where a sanction has been imposed unjustly, it follows that if the opportunity arises it should be remedied. Accordingly, the reformed dead time principle we suggest in this article should apply to sanctions other than imprisonment.

Prison is the harshest sanction in our system of law. Hence, it is in this context where the principle would apply most frequently and would be the easiest to implement. Prison is also the sanction which will most commonly and neatly attract the proposed approach to dead time. This is because cases which result in prison are most frequently appealed, and it is easy to calculate the appropriate credit which should be accorded — that is, the credit matches the time wrongly served in prison. However, this does not logically entail that our proposed reform is only apposite to imprisonment.

We acknowledge there is no obvious or mechanical formula which could be applied to determine how much credit should be accorded in circumstances when the relevant sanctions are of a different nature, for example, where the wrongful conviction attracted a community-based order and the new sentence is a term of imprisonment. This is because there is no meaningful formula for measuring equivalence between sanctions.[103] The lack of objective precision in this regard should not prevent application of the dead time principle in the context of all sanctions. As we have seen, sentencing — largely due to the instinctive synthesis — by its nature involves a considerable degree of discretion and individualised assessment of each case. This same standard and approach is apposite in relation to our proposed dead time principle when the respective sanctions are different in nature. Thus, by way of example, it would not be inappropriate to accord a day's prison credit for every two days an offender had unjustly been placed on a community corrections order.[104]

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103 For a discussion regarding the equivalence between criminal sanctions, see Mirko Bagaric, 'New Criminal Sanctions: Inflicting Pain Through the Denial of Employment and Education' [2001] *Criminal Law Review* 184.

104 Another equivalence-related issue which could arise in relation to our proposed reform is how to deal with situations where mitigating or aggravating factors were present in relation to the previous sentencing exercise, but are no longer relevant in relation to the later sentence. This situation is more straightforward. The focus of the dead time principle is on the nature and severity of the sanction which was unjustly imposed, as opposed to the sentencing factors resulting in the sanction. Accordingly, in applying the dead time principle it would not be relevant to determine the reasons underpinning the earlier sentence. We thank the anonymous reviewer for this point.

IV Reform Proposals and Concluding Remarks

There is no settled common law principle regarding how dead time should be dealt with in the sentencing calculus. In particular, there is a discord between the approaches taken in NSW and Victoria. It is unsatisfactory that there is such a divergence of approaches in relation to crediting prison time in the two largest Australian jurisdictions, given the profound impact that prison has on the lives of prisoners.

It bears repeating that prison is the harshest sanction in our system of law. It involves a total denial of liberty and deprives people of nearly everything that is meaningful in their lives. People who have spent time in prison for offences for which they are ultimately not convicted have suffered a gross injustice and hardship. They are usually not afforded a remedy, or compensated for this in any manner. The only practical manner in which most offenders can be 'compensated' for dead time is if the offender has this time quantified and credited against any future sentence.

To not credit dead time in these circumstances fails to acknowledge the stringency of the principle that the innocent should not be punished and fails to recognise the grave punishment that is inherent in a term of imprisonment. The underlying norm in this case is the entrenched value of protecting the innocent from arbitrary, improper or defective use of state power. Dead time emerges as a class of sanction that is the by-product of an imperfect system that has the effect of incarcerating the innocent and tries to provide a remedy for that effect.

The fact a person has accrued dead time means that they have been wrongly imprisoned. To punish the innocent is a repugnant act. To refuse to remedy this act, should the opportunity avail, exacerbates this normative wrongdoing. The fact that dead time does not relate directly to the offence for which an offender is being sentenced should not deflect the need to remedy an earlier injustice. The direct connection to an offence and time served is arguably not a paramount consideration in the final analysis. The need to credit dead time also follows from fairness considerations and the practical application of the proportionality principle. Legislative provisions to give effect to this reform should be formulated to clearly align dead time with pre-sentence detention in the sentencing calculus, especially if the High Court is not presented with an opportunity to resolve the current differences and confusion apparent in the common law throughout Australia.

The law should be reformed so that dead time is always credited to offenders in the absence of exceptional circumstances. To this end, the only exception we would make to the principle is that dead time should not be credited if an offender commits a crime with the express expectation of impunity (at least for the time served) for the offence. The reason for this exception, is that no legal principle should operate in a manner which could potentially encourage the commission of crime. As this would relate to a question of fact relevant to sentencing, such an exception would ordinarily require adducing evidence by the prosecution in the course of the proceedings and

be specifically considered by the court, in accordance with the rules of evidence.[105] Such evidence would then allow the court to determine the motivation and context of the crime in deciding whether the exception is established.[106]

The reform proposed in this article logically stems from the theoretical arguments we have put forward in support of crediting dead time — whether the earlier detention relates to an offence committed before or after the sentence is a matter of happenstance rather than doctrinal relevance. This approach is amenable to integration into the sentencing synthesis as a consistent principle. Further, it is time that can usually be numerically quantified, and so should be a specific consideration in the sentencing calculus, in the same way as quantified pre-sentence detention (relating to the crime for which the offender is being sentenced) and other quantified sentencing factors, such as the discount for a guilty plea.[107] Thus, the reform proposal is not only normatively and jurisprudentially desirable but also pragmatically readily achievable.

105 See *Evidence Act 1995* (Cth) s 4(2).

106 In those jurisdictions where the uniform evidence provisions apply, those considerations are specifically included. See *Evidence Act 1995* (Cth) s 4; *Evidence Act 2011* (ACT) s 4; *Evidence Act 1995* (NSW) s 4; *Evidence (National Uniform Legislation) Act 2011* (NT) s 4; *Evidence Act 2001* (Tas) s 4; *Evidence Act 2008* (Vic) s 4.

107 See above n 27.

*Brendan Walker-Munro**

RISKS OF ESPIONAGE IN OUR UNIVERSITIES? LESSONS ON RESEARCH SECURITY FROM *LI V CANADA*

Abstract

In the 2023 case of *Li v Canada*, the Canadian Federal Court upheld the refusal of a visa for Chinese national, Yuekang Li, based on his apprehended risk of engaging in espionage. Yet this decision is only the latest in a string of cases in Canada evidencing a tougher stance on research security — that is, the protection of certain university research and programs with national security dimensions. In Australia, where research security is almost entirely absent from political and policy discourse, what is the potential role of migration law in the pursuit of research security? Can Australia learn anything from Canada's experience? The answers to these questions help inform not only Australia's burgeoning migration law scholarship, but also future pathways for the due recognition of research security in this country.

I Introduction

In the late 2023 decision of *Li v Canada* ('*Li*'),[1] the Canadian Federal Court ('CFC') affirmed the refusal of a student visa to a prospective international PhD student, Mr Yuekang Li. Ordinarily, this would not make the national headlines — except in this case, the PhD student was a Chinese national and the refusal was on the basis of an apprehended risk of Mr Li being 'targeted and coerced into providing information that would be detrimental to Canada or contrary to Canada's interests'.[2] The case immediately drew media attention, with some labelling the decision 'deeply unhelpful',[3] an unacceptable example of 'pre-crime',[4] and a strong disincentive for

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1 [2023] FC 1753 ('*Li*').

2 Ibid [17], [63].

3 Alex Usher, 'A Deeply Unhelpful Federal Court Ruling', *Higher Education Strategy Associates* (Blog Post, 10 January 2024) <https://higheredstrategy.com/a-deeply-unhelpful-federal-court-ruling/>.

4 Creso Sá, 'A "Precrime" Has Been Prevented — Or Has It?', *University Affairs* (Blog Post, 12 January 2024) <https://www.universityaffairs.ca/opinion/policy-and-practice/a-precrime-has-been-prevented-or-has-it/>.

international students to attend Canadian universities (which may have been the CFC's intention).[5]

Universities are having to contend with just these types of geopolitical challenges on an unprecedented scale, where the *domaine réservé* of national security sits uncomfortably beside notions of open science and academic inquiry. Previously funded by incredibly high engagement with international student cohorts and research arrangements with international entities,[6] universities are now being forced to question the closeness of these associations.[7] Universities are now seen as prime targets for physical or 'in-person' espionage,[8] as well as virtual or cyberespionage (a domain where universities have long struggled to protect themselves).[9] In response, governments and institutions have taken a variety of approaches across the law and policy

5 CBC, 'Court Decision Barring Chinese Student Sends Message About Espionage Risk, Experts Say', *Yahoo! News Canada* (online, 5 January 2024) <https://ca.news.yahoo.com/court-decision-barring-chinese-student-225416110.html>.

6 See, eg, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Tourism and International Education Sectors* (Interim Report, October 2023) 12–13, 33–4.

7 Radomir Tylecote and Robert Clark, *Inadvertently Arming China? The Chinese Military Complex and its Potential Exploitation of Scientific Research at UK Universities* (Final Report, Civitas, February 2021); Brendan Walker-Munro, Ruby Ioannou and David Mount, *Are We Training Potential Adversaries? Australian Universities and National Security Challenges to Education* (Final Report, 30 October 2023).

8 See, eg: Ana Swanson and Keith Bradsher, 'White House Considers Restricting Chinese Researchers Over Espionage Fears', *New York Times* (online, 30 April 2018) <https://www.nytimes.com/2018/04/30/us/politics/trump-china-researchers-espionage.html>; Erin N Grubbs, 'Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security' (2019) 20(5) *North Carolina Journal of Law and Technology* 235; Ken Dilanian, 'American Universities Are a Soft Target for China's Spies, Say US Intelligence Officials', *NBC News* (online, 3 February 2020) <https://www.nbcnews.com/news/china/american-universities-are-soft-target-china-s-spies-say-u-n1104291>; Louise Ayling, 'How a Major Spy Ring is Operating on Australian Soil and "Conducting Clandestine Intelligence Collection", Harassing Expatriates and Sending Information to Other Countries', *Daily Mail* (online, 25 February 2020) <https://www.dailymail.co.uk/news/article-8038051/Major-spy-ring-Australia-clandestine-intelligence-collection-harassing-expatriates-foreign-agents.html>; Gordon Corera, 'Iranian Hackers Posed as British-based Academic', *BBC News* (online, 13 July 2021) <https://www.bbc.com/news/technology-57817463>.

9 See, eg: Ivano Bongiovanni, 'The Least Secure Places in the Universe? A Systematic Literature Review on Information Security Management in Higher Education' (2019) 86 *Computers and Security* 350; Peter Romness, 'Securing University Research: An Industry Perspective', *Cisco Blogs* (Blog Post, 13 April 2021) <https://blogs.cisco.com/education/securing-university-research-an-industry-perspective>; Jin Li, Wei Xiao and Chong Zhang, 'Data Security Crisis in Universities: Identification of Key Factors Affecting Data Breach Incidents' (2023) 10 *Humanities and Social Sciences Communications* 1.

spectrum, from centralisation of policy and the broadening of export controls,[10] to recommendations that funding bodies impose research security obligations through grant contracts.[11]

The implications of some types of research security programs on universities have been tremendous. The United States' 'China Initiative' — a program by the Department of Justice and the Federal Bureau Investigation to surveil Chinese academics for risks of espionage — was abandoned after failed prosecutions and allegations of racial bias.[12] Imposing national security rules on a profession that embraces publication and open collaboration harms academic freedom and chills intellectual inquiry.[13] There is also a suggestion in the literature that research security programs that are hastily or arbitrarily imposed could compromise international legal obligations, such as a 'right to science', which may arguably be derived from the *International Covenant on Economic, Social and Cultural Rights*.[14]

The decision in *Li* also forms part of this broader web of actions by Canada to enhance research security. The Canadian government defines research security as 'the ability to identify possible risks to your work through unwanted access, interference, or theft and the measures that minimize these risks and protect the inputs, processes, and products that are part of scientific research and discovery'.[15] In 2020, the Canadian government launched a centralised research security portal, and subsequently issued the *National Security Guidelines for Research Partnerships* ('Canadian Guidelines') on 12 July 2021.[16] The Canadian Guidelines mandated that recipients of federal funding conduct risk assessments on both the nature of research

10 Alex Wilner et al, 'Research at Risk: Global Challenges, International Perspectives, and Canadian Solutions' (2022) 77(1) *International Journal* 26; Caroline Winter, 'Research Security and Open Scholarship in Canada', *Open Scholarship Policy Observatory* (Web Page, 17 November 2023) <https://ospolicyobservatory.uvic.ca/research-security-and-os-in-canada/>.

11 Tommy Shih, 'The Role of Research Funders in Providing Directions for Managing Responsible Internationalization and Research Security' (2024) 201(1) *Technological Forecasting and Social Change* 123253.

12 Margaret K Lewis, 'Dismounting the "China Initiative" Tiger' (2021) 52 *Seton Hall Law Review* 987.

13 Grubbs (n 8); Ot van Daalen, 'In Defense of Offense: Information Security Research Under the Right to Science' (2022) 46 *Computer Law and Security Review* 105706.

14 Brendan Walker-Munro, *A Duty to Protect from Science? Interactions in International Law Between Research Security and the Right to Science* (Report, 23 May 2024); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15(1)(b).

15 'Why Safeguard Your Research?', *Government of Canada* (Web Page, 5 May 2022) <https://science.gc.ca/site/science/en/safeguarding-your-research/general-information-research-security/why-safeguard-your-research> ('Why Safeguard Your Research?').

16 Innovation, Science and Economic Development Canada, *National Security Guidelines for Research Partnerships* (January 2024).

being conducted and the entities with whom the research was being conducted.[17] The purpose of the Canadian Guidelines was to:

> … help safeguard Canada's research ecosystem from foreign interference, espionage, and unwanted knowledge transfer that could contribute to: advancements in military, security, and intelligence capabilities of states or groups that pose a threat to Canada; or disruption of the Canadian economy, society, and critical infrastructure.[18]

Following the issue of the Canadian Guidelines, two separate joint statements by the Canadian Minister of Innovation, Science and Industry, Minister of Health, and Minister of Public Safety have made clear that research security is a top priority of the Canadian government and would be pursued through robust application of both law and policy.[19]

Australia has no such unified government agenda on research security. Although the Australian government, through the Universities Foreign Interference Taskforce ('UFIT'), published *Guidelines to Counter Foreign Interference in the Australian University Sector* ('UFIT Guidelines') in 2019 (and later refreshed them in 2021),[20] the UFIT Guidelines are voluntary. They are not universally applied by all Australian universities in the same way,[21] and are not mandated requirements for seeking federal funding from the Australian Research Council ('ARC'). Nor does the Australian government have a federally articulated research security policy. Despite an inquiry by the Parliamentary Joint Committee on Intelligence and Security making 27 recommendations in March 2022,[22] almost none of those recommendations have been successfully implemented, and some were outright rejected by the Commonwealth Government.[23] In December 2023, the ARC published a Countering Foreign Interference Framework;[24] however, this does not analyse the full scope of risks

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17 Ibid 9–11.

18 Ibid 4.

19 Innovation, Science and Economic Development Canada, 'Statement from Minister Champagne, Minister Duclos and Minister Mendicino on Protecting Canada's Research' (Press Statement, 14 February 2023); Innovation, Science and Economic Development Canada, 'Statement from Minister Champagne, Minister Holland and Minister LeBlanc on New Measures to Protect Canadian Research' (Press Statement, 16 January 2024).

20 University Foreign Interference Taskforce, *Guidelines to Counter Foreign Interference in the Australian University Sector* (Department of Education, Skills and Employment, 17 November 2021).

21 Department of Education, *Report on Implementation of the Guidelines to Counter Foreign Interference in the Australian University Sector* (Report, August 2023).

22 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (Final Report, March 2022) [6.8]–[6.120].

23 Department of Home Affairs, *Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security Report: National Security Risks Affecting the Australian Higher Education and Research Sector* (Report, February 2023).

24 Australian Research Council, 'ARC Countering Foreign Interference Framework' (December 2023).

associated with research security and is limited to a small subset of due diligence checks able to be conducted on publicly sourced information.[25] An important note is that each of these policy tools have not focused on the broader notion of research security, but on foreign interference — merely one of the many risks facing our higher education sector.

This article will therefore consider whether the use of migration law as a tool for research security in Australia is appropriate, given its reliance on Ministerial executive power and discretion, often applied in a manner detrimental to the applicant where issues of national security are invoked. Part II of this article will present the case of *Li*, including the originating decision but with specific focus on the CFC's novel interpretation of the term 'espionage' in the context of Canada's recent moves to tighten their research security frameworks. Part III will then conduct a brief examination of Canadian migration law and research security policy to demonstrate why *Li* is so important to the use of migration law as a research security control.[26] Part IV will then present the equivalent Australian provisions that might be relied upon in an Australian case touching upon research security. Part V then examines the tensions or limits of using migration law as a mechanism for protecting research security, rather than relying primarily on other areas of law such as criminal law or sanctions law, or domestic regulation of universities as statutory creatures. Part VI will conclude with some recommendations for policy development and future research in this critical area. In its approach, this article has two aims. The first is to contribute to the overall discourse regarding how migration law has served the Executive — particularly the Minister for Immigration and Multicultural Affairs — in achieving their policy objectives, which increasingly refer to notions related to research security. The second is to bring attention to the Canadian legal framework, case law (following the *Li* decision), and academic analysis as a comparative jurisdiction that has considered similar conceptual questions and may therefore have instructive lessons for Australia.

II The Facts and Decision in *Li*

Yuekang Li was a resident and citizen of the People's Republic of China ('PRC') admitted to the PhD program of the University of Waterloo in Canada in April 2022.[27] As part of his studies, Mr Li applied in September 2022 for a study permit under Canada's *Immigration and Refugee Protection Act* ('*IRPA*')[28] and *Immigration and Refugee Protection Regulations* ('*IRPR*').[29] The issue of a Study Permit requires a security assessment of the prospective applicant,[30] meaning the processing of the application

25 Ibid 6; Brendan Walker-Munro, '(Professor) Hadrian's Wall: The Role of the Australian Research Council in Securing University Research' (2024) *UNSW Law Journal*, forthcoming.

26 For the United States example, see Alex Nowrasteh, *Espionage, Espionage-Related Crimes, and Immigration* (Report No 909, 9 February 2021).

27 *Li* (n 1) [6].

28 Ibid; *Immigration and Refugee Protection Act*, SC 2001, c 27 ('*IRPA*').

29 *Immigration and Refugee Protection Regulations*, SOR/2002–227 ('*IRPR*').

30 Ibid s 216(1).

was quite protracted.[31] When Mr Li sought judicial review of that delay, it became clear in tendered documents that Mr Li's permit had been recommended for refusal, as there were 'reasonable grounds to believe that he is inadmissible to Canada'.[32]

The security grounds provision in the *IRPA*, s 34(1), deems a person to be inadmissible to Canada if there 'are reasonable grounds to believe that any of the following have occurred, are occurring or may occur' in relation to that person:

> (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
> (b) engaging in or instigating the subversion by force of any government;
> (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
> (c) engaging in terrorism;
> (d) being a danger to the security of Canada;
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
> (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

The specific nature of the concerns were outlined in the decision by the Minister's delegate as being a combination of 'Mr Li's education, his field of study and research in Canada, and open-source information reporting on the PRC's reliance on non-traditional collectors of information, including science and technology students, to advance China's military and other interests'.[33] It was this combination of factors which presented a risk of Mr Li 'engaging in an act of espionage that is against Canada or that is contrary to Canada's interests'.[34] The Chief Justice noted that no Act of the Canadian Parliament had defined the word 'espionage', but at its most basic it constituted 'the secret, clandestine, surreptitious or covert gathering or reporting of information to a foreign state or other foreign entity or person', where 'such activity is against Canada or is contrary to Canada's interests'.[35] That conclusion was reinforced by the CFC's previous decisions in: (1) *Crenna v Canada* ('*Crenna*'),[36] where the CFC held that espionage involved 'gathering' information that was conducted secretly, covertly, or clandestinely; and (2) *Qu v Canada* ('*Qu*')[37] and *Peer v Canada* ('*Peer*'),[38] where the CFC held that espionage included reporting

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31 *Li* (n 1) [8].

32 Ibid [9]–[11]; *IRPA* (n 28) ss 34(1)(a), 87, 83(1)(d).

33 *Li* (n 1) [14].

34 *Li* (n 1) [77]; *IRPA* (n 28) s 34(1)(a).

35 *Li* (n 1) [32] (emphasis omitted).

36 [2020] FC 491 ('*Crenna*').

37 [2000] 4 FC 71 ('*Qu*'). See also *Qu v Canada (Minister of Citizenship and Immigration*) [2002] 3 FC 3. Though *Qu* was a decision prior to the enactment of the *IRPA* (n 28), Crampton CJ observed that 'the pre-IRPA jurisprudence with respect to the meaning of "espionage" continues to be good law': *Li* (n 1) [45], citing *Sumaida v Canada (Citizenship and Immigration)* [2018] FC 256, [21] ('*Sumaida*').

38 [2010] FCA 752 ('*Peer*').

information conducted secretly, covertly, or clandestinely.[39] Further, CFC confirmed in 2022 that the impugned activity did not need a nexus to the commonly understood concept of 'national security'.[40]

His Honour then referred specifically to 'open-source' (ie, publicly available) information which stated 'the PRC relies on non-traditional collectors of information to target non-governmental organizations in Canada, including academic institutions and businesses'.[41] The loss or unauthorised disclosure of such information to such 'non-traditional collectors' could conceivably 'have a negative impact on the safety, security or prosperity of Canada' and thus be 'contrary to Canada's interests'.[42] With regard to Mr Li's chosen field of study — indicated as microfluidics — his Honour noted that the open-source material relied upon by the Minister's delegate included references to the PRC naming microfluidics as a growth industry as well as contributing to their 'top ten' targeted high-tech industries (advanced medical products).[43]

What is perhaps the most novel aspect of *Li* is the CFC's validation of the decision-maker's finding that the espionage criterion could be fulfilled by an applicant being 'targeted and coerced into providing information that would be detrimental to Canada or contrary to Canada's interests'.[44] Such targeting and coercion may occur, it would seem, independent of the applicant's intentions and consent, and at any time before, during or after their time in Canada.[45]

Immediately after Mr Li's case, another PhD student — this time an Iranian computer engineer — was refused a visa for purportedly 'being a danger to the security of Canada'.[46] A week later, the Canadian government published strict new guidelines which prohibited research collaborations with hundreds of named entities in China, Russia and Iran.[47] Thus, Mr Li's decision addresses significant issues for Canada,

39 Ibid [28], [35].

40 See, eg, *Canada (Citizenship and Immigration) v Mason* [2022] 1 FCR 3 ('*Mason*').

41 *Li* (n 1) [52].

42 Ibid [68].

43 Ibid [54]–[56].

44 Ibid [17], [63]. It is to be emphasised that it was the immigration officer's decision that held this could be captured by s 34(1)(a) of the *IRPA* (n 28). The CFC merely upheld that such a decision was not unreasonable.

45 *Li* (n 1) [65]–[66].

46 Jim Bronskill, 'Iranian Student, Denied Permit to Study in Canada, Disputes Security Danger Label', *CityNews* (online, 9 January 2024) <https://kitchener.citynews.ca/2024/01/09/iranian-student-denied-permit-to-study-in-canada-disputes-security-danger-label/>.

47 Omair Quadri, 'Ottawa Clamps Down on University Research Partnerships with China, Iran and Russia', *The Globe and Mail* (online, 17 January 2024) <https://www.theglobeandmail.com/canada/article-morning-update-ottawa-clamps-down-on-university-research-partnerships/>; Government of Canada, *Named Research Organizations* (Policy Document, January 2024) ('*Named Research Organizations*').

which aims to become a world leader in research security, including identifying risks to research and taking action to 'protect the inputs, processes, and products that are part of scientific research and discovery'.[48] The use of immigration law to protect Canadian research security interests can hardly be seen as surprising — espionage from inside a country is far easier than from outside it. But is migration law an ideal tool for providing research security? What tensions does it create with the notions of academic freedom and open intellectual inquiry which university research seeks to uphold? In the next Part, I will examine the Canadian research security framework and how some of the migration law provisions could apply in that context.

III Canadian Migration Law and Research Security

Canada has had a reasonably swift introduction to the practice of research security. The federal government first published a research security policy position in 2021, which asked the Government-Universities Working Group to 'develop specific risk guidelines to integrate national security considerations into the evaluation and funding of research partnerships'.[49] The subsequent 'Safeguarding Research' portal defined research security as the 'ability to identify possible risks to your work through unwanted access, interference, or theft and the measures that minimize these risks and protect the inputs, processes, and products that are part of scientific research and discovery'.[50] More recently, Canada has been spurred by recent scandals in research[51] to engage in crackdowns in academic contexts through a tripartite national policy response: the *Policy on Sensitive Technology Research and Affiliations of Concern*,[52] the list of *Sensitive Technology Research Areas*,[53] and the *Named Research Organisations* ('NRO') identifying entities which could pose a risk to Canada's national security.[54]

The *IRPA* has a clear role to play in securing Canadian national security in general, and research security in particular. This is because s 34(1) of the *IRPA* renders inadmissible to Canada any person who poses a risk of espionage, subversion of

48 Why Safeguard Your Research? (n 15).

49 Innovation, Science and Economic Development Canada, 'Research Security Policy Statement — Spring 2021' (Press Statement, 24 March 2021).

50 Why Safeguard Your Research? (n 15).

51 See, eg: Bob Young, 'Foreign Interference / Influence in Canada: A Way Forward' (2023) 6(2) *Journal of Intelligence, Conflict, and Warfare* 79; Brendan Walker-Munro, 'Canada's Biosecurity Scandal: The Risks of Foreign Interference in Life Sciences', *The Strategist* (online, 2 April 2024) <https://www.aspistrategist.org.au/canadas-biosecurity-scandal-the-risks-of-foreign-interference-in-life-sciences/>.

52 Government of Canada, *Policy on Sensitive Technology Research and Affiliations of Concern* (Policy Document, January 2024).

53 Government of Canada, *Sensitive Technology Research Areas* (Policy Document, January 2024).

54 *Named Research Organizations* (n 47).

the government, acts of terrorism or violence, or otherwise 'being a danger to the security of Canada'. Section 34 in the *IRPA* was amended on 19 June 2013 by the *Faster Removal of Foreign Criminals Act* ('*Faster Removal Act*'),[55] which changed s 34(1)(a) from 'engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada' to the current form of 'engaging in an act of espionage that is against Canada or that is contrary to Canada's interests'.[56] This amendment was intended to provide an exclusion for 'those who may have been involved in espionage for close democratic allies of Canada and who may in fact have been gathering intelligence on behalf of Canada against common security threats'.[57] As an unintended benefit, it dealt with a potential loophole in the *IRPA* which prevented inadmissibility decisions being made against persons who committed espionage against States that were not democracies at the time of their conduct.[58] That definition of espionage, contrary to s 34(1)(a) of the *IRPA*, remained largely undisturbed for a number of years, and appeared routinely in declarations of inadmissibility to Canada for former employees of the intelligence services of Iran,[59] Ethiopia,[60] Sudan[61] and Syria.[62]

One of the earliest cases of applying the espionage provision of the *IRPA* arose in the 2003 case of *Gariev v Canada*.[63] Viatcheslav Gariev was a Belarusian citizen who served in the armed forces of the former Soviet Union as a computer programmer

55 *Faster Removal of Foreign Criminals Act*, SC 2013, c 16.

56 Ibid s 13(2).

57 Canada, *Parliamentary Debates*, House of Commons, 24 September 2012, 10327 (Jason Kenney).

58 *X v Canada (Public Safety and Emergency Preparedness)* [2009] CanLII 49233.

59 One case succeeded at judicial review because the original decision relied on s 34(1)(d) of the *IRPA* and declared the applicant a 'danger to Canada' without requisite evidence: *Hosseini v Canada (Immigration, Refugees and Citizenship)* [2018] FC 171. The second case was uncontroversial because the applicant had published his autobiography in which he laid out his extensive intelligence work: *Sumaida* (n 37) [1].

60 *X (Re)* [2019] CanLII 142993 ('*X (Re)* 142993'); *X (Re)* [2019] CanLII 132626 ('*X (Re)* 132626'); and *X (Re)* [2019] CanLII 135483 ('*X (Re)* 135483') are three such decisions involving inadmissibility to Canada of former employees of the Ethiopian Information Network Security Agency ('INSA'), which conducted spying on dissidents, journalists, and Ethiopian expatriates. Cf *Gaga v Canada (Citizenship and Immigration)* [2020] FC 607 where the CFC allowed judicial review despite evidence of employment of the Applicant by INSA because the Immigration Division merely adopted the reasons of another decision-maker 'without showing clear engagement with the issues [so] does not meet the requirements of justification, transparency and intelligibility': at [22], citing *Dunsmuir v New Brunswick* [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65.

61 *X (Re)* [2020] CanLII 125445 ('*X (Re)* 125445'), which was upheld on review: *Ibrahim v Canada (Citizenship and Immigration)* [2022] FC 1299.

62 *Al Ayoubi v Canada (Citizenship and Immigration)* [2022] FC 385.

63 [2004] FC 531.

and worked on 'intercepting and deciphering communications from Europe'.[64] Mr Gariev was deemed inadmissible under s 34(1)(f) of the *IRPA*, because his previous service with Russian military intelligence (now commonly known by the abbreviation 'GRU') constituted membership 'of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in acts [of espionage]'.[65] Similar conclusions were reached in *Canada v Abramishvili*,[66] *Lennikov v Canada*,[67] *Moiseev v Canada*,[68] and *Zhulanov v Canada*[69] where members of the former Soviet KGB were held to be inadmissible under s 34(1)(f) because of that membership.[70] Thus in the research security context, membership of any type of organisation with security implications would be sufficient ground for an inadmissibility decision.

Two cases then established the groundwork for judicial interpretation of the espionage provision in the *IRPA*: *Peer* and *Afanasyev.* In *Peer*,[71] a Pakistani citizen (and husband to a Canadian citizen) was found to be inadmissible to Canada because of the espionage provision in the *IRPA* for serving in Pakistan's Corps of Military Intelligence and its Inter-Services Intelligence Directorate.[72] Mr Peer argued his service did not constitute espionage, given his duties were largely equivalent to those of the Canadian Security Intelligence Service ('CSIS') and authorised by Pakistan's domestic law.[73] However, this contention failed because espionage 'does not have to have an illicit outcome as its goal',[74] nor is it 'dependant on whether the person who is engaged in the espionage does so only within the boundaries of his home country and reports to agencies in his home country, as in this case, or does so in a foreign country and reports to agencies of his home country'.[75]

64 Ibid [39].

65 Ibid [2], [37], [41].

66 [2007] CanLII 12841.

67 [2007] FC 43.

68 [2008] FC 88.

69 [2009] CanLII 93270.

70 Since those decisions, other decisions have also determined that it is not necessary for the acts of espionage by an organisation coincide with the timing of membership of the individual in that organisation: *Al Yamani v Canada (Minister of Citizenship and Immigration)* [2006] FC 1457; *Gebreab v Canada (Minister of Citizenship and Immigration)* [2009] FC 1213; *Gebreab v Canada (Minister of Citizenship and Immigration)* [2010] FCA 274.

71 *Peer* (n 38).

72 Ibid [25].

73 Ibid [23], [25]–[26].

74 Ibid [34].

75 Ibid [35]. Affirmed on appeal in *Peer v Canada (Citizenship and Immigration)* [2011] FCA 91.

Afanasyev v Canada[76] involved a decision to refuse Dmytro Afanasyev permanent residence in Canada based on the risk of espionage. Mr Afanasyev was a Ukrainian citizen who served in the Soviet Army from 1985 to 1987 in military signals intelligence, where (according to the CSIS) he was trained in radio intelligence and telecommunications interception.[77] However, Mr Afanasyev described his role as more clerical in nature, involving writing encrypted English words in a report and filing them with a duty officer.[78] In the first case in 2010, the judicial review application succeeded because the Court held that the immigration officer had failed to explain his reliance on CSIS reports over Mr Afanasyev's account of his actions: '[i]n those circumstances, it was imperative for the Officer to explain why he rejected the applicant's explanations'.[79] The Court also held that the immigration officer had failed to articulate how Mr Afanasyev's activities constituted 'espionage' within the meaning of the *IRPA*.[80]

Another case considering the risk of espionage under s 34(1)(a) of the *IRPA* was *Crenna*, where it was alleged that Elena Crenna had cooperated with an agent from the Russian Federal Security Service, who was investigating a construction project at which Ms Crenna worked.[81] The CFC held that Ms Crenna's actions did not engage the espionage definition because they were 'neither secret, clandestine, surreptitious nor covert', and so lacked the requisite character to be considered espionage.[82] *Crenna* thus became an important touchstone because it imported an element of secrecy or covertness that was otherwise lacking in the statutory text into the 'ordinary meaning' of espionage under s 34(1)(a).[83]

Given the global attention on Chinese acts of interference and influence in Canada from 2019 onwards,[84] the notion that espionage could be conducted by non-traditional actors, in non-traditional ways, has started to emerge with repercussions

76 [2010] FC 737 ('*Afanasyev*'). See also *Afanasyev v Canada (Citizenship and Immigration)* [2012] FC 1270.

77 *Afanasyev* (n 76) [4].

78 Ibid [32].

79 Ibid [33]. See also *Okomaniuk v Canada (Citizenship and Immigration)* [2013] FC 473, [25]–[28].

80 *Afanasyev* (n 76) [34], [36].

81 *Crenna* (n 36) [23]–[27].

82 Ibid [59].

83 *X (Re)* 125445 (n 61) [13], [45]; *Gao v Canada* [2022] FC 64, [38]–[39] ('*Gao*').

84 See, eg: Alex Joske, Australian Strategic Policy Institute, *China Defence Universities Tracker* (Report No 23, 25 November 2019); Alex Joske, Australian Strategic Policy Institute, *Hunting the Phoenix* (Report No 35, 20 August 2020); Scott Livingston, Centre for Strategic and International Studies, *The Chinese Communist Party Targets the Private Sector* (Report, 8 October 2020); Jude Blanchette, Centre for Strategic and International Studies, *Strengthening the CCP's "Ideological Work"* (Report, 13 August 2020); Tylecote and Clark (n 7).

for research security. In *Gao v Canada*,[85] the applicant had been employed with the Overseas Chinese Affairs Office ('OCAO') for 20 years and been deemed inadmissible to Canada. The CFC heard evidence that the OCAO was '(i) … involved in covert action *vis-a-vis* overseas Chinese communities, including monitoring their activities and exercising political influence; and (ii) [maintaining] policies on topics including "how to gain and consolidate trust amongst targets, how to actively manage targets and how to supervise their behaviour"'.[86] The CFC held it to be common ground between the parties that

> the OCAO infiltrates the inner workings of the overseas Chinese communities, selectively imparts to them only what they need to know, and denies them access to information that may affect the success of the OCAO and the Communist Party of China's *qiaowu* work. Based on the record, it was reasonable for the Officer to conclude that, in fact, there are reasonable grounds to believe that OCAO engages in covert and surreptitious intelligence gathering.[87]

Following the decision in *Gao*, in *X (Re)*[88] the Immigration Review Board considered the case of a Chinese national who was employed at the Information Engineering University ('PLAIEU') of the People's Liberation Army ('PLA') and purportedly held a military rank. The Board held that '[b]road meaning is to be given to the term "espionage", which has been defined as a method of information gathering, by spying, by acting in a covert way, or through "surreptitious or covert information gathering"'.[89] Applying that definition, the Chinese national was ruled not inadmissible to Canada, as the Minister failed to prove any requisite connection between PLAIEU and bodies of the Chinese state which conducted espionage activities.[90] A later decision of the CFC in *Geng v Canada*[91] — where the applicant was a professor who taught linguistics at the Luoyang Foreign Languages Institutes, including to current and future intelligence operatives of the PLA — held that '[w]hile membership is an expansive concept in the context of *IRPA* s 34, it can't be stretched infinitely'. So, whilst membership can be considered under s 34(1)(f), mere membership of a group is insufficient to find that an applicant is *per se* at risk of engaging in espionage under s 34(1)(a).[92]

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85 *Gao* (n 83). See also *Zhang v Canada (Public Safety and Emergency Preparedness),* [2023] CanLII 123767.

86 *Gao* (n 83) [33].

87 Ibid [39].

88 *X (Re)* [2021] CanLII 151780.

89 Ibid [26], citing *Qu* (n 37) [12], [33] and *Sumaida* (n 37) [21].

90 Ibid [28]–[32], [73]–[81]. Much of these reasons are redacted, somewhat limiting their utility; cf *Meng v Canada (Public Safety and Emergency Preparedness)* [2023] CanLII 76330, [7], [53]–[57].

91 *Geng v Canada (Citizenship and Immigration)* [2023] FC 773.

92 Ibid [75].

Taking the above cases together, the implications for migration control in research security are relatively straightforward. As early as 2000, the CFC had established that simply 'reporting' information of intelligence value could constitute espionage if it met a 'secret, clandestine, surreptitious or covert' criterion,[93] and this could include publicly available information.[94] That definition of espionage was upheld in *Peer*[95] and not disturbed by the Federal Court of Appeal.[96] From 2013 when the changes in the *Faster Removal Act* took effect, the bar was lowered further to involve conduct either 'against Canada' or 'contrary to Canada's interests'.[97] On that basis, the reporting of 'sensitive' information (but not necessarily information regarding 'national security')[98] contrary to Canada's interests would be espionage.[99] Therefore, where a student, researcher or professor engages in research with 'intelligence value' — whether that research is publicly available or not — and shares that information with a foreign power in a secret, clandestine or surreptitious way, they are likely to be engaging in espionage.

So, what does the *Li* case offer from the perspective of research security? His Honour Crampton CJ held that an individual did not need to be operating under the control or direction of a foreign entity to be at risk of committing espionage contrary to Canada's interests. That position seems broadly analogous to the decision in *Qu*, where the CFC held that '[t]he words "espionage", "sabotage" and "subversive activity" would appear to have no special legal meaning, and they must therefore be given their ordinary meaning … espionage is simply a method of information gathering by spying, by acting in a covert way'.[100]

However interesting, it is entirely possible that the decision in *Li* could have been supplanted by the Federal government policy enacted by Canada shortly after *Li* was decided. Effectively, any researcher (foreign or domestic) now intending to work in a listed sensitive technology research area must not collaborate with any entity on the NRO list and must cease any association before commencing work. Microfluidics would find several bases for inclusion in a sensitive technology research area (under either 'advanced manufacturing' or 'advanced medical/health care'), and Beihang University (where Mr Li completed a bachelor's degree in Mechanical Engineering) is listed on the NRO and has strong ties to the defense industry in the PRC. Therefore, it is unlikely that Mr Li would have been permitted to perform

93 *Qu* (n 37) [45]–[46]; cf *Crenna* (n 36).

94 *Peer* (n 38) [25].

95 Ibid.

96 Ibid.

97 *Weldemariam v Canada (Public Safety and Emergency Preparedness)* [2020] 4 FCR 354, [42].

98 *Mason* (n 40).

99 For example, the reporting on the activities of students: *Qu* (n 34), dissidents: *X (Re)* 142993 (n 60); *X (Re)*132626 (n 60); and *X (Re)* 135483 (n 60), or Chinese nationals: *Gao* (n 78).

100 *Qu* (n 37) [25], [48], quoting *Re Wenberg* (1968) 4 IAC 292, 307.

his research or qualified for the issue of a visa in the first place.[101] Similarly, future researchers — whether students or not — will need to satisfy their *alma mater* that they have no association with any NRO to participate in research in sensitive technology areas, well in advance of any migration process under Canadian law.

I will now turn to Australia — which has no such, or similar, policy — to examine how migration law could enforce research security, and the analogies with Canada's previous approaches.

IV Australian Migration Law and Research Security

Entry to Australia (including for study purposes) for non-citizens (both students and academics) is regulated by the *Migration Act 1958* (Cth) ('*Migration Act*') and the *Migration Regulations 1994* (Cth).[102] To qualify for a visa, applicants must satisfy a number of statutory criteria — for this article I will limit the consideration of these to the public interest criteria ('PIC') in Schedule 4 of the *Migration Regulations*.[103] Relevantly these include meeting the character test,[104] and not being assessed by the Australian Security Intelligence Organisation ('ASIO') as a risk to security;[105] or subject to declarations or sanctions from the Foreign Minister.[106] For example, the Minister can declare that 'there is an unreasonable risk of an unwanted transfer of critical technology by the applicant'.[107] Failure to meet the character test under the *Migration Act* also enlivens a discretion to refuse or cancel any form of visa, including where that refusal or cancellation is 'in the national interest'.[108] In doing so, delegates of the Minister must consider the directions issued by the Minister under s 499 of the *Migration Act*,[109] but the Minister is not so bound when exercising those decisions personally. When a decision is rendered by the Minister personally, this has been considered a 'god-like power' because of

101 *Li* (n 1) [15]–[16], [60].

102 *Migration Regulations 1994* (Cth) sch 2, cl 408.226 ('*Migration Regulations*').

103 *Migration Act 1958* (Cth) s 31(3) ('*Migration Act*'); ibid reg 2.03(1), sch 4 pt 1.

104 *Migration Act* (n 103) ss 501(1), (6); *Migration Regulations* (n 102) sch 4 criterion 4001.

105 *Migration Regulations* (n 102) sch 4 criterion 4002.

106 Such as 'a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests' or 'a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction': ibid criteria 4003(a)–(b), 4003A.

107 Ibid criterion 4003B.

108 *Migration Act* (n 103) ss 501(1)–(3). Some cancellations 'must' or 'must not' be performed by the Minister or delegate if prescribed circumstances are met: *Migration Act* ss 134B; *Migration Regulations* (n 102) reg 2.43.

109 Minister for Immigration and Citizenship (Cth), *Direction No 99: Visa Refusal and Cancellation Under s501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (23 January 2023).

the 'non-delegable, non-reviewable and non-compellable' nature of that decision.[110] A visa already granted may also be cancelled if any of the following apply:

- the holder might pose a risk to 'the health, safety or good order of the Australian community' or 'the health or safety of an individual or individuals';[111]
- the holder 'is not, or is likely not to be, a genuine student'[112]
- the holder 'has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa';[113] or
- 'there is an unreasonable risk of an unwanted transfer of critical technology by the holder of the visa'.[114]

An applicant fails the character test if, *inter alia,* he or she has or had membership or association with a 'group, organisation or person [who] has been or is involved in criminal conduct'[115] (broadly analogous to s 34(1)(f) of the Canadian *IRPA*). Another ground for failing the character test is where there is an apprehended risk that the person may 'engage in criminal conduct in Australia' or otherwise 'represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to … that community or segment, or in any other way' (analogous to s 34(1)(b) of the *IRPA*).[116] A further ground is where 'the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security' (analogous to s 34(1)(d) of the *IRPA*).[117] Likewise, a determination by the Foreign Minister under PIC 4003 or 4003A, that the applicant is a risk to Australia's foreign policy interests and/or directly or indirectly associated with weapons of mass destruction, is fatal to an applicant's attempt to obtain a visa.[118]

Australian courts have traditionally limited migration reviews actuated by national security concerns to questions of law around legality, procedural fairness and reasonableness of decision-making, a position certainly far from ideal. Not only

110 Samuel C Duckett White, 'God-Like Powers: The Character Test and Unfettered Ministerial Discretion' (2020) 41(1) *Adelaide Law Review* 1; Aeron Leyesa and Janice Yong, '*Deus Ex* Minister: *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 397 ALR 1' (2022) 43(2) *Adelaide Law Review* 961, 961.

111 *Migration Act* (n 103) s 116(1)(e).

112 Ibid s 116(1)(fa)(i).

113 Ibid s 116(1)(fa)(ii).

114 Ibid s 116(1)(g); *Migration Regulations* (n 102) reg 2.43(1)(c). This would potentially include the transfer of 'sensitive' technologies such as microfluidics to a country such as China.

115 *Migration Act* (n 103) s 501(6)(b).

116 Ibid s 501(6)(d).

117 Ibid s 501(6)(g), citing the definition of 'security' in the *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 (which includes espionage) ('*ASIO Act*').

118 *Chen (Migration)* [2023] AATA 297; *Zhu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] FedCFamC2G 411.

can it lead to confusing sets of circumstances where an appellant is left in the dark as to the likely grounds of any appeal or review,[119] it also renders the appeal of a visa refusal a functional nullity if the visa could not be granted because an adverse determination remains in place.[120] Further, it can mean that the courts must curtail the ordinarily expansive rights to procedural fairness in the interests of protecting the information or sources that demonstrated the security concerns.[121] And finally, it can result in judicial unwillingness to question matters of policy better left to the executive (as national security matters largely are).[122]

There are two reasons that this approach is relevant to research security. First, in respect of applicants who undergo a security assessment by ASIO, it is implicit in the Adverse Security Assessment ('ASA') process that the applicant will be assessed for risk of espionage (as well as all other forms of security threat). This is because the definition of 'security' in the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') invokes the protection of the Commonwealth, States and Territories (and their people) from a wide range of conduct contrary to such security.[123] This includes acts of espionage, but also foreign interference, sabotage, as well as a catch-all to protect 'Australia's territorial and border integrity from serious threats' (without specifying what such threats might be).[124] Secondly, the *Migration Regulations* allow for the making of Ministerial determinations that an individual poses a risk for proliferation of weapons of mass destruction or — since the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* (Cth) ('*PACT Regulations*') took effect — of unreasonable risk of technology transfer that sit at a lower evidentiary threshold. Where ASIO does not issue an

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119 *Leghaei v Director-General of Security* (2007) 241 ALR 141 ('*Leghaei*'). See also Leyesa and Yong (n 110) 967.

120 *SDCV v Director-General of Security* (2021) 284 FCR 357, 370 [44] (Bromwich and Abraham JJ) ('*SDCV*'). By contrast, in *CMA19 v Minister for Home Affairs* [2020] FCA 736 ('*CMA19*'), the Federal Court held that the Minister was wrong to deny a protection visa to a person who had served as an intelligence officer in the Liberation Tigers of Tamil Eelam, and potentially committed war crimes or crimes against humanity (thus failing the character test), on the grounds that he posed no risk to Australian society: at [1]–[8].

121 *Leghaei* (n 119). See also Keiran Hardy, 'ASIO, Adverse Security Assessments and a Denial of Procedural Fairness' (2009) 17(1) *Australian Journal of Administrative Law* 39, 39–44; Pauline Collins and Anthony Gray, '*SDCV v Director-General of Security*: Procedural Fairness and the Ability to Decide a Matter Based on Secret Evidence Not Disclosed to a Party or their Legal Team' (2024) 98(1) *Australian Law Journal* 57.

122 Amanda Sapienza, 'Justiciability of Non-Statutory Executive Action: A Message For Immigration Policy Makers' (2015) 79 *AIAL Forum* 70; John Logan, 'Not a Suicide Pact?: Judicial Power and National Defence and Security in Practice' (2022) 106 *AIAL Forum* 20; Greg Carne, 'The Legal Rhetoric of Safety and Security: Improving National Security Law Process, Enactment and Content by Moderating its Executive and Legislative Influence' (2023) 50(1) *University of Western Australia Law Review* 168.

123 *ASIO Act* (n 117) ss 4, 17, pt IV.

124 Ibid s 4 (definition of 'security').

ASA, or otherwise produces a security assessment favourable to the applicant, the Ministers of both immigration and foreign affairs have tremendous discretion to otherwise bar that applicant from Australia.

In *QDJM v Director-General of Security*, for example, a review was brought in the Administrative Appeals Tribunal by an applicant whose identity was protected.[125] The applicant had conducted research and provided material support at the instructions of an individual from the applicant's home country, where the applicant had assumed this individual was a member of his home country's intelligence services.[126] The applicant sought to dispute the ASA that ASIO produced about him on the basis that his conduct was not clandestine or deceptive,[127] was not conducted for 'intelligence purposes, or for the purpose of affecting political or governmental processes',[128] and was not 'otherwise detrimental to the interests of Australia'.[129]

The Tribunal disagreed, rejecting the applicant's submissions. Instead, the Tribunal found that the applicant's actions were motivated by instructions received from a foreign official to conduct property searches in Australia on Australian properties, and to deliver $20,000 to a person residing in Australia.[130] The Tribunal considered the applicant's conduct was both clandestine and deceptive, given that he undertook actions to comply with requests of a foreign government in circumstances that obscured the involvement of that same government.[131] The Tribunal was also satisfied that these acts were for 'intelligence purposes' because they were not done voluntarily, but at the behest of the foreign official (who the applicant knew was a member of a foreign intelligence service).[132] The Tribunal was satisfied that the applicant's conduct therefore affected Australia's national security.[133] The basis for the ASA was validated. A researcher, providing access to research data at the behest of a foreign intelligence service, may also fall under the same provisions as *QDJM* and be the subject of an ASA.

125 [2021] AATA 4761 ('*QDJM*').

126 Ibid [22]–[28].

127 Ibid [82]–[83].

128 Ibid [85], [87].

129 Ibid [85].

130 Ibid [68]–[70].

131 Ibid [79]. Foreign interference is any conduct that is 'clandestine or deceptive and [is] carried on for intelligence purposes [or] … carried on for the purpose of affecting political or governmental processes [or] are otherwise detrimental to the interests of Australia': *ASIO Act* (n 117) s 4.

132 A term not defined in the various Acts referenced in this article but given wide scope by the jurisprudence: *Jaffarie v Director General of Security* (2014) 226 FCR 505, 525 [64]–[65]; *SDCV* (n 120) 399 [175]; *QDJM* (n 125) [89]–[94].

133 *Criminal Code Act 1995* (Cth) sch 1, ss 90.4(2)(a), (f) ('*Criminal Code*'). The learned Tribunal Deputy President did not engage with whether the acts of foreign interference were 'detrimental to the interests of Australia', as it was not necessary for the Tribunal to consider that alternative submission: *QDJM* (n 125) [98].

When compared to the Canadian provisions in the *IRPA*, Australian migration law appears both broader in scope and more flexible in dealing with potential risks to research security by foreign nationals. The recent changes to the *PACT Regulations* likewise make clear that migration officials can (and should) have regard to the likelihood of breaches of research security during the visa process, by considering whether a student or researcher might pose an 'unreasonable' risk of unwanted technology transfer.[134] Given the above analysis and the paucity of literature on research security in Australia, what can *Li* teach our government and legal professionals about the use of migration law to control research security concerns?

V What Can Australia Learn From *Li*?

The first obvious difficulty with assessing *Li* in an Australian migration law context is that, unlike Canada, Australia has a statutory definition of espionage.[135] Given such a definition exists, judges may be somewhat constrained from widening the meaning of the word to take it beyond the context of the Acts in which it appears.[136] In Australia, where a judge might be invited to redefine the word espionage — such as by reference to it in an ASA or in the reasons of the Minister or their delegate — the term must be afforded a construction which gives effect to the object of the *Migration Act*,[137] being to 'regulate, *in the national interest*, the coming into, and presence in, Australia of non-citizens'.[138] The imposition of that national interest criterion has been held by the Federal Court of Australia to invoke a 'common thread' around 'the risk of harm posed by a person coming into or remaining in the Australian community'.[139] The question must be answered with respect to whether a refusal or cancellation decision 'lacked an evident and intelligible justification'.[140]

On that basis, there are a number of pathways that might plausibly be deployed to cater to an entrant in Mr Li's situation and evaluate the potential likelihood of a removal being properly grounded on those provisions. It can be assumed that a foreign individual like Mr Li, intending to undertake research or work in a sensitive and high-technology domain who has expressed a desire to return to his home country, would probably draw the attention of ASIO and be subject to a security

134 *Migration Regulations* (n 102) r 1.15Q, sch 4 criterion 4003B.

135 Not only under the *ASIO Act* (n 117), s 4, but also as a suite of discrete offences set out in *Criminal Code* (n 133) div 91 sub-divs A, B.

136 See the settled principles in: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27.

137 *Acts Interpretation Act 1901* (Cth) s 15AA.

138 *Migration Act* (n 103) s 4(1) (emphasis added).

139 *Roach v Minister for Immigration and Border Protection* [2016] FCA 750, [71], citing *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367, 380 [58].

140 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76].

assessment. Obviously, a prospective entrant that was the subject of an ASA would still likely see a visa application refused under s 501(6)(g) (unless the extant circumstances of their application warranted the Minister to not exercise their discretion to refuse the visa *à la CMA19*).[141] However, if one recalls the very expansive definition of 'security' in the *ASIO Act*[142] — and hence the various parameters towards which the inquiry of an ASA would be directed — a number of aspects of the entrant's history may be red flags from a research security perspective. After all, 'security' in the *ASIO Act* specifically includes 'protection of, and of the people of, the Commonwealth and the several States and Territories from … espionage',[143] as that term appears in the *Criminal Code*. 'Security' also includes protection from 'attacks on Australia's defence system' or 'acts of foreign interference'. Again, matters equally of relevance to acts intended to interfere with Australian research security. Thus, if ASIO formed the reasonable and real view that the entrant would pose a risk of espionage, attack on Australia's defence system, or foreign interference, ASIO would likely issue an ASA (resulting in the cancellation or refusal of the visa in question).

Of course, ASIO may decline to issue an ASA, particularly if they considered that the risk of an entrant being targeted or coerced on their return home was negligible or at least manageable. After all, it bears recalling that in *Crenna*, the Applicant's admission to Canada had in fact been cleared by the Immigration Department, the Minister's Office and CSIS.[144] So if an ASA was not issued in the case of our hypothetical entrant to Australia, the Minister would still have other means at his or her disposal if the Minister believed on reasonable grounds that the risk of espionage remained.

The Minister could conclude that the entrant's prior association with Beihang University — one of China's 'Seven Sons of National Defence' and an institution heavily involved with missile development for the PLA[145] — were matters of general conduct rendering him or her a person 'not of good character' under s 501(6)(c) of the *Migration Act*.[146] That seems a weak argument: to meet the criteria of poor character under s 501(6)(c) usually requires not only 'continuing conduct' but conduct of a kind 'that shows a lack of enduring moral quality'.[147] Given that mere association with a questionable institution was not deemed enough to warrant

141 *CMA19* (n 120).

142 *ASIO Act* (n 117) s 4.

143 Ibid s 4(a)(i) (definition of 'security').

144 *Crenna* (n 36) [44]–[50].

145 Australian Strategic Policy Institute, *Beihang University* (Web Page, 2019) <https://unitracker.aspi.org.au/universities/beihang-university/>.

146 *Wong v Minister for Minister Immigration and Multicultural Affairs* [2002] FCAFC 440, [33]. It also permits the consideration of conduct which occurs outside Australia: *DVE18 v Minister for Home Affairs* [2019] FCA 1389, [75]–[77].

147 *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, 426 [51]; cited in *Asare Appiah Johnson and Minister for Immigration, Citizenship, and Multicultural Affairs* [2023] AATA 251, [140].

inadmissibility under the *IRPA*,[148] I suggest it would equally fail to satisfy s 501(6)(c) of the *Migration Act*.[149]

As a ground for refusal, relying on an entrant's membership or association with a group or organisation that 'has been or is involved in criminal conduct'[150] is objectively less likely to fail. Section 501(6)(b) of the *Migration Act* does not require the Minister to consider whether the association or membership of the organisation colours the character of the applicant; membership or association under this statutory criteria is enough.[151] The Minister need only form a reasonable suspicion that a group or organisation has been or is engaging in criminal conduct (such as espionage), and then the Minister must make a finding of fact that the entrant was or is a member or associate of that entity.[152] The Minister's suspicion of criminal conduct does not require a conviction or court finding, merely an assessment of past facts to determine whether the association is 'innocent or culpable'.[153]

Indeed, based on the case of *Zhu* mere association seems capable of grounding a refusal decision.[154] On 8 June 2020, Xiaolong Zhu, a PhD student at the Queensland University of Technology, was deemed 'a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction (WMD)' by the Foreign Minister under PIC 4003(b), perhaps because of his prior association with Beihang.[155] Mr Zhu's review in the Administrative Appeals Tribunal and then the Federal Circuit and Family Court of Australia was unsuccessful. His Honour Egan J held that, as the WMD determination had not been revoked by the Foreign Minister, the applicant failed to meet the public interest criterion applying to the student visa under the *Migration Regulations* irrespective of whether or not he also demonstrated that he met the character test in s 501.[156] Meeting the character test and the adverse determination by the Foreign Minister were held to be separate considerations in the issue of a visa, such that

148 *Geng v Canada (Citizenship and Immigration)* [2023] FC 773.

149 Association with a university with strong defence ties also has no requisite grounding with the section in accordance with the Ministerial direction: Minister for Immigration and Citizenship (n 109) annex A section 2 cl 5(1)–(3).

150 *Migration Act* (n 103) s 501(6)(b); *Mrishaj v Minister for Immigration and Border Protection* (2016) 247 FCR 224.

151 '[T]he Minister is not required to further ruminate about whether a person's association with a group or organisation "has a bearing" on the person's character': *Stevens v Minister for Immigration and Border Protection* (2016) 153 ALD 346, 372 [102]. Cf *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 81 [230].

152 *Godley* (n147) 425 [47]; not disturbed on appeal: *Minister for Immigration & Multicultural & Indigenous Affairs v Godley* (2005) 141 FCR 552.

153 *NBMW v Minister for Immigration (No 2)* (2014) 222 FCR 376, 382–3, citing *Haneef* (n 151); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391. See also *Graham v Minister for Immigration and Border Protection* (2016) 246 FCR 439, 452 [58].

154 *Zhu* (n 118).

155 Ibid [3], [7], [10]–[15]. Cf Australian Strategic Policy Institute (n 145).

156 *Zhu* (n 118) [35].

there was no inconsistency in the Minister's delegate finding the applicant did not meet the PIC.[157]

Another foundation for visa refusal could also be based on ss 501(6)(d)(i) and (v) — the 'likelihood of criminal conduct' and/or 'likelihood of danger' grounds. Sub-sections 501(6)(d)(i) and (v) are cast in presumptive terms. It only considers possible future conduct by the visa applicant,[158] and the risk of that future conduct eventuating does not need to be a significant one.[159] Instead, these provisions consider the likelihood of conduct occurring which colours the applicant's character in a manner that affects the Minister's finding that they meet the character test. The criminal conduct contemplated by s 501(6)(d)(i) does not strictly require 'some temporal result, such as the incurring of a conviction',[160] though Ministerial Direction No 99 ('Ministerial Direction') makes clear that '[t]he reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded'.[161]

However, the specific form of risk posed by Mr Li as outlined above was one of coercion and targeting by the intelligence services of his home country to reveal sensitive information he obtained during his PhD study. Those acts could be covered by the criminal provisions for espionage, foreign interference, and the theft of sensitive information or trade secrets in the *Criminal Code*,[162] and so allow the possible future conduct of the applicant to be assessed under s 501(6)(d)(i) in those terms. The Ministerial Direction makes clear that much of this provision is focused on 'the use of violence as a legitimate means of political expression',[163] but these are not the only matters the Minister may consider. However, the provision has

157 Ibid [36]. Cf *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1, 48 [71].

158 'Shortly put, persons who have committed or are likely to commit criminal or other like conduct should not be permitted to travel to or remain in Australia. Because the purpose is to exclude those persons, the matters that are relevant to the exercise of the Minister's discretion will include any fact or circumstance which would suggest that a person of otherwise bad character (as it is defined in the Act) should be allowed to travel to or remain in Australia': *Akpata v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 65, 105.

159 '[I]f there is evidence suggesting that there is more than a minimal or remote chance': Minister for Immigration and Citizenship (n 109) annex A section 2 cl 6(2). The word 'significant' before the word 'risk' was removed by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) s 11.

160 *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, 194. In so doing, in the absence of a conviction the Minister's position on character 'will not be attained on slight material': at 194. See also *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 450–1 [122]–[128].

161 Minister for Immigration and Citizenship (n 109) annex A section 2 cl 6.1(2).

162 *Criminal Code* (n 133) divs 91, 92, 92A.

163 Minister for Immigration and Citizenship (n 109) annex A section 2 cl 6.3(1).

previously been interpreted as involving activities which are disruptive or involve violence, threatening harm to the community or a segment of that community'.[164]

Yet there are some challenges with that approach. First, the chance of our hypothetical entrant's future offending materialising would still need to be more than likely — a refusal based on this provision will only be successful at administrative or judicial review if the Minister can successfully establish the requisite inter-relationship between the establishment of the occurrence of past events and the evaluation of the prospect that an event might occur in the future.[165] Such an assessment is evaluative,[166] and so may be hard to prove in the terms that were described in *Li*, where the reasonable ground for espionage was the applicant being targeted and coerced on his return to China during or after his studies. That said, being the target of such coercion could still ground reasonable suspicion of the commission of an offence, such as espionage — 'reckless as to national security',[167] 'recklessly supporting foreign intelligence agency',[168] or 'theft of trade secrets involving foreign government principal'.[169]

Second, the nature of the evaluation by the Minister is made more challenging when attempting to determine the threshold at which an individual would pose such a future risk (especially for a covert crime like espionage). In cases of criminal offending — where statistical tests and psychological assessments may be undertaken on convicted criminals to assess the likelihood of their reoffending for that purpose[170] — criminal histories are usually used to demonstrate future risk,[171] and Mr Li did not have one. However, the language of the statute (particularly in

164 *BHL19 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 166 ALD 284, 300 [72]–[73]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* (2021) 285 FCR 540, 561–3 [81]–[87]. Cf *LLSY and Minister for Immigration and Citizenship* (2011) 55 AAR 57.

165 *Minister for Immigration and Ethic Affairs v Guo* (1997) 191 CLR 559, 574–5.

166 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 353 [89]; *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160, [2].

167 Where 'the person deals with information or an article; and the person is reckless as to whether the person's conduct will prejudice Australia's national security; and the conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal': *Criminal Code* (n 133) s 91.2(2).

168 Where 'the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and … the organisation is a foreign intelligence agency': ibid s 92.8.

169 Ibid s 92A.1(1).

170 See, eg, *CYTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 2940, [155].

171 *QKVH and Minister for Home Affairs* [2020] AATA 4431; *Sadiq and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 80.

s 501(6)(d)(v)) permits the Minister to take a 'pessimistic' and 'overly cautious' view of future offending, as the *Migration Act* 'is cast in terms that authorised the Minister to be highly protective of the Australian community when it [comes] to granting or refusing a visa when character is in issue'.[172] On that basis, a properly evidenced and well-crafted set of reasons could give rise to a refusal of a visa under section 501(6)(d)(i) of the *Migration Act*, based on the low (but beyond nil or remote) risk of the applicant's commission of a national security offence at some time in the future.[173]

Third, a risk that a person could be targeted or coerced by their home country into revealing sensitive information (and therefore committing a potential national security offence) is a matter going back to security under s 4 of the *ASIO Act*. Once again, the likelihood of an ASA being issued is high (given publicly available statements by ASIO about the threat posed by China[174]), and the assessment is likely to canvas the likelihood of Li's risk of espionage, foreign interference and technology theft as matters going to security.[175] If an ASA is issued, the ground of refusal under s 501(6)(g) of the *Migration Act* is enlivened in far less contentious circumstances than reliance upon s 501(6)(d)(i). Alternatively, a security assessment from ASIO (even a qualified assessment) that finds the applicant is *not* a threat to security would remain a highly relevant matter that weighs against a finding that the applicant poses a danger to the Australian community.[176]

The last matter for consideration involves recent developments by Australia to counter precisely the kinds of conduct that Li could have engaged in, quite separate from the application of the character test. From 1 July 2022, the *PACT Regulations* amendment took effect. The *PACT Regulations* amended the *Migration Regulations* by inserting a new PIC for the Minister to cancel a visa if the Minister was reasonably satisfied the visa holder posed 'unreasonable risk of unwanted critical

172 *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420, 490 [338]. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333.

173 *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1046, [43]–[44].

174 Jade Macmillan and Andrew Greene, 'ASIO Director Tells Five Eyes Intelligence Summit That Alleged Chinese Spy Was Removed from Australia', *ABC News* (online, 18 October 2023) <https://www.abc.net.au/news/2023-10-18/five-eyes-spy-summit-asio-cia-fbi-san-francisco/102984976>; Zeba Siddiqui, 'Five Eyes Intelligence Chiefs Warn on China's "Theft" of Intellectual Property', *Reuters* (online, 19 October 2023) <https://www.reuters.com/world/five-eyes-intelligence-chiefs-warn-chinas-theft-intellectual-property-2023-10-18/>; Evelyn Manfield, '"Disgruntled Employees" Being Targeted by Foreign Spies on Dark Web, As Insider Threats Become Major National Security Focus', *ABC News* (online, 1 November 2023) <https://www.abc.net.au/news/2023-11-01/criticial-infrastructure-review-finds-insider-espionage-threat/103048752>.

175 *ASIO Act* (n 117) s 4.

176 *DLF16 v Minister for Immigration and Border Protection* [2017] FCA 1072, [57]–[65].

technology transfer'.[177] A person poses such a risk if they could or might transfer (verbally or otherwise) a technology or any information about that technology that would 'harm or prejudice the security or defence of Australia', 'harm or prejudice the health and safety of the Australian public or a section of the Australian public', 'interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth', or 'harm or prejudice Australia's international relations'.[178]

There has been little time for courts and tribunals to consider these new provisions. That said, the Minister would need to make several findings to enliven a refusal ground under PIC 4003B. The first would be a finding that the named technology — in Mr Li's case, microfluidics — was on the prescribed list.[179] The second finding is whether the entrant posed a risk of 'unwanted technology transfer' by providing microfluidics technology in a manner that met one or more of the criteria in the *Migration Regulations*, such as by 'enabling critical technology to be used in a way that is contrary to Australia's international obligations or commitments'.[180] The Minister would need to be satisfied, and articulate in reasons, the precise international obligation or commitment that the technology could contravene. A less obvious and perhaps weaker argument might also focus on the effect of 'prejudice' to the health of the Australian public,[181] especially given this same prejudice was the focus of the CFC in the application of microfluidics being against Canada's interests.[182]

For the preceding reasons, had an entrant like Mr Li applied for a visa to research in Australia, there would have certainly been several potential grounds for refusal. The most likely and efficient pathway is the conduct of a security assessment by ASIO and potential issue of an ASA, enlivening refusal under s 501(6)(g). Otherwise, the matter falls to ministerial discretion, such as whether the Minister was satisfied that the entrant's association with Beihang University and/or risk of his committing a national security offence like espionage, foreign interference or theft of trade secrets rendered him not of good character under s 501(6), or that he posed an unreasonable risk of unwanted technology transfer in the field of microfluidics under the *PACT Regulations* and PIC 4003B. Of course, such findings would depend entirely on the

177 *Migration Regulations* (n 102) sch 4 pt 1 criteria 4003B. Schedule 8, cl 8204 also prohibits the holder of a sub-class 500 Student Visa from changing their course of study or thesis without permission from the Minister.

178 Ibid regs 1.15Q(1)(c)–(f).

179 Microfluidics is not specifically listed, though could be captured as an 'advanced manufacturing and materials technology' because it 'produces, forms, shapes or structures matter in forms with one or more definable properties, characteristics, qualities, or features, and the results thereof': ibid regs 1.03, 1.15Q(2); *Migration (Critical Technology — Kinds of Technology) Specification* (LIN 24/010) 2024.

180 *Migration Regulations* (n 102) r 1.15Q(1)(f)(ii).

181 Ibid reg 1.15Q(1)(d).

182 *Li* (n 1) [55], [76].

information that was available to the Minister's delegate at the time of making the decision.[183]

Australia's *Migration Act* thus appears *prima facie* capable of rendering a decision similar to the CFC in *Li* and supporting the protection of research security in Australia. The definition of espionage which the Chief Justice of the CFC outlined — 'that Mr. Li may be recruited or coerced by the PRC to engage in the espionage activities [outlined]'[184] — itself falls within both the criminal statutory definitions and the case law of decided migration cases which have considered the risks of espionage and foreign interference in Australia as a basis for refusing visas. Yet there is also apparent parliamentary intent to capture precisely the kind of conduct Mr Li could have engaged in by virtue of the passage of the *PACT Regulations*, showing the Australian legislature has clearly been alive to the potential risk of these sorts of issues.

VI Conclusion

Li was considered a controversial decision in Canada because it involved an expansion of a common law definition of espionage which, until that time, had stringently focused on conduct involving information collection that was secret, clandestine, surreptitious or covert.[185] That same definition has clear implications for students and researchers working with Canadian universities, by applying potential findings of espionage to the sharing of any of their research data with foreign intelligence or government officers. However Canadian government policy has, to a significant extent, placed an *ex ante* restriction on such collaborations where the applicant has had affiliations with an entity on the NRO list. The broader impacts of this policy decision are yet to be examined; however, it is clear that academic freedom will be infringed, as will numerous projects with economic, social and cultural benefits to Canada.

Indeed, one of the key issues that *Li* and the broader research security framework in Canada highlights for Australia is the need for a comprehensive national policy position on research security. In the current environment, a lack of governmental

183 It bears repeating that the Minister may exercise their discretion to cancel the visa if the person does not meet the character test and it is otherwise 'in the national interest': *Migration Act* (n 103) s 501(3). Such 'national interest' may be met with consideration of the risk of technology transfer by the applicant, such as are outlined in the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* (Cth).

184 *Li* (n 1) [63].

185 Will Tao, 'Part 2A — An Annotated Review of Li and the Unforeseen and Unsettled Legal Consequences of Expanding the Definition of Espionage', *Vancouver Immigration Blog* (Blog Post, 11 January 2024) <https://vancouverimmigrationblog.com/li-fc-espionage-part2a/>; Steven Muerrens, 'The Expansion of Inadmissibility for Espionage', *Muerrens on Immigration* (Blog Post, 17 January 2024) <https://meurrensonimmigration.com/the-expansion-of-inadmissibility-for-espionage/>.

certainty about the application of research security provisions in Australian university research and development is incredibly short-sighted. Whilst Australia does not need to go as far as Canada in erecting a named list of prohibited institutions, it certainly could do so and would join other Western nations like the United States and Japan.[186]

In Australia's defence, the *PACT Regulations* demonstrate the legislature's intention to proscribe precisely the form of conduct that research security is targeted towards: the collection of information or material that touches upon advanced technologies and is disclosed to a foreign nation to the detriment of Australia or Australia's interests. These changes to Australian immigration laws will enable the Minister to have a clearer pathway to refusing potential risks to Australia's higher education research sector. Where the *PACT Regulations* do not apply, ASIO security assessments and the character test in s 501(6) of the *Migration Act* remain highly useful tools to support the objects of the Act in determining the entry status of non-citizens to Australia in a manner that meets the public interest.

There are some matters which could warrant further scrutiny and research, both by the legal profession and the academic community. The first is that the *PACT Regulations* require the Minister to publish an instrument defining the term 'critical technology'.[187] Although a reasonable assumption would be to suggest that such an instrument would prescribe anything on the *List of Critical Technologies in the National Interest*[188] (which includes artificial intelligence, quantum technologies, biotechnology and clean energy generation and storage), as well as any of the military or dual-use technologies listed on the *Defence and Strategic Goods List 2024* (Cth),[189] these lists do not completely overlap. Where a technology is in the national interest but is not proscribed in the Minister's declaration, the PIC 4003B criterion cannot be relied upon in refusal or cancellation decisions, meaning that Australia lacks access to one of the most useful tools in regulating the types of conduct described in *Li*.

The Direction could also be amended to contemplate past actions of a visa applicant or holder that run counter to Australia's interests.[190] Currently, Australian interests

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186 See, eg: Bureau of Industry and Security, *Lists of Parties of Concern* (Web Page) <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern>; Ministry of Economy, Trade and Industry, *Review of the End-User List* (Web Page, 6 December 2023) <https://www.meti.go.jp/english/press/2023/1206_001.html>.

187 *Migration Regulations* (n 102) regs 1.03, 1.15Q(2). Currently the Migration (Critical Technology — Kinds of Technology) Specification (LIN 24/010) 2024.

188 Department of Industry, Science and Resources, *List of Critical Technologies in the National Interest* (Web Page, 19 May 2023) <https://www.industry.gov.au/publications/list-critical-technologies-national-interest>.

189 Made under the *Customs Act 1901* (Cth) s 112(2A)(aa) and enforceable by the *Defence Trade Controls Act 2012* (Cth).

190 This matter was raised but not considered by the Administrative Appeals Tribunal in *QDJM* (n 125) [106]–[108].

do not have the same level of statutory recognition as Canadian interests do in the *IRPA*. Whilst such matters are considered by ASIO in the conduct of a security assessment,[191] ASIO may reach a conclusion that the applicant or holder does not pose a risk to Australia's security. In such cases, the Department of Home Affairs should be permitted the widest possible scope to consider the relevant risks which may be posed by a potential arrival into Australia. Without a clear recognition of Australia's interests in the underpinning document for use in such decisions, it is entirely possible that one day a decision may be made that compromises those very same interests.

Finally, there will need to be a groundswell in research on the unintended implications of these controls on the notions of open collaboration, freedom of expression and publication of results that are the hallmarks of Western universities. These discussions in the literature are still very much in their infancy, and somewhat *ad hoc* in their approach and focus.[192] Not only will further research provide a more nuanced understanding of the contours of academic freedom, but it will ensure that academic institutions — especially in the West — do not end up aping the draconian control systems of the very nation-States they are attempting to protect themselves against.

191 Australian interests are imported into 'acts of foreign interference' in *ASIO Act* (n 117) s 4, and thus become a matter of 'security'. An ASA will enliven s 501(6)(g) and inform a refusal or cancellation.

192 Grubbs (n 8); Shih (n 11); Robert Schaefer, 'Academic Freedom and International Students, Part 5: The Gray Areas' (2024) 49(2) *ACM SIGSOFT Software Engineering Notes* 10.

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SAILING TOO CLOSE TO THE WIND: *KARPIK V CARNIVAL PLC* (2023) 98 ALJR 45

I Introduction

On 8 March 2020, the *Ruby Princess* passenger cruise ship departed from Sydney, destined for New Zealand. The ship prematurely returned to Sydney on 19 March 2020 after an outbreak of COVID-19 on board, infecting more than 660 passengers and resulting in 28 deaths.[1] Ms Susan Karpik, a passenger who contracted COVID-19 while aboard, instituted representative proceedings under pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCAA*') for claims in tort and under the *Australian Consumer Law* ('*ACL*')[2] against Carnival plc and its subsidiary, Princess Cruise Lines Ltd (together, 'Princess').[3] The High Court unanimously held that pt 2-3 of the *ACL* had extraterritorial application to a class of cruise contracts formed outside of Australia with foreign corporations who were carrying on business within Australia.[4]

At the heart of *Karpik v Carnival Plc* ('*Karpik*')[5] is a caution against overreliance on canons of statutory construction where the wording of a statute demonstrates contrary Parliamentary intent. Indeed, the decision also serves as a warning to foreign corporations carrying on business in Australia that 'a price of doing so

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1 Jamie McKinnell, 'Ruby Princess Passengers Win Class Action Lawsuit Against Carnival Australia Over COVID Outbreak on Ill-fated Voyage', *ABC News* (online, 25 October 2023) <https://www.abc.net.au/news/2023-10-25/nsw-ruby-princess-passengers-win-class-action-carnival/103018412>; Maeve Bannister, 'Ruby Princess Liner Negligent, Misleading in COVID-19 Trip', *Australian Financial Review* (online, 25 October 2023) <https://www.afr.com/companies/tourism/ruby-princess-operator-negligent-for-covid-cruise-20231025-p5eevh>.

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

3 *Karpik v Carnival Plc* (2023) 98 ALJR 45 ('*Karpik*'). Carnival plc was the charterer and operator of the ship, while Princess Cruise Lines Ltd was the ship's owner and marketer of the cruises.

4 Carnival plc was incorporated in the United Kingdom, whilst Princess Cruise Lines Ltd was registered in Bermuda: ibid 49 [2].

5 *Karpik* (n 3).

is that the corporation is subject to and [must comply] with statutes intended to provide protection for consumers'.[6]

This case note examines: (1) the legislative landscape of the *ACL* and judicial development of the presumption against extraterritoriality; (2) the facts underlying *Karpik* and the findings of lower courts; (3) the High Court decision; and (4) the implications of *Karpik* on the future of the presumption, as well as for corporations relying on standard form contracts[7] and class action waivers in Australia.

II Background

A *The ACL*

In the late 2010s, Australia's consumer protections were considered 'largely effective',[8] 'sound', and when compared on an international level, 'broadly appropriate'.[9] But one thing was abundantly clear: 'there [was] scope to do much better'.[10] The introduction of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') was the largest overhaul of Australian consumer law in over 25 years.[11] Australia's consumer law previously stemmed from over 20 pieces of law, across nine different jurisdictions.[12] Central to the previous regime was the *Trade Practices Act 1974* (Cth) ('*TPA*'),

6 Ibid 55 [38].

7 A standard form contract is defined in s 27 of the *ACL* by reference to a series of factors including the relative bargaining power of the parties, the number of similar contracts one party has made, and how much opportunity to negotiate the other party has.

8 Dr Steven Kennedy, 'An Introduction to the Australian Consumer Law' (Speech, Standing Committee of Officials of Consumer Affairs, 27 November 2009) 4.

9 Productivity Commission, *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report* (Final Report No 45, 30 April 2008) 7–8 ('*Productivity Commission Report*').

10 Ibid 11.

11 Kennedy (n 8) 2.

12 On a federal level, most of the regulatory regime was found within the *Trade Practices Act 1974* (Cth) ('*TPA*') and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). Across the states and territories, there were the Fair Trading Acts: *Fair Trading Act 1987* (NSW); *Fair Trading Act 1999* (Vic) ('Victorian *FTA*'); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1987* (WA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1992* (ACT); *Consumer Affairs and Fair Trading Act 1990* (NT). Some states supplemented these statutes with further regulation: *Consumer Affairs Act 1971* (WA); *Consumer Transactions Act 1972* (SA); *Fair Trading (Consumer Affairs) Act 1973* (ACT). It was also common for the states and territories to have additional legislation relating to the selling of goods: *Sale of Goods Act 1923* (NSW); *Goods Act 1958* (Vic); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (WA), *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1972* (NT).

which sat alongside state and territory legislation.[13] Whilst this mechanism provided a 'broad platform for consumer protection', there were 'systemic impediments in the framework'.[14] Flaws included regulatory complexity, perverse outcomes for consumers, lack of policy responsiveness to emerging needs and problems relating to contract terms and information disclosure.[15] As for a statutory 'unfair contract regime', nothing concrete existed. The *TPA* addressed unfair contract terms generically through misleading and deceptive conduct offences.[16] Victoria introduced some regulations governing the use of unfair or detrimental contract terms in consumer contracts — however, this was not reflected across the country.[17] Australia's consumer protections were complex, inconsistent and outdated.

The Productivity Commission found that a national scheme governing unfair contract terms, consumer protections, fair trading and product safety was necessary.[18] Thus, the *ACL* was born, operating in furtherance of the object of the *CCA*: enhancing 'the welfare of Australians … through the provision for consumer protection'.[19]

The *ACL* introduced an unfair contract terms regime to 'fix the deficiency' of the previous framework.[20] Specifically, ss 23 and 24 provide that:

> **23 Unfair terms of consumer contracts and small business contracts**
>
> (1) A term of a consumer contract or small business contract is void if:
> (a) the term is unfair; and
> (b) the contract is a standard form contract.
>
> (2) …
>
> (3) A ***consumer contract*** is a contract for:
> (a) a supply of goods or services; or
> (b) a sale or grant of an interest in land;
> to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

13 Ibid.

14 *Productivity Commission Report* (n 9) 7–8.

15 Ibid 9.

16 *TPA* (n 12) s 52.

17 Victorian *FTA* (n 12) pt 2B.

18 *Productivity Commission Report* (n 9) 19.

19 *CCA* (n 2) s 2.

20 *Productivity Commission Report* (n 9) 34.

> **24 Meaning of *unfair***
>
> (1) A term of a consumer contract or small business contract is ***unfair*** if:
> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
>
> (2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
> (a) the extent to which the term is transparent;
> (b) the contract as a whole.

A term is deemed unfair where all three elements in s 24(1) of the *ACL* are satisfied.[21] First, there must be a 'significant imbalance in the parties' rights and obligations'.[22] For example, in *Perera v Bold Properties (QLD) Pty Ltd*, a term allowing Bold Properties to unilaterally vary rates without opportunity for negotiation or termination was held to constitute a significant imbalance.[23] Second, the term must not be reasonably necessary to protect the legitimate interests of the advantaged party.[24] There is a presumption that the term is not reasonably necessary, with the onus on the reliant party to discharge the presumption.[25] Third, the term must cause detriment to the aggrieved party if relied upon,[26] whether financial or otherwise.[27]

B *The Presumption Against Extraterritoriality*

In the absence of express words as to the territorial reach of the legislative subject matter, the orthodox approach is that the law is 'fundamentally territorial' such that statutes are presumed to not operate extraterritorially.[28] That is, state or territory

21 See also examples of unfair terms set out in *ACL* (n 2) s 25.

22 *ACL* (n 2) s 24(1)(a).

23 [2023] QDC 99 [84].

24 *ACL* (n 2) s 24(1)(b).

25 Ibid s 24(4).

26 Ibid s 24(1)(c).

27 See, eg, *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436, [173].

28 Chief Justice Andrew Bell, 'Extraterritoriality in Australian Law' (Spigelman Oration, Banco Court, 27 April 2023) 9 [26]. See also: *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* (2018) 336 FLR 37, 73 [155] (Basten JA); *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 43 (Windeyer J), 22–23 (Kitto J, McTiernan J agreeing at 20); *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101, 132 [145] (Emmett JA and Ball J, Bathurst CJ, Beazley P and MacFarlan JA agreeing at 103–4 [1]–[3]).

statutes only apply within that state or territory, and Commonwealth statutes only apply within Australia.[29] The origin of the common law presumption is found in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association*, in which O'Connor J remarked that '[m]ost statutes, if their general words were to be taken literally … would apply to the whole world, but they are always read as being *primâ facie* restricted in their operation within territorial limits'.[30] Shortly thereafter, Isaacs J commented in *Morgan v White* that the subjects 'in respect of which Parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction'.[31] The presumption may be displaced where: (1) the statute contains express contrary words;[32] (2) the construction would frustrate the operation of the statute;[33] or (3) extraterritorial effect is indicated in the 'object, subject matter or history of the enactment'.[34] Statutory presumptions have been introduced to the same effect,[35] but the common law presumption is capable of arising independently of statute.[36]

The traditional formulation of the presumption is grounded in historic notions of territorial sovereignty,[37] leading statutes to be understood as confined to that which 'is within the province of our law to affect or control'.[38] This framing was recently embraced by Kiefel CJ and Gageler J in *BHP Group Ltd v Impiombato* ('*Impiombato*') in which their Honours considered that the presumption was better described as a 'presumption in favour of international comity'.[39] Indeed, 'it is by

29 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2017) 227.

30 (1908) 6 CLR 309, 363.

31 (1912) 15 CLR 1, 13.

32 See, eg: *Waller v Freehills* (2009) 177 FCR 507, 519–20 [50]–[53]; *XYZ v Commonwealth* (2006) 227 CLR 532, 535–6 [4] (Gleeson CJ).

33 See, eg, *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531, 535–6 (Lehane J, Lockhart and Foster JJ agreeing at 533).

34 *Schmidt v Government Insurance Office (NSW)* [1973] 1 NSWLR 59, 67–8, citing GFL Bridgman, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 7th ed, 1929) 124.

35 See, eg: the combined operation of ss 12(1)(b) and 5(2) of the *Interpretation Act 1987* (NSW); *Acts Interpretation Act 1901* (Cth) s 21(1)(b).

36 *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 159 [28].

37 *BHP Group Ltd v Impiombato* (2022) 276 CLR 611, 623 [24] (Kiefel CJ and Gageler J) ('*Impiombato*').

38 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J) ('*Wanganui-Rangitikei*').

39 *Impiombato* (n 37) 623 [23] (Kiefel CJ and Gageler J). See also Stuart Dutson, 'The Territorial Application of Statutes' (1996) 22(1) *Monash University Law Review* 69, 76–7.

reason of the respect for the sovereignty of other nations that a state will not pass laws which purport to operate in or regulate conduct in other jurisdictions'.[40]

III The Case

A *Facts*

Within the representative proceedings brought by Ms Karpik, 696 passengers formed the United States ('US') subgroup, who were parties to the US Terms and Conditions. Relevantly, these Terms and Conditions included: (1) a class action waiver clause; (2) a choice of law clause applying the general maritime law of the US; and (3) an exclusive jurisdiction clause in favour of the US District Courts for the Central District of California in Los Angeles.[41] Princess sought a stay of proceedings insofar as they related to the US subgroup, arguing that the class action waiver clause meant these members could only pursue *individual* legal action.[42] Mr Patrick Ho, a Canadian passenger and representative of the US subgroup, resisted the application on the basis that the clause was void for unfairness under s 23 of the *ACL*.[43]

Four issues arose for determination by the primary judge, and on appeal to both the Full Court of the Federal Court of Australia ('FCFCA') and the High Court:

1. The extent of any extraterritorial application of s 23 of the *ACL*;
2. If s 23 did apply, whether the class action waiver clause was an unfair contract term;
3. Whether the class action waiver clause was void for being contrary to pt IVA of the *FCAA*; and
4. The enforceability of the exclusive jurisdiction clause.

B *Prior Proceedings*

The primary judge, Stewart J, refused the stay application on the basis that the US Terms and Conditions which Princess relied upon were not validly incorporated into Mr Ho's contract.[44] Nevertheless, his Honour went on to hold that, should those terms be incorporated into Mr Ho's contract, the *ACL* had extraterritorial application to that contract by operation of s 5(1)(g) of the *CCA*.[45] Justice Stewart also

40 Bell (n 28) 11 [27]. See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424 (Dixon J), quoting *Niboyet v Niboyet* (1878) 4 PD 1, 7 (James LJ).

41 *Karpik* (n 3) 50–1 [13]–[16].

42 Ibid 59 [54].

43 Ibid 49 [3]–[4]. Note that the application was not resisted by Mr Ho directly, but by Ms Karpik as the initiator of representative proceedings.

44 *Karpik v Carnival plc* (2021) 157 ACSR 1, 19 [74].

45 Ibid 29 [126].

found that the class action waiver clause would be void for unfairness,[46] that the clause was not contrary to pt IVA of the *FCAA*[47] and that there were 'strong reasons for not enforcing the exclusive jurisdiction clause'.[48]

On appeal to the FCFCA, the Court unanimously held that the US Terms and Conditions were incorporated into Mr Ho's contract.[49] The majority (being Allsop CJ and Derrington J, with Rares J dissenting) allowed the appeal, enforcing the exclusive jurisdiction clause and staying the proceedings. The majority held that the class action waiver clause was not void for unfairness under the *ACL*[50] and that the clause was not otherwise unenforceable by reason of pt IVA of the *FCAA*.[51] Notably, the majority reserved a final view as to the extraterritorial application of the *ACL*.[52] Ms Karpik appealed to the High Court.

IV The Decision

A *Extraterritorial Application of the ACL*

The High Court held that s 23 of the *ACL*, read with ss 5(1)(c) and (g) of the *CCA*, extended the application of s 23 to Mr Ho's contract (and all members of the US subgroup), and consequently, that pt 2-3 of the *ACL* has extraterritorial application.[53] Crucially, the Court emphasised that in determining any extraterritorial application of a statute, the starting point must always be statutory construction of the local law.[54] This principle is consistent with the comments of Gordon, Edelman and Steward JJ in *Impiombato* that '[w]hether a restriction is supplied by the context or the nature of the subject matter is a question of statutory construction which *necessarily precedes the application of the presumption*'.[55] Indeed, following the interpretation of the statute, the presumption may have 'little or no place where some other restriction is supplied by context or subject matter'.[56] The Court characterised the presumption as 'an interpretive principle only', rather than 'a fundamental common law right'.[57] In direct contradiction to Princess' submissions, the Court stated that 'the application and force of the presumption depends upon the extent to which the provisions of a

46 Ibid 9 [21].

47 Ibid 28 [121].

48 Ibid 67 [331].

49 *Carnival plc v Karpik* (2022) 294 FCR 524, 541 [47] (Rares J), 591 [238] (Derrington J, Allsop CJ agreeing at 530 [1]).

50 Ibid 592 [245], 600 [272]–[273] (Derrington J), 532 [10] (Allsop CJ).

51 Ibid 532 [11]–[14] (Allsop CJ), 620–1 [353] (Derrington J).

52 Ibid 534 [20] (Allsop CJ), 601 [276] (Derrington J).

53 *Karpik* (n 3) 56 [42].

54 Ibid 52 [21].

55 *Impiombato* (n 37) 637-8 [61] (emphasis added).

56 *Karpik* (n 3) 52 [22], quoting *Wanganui-Rangitikei* (n 38) 601 (Dixon J).

57 *Karpik* (n 3) 51 [19].

statute depart from common expectations that Parliament's concern with the subject matter is limited to matters within its territory'.[58]

In identifying the correct approach to this inquiry, the Court rejected Princess' submissions that the first step is to determine the *lex causae* — the choice of applicable law — before construing a statute.[59] The Court relatedly took issue with Princess' reliance on *Akai Pty Ltd v People's Insurance Co Ltd* ('*Akai*') insofar as they sought to rely on the decision as authority for the proposition that 'if the lex causae is foreign law, the local statute cannot apply unless it demands application irrespective of the lex causae', with the Court confining *Akai* to its facts.[60]

In construing the statute, the Court turned to the combined operation of ss 5(1)(c) and (g) of the *CCA*, which together provide that the *ACL* (other than pt 5-3) extends to engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia. Here, engaging in conduct refers to 'doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract'.[61] The Court construed these provisions as demonstrating legislative intent that a corporation carrying on business in Australia who uses standard contract terms be required 'to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas'.[62] The wording of these provisions demonstrated that Parliament intended to provide for extraterritorial operation. Recourse to the presumption was unnecessary.

In relation to ss 5(1)(c) and (g), Princess argued that the absence of an additional express territorial limit in this generally worded provision required the identification of a statutory 'hinge' with a clear territorial connection.[63] The Court rejected this submission on the basis that this was not a generally worded provision requiring such an inquiry; rather, the specificity of ss 5(1)(c) and (g) demonstrate clear and express intent as to the extraterritorial reach of the statute.[64] Accordingly, the presumption had 'no role to play in light of [these] express contrary words' — rather, any application of the presumption would 'frustrate an object of the legislation'.[65] Nonetheless, the Court considered each of Princess' proposed limitations, namely:[66]

58 Ibid.

59 Ibid 51 [20], 52 [22].

60 Ibid 52 [23], citing *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

61 *CCA* (n 2) s 4(2)(a).

62 *Karpik* (n 3) 55 [40].

63 Ibid 56 [43]. See, eg, *Impiombato* (n 37) 656 [59] (Gordon, Edelman and Steward JJ).

64 *Karpik* (n 3) 56 [43].

65 Ibid 56–7 [44].

66 Ibid 57 [47]–[49].

1. Section 23 is only applicable where the proper law of the contract is Australian law;
2. The contract must be entered into 'while' the foreign company was engaged in business in Australia;
3. Section 23 should only apply to a contract which affects or is capable of affecting the acquisition of goods or services by a consumer in Australia; and
4. Section 23 only applies to contracts for services 'performed wholly or partially in' Australia.

The first limitation was dismissed on the basis that such a construction would allow parties to simply contract out of the ambit of s 23 through including a foreign choice of law clause; accordingly, this construction would be counterintuitive to the object of the *CCA* as beneficial consumer legislation.[67] The second and third limitations were rejected for being contrary to the text of the *ACL* and *CCA*.[68] The second was incompatible with the definition of 'engaging in conduct',[69] while the third was inconsistent with the definition of when a consumer is taken to have acquired goods or services.[70] The fourth limitation was refused because the proposed construction would frustrate the objectives of the *ACL* as s 23 would no longer apply to corporations incorporated within Australia who supplied contracts to Australian consumers for services performed wholly or predominantly overseas.[71]

B *Class Action Waiver Clause an Unfair Contract Term*

The High Court deemed the class action waiver clause void for unfairness under s 23 of the *ACL*.

1 *Section 24(1)(a): Significant Imbalance*

The Court held the class action waiver clause was unfair, as it was 'particularly one-way … [operating] to impose limitations on passengers but in no way [restricting] the options of the carrier'.[72] Whilst the clause did not impede Mr Ho's *right* to pursue individual action against Princess, the clause nonetheless imposed a significant imbalance because it 'had the effect of preventing or discouraging passengers from vindicating their legal rights'.[73]

67 Ibid 57 [47].

68 Ibid 57 [48].

69 *CCA* (n 2) s 4(2)(a).

70 Ibid s 3.

71 *Karpik* (n 3) 57 [49].

72 Ibid 58 [53].

73 Ibid 59 [54].

2 *Section 24(1)(b): Reasonably Necessary to Protect Legitimate Interests*

At the outset, the Court made clear that the intended operation of this limb required 'the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling'.[74] Princess contended that the class action waiver clause protected its legitimate interests due to its preference for individual claims, arguing that the risk of engaging in class actions sometimes 'pressured' defendants to 'settle questionable claims'. Therefore, the clause mitigated the potentially 'devastating' outcome of a class action.[75] Princess failed on this limb. The Court held that, first, 'there is no legitimate interest in Princess seeking to prevent people from participating in a class action', and second, that Princess failed to address the critical issue of whether the clause was *reasonably necessary* to protect their interest.[76]

3 *Section 24(1)(c): Detriment*

In establishing detriment, 'more than a hypothetical case is required, although proof of actual detriment or that a term has been enforced is not necessary'.[77] By virtue of Princess' reliance on the class action waiver clause, 'Mr Ho would be denied the benefits of Part IVA of the FCA Act', constituting sufficient detriment.[78]

4 *Section 24(2)(a): Transparency*

A term is transparent if it is: (1) expressed in reasonably plain language; (2) legible; (3) presented clearly; and (4) readily available to any party affected by the term.[79] The Court provided significant guidance on the role of s 24(2)(a) in the inquiry, stating that 'the greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly'.[80] While the clause was legible, the process for accessing the clause was complex (involving navigating links and signing-in to various webpages), meaning the term was 'not being presented clearly', nor was it 'readily accessible'.[81]

C *Class Action Waiver Clause not Contrary to Part IVA of the FCAA*

Part IVA of the *FCAA* provides a procedural scheme for the grouping of existing claims. Importantly, s 33J provides a mechanism through which group members may opt-out from representative proceedings.

74 Ibid 53–4 [30], quoting Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 64 [5.28].

75 *Karpik* (n 3) 59 [56].

76 Ibid.

77 Ibid 59 [57].

78 Ibid.

79 *ACL* (n 2) s 24(3).

80 *Karpik* (n 3) 54 [32].

81 Ibid 59 [58].

Ms Karpik argued that the class action waiver clause was unenforceable because it ran contrary to pt IVA — that is, that the waiver of a class action right was inconsistent with the object of pt IVA in 'avoiding a multiplicity of proceedings and promoting the efficient administration of justice'.[82] Relevantly, a contract term is not enforceable if 'the provisions of the statute, read as a whole, are inconsistent with a power to forgo its benefits' or 'the policy and purpose of the statute may shew that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced'.[83] In making this submission, Ms Karpik contended that the right to opt out in s 33J(2) of the *FCAA* should be interpreted as being subject to a temporal limitation, the effect of which was that any opting-out of a group member prior to a statutorily-prescribed time was void.[84]

The Court rejected Ms Karpik's submission on the basis that pt IVA of the *FCAA* 'accommodates and, in some cases, expressly provides for a person to take a step or steps at multiple points of time in the life of a dispute that would "remove" themselves from the regime provided for in pt IVA'.[85] Under pt IVA, group members retained their autonomy not to participate in representative proceedings — in fact, their right to do so was expressly permitted by s 33J. Accordingly, contracting away this right was not contrary to anything in pt IVA. The proposed temporal limitation failed on the text of pt IVA: the provisions impliedly contemplated opting-out from proceedings in a manner of ways which could occur before the proposed time limitation, and there was nothing on the wording to suggest this limitation was required.[86]

D *Strong Reasons for Not Enforcing the Exclusive Jurisdiction Clause*

Having found that the class action waiver clause was unfair and void, Princess' stay application was significantly weakened as they were deprived of 'the ability to rely on [the waiver clause] to support a stay'.[87] The voiding of the class action waiver clause also acted as a strong, countervailing reason not to enforce the exclusive jurisdiction clause.[88] With no waiver of his right to engage in representative proceedings, Mr Ho consequently had a 'strong juridical advantage in remaining as part of the class action in … Australia', as he may have been unable to participate in class action proceedings overseas.[89] Further reasoning for not enforcing the exclusive jurisdiction clause included the fracturing of litigation: duplicate individual proceedings in the

82 Ibid 60 [62].

83 *Price v Spoor* (2021) 270 CLR 450, 466–7 [39] (Gageler and Gordon JJ), quoting *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456 (Windeyer J).

84 *Karpik* (n 3) 60 [63]–[64].

85 Ibid 60 [63].

86 Ibid 60 [64].

87 Ibid 61 [68].

88 Ibid.

89 Ibid.

US alongside the representative proceedings in Australia for 'essentially identical claims', risked the possibility of 'conflicting outcomes in different courts', potentially 'bringing the administration of justice into disrepute'.[90]

V Comment

A *Strength of the Presumption Against Extraterritoriality*

While interpretive canons are an important tool of statutory interpretation which promote consistency and stability in the law,[91] the High Court was at pains to emphasise that the presumption against extraterritoriality 'is an interpretive principle only' and not a 'fundamental common law right'.[92] *Karpik* is a stern reiteration of the principles in *Impiombato*, cementing the importance of first turning to the wording of a statute for indication of its territorial reach, before considering the common law presumption (which may have a negligible role to play).[93]

Evidently, the presumption is readily rebuttable by contrary legislative intention — so much so that the strength of the presumption may be waning.[94] Indeed, it is no longer the case that '[a]ll crime is local'.[95] The shift away from this orthodox approach is attributable to the phenomenon of globalisation, through which 'vastly more commercial activity traverses territorial borders and boundaries than when the statutory and common law presumptions were laid down'.[96] These changes have resulted in 'modern legislatures [being] more prepared and motivated to legislate with extraterritorial effect', making clear legislative drafting as to the territorial reach of statutes increasingly apposite.[97] The decision demonstrates a desire for legislative drafters to do more than merely rely on the presumption to determine the territorial reach of legislation.

Importantly, the Court's reasoning as to the extraterritorial application of the *ACL* is likely to apply to similarly drafted statutes, such as the unfair contract term

90 Ibid 61 [69].

91 William S Dodge, 'The New Presumption Against Extraterritoriality' (2020) 133(5) *Harvard Law Review* 1582, 1583–4.

92 *Karpik* (n 3) 51 [19].

93 *Impiombato* (n 37) 640 [69] (Gordon, Edelman and Steward JJ).

94 Bell (n 28) 9 [26].

95 *MacLeod v A-G (NSW)* [1891] AC 455, 458 (Lord Halsbury LC for the Court).

96 Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023) 642–3 [41.8], citing *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692, 701–2 [26] (Bell P) ('*DRJ*').

97 Bell (n 28) 33 [97]; *DRJ* (n 96) 702 [28], 705 [37] (Bell P).

provisions in the *Australian Securities and Investments Commission Act 2001* (Cth),[98] which has parallel provisions as to extraterritorial application.[99]

B *Implications for Corporations Carrying on Business in Australia*

The finding of unfairness in relation to the class action waiver clause sets a critical precedent for the mobilisation of s 23 to void similar clauses before courts in future. The decision serves as a warning to corporations seeking to rely on standard form contracts containing class action waiver clauses; indeed, *Karpik* makes clear that these protections could be widely relied upon, with reprieve even available for foreign consumers contracting overseas, provided the corporation is incorporated, or carries on business, in Australia.

The standard of fairness in Australia is distinct. For example, in the US, class action waiver clauses have generally been considered not to be fundamentally unfair terms.[100] The strength of Australian consumer protections may support the refusal to enforce an exclusive jurisdiction clause where an unfair class action waiver clause exists, in the paramount interest of consumer justice. It is also encouraging that the inclusion of a choice of law or exclusive jurisdiction clause was not decisive on the application of s 23, where the effect of application would oust the unfair contract term regime.

Karpik has undoubtedly increased the risk environment for foreign corporations carrying on business in Australia who rely on standard form contracts. It is clear too that litigation of breaches of the unfair contract terms regime will increase, with this being a target of the Australian Competition and Consumer Commission.[101] Harsher penalties, some to the tune of $50 million, have been introduced so that 'breaches are not seen as a cost of doing business, but rather as a significant impost', incentivising businesses to avoid reliance on unfair contract terms.[102]

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98 *ASIC Act* (n 12) pt 2 div 2 sub-div BA.

99 Ibid s 12AC.

100 See, eg: *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011); *Carter v Rent-A-Center Inc*, 718 Fed Appx 502, 504 (9th Cir, 2017); *DeLuca v Royal Caribbean Cruises Ltd*, 244 F Supp 3d 1342, 1348 (SD Fla, 2017). See also *Kohen v Pacific Investment Management Company LLC*, 571 F 3d 672, 677–8 (7th Cir, 2009).

101 Australian Competition and Consumer Commission, 'Businesses Urged to Remove Unfair Contract Terms Ahead of Law Changes' (Media Release No 115/23, 11 September 2023).

102 Australian Competition and Consumer Commission, 'ACCC Welcomes New Penalties and Expansion of the Unfair Contract Terms Laws' (Media Release No 153/22, 1 November 2022).

VI Conclusion

Karpik serves as a cautionary tale for corporations carrying on business in Australia, illustrating the perils of relying on class action waiver clauses in standard form consumer or small business contracts. This demonstration of judicial hesitancy in the enforcement of exclusive jurisdiction and choice of law clauses, where enforcement would have the consequence of inhibiting consumers' access to justice, is to be welcomed. After all, Australian consumer protections fundamentally aim to remedy the inequity in bargaining power in the consumer-supplier dynamic.[103] It is reassuring, then, that Australian courts are fiercely safeguarding these protections from being contracted away by powerful corporations.

103 Kate Tokeley, 'When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace' (2017) 39(1) *Sydney Law Review* 59, 72–3.

Ruby Haines*

NOT ALL THAT GLITTERS: EXPLORING THE ADEQUACY OF COMPENSATION IN *TAYLOR V AUGUST & PEMBERTON PTY LTD* (2023) 328 IR 1

I Introduction

It is increasingly recognised that workplace sexual harassment can have devastating consequences for victims.[1] While experiences differ, sexual harassment at work can have adverse impacts on a person's physical and psychological health, negatively affect their employment and career development, and have significant financial consequences.[2] It is known that women are sexually harassed in the workplace at a higher rate than men,[3] an issue the *Sex Discrimination Act 1984* (Cth) ('*SDA*') seeks to rectify.[4] The significance of the impacts of sexual harassment were recognised by the Federal Court in *Taylor v August and Pemberton Pty Ltd* ('*Taylor*').[5] After finding that the complainant had been subject to 'unwelcome and unsolicited' sexual conduct by her employer and colleague,[6] Katzmann J awarded a landmark payout of $140,000 in general damages for sexual harassment, the largest award of its kind under the *SDA* to date.[7]

As noted by Katzmann J, '[t]he purpose of damages is to compensate the applicant … not to reflect the community's appreciation of the extent of harm that can be

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1 See, eg: Australian Human Rights Commission ('AHRC'), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) ('*Respect@Work*'); Law Council of Australia, Submission No 249 to AHRC, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019); Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, 9 April 2021).

2 *Respect@Work* (n 1) 257–8.

3 AHRC, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, 30 November 2022) 50 [3.2] ('*Time for Respect*').

4 *Sex Discrimination Act 1984* (Cth) ('*SDA*') s 3.

5 (2023) 328 IR 1 ('*Taylor*').

6 Ibid 15 [61].

7 Max Mason, 'Sydney Jeweller Hit with Record Sexual Harassment Damages', *Australian Financial Review* (online, 6 November 2023) <https://www.afr.com/work-and-careers/workplace/sydney-jeweller-hit-with-record-sexual-harassment-damages-20231103-p5ehia>.

occasioned by sexual harassment'.[8] While this is not an extraordinary observation, in light of recent reforms to the *SDA* to bring it in line with community standards,[9] this case note explores the historical emphasis on compensating the harm caused by sexual harassment. Ultimately, it concludes that the decision in *Taylor* acts as a timely reminder of the need for a more robust and preventative legal framework to address workplace sexual harassment.

II Background

The applicant, Fiona Taylor, was employed by the respondent company, August and Pemberton Pty Ltd trading as Grew & Co, a small business which manufactures and sells fine jewellery.[10] Simon Grew, the second respondent, established the business in 2007 and is the manager and sole director of the company.[11] He is 10 years Ms Taylor's senior.[12] During Ms Taylor's employment, the business had no human resources department, meaning employees had to raise any issues with Mr Grew directly.[13]

While working at what she once considered her 'dream job', Ms Taylor complained of being sexually harassed by Mr Grew for a period of more than 22 months.[14] In 2020, she lodged a complaint with the Australian Human Rights Commission ('AHRC'), which was terminated due to a lack of reasonable prospects for resolution through conciliation.[15] Ms Taylor later commenced proceedings in the Federal Court against Mr Grew, alleging that he had contravened s 28B(2) of the *SDA*, which provides that it is unlawful for one employee to sexually harass another.[16] The initial AHRC complaint made by Ms Taylor also attracted an 'intimidatory and vindictive' response from Mr Grew's solicitors, which became the subject of a victimisation claim made by Ms Taylor in the Federal Court proceedings.[17] The scope of this case note, however, is limited to the sexual harassment claim only.

The conduct complained of by Ms Taylor fell into 'relatively discrete categories [including] the provision of numerous gifts; the making of certain comments and

8 *Taylor* (n 5) 86 [520].

9 See *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) ('*Respect at Work Amendment Act*').

10 Ibid 6–7 [3]–[4].

11 Ibid 6 [3].

12 Ibid 7 [5].

13 Ibid 7 [9].

14 Ibid 6 [1], 7 [10].

15 Ibid 9 [24]. Under s 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'), if a complaint is unsuccessful with the AHRC, an applicant can commence proceedings in the Federal Court or Federal Circuit Court.

16 *Taylor* (n 5) 10 [35], [38].

17 Ibid 74 [453].

"declarations of feelings"'.[18] Shortly after separating from his wife, Mr Grew started giving Ms Taylor gifts, which included jewellery, $2,000 in cash, a booking for a massage, a MECCA gift voucher, a Chanel coin purse, and a Michael Kors jacket.[19] Ms Taylor alleged that Mr Grew gave her a total of 19 gifts, all of which were both unsolicited and unwelcome.[20] She also contended that Mr Grew made unsolicited and unwelcomed comments to the effect of: 'I like petite curvy brunettes'; 'You have a really nice body'; 'You have a beautiful body'; and 'You have bedroom eyes'.[21] The conduct complained of also included Mr Grew's initial declaration of his feelings towards Ms Taylor, and when he revived the subject some months later.[22] Ms Taylor also alleged that Mr Grew had slapped her on her bottom while at work.[23]

A *Sexual Harassment Under The* SDA

Liability for sexual harassment under the *SDA* is broad; it is not limited by 'temporal considerations',[24] nor the intention of a respondent.[25] Sexual harassment is defined under s 28A of the *SDA*. The elements of sexual harassment are: (1) the perpetrator 'makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed'[26] or the perpetrator 'engages in other unwelcome conduct of a sexual nature in relation to the person harassed';[27] and (2) in the circumstances, 'a reasonable person … would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.[28] The *SDA* only makes sexual harassment unlawful in particular contexts.[29] In the case of *Taylor*, the relevant context was the conduct occurring in the workplace, therefore falling within the scope of s 28A, by virtue of s 28B of the *SDA*.

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18 Ibid 10 [35].

19 Ibid 16 [70], 23 [121], [126], 26 [148], 28 [161].

20 Ibid 15–16 [61].

21 Ibid 32 [185].

22 Ibid 37 [219]–[222], 42 [255]–[256].

23 Ibid 35–6 [209]–[213].

24 Section 28B of the *SDA* does not expressly require that sexual harassment occur 'during working hours or while the participants were working', and therefore liability is not restricted to these circumstances: *Ewin v Vergara [No 3]* (2013) 307 ALR 576, 585 [37] (Bromberg J).

25 *Vitality Works Australia Pty Ltd v Yelda [No 2]* (2021) 105 NSWLR 403, 425 [98] (Bell P and Payne JA) ('*Vitality Works*').

26 *SDA* (n 4) s 28A(1)(a).

27 Ibid s 28A(1)(b).

28 Ibid s 28A(1).

29 In addition to the workplace, div 3 of the *SDA* provides that sexual harassment is unlawful in other contexts such as: educational institutions (s 28F); goods, services and facilities (s 28G); provision of accommodation (s 28H); land (s 28J); clubs (s 28K); and Commonwealth laws and programs (s 28L).

Section 28A is therefore limited by an objective requirement that unwelcome conduct occurs in circumstances where a reasonable person would have anticipated that the complainant would be 'offended, humiliated or intimidated' by it.[30] Justice Katzmann in *Taylor* noted that

> it is not enough that the conduct was unwelcome. Nor is it enough that the complainant was offended, humiliated or intimidated by it. If the circumstances were such that a reasonable person would not have anticipated that was a possibility, the definition is not satisfied and the case must fail.[31]

The operation of the provision is otherwise broad. The phrase 'unwelcome conduct of a sexual nature' is subjective in nature, based on the recipient's perception and experience of the conduct.[32] While it includes conduct that invites or explores sexual behaviour, the meaning of 'unwelcome conduct' under s 28A is still 'of broad import' and 'should not be read down or confined by … limits or restrictions which do not appear in the statute'.[33]

B *Assessing Sexual Harassment in Context*

As noted by Katzmann J in *Taylor*, '[a]part from the slap on the bottom, Mr Grew was not said to have touched Ms Taylor in an inappropriate way'.[34] The conduct complained of was largely not explicitly sexual in nature.[35] However, under s 28A, 'conduct of a sexual nature' may be implicit or explicit. This was recently noted in *Vitality Works Australia Pty Ltd v Yelda (No 2)*.[36] The Court of Appeal held that conduct which, on its face, appears to have no explicit sexual connotation, may still amount to 'conduct of a sexual nature' when assessed in context.[37] Justice McCallum also noted that the sexualisation of female employees by their male colleagues or employers is often implicit, and to suggest otherwise 'overlooks the infinite subtlety of human interaction and the historical forces that have shaped the subordinate place of women in the workplace for centuries'.[38] These gendered dynamics are also explicitly addressed under s 3(a) of the *SDA*, which outlines one of the objects of the Act is 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions

30 *SDA* (n 4) s 28A(1).

31 *Taylor* (n 5) 13 [48].

32 AHRC, *Sexual Harassment in the Workplace: A Code of Practice for Employers* (Guidelines, March 2004) 10 [1.1].

33 *Vitality Works* (n 25) 425 [97] (Bell P and Payne JA).

34 *Taylor* (n 5) 59 [356].

35 Ibid.

36 *Vitality Works* (n 25) 433 [125] (McCallum JA).

37 Ibid 426 [101] (Bell P and Payne JA), 433 [125] (McCallum JA).

38 Ibid 433 [125] (McCallum JA).

of other relevant international instruments'. The international instruments referred to similarly have goals of eliminating discrimination against women.[39]

III Decision

Justice Katzmann ultimately held that Ms Taylor was sexually harassed by Mr Grew while she was employed by Grew & Co. Her Honour found that Mr Grew sexually harassed Ms Taylor, contravening s 28B(2), when he: slapped her on the bottom; declared his feelings for her, 'implicitly inviting her to enter into an intimate and personal relationship with him [that] she neither solicited nor welcomed'; and when he later revived the subject of his feelings with her, 'despite knowing she was not interested in such a relationship'.[40]

Ms Taylor was awarded general damages of $140,000 for the sexual harassment claim.[41] In total, she was awarded compensation of $244,284.[42] Prior to *Taylor*, the largest general damages payout under the *SDA* was $120,000 in 2019.[43] While Katzmann J recognised that Ms Taylor had suffered significant losses as a result of the sexual harassment, the general damages of $250,000 claimed by Ms Taylor was deemed 'manifestly excessive' and 'would not be compensatory but punitive'.[44]

Despite setting a new threshold for general damages in respect of sexual harassment claims under the *SDA*, not all of Mr Grew's conduct complained of by Ms Taylor was found to meet the meaning of 'unwelcome conduct of a sexual nature' for the purposes of s 28A. With respect to the gifts, Katzmann J accepted Ms Taylor's contention that all 19 gifts were unwelcome.[45] However, not all the gifts were found to amount to the conduct described in s 28A. Ten gifts were given to Ms Taylor before July or August 2019, with eight more gifted after this time. Justice Katzmann held that the earlier gifts could not be considered a sexual advance or other conduct of a sexual nature due to insufficient evidence of Mr Grew's romantic interest at that time.[46] Conversely, the gifts given after he declared his feelings for her clearly conveyed his affection and were 'part of an attempt to woo her', making them either

39 See, eg, *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 2; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 2.

40 *Taylor* (n 5) 63 [394].

41 Ibid 86 [522].

42 Ibid 86 [522], 89 [539], 90 [548], 91 [557]. Interest is not included in this figure.

43 *Hill v Hughes* (2019) 382 ALR 231.

44 *Taylor* (n 5) 86 [522].

45 Ibid 59 [369].

46 Ibid 60 [370]–[374].

an unwelcome sexual advance or other relevant sexual conduct.[47] However, in light of Mr Grew's 'generous nature', evidenced by the giving of gifts to other employees, her Honour was not satisfied that 'a reasonable person would have anticipated the possibility that Ms Taylor would be offended, humiliated or intimidated by this aspect of Mr Grew's behaviour'.[48] The gifts therefore did not constitute conduct within the meaning of s 28A.

When considering the comments made by Mr Grew about Ms Taylor's appearance, Katzmann J observed their close personal and professional relationship, noting their 'conversations were not confined to work-related matters' and often discussed health, fitness and diet.[49] Her Honour therefore found that, in this context, a reasonable person would not anticipate that Mr Grew's comments about her appearance would cause Ms Taylor to feel 'offended, humiliated or intimidated'.[50]

IV Comment

While at first glance the outcome in *Taylor* seems to reflect the significant 'price' which courts acknowledge sexual harassment victims pay, it also highlights problematic aspects of the *SDA*. First, there is an explicit rejection by Katzmann J in *Taylor* that damages awarded in sexual harassment cases should be greater so as to reflect a change in community values; and second, irrespective of the damages awarded, the decision raises questions regarding the focus on compensation under the *SDA*.

A *Community Values*

In 2014, compensation for sexual harassment under the *SDA* underwent a seismic change when the Federal Court handed down its decision in *Richardson v Oracle Corporation Australia Pty Ltd* ('*Richardson*').[51] In a primary judgment written by Kenny J, with Besanko and Perram JJ agreeing, the Full Court held that the orthodox 'general range' of non-economic damages in sexual harassment jurisprudence was no longer consistent with changing community values.[52] The appellant, who was awarded $18,000 in the first instance, had been persistently sexually harassed at work, resulting in significant psychological injury.[53] On appeal, the initial award was deemed 'manifestly inadequate' as it did not adequately compensate the loss and damage sustained by the appellant, and was 'out of step with the general standards prevailing in the community'.[54] The appellant was instead awarded $100,000 in

47 Ibid 60 [375].

48 Ibid 63 [391].

49 Ibid 8 [13], 63 [392].

50 Ibid 63 [392].

51 (2014) 223 FCR 334.

52 Ibid 363 [109], 366 [117] (Kenny J, Besanko and Perram JJ agreeing at 367 [119]).

53 Ibid 337 [2], 338–9 [6]–[12] (Kenny J).

54 Ibid 367 [118] (Kenny J).

damages.[55] Although *Richardson* is not uniformly followed, sexual harassment complainants have since received relatively generous compensation awards for psychological harm resulting from sexual harassment.[56]

Richardson is often cited as authority for awarding complainants more substantial compensation in sexual harassment claims, and makes litigation under the *SDA* 'considerably more attractive' for complainants.[57] The benefit of incentivising complaints under the *SDA* through larger damages awards cannot be understated. In 2022, the AHRC conducted its fifth national survey regarding sexual harassment in Australian workplaces, finding that only 18% of people who were sexually harassed at work made a formal report or complaint.[58]

Justice Katzmann noted the fact that sexual harassment is 'notoriously under-reported'.[59] However, when Ms Taylor sought to rely on *Richardson* in claiming general damages of $250,000, her Honour had 'real difficulty' with the submission.[60] Ms Taylor submitted it had been recognised since *Richardson* that there had been 'a further significant and fundamental shift in community standards' regarding the loss and harm occasioned by sexually harassing conduct,[61] and that an award of $250,000 in general damages would recognise this shift in community values.[62] Justice Katzmann rejected Ms Taylor's submission that damages ought to be awarded in accordance with 'the community's appreciation of the extent of harm that can be occasioned by sexual harassment'.[63] Instead, her Honour outlined that damages for sexual harassment could only be compensatory.[64] They could not be punitive, nor could they use Mr Grew's conduct as a cautionary tale for employers, or be taken to signify the judiciary's alignment with changing community values. Despite awarding general damages within the range endorsed by Kenny J in *Richardson*, Katzmann J emphasised that the compensation should only address the extent of the harm sustained by Ms Taylor, without the need to have regard to the community's appreciation of the harm.[65]

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55 Ibid.

56 See Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *University of New South Wales Law Journal* 155, 164–5.

57 Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231, 231.

58 *Time for Respect* (n 3) 130 [5.1].

59 *Taylor* (n 5) 54 [332].

60 Ibid 86 [519]–[520].

61 Ibid 83 [502].

62 Ibid 86 [519].

63 Ibid 86 [520].

64 Ibid 86 [522].

65 Ibid 86 [520]–[521].

B *Achieving Justice Through Compensation?*

Following the tabling of the AHRC's National Inquiry into Sexual Harassment in Australian Workplaces ('*Respect@Work*') report in 2020,[66] the *SDA* underwent significant changes.[67] Notably, a positive duty now exists under the *SDA* which requires employers to take proactive measurements to eliminate and prevent sexual harassment, as far as practicable.[68] Should these changes have been in force earlier, Mr Grew would have clearly been found to have breached his duty with respect to his conduct towards Ms Taylor.

These changes to the *SDA*, however, came into effect in December 2022, and therefore were not operative at the time of the conduct complained of in *Taylor*. The approach under the *SDA* applied in *Taylor* frames the regulation of sexual harassment as a private, individual issue rather than a systemic problem.[69] While the *SDA* is designed to compensate victims, historically it was not effective in preventing sexual harassment by changing behaviours and culture in the workplace. Prior to its amendment, the *SDA* adopted a 'corrective justice approach' whereby losses occasioned through sexual harassment were corrected by: (1) establishing 'a rule prohibiting the wrongful conduct'; and (2) 'requiring the wrongdoer to compensate the victim of the wrongful conduct for any loss or damage caused by the conduct'.[70] While this approach aimed to change behaviour on an individual basis, with damages acting as a deterrent to potential perpetrators, it did so in a reactive rather than proactive way, and was accordingly limited. It also failed to address the systemic causes of workplace sexual harassment.[71]

This corrective justice approach is also evident under the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'), which provides that sexual harassment claims under the *SDA* may be remedied through proceedings commenced in the Federal Court or Federal Circuit Court. Section 46PO(4) of the *AHRC Act* authorises the relevant court to make 'such orders … as it thinks fit', and provides the following examples:

66 *Respect@Work* (n 1).

67 *Respect at Work Amendment Act* (n 9).

68 *SDA* (n 4) s 47C.

69 Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422, 424.

70 Shi and Zhong (n 56) 160, citing Jules Coleman, Scott Hershovitz and Gabriel Mendlow, 'Theories of the Common Law of Torts' (2022) (Spring) *The Stanford Encyclopedia of Philosophy* 1, 1.

71 See generally: Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 84, 88; Paula McDonald, Sara Charlesworth and Tina Graham, 'Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment' (2015) 53(1) *Asia Pacific Journal of Human Resources* 41, 42.

> (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
> (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
> (c) an order requiring a respondent to employ or re-employ an applicant;
> (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
> (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant …[72]

Each of the examples provided under s 46PO(4) are aimed at remedying or compensating wrongful conduct that has already occurred, with the exception of s 46PO(4)(a) which allows for an order to 'direct' a respondent 'not to repeat or continue such unlawful discrimination'. In *Taylor*, Katzmann J considered both ss 46PO(4)(a) and (d) relevant to her discretionary powers under the provision.[73]

Historically, the focus of the *SDA* has been to compensate harm caused by sexual harassment, rather than attempting to mitigate the unlawful conduct of employers and organisations. For what is a systemic issue, however, the legislative framework was arguably limited in its scope for addressing workplace sexual harassment.[74] It was also at odds with the objects of the *SDA*, which aims to 'to eliminate, so far as is possible, discrimination involving sexual harassment … in the workplace'.[75] With the introduction of a positive duty on employers to mitigate workplace sexual harassment, as well as improved regulatory mechanisms and discretions under the *AHRC Act*,[76] we will hopefully see a change to the way in which harm is addressed and prevented under the *SDA*.

V Conclusion

As Katzmann J did not have the benefit of a reformed *SDA* when handing down her decision in *Taylor*, it is yet to be seen if preventative mechanisms under the new scheme will have a tangible impact on the incidence and litigation of workplace sexual harassment in Australia. What is clear, though, is that compensation alone is not enough to address the systemic issue of workplace sexual harassment. This case note accepts that the trend of more generous damages being awarded to complainants since *Richardson* is important; it reflects a positive shift in community values (whether express or implied by the courts), and makes formal complaints and

72 *AHRC Act* (n 15) s 46PO(4).

73 *Taylor* (n 5) 75 [455].

74 Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) *Sydney Law Review* 371, 373–4.

75 *SDA* (n 4) s 3(c).

76 *AHRC Act* (n 15) s 35L.

litigation under the *SDA* significantly more attractive. This is particularly important when little else exists to incentivise complainants. However, the introduction of reforms such as those prompted by the *Respect@Work* report change the normative approach to addressing sexual harassment claims — incentivising employers to act in a preventive capacity. This case note is therefore not a criticism of Katzmann J's furtherance of the trend of awarding substantial damages for non-economic loss occasioned by sexual harassment. Instead, it queries whether a normative shift in the assumption under the *SDA* would better achieve the objects of the Act in eliminating workplace sexual harassment. With new reforms in place, this remains to be seen.

Thomas McClure and Mahya Panahkhahi***

INDEFINITE DETENTION DEPORTED AT LAST: *NZYQ V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS* (2023) 415 ALR 254

'For those who've come across the seas
We've boundless plains to share'[1]

I Introduction

The High Court of Australia in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*')[2] unanimously found the executive's power to indefinitely detain unlawful non-citizens that enter Australia — provided for by ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) ('*Migration Act*') — repugnant to ch III of the *Constitution* and thus invalid. In so finding, the High Court overturned its infamous ruling in *Al-Kateb v Godwin* ('*Al-Kateb*').[3]

The separation of powers lies at the heart of this decision. *Al-Kateb* was said to conflict with the well-established principle that migration detention must be 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[4] Otherwise, the detention is punitive in nature and thus within the judiciary's exclusive province.

Part II of this case note sets out the legal background to *NZYQ*, highlighting the High Court's previous decisions on immigration detention. The facts of *NZYQ* are explained in Part III. Part IV then outlines the Court's reasoning, including the slight divergence from Edelman J. Part V comments on the implications of *NZYQ*, ultimately finding that the decision is doctrinally sound, but the federal government's severe legislative response may infringe human rights and raise further issues

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1 'New Lyrics for Verse One', *Australian National Anthem* (Web Page) <https://www.pmc.gov.au/honours-and-symbols/australian-national-symbols/australian-national-anthem>.

2 (2023) 415 ALR 254 ('*NZYQ*').

3 (2004) 219 CLR 562 ('*Al-Kateb*').

4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ) ('*Lim*').

regarding constitutional validity. This Part also touches on the High Court's recent decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*'),[5] where it was found that part of the government's legislative response to *NZYQ* was itself unconstitutional.

II Legal Background

Under s 51(xix) of the *Constitution*, the legislature can make laws with respect to 'aliens' — generally, although not conclusively,[6] persons that are not Australian citizens (henceforth, 'non-citizens'). The *Migration Act* seeks support from this head of power.[7]

Section 189(1) of the *Migration Act* requires detainment of non-citizens that arrive in Australia 'unlawfully' — that is, without a visa.[8] This detention is mandatory: non-citizens within Australia[9] 'must' be detained if an officer 'knows or reasonably suspects' that they arrived unlawfully. Under s 196(1), this detention ends when the non-citizen is: (a) 'removed from Australia'; (b) 'deported'; or (c) 'granted a visa'. In circumstances where detainees are stateless or have criminal convictions, the occurrence of these events is highly improbable, making the detention potentially indefinite.

Mandatory detention is an exercise of executive power, not a product of judicial pronouncement. This is problematic because ch III of the *Constitution* implicitly prevents an executive body, in this case a government 'officer',[10] from exercising power if its 'dominant purpose and essential functions' are naturally judicial.[11] This restriction is apposite to immigration detention, given it has 'many, if not all, of the physical features and administrative arrangements commonly found in prisons',[12] and ordering punishment 'lies in the heartland of judicial power'.[13] In saying this, the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*')[14] held that ch III permits laws with respect to executive detainment of unlawful non-citizens.[15] But this detention must be 'reasonably

5 [2024] HCA 40 ('*YBFZ*'). See below nn 111–29 and accompanying text.

6 See *Love v Commonwealth* (2020) 270 CLR 152.

7 Explanatory Memorandum, Migration Bill 1958 (Cth) 2519.

8 See *Migration Act 1958* (Cth) s 42(1) ('*Migration Act*').

9 See ibid s 5 (definition of 'migration zone').

10 Ibid s 5 (definition of 'authorised officer').

11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

12 *Al-Kateb* (n 3) 650 [264] (Hayne J).

13 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 380 [111] (Gageler J) ('*Alexander*').

14 *Lim* (n 4).

15 Ibid 27 (Brennan, Deane and Dawson JJ).

capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[16] Otherwise, the detention is penal, and thus can only be ordered by a ch III court. Together, these findings constitute the '*Lim* principle'.

The High Court has been willing to characterise immigration detention as non-penal in previous cases,[17] notwithstanding that the matters before the Court were seemingly at odds with the *Lim* principle. These decisions suggested that any freedom from involuntary detention propounded by *Lim* may require reformulation of the principle.[18] *Al-Kateb* best represents this straining of the *Lim* principle. Al-Kateb arrived in Australia unlawfully by boat in late 2000. He was mandatorily detained[19] and his application for a protection visa[20] was refused.[21] Section 198(6) therefore required Al-Kateb be removed from Australia 'as soon as reasonably practicable'. It was uncontested that Al-Kateb was 'stateless';[22] he could not be removed from Australia to a country of nationality, and no other country was willing to accept him.[23]

With no reasonable prospects of removal or the grant of a visa, Al-Kateb was detained indefinitely. His application to the Federal Court for a declaration that his detention was unlawful and a writ of habeas corpus for release from immigration detention was dismissed.[24] Al-Kateb's subsequent appeal was heard by the High Court.

The appeal was dismissed by the majority (McHugh, Hayne, Callinan and Heydon JJ), with Gleeson CJ, Gummow and Kirby JJ dissenting. The High Court addressed two separate issues: first, whether ss 189(1) and 196(1) of the *Migration Act* provide for indefinite detention ('statutory construction holding'); and second, if so, whether this indefinite detention is constitutional ('constitutional holding'). The Court found the *Migration Act* provides for indefinite detention. As to the constitutional issue, the majority construed Al-Kateb's indefinite detention as non-punitive

16 Ibid 33 (Brennan, Deane and Dawson JJ).

17 See, eg: *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*'); *Re Woolley; Ex parte Applications M276/2003* (2004) 225 CLR 1.

18 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 662, discussing *Behrooz* (n 17).

19 See *Migration Act* (n 8) ss 189, 196.

20 See ibid s 36.

21 *Al-Kateb* (n 3) 602 [100] (Gummow J).

22 Ibid 615 [145] (Kirby J). See also the definition of 'stateless persons' in the *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1.

23 *Al-Kateb* (n 3) 615 [145] (Kirby J).

24 *SHDB v Goodwin* [2003] FCA 300.

and thus consistent with ch III of the *Constitution*. The members of the majority each set out slightly different rationales for this finding.

For Hayne J (with Heydon J agreeing),[25] although a receiving country had not been identified, one may have been found later and s 198(1) would then be met.[26] Al-Kateb's indefinite detention thus provided for 'subsequent removal' when the time came, a function separate to punishment.[27] For this purpose, the power to segregate an unlawful non-citizen 'from the community by detention in the meantime' was said to be constitutionally valid.[28] Justice Callinan similarly held that the *Constitution* supports executive detention in view of an unlawful non-citizen's removal, notwithstanding that 'deportation appears unlikely to be achievable within a foreseeable period'.[29] Justice McHugh proffered an additional characterisation. Instead of being merely auxiliary to deportation, immigration detention also serves a protectionist function.[30] For his Honour, 'a law authorising detention' cannot 'be characterised as imposing punishment' and thus cannot infringe ch III of the *Constitution* 'if its object is purely protective'.[31] In this sense, ss 189(1) and 196(1) have a purely protective purpose because they enable 'unlawful non-citizens to be detained so as to ensure that they do not enter Australia', and prevent them from becoming 'de facto Australian citizens'.[32] This protectionist characterisation echoed previous High Court rulings on deportation of unlawful non-citizens.[33]

Following from these characterisations, the majority dismissed 'the Ch III question',[34] despite McHugh J recognising that Al-Kateb's position was 'tragic'.[35] The Court held that because s 189(1) did not confer a discretion on the executive[36] and the matters condition precedent to detention were amenable to judicial scrutiny,[37] ch III was not infringed.

25 *Al-Kateb* (n 3) 662–3 [303]–[304] (Heydon J).

26 Ibid 640 [231] (Hayne J).

27 Ibid.

28 Ibid 648 [255].

29 Ibid 658 [290].

30 Ibid 584 [44].

31 Ibid.

32 Ibid 584–5 [46].

33 See *O'Keefe v Calwell* (1949) 77 CLR 261, 278 (Latham CJ).

34 *Al-Kateb* (n 3) 648 [256] (Hayne J).

35 Ibid 580–1 [31].

36 Ibid 647 [254] (Hayne J).

37 Ibid 584 [44] (McHugh J).

Although adopting slightly varied reasoning, the *Al-Kateb* majority was clear: indefinite detention is constitutionally valid. For some 20 years, and despite repeated challenge,[38] this remained the law of Australia. That is, until *NZYQ*.

III The Facts of *NZYQ*

The plaintiff was a Myanmar-born, stateless Rohingya man, assigned the pseudonym NZYQ. Escaping persecution in Myanmar, he arrived in Australia by boat in 2012. He was immediately taken into immigration detention in accordance with s 189 of the *Migration Act*. He was granted a bridging visa and released from detention after two years.[39] In 2016, NZYQ pleaded guilty to one count of sexual intercourse with a child and was sentenced to five years imprisonment.[40] NZYQ was released on parole in 2018.[41] He was subsequently taken into immigration detention as he was reasonably suspected of having been an unlawful non-citizen by an officer of the Department of Home Affairs ('Department').[42]

NZYQ had applied for a protection visa while in criminal custody. In 2020, his application was considered by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('Minister'). Whilst he had a well-founded fear of persecution in Myanmar and was therefore a refugee in respect of whom Australia had protection obligations, the delegate determined NZYQ's criminal conviction provided reasonable grounds for considering him a danger to the Australian community, and therefore refused his application.[43]

The delegate's decision was affirmed by the Administrative Appeals Tribunal ('AAT').[44] An application for judicial review of the AAT decision was dismissed by the Federal Court of Australia.[45] As a result, officers of the Department were required to remove NZYQ from Australia as soon as reasonably practicable.[46] An identical duty arose when NZYQ formally requested his removal in writing.[47]

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38 See, eg: *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*Plaintiff M76/2013*'); *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

39 *NZYQ* (n 2) 256 [1].

40 Ibid 256 [2].

41 Ibid.

42 See *Migration Act* (n 8) s 189(1).

43 *NZYQ* (n 2) 256 [3].

44 *NZYQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 378.

45 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 976.

46 See *Migration Act* (n 8) s 198(6).

47 See ibid s 198(1).

However, removing him from Australia proved challenging. The *Migration Act* did not require or authorise an officer to remove NZYQ to Myanmar, and even if it did, he had no right of entry or residence there. There was no real prospect of another country providing him with a right to enter or reside. Further, the Department has never succeeded in removing any individuals convicted of a sexual offence against a child to a country of which they are not a citizen.[48]

NZYQ began proceedings in the original jurisdiction of the High Court against the Minister and the Commonwealth of Australia.[49] NZYQ presented two arguments that mirrored the statutory construction and constitutional issues raised by Al-Kateb. The High Court heard the matter in November 2023, with the Australian Human Rights Commission, the Human Rights Law Centre ('HRLC'), and the Kaldor Centre for International Refugee Law ('KCIRL') appearing as amici curiae. The Court made its orders on 8 November 2023, prior to publishing reasons.

IV The Decision

The High Court decided *per curiam* to reopen and overrule the constitutional holding in *Al-Kateb*. NZYQ's detention was deemed unconstitutional from 30 May 2023, when there was no real prospect of his removal becoming practicable in the reasonably foreseeable future.

A *Reopening Al-Kateb*

As *Al-Kateb* presented 'an implacable obstacle' to NZYQ's claims, leave was sought to reopen the decision.[50] In deciding whether to grant leave, the Court was 'informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law'.[51] Applying this principle, the Court was quick to refuse leave to open the statutory construction holding in *Al-Kateb*, determining the proper construction of ss 189 and 196 of the *Migration Act* authorised NZYQ's indefinite detention. Emphasis was placed on the legislative reliance on, and implicit endorsement of, *Al-Kateb* on this point, as well as the recent endorsement of this construction in *Commonwealth v AJL20*.[52] In light of the *Lim* principle's application in numerous cases since *Al-Kateb*,[53] the Court described the constitutional holding in *Al-Kateb* as 'an outlier in the stream of authority which has flowed from *Lim*'[54] and thus found it difficult to reconcile the two. The conclusion was that

48 *NZYQ* (n 2) 257 [5].

49 See: *Constitution* s 75(v); *Judiciary Act 1903* (Cth) s 30.

50 *NZYQ* (n 2) 259 [15].

51 Ibid 259 [17], quoting *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

52 (2021) 273 CLR 43.

53 See, eg: *Alexander* (n 13); *Benbrika v Minister for Home Affairs* (2023) 415 ALR 1; *Jones v Commonwealth* (2023) 415 ALR 46.

54 *NZYQ* (n 2) 264 [35].

'continuity and consistency in the application of constitutional principle' obliged the Court to reopen the constitutional holding.[55]

B *Overruling Al-Kateb*

In determining whether the constitutional holding in *Al-Kateb* should be overruled, the Court considered the decision's consistency with the *Lim* principle. It was expressed that for detention to be constitutionally valid, the legislative purpose behind it must be non-punitive, legitimate, and capable of being achieved in fact.[56] Consistency with the *Lim* principle would thus require limiting the detention's duration to a period that is reasonably capable of being seen as necessary to achieve its statutory purpose.[57]

As previously discussed, the majority in *Al-Kateb* observed that laws in relation to detaining unlawful non-citizens are characterised by their purpose — detention is non-punitive if its purpose is to make an unlawful non-citizen available for deportation or prevent them from entering the Australian community.[58] The *NZYQ* Court described this as 'an incomplete and … inaccurate statement of the applicable principle' and consequently overruled the constitutional holding in *Al-Kateb*.[59] In reaching this conclusion, Edelman J took a slightly different approach to the remaining six members of the Court.

C *Chief Justice Gageler, Gordon, Steward, Gleeson, Jagot, and Beech-Jones JJ*

The six members noted the *Lim* principle would have no substance if it enabled detention where there was no real prospect of achieving the detention's purpose in the reasonably foreseeable future.[60] In such circumstances, the first purpose outlined by the *Al-Kateb* majority — availability for deportation — would be void. As to the second purpose, the Court concluded that separating an unlawful non-citizen from the Australian community is not within the limited range of executive detention's legitimate purposes identified in *Lim*.[61] There, this purpose was found

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55 Ibid 264 [37].

56 Ibid 264–5 [40].

57 Ibid 265 [41], quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 625 [374] (Gageler J).

58 *NZYQ* (n 2) 265 [42], quoting *Al-Kateb* (n 3) 584 [45] (McHugh J).

59 *NZYQ* (n 2) 265 [43].

60 Ibid 265–6 [45].

61 Ibid 266 [48], citing: *Plaintiff M76/2013* (n 38) 369–70 [138]–[140] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 593 [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Commonwealth v AJL20* (2021) 273 CLR 43, 64–5 [27]–[28] (Kiefel CJ, Gageler, Keane and Steward JJ), 85–6 [85] (Gordon and Gleeson JJ), 102–3 [128]–[129] (Edelman J).

to be permissible only if it was incidental to the legitimate purpose of deportation, or determination of whether the unlawful non-citizen should be granted a visa.[62]

By extension of the *Lim* principle, for the purpose behind detention to be legitimate, it must be a purpose that is distinct from the detention itself.[63] The Court firmly rejected the defendants' assertion that 'separation from the Australian community' was a legitimate purpose for executive detention.[64] This was said to 'impermissibly [conflate] detention with the purpose of detention', resulting in a 'circular and self-fulfilling' inquiry.[65] Further, the defendants' assertion that the detention of unlawful non-citizens is incidental to the executive power to exclude such non-citizens was said to be 'misconceived'.[66]

D *Justice Edelman*

Justice Edelman 'disaggregate[d] the concept of punishment as used in *Lim*' into two distinct ideas.[67] The first is a classicalist conception of criminal detention, with a view of 'just desert' and community protection.[68] The second concerned '"prima facie" punitive detention', encompassing detention that, under a *Lim* analysis, is disproportionate to its legitimate, non-punitive purpose.[69] Justice Edelman held the purpose of ss 189(1) and 196(1) of the *Migration Act* — 'detention pending removal to ensure that the unlawful non-citizen will remain "available for deportation when that becomes practicable"' — to be legitimate.[70] The unattainability of this goal did not matter.[71] However, indefinite detainment of an unlawful non-citizen was deemed disproportionate — that is, not 'reasonably capable of being seen as necessary'[72] — to ensure the unlawful non-citizen is available for removal, and thus punitive under his Honour's second conception of punishment.[73]

E *The Constitutional Limitation on Executive Detention*

Following the above reasoning, the Court held that the constitutionally permissible period of executive detention for an unlawful non-citizen ends when there is no real

62 *Lim* (n 4) 10 (Mason CJ), 27, 32–3 (Brennan, Deane, Dawson JJ).

63 *NZYQ* (n 2) 266 [49].

64 Ibid.

65 Ibid.

66 Ibid 267 [50].

67 Ibid 267 [51].

68 Ibid.

69 Ibid 267 [52].

70 Ibid 267–8 [53].

71 Ibid.

72 Ibid 268 [54], quoting *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 30–1 [71] (McHugh J).

73 *NZYQ* (n 2) 268 [54].

prospect of their removal from Australia becoming practicable in the reasonably foreseeable future.[74]

The defendants and amici curiae provided two alternatives to the expression of this constitutional limitation. The defendants asserted that the constitutionally permissible period should end when there is no real prospect of the non-citizen's removal from Australia.[75] The Court rejected this, emphasising that the elements of 'practicability' and 'reasonably foreseeable future' are 'essential to anchoring the expression of the constitutional limitation in factual reality'.[76] The submission from the HRLC and the KCIRL — that the period should end 'at any point when it can be determined to be more probable than not that the [non-citizen] will not be removed from Australia in the foreseeable future' — was also rejected for being too expansive and unstable.[77]

The Court commended the defendants for correctly conceding that they had the burden of proving the constitutional limitation had not been surpassed. Their Honours held that where a detainee seeks a writ of habeas corpus and provides sufficient evidence supporting the fact that their detention transgresses the constitutional limitation, the burden of proving the limitation is not exceeded falls on the detainer.[78] Thus, proof of a real prospect of NZYQ's removal becoming practicable in the reasonably foreseeable future was required. The parties agreed: (1) NZYQ had cooperated with officers; (2) he could not be removed from Australia as at 30 May 2023; and (3) there was no real prospect of him being removed in the reasonably foreseeable future.[79] While there was a possibility of NZYQ's removal to the United States, there was no evidence that this possibility was realistic.[80] Consequently, NZYQ's detention was unlawful from 30 May 2023 onwards and the defendants were obliged to release him.

The Court did not address whether the outcome would be different if a detainee refused to cooperate. This was dealt with in *ASF17 v Commonwealth of Australia*,[81] with the High Court finding that processes for removal were practicably available, but untenable because of the non-citizen's failure to cooperate. Regardless, these processes remained available, in theory, and thus the constitutional limitation from *NZYQ* did not apply.[82]

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74 Ibid 268 [55].

75 Ibid 268 [57].

76 Ibid.

77 Ibid 269 [58].

78 Ibid 269 [59].

79 Ibid 270 [62]–[63].

80 Ibid 270–1 [64]–[70].

81 (2024) 98 ALJR 782.

82 Ibid [41] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

V Comment

NZYQ is notable for its brevity. Decisions on constitutional issues are often extensive; *Al-Kateb* spans 102 pages. *NZYQ* is a mere 20 pages. This concision may point to the High Court's desire to solidify its position on the politically charged topic of immigration detention. Against this wider political backdrop, '[i]t is desirable that the Court's reasons themselves be accessible and readable by members of the public'.[83] Moreover, the perceived legitimacy of the Court's overruling of *Al-Kateb* is arguably reinforced by a unanimous judgment (albeit with slight divergence in one step of the reasoning from Edelman J). The Court emphasised the importance of the *Lim* principle as a mechanism for maintaining the separation of powers; it did not proffer a new application of this principle.

Given the discrete nature of this determination and the brevity with which it was expressed, *NZYQ* is important for its conclusion, not so much its legal reasoning. The Court was unequivocal: *Lim* survives, *Al-Kateb* does not. What does warrant attention are the policy implications stemming from this decision; this comment will therefore focus on these.

A *The Aftermath of NZYQ*

Following *NZYQ*, some 150 detainees were released into the community.[84] Panic ensued, with fears that 'the Government was releasing "hardened criminals" and "predators"', even though the released non-citizens who had a criminal conviction had all served their time.[85] The fact that numerous released detainees were charged with criminal offences shortly after their release intensified fears, with the media further fuelling these fires.[86]

In response to these growing concerns for safety, the federal government passed the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ('*Migration Amendment Act*') and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) ('*Other Measures Act*').

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83 Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia', *Australian Public Law* (Web Page, 31 January 2024) <https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>.

84 Commonwealth, *Parliamentary Debates*, Senate, 20 March 2024, 973 (James Paterson, Senator).

85 Anne Twomey, 'Constitutional Law: NZYQ v Minister for Immigration and Its Legislative Progeny' (2024) 98(2) *Australian Law Journal* 103, 105.

86 Georgia Roberts, 'Fourth Non-Citizen Arrested After High Court Decision', *ABC News* (Web Page, 6 December 2023) <https://www.abc.net.au/news/2023-12-06/fourth-person-arrested-after-detainee-released/103197184>; Brett Worthington, 'The Bloodied and Bruised Image That Puts a Human Face on the High Court Fallout', *ABC News* (Web Page, 30 April 2024) <https://www.abc.net.au/news/2024-04-30/nzyq-high-court-immigration-detainees-albanese-government/103785094>.

These laws have been described as 'hasty', 'rushed' and 'reactive',[87] with the former being passed by the Houses of Parliament only eight days after *NZYQ*, and the latter being passed less than a month after the decision.

The *Migration Amendment Act* introduced a new bridging visa for non-citizens for whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.[88] The new visa, called a 'Bridging R visa', could be accompanied by highly restrictive requirements, including mandatory monitoring conditions that required the visa holder to notify the Minister or Department of certain matters and report to them at certain times.[89] It could also impose a curfew,[90] and/or require the wearing of monitoring devices at all times.[91] Breaching any of these conditions was an offence with its own penalty,[92] with a mandatory period of imprisonment of one year.[93] These curfew and monitoring restrictions were later found to be unconstitutional in *YBFZ*.[94]

At the conclusion of their judgment, the *NZYQ* Court noted their decision did not prevent NZYQ from being detained on another statutory basis, 'such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody'.[95] The *Other Measures Act* became this law. In addition to introducing further visa restrictions and offences, it introduced a preventive detention regime, under which the Minister may apply to a court for a community safety detention order or supervision order (with a duration of up to three years). The court may grant such an order if satisfied 'to a high degree of probability' that the individual 'poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence'.[96]

The government has sought to impose far harsher measures with the Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) ('Migration

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87 Lorraine Finlay, 'Hasty Detainee Laws Raise Human Rights Concerns', *Australian Human Rights Commission* (Web Page, 7 December 2023) <https://humanrights.gov.au/about/news/opinions/hasty-detainee-laws-raise-human-rights-concerns>.

88 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) sch 1 item 2 ('*Migration Amendment Act*'), inserting *Migration Act* (n 8) ss 68(5)–(6).

89 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) s 76B.

90 *Migration Amendment Act* (n 88) sch 2 items 8, 13, inserting *Migration Regulations 1994* (Cth) cl 070.612A(1), referring to visa condition 8620 ('*Migration Regulations*').

91 *Migration Amendment Act* (n 88) sch 2 items 8, 13, inserting *Migration Regulations* (n 90) cl 070.612A(2), referring to visa condition 8621.

92 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) ss 76B–76D.

93 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) s 76DA.

94 See below nn 111–29 and accompanying text.

95 *NZYQ* (n 2) 271–2 [72].

96 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) sch 2 item 5, inserting *Criminal Code Act 1995* (Cth) s 395.12.

Amendment Bill'), which introduces a duty for 'removal pathway non-citizens' to cooperate in relation to their removal and criminalises non-cooperation.[97] It also enables the Minister to designate a country as a 'removal concern country', with the consequence that visa applications from nationals of that country will be considered invalid.[98] This draconian proposal resembles Donald Trump's 'Muslim travel ban' from 2017.[99] The Migration Amendment Bill passed through the House of Representatives on 26 March 2024, but was referred to the Legal and Constitutional Affairs Legislation Committee ('Committee') for further scrutiny by the Senate in May 2024. Whilst the Committee's ultimate recommendation was that the Senate pass the Migration Amendment Bill,[100] the backlash from human rights organisations, refugee and asylum seeker representatives and members of the public has halted its progress.[101]

The Migration Amendment Bill and the *Other Measures Act* were swiftly introduced with the aim of protecting the Australian community, although it is unclear from what exactly, given all of the released immigration detainees with criminal convictions have served their sentences. Regardless, any purported protectionist aim

97 Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) sch 1 item 3 ('Migration Amendment Bill'), inserting *Migration Act* (n 8) ss 199B–199E.

98 Migration Amendment Bill (n 97) sch 1 item 3, inserting *Migration Act* (n 8) ss 199F–199G.

99 See: Exec Order No 13769 'Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States', 82 Fed Reg 8977 (27 January 2017); Exec Order No 13780 'Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States', 82 Fed Reg 13209 (6 March 2017).

100 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (Report, May 2024) 43.

101 See, eg: Kaldor Centre for International Refugee Law, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (9 April 2024); Human Rights Law Centre, Submission No 18 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (10 April 2024); Médecins Sans Frontières Australia, Submission No 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (11 April 2024); Amnesty International Australia, Submission No 26 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (11 April 2024); Migrant Workers Centre, Submission No 29 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (April 2024); Anne Cawsey, Submission No 230 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (2024); Gemma Prior, Submission No 250 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (2024).

should not come at the cost of human rights, nor should it overstep constitutional limitations.

B *Human Rights Concerns*

It is uncontroversial that placing curfews on individuals, monitoring their movements, and subjecting them to preventive detention orders are all significant restrictions on liberty — a right enshrined in the *Universal Declaration of Human Rights*.[102] The new laws engage numerous human rights,[103] with concerns raised that they violate many of these.[104] The Statement of Compatibility with Human Rights released together with the *Other Measures Act* concluded that the laws are only 'partially compatible with Australia's human rights obligations'.[105] Whilst the restrictions imposed by the *Migration Amendment Act* are similar to existing parole regimes applicable to those subject to a custodial sentence, these laws are concerning as they are 'imposed … through a unilateral grant of a visa, with no periodic review and no assessment of necessity, effectiveness or impact on the person'.[106] Further scrutiny of the laws is therefore required to ensure they meet human rights standards.

These laws are not only restrictive, but also discriminatory. Consequently, they may violate the right to equality and non-discrimination.[107] Australian citizens with criminal convictions get released from prison every day. Some may indeed pose 'an unacceptable risk of seriously harming the community' after they are released.[108] But regardless, no Australian government has ever sought to impose such harsh and widespread restrictions on them. The only distinguishing factor between the released immigration detainees and Australian citizens with a criminal record is their visa status. Ultimately, this double standard highlights the inherent injustice of these laws, which infringe the rights of non-citizens and perpetuate a system of

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102 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 3.

103 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2, 6, 13 ('*ICESCR*'); *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 6, 9, 10, 12, 14, 15, 17, 19, 22, 26 ('*ICCPR*').

104 Supplementary Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth) 7 ('Supplementary Explanatory Memorandum').

105 Ibid.

106 Laura John, Josephine Langbien and Sanmati Vermo, 'Liberty, Punishment and the Power to Detain: The Fallout from NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs', *Australian Public Law* (Web Page, 6 December 2023) <https://www.auspublaw.org/blog/2023/12/liberty-punishment-and-the-power-to-detain-the-fallout-from-nzyq-v-minister-for-immigration-citizenship-and-multicultural-affairs>.

107 See *ICESCR* (n 103) art 2; *ICCPR* (n 103) arts 2, 26.

108 See above n 96 and accompanying text.

discrimination, raising critical questions about Australia's commitment to upholding human rights obligations.

C *Constitutional Concerns*

Given the haste with which the government's legislative response to *NZYQ* was passed, many raised concerns about the constitutionality of these reforms.[109] These concerns proved perceptive, as a case against the validity of curfew and monitoring conditions was brought to the High Court in *YBFZ*, in which the majority of the Court found that the conditions were punitive and thus unconstitutional.[110] It is foreseeable that the preventive detention regime may similarly be called into question.

1 *Curfews and Monitoring*

YBFZ was a stateless refugee who arrived in Australia in 2002 and was convicted of serious offences between 2006 and 2017.[111] Following *NZYQ*, YBFZ was released from immigration detention and was granted a Bridging R visa subject to curfews and monitoring via an electronic ankle bracelet, which he was alleged to have breached.[112] YBFZ argued that these conditions were unconstitutional, relying in essence on similar arguments to those successfully run in *NZYQ*: the restrictions are punitive in nature, and thus within the judiciary's exclusive province by virtue of ch III of the *Constitution*.[113]

The majority — Gageler CJ, Gordon, Gleeson, and Jagot JJ — found both the curfew and monitoring conditions to be prima facie punitive. The detriments imposed by the curfew condition, such as the restriction of movement within the bounds of a particular address between certain hours, along with the psychological burden of those detriments, were not 'comparatively slight' or 'modest'.[114] Further, the detention imposed by this condition was 'neither trivial nor transient in nature'.[115] The curfew restrictions involved a material and long-term deprivation of liberty

109 John, Langbien and Vermo (n 106); Anne Twomey, 'New Laws to Deal with Immigration Detainees Were Rushed, Leading to Legal Risks', *The Conversation* (Web Page, 13 December 2023) <https://theconversation.com/new-laws-to-deal-with-immigration-detainees-were-rushed-leading-to-legal-risks-219384> ('New Laws to Deal with Immigration Detainees').

110 Chief Justice Gageler, Gordon, Gleeson, Jagot and Edelman JJ all came to this conclusion, with a separate judgment by Edelman J. Justices Steward and Beech-Jones dissented, both writing judgments of their own.

111 *YBFZ* (n 5) [39].

112 Ibid [41].

113 YBFZ, 'Submissions of the Plaintiff', Submission in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, S27/2024, 27 May 2024, 3 [2].

114 *YBFZ* (n 5) [50].

115 Ibid [51].

which applied to all persons with a particular visa condition, unless the Minister was satisfied otherwise, making them prima facie punitive.[116]

As to the monitoring condition, the majority stated that whilst the continued presence of a monitoring device would not cause pain or physical discomfort, it nonetheless imposed long-term and material detriments, including both physical and psychological burdens.[117] Further, the requirement that the device be charged twice per day and be maintained in good condition essentially forced individuals into remaining in places that had access to a mains power supply, and the fact that individuals were tracked deterred them from going to certain locations out of fear of consequences or shame.[118] In addition, the monitoring device, unless covered by clothing, may have conveyed that an individual wearing it was 'an unworthy or dangerous person or a criminal', which was 'likely to expose the wearer to a degradation of autonomy', further restricting their liberty.[119] These all led to the conclusion that the monitoring condition was prima facie punitive.

However, the query did not end once the conditions were found to be prima facie punitive as such laws could nonetheless be valid if they are 'reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose'.[120] This threshold was not met in this case. The Court found that the stated purpose of these laws, being the 'protection of any part of the Australian community'[121] was 'expressed at a high level of generality'.[122] Further, there was no specificity as to what was required for the Minister to be satisfied that a curfew or monitoring condition did not need to be imposed on an individual.[123] The Court vehemently rejected the defendants' submission that the legislation should be interpreted to mean that the Minister may refuse to impose the conditions if satisfied that doing so is not reasonably necessary for protecting the Australian community 'from the risk of harm arising from future offending'.[124] It was found that such words could not be read into the relevant provisions. The law that enabled the imposition of the curfew and monitoring conditions was thus very broad and could result in uncertain and unpredictable outcomes.[125]

This broad purpose was found to be 'a concept of such elasticity that it is not necessarily inconsistent with the imposition … of a criminal punishment following an adjudication of criminal guilt — a function which lies in the heartland of judicial

116 Ibid [53].

117 Ibid [58], [60].

118 Ibid [61].

119 Ibid [62].

120 Ibid [64].

121 *Migration Regulations* (n 90) cl 070.612A(1).

122 *YBFZ* (n 5) [65].

123 Ibid.

124 See ibid [66]–[76].

125 Ibid [79].

power'.[126] It could not be said to be a legitimate non-punitive purpose because '[i]f protection from any harm of any nature, degree, or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined.'[127] Consequently, the majority of the High Court found that the Minister's broad and flexible power to impose curfew and monitoring restrictions on certain visa holders was punitive and thus infringed upon the exclusive power of the judiciary under ch III of the *Constitution*.[128] Justice Edelman came to a similar conclusion, but with significantly different reasoning.[129]

2 *Preventive Detention*

The preventive detention regime introduced by the *Other Measures Act*, which mirrors the existing post-sentence regime applicable to terrorism offenders,[130] is yet to face judicial scrutiny, perhaps because no one has been subjected to it yet. The existing regime covering terrorism offenders is supported by the federal parliament's defence power,[131] and its constitutionality was recently affirmed by the High Court.[132] In contrast, the preventive detention regime applicable to unlawful non-citizens likely seeks support from s 51(xix) of the *Constitution*. There is no authority on whether s 51(xix) can support a law about criminal matters that are distinct from a person's status as a non-citizen.[133] Even if s 51(xix) does extend this far, questions arise as to the legitimacy of preventive detention's non-punitive purpose — 'keep[ing] the community safe'[134] — given the scheme applies to individuals who have served their criminal punishment. In this regard, it may be argued that the *Other Measures Act*'s preventive detention relies on the same 'circular and self-fulfilling' purpose rejected in *NZYQ*.[135] That is, detention justified by community protection through means of detention, or, put another way, 'detention … for the purpose of detention'.[136] In light of these concerns, preventive detention's constitutional validity is dubious.

D *Looking Forward*

In response to *NZYQ* and more recently *YBFZ*, the federal government has tabled yet another bill pertaining to unlawful non-citizens: the Migration Amendment

126 Ibid [81], quoting *Alexander* (n 13) 380 [111].

127 Ibid [82].

128 Ibid [83].

129 See ibid [89]–[171].

130 See *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth), amending *Criminal Code Act 1995* (Cth).

131 *Constitution* s 51(vi).

132 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68.

133 Twomey, 'New Laws to Deal with Immigration Detainees' (n 109).

134 Supplementary Explanatory Memorandum (n 104) 2.

135 *NZYQ* (n 2) 266 [49].

136 Ibid.

(Removal and Other Measures) Bill 2024 (Cth) ('Bill'). The Bill would permit the Australian government to fund 'third country reception arrangements', whereby unlawful non-citizens in Australia are sent to a foreign country.[137] In effect, this expands the current off-shore detention regime.[138] Indeed, the Bill specifically contemplates detention of Australia's unlawful non-citizens by foreign countries.[139] The Bill also immunises the Australian government against civil claims arising from an unlawful non-citizen's removal to a 'third country'.[140] Moreover, a new test for curfews and ankle monitoring conditions is imparted, that these conditions will not be imposed if the Minister, on the balance of probabilities: (1) is not satisfied that 'the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence'; or (2) is satisfied that 'the non-citizen poses the substantial risk', but 'is not satisfied … that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting any part of the Australian community'.[141] This is reminiscent of the test that the Minister in *YBFZ* submitted (unsuccessfully) should have been read into the *Migration Amendment Act*.[142] The government must now wait and see whether third time really is the charm for its desired regime on unlawful non-citizens.

VI Conclusion

NZYQ led to the historic overturning of *Al-Kateb*, a decision that had left scholars and human rights activists frustrated for almost 20 years.[143] The High Court's succinct, unanimous judgment provided an unequivocal answer to the constitutional question: executive detention of unlawful non-citizens is only constitutionally permissible up to the point where there is no real prospect of their removal from

137 See Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) cl 198AHB ('MA Bill').

138 'Explainer: Labor's Brutal Deportation and Surveillance Bill', *Human Rights Law Centre* (Web Page, 8 November 2024) <https://www.hrlc.org.au/reports-news-commentary/2024/11/8/deportation-surveillance#:~:text=Expanding%20offshore%20detention,from%20indefinite%20detention%20in%20Australia>.

139 MA Bill (n 137) sch 5 item 1.

140 Ibid sch 2 item 1.

141 Ibid sch 6 item 2.

142 See above n 125 and accompanying text.

143 See generally: Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different if Australia Had a Bill of Rights Like Victoria?' (2007) 18(2) *Public Law Review* 119; Australian Human Rights Commission, 'Commission Commends High Court Ruling on Indefinite Immigration Detention' (Media Release, 9 November 2023) <https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>; 'High Court Rules Indefinite Immigration Detention Unlawful', *Human Rights Law Centre* (Web Page, 13 November 2023) <https://www.hrlc.org.au/reports-news-commentary/indefinite-detention-ends>.

Australia becoming practicable in the reasonably foreseeable future. Beyond that point, executive detention is unconstitutional.

The legal reasoning behind *NZYQ* is undoubtedly sound. The High Court has finally resolved the tension between *Al-Kateb* and *Lim* and, in doing so, maintained some important constitutional protections against tyranny. But *NZYQ* is no panacea for all the ills of a mandatory detention regime. People like NZYQ now walk an unclear line between freedom and detention. In this sense, *NZYQ* may have resulted in the substitution of 'one impermissible punitive regime — indefinite immigration detention — with another'.[144] Time will tell whether this new regime will withstand judicial testing.

144 'Imprisonment of Migrants Without Charge Would Be a Cruel and Costly Mistake' *Human Rights Law Centre* (Web Page, 6 December 2023) <https://www.hrlc.org.au/news/2023/12/6/imprisonment-of-migrants-without-charge-costly-mistake>.

SUBMISSION OF MANUSCRIPTS

In preparing manuscripts for submission, authors should be guided by the following points:

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3. Biographical details should be starred (*) and precede the footnotes. They should include the author's current employment.

4. Submissions should comply with the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 4th ed, 2018) <http://law.unimelb.edu.au/mulr/aglc>.

5. An abstract of between 150 and 200 words should also be included with submissions (excluding case notes and book reviews).

6. As a peer-reviewed journal, the *Adelaide Law Review* requires exclusive submission. Submissions should be accompanied by a statement that the submission is not currently under consideration at any other journal, and that the author undertakes not to submit it for consideration elsewhere until the *Adelaide Law Review* has either accepted or rejected it.

7. Any figures in manuscripts that are of too low a resolution to produce a suitable print quality will be re-drawn by the *Adelaide Law Review*'s typesetters at the author's cost.

8. If the submission is accepted by the *Adelaide Law Review*, it will be published electronically only.

9. Authors must sign an Author Agreement (available at <https://law.adelaide.edu.au/adelaide-law-review/submissions>) prior to the publication of their submission. The Editors prefer that a signed Author Agreement be included at the time of submission.

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